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### Twilight of Sovereignty or the Emergence of Cosmopolitan Norms? Rethinking Citizenship in Volatile Times

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# Twilight of Sovereignty or the Emergence of Cosmopolitan Norms? Rethinking Citizenship in Volatile Times

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**ABSTRACT** *This essay examines recent debates concerning the emergence of cosmopolitan norms such as those pertaining to universal human rights, crimes against humanity as well as refugee, immigrant and asylum status. What some see as the spread of a new human rights regime and a new world order others denounce as the “spread of empire” or characterize as “law without a state”. In contrast, by focusing on the relationship of global capitalism to deterritorialized law this essay distinguishes between the spread of human rights norms and deterritorialized legal regimes. Although both cosmopolitan norms and deterritorialized law challenge the nation-state and threaten to escape control by democratic legislatures, it argues that cosmopolitan norms enhance popular sovereignty while many other forms of global law undermine it. It concludes by pleading for a vision of “republican federalism” and “democratic iterations”, which would enhance popular sovereignty by establishing interconnections across the local, the national and the global.*

In several works in the last decade I have documented the disaggregation of citizenships rights, the emergence of an international human rights regime and the spread of cosmopolitan norms (Benhabib, 2001, 2002, 2004a). National citizenship is a legal and social status which combines some form of collectively shared identity with the entitlement to social and economic benefits and the privileges of political membership through the exercise of democratic rights. I have argued that in today’s world the civil and social rights of migrants, aliens and denizens are increasingly protected by international human rights documents.<sup>1</sup> The establishment of the European Union has been accompanied by a Charter of Fundamental Rights and by the formation of a European Court of Justice. The European Convention for the Protection of Human Rights and Fundamental Freedoms, which encompasses states which are not members of the EU as well, permits the claims of citizens of adhering states to be heard by a European Court of Human Rights. Parallel developments can be seen on the American continent through the establishment of the Inter-American System for the Protection of Human Rights and the Inter-American Court of Human Rights. African states have accepted the African Charter

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on Human and Peoples' Rights in 1981 through the Organization of African Unity and to date it has been ratified by 49 states (Henkin *et al.*, 2003, pp. 147ff).

Despite these developments, the link between national citizenship and the privileges of democratic participation such as voting rights that restrict these privileges to nationals alone is retained, but in this domain as well, changes are visible throughout the European Union in particular: in Denmark, Sweden, Finland and the Netherlands, third-country nationals can participate in local and regional elections; in Ireland these rights are granted at the local level. In the UK Commonwealth citizens can vote in national elections.

These trends are not limited to Europe. Increasingly, Mexico, and central American governments such as El Salvador and Guatemala are permitting those who are born to citizen parents in foreign countries to retain voting rights at home and even to run for office; the practice of recognizing dual citizenship is becoming widespread. In South Asia, particularly among economic elites who carry three or more passports and navigate three or more national economies, the institution of "flexible citizenship" is taking hold (Ong, 1999).

Yet these changes in modalities of political belonging have been accompanied by other, more ominous, forms of exclusion: first, the condition of refugees and asylum seekers has not benefited equally from the spread of cosmopolitan norms. While their numbers the world over have increased as a result of the global state of violence (Zolberg & Benda, 2001), most liberal democracies since September 11, 2001, and even before then, had already shifted toward criminalizing the refugee and asylum seeker either as lying to gain access to economic advantages or as a potential security threat. The politics of refuge and asylum have become sites of some of the world's most intense global distributive, as well as racialized, confrontations. Even within the European Union, the establishment of refugee processing transit camps (RPTCs) outside the borders of the EU, such as to catch refugees and illegal migrants before they land on European soil, have been advocated by the UK and Denmark and are in operation in Spanish held territories in North Africa and in transit camps in Libya.

Furthermore, as Hannah Arendt observed more than half a century ago, "the right to have rights" remains an aporetic longing.<sup>2</sup> For who is to grant "the right to be a member", the right to belong to a community in which one's right to have rights is to be protected by all? Within a permanently divided mankind it is only through membership in a polity in which one's right to have rights is defended through the solidarity of all that the aporias of statelessness can be resolved. The right to have rights must combine the liberal vision of citizenship as entitlement to rights with the republican-democratic vision of membership through full democratic participation.

The disaggregation of citizenship rights through the extension of cosmopolitan norms, the continuing liminality of the condition of refugees and asylum seekers, and the increasing criminalization of migrants as a consequence of the global state of confrontation between the forces of political Islam and the USA have led a number of scholars to interpret these developments in quite a different light than I have. For some, the spread of an international human rights regime and of cosmopolitan norms presents a Pollyannaish narrative which does not account for the growing condition of a global civil war (Hardt & Negri, 2001; Agamben, 2005). For others, while these trends are real, the defense of republican federalism seems inadequate in that it does not acknowledge the more radical political potentials of the present moment (Balibar, 2004; Held, 2004).

The very great disparity among these diagnoses of our contemporary condition, which extend from predictions of global civil war and a permanent state of exception to the utopia of citizenship beyond the state and to transnational democracy, may itself be an indication of the volatile and obscure moment we are traversing. What has become crystal clear is that the changing security situation after September 11, 2001 has destabilized the principle of formal sovereign equality of states. The spread of cosmopolitan norms and transformations of sovereignty inevitably accompany one another. The rise of an international human rights regime, which is one of the hallmarks of post-Westphalian changes in sovereignty, also heralds alterations in the jurisdictional prerogative of nation-states. As Jean L. Cohen (2004, p. 2) rightly observes:

Talk of legal and constitutional pluralism, societal constitutionalism, transnational governmental networks, cosmopolitan human rights law enforced by “humanitarian intervention”, and so on are all attempts to conceptualize the new global legal order that is allegedly emerging before our eyes. The general claim is that the world is witnessing a move to cosmopolitan law ... But ... if one shifts the political perspective, the sovereignty-based model of international law appears to be ceding not to cosmopolitan justice but to a different bid to restructure the world order: the project of empire.

The rise of cosmopolitan norms or the spread of empire? Indeed, it is crucial to unravel this ambivalent potential: while the emergence of cosmopolitan norms are intended to protect the individual in a global civil society, there are dangers as well as opportunities created by the weakening of state sovereignty. The fact that the internationalization of human rights norms and the weakening of state sovereignty are developing in tandem with each other decidedly does not mean that the one can be reduced to the other; the genesis of these developments as well as their normative logics are distinct.<sup>3</sup> Nor should concerns about the weakening of state sovereignty, some of which I share, lead one to reject the spread of human rights norms for fear that they can be used to justify humanitarian interventions.

Since these transformations are altering norms of state sovereignty as well as impacting the actual capacity of states to exercise sovereignty, it is important at the outset to distinguish between *state sovereignty* and *popular sovereignty*. The concept of “sovereignty” ambiguously refers to two moments in the foundation of the modern state, and the history of modern political thought in the West since Thomas Hobbes can plausibly be told as a negotiation of these poles: first, sovereignty means the capacity of a public body, in this case the modern nation-state, to act as the *final* and *indivisible* seat of authority with the jurisdiction to wield not only “monopoly over the means of violence”, to recall Max Weber’s famous phrase, but also to distribute justice and manage the economy.

Sovereignty also means, particularly since the French Revolution, *popular sovereignty*, that is, the idea of the people as subjects and objects of the law, or as makers as well as obeyers of the law. Popular sovereignty involves representative institutions, the separation of powers, and the guarantee not only of liberty and equality, but of the “equal value of the liberty of each”. Etienne Balibar (2004, p. 152) has expressed the interdependence between state sovereignty and popular sovereignty thus: “... state sovereignty has simultaneously ‘protected’ itself from and ‘founded’ itself upon popular sovereignty to the extent that the political state has been transformed into a ‘social-state’ ... passing through

the progressive institution of a ‘representation of social forces’ by the mechanism of universal suffrage and the institutions of social citizenship ...”

My question is: how does the new configuration of state sovereignty influence popular sovereignty? Which political options are becoming possible? Which are blocked? Today we are caught not only in the reconfiguration of sovereignty but also in the *reconstitutions of citizenship*. We are moving away from citizenship as national membership increasingly towards a *citizenship of residency* which strengthens the multiple ties to locality, to the region, and to transnational institutions.

I will argue that cosmopolitan norms enhance the project of popular sovereignty while prying open the black box of state sovereignty. They challenge the prerogative of the state to be the highest authority dispensing justice over all that is living and dead within certain territorial boundaries. In becoming party to many human rights treaties, states themselves “bind” their own decisions. Very often this can lead to collusions between the will of majorities and international norms, as we can observe with regard to issues of women’s rights and the rights of cultural, ethnic and linguistic minorities for example. But such collusions have become all too frequent only because the world is moving towards a new form of post-Westphalian politics of global interdependence.

To be distinguished from the influence of cosmopolitan human rights norms is the undermining of state sovereignty through the demands of global capitalism. Global capitalism is indeed creating its own form of “global law without a state” (Teubner, 1997), as well as sabotaging the efforts of legislators to conduct open and public deliberations on legislation impacting the movements of capital and other resources. Furthermore, many states are privatizing their own activities by disbursing authority over prisons and school to private enterprises (Apter, 2001). My thesis is that whereas cosmopolitan norms lead to the emergence of *generalizable human interests and the articulation of public standards of norm justification*, global capitalism leads to the *privatization and segmentation of interest communities* and the *weakening of standards of public justification through the rise of private logics of norm generation*. This results in the deterioration of the capacity of states to protect and provide for their citizens.

The following sections of this essay document in broad strokes three types of changes in the relationship of territoriality and jurisdiction in the evolution of the modern state: transnational migrations, the emergence of global law, and the rise of fast-track legislation. The latter two socioeconomic and legal transformations are leading to the undermining of popular sovereignty and the privatization of state sovereignty, while transnational migrations are both enabled by and contribute to the spread of cosmopolitan norms. I conclude with normative considerations on democratic iterations, which I define as processes whereby cosmopolitan norms and the will of democratic majorities can be reconciled, though never perfectly, through public argumentation and deliberation in acts of normative iterations.

### **Territorialization and Law: Colonialism vs. Transnational Migrations**

The modern state formation in the West begins with the “territorialization” of space. The enclosure of a particular portion of the earth and its demarcation from others through the creation of protected boundaries, and the presumption that all that lies within these boundaries, whether animate or inanimate, belongs under the dominion of the sovereign is central to the territorially-bounded system of states in western modernity. In this

“Westphalian” model, territorial integrity and a unified jurisdictional authority are two sides of the same coin; protecting territorial integrity is the obverse side of the power of the state to assert its jurisdictional authority (*dominium*).

The modern absolutist states of Western Europe were governed, in Carl Schmitt’s (1997, p. 99) terms, by the “*jus publicum Europaeum*” as their international law. However, this model was unstable from its inception, or in Stephen Krasner’s (1999) famous phrase “sovereignty is hypocrisy”. Already the discovery of the Americas, the imperialist ventures into India and China, the struggle for domination over the Indian Ocean and the nineteenth century colonization of Africa destroyed this form of state sovereignty and international law by chipping at the peripheries.<sup>4</sup> Not only the West’s confrontation with other continents but already the question as to whether the non-Christian Ottoman Empire belonged to the “*jus publicum Europaeum*” showed the limitations of this order. Though Schmitt himself is not far from idealizing this moment in the evolution of “the law of the earth”, his own account documents its inherent limits and eventual dissolution.<sup>5</sup> The “deterritorialization” of the modern state goes hand in hand with its transformation from early bourgeois republics into European empires, whether they be those of England, France, Spain, Portugal, Belgium, the Netherlands or Italy.

The evolution of bourgeois republics into empires destroys the overlap of territorial control with jurisdictional authority, which governs, at least in principle, the motherland. Europe’s colonies become the sites of usurpation and conquest in which *extra-juridical spaces*, removed from the purview of liberal principles of consent, are created. As Edmund Burke was to express it pithily with respect to “administrative massacres” in India, and the impeachment of Warren Hastings, who was responsible for them by the British House, this needed to be done so that “breakers of the law in India might [not] become ‘the makers of law for England.’”<sup>6</sup>

With the rise of bourgeois and democratic republics the “subject” of the absolutist state is transformed into the “citizen”. As the Westphalian paradigm of sovereignty meets its limits outside Europe, it is constitutionalized at home by social struggles for increased accountability, universal suffrage, expanded representation, democratic freedoms and social rights. These struggles are the site of popular sovereignty, of demands to make the state apparatus responsive and transparent to its citizens. In ways that much scholarship has not even begun to fathom, popular sovereignty struggles at home, the spread of modern citizenship, and imperialist ventures abroad go hand in hand (Brodie, 2004; Ikeda, 2004).

This legacy of empire has come back today to haunt the resource-rich countries of the Northern Hemisphere through the rise of transnational migrations. Transnational migrations also produce an uncoupling between territoriality, sovereignty, and citizenship but in ways quite different than colonialism. Whereas in the nineteenth and twentieth centuries, European imperialism spread forms of jurisdiction into colonial territories which were shielded from democratic consent and control, contemporary migratory movements give rise to *overlapping jurisdictions* which are often protected by international norms.

In 1910 roughly 33 million migrants lived in countries other than their own; by the year 2000 their number had reached 175 million (Zlotnik, 2001, p. 227). During this same period (1910–2000), the population of the world grew from 1.6 to 5.3 billion, roughly threefold. Migrations, by contrast, increased almost sixfold over the course of the same 90 years. Strikingly, more than half of this occurred in the last three decades of the twentieth

century, between 1965 and 2000. In this period 75 million people undertook cross-border movements to settle in countries other than those of their origin (United Nations, 2002).

Transformations in patterns of migration are leading more and more individuals to retain ties with their home countries and not to undertake total immersion in their countries of immigration. The ease provided by globalized networks of transportation, communication, electronic media, banking and financial services are producing guest workers, seasonal workers, dual nationals, and diasporic commuters. Migrations no longer bring with them total immersion and socialization in the culture of the host country—a process poignantly symbolized by the assignment to immigrants to the US of new family names on Ellis Island.

Today nation-states encourage diasporic politics among their migrants and ex-citizens, seeing in the diaspora not only a source of political support for projects at home, but also a resource of networks, skills and competencies that can be used to enhance a state's own standing in an increasingly global world. Notable examples of such diasporas are the large Indian, Chinese and Jewish communities across the globe. Their continuing allegiance to the so-called "home country" is carefully cultivated.

Migrations thus lead to a pluralization of allegiances and commitments and to the growing complexity of nationals who, more often than not, in today's world, are also ex-, post- and neo-colonials. We are witnessing the increasing migration from periphery to center, encouraged by wide differentials in standards of living between regions of the world, and facilitated by the large presence of family and kin already at the center of what was once the Empire. Indians, Pakistanis, Kashmiris and Sri Lankans in the UK; Algerians and Moroccans in France; Surinamese and Moluccans in the Netherlands; Latin Americans in Spain; Libyans in Italy are all populations groups whose history is deeply bound up with European Empires. The Westphalian state which extended towards the rest of the world now finds that its borders are porous in both directions and that it is not only the center which flows to the periphery but the periphery which flows towards the center.

State sovereignty, which is imminently tied to the ability to protect borders, now more than ever is revealed to depend upon skillful negotiations, transactions, agreements and flows with other states. Of course, states and regions differ widely in their ability to assert their sovereignty and to throw their weight around. The poorer economies of Central America, South Asia and Africa are less able to police their borders; the world's largest refugee populations are also settled in some of the world's poorest regions such as Chad, Pakistan and Ingushtia (Benhabib, 2004a).

Migrations are the site of intense conflicts over resources as well as identities. In the contemporary world, strong states militarize and increasingly criminalize migratory movements. The poor migrant becomes the symbol of the continuing assertion of sovereignty. Migrants' bodies, both dead and alive, strew the path of state's power.

Transnational migrations reveal the pluralization of sites of sovereignty in that, with the changing patters of acculturation and socialization, migrants begin to live in multiple jurisdictions. Although they are increasingly protected by cosmopolitan norms in the form of the various human rights treaties, they are still vulnerable to a system of state sovereignty which privileges national citizenship while restricting dual and multiple citizenship regimes.

Militarization and criminalization are defensive responses which states use to reassert their sovereignty in the face of transnational migrations. But is it possible to think about sovereignty in terms other than those suggested by the model of autochthonous

impermeability? Is it conceivable to think of sovereignty in relational terms? Is it possible to functionally disaggregate sovereignty's functions and yet create modalities of cooperation? Can we still maintain the ideal of popular sovereignty and democratic rule if the state-centered model of sovereignty is itself becoming dysfunctional?

### **Deterritorialization of Law: Global Capitalism**

Transnational migrations reveal the dependence of states upon the world-wide movement of peoples' as well as each other's policies. Since every inch of the face of the world, with the exception of North and South Poles, are now statized and governed by a state which has territorial jurisdiction, cross-border movements initiated by migrants as well as refuge and asylum seekers, bring to light the fragility as well as the frequent irrationality of the state system. *Vis-à-vis* peoples' cross-border movements, the state remains sovereign, albeit in much reduced fashion. *Vis-à-vis* the movement of capital and commodities, information and technology across borders, the state today is more hostage than sovereign.

A great deal has been written in recent years about globalization as a world-wide phenomenon and the diminished capacity of states. I am persuaded by the argument that to understand this phenomenon it is analytically more useful to use the term "stateness", that is, the dynamic capacity of states to react to and control their environments in multiple ways (Nettl, 1968, p. 559; Evans, 1997). There is tremendous variation across the globe in the capacity of "stateness". The affluent democracies of North America, Europe, Australia and New Zealand can manipulate, tame and channel the forces of global capitalism as well as the world-wide flow of information, communication and transportation technologies. This is obviously much less true for many states in North Africa, the Middle East, Latin America and Asia. The rise to global prominence of China, India, Brazil, as well as the Asian "tiger" economies is in large measure due to the capacity of these states to channel economic globalization to their own advantage.

In her analysis of Southeast Asian economies, Aihwa Ong gives a compelling example of the ways in which global capitalism is creating jurisdictional spaces over and beyond democratic controls. New forms of "multinational zones of sovereignty" in the form growth triangles (GTs) are spreading throughout South Asia and Central America. These "straddle borders between neighboring states such as to maximize the locational advantage and attract global capital" (Ong, 1999, p. 221). The three GTs formed by linking neighboring countries are Indonesia–Malaysia–Singapore (Sijori), Indonesia–Malaysia–Thailand, and Brunei–Indonesia–Malaysia–Philippines. Transnational corporations such as Nike, Reebok, and the Gap now employ millions of women who work 12 hours a day and make less than \$2.00 a day. Ong observes that these "growth triangles are zones of special sovereignty that are arranged through a multinational network of smart partnerships and that exploits the cheap labor that exists within the orbit of a global hub such as Singapore. It appears that GT workers are less subject to the rules of their home country and more to the rules of companies and to the competitive conditions set by other growth triangles in the region" (Ong, 1999, p. 222).

A parallel account is provided by Carolin Emcke of the workings of the *maquilladoras* in Central America. These are established by foreign capital in El Salvador, Guatemala, and Costa Rica under the protection of respective governments often as tax-free zones to attract foreign investment. They protect the zones they occupy through the use of private security guards and forces, crush any attempt to organize the labor force, and fiercely



defend themselves against international and even national control and supervision. They resemble medieval warlords who have taken the native populations hostage.

Whether it is the Growth Triangles of Southeast Asia or the *maquilodaras* of Central America, this form of economic globalization results in the disaggregation of states' sovereignty with their own complicity. As in the case of colonization and imperialism, there is an uncoupling once more of *jurisdiction and territory* in that the state transfers its own powers of jurisdiction, whether in full knowledge or by unintended consequence, to non-statal private and corporate bodies. The losers in this process are the citizens from whom state protection is withdrawn or more likely, who never had strong state protection in the first place, and who become dependent upon the power and mercy of transnational corporations and other forms of venture capitalists.

Despite the great variation across countries with respect to the interactions of the global economy and states, one generalization can be safely made: economic globalization is leading to a fundamental transformation of legal institutions and of the paradigm of the rule of law. Increasingly globalization is engendering a body of law which is self-generating and self-regulating and which does not originate through the legislative or deliberative activity of national legislators.

### Law without a State?

In his influential article, "Global Bukowina: legal pluralism in the world society", Gunther Teubner (1997, p. 5) makes this case: "Today's globalization is not a gradual emergence of a world society under the leadership of interstate politics, but is a highly contradictory and highly fragmented process in which politics has lost its leading role". As examples of global law without a state Teubner cites "*lex mercatoria*", the transnational law of economic transactions; labor law, where enterprises and labor unions, acting as private actors become law-makers; the technical standardization and professional self-regulation engaged in world-wide by the relevant parties without the intervention of official politics.

This emergent body of law is "a legal order", even if it has no specific point of origination in the form of law-producing institutions, and even less, a single and visible law-enforcing agency. The boundaries of global law are not set by national borders but by "invisible colleges,' 'invisible markets and branches,' 'invisible professional communities,' invisible social networks' ..." (Teubner, 1997, p. 8). Territorial boundaries and jurisdictional powers are once more uncoupled.

As Teubner acknowledges, this form of law has serious democratic deficits. "It is a law that grows and changes according to the exigencies of global economic transactions and organizations. This makes it extremely vulnerable to interest and power pressures from economic processes, because it is 'indeterminate' and can change in its application from case to case" (Teubner, 1997, p. 21). Soft law is law without the characteristics traditionally associated with the rule of law: transparency, predictability, and uniformity of application. These features of the rule of law, however, are not mere procedural characteristics; they act as guarantees of the equality of persons and citizens before the law. Global law, by contrast, is not equality-guaranteeing and equality-protecting; rather it is law which enables global corporations and other bodies to carry out their transactions in an increasingly complex environment by generating self-binding and self-regulating norms.

There are important clashes and tensions between these features of “*lex mercatoria*” and human rights law and cosmopolitan norms: both the growth triangles and the *maquilladoras* are characterized by a *suspension* of human rights norms in zones of special economic and business privilege. Furthermore, individuals working in these zones are not only, or even primarily, the citizens of the countries in which these zones of privileged economic sovereignty operate; very often they are themselves transnational migrants from neighboring countries, whose human rights are regularly trampled upon. Thus Malaysians, Thai, Burmese and others work in Indonesia; illegal Chinese laborers abound in the *maquilladoras* of central America. While without a doubt, the flow of global capital is itself responsible for encouraging the flow of transnational migrations, we see that the norms which ought to protect migrants and the laws which enable global capitalism are not compatible. *Lex mercatoria*, the law of international commercial transactions, and human rights law collide and conflict (Fischer-Lescano & Teubner, 2004).<sup>7</sup>

That economic globalization threatens core features of the rule of law and thereby challenges the prospects for liberal democracy as well is emphatically argued by William E. Scheuerman in *Liberal Democracy and the Social Acceleration of Time*:

Contemporary capitalism is different in many ways from its historical predecessors: economies driven by huge transnational corporations that make effective use of high-speed communication, information, and transportation technologies represent a relatively novel development. The relationship of capitalism to the rule of law is thereby transformed as well . . . As high-speed social action “compresses” distance, the separation between domestic and foreign affairs erodes, and the traditional vision of the executive as best suited to the dictates of rapid-fire foreign policy making undermines basic standards of legality in the domestic sphere as well. (Scheuerman, 2004, p. 145)

The transformation of the rule of law gives rise to fast-track legislation, pushed by national legislators without adequate debate and deliberation; the power of deliberative bodies is eclipsed and that of the executive increases. “The main problem posed by globalization is less that transnational business can only preserve its autonomy by limiting state power by means of the rule of law than that the democratic nation-state can only hope to maintain its independence in relation to global business by counteracting the virtually universal competitive rush to provide transnational firms with special rights and privileges” (Scheuerman, 2004, p. 169). States are pushed into the “race to the bottom”, that is, to embrace neo-liberal reforms, cutting back on the welfare state and relaxing labor and environmental legislations.

Law without a state? Or race to the bottom? In the first part of this essay I had asked: the spread of cosmopolitan norms or imperialism? Again we seem faced by alternatives and disjunction. Surely, these are not the only alternatives which globalization processes confront us with, but in either case, the model of liberal sovereignty, based upon the unity of jurisdiction administered over a defined territory, assuring citizens’ equality through the administration of the rule of law and guaranteeing social welfare through economic redistribution, more and more appears as if it were the memory of a quaint past. It is important to emphasize that sovereign states are players with considerable power in this

process: they themselves often nurture and guide the very transformations which curtail their own powers (Sassen, 2006).

Whether it be through the changing patterns of transnational migrations; or through the emergence of growth triangles and new global forms of law without a state in the accelerated and fluid global market place; or through the pressure to adopt state bureaucracies to the new capitalism, an epochal change is under way in which aspects of state sovereignty are being dismantled chip by chip. State jurisdiction and territoriality are uncoupled, as new agents of jurisdiction in the form of multinational corporations emerge. In some cases, the state disburses its own jurisdiction to private agencies in order to escape the territorial control of popular legislators. The social contract is increasingly frayed.

If the analysis presented above is partially accurate, does the “twilight of state sovereignty” mean the end of citizenship and of democratic politics, the displacement of the political or maybe even its eventual disappearance in the evolution of world societies? What are the normative consequences of these transformations? What light does this social-theoretic analysis shed on the political philosophies of the present period?

### **Twilight of Sovereignty and Global Civil Society**

Just as the capacity of nation-states to exercise their “stateness” varies considerably, so do their reactions to the shrinking sphere of state autonomy and activity. *Vis-à-vis* the economic, ecological, legal challenges and the growing fluidity of world-wide migrations, the states of Europe have chosen *the cooperative restructuring of sovereignty*. To be juxtaposed to this cooperative restructuring of sovereignty is the *unilateral reassertion of sovereignty*. At the present time not only the United States, but China, Iran and India are going down this route, not to mention Russia, North Korea and Israel. The strategy here is to strengthen the state via attempts to gather all the markers of sovereignty in the public authority with the consequence of increased militarization, disregard for international law and human rights, regressive and hostile relations with neighbors, and criminalization of migration. The third alternative is the *weakening* of the already fragile institutions of *state sovereignty* in vast regions of Africa, Central and Latin America, and South Asia. In these cases global market forces further destabilize fragile economies; they break up the bonds between the vast army of the poor and the downtrodden and their local elites, who now network with their global counterparts, thus leaving the masses to the mercy of *maquilladoras*, paramilitaries, drug lords and criminal gangs. The state withdraws into a shell, as has happened in the Ivory Coast, in the Congo, in the Sudan, in El Salvador, in some parts of Brazil, in Burma, etcetera. Under such conditions popular sovereignty takes the form, at best, of guerilla warfare and, at worst, of equally criminal groups fighting to gain a piece of the pie. Neither the contraction of stateness nor its militarized reassertion enhance popular sovereignty.

The volatile and often ambivalent configurations of institutions such as citizenship and sovereignty which have defined our understanding of modern politics for nearly the last 350 years since the Treaty of Westphalia (1648) have understandably given rise to conflicting commentaries and interpretations in contemporary political thought. These can be characterized as: theories of empire, theories of transnational governance, and theories of post-national citizenship.

Empire, according to Michael Hardt and Antonio Negri, is the ever-expanding power of global capital to bring farther and farther reaches of the world into its grip. Unlike the

extractive and exploitative empires of the past, however, the new empire encourages the spread of human rights norms; it pushes the new technologies of networking, thus destroying the walls of separation and generating a new global connectivity consonant with this new age.<sup>8</sup>

Since the webs of empire are so ubiquitous, sites of resistance to it are diffuse, decentered and multiple. The “multitude” resists the total penetration of life structures by the empire in organizing demonstrations against the G-7, the World Bank, the Gulf War, the Iraq War and the violation of international law. The multitude focuses on power as a global phenomenon and attempts to generate a counter-force to empire.<sup>9</sup>

The metaphors of networking, entanglement, binding, spread of communicative forms and the like which underlie this social-theoretical analysis are one-sided precisely because they present a world without institutional actors and without structured centers of resistance.<sup>10</sup> Relatedly, the multitude, Hardt’s and Negri’s revolutionary subject, is not the citizen. The multitude is not even the carrier of popular sovereignty since it lacks the drive toward the constitutionalization of power, which has been the desiderata of all popular movements since the American and French revolutions. The multitude gives expression to the rage of those who have lost their republics: the multitude smashes institutions and resists power. It does not engage in what Hannah Arendt has called the “*constitutio libertatis*” (Arendt, 1963; Benhabib, 2003). By contrast, popular sovereignty aims at widening the circle of representation among all members of the demos in an enduring form; popular sovereignty aims at the control of state power via the separation of powers between the judiciary, the legislative and the executive; popular sovereignty means creating structures of accountability and transparency in the public exercise of power. This is a far cry from the politics of the multitude.

This aspect of the legitimate exercise of power is well emphasized in contemporary debates by theorists of transnational governance such as Anne-Marie Slaughter and David Held. At the roots of empire’s extension, argue advocates of transnational democracy, lies a problem of legitimation. We are in the grips of forces and processes which resemble the galloping horseman without a head. Decisions are made in exclusive board meetings of the IMF, WTO and the World Bank affecting the lives of millions, while nation-states refuse to sign multilateral treaties such as the Kyoto Convention or the Rome Treaty leading to the establishment of the International Criminal Court. Theorists of the multitude seem to confuse politics with carnival. Only transnational institutions can build permanent structure to counteract the forces of empire.

We need transparent and accountable structures of world governance and coordination. Some of these structures are already in sight through the networking of economic, judicial, military, immigration, health and communication experts. They form horizontally networked sites of information, coordination, and regulation. The future of global citizenship lies in becoming actively involved in such transnational organizations and working towards global governance. Whether this implies world government or not is at this stage beside the point: what matters is to increase structures of global accountability and governance.<sup>11</sup>

In the version of the global governance thesis advocated by Anne-Marie Slaughter, who focuses less on the normative possibilities for democratic governance beyond borders but more on the horizontal networks linking government officials in judicial, regulatory and administrative organizations across state boundaries, a realm of law “beyond the state” has

already been created and the reach of global law is extended without the agency of the state and its institutions.

Whereas followers of the late Niklas Luhmann, such as Gunther Teubner, see structures of global governance resulting *per impossibile* through the self-regulating interlocking of anonymous systems of norm generation which act as each other's environment, Anne-Marie Slaughter places her faith in the networking of actual elites in the judiciaries across the world, administrative bureaucracies, etcetera. The hope is that new norms and standards for public behavior will result through such interlockings.

Defenders of transnational governance have a point: the current state of global interdependence requires new modalities of cooperation and regulation. Arms control, ecology, combating disease and epidemics, and fighting the spread of poverty must be global joint ventures which will require the work of all people of good will and good faith in all nations of the world. As David Held in particular has argued powerfully, the goal is not only to form new institutions of transnational governance but to render existing ones such as the WTO, IMF and AID more transparent, accountable and responsive to their constituencies needs. This in turn can only happen if popular movements within donor and member countries force the elites who govern these institutions toward democratic accountability. It is naïve to assume, as Guther Teubner and Anne-Marie Slaughter at times seem to, that the good faith of elites or the miraculous sociological signals of anonymous systems alone will move such structures towards democratization and accountability. They won't. Transnational structures need to be propelled toward a dynamic where they can be controlled by public law.

Here, however, we reach a dilemma: precisely because state-centered politics have become so reduced in effectiveness today, new theoretizations of the political have emerged. Yet my critique of the models of empire and transnational governance seems to presuppose a form of popular sovereignty, a *global demos*, which is nowhere in existence. Where is the popular sovereign who can counter empire or who can be the bearer of new institutions of transnational governance?

Today we are caught not only in the reconfiguration of sovereignty but also in the *restitutions of citizenship*. We are moving away from citizenship understood as national membership increasingly towards a *citizenship of residency* which strengthens the multiple ties to locality, to the region, and to transnational institutions. In this respect defenders of post-national citizenship are correct. The universalistic extension of civil and social rights, and in some cases, of political participation rights as well, to immigrants and denizens within the context of the European Union in particular, is heralding a new institution of citizenship. This new modality decouples citizenship from national belonging and being rooted in a particular cultural community. Not only in Europe but all around the globe we see the rise of political activism on the part of non-nationals, post-nationals, and ex-colonials. They live in multicultural neighborhoods, they come together around women's rights, secondary language education for their children, environmental concerns, jobs for migrants, representation in school boards and city councils. This new urban activism, which includes citizens as well as non-citizens, shows that political agency is possible beyond the member/non-member divide. The paradoxes of the "right to have rights" (Hannah Arendt) are ameliorated by those who exercise their democratic-republican participation rights with or without the correct papers.

Neither is the local alone the site of post-national citizenship. New modalities of citizenship and a nascent public sphere are also emerging at the global level through the

meetings of the World Social Forum in which activists from all nations, representing women's, ecology, ethnic rights, cultural self-determination, economic democracy groups, NGOs and INGOs, gather together, and plan strategy and policy. They are, in many cases, the ones who articulate and bring to global awareness problems to which transnational structures of governance have to respond. These citizens' groups and social activists are the transmitters of local and global knowledge and know-how; they generate new needs and demands that democracies have to respond to. They are members of the new global civil society. This new global civil society is not only inhabited by multinational and transnationals, whether public and private, but also by citizens, movement activists and constituents of various kinds. This emergent global civil society is quite complementary to republican federalism, which in my opinion constitutes the only viable response to the contemporary crisis of sovereignty.<sup>12</sup>

### **Republican Federalism and Democratic Sovereignty**

I will define "republican federalism" as the constitutionally structured reaggregation of the markers of sovereignty, in a set of interlocking institutions each responsible and accountable to the other. There is, as there must be in any structuring of sovereignty, a moment of finality, in the sense of decisional closure, but not a moment of ultimacy, in the sense of being beyond questioning, challenge and accountability. As the legal scholar Judith Resnik notes, the development of international law and of cosmopolitan human rights treaties are creating new modalities for the exercise of federalism:

... federalism is also a path for the movement of international rights across borders, as it can be seen from the adoption by mayors, local city councils, state legislatures, and state judges of transnational rights including the United Nations Charter and the Convention to Eliminate All Forms of Discrimination Against Women (CEDAW) and the Kyoto Protocol on global warming. Such actions are often trans-local—with municipalities and states joining together to shape rules that cross borders. (Resnik, 2006)

I call such processes of "law's migration" (Resnik, 2006) across state boundaries and institutional jurisdictions, whether institutionalized or popular, "democratic iterations". By "democratic iterations" I mean complex processes of public argument, deliberation, and exchange through which universalist rights claims and principles are contested and contextualized, invoked and revoked, posited and positioned throughout legal and political institutions, as well as in the associations of civil society. Democratic iterations can take place in the "strong" public bodies of legislatures, the judiciary and the executive, as well as in the informal and "weak" publics of civil society associations and the media.

In the process of repeating a term or a concept, we never simply produce a replica of the first original usage and its intended meaning: rather every repetition is a form of variation. Every iteration transforms meaning and enriches it in ever so subtle ways. In fact, there really is no "originary" source of meaning, or an "original" to which all subsequent forms must conform. Even if the concept of "original meaning" makes no sense when applied to language as such—for to identify the original we would already need to use language itself—it may be thought that it would not be so ill-placed in conjunction with documents such as the law and institutional norms. Thus, every act of iteration might refer to an antecedent which is taken to be authoritative. The iteration and interpretation of norms, and

of every aspect of the universe of value, however, is never just an act of repetition. The antecedent thereby is repositied and resignified via subsequent usages and references. Meaning is enhanced and transformed; conversely, when the creative appropriation of that authoritative original ceases or stops making sense, then the original loses its authority upon us as well.

Democratic iterations are processes of linguistic, legal, cultural, and political repetitions-in-transformation, invocations which are also revocations.<sup>13</sup> Through such iterative acts a democratic people who considers itself bound by certain guiding norms and principles reappropriates and reinterprets these, thus showing itself to be not only the *subject* but also the *author of the laws*. Whereas natural right doctrines assume that the principles which underline democratic politics are impervious to transformative acts of will, and whereas legal positivism identifies democratic legitimacy with the correctly posited norms of a sovereign legislature, jurisgenerative politics signals a space of interpretation and intervention situated between transcendent norms and the will of democratic majorities.<sup>14</sup> On the one hand, the rights claims which frame democratic politics must be viewed as transcending the specific enactments of democratic majorities under specific circumstances; on the other hand, such democratic majorities *reiterate* these principles and incorporate them into the democratic will-formation of the people through argument, contestation, revision and rejection. *Popular sovereignty no longer refers to the physical presence of a people gathered in a delimited territory, but rather to the interlocking in a global public sphere of the many processes of democratic iteration in which peoples learn from one another.*<sup>15</sup>

There will be an inevitable tension between the border- and boundary-transcending discourses of democratic iterations and state sovereignty. In fact, democracy is the process through which the popular sovereign tries to tame state sovereignty by making it responsive, transparent and accountable to the people. The spread of cosmopolitan norms which aim to protect the human being as such, regardless of national membership, but rather as a citizen of a global civil society, and popular sovereignty mutually reinforce one another. Whereas in the case of the decline of state sovereignty it is the receding of the public exercise of state power which is at stake, in the case of the augmentation of popular sovereignty, international and cosmopolitan norms subject agencies of the public exercise of power. First and foremost the state itself is submitted to heightened public and juridical scrutiny, thus aiding the assertion of popular sovereignty. The supposed conflict between the spread of cosmopolitan norms and popular sovereignty is based upon a mistaken equation of state with popular sovereignty.

Whereas cosmopolitan norms lead to border-crossing interlockings and coordinations of democratic iterations among those who are organized in human rights, women's rights, ecology and indigenous rights movements, "*lex mercatoria*" and other forms of law without the state generated by global capitalism, by contrast, strengthen private corporations *vis-à-vis* public bodies. Thus, in the case of North American Free Trade Agreement firms are granted rights hitherto generally limited to nation-states. Chapter II (B) of the Treaty allows private businesses to submit complaints against member states to a three-member tribunal. One of the members is chosen by the affected state, another by the firm, and the third jointly by the parties. As Scheuerman observes, "NAFTA thereby effectively grants states and corporations equal authority in some crucial decision-making matters". And he adds, "In a revealing contrast the procedures making up NAFTA's labor 'side agreement' deny similar rights to organized labor" (Scheuerman, 2004, pp. 268–269, note 52).

There is an interesting parallel here to the growing power of individuals to bring charges for human rights violations against states that are signatories to the European Convention for the Protection of Human Rights and Fundamental Freedoms in front of the European Court of Human Rights. In this case as well, states are defendants and no longer immune from legal prosecution. In both cases, the “black box” of state sovereignty has been pried open but with very different normative presuppositions: in the case of NAFTA and other forms of *lex mercatoria* states becomes liable to prosecution by corporate bodies which do not represent *generalizable interests* but only their particular interests and those of their constituents. Interestingly, they also disempower organized labor and environmental groups from enjoying similar jurisdictional privileges in bringing charges against the state.

In the case of charges brought against states for human rights violations, by contrast, there is a potential *generalizable interest* shared by all citizens and residents of a state alike, namely: to prevent the use of torture and other forms of the widespread violation of human rights. Human rights trials against sovereign states even go beyond the generalizable interest of the national citizens involved, to establish universalizable norms of human rights which would protect individuals everywhere and in any part of the world. There is a context-transcending power to these human rights iterations which feed into the normative power of cosmopolitan norms.

The boundaries of the political have shifted today beyond the republic housed in the nation-state. The deterritorialization of law brings in its wake a displacement of the political. It is clear that only multiple strategies and forms of struggle can reassert the ruptured link between consent and the public exercise of power which is the essence of democratic sovereignty. Transnational structures of governance are fundamental in order to tame the forces of global capitalism; but the accountability of transnational elites can only be demanded by their own constituencies who mobilize for post- and transnational citizenship projects. The interlocking networks of local and global activists in turn form an emergent global civil society, in which new needs are articulated for a world-wide public, new forms of knowledge are communicated to a world-public opinion and new forms of solidarity across borders are crafted.

Popular sovereignty cannot be regained today by returning to the era of the “black box” of state sovereignty: the formal equality of sovereign states must mean the universalization of human rights across state boundaries; respect for the rule of law and democratic forms of government all over the globe. It is an insult to the dignity and freedom of individuals everywhere to assume, as so many today are tempted to do, that human rights and cosmopolitan norms, such as the prohibition of “crimes against humanity”, are products of western cultures alone whose validity cannot be extended to other peoples and other cultures throughout the world. Not only is this a very inadequate view of the spread of modernity as a global project, but it is also a philosophical conflation of genesis and validity, that is to say, of the conditions of origin of a norm with the conditions of its validity. Global human rights and cosmopolitan norms establish new thresholds of public justification for a humanity that is increasingly united and interdependent.<sup>16</sup> New modalities of citizenship, not only in the sense of the privileges of membership but also in the sense of the power of democratic agency, can only flourish in the transnational, local as well as global spaces, created by this new institutional framework. The multiplying sites of the political herald transformations of citizenship and new configurations of popular sovereignty.



## Notes

- <sup>1</sup> The most prominent of these are: the Universal Declaration of Human Rights of 1948, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention of the Elimination of All Forms of Discrimination Against Women, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Rights of the Child.
- <sup>2</sup> For a more extensive treatment of Arendt's concept, see Benhabib (2004a, Chapter 2), Benhabib (2004b), and Brunkhorst (1999, pp. 52–84).
- <sup>3</sup> The genesis of cosmopolitan norms goes back to the experiences of the two World Wars, European colonialism and anti-colonial struggles, the Armenian genocide in the late stages of the Ottoman Empire and the Holocaust. It is wrong to confuse "*lex mercatoria*", which is also global law, with the development of cosmopolitan human rights norms. For an account of the development of international law, see Koskeniemi (2002). See also the accounts of trials against members of the "Union and Progress Party" in the Ottoman Empire, who were responsible for the Armenian genocide (Akcem, 1996); for the Nuremberg trials, compare Marrus (1997); and for Ralph Lemkin and his efforts to pass the Genocide Convention, compare Power (2003). See also Brunkhorst's (2002) impassioned defense of "strong human rights".
- <sup>4</sup> For a masterful account, which is also a sustained critique of Schmitt, see Koskeniemi (2002, pp. 98–179). Compare the statement of the Belgian legal historian Ernest Nys: "A state uses the territories that constitute its private domain as it wishes; it sells them, it rents them out, it attaches such conditions to the concessions it grants as it sees warranted . . . in none of this does it owe an explanation to other States". From "L'Etat Independent du Congo et les dispositions de l'acte generale", quoted in Koskeniemi (2002, p. 161).
- <sup>5</sup> Schmitt's eulogy to the "*Jus Publicum Europaeum*" (the public law of Europe) emphasizes that this system "neutralizes" war by moving away from the medieval notion of "just war". In this transformation the enemy is no longer viewed as "inimicus" but a "justi hostes" (categories which also return in Schmitt's concept of the "political"). This "neutralized" concept of war is also called "the non-discriminatory concept of war" (*der nicht-diskriminierende Kriegsbegriff*). "All inter-state wars upon European soil, which are carried out through the militarily organized armies of states recognized by European law of nations (*Voelkerrecht*), are just in the sense of the European law of nations of this inter-statal period" (Schmitt, 1997, p. 115, emphasis in the text). Schmitt here conflates "justice" and "legality", not out of some logical error, but because he rejects all normative standards in judging wars.
- <sup>6</sup> Burke, cited in Arendt (1951, p. 183). See also Hannah Arendt's (1951, p. 132) powerful treatment: "The only grandeur of imperialism lies in the nation's losing battle against it".
- <sup>7</sup> Particularly interesting is the collusion between the economic interests of patent holders, such as big pharmaceuticals Merck, Pfizer, and Roche, which in 2001 asked the WTO to investigate Brazil which had permitted the domestic production of generic drugs via copying patented medicines. Brazil defended itself by pointing out that the AIDS epidemic had taken 150,000 lives since 1981 and that with preventive measures annual infections could be reduced to less than 5,000. This case, entailing a clear human rights claim to health and public protection from epidemic disease, in turn led to a major renegotiation of the terms of TRIPS (Trade Related Intellectual Property Rights) and to further negotiations between WHO and WTO about the preventive and non-commercial use of patented drugs and led all the way to a resolution of the UN Commission on Human Rights in 2000 protecting the preventive use of generic drugs whenever possible to help combat the spread of disease and epidemics. At the Doha meetings in 2002, a Declaration on the TRIPS agreement and Public Health was issued, which affirmed the safeguards provided in TRIPS with regards to rights of states to issue such measures as compulsory licensing to cope with health crises in their respective countries. Company representatives in general preferred methods of differential pricing but accepted that they must accept the decision of states to deal with their own health problems. Since the DOHA round in 2002, however, trends have apparently gone in the direction of bilateral rather than multilateral agreements. See the publication "Intellectual Property Rights", Results of a Stakeholder Dialogue between the World Business Council for Sustainable Development and the Wissenschaftszentrum Berlin fuer Sozialforschung (reprint April 2004). Contact: wbcasd@earthprint.com
- <sup>8</sup> Although first translated into English in 2001, the Italian version of *Empire* was written in the period between the Persian Gulf War of 1991 and the Yugoslav Civil War of 1994. Its view of US power is

more benevolent than the subsequent work by Michael Hardt and Antonio Negri (2004), *Multitude. War and Democracy in the Age of Empire*.

- <sup>9</sup> The last chapter of Hardt and Negri's *Multitude* is called "May the force be with you" (see pp. 341–348); on carnival, compare "The various forms of carnival and mimicry that are so common today at globalization protests might be considered another form of weaponry. Simply having millions of people in the streets for a demonstration is a kind of weapon, as is also, in a rather different way, the pressure of illegal migrations ... A one-week global biopolitical strike would block any war" (Hardt & Negri, 2004, p. 347).
- <sup>10</sup> Just as in Michel Foucault's theory of power, the subjects of power are interpellated by it, in other words, constituted in part through the network of power rather than preceding it, in Hardt and Negri's analysis as well, states and other world institutions disappear as agents and sites of resistance that have prior constitution. I disagree with this theory of power. One can stipulate the existence of very distinct and structured institutions and patterns of resistance to power without presupposing a metaphysical primordality of either the state or of the subject. The reach of empire is neither as ubiquitous nor as omniscient as Hardt and Negri would like us to think.
- <sup>11</sup> See Held (2004), Kuper (2004), Slaughter (2004). There is something all too cheery and optimistic in these proposals which downplay the danger of dissociating constitutionalism from democracy and from citizens' will and reason, by transferring it to an expertocracy, even if as good willing an expertocracy as the judges and practitioners of international law.
- <sup>12</sup> Global civil society, as defended here, should not be confused with the appeal to voluntarism and private associations, so characteristic of the neo-liberals, who aim at curtailing state power. I endorse the public provision of public goods in a system of nested interdependencies of public authorities. Global civil society is a space of global civic activism and the counterpart to the model of "republican federalism" which I develop below.
- <sup>13</sup> Since I have introduced the concept of "democratic iterations" (Benhabib, 2004a, Chapter 5), I have been asked to clarify (1) the relationship between practical discourses of justification and democratic iterations and (2) whether democratic iterations can also be regressive and non-meaning enhancing. Democratic iterations are processes of *legitimation* and not *justification*. They stand in the same relationship to normative discourses of justification as theories of democracy stand to John Rawls's *Theory of Justice* (1971); that is, the former are concerned with legitimacy, the second with justice; second, yes, "jurispathic" democratic iterations, which block the enhancement of meaning and the augmentation of rights claims, are possible. See Benhabib (2006).
- <sup>14</sup> For the concept of the "jurisgenerative", see Cover (1983).
- <sup>15</sup> See Juergen Habermas' (1989) early formulation, "Ist der Herzschlag der Revolution zum Stillstand gekommen?"
- <sup>16</sup> On the idea of a threshold of justification, see Benhabib (2004a, pp. 15–21).

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