

The Cosmopolitan Rights of Foreigners

A Phenomenological Defense of Cosmopolitan Law

Johannes Servan

Thesis for the Degree of Philosophiae Doctor (PhD)
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Abstract

This thesis argues that states have cosmopolitan obligations of a moral-legal character. These obligations are articulated as “cosmopolitan law”, which is a Kantian term referring to the moral-legal norms that regulate the relation between states and foreigners. The main example of cosmopolitan law today is found in the right to asylum. In the first part, I argue that the globalized circumstances actualize the need for an extension of this law and therefore I consider some of the main contributors to the extension of cosmopolitan law, namely Immanuel Kant, Hannah Arendt and Seyla Benhabib. I also situate this Kantian account in the immigration debate and conclude that I prefer Benhabib’s position compared to other positions in the current discussion.

In the second part, I take some distance from Benhabib’s reading of Arendt and seek to explore an alternative reading informed by a Husserlian phenomenological perspective. I tend to agree with a more radical reading of Arendt, which seeks to balance the institutionalist and performative aspects of her thinking. My reading is grounded in a systematic conceptual analysis of Arendt’s more theoretical perspectives that are found in *The Human Condition*, in central chapters of *The Origins*, and in some of her essays.

My main point is to show how central the significance of the co-presence of others is to her thinking. Through a phenomenological reading, the richest experiential mode of this co-presence – as “fully human” – is taken to be the basic experience that motivates Arendt’s typology of modes of activities and her normative ranking of principles of action. Further, informed by Alfred Schutz’s conceptual framework of social relations, I discuss in more detail what this experience of the “fully human” could entail. I argue that this mode of experience has normative implications both on the face-to-face level of interaction, and on the level of indirect interaction among strangers.

The main implication of this reading is that Arendt’s contribution should not be understood – as Benhabib seems to suggest – only as an extension of the content of cosmopolitan law within the Kantian framework. Decisively, Arendt’s thinking should be considered as a reconceptualization of the guiding principles of political thought and a new concept of human dignity. I argue that this reconceptualization allows for an extension of cosmopolitan law more adequately adapted to the circumstances of our times than the Kantian framework.

Introduction – “the frailty of human affairs”

What obligations does a state have toward foreigners? There are at least two decisive aspects of this question that needs to be answered. First of all: What is *the scope of justice* that states are obliged to fulfill toward individuals? Is it responsible only for its own citizens, or does the state have some obligations toward non-citizens as well? Does it make a difference whether these non-citizens are within the state territory or not? Unless we hold the scope of justice to be strictly bounded to the citizens of a state, we would also have to give an answer to a second aspect: What is *the character* of the state’s obligations toward foreigners? Mainly, even if we accept the premise of universal moral equality, we still need to distinguish merely humanitarian or Samaritan obligations from obligations that ought to be legally binding and that correspond to individual rights of foreigners.

In this dissertation I will argue in favor of an extension of cosmopolitan law according to the current circumstances of globalization. By cosmopolitan law I mean the kind of obligations a state have toward foreigners and the corresponding rights a foreigner can claim from alien states. I consider some of the main contributors to the extension of cosmopolitan law, namely Immanuel Kant, Hannah Arendt and Seyla Benhabib. I tend to agree with a radical reading of Arendt, which seeks to balance the institutionalist and performative aspects of her thinking. The main implication of this reading is that Arendt’s contribution should not be understood only as an extension of the content of cosmopolitan law within the Kantian framework. Decisively, Arendt’s thinking should be considered as a reconceptualization of the guiding principles of political thought motivated by the new and globalized circumstances. I argue that this reconceptualization allows for an extension of cosmopolitan law more adequately adapted to the circumstances of our times than the Kantian framework.

Although the argument of this dissertation is based on a reconceptualization of the basic principles of justice, the basic categories of Kant’s notion of public right remains applicable and guiding. According to these categories cosmopolitan law takes on a specific meaning. States have moral-legal obligations toward foreigners according to cosmopolitan law, which – similarly to domestic law and “interstatal” law¹ – regulate a certain domain of external interactions. The extent of these obligations might vary according to the given historical circumstances. Especially it might vary according to the degree to which the actions of states, citizens and foreigners affect each other.

¹ I generally use «interstatal» to define the category of public right which compliments domestic and cosmopolitan law. (see chapter 2) I use “international”, similar to the common use of the term, when referring to the legislation and institutions which may implement the moral-legal norms. Like the national level of institution, the international may implement norm on any level of public right, including domestic, interstatal and cosmopolitan.

An indication of the favoring circumstances for the actuality of the question of the scope of justice is found in the increasing relevance of the statist-cosmopolitan axis in the political landscape, compared to the traditional left-right axis. The level of globalization we experience today, with its economic interdependence and porous borders seems to call for an extension of cosmopolitan justice. This view is however contested. An example of these ongoing negotiations is linked to the only conventionally recognized cosmopolitan law in the current international law, namely the right to asylum. Although it is plausible to say that this right (and its corresponding state obligation) still has wide public support, it is also challenged by those who, for various reasons, redeem it outdated in the current circumstances. I think there is a core of truth in this diagnosis in the sense that the right to asylum is primarily intended for the exceptional cases of individual refugees, such as political dissidents. Hence, I agree with the challenge in the qualified sense that the right to asylum only covers a narrow aspect of the content of cosmopolitan law that the current circumstances seems to demand.

In the following I will not only defend the right to asylum, but also argue that the circumstances call for an extension rather than a full abandonment of cosmopolitan law. I will pursue to justify the claim of an extended cosmopolitan law along two main lines. First of all, I will consider specifically the kind of obligations that a state has toward foreign immigrants and argue, with Seyla Benhabib, that a state today has obligations toward residential non-citizens that go beyond fulfilling the right to asylum. These obligations should however be moderated by the concern for democratic self-determination of a state. In general, I label the moral-legal norms regulating these obligations toward foreigners, entering or residing on the territory of a state, under the heading: *the cosmopolitan law of admission*. Second, I will also consider the kind of obligations that a state has regarding the protection of an emerging global civil society. These obligations correspond to the foreigner's right to establish communicative relations and participate in democratic processes of decision-making in cases that affect them. This second kind of obligations and rights belong to *the cosmopolitan law of deliberation*, and do not to the same degree rely on the territorial proximity or positive legal status of the foreigner. In brief I argue that the second line of cosmopolitan law is necessary in order to adequately address systemic issues of the first line.

I will begin my discussion by clarifying the specific character of cosmopolitan law and distinguish it from state-centric positions within the tradition of political philosophy of justice. In my initial defense of cosmopolitan law I will argue mainly within the scope of issues regarding immigration and foreign residents related to the law of admission. Having established my support for Benhabib's proposal to extend this law by adding a foreigner's right to political membership, I will however issue critical concerns internal to the project of cosmopolitan law. This critique is

concerned both with the issues of admission and with the issues of deliberation. Considering admission, Benhabib's proposal can be viewed as an extension of the rights to "second admission" (i.e. to acquire membership). This might solve some of the problems associated with irregular territorial residents, but it does not seem fit to solve the systemic problems of admission policies, such as those associated with long term encampment and the problem of relocating refugees. As a systemic problem, the admission policies are viewed from the perspective of the international society and how well-intended policies of each polity might generate excluding consequences as a whole. A central example is long-term encampment, which involves unacceptable suffering inflicted by exclusion of people from political life.

Considering the cosmopolitan law of deliberation, Benhabib's proposal might improve the internal political process of some strong democracies, but it does not adequately address the increased need for institutionalized protection of the emerging global civil society. I argue that this protection can be given principled reason that concords with the regulative idea of humanity as a global collective. Further I argue that the protection of global civil society has an instrumental value in the sense that it facilitates deliberations among citizens and non-citizens which may improve the actual content given to cosmopolitan law. In the case of the problem of long-term encampment, and the exclusionary mechanisms it presents, the cosmopolitan law of deliberation both articulate the implied moral-legal norms that are violated and suggests a framework of political problem solving that does not imply turning foreigners into citizens.

To accommodate these critical concerns, I suggest an alternative reading of "the right to have rights" that emphasizes the implications of Hannah Arendt's relational revision of the principle of justice. According to a phenomenologically informed reading, Arendt's basic concern for plurality takes conceptual distance from Kant's principle grounding in the autonomous will of the individual. In short, the intersubjectivity of politics cannot be reduced to scaffolding for the development of individual autonomy and public reason. Accordingly, just institutions should be grounded in moral-legal norms that answer to the human condition of plurality, which is given shape in the public space of human affairs. Since these human affairs are fragile, just institutions should protect them against the arbitrary rule of physical force or economic incentives, and give endurance to this public space through the rule of law. In my view, this need for protection includes both spaces with domestic and cosmopolitan character. The cosmopolitan public spaces should be protected by a cosmopolitan law of deliberation.

Theoretically the discussion of the political character of the global civil society is related to the question of how we appear as human. I explicate Arendt's answer to this question by arguing that

this human mode of appearance is not only related to a communicative practice, but also to a certain mentality of action. Conceptually, I take the implications to be that “the right to have rights” does not belong to the conventional category of human rights, which include at least *one* cosmopolitan right of foreigners (i.e. the right to asylum). It is rather an articulation of a political principle of meaningfulness, which is a principle of action answering to the condition of plurality. This principle is given an insufficient and partly misleading articulation within the dominating individualistic discourse of “right”. It is not simply an inherent individual right (an acquisition right), nor is it simply a communitarian or group right (such as a right to a national public). It is a general right to political integrity, articulated to protect the basic political activities of human agency – action and speech. This general human right can be given specified expressions in the content of domestic, interstatal or cosmopolitan law. This dissertation will restrict the discussion mainly to the adequate content of cosmopolitan law.

In practical terms I take my main contribution to be the articulation of the need for a cosmopolitan law of deliberation. This general law of deliberation articulates state obligations regarding the protection of the political participation of foreigners. This is especially relevant to the issuing of immigration laws and policies, because foreigners are in these cases subjected to the law of the state. First of all, the law of deliberation adequately reflects the basic cosmopolitan intention of preserving the political integrity and humanity of foreigners. On this ground it objects to an understanding of “the right to have rights” as merely an individual right to admission, because this interpretation neglects the scope of the relevance of this “right” for public right in general. In terms of cosmopolitan law, more specifically, it neglects the regulation of non-resident or extra-territorial foreigners’ right to political participation. Second, this law is compatible with a foreigner’s right to establish communication and participate in the deliberations of civil society, especially when affected by the binding decisions in question. This participation finds, to a degree, some protection within the law of admission. Yet, a conception of cosmopolitan obligations restricted to admission tends to conceive the moral obligations to foreigners as non-political (and merely moral) in character. For instance, it seems to devalue the relevance of perspectives of foreigners, beyond their generalized interests as human beings. Finally, even if this law of deliberation is not feasibly implemented on the international level, it could still articulate a strong moral-legal obligation of single states. Assuming that strong democracies benefit epistemologically from the perspectives of foreigners, this could strengthen the deliberations in the decision-making processes, and more suggestively and speculatively indeed, a procedural right of foreigners to participate in the aggregation of binding political

decision-making could give representatives of less democratic states valuable experiences in deliberative democratic practices.

...

A central premise of this thesis is a normative cosmopolitan assumption which Arendt shares with Kant: In order for a state to be legitimate under the globalized circumstances we find ourselves in today, it cannot rest on the protection of the individual rights and interests of its citizens alone. It must also fulfill its cosmopolitan responsibility for foreigners. In other words, for a state to be legitimate it must not only comply with a liberal-democratic standard of domestic legality and democratic participation, it must also comply with a complementing cosmopolitan standard. In the cosmopolitan tradition after Kant, this responsibility has been mainly associated with migration and the kind of interactions with foreigners it implies. In the liberal reading of Kant, the central cosmopolitan principle is the *individual* freedom of movement, which tends to be defended by arguing for the individual interest of this freedom. But, we might also read the Kantian cosmopolitan law with an emphasis on the regulative political idea this freedom, in my opinion, is mainly sought to comply with, namely: the emergence of a cosmopolitan society.

Since our categories of political relations are so tightly connected to the state-system, we are easily led to assume that a cosmopolitan society entails a global state. I don't think this is a very accurate reading of Kant's position, but more importantly I don't think it helps us much in our current situation. What I propose instead is that we – inspired by Arendt – reconfigure our conceptual understanding of the political, such that the primary purpose of the sovereign liberal state is not the protection of individual rights, but the protection of the public space in which such rights may be actualized. We may still appreciate the discourse of individual rights as a useful rhetorical device, but the main value of the state and its institutions would be its protection of public space, appreciated as the condition of human agency.

The main benefit of this conceptual shift is that it makes clearer that the state has an obligation to protect public spaces of different characters and this entails different kinds of state obligations and individual rights in order to be adequate. There are of course many ways to define various public spaces, but – following the Kantian triad of public right – we might at least distinguish between domestic, inter-state and cosmopolitan publics. In the current state-centric order, there is a striking asymmetry in the international law regarding the obligations of a state. Whereas international law imposes a wide range of regulations on domestic and interstatal interactions, there are but a few conventions issuing cosmopolitan law. This thesis is the product of a concern to explicate and suggest remedies to a poorly protected cosmopolitan public space.

The revised conception of the principle of justice detaches the notion of “the political” from the conventional, state-centric use. We might say that the conventional use of “political activities” has a primarily descriptive reference to the kind of activity related to the institutions and procedures that lead to collective binding decisions within a modern state. There are also positions that will hold that these political activities imply inherent norms, such as a division between citizens and enemies, or at least a democratic closure necessitated by the principle of public autonomy. Arendt’s alternative notion of political activities refers to the specific status of actions and mentalities that manifest and are guided by principles, which in its turn answer self-reflexively to the conditions of human agency. By introducing such a notion of “the political”, the descriptive reference is detached from the decision-making of a state and potentially relocated to any communicative relations performed in a political mode, including deliberations over instrumental and constitutive issues. Law is in this sense not only the product of politics, but primarily the necessary protection of political life and its framework. To retain the pre-institutional character of public space I will emphasize the secular idea of society as associations that are able to emerge spontaneously and independently of such institutional protection. I refer to this alternative notion of the political, which is detached from the state system, as “proto-political”.

The aim of this thesis is to develop an answer to *how* states can form responsible immigration policies by including the perspectives of affected foreigners in the decision-making process. An important part of this answer relates to a change of mentality when it comes to our collective self-understanding as a democratic people. Hence, this is primarily a conceptual argument, with the practical implementation of reconfigured political principles as its guiding star. From the ideas of the two thinkers – Kant and Arendt – I will draw two main implications. First, I argue that if we recognize cosmopolitan law as a moral-legal domain, even if only a provisional and non-sanctioned one, we should also consider the possibilities of democratizing the legislation and decision-making within this field. By appealing to a basic democratic ideal of including all affected parties, I suggest we consider it a cosmopolitan right of the foreigner to influence legislation and policies that affect them.

The outline of the thesis

The thesis is divided into two parts. The first part addresses the specific scope and character of cosmopolitan law and discusses the question of its adequate content in terms of the actual historical circumstances within the immigration debate. The second part challenges this narrow scope of cosmopolitan law within the Kantian tradition and seeks to widen its conception via an alternative reading of Arendt. This interpretation contests the institutionalist reading of Arendt's "right to have rights" and suggests that this right must be interpreted in the context of Arendt's rethinking of the conceptual framework of justice in the face of the new circumstances.

Part 1 Cosmopolitan law – the character and adequate content of immigration law

In chapter 1 I will structure the public debate on immigration according to a division between cosmopolitan and statist positions. Inspired by Christoph Menke's commenting on the German debate², I've organized the positions according to a shared conceptual framework of "the individual" and "the state".³ These positions are considered ideal typical poles on a continuum where various actual positions will tend to take more moderate positions where one of the two concerns is emphasized and the burden of proof distributed accordingly to the opposite side.

On the one side, the cosmopolitan positions tend to emphasize the moral obligations the state have to every human individual. The scope of these obligations goes beyond the obligations of each state toward their own citizens. Cosmopolitan positions tend to view borders as morally arbitrary in light of the premise of universal moral equality. These positions tend to appeal to the discourse of "human rights", such as the right to asylum.

Since the appeal to such state obligations trumps consequential concerns of the hosting countries, they are sometimes referred to as an "ethics of conscience" [*Gesinnungsethik; sinnlagsethik*]⁴, which in Max Weber's conception is opposed to the more "realistic" or "responsible" political balancing of interests [*Verantwortungsethik; konsequensethik*] within a state.⁵ A moderate cosmopolitan position would therefore implement certain restrictions on the scope of obligations, such as for instance a concern for the public order of the hosting state.

On the other side we have the statist positions. These tend to emphasize the concern for sustainable policies of immigration, where the Samaritan duty of assistance is balanced with the

² Menke, Christoph. 2016. "Philosophiekolumne - Zurück Zu Hannah Arendt - Die Flüchtlinge Und Die Krise Der Menschenrechte." *Merkur-Deutsche Zeitschrift Für Europaisches Denken* 70, no. 806 (Jul): 49-58.

³ A simple illustration: the two perspectives see the same structure from different angles, analogue to the way "6" and "9" are arguably equally true reports on the same sign, depending on the perspective.

⁴ This refers to the typically ascribed positions in the German and Norwegian debate.

⁵ Max Weber: *Politik als Beruf*, in: *Gesammelte Politische Schriften*, hrsg. von J. Winckelmann, 5. Auflage Mohr Siebeck, Tübingen 1988 [1926], 551-552

costs of hosting presumably traumatized, low-skilled and culturally distanced individuals. An extreme statist position would imply a double standard between the domestic rule of law and relations to foreigners, which are considered as a lawless state of nature.

To specify conceptually the moral-legal domain that is relevant for the debate on immigration, I will in chapter 2 draw on Kant's notion of "cosmopolitan law" which articulates the specific obligations states have toward foreigners. As a formal legal domain, cosmopolitan law is distinguished from domestic and interstate law. Kant's notion offers us a way to localize cosmopolitan problems, such as the issue of immigration, more precisely within the conventional framework of possible relations between individuals and states. This is basically a formal conceptual clarification, which allows us to think of cosmopolitan norms as distinct from other universal moral-legal norms. It also designates a moral-legal domain where foreigners – or non-citizens – are per definition considered subjects of law.

Further, within the Kantian framework I discuss the requirements of the adequate content of cosmopolitan law. I argue that this content cannot be determined by general principles (such as freedom and justice) alone, but that an adequate content must also answer to the given circumstances and the regulative idea of a global civil society. In the end of chapter 2 I suggest two possible readings of the law of hospitality that follows the general lines defined by the law of admission and the law of deliberations.

In chapter 3 I consider three levels of state-centrism which stands in conceptual conflict to the notion of cosmopolitan law. In contrast to the statist positions, *state-centric* positions do not necessarily oppose the cosmopolitan position in the question of the *scope* of state obligations. But a state-centric view will take distance from a cosmopolitan position on the question of the *character* of cosmopolitan obligations. On the question of character it operates with a distinction between moral cosmopolitan matters and domestic or interstate political matters according to the institutional framework of modern state boundaries. In contrast, the cosmopolitan position on the question of character holds moral-legal norms to be valid, at least as an unwritten code, on the cosmopolitan level as well.

The first level of state-centrism is the methodological. I will present John Rawls' conception of justice as the central example of this level. The second level concerns the social imaginary of modern society. This level will be discussed in the light of Charles Taylor's analysis and with a special emphasis on the secular imaginary of civil society. The third level of state-centrism refers to the way this position is given expression in democracy theory and the deliberative turn. On this level there is a noticeable change in the way foreigners are viewed as relevant subjects of

opinion- and will-formation. As Seyla Benhabib points out, the views on democratic participation are changing in a globalized situation where cross-border migration is an integral part of everyday life. For instance, some countries experiment by giving non-citizen residents a right to vote in local (sub-national) elections, and by giving expats (citizens living abroad) representation via parliamentary seats.

The main challenge of state-centrism is that it tends to marginalize the political significance of cosmopolitan issues. To defend the relevance of cosmopolitan law against this state-centric marginalization, I will in chapter 4 argue that the circumstances of our current global situation implies political commitments to the cosmopolitan law. This is especially urgent in the field of immigration, where the dominating state-centric approach tends to deal poorly with the actual problems of exclusion. The most severe problems are related to systemic issues of long-term encampment. These are systemic consequences of the state-centric understanding, where states limit their institutional responsibility for foreigners (if they recognize it at all) to those that reside on or are about to enter its territory. There is currently no international coordinated effort to resettle the displaced and homeless on a scale adequate to the demand. Unlike statist policies that contest the moral status of foreigners, and are willing to violate the premise of moral equality, the systemic outcome of state-centrism is compatible with acknowledging cosmopolitan obligations in terms of voluntary aid beyond the narrow law of admission (i.e. the right to asylum).

To get a clearer view on what is at stake, I will go back to Kant's argument on cosmopolitan law and elaborate on the question of what it is that the legal domain is meant to protect. Kant's answer reveals him as a thinker of the Enlightenment: the cosmopolitan law is to protect the emergence of a global civil society of commerce and communication. By exchanging goods and ideas we will understand each other better, and will be less likely to make legislations or policies that lead to military conflict. Within the framework of basic human dignity, the regulative idea of a global civil society must be given an adequate institutional specification and content of law according to circumstances. Kant's understanding of the circumstances at his time suggests a clear relevance of cosmopolitan law, but is only provided with a quite narrow scope of adequate content.

The need for a more encompassing protection of the global civil society becomes evident, I argue, in light of the experiences that Arendt witnessed in the midst of the 20th century. The extensive use of internment camps, concentration camps and later extermination camps, made it clear to Arendt that even the basic condition of human agency cannot be taken for granted in a world that had become "One"; a completely organized international order. For the excluded, the

economically superfluous and politically denationalized there was nowhere else to go. Their utterly reliance on the celebrated “human rights” proved of little more value than the rights of a species to basic needs of shelter and food. By turning encampment into an institutional response to the superfluous, the excluded were left in an uncanny state of the “living dead”. In this context “the right to have rights” can be read as a way to give expression to the condition of human agency as something more than being treated well according to certain category of animal rights.

If we look at Arendt’s formulation of “the right to have rights” as a contribution to the context of the debate on immigration and just membership, it seems perfectly reasonable to assume that what Arendt is promoting, is a cosmopolitan right to state citizenship. In chapter 5 I will demonstrate how Benhabib, by interpreting Arendt in this manner, is able to balance between the “closed” and “open” standard positions in the theoretical debate on immigration. According to this reading, Arendt’s contribution is situated within the conventional framework as an extension of cosmopolitan law. It adds to Kant’s right to visit, the right to become a permanent guest with – eventually – full citizenship. Hence, it suggests a revision of the cosmopolitan law of admission in a way that more adequately answers to the circumstances that Arendt depicted and that still is actual.

Part 2 Rethinking human dignity – A phenomenologically informed revision of the right to have rights

Although I am sympathetic to Benhabib’s position and support her argument against state-centrism, it is questionable to what degree her argument is able to escape the state-centric premises. Sarah Parekh makes this clear in her general critique of how the discussion on membership distribution takes on the character of an “ethics of admission”. Benhabib’s solution neglects, like the standard positions, the systemic issues of migration that have a transnational and systemic character – such as long-term encampment.

In chapter 6 I offer a “proto-political reading” of Arendt that emphasizes her philosophical argument of the performative and informal character of the public. This alternative reading seeks a greater consistency between the conceptual ambition in Arendt’s early critique of human rights and her later formulation of the human condition of plurality. If the “new law on earth” is read in the light of the political principle it seeks to address, namely the principle of meaningfulness, the right to have rights can be interpreted as the articulation of a basic human right to the political activities of action and speech. In other words it expresses a rethinking of the Kantian principle of justice that seems to be overlooked in the conventionalist reading of Arendt.

Further, I argue that the critique of Arendt, mainly represented by Benhabib and Rancière, can be answered by this proto-political reading. The critique of Arendt can be summarized in two main points: First, Arendt seems to rely on Aristotle's anthropology of the political and speaking animal. Without clarifying the philosophical step to its normative political relevance, Arendt's conception is left with problematic and hidden normative presumptions. Second, Arendt provides a political solution to the historical problems she faced, but without providing it with a philosophical grounding.

In chapter 7 I defend Arendt's proto-political position by arguing that the anthropological premise of her conception should be understood as a non-foundational grounding in a comparative analysis of the human condition. Arendt is inspiring because she thinks politics within history, and not from a given set of ideas.⁶ She provides us with no system or doctrine, but rather emphasizes the practical aspect of thought as wisdom or judgement guided by principles; the adequate, thoughtful grasp of human co-existence that pure logic, ideology and knowledge alone cannot guarantee. This is reflected in her critique of philosophical solipsism in Heidegger, and in the instrumental notion of politics initiated by Hobbes, based on an ambition to unify the free will of the individual with the sovereignty of the state.

Guided by the Greek concept of "praxis", Arendt develops an original notion of political activities that relies on public appearance among equals and a notion of political public space that cannot be reduced to its institutional organization. Further, by distinguishing three kinds of human activities according to their relative reliance on and constitutive role for the togetherness of public space, Arendt identifies certain stable human conditions which correspond to certain principles of action; comfort, usefulness, and meaningfulness. I argue that it is a mistake to identify Arendt's reference to "praxis" directly with her conceptual ambition. Rather, she finds in this old concept inspiration to rearticulate a new political mentality. Mentalities are generally guided by principles of action and are internally ranked by Arendt relative to their capacity to form norms, regulative ideas and institutions that answer to the condition of human agency. In this manner, Arendt never intended in my view to restore a topical, face-to-face model of politics from the city state, but sought to reform the modern conception of politics by grounding its guiding principle of action in a manner that does not undermine or neglect the very condition of action. Arendt identifies this in the principle of meaningfulness, the principle of principled action, which corresponds to the highly artificial human condition of plurality.

⁶ On the impossibility of finding an Archimedean point, see Disch, Lisa Jane. 1994. *Hannah Arendt and the Limits of Philosophy*. Ithaca: Cornell University Press..

To flesh out the implications of this principle for a mentality of action, I consider in chapter 8 Arendt's notion of plurality in comparison with Alfred Schutz's analysis of social space and the double character of personal experience. I argue that there is a conceptual distinction between the kind of equality (i.e. reciprocity) that makes us able to understand each other and the kind of equality (i.e. principled) that makes us appear as human. The former relies on *types* derived from experience or reducible to imaginable examples. The latter cannot be determined in the same manner. It relies on temporal manifestations that must be reenacted and rethought under the guidance of principles.

Further, I distinguish between the metatopical manifestations of plurality of contemporaries in our imaginary and the ideal objective manifestation of plurality of collectives. If these levels are isolated analytically we might consider how the principle of meaningfulness can be given responsible expression in the way we imagine our contemporaries, even in the form of quite empty and anonymous types, and in the way we think of collectives in terms of regulative ideals. These are clearly political issues that should be addressed. In the context of a global civil society these levels – the imagined society and the collective – specify aspects of a mentality of actions that can formulate an adequate content of cosmopolitan law.

In chapter 9 I discuss the implications of the proto-political reading of Arendt in greater detail. First I reconsider the relation between the pre-institutional and the institutional public space in relation to the reception of Arendt within the deliberative turn in democracy theory. Second I consider certain practical implications of the mentality of action for the cosmopolitan law of deliberation beyond Arendt's own thinking.

Part 1 Cosmopolitan law – the character and adequate content of immigration law

In 2015 “we” – as Norwegians and as Europeans – experienced a high increase of refugees that entered the Schengen territory. The experience has been referred to as the “refugee crisis”. Curiously, it is ambiguous exactly for whom it is a crisis, or what kind of crisis we understand this to be. At first, we might say, the numbers of refugees told a story of millions of personal crises, of people losing their community, their homes and were forced to go searching for new ones. Some of the pictures that reach the global public solicited a boundless moral response to the inhumane suffering and treatment of people that had already lost almost everything. Other pictures portrayed refugees as normal adult migrants, usually male, with a smartphone and apparently with enough resources to pay smugglers to get across the borders. These second kind of pictures resonated with the second reaction, the crisis was rhetorically turned into “our” crisis, as the crisis of the hosts of some of these refugees that succeeded to enter Schengen territory. The spontaneously solicited moral response was halted by questions like: How can we afford to host masses of refugees? What will be the cultural and economic consequences of keeping our borders open?

In the public debate these reactions were mirrored by opposing positions. On one side, people argued in favor of our moral obligation to help individuals in need, based on the idea of human rights. Some politicians even had the courage to lead the welcome. “Wir schaffen das!” On the other side, people promoted a concern for the state obligations to promote the interests of those already within the territory. The debate reflects in my mind a crisis on a deeper level, understood as a critical event, where the normative foundation of the state, as our political community, is negotiated and where two clear alternatives seem to stand out. In this sense the presence of the refugees provoked a crisis in the political self-understanding of “us” as a democratic people and as a European community. From an optimistic perspective this was an occasion for *questioning our moral responsibility as a political community* and to bring the deliberations on this issue into full public. It raised constitutive questions on the border-line between moral and political issues: Do we not have a cosmopolitan responsibility toward people in need of a place to stay? To what extent are we justified to let national and regional (EU) interests go first?

From a pessimistic perspective the critical event might as well have turned out to be an occasion to sharpen the opposing views even more, and polarizing the debate to a point where the search for a common ground seems futile. In part 1 I will shed light on this debate by considering the perspectives of thinkers that have dealt with relevant cosmopolitan experiences in the past. Primarily I will draw on the ideas of two central cosmopolitan thinkers: Immanuel Kant and

Hannah Arendt. Kant argued, in the wake of the early experiences of imperialism, for the need to recognize “cosmopolitan law” as a distinct legal domain, which should regulate the interaction between states and foreigners according to rational principles. By “foreigner” I simply mean the relative status of a non-citizen to any given state, such as a “hosting state”. Kant’s contribution has the advantage of providing conceptual clarity to a field of moral and legal obligations which is usually obscured by the vague and complex notion of “human rights”. Still, Kant clearly operates within the conceptual bounds of modern political philosophy where “rights” (corresponding to perfect moral-legal duties) are understood as legitimizing moral claims of moral agents, i.e. either states or individuals. In light of this distinct use of cosmopolitan law I see the potential to moderate the tension between the actual opposing views. There is for instance a grain of justification in the current “nativist backlash” as a reaction against the unconstrained and overly optimistic liberal cosmopolitanism of the early 90’s. It did not distinguish clearly enough between the problems solved by universal citizen rights and problems solved by cosmopolitan rights.

It should be made clear from the beginning that by committing to a Kantian notion of cosmopolitan law, I take distance from the idea of universal human rights by default as cosmopolitan norms. I think it is instructive to distinguish norms held to be *universal*, including both liberal citizen rights and rights of foreigners, and norms held to be *cosmopolitan*, which refer to rights of foreigners exclusively. This distinction comes with some overlap in relation to the conventional use of “human rights”, since this expression also refers to the articulation of both citizen and cosmopolitan right in positive international law. There is also a grey area of domestic rights associated with territorial residents without formal status as citizens. As residents they might still have some status as domestic members with limited rights to education, health services, etc.

The Kantian notion of cosmopolitan law also comes with the implication that it presumes boundaries within the global political order. A borderless global state would simply leave the rights of foreigners (and the very content of cosmopolitan law) redundant, unless we prepare conceptually for extra-terrestrial encounters or the interplanetary relation with the human settlers of Mars. Hence, the notion of cosmopolitan law that I promote is only compatible with some sort of global federation of states. Within this framework, the notion of “foreigner” is not conceived as derogatory and must not be confused with notions such as “stateless” or “strangers”. The “stateless” might simply refer to individuals that are deprived of citizenship. As such these individuals are subject to institutional exclusion and are vulnerable to further violations of their political integrity and humanity. In some contexts it also might refer to certain an activist term, appealed to as a representation of resident non-citizens with clean sheets (and no

papers). Like newborns they are “bare”, with no loyalty or papers related to other states, and thus they are pure and easily assimilated. The “stranger” seems to refer to the contrary, to someone with strong, but abnormal or outlandish affiliations. This might also be applied as a representational strategy, by playing with the distancing and alienating effect of the exotic or impartial.

Arendt, who considered herself a “German Jewess”, had escaped the horror of the Nazi-regime as a refugee. Her life experience exemplifies a more fundamental confrontation with the premises of the current debate. In Arendt’s attempt to find meaning in the historical events she experienced, she developed a conception of political activities that could articulate the great risk inherent to the international order and the grave violations of human dignity associated with the totalitarian regimes. The famous and paradoxical formulation of a new political law, “the right to have rights”, reflects Arendt’s response to these circumstances. The violations are articulated as the unprecedented deprivation of the human condition of plurality, taken for granted in our appreciation of individual human rights: to have ordinary rights depend on the possibility of human agency. Exactly what this human agency entails in Arendt’s thinking will be discussed in the next part (part 2). The relevant point for the argument in part 1 is that Arendt describes new global circumstances that call for the renewal of cosmopolitan law. In part 1, I will pursue this concern for the changing circumstances mainly by considering the adequacy of extending the cosmopolitan law of admission. In part 2, I will consider Arendt’s response in greater detail and suggest arguments for a democratization of the determination of this content. The protection of this democratic process could find its expression in the form of moral-legal norms of the cosmopolitan law of deliberation.

Chapter 1: The public debate on immigration. Statist and cosmopolitan positions

In general we might say that migration as a phenomenon tends to provoke two kinds of debates, which are both associated with the political and moral negotiations on the self-understanding of modern state communities. In other words, “migration”, i.e. simply people moving, tends to spark debates from the perspective of the hosting states on “immigration”, which more specifically refers to people on the move entering a foreign state territory.⁷ The first kind of debates respond directly to the consequences of immigration. Given that immigrants as a group are highly diversified, there is a broad set of issues related to this debate that span from the consequences of free work migration to the urgent needs of displaced people to relocate. In sum we might classify these issues as practical problems answering the question: *How do we best fulfill our obligations as a state community in cases of immigration?* The second kind of debates are associated with immigration on the level of intellectual provocation. The unease of dealing with immigration as a political and moral issue reflects a conceptual and principle vagueness that puts us in moral-intellectual embarrassment. Hence, immigration can also be said to motivate a theoretical problem: *What are our obligations toward foreign immigrants?*

In the currently ongoing public debate on immigration we find at least two main positions on how to solve the practical question of immigration. The disagreement between these two positions does however also reflect a tension between competing principled commitments associated with the modern state. This tension relates to a theoretical problem concerned with the scope and character of the obligations of a state toward foreign immigrants:

On the one side there is the position of *moral cosmopolitanism*, which is defined by the universal moral concern for the well-being and dignity of every human individual. It is usually a position based on a moral individualism that follows the principle of the moral equality of every individual. In the debate on immigration it is typically articulated as a concern for human rights and especially for the right to asylum. This position is cosmopolitan in character, but is disclaimed by its opponents as an “ethics of conscience” [*sinnelagsetikk*], implying that it is not a public concern or that it is not likely to become one.

⁷ The Wikipedia definition reflects the common use of the term quite well: “**Immigration** is the international movement of people into a destination country of which they are not natives or where they do not possess citizenship in order to settle or reside there, especially as permanent residents or naturalized citizens, or to take-up employment as a migrant worker or temporarily as a foreign worker.” Usually, in a political context, we speak of “migration” not simply as movement of individuals, but as movement across political borders on long-term basis, excluding short-term trips for business, study or tourism. Jordan, Bill, and Franck Düvell. 2003. *Migration : The Boundaries of Equality and Justice*, Themes for the 21st Century. Cambridge, UK Malden, MA: Polity Press ; Distributed in the USA by Blackwell Publishers. It should also be noted that “immigration” (associated with the right to *enter* a political territory) is legally distinguished from “emigration” (associated with the right to *leave* a political territory).

On the other side there is the position of normative statism, which is defined by limiting the state obligations to its citizens or territorial boundaries. The concern for the legitimacy of the state is primarily grounded in its obligations to protect the interests of its citizens. These obligations may take on a legal character in terms of duties of the state to protect citizens and their rights. But they may also take on a more strictly political character by representing the democratic will of a sovereign people. In the face of immigration, these statist concerns are typically expressed in terms of the sustainability of the economic and social conditions of the hosting state. The typical arguments will take the form of a domestic cost and benefits-analysis of immigration, for instance comparing the cost of high rates of individuals given asylum with the benefits of spending the same money elsewhere. This position is statist in character and is associated with a consequentialist style of reasoning. Opponents will typically raise concerns for the cynical “realist” conception of state obligations toward foreigners.

These positions are ideal-typical descriptions and do not pretend to point out the view point of any real proponent. Fortunately, most participants in the public debate are moderate and reasonable in the sense that they recognize both these concerns as important. Nonetheless, the emphasis on either concern seems to go beyond a mere preference of competing normative intuitions. As indicated above they also represent distinct styles of reasoning, which reflects a disagreement on the scope of the obligations. The cosmopolitan proponents tend to appeal to a right-discourse, which rests on an idea of the inherent dignity of every individual. I will use the legal example of asylum right to illustrate this style of political thought in the debate on immigration. Their statist opponents tend to appeal to a calculating cost-benefit-reasoning, which serves the purpose of defining the most profitable or at least most sustainable options for a polity (such as a modern state) understood as a common wealth. To exemplify this style of thought I will present a case where the Norwegian Supreme Court considers the main type of arguments for legal residency on humanitarian grounds. The obligation corresponding to the right to asylum has the character of a specified or “perfect” duty, whereas the humanitarian claim corresponds to a conditional or “imperfect” duty.

Even though the dominating competing positions tend to be moderate, there is in any case a polarizing tendency in the current debate – varying of course according to the national context – which to some degree makes it plausible to speak of the ideal-typical positions as lining out two distinct and competing political projects for the state. We might speak of this as a public disagreement in the negotiations on the collective self-understanding of the modern state community with implications for the direction to take the ongoing institutional reforms. Should

we go in the cosmopolitan direction of opening up or in the statist direction of closing the borders?

In the following I will elaborate further on these standard positions in the debate on immigration. I will discuss some of the theoretical ideas behind these positions and consider their main strengths and weaknesses. At the end of the chapter I will also point out that these positions are binary in the sense that they both rely on a conceptual framework of “individual” and “state” as the relevant entities of the social ontology. Taken as a conceptual whole neither the individual nor the state can serve as an absolute ground without relying on uncanny abstractions. Provided that I support neither extreme position as practically or theoretically liable, I end by asking for a way out of this dilemma: How can we find a middle ground that includes both concerns?

1.1 Cosmopolitan positions

Cosmopolitan positions tend to take the human species as a whole as the relevant category for the moral community. On this account, state borders are in principle morally arbitrary, but might – at least by the moderate positions – serve an instrumental purpose insofar as the state-apparatus promotes cosmopolitan norms and values.

If we divide normative positions according to three main levels – individual, group, global – we see a clear difference between the statist and cosmopolitan positions. In contrast to the statist emphasis on a particular type of group (usually the nation or “bounded society”), cosmopolitans emphasize the global level, undifferentiated by membership of states. Some do this by envisaging a global state, and we might call these legal or political cosmopolitan positions.⁸ But, not all cosmopolitan conceptions envisage such a global state as an aiming point. In fact, the traditional and common cosmopolitan denominator is the conception of each individual as primarily a “citizen of the world”. This corresponds to the meaning of the Greek root of the word in *kosmopolitês*. Hence, the global is mediated through the status of each individual, regardless of their political affiliations. In other words, while the normative level is global, cosmopolitanism finds its expression in a conceptual individualism. Historically, this cosmopolitan individualism has found its ground in some conceptions of human nature (universal; natural law) in contrast and opposition to human conventions (particular community). So, in general we could say that cosmopolitan positions are global and usually universal in character, grounded in the assumed moral relevance of the similarity of human individuals.

⁸ After Thomas Pogge: Legal cosmopolitanism is committed “to a concrete legal political ideal of a global order under which all persons have equivalent legal rights and duties, that is, are fellow citizens of a universal republic.” (p. 49, in Pogge, Thomas W. 1992. “Cosmopolitanism and Sovereignty.” *Ethics; an international journal of social, political and legal philosophy* 103, no. 1: 48-75.

In the following I will consider mainly the moral cosmopolitanism, since this is the most relevant in the context of the immigration debate. Rather than emphasizing the institutional and legal structure of being a “*citizen* of the world”, moral cosmopolitanism refers to a certain attitude or form of life that puts an emphasis, we might say on being a citizen of the *world*,⁹ rather than of a specific state. The most common form of moral cosmopolitanism today is associated with the idea of moral human rights as a moral standard of principles that exists independently of any specific legal system and that lends its legitimacy to the modern state in so far as it fulfills this standard.

To the extent that cosmopolitan moral claims, such as rights, are seen as unconditional, their proponents have been criticized for being moralistic, lofty and idealistic. It is useful therefore to distinguish this position from the conception of a humanitarian duty to assist foreigners in need. The latter, also known as a Samaritan duty, is clearly conditional in character and more “realistic” in the sense that it balances different political concerns. In brief, the duty to assist would not be allowed to compromise the interests of the helper. To the extent that the right of asylum, or similar rights of foreigners, do not have a corresponding duty to a specified party, the moral cosmopolitanism (the opponents argue) mistake a private duty of conscience for a public duty. Hence, it is accused of being a moralist ethics of conscience. The moral cosmopolitans would obviously object, for instance by arguing that there are or should be assigned institutions to bear the obligations corresponding to cosmopolitan rights.

1.1.1 Moral cosmopolitanism

In the famous scenario of the drowning child, Singer vividly depicts our experienced urge to help people in our physical proximity.¹⁰ Further, Singer’s dismissal of physical proximity as a morally relevant criterion for being responsible, articulate the basic premise of a moral cosmopolitanism: all human beings are of equal moral worth, no matter where they happen to be on the globe (or beyond). In its unqualified form we might call it a strong moral cosmopolitanism. Singer represents a utilitarian version. We also find similar conceptions of moral cosmopolitanism in Kantian¹¹ and virtue ethics¹².

⁹ Martha Nussbaum, for instance, denies special moral obligations to people that we share culture or descent. In this sense cosmopolitanism entails a moral attitude of not placing partial concerns ahead of those of others/strangers. Nussbaum, Martha Craven. 2006. *Frontiers of Justice : Disability, Nationality, Species Membership*. Cambridge, Mass.: The Belknap Press : Harvard University Press.

¹⁰ See for instance Singer, Peter. 1997. "The Drowning Child and the Expanding Circle." *New internationalist*, no. 289 (April 01): 28.

¹¹ See O'Neill, Onora. 2016. *Justice across Boundaries : Whose Obligations?*: Cambridge University Press.

¹² Nussbaum 2006

Strong cosmopolitanism is criticized from several positions. The most common, which both moderate cosmopolitans and statisticians share, is a levelling-down argument against a radical egalitarian world-wide redistribution.¹³ It is utopian in the bad sense of the word, because it does not seem to allow for cultural and individual distinctness or the corresponding psychological incentives for making an effort (or literary: for making a difference). Similarly, a contractual critique would emphasize the benefits of the kind of implicit agreement that keeps fellow-citizens together. A strong moral cosmopolitanism seems to undermine the moral value of such agreements, or the implicit bonds of trust and promise on the political level. Why such a contract would not be possible to reproduce on a global level is less clear, but such a globally constituted state certainly introduces its own problems. Kant has famously pointed out the undesirable risk of such a state in terms of division of power: A global state “may lead to the most fearful despotism”.¹⁴

In the Kantian tradition of moral cosmopolitanism we find a moderated position, which recognizes the contractual notion of special commitment to fellow-citizens, in the sense that it is required by democratic states.¹⁵ So, the usual tendency seems to be something like the following: A strong moral cosmopolitanism stands in stark contrast to the conventional political community (that is defended by moderate statisticians), while a moderated version seems to stand in a complementary – sometimes foundational, other times co-original – relation to the political obligations. As I will discuss further in chapter 2, the Kantian approach will solve this relations conceptually (or “metaphysically”) by clarifying the formal relation between different domains of moral duty, all complying with the human dignity of each person.

In the utilitarian tradition, the strong moral cosmopolitanism is usually moderated by including knowledge of the negative consequences of a “flat” or non-discriminating treatment of everyone. There is a range of biological and evolutionary psychological arguments that aim to counter the utopian cosmopolitanism with facts about how human social nature and moral psychological dispositions will affect such policies. For instance, it seems plausible to say that we have certain deep-seated intuitions that make us treat our closest family without necessarily being able to give a rational argument as to why. The question “Why do you help your own children?” is either pragmatically absurd, or it is contextually detached (such as the “selfish gene”-explanation) from my conscious deliberations. In the context of evolutionary theory the question of child care makes perfect sense and the answer would be according to the evolutionary logic of kinship

¹³ Appiah, Kwame Anthony. 2006. *Cosmopolitanism : Ethics in a World of Strangers*. London: Allen Lane.

¹⁴ See p. 90 in Kant, Immanuel, and Hans Reiss. 1991. *Political Writings*. 2. enlarged ed., Cambridge Texts in the History of Political Thought. Cambridge: Cambridge University Press.

¹⁵ O’Neill describes it as a “semi-cosmopolitanism”. (O’Neill 2016)

altruism. To the same effect regarding egalitarianism, it seems morally contra-intuitive, even unnatural, to require that we treat our closest family in the same mode – with the same effort and passion – as everyone else.¹⁶

Most cosmopolitan positions will account for these possibly absurd and contra-intuitive consequences by building moderations of psychological realism into their own position. Singer acknowledges the utility of attending to family relations¹⁷, and also – perhaps more problematic – to allow dumb-founded or triggered xenophobia to define the pace of immigration.¹⁸ We might call these kinds of moderations anti-utopian moderations of moral cosmopolitanism. These moderations acknowledges that the way we treat “our own” is not completely morally arbitrary. The utopians conceive such partial norms (of family or nation) as fully malleable and have at least since Plato, suggested ways to abandon this natural moral bias on an institutional level. The conservatives conceive the nature of these partial norms as unavoidable, and argue instead for accommodation of the norm on an institutional level according to an impartial norm of a secondary order. The formula is thus:

Given that we have naturally the first order *partial* norm P, we should agree on the second order *impartial* norm P².

In the case of kinship altruism this implies that the natural care for one’s own is institutionally legitimated by a general consensus on the value of the family as “the natural and fundamental group unit of society”.¹⁹

Regarding the national level as a possible institutional accommodation of ingroup-partiality, the utopian-liberal seems to disregard this aspect as well, conceiving no peculiar reason why the institutional reform cannot expand the circle beyond the national borders. Singer seems to support an anti-utopian moderation of this in a recent online commentary: “*Such [open border-policies] arguments ignore our species’ lamentable xenophobic tendencies*, evidenced all too clearly by the surge in popularity of far-right extremist political parties in Europe.”²⁰ As I will discuss in more detail in chapter 5, I support the anti-utopian moderation of the cosmopolitan liberalism, but I

¹⁶ The cosmopolitan egalitarian ideal has traditionally found expression in two, equally inadequate, imperatives: The stoic ideal implies that we should treat our closest like everyone else, whereas the Christian ideal implies that we should treat everyone else like our closest.

¹⁷ Singer, Peter. 1981. *The Expanding Circle : Ethics and Sociobiology*. Oxford: Clarendon Press.

¹⁸ ---. "Escaping the Refugee Crisis". Accessed 15.05.2017. <https://www.project-syndicate.org/commentary/escaping-europe-refugee-crisis-by-peter-singer-2015-09?barrier=accessreg>.

¹⁹ §23 in UN. "The Un Covenant on Civil and Political Rights". Accessed 16.05.2017. <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>.

²⁰ Singer 2015

also raise some concerns regarding the tolerance for the political influence of “xenophobic tendencies” indicated in the quote from Singer.

When it comes to the issue of immigration, I find the deontological approach more adequate than the utilitarian approach, for the following reason: To the extent that immigration provokes a question of obligations of a state toward foreign immigrants, it actualizes a constitutive question of what kind of world – both domestically and interstatal – we want to live in.²¹ By default the utilitarian gives only one unconditional answer to this question: We are obliged to promote the happiest (or otherwise preferable) world. In comparison, the deontological approach allows us to articulate the rational legal and moral obligations that structure this world in a way that is less contingent on the shifting empirical knowledge of the complex social and interactive environment.

To give an example, the utilitarian approach will have no principle objection to the strong cosmopolitan claim on freedom of movement. It may argue in favor of such a freedom, provided that for instance the redistributive effect of such an open border-policy will comply with the basic utilitarian obligation and provide the best means compared to alternative measures.²² This utilitarian support for the freedom of movement could however easily be dismantled, provided that other empirical knowledge suggests that free mobility has less redistributive effect than expected or has other unintended negative effects. Do we want a world where the obligations of states are so easily shifting to the current consensus of social scientists?

As I will present in more detail in the following chapter, Kant provides an anti-utopian moderation of the strong cosmopolitan position that is more robust on these terms. The point is not to deny the value of social science in the implementation of immigration policies, but to articulate certain principled boundaries that ensure predictability in highly complex social systems. In the light of the current debate this is perhaps one of the reasons moderate cosmopolitans tend to appeal to a (deontological) discourse of rights, such as the right to asylum, whereas moderate statist tend to appeal to a Samaritan (utilitarian) discourse, such as residency on humanitarian grounds. Accordingly, as I discuss in section 1.3, the disagreement between

²¹ I do not have a decided theoretical preference on the deontological and utilitarian approaches in general. They are pragmatically speaking best suited for different task. It is also questionable to what extent they actually come up with different results, or if they are rather not procedures to sort out arguments and rationalize an already desired conclusion. In the discussion on immigration I find the deontological approach suitable because the issue of immigration, as I address it, is basically a formal and conceptual matters related to the theoretical problem. Empirical knowledge of consequences of different kinds of policies will of course be extremely valuable in the further deliberations on the practical problem.

²² For argument in this direction, see Wilcox, Shelley. 2009. "The Open Borders Debate on Immigration." *Philosophy Compass* 4, no. 5: 813-821. <http://dx.doi.org/10.1111/j.1747-9991.2009.00230.x>.

these moderate positions is not so much on the issue of the scope of the obligations, as it is on the character of these obligations.

1.1.2 The extreme side of cosmopolitanism

A noticeable tendency in the statist positions in the debates on immigration is a certain discursive reduction of the representation of the foreigner from a full human agent to a more generic strategic agent or passive subject of charity or violence. To the extent that this discourse has gained political power, this discursive distancing is also reflected in the strategic antagonism that at least to some degree defines the field of immigration policies. Some state measures to exclude or keep out undesirable foreigners are quite physical, such as fences and walls; others are less material, such as visa-bans and bilateral agreements on border regulation.

In positive legal terms this reflects a quite narrow scope of moral-legal obligations in international law, and those that exist are hardly sanctioned when states transgress the legal limits they define. To trust each state to fulfill its obligations by themselves has proven a futile endeavor. For instance, the international law is explicit on the right to asylum, but the general willingness to take one's share of a common responsibility is low and the international community stands with few options on how to sanction this strategic "free-riding". Feasible measures to solve this impasse is beyond the scope of this thesis, but the theoretical concern of my discussions are motivated by a question on how we might raise the general global level of trust, or willingness to be vulnerable, in the encounter with foreigners. And then especially in the cases where the practical responses of states (or the lack thereof) to foreigners in a desperate situation – deprived of a home and with nowhere to go – causes even more harm.

What I've called in somewhat dismissive terms "extreme" cosmopolitan positions, tend to solve this problem of systemic failure conceptually by simply moving one concern from the equation. The economic cosmopolitanism solves the problem by simply minimizing the significance of the sovereign state in favor of an unregulated, cosmopolitan civil society. The utopian political cosmopolitanism solves it by moving the state level to the higher, global level, aligning the institutional level with the cosmopolitan level of civil society. I hold neither to be particularly attractive positions.

1.1.2.1 Economic cosmopolitanism – free market capitalism

If we start with the kind of cosmopolitanism most strongly associated with a minimal state, we find an economic cosmopolitanism that promotes a single global market. It conceives favorably of open borders for goods and people (labor power) and the down-scaling of (presumably too

expensive) welfare states. It is quite clearly highly influential in the development of international trade (Washington-consensus) and has been promoted by prominent economists such as Friedrich Hayek and Milton Friedman.

From the Marxist tradition this free market cosmopolitanism has been criticized for advocating an unregulated market that leads to high inequality and a problematic wealth concentration.²³ This “global neighborhood”-model has also been criticized for its views on immigration, one of the earliest criticisms was Henry Sidgwick’s utilitarian argument for regulation of borders; Sidgwick argued that open border policies would threaten to diminish the social cohesion of a state society. Today, the antagonistic market of international corporations is met with increasing suspicion, especially when it comes to issues such as the environment and democratic control.

Taking these concerns into account, the emergence of a global market can also be seen as an important step in the development of an emerging cosmopolitan civil society. As I discuss in chapter 4, commercial relations are an important part of how Kant envisioned the emergence of peaceful interactions across borders.

1.1.2.2 Political cosmopolitanism

Formally, a global state would have the attractive effect of eradicating the problem of immigration, since immigration implies an inter-state system. In a global state all migration would in effect be internal.²⁴ However, as mentioned above, the main argument against a political cosmopolitan aspiration for a global political state is the inherent danger of despotic reign, unchecked by any comparable power.

Because of this inherent danger (as well as its implausible utopian nature), most political cosmopolitans would hold a more moderate view that either aspire to some weaker federation among states or some vertically dispersed sovereignty model. The difference between these two positions is manifested in the debate between Rawls and his cosmopolitan critics. Because a weak federation would be, strictly speaking, *international* and not global, it is compatible with Rawls liberal-statist conception of justice. His cosmopolitan critics, such as Thomas Pogge and Charles Beitz, would be more skeptical to the idea of the state as an indispensable instrument in the pursuit of justice. Pogge’s critique would for instance question if the state interests could be promoted without imposing expenses and harm on individual world-citizens. In some issues of

²³ Piketty, Thomas, and Arthur Goldhammer. 2014. *Capital in the Twenty-First Century*. Cambridge Massachusetts: The Belknap Press of Harvard University Press.

²⁴ In terms of “migration” as mere movement this is of course the case today as well, in the sense that the migration within federal/imperial regions like China, Schengen, Brazil, US, is much higher in numbers than the trans-regional migration across political borders.

globalization, and we might include migration, the states are clearly not the adequate level of administration to address the issue and its systemic implications. In these matters the states should disperse some of their autonomy to another, regional or global, level.

Whereas Rawls tends to emphasize the domestic and interstate levels of Kant's notion of public right, his cosmopolitan critics emphasize (contrary to Rawls) Kant's notion of *cosmopolitan law*. This law does not regulate the relation between states, but it regulates the commercial and communicative relations between state and individual foreigners (see also chapter 2). It presents a moderate version of the "extreme" political cosmopolitanism, which we find traces of already today. In the "soft law"-model of international order, cosmopolitan law is to some degree implemented in the international criminal court, which seeks to protect individuals and groups against "crimes against humanity", such as genocide, regardless of which territorial sphere of sovereignty they happen to reside in. This model allows for some degree of legitimate interference in the sovereign sphere of domestic rule of positive law. These cases seem to be the only field – so far – where there is an actual international willingness to forcefully deprive an alien state of its sovereignty on the grounds of a shared moral standard as expressed in international law.

An interesting and less institutionally explored option, in addition to cosmopolitan legality, is the implementation of procedures of democratic legitimacy in the regulation of cosmopolitan interaction. This option reflects a concern for the democratic character of dispersing of power to regional and global levels. I take this issue of democratic deficit to be highly relevant in the case of immigration laws. I understand this deficit to be relevant in at least two distinct but interconnected ways:

First of all: formally speaking, immigration laws are one of the few domains of legislation on the state level that directly affects and specifically address foreigners as its legal subjects.²⁵ In other words, immigration laws are laws issued on, according to Kantian cosmopolitanism, a distinct legal domain of cosmopolitan law. As such, these laws are formally in conflict with the statist notion of democratic legitimacy as limited to the decision-making process among citizens. This is a concern for the democratic legitimacy of the cosmopolitan law of admission.

Second, immigration laws regulate an emerging field of a global civil society, as the first step to a moral-legal civil condition on the cosmopolitan level. If we consider the cosmopolitan law of

²⁵ The Norwegian law is explicitly called "the law of foreigners" [*Utlendingsloven*].

admission²⁶ beyond its minimal content (such as the right to asylum), then we can understand it to also protect the conditions of this emerging civil society. Primarily it has the self-referential function of articulating certain obligations and rights to protect the further deliberations on the content of cosmopolitan law. The content of a law of admission beyond asylum protects communication across state boundaries, and might also ensure the possibility of “voting with one’s feet” as a grass-root means of sanction against states. Regarding this latter aspect, we might speak of immigration in terms that overlap with the cosmopolitan law of deliberation. I will develop these ideas further in chapter 2.

1.2 Statist positions

A statist position can be described as a variant of ethical or moral particularism. Statists tend to regard the political community of the state as having particular moral significance, which implies that our central moral obligations are restricted to those who share membership in the same political community, i.e. in the same state or nation. A common case of such statism is found in the almost taken-for-granted assumption that questions of justice are limited to the state. As a consequence, the state is seen as having few, if any, obligations to human beings living outside the community.

The conception of the state might vary; from the classical liberal “Night watchman”-state, via a wide range of welfare state models, to the more authoritarian models of fascism, socialism, theocracy, etc. There are nonetheless some quite commonly held features as well. The political community is distinguished from other associations or groups in several ways. Like membership in the family one is born into, membership in the state is not a voluntary association and the members are subjected to a set of common rules. In its modern form, the state is, however, also distinct from family-groups in a number of ways: The state is a legally defined term. In principle, the state rules as sovereign over a territory and a people (inhabitants, citizens, members). It is the only organization that has the legal decision-making competence of giving laws to a defined territory. It is also the only organization that can legitimately claim monopoly of violence and hence use extensive sanctioning force. As a constituted legal community, the modern state of mass societies is usually also closely associated with extensive and impersonal bureaucratic systems, which regulates and (ideally) protects civil society; the economy, the sovereign people and the public sphere.

²⁶ I consider the “law of admission” and the “laws of deliberation” subcategories of the formal cosmopolitan law, that have a semi-formal status in the sense that they primarily gives conceptually guided designation to certain fields of issues or concerns related to the relation between states and foreigners.

The statist positions on immigration tend to vary with the corresponding conception of the state. Those holding a conception of a minimum state – such as the libertarians – tend to reduce the question of immigration to a non-political question of trespassing upon private property.²⁷ The external borders are primarily seen as marking the limit of a distinct realm of legitimate and state-protected property rights. Those favoring a conception of a more extensive state, such as that of a welfare state, tend to be more concerned with immigration on a political level. This is because the welfare state is based on a bureaucratic system of redistribution that relies on reciprocity between duties and rights of its citizens. Border regulation, both external and internal, becomes an important mean of securing social integrity and trust. A restricted pace of migration is intended to ensure a certain homogeneity of worldviews and values. The welfare state also depends on the ability to sanction the potential free-riders or “fortune-hunters”, which threaten to exploit the generosity of the system. Within a moderate statist position, communitarians tend to emphasize the importance of social cohesion, and liberal-egalitarian statist the institutional reciprocity as reasons for border-control.

Among moderate statist we also find recognition for the idea that state legitimacy rests on international standards such as “universal human rights” in the sense that each state is obliged to secure the enjoyment of these rights among its citizens (and even for residential members in a wider sense). The difference between a moderate statist position and a moderate cosmopolitan one could then in practice be small. It relies basically on a theoretical disagreement on the primary emphasis of the question of the scope of justice. The burden of proof on easing or strengthening the border control is distributed accordingly. As I will discuss in the next section, this difference also tends to be reflected in a different view of the character of obligations beyond state borders.²⁸

²⁷ For a more extensive discussion on the libertarian view on immigration, see Carens’ account in section 5.3.

²⁸ A “liberal” statism might seem like a contradiction in terms, but there seems to have been at least an historical development from a liberalism which understood «the rights of Man» as citizen rights, to an international consensus where human rights are held to be cosmopolitan. In the early liberal international order, every liberal state was expected to treat their own citizens with dignity according to universal standards of rights. After the World Wars there seems to have been a change toward an understanding of rights as not only universal citizen rights, but actual “human” rights. (See for instance: Pogge 1992, p. 49)

After the World Wars and the UN declaration of Human Rights, many welfare-states practiced a cosmopolitan reading of these rights as an extended right of the visitors. Foreigners on the territory had access to health care, education and most civil and political rights (except vote). Today the internal performance of borders is more nuanced and discriminating. The general tendency seems to be a formalization of qualifications of services, especially regarding positive rights that give access to welfare services, in order to discriminate more selectively between desired migrant workers and undesired irregular migrants. This quote from a call for papers to the Nordic Migration Research (NMR) conference, in Oslo August 11-12 2016, illustrates the point (might replace with ref. to research on welfare-provisions):

“State borders can no longer, if they ever could, be studied only as the geographical demarcation line of a specific territory. Moving toward an understanding of borders as situational and performed, state borders can occur everywhere, including at healthcare clinics, at working-places, and in people’s homes. This decentralized and

1.2.1 The extreme side of statism

In the current polarized public discussion on immigration, one side of the discourse represents a reactionary “nativist backlash” to the current globalizing trend of more open borders. Donald Trump’s slogan “America first” exemplifies this anti-globalist movement, which reminds us of a specific tradition of interpreting the sovereign people as identical to *the nation*. Historically, the nation-state offered a believable response to the disintegrating effects of industrialization. It efficiently replaced the absolutist territorial states, the city-states and the empires as the most attractive model of political formation.

To some degree, the statist discourse of what is often termed ‘the populist right’ is (at least in Norway) following the moderate line of the conventional view of the welfare state. Part of this discourse even seems to express a certain nostalgia for the period after the Second World War, where the welfare state was combined with exceptionally low levels of economic inequality. In this period the myth of national homogeneity discretely provided loyalty on the part of the citizens to a liberal constitutional state. In a globalized situation, this loyalty is easily dispelled as socio-economic security no longer sustains the multi-cultural revisions of the old nationalist imaginary.²⁹

The more extreme and worrisome aspects of this populist statist discourse are associated with a certain imaginary of a nationalist world order, where each nation is represented by its own state. The idea of a “right to national self-determination” and the myth of the nation have proven to be very powerful instruments both in the imperial and the totalitarian regimes in recent European history. The nationalism of late 19th and early 20th centuries solved growing domestic class conflicts by creating loyalty to the expansionist politics of the elites (first in the form of colonies and later in the form of continental *Lebensraum*).³⁰

Hannah Arendt’s provoking reflections on the historical catastrophe of nationalism draws out the darkest potential in the statist position. In chapter 9 “The Decline of the Nation-State and the End of the Rights of Man” of *Origins of Totalitarianism* (1968), Arendt depicts how the members of the “League of Nations” struggled with the question of minorities and people of different

dematerialized approach to borders has implications for how we understand and examine migration control. Migration control here implies a different sense of materiality, management and agency than control over physical border barriers, and there are different ways of understanding control: as coercive or as disciplinary, as practiced by state actors, but also by non-state actors.”

²⁹ This is probably one of the reasons why the “rust-belt” started to move right: the white worker rejected becoming yet another marginalized party of identity politics.

³⁰ Although the claim to national self-determination also has positive connotations to it in the post-colonial context, it seems reasonable to question to what degree this call to sovereignty on the grounds of nationality has served the general public and reformed the system of exploitation implemented in the former colonies.

nationalities. It was the first international attempt to regulate the issue of national strangers (minorities) and foreigners. Notice in the following passage how prevalent the idea of national self-determination was in the negotiations on immigrants and minorities in the League of Nations:

The interpretative speeches on the League treaties by statesmen of countries without minority obligations³¹ spoke an even plainer language: they took it for granted that the law of a country could not be responsible for persons insisting on a different nationality. They thereby admitted – and were quickly given the opportunity to prove it practically with the rise of stateless people – that *the transformation of the state from an instrument of the law into an instrument of the nation had been completed*; the nation had conquered the state, national interest had priority over the law long before Hitler pronounced “right is what is good for the German people.”³²

The point is not to draw an immediate line between demagogic oligarchs and Holocaust, but to keep in mind the danger of taking the state to be an instrument for “the people”. It easily leads to the assumption that in order to have one’s own human rights fully realized, each nation/people would need its own state. Perhaps needless to say, this step was – from a cosmopolitan standpoint – a disastrous strategy for dealing with the migration crisis of the mid-war period. A moderate nationalism has to face this danger and find ways to redefine the social imaginaries of patriotism in a way that is compatible with a pluralist civil society. We find examples of this in the attempts to formulate “civic religions” and “constitutional patriotism”.

1.3 The right to asylum and residency on humanitarian ground – moderate statist and cosmopolitan positions

So far I’ve mainly discussed the statist and cosmopolitan positions with regard to the question of the scope of justice. I’ve also claimed that the most dominant positions in the public debates tend to take a moderate stand between two extreme (idealized) positions.³³ Both moderate positions acknowledge some state obligations to foreign immigrants, and in this section I will discuss the character of these obligations. I’ve also suggested above that there is a tendency in moderate cosmopolitan positions to emphasize the obligations of a deontological character, whereas the statist positions emphasize obligations that are based on consequentialist concerns. In the

³¹ In a footnote Arendt is referring quite curiously to a representative from Brazil, the “rainbow nation”.

³² P. 275, my emphasis, in Arendt, Hannah. 1968. *The Origins of Totalitarianism*. New York,: Harcourt. First published 1951. From now on: (Arendt 1968). In the text: *Origins*.

Absurdly, this expression is a reversal or appropriation of an expression given to the world conspiracy of the Jews in the Russian forgery “the Protocols of Sion.”

³³ This claim will of course rely on empirical conditions that might vary from state to state, or between different locations within the public sphere. My assumption is probably colored by my experience with the Norwegian public, which tends to be quite moderate. Other publics, like the American one, seem to be more polarized.

following I will exemplify these tendencies by considering how representatives of each position find its expression in the Norwegian immigration law.

1.3.1 The legal distinction between asylum and residency on humanitarian grounds

If you arrive in Norway as an immigrant without a visa, your only possibility for attaining legal residency would be to apply for asylum to the Norwegian Directorate of Immigration (*Utlendingsdirektoratet*, UDI). Given that Norway has ratified the “UN convention relating to the status of refugees”³⁴, any foreigner on the border or within the territory has a right to do so. In other words, the Norwegian state recognizes its international (and moral) obligation in these cases. The only condition is that the asylum seekers haven’t already applied in another Schengen state. Asylum (from Greek *asylon*) means a haven or safe and free place. In practice, it means for the immigrant the legal right to residency, social service and work permit, and the right to acquire travel documents. To get there, the directorate must approve the foreigner’s status as a “real”/conventional refugee.

If you are denied an asylum after § 28 in the Norwegian foreigner law by UDI, you may still attain residency on subsidiary or humanitarian grounds after § 38 (you cannot apply directly according to § 38).

1.3.2 The right to asylum (§28)

So far I’ve treated the moral cosmopolitan position in theoretical terms. The right to asylum is a practical case where cosmopolitan law (in Kantian terms) is quite broadly recognized both in legal terms and in popular opinion. In general, we could say that the right to asylum corresponds to a clear obligation of the state toward foreign immigrants. It gives the government and migration officers clear instructions, and provides the foreigners with an unconditional right to apply for asylum. That is, it is unconditional in the sense that the need for protection shall not be weighed against any other concerns, such as migration control, national economy, etc. Ideally speaking, it is an inalienable individual right of the foreigner, no matter the consequences for the common wealth.

Still, statist-minded governments will be able to use the space within the legal framework to limit its obligations. To the extent that the government wants to regulate or manage the scope of its

³⁴ The “Geneva convention” of 1951 is considered the “lex specialis” on refugee law. It defines a refugee as a person who: “[...] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.” (UN. "The Un Convention Relating to the Status of Refugees". Accessed 16.05.2017. <http://www.unhcr.org/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html>.)

obligation to asylum seekers, it has to work around the right to asylum by external measures. The most commonly applied measure is to exploit the territorial condition, that one may only apply for asylum if at or within the borders of the state. One might do so by “non-arrival” measures such as physical obstacles (fences/walls) or legal regulations (such as EU’s agreement with Turkey).

Another way to regulate the state’s obligation to provide asylum, would be through re-defining the amount of refugees. The concept of a refugee is defined in the Norwegian foreign law § 28 The first part, “a)”, refers to the “UN convention relating to the status of refugees” which emphasizes the “well-founded fear of being persecuted”. Since 2010 a more controversial second part of the paragraph has been added to align the Norwegian law with the precedence of the European Court of Human Rights.³⁵ It states that the definition of refugees also includes those in risk of death penalty or inhumane treatment when deported, regardless of the reasons given in a). The widening of the definition also corresponds better to the way “refugee” is commonly used, which includes refugees of war (and not just persecution).

This extension was added by a previous, cosmopolitan-minded government. As a consequence, the numbers of persons receiving residency on humanitarian grounds dropped in 2010.³⁶ This was an intended consequence of the widened definition of “refugees”, because the sitting government at the time sought to strengthen the legal status of those granted permanent residency. The residency provided on humanitarian ground implies weaker privileges compared to asylum. Hence, the regulation of the amount of refugees is directly linked to the character of the obligations the state has toward foreign immigrants.

The current, statist-minded government (sitting from 2013 to 2017) has suggested removing this last part in order to get the law back in line with the definitions used by our neighboring countries. Although the European Court of Human Rights already has a liberal precedence, § 28 b) implies that Norway currently has the widest legal definition of refugees in Europe.³⁷

The argument for restricting the definition of refugee appealed to the consequences of operating with a comparatively wider definition than our neighboring countries: Under the “refugees crisis” of 2015 this subtle difference was considered to have great strategic significance in terms of immigration control. The sitting government met the crisis in 2015 with a set of proposed changes that among other things proposed to revise the change in §28 and go back to a more

³⁵ See also: 2010. *Asylum and the European Convention of Human Rights*, by Mole, Nuala and Meredith, Cathrine

³⁶ UDI. "Hvem Fikk Beskyttelse?". Accessed 16.05.2017. <https://www.udi.no/en/statistics-and-analysis/annual-reports/annual-reports-from-previous-years/tall-og-fakta-2014/hvem-fikk-beskyttelse/>.

³⁷ See p. 275ff, in Øyen, Øyvind. 2013. *Lærebok I Utledningsrett*. Universitetsforlaget.

extensive use of subsidiary grounds.³⁸ There might be several reasons for this proposal. The proposal argues for the privileged status of “refugees” and explicitly raises concerns about the incentives (i.e. the “pull factor”) this might give migrants for choosing Norway as their destination. The report explaining the proposal states that this must have been an unintended consequence of widening the definition.³⁹ Besides being an explicit attempt to regulate the pace of immigration, this proposal also exemplifies a clear preference of the statist position to formulate obligations in humanitarian terms rather than in terms of legal commitments.

Without accepting the empirical assumptions supporting the assumed “pull factor” that this revision sought to reduce, this proposal also reflects how systemic perspectives take on an antagonistic attitude toward foreigners who are portrayed as strategic agents that will react as rational and well-informed agents to the symbolic legal measures of the government of the hosting countries. Contrary to the cosmopolitan spirit of the right to asylum, this strategic approach to foreigners both affirms and enforces the idea of cross-border movement as situated in an interactive environment where subjects might seek to be subsumed to the category of refugees for strategic purposes. The widening of the definition of refugees is not conceived here as an appropriate alignment with our principles – according to a moral cosmopolitan position, but it is rather seen as a sign of weakness that make the state stand out as a preferable “prey” among potential hosting countries.

1.3.3 Residency on humanitarian grounds (§ 38)

If we compare the right to asylum with the grant of residence on humanitarian grounds, the room for political discretion in the latter case is far wider. The required balancing of humanitarian concern with the interest of state sovereignty is here made explicit. On the one hand, there is given specific weight in the law to concerns regarding children, health conditions, return conditions and cases of human trafficking. On the other hand, these concerns must be balanced against the possible number of similar applicants, the societal consequences, and the concern for immigration control and foreigner’s respect for Norwegian law in general. While most statist positions will recognize the international and moral obligations mentioned, these obligations take on a Samaritan character of charity where the amount of aid given is seen in proportion to the capacity of the provider.

³⁸ beredskapsdepartementet, Justis- og "Høringsnotat - Endringer I Utlendingslovgivningen (Innstramminger Ii)". Accessed 16.05.2017. <https://www.regjeringen.no/no/dokumenter/horing--endringer-i-utlendingslovgivningen-innstramminger-ii/id2469054/>.

³⁹ Justis- og beredskapsdepartementet 2015, p. 45

The textbook example⁴⁰ is as follows: one could easily make the case that foreigners living in extreme poverty, and without education and work, would benefit from being granted permanent residency in an affluent welfare state. Nonetheless, concerns for immigration control would clearly deny this as a sufficient reason for residency on the ground that this could lead to innumerable other cases with an equally valid claim to be admitted.⁴¹ It would basically create a precedence that would “leave the door open” and undermine the welfare state.

1.3.4 The statist arguments recognized by the Norwegian Supreme Court

A discussion in the Norwegian Supreme Court on the issue of residency on humanitarian grounds is interesting here because it in many ways illustrates the statist perspective on immigration. The particular case concerns humanitarian grounds associated with the best interest of children. First of all, the court establishes the general point that it is important to maintain political control on the pace of migration in order to keep it on a sustainable level. In addition, the court acknowledges that the state has commitments to protect foreigners according to international law. In the case of children, this includes the UN Convention of children’s rights, and more specifically the article on the best interest of the child.

In addition to the obvious interest of any child to material wealth (and the Norwegian state’s capacity to provide welfare outcompetes most states in this regard), the court also accounts for “the distinct value of growing up in a place where the roots, networks and belonging are strong”.⁴² In the cases of children, this attachment is considered to shift from their parents and gradually toward the society of residence as the child attends daycare and school. This has decisive implications in cases of deportation, since it will define whether it is in the children’s best interest simply to be with their parents, or whether it is also in their interest to remain in a neighborhood and society where they have strong attachments of their own.

Further, the court presents four arguments, where at least two of them are balanced against the child’s best interest:

- 1) The “innocence”-argument: the child should not be held responsible for the actions of its parents.⁴³ (also known as the Jeffersonian proviso)
- 2) The “systemic consequence”-argument: the child’s best interest cannot be seen in isolation from other, similar cases. A liberal practice that might benefit one child, might lead other parents to use their children as means to an end.⁴⁴

⁴⁰ Øyen 2013

⁴¹ Ibid., p. 316

⁴² There’s a distinct sense of personal identity in value of attachment that stands in a curious tension to the notion of citizenry. In Norwegian: «Det er også tydelige verdier knyttet til å vokse opp et sted hvor røttene, nettverkene og tilhørigheten er sterk.», § 111 in (Høyesterett), Norwegian Supreme Court. 2012. *RA-2012-1985*.

⁴³ § 113, Rt-2012-1985, this concern is dismissed by the first-voting judge as irrelevant in these particular cases (133)

- 3) The “developmental aid”-argument: From the perspective of immigration control the pace of immigration cannot be significantly increased and still be sustainable. The main humanitarian instrument of the Norwegian government is developmental aid.⁴⁵
- 4) The “humanitarian exception”-condition: “If a granted application will not give a potentially significant increase in the influx [*tilstrømming*] or imply consequences for other cases to come, there might be occasion to give a higher rate of grants than in cases where the immigration control concerns are more pertinent.”⁴⁶

In general, we see how the right of the child corresponds to obligations which are quite different from the duty corresponding to the right to asylum. The right of the child is not unconditional, but highly contingent on the humanitarian rationale and the specific circumstances of the case. Most clearly, this is articulated in the argument of the “humanitarian exception”, where the right is contingently relying on the uniqueness of the case. The less precedence a case is conceived to create, the easier it will be to give weight to individual concerns.⁴⁷ It is also noticeable how all these arguments maintain a highly distancing discourse about the foreigner, either as a strategic agent or as a subject of charity.

1.4 A shared conceptual framework – concluding remark

In this chapter I’ve laid out, in quite schematic lines, the two main positions regarding the question of the scope of obligations a state has toward foreign immigrants. I’ve emphasized the soundness of moderate positions on each side and pointed out that one may discuss meaningfully the character of the cosmopolitan obligations in question from either position. One might say that the moderate positions allow for justified exceptions in either direction. For the statist there are justified cosmopolitan exceptions to the state interest, and likewise there are justified statist exceptions to the interest of the foreigner.

I’ve also briefly discussed how immigration can provoke issues of justice that seem unusual to a statist tradition of political philosophy, which habitually assume the scope of justice to be confined within its territorial borders. As a minimum, immigration reveals that borders are institutions which create their own problems of justice: “Boundaries of whatever sort are not unquestionable presuppositions of thinking about justice, but institutions whose structure raises questions of justice.”⁴⁸ The issues related specifically to immigration can be labeled “issues of

⁴⁴ § 114, Rt-2012-1985, see also § 120, this argument is related to a systemic logic: the respect for the law; avoiding incentives to non-cooperation, avoiding signals that create pull-factors (ultimately based on the assumptions of the psychology of the ideal-typical migrant).

⁴⁵ § 116, Rt-2012-1985

⁴⁶ § 117, Rt-2012-1985

⁴⁷ § 129, Rt-2012-1985: non-cooperation might be overlooked in “concrete cases where special concerns are decisive.”

⁴⁸ O’Neill 2016, p. 100

admission”, and in the next chapter I will address the segment of cosmopolitan law that seeks to regulate these issues. I’ve also indicated that I find it plausible to argue that immigration, in a broader thematic scale, also provokes a concern for cosmopolitan law as the protection of an emerging and ideally democratically deliberating global civil society.

As a final remark, I also find it worth pointing out that although each of the two main positions tends to give incommensurable answers to the scope of justice, they also tend to share a common conceptual framework. If we consider the two extreme positions it is easier to identify the main concepts that guide the moderate positions as well. Characteristic of the extreme cosmopolitan perspectives is that it holds the scope of justice to be global. The character of the obligations in question are however usually grounded in some conception of individual rights, which in some cases even leaves the conventional state structure redundant. For instance, in the UN declaration and conventions on human rights, one gets the sense that world-citizenship might be something that each of us have, independently of our membership or relation to any group or state. From a diametrically opposite position, the extreme statist perspective finds its point of departure in the state (or some group it naturally represents, such as the nation, the people or the common wealth) to the point where the distinctiveness of each individual implodes.

The moderate positions on either side try to mediate between these two perspectives, admitting that the concept of the individual and the concept of the state should not be considered completely separate from each other. From these moderate positions it is easier to realize that the ideas of inherent dignity and inalienable rights are individualist abstractions from a relational structure relying on a corresponding responsible party, such as the state. We might say that what characterizes the moderate positions is their ability to recognize this relational structure and the value of the opposing perspective. The two extreme positions also share, as I said above, a certain similarity. To give a simple comparison, just as a number might be “6” or “9” depending on one’s perspective, the two extreme positions are referring to the same relation with a symmetrically opposed prioritizing of either the individual or the state. Hence, moderation would here imply the capacity to admit that both sides possess part of the truth. They even tend to share the conceptual framework. In so far as they do, the cosmopolitan and statist positions are parts of a conceptually predictable dialectical disagreement that both confirm what we with Menke could call the same “situational ontology”.⁴⁹

Given that both ‘individual’ and ‘state’ are to be considered dependent parts of a conceptual whole (an ontology), they should be acknowledged as relationally dependent on the other

⁴⁹ Menke 2016

concept. To reduce either concept to a “natural kind” has an abstractive function, similar to the uncanny effects of imagining a living body without consciousness (a zombie) or a consciousness without a body (a ghost).

To avoid either of the extreme positions, and to counter the polarizing effect of the debate on immigration, we might reasonably search for a middle ground. There are different strategies for doing so and the moderate positions tend to raise reasonable concerns and perspectives on either side. In the following chapters I will follow the liberal and discourse-ethical individualist approach of Benhabib quite far along the way. In part 2, I will however break with Benhabib’s argument to explore a reading of Hannah Arendt that might provide us with a “situational” ontology that more adequately fits the issues of cosmopolitan law.

To put it very simple, this reading aims to introduce a third level, that of public space, to split open the conceptual dyad of the individual and the state. Unlike Rawls “peoples” this space does not depend on the state and does not follow the state as a conceptual shadow. Nor does it simply promote the allocation of cosmopolitan obligations to civil society, as both O’Neill and Benhabib seem to suggest. The ambition is to explicate that state obligations are not primarily grounded in individual rights, but in the protection of the conditions that make human life possible in terms of the activities of action and speech.

Chapter 2: Cosmopolitan law – cosmopolitan law of admission and political deliberation

[It] is imposed by men upon themselves, in that their inclinations make it impossible for them to exist side by side for long in a state of wild freedom. But once enclosed within the precinct like that of civil union, the same inclinations have the most beneficial effect. In the same way, trees in a forest, by seeking to deprive each other of air and sunlight, compel each other to find these by upward growth, so that they grow beautiful and straight – whereas those which put out branches at will, in freedom and in isolation from others, grow stunted, bent and twisted.

- Kant, *Idea of Universal History*

In analogy to the constructive antagonism of trees forced to live side by side, Kant appreciates the antagonism of a free market and a free public debate within the framework of a “civil union”. Could we not assume that globalization would deem a similar union on the cosmopolitan level necessary for the beneficial effect of our conflicting inclinations?

The notion of cosmopolitan law⁵⁰ is already briefly mentioned as the formal category of law regulating the interaction between states and foreigners. In this chapter I will follow Kant’s conceptual argument in order to specify the character and content of this formal category as a way to clarify the cosmopolitan obligations of the state and the corresponding cosmopolitan rights of the foreigner. I will begin by situating the cosmopolitan law in Kant’s conceptual framework of moral principles and norms. The main ambition is to clarify a distinction between three domains of moral-legal norms (or “right”/law): the domestic, the interstate and the cosmopolitan. Further, it is important to distinguish these moral-legal domains from their positive institutional implementation on the state and international level. In general, these three domains are regulated by formal principles of justice which can be given institutionalized expression in various ways. By implication, “international law” designates a set of positive laws grounded in conventional agreements on all three moral-legal domains.

Second, I will continue by discussing the character of the content of cosmopolitan law as consisting of either ethical-humanitarian or moral-legal duties. This discussion is important because it clarifies the character of the obligations a state might have toward foreigners. I also want to stress the inadequacy of a distinction between merely “moral” obligations and legal

⁵⁰ I use “cosmopolitan law” instead of the ordinary English translation of “Recht” to “right”. There are two reasons for this. The first is merely pragmatic: I want to be able to distinguish between a legal domain of law and the individual rights that are related to this domain. The distinction between citizen rights and cosmopolitan rights are crucial here. Second, I think “law” reflects better than “right” the original use of Kant’s German “Recht” (or Latin “ius”) as referring to a moral-legal domain. The risk here is the somewhat misleading connotation to merely positive law, given that cosmopolitan law (formally speaking) is distinct from international law. Its content can still be part of the positive “international law”, if by “international law” we mean international agreements on content that might include all three formal domains.

obligations as it tends to confuse the discussion of the adequate content of cosmopolitan law with the discussion of the *actual* content of international law.

As a third point, I will discuss cosmopolitan law in light of its constitutive idea of a global civil society and bring forth readings of Kant by Jeremy Waldron and Onara O’Neill that emphasize the provisional and compromising character of cosmopolitan law. The adequate content of cosmopolitan law is not, according to these readings, found by deducing it from, or grounding it on, some shared or metaphysical premises. Rather, the adequacy of the content relies on a rational and publically communicable response to changing circumstances. Given the significance of public reason for the articulation of the adequate content of law, the global civil society takes on a central role in Kant’s cosmopolitan conception.

In light of these considerations I will end this chapter by discussing two different interpretations of Kant’s universal law of hospitality. I will discuss to what degree it can be considered to articulate the moral-legal duties of the state, and to what degree it adequately answers to the circumstances of our times, and finally I will argue that the law of hospitality articulates elements of cosmopolitan law concerning both admission and deliberation.

2.1 A conceptual clarification of cosmopolitan law

Kant’s account is quite straightforward in the sense that it relies on the premise that law might regulate actions between moral agents. The possible kinds of moral agents are confined to the situational ontology described in the last chapter: individuals and states. Given that some individuals⁵¹ are citizens of a state and some are not, we get a set of three possible kinds of legal relations. (See figure 1).

Moral-legal domains	Interactive relation	OP ⁵²	Ex.
<i>Domestic law</i>	State – citizen	“citizen”	Citizen rights
<i>Interstate law</i>	State – state	“people”	Rules of war
<i>Cosmopolitan law</i>	State – foreigner	“world citizen”	Right to asylum

Figure 1: Kant’s threefold categorization of legal domains.

Relying on this formal distinction of domains within the dominating situational ontology, “cosmopolitan rights” are not synonymous with “human rights”. As figure 1 indicates, “human rights” is rather an umbrella term which encompasses both citizen rights *and* cosmopolitan rights.

⁵¹ We might also consider corporations and civil organizations individuals in this regard.

⁵² OP = original position, which refers to Rawls procedural adaptation of the Kantian framework. See chapter 3 and 5 for more detailed accounts.

It is also worth noticing that Kant's conceptual framework does not determine the specific content of cosmopolitan law. Today we could for instance easily think of economic and environmental reasons to develop cosmopolitan law to include redistribution and carbon emission. I've chosen to narrow my concern here to the issue of immigration. This is partly due to practical reasons concerning the thematic scope of this thesis, but it is also because of the peculiar character of immigration as a topic of cosmopolitan law. First of all, it concerns the kind of content of cosmopolitan law which has been historically recognized, such as the right to asylum. Second, it differs from economic and environmental concerns in the sense that immigration is indisputably a case of cosmopolitan law. Unlike cases where our economic actions or the use of fossil fuels might affect others in complex and indirect ways, there seems to be less need to consider whether or not the actions of a state (or its citizens) affect foreigners in cases of border-crossing and residency on state territory. As a third point, there is also a close connection between the law of hospitality, which Kant promotes as the only content of cosmopolitan law, and the regulative idea of a global civil society. I will discuss this last point in more detail at the end of this chapter.

2.1.1 On the three domains of the “public right”

As shown in the table above, cosmopolitan law is part of a triad in the Kantian framework. These three moral-legal domains are to be complementary elements of a civil condition of “public right”. Hence, cosmopolitan norms are not understood conceptually as more fundamental than other moral-legal norms. Cosmopolitan law consists of universal norms, but so does domestic law and interstate law. In order to clarify the distinct character of cosmopolitan obligations of the state, we might take a closer look at each domain.

First of all, we have the interaction between the citizens and the state. The state is, according to Kant, the shape all the individuals in the same civil condition take in relation to themselves as individual members. As an inherited union, it is called a *nation*, and as a union of interest it is called a *commonwealth*. This kind of domestic interaction is regulated by domestic law or *the right of the state* (including the right to sanction transgressions of the law).

Like other liberal Enlightenment thinkers, it was important for Kant to distinguish between public and private law (mainly the right to private property and to initiate voluntary private contracts) because it differentiated the state from civil society (especially the economy). When the state makes use of positive law as a means of organizing and implementing its power (through public law), it also commits itself to the recognition of subjective rights and its bearer: the citizen as a legal person. In this sense domestic law protects the freedom of the extra-political, civil

society in a negative form: “[...] within an order of modern law that is set free from immediate moral expectations (though only in certain respects), the citizens are permitted to do anything that is not prohibited.”⁵³

Second, we have interactions among sovereign states.⁵⁴ These interactions are regulated by “*interstatal law*”⁵⁵, which seeks to avoid the arbitrary rule of the mighty associated with a political realist position. The main threat here is military aggression from foreign states, and Kant argues that neighboring states have an obligation – more or less analogous to individual agents in the social contract – to enter into a civil condition to avoid confrontations. In its minimal form, the civil condition between states is not much more than a non-attack alliance, but the content might be broadened. Today, the system of international law contains a quite extensive set of interstatal laws, which includes rules of trade, rules of war and numerous other agreements.

Third, and clearly distinguished from both domestic and interstatal interactions, there is the *cosmopolitan law*.⁵⁶ This last domain is seen by Kant as complementary to the two other domains in order to have a stable global civil condition. As I read it, the cosmopolitan right has two main implications: First, it rejects the statist idea of the sovereign state that has no obligations to foreigners and that unavoidably acts on self-interest. Second, it is incompatible with the idea of a global state, because this would dissolve all interstatal and cosmopolitan relations and make the triad of moral-legal domains implode. Hence, the institutionalization of this law seems to require as a minimum the balancing between these two unacceptable extremes.

By specifying cosmopolitan law as duties of states toward foreigners, it also has implications that differ from other common uses of “cosmopolitan”. First, cosmopolitan law does not simply refer to universal moral norms or claims that can be made by any human being, as for instance “human rights”, as the ground for more specific rights as citizens. Cosmopolitan law does not serve as a normative ground for domestic law, they complement each other. Second, cosmopolitan law is not compatible with a global state of world-citizens. It requires some people to remain foreigners. Hence, cosmopolitan law is not the constitution of a global state order. It

⁵³ P. 109, in Habermas, Jürgen. 2001. *The Inclusion of the Other : Studies in Political Theory*. 3. print. ed., Studies in Contemporary German Social Thought. Cambridge, Mass.: MIT Press. See T.H. Marshall for influential essay on “Citizenship and Social Class” (1950) for account on the historical development of the content of domestic rights since Kant went from “civil”, and later “political” to “social” rights.

⁵⁴ Notice that Kant recognizes states as moral agents, with rights and duties.

⁵⁵ Kant uses “*the right of nations*” (*ius gentium*; law of peoples). I use «interstatal» to distinguish it from the more ambiguous notion of “nation” and “international law” in our current use of the terms. A state might host a number of nations, and as such be an inter-national or multi-national polity. “International law” refers usually to the positive legal framework, and is not necessarily identical in content to the moral-legal domain of interstatal law.

⁵⁶ At some point Kant refers to “the right of a state of nations”, which I find confusing unless we hold that all three moral-legal domains define elements of this law of a “league” or loose federation of nations (i.e. states).

does, however, express moral-legal duties and rights that are rational and that should be implemented on some level to ensure the adequate protection of a global civil condition.

2.1.2 Cosmopolitan law as moral-legal laws and positive law

To clarify the relation between moral-legal cosmopolitan law and positive international law even further, it should be made clear that the distinction is not merely between the notion of what international law ought to be and what it actually is in legal and institutional terms. There is also a conceptual distinction of levels, where cosmopolitan law, as a part of public right, defines a category of laws that might be implemented on two different levels: On one level as a formal class of law, on the other level as an institution of justice:

For Kant a just world is one in which principles of justice that could be principles for all are realistically institutionalized. He argues that realistic institutions of justice will include not only states – and therefore boundaries – but further structures that secure international justice and cosmopolitan right, including a league of states.⁵⁷

Like the entire set of public rights, cosmopolitan law answers to universal principles of justice. The realistic institutionalization of these principles can be implemented both on the level of state and international institutions of justice. Kant defines cosmopolitan law to denote an area or department of juridical concern, similar to “interstatal law”⁵⁸, and with a decisive distinction in mind to *international* law: Whereas international law (usually) refers to actual agreements among states on how to regulate a global order of states (for Kant this was ideally a federation or “league” of states), cosmopolitan law is meant to articulate conceptually a specific kind of obligations that states should recognize – both individually and as part of a federation. These obligations might be actualized as positive laws on both the state level (as immigration laws) and the international level (as human rights or refugee conventions). Hence, cosmopolitan and interstatal law refer to formal classes of law (or public right), and international law refers to an institution of justice.

To give an example: if we compare cosmopolitan law to the current “soft law” regime of Human Rights, we could say that only a few articles of the Universal Declaration of human rights (1948) and the succeeding UN conventions (1966) are, strictly speaking, implementations of cosmopolitan law. Most of them articulate traditional liberal and welfare rights of citizens. In other words, it articulates well-established contents of domestic law as laws “for all”. That is, these domestic rights are held as rights that each human being should be entitled to. They are,

⁵⁷ O’Neill 2016, p. 116

⁵⁸ Kant use «international law» where I use «interstatal». O’Neill, in my reading, is referring to “international justice” as “interstatal law”. My use of “international law” is designated to the way it is most often referred to these days as the positive law based on multilateral agreements among states.

strictly speaking, international agreements on citizen rights as a universal, softly binding standard of international law. The responsible agents to fulfill these rights are the states, and the UN human rights regime relies on the state level to implement these principles.

Hence, cosmopolitan law is not only different in the normative modality of what international law ought to be or is, but also in its possible content. Actually, the only clearly identifiable cosmopolitan right in the declaration of 1948 is article 14:

“Everyone has the right to seek and to enjoy in other countries asylum from [mainly political] persecution.”

This is the only exception that to some degree compensates for the lack of a cosmopolitan right to immigrate that would correspond meaningfully with the citizen right to emigrate (Article 13). According to the declaration, only persecuted individuals have a cosmopolitan freedom of movement. In any case, it should be quite clear that the content of human rights in international law is not identical in content to cosmopolitan rights.

Some claim that there has been a cosmopolitan shift after the Second World War in the public understanding of the state’s obligations toward foreigners according to the idea of human rights. This is partly true in the sense that many states would interpret their obligations to extend to “all human beings” currently residing on its territory. It is in this sense cosmopolitan in spirit. This is however not a conceptual transposition of human rights from domestic law to cosmopolitan law (including cosmopolitan rights), but rather an extended implementation of domestic right due to a wider notion of legal subjects; which is widened from citizens only to include territorial members (its “guests”) as well.

It should also be noticed that the UN human rights regime is vague on the question of how strongly states are legally obliged to give foreign residents something approximating citizen rights. There are ongoing negotiations on which categories of rights (civil, political and social) that correspond meaningfully to an extended obligation of the state to foreign residents. Generally, liberal civil rights are more easily accepted than obligations to provide political, social, economic and cultural goods and services.⁵⁹ Some of this vagueness is dealt with by bilateral or regional agreements among states, which implies that the vagueness is especially problematic for those people who find themselves outside the grid of concrete international agreements, such as the stateless, the irregular immigrants and the non-deportable.

⁵⁹ See for instance report from “Menneskerettighetsutvalget”: «Rapport til Stortingets presidentskap fra Menneskerettighetsutvalget om menneskerettigheter i Grunnloven» (Dokument 16 (2011–2012))

Given the unclear normative and weak institutional status of human rights on the international level, I find it necessary to stress that cosmopolitan law is not deprived of its conceptual status as “moral-legal” simply because it is not written in conventions or realistically institutionalized. Cosmopolitan law might still articulate an adequate answer to the constitutive question of how the world *ought* to be, even if an answer to the instrumental question of feasibility seems pragmatically distant.

2.2 The character of cosmopolitan obligations – ethical and legal duties

Within a Kantian framework it seems quite obvious that a state has cosmopolitan obligations of some sort. The character of these obligations is however contested. In this part I want to clarify the status of ethical and legal norms within the Kantian framework in order to explicate what is at stake in this discussion. According to the distinction made above between moral-legal norms and positive law, I also want to stress that the distinction between moral and legal cosmopolitanism bears little relevance in this discussion (unless we take “moral norms” as referring to a general category of norms that include duties that ought *not* to be sanctioned by positive law).⁶⁰

If we look at Thomas Pogge’s well-known definition of moral and legal cosmopolitanism, it makes little sense to locate cosmopolitan law in either of these categories:

Legal cosmopolitanism is committed to a concrete political idea of global order under which all persons have equivalent legal rights and duties, that is, are fellow citizens of a universal republic. *Moral* cosmopolitanism holds that all persons stand in certain moral relations to one another: we are required to respect one another’s status as ultimate units of moral concern – a requirement that imposes limits upon our conduct and, in particular, upon our efforts to construct institutional schemes.⁶¹

As already established, cosmopolitan law is not compatible with a global state, even if its citizens are fortunate enough to sustain it in the form of a republic. With this moderation in mind we might still insist on the legal character of cosmopolitan law and label it as a quasi-legal or semi-cosmopolitan account. This is, however, problematic on Pogge’s terms, since his definition puts legal cosmopolitanism very close to the institutionalization of cosmopolitan law. Legal rights “depends on the legislative, judicial, and executive bodies that maintain and interprets the laws in question.”⁶²

⁶⁰ There are for instance certain moral duties in the Kantian framework which are harder to categorize in this manner as moral-legal norms, such as honesty, which are necessary conditions for a civil society, but hardly possible to sanction.

⁶¹ Pogge 1992, p. 49

⁶² Ibid.

Another strategy, which is found in Seyla Benhabib's reading of Kant, is to understand cosmopolitan law as a hybrid of legal and moral norms. For Benhabib, cosmopolitan law "occupies that space between human rights and civil rights, between the right of humanity in our person and the rights that accrue to us insofar as we are members of specific republics."⁶³ Given that cosmopolitan law is conceptually complimentary with civil rights (as part of domestic law), I find this "space between" rather puzzling. But it might make sense in terms of the strength of the obligations in question in the sense that a broad institutionalization of cosmopolitan law seems unrealistic at the moment.

Benhabib seems to argue that the "space between" of cosmopolitan law is distinct from the ethical duties of moral cosmopolitanism which go beyond the call of moral-legal duty. For instance, in our "effort to construct institutional schemes" on a state level we might take concerns to assist non-citizens in humanitarian or Samaritan ways. Cosmopolitan law, according to Benhabib, seems, on the contrary, to express a "certain sort" of moral-legal claim: "The right of hospitality entails a moral claim with potential legal consequences in that the obligation of the receiving states to grant temporary residency to foreigners is anchored in a republican cosmopolitan order."⁶⁴ In other words, it has a hybrid status of: "quasi-legal binding obligations through voluntary commitments".⁶⁵

Benhabib draws in this way a ladder from weaker moral obligations, via quasi-legal obligations (which are still voluntary) to strong legal obligations that are reciprocal and sanctioned. If we consider this ladder in relation to the distinction between cosmopolitan law and positive law, it seems reasonable to say that within the current weak sanctioning regime of human rights, any state obligation is "voluntary". In the following I want to make clear that this sense of voluntariness is different from ethical duties due to its commitment to a global civil condition. To clarify this distinction, we need to locate Kant's threefold distinction of public right – domestic, interstatal and cosmopolitan law – within a larger set of systematic distinctions.

Primarily, legal norms are part of the subject of "metaphysics", which in Kant's terminology is restricted to a question of *form or law (noumena)* as conceptually distinguished from experienced content (*phenomena*). Distinct from natural laws (of the natural sciences), *the metaphysics of morals* is concerned with the laws of humans as free or autonomous (self-lawgiving) beings. All laws have,

⁶³ Benhabib 2004, p. 27

⁶⁴ Ibid., p. 29

⁶⁵ Ibid., p. 29

according to Kant, an empirical (or synthetic) aspect as well, but metaphysical analysis brackets this content and considers only the purely formal, a priori aspects.⁶⁶

In distinction from natural laws, both ethical and moral-legal norms are moral laws. All laws within this category of moral laws must comply with the general formal criteria of universality. Furthermore, moral norms are divided into two main formal categories: On the one hand we have duties of rights which regulate external acts. These include domestic (ordinary laws, constitutional law), interstatal and cosmopolitan law. On the other hand, we have duties of virtue (or ethical duties), which concerns the internal determination and incentive of one's will. These two spheres, the legal and ethical, are equiprimordial or co-original as they emerge from the same binary distinction: external actions and internal motive.

For Kant, the main difference between legal and ethical norms is that legal norms are conceived as the expression of public reason,⁶⁷ whereas ethical norms are conceived as the law of our own will (a private maxim). The *content* of the norm might be the same, but the formal classification significantly changes the way we conceive the specific character of the action that the norm is intended to regulate. From a legal perspective, Kant argues, we expect from ourselves and others that our actions comply with the general law. To follow the law is seen as a perfect duty. From an ethical perspective we may in addition also judge how our own specific actions are motivated and how well or honestly they are performed. To follow moral maxims is seen as an imperfect duty.

Kant's emphasis on the legal as restricted to external acts, i.e. to observable behavior, has the conceptual advantage of articulating a clear boundary for the appropriate realm of sanctioned moral-legal norms. *Duties of virtue* address the ability to set ends, understood as internal acts of the mind which cannot be directly subjected or subsumed to prescriptions of external actions.⁶⁸ Since this end-setting capacity cannot be regulated by law, any legitimate legislation should respect the negative freedom of conscience on the reasoning that it is futile to legally control the internal will.

⁶⁶ I understand this to be a procedural concern. Kant does not present a substantial metaphysics, but relies primarily on a conceptual analysis guided by certain indeterminable principles. Some of the distinctions Kant makes still have problematic ontological implications, but I think his conceptual analysis can be appreciated as a procedural suspension of the concrete content of the norms in order to simplify the analysis of their form.

⁶⁷ This has connotations to Rousseau's general will (the will of all; the will in general), but as we will see in 2.3.2, Kant's notion of public reasons is quite open.

⁶⁸ P. 6:239-240, in Kant, Immanuel, and Mary J. Gregor. 1996 [1797]. *The Metaphysics of Morals (in "Practical Philosophy")*, The Cambridge Edition of the Works of Immanuel Kant. Cambridge: Cambridge University Press. Originally published 1797. Hereafter "MM".

In other words: in Kant we find a Cartesian dualism at work in the definition between the legal (bodily behavior) and the moral (acts of the mind).

This might be a convenient distinction for practical reasons within the liberal project, but it presumes a problematic theoretical divide between pure behavior and the “supersensible” will.⁶⁹ As a concern for the freedom of thought and conscience, it seems reasonable. But intuitively, it also seems unreasonable to say that we should not distinguish legally between intended and unintended actions. If we look at more contemporary accounts of interaction, we find a wide ranging critique of the behaviorist account of human interaction.⁷⁰ Every action is mediated and interpreted with some intention (or will) inherent to it. In the end this theoretical problem provides a leading clue for the questioning of the situational ontology (see chapter 6 ff.).

2.2.1 The grounding principles of cosmopolitan law

Even if it is reasonable to question the ontological distinction between the external action and the internal motive that grounds Kant’s operative distinction between ethical and legal norms, we might accept that there is a distinction in principle between duties that ought to be enforced by law and those that ought to be considered voluntary obligations. Since the content of moral-legal norms cannot be deduced from general moral principles, the manifestations or concrete articulation of the obligations might vary according to the context.

In any case, all concrete ethical and moral-legal norms must be considered as coherent with the principle of humanity, which includes the ideas of “innate” freedom and equality of the individual, and finds its clearest expression in the “right to humanity”:

Freedom (independence from being constrained by another’s choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity.⁷¹

In addition to this general requirement of moral norms, moral-legal norms must comply with the principle of justice. In line with a liberal ideal, these norms are restricted in the negative sense that they prohibit the kind of interaction among individuals that inhibit the autonomy of one or more of the parts. This is formulated as the formal criterion of moral-legal norms, also called the “universal principle of rights”:

⁶⁹ Associated with thinking, or the mind as ‘the organ of the supersensible’. Its objects: metaphysics, “the true world” (as against the apparent) or even God. Positivism = the death of the supersensible. For discussion on this, see p. 421 in Arendt, Hannah. 1971. "Thinking and Moral Considerations - Lecture." *Social Research* 38, no. 3: 417-446. <Go to ISI>://WOS:A1971Y182700001.

The “supersensible” is associated with the opposite of the extended and phenomenal: According to the Cartesian division of the extended and the rational, the body and mind, or in Kant’s words: phenomena and noumena.

⁷⁰ For Norwegian critique of positivism, see Skjervheim, Hans. 1976. *Deltakar Og Tilskodar Og Andre Essays*, Idé Og Tanke 31/32. Oslo: Tanum-Norli. For social anthropological account, see Geertz, Clifford. 1993. *The Interpretation of Cultures : Selected Essays*. London: Fontana Press. For recent phenomenological account, see for instance: Overgaard, Søren. 2007. *Wittgenstein and Other Minds : Rethinking Subjectivity and Intersubjectivity with Wittgenstein, Levinas, and Husserl*, Routledge Studies in Twentieth-Century Philosophy. New York: Routledge.

⁷¹ MM, p. 6:237

Any action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law.⁷²

Since legal norms (*the duty of right*) regulate external actions by the use of force, they do not rely on the good will of its citizens. They are robust enough to hold, even in a “society of devils” or a society of “social morons” (i.e. ambitious and selfish *bomo economicus*).⁷³ On this ground Kant articulates the distinction between the three moral-legal domains of public right (a legal category distinguished from private right).

2.2.2 Cosmopolitan law distinguished from philanthropy

What seems clear in Kant's account, is that the cosmopolitan law cannot be reduced to a matter of the ethical private conscience (or “philanthropy” as he calls it) of each individual world-citizen. As stated above, the ethical subcategory of moral norms consists of norms that regulate internal acts of the will. Ethical norms are related to the idea of “the good” (i.e. the realization of the ends of oneself and others), and are meant to regulate the positive and voluntary motives for action. They involve duties toward oneself and others according to the mutual recognition of each other as free and equal human beings. Following the general distinction between what is right and what is good, ethical norms are articulated as positive formulation of ends (of the good) distinguished from the articulation of the “right” in the negative formulation of freedom. The ethical principle recognizes that: “a human being is an end for himself as well as for others.”⁷⁴

Even if ethical duties should not be enforced, their weaker character of obligation is not meant as a moral excuse for being a “law-abiding devil”. The point is rather that the wide duty, i.e. the duty to go beyond the narrow duty of legal prohibitions, involves a freedom of choice. You stand free to limit the scope of your obligations from “the love of one's neighbor in general” to “the love of one's parents”, but it does not necessarily make you more virtuous:

The wider the duty [...] the more imperfect is a man's obligation to action; as he, nevertheless, brings closer to narrow duty the maxim of complying with wide duty, so much the more perfect is his virtuous action.⁷⁵

In this sense, moral cosmopolitanism, understood as the individual responsibility for everyone else, is the widest obligation possible and hence the most imperfect duty thinkable. We should of course think of every human being as an end in him- or herself, but we are not legally obliged to

⁷² MM, p. 6:230-231

⁷³ Sen, Amartya. 1977. "Rational Fools - Critique of Behavioral Foundations of Economic-Theory." *Philosophy & Public Affairs* 6, no. 4: 317-344. <Go to ISI>://WOS:A1977DX39800002.

⁷⁴ MM, p. 6:395

⁷⁵ MM, p. 6: 390

do so beyond the perfect duty of the negative maxims of co-existence. Cosmopolitan law has a quite different character than this widest duty.

In practice this philanthropic duty is usually interpreted according to the principle of mutual aid, for instance as a Samaritan duty. We have – both as individuals and as political communities – an ethical, imperfect duty to provide aid to some people, but we cannot possibly help everyone. Imperfect duties allow exceptional assistance to some (similar to residency on humanitarian grounds). It also allows for some discretion on how to fulfill them.

An example of how the distinction between ethical and moral-legal norms might change according to context is related to the distinction between the right and the good outlined by Kant. The current political negotiations between the political left and right can be understood as a negotiation on the character of the obligations associated with “social and economic rights”. The political right might agree that we have some ethical-humanitarian obligations as a political community to provide goods and services, whereas the political left will typically argue that there is a false distinction between the material and civil conditions for the freedom of choice. A decisive issue in this regard is for instance whether social and economic rights should be included as constitutional rights, or rather should be confined to less protected political agreements.

Without taking position in these political negotiations (or struggles), I take the decisive issue to be the regulative idea of an inclusive civil society that is protected against the rule of force (including economic force) and defined by mutual trust. Given this regulative idea, we might question if the distinctions between the internal and external; the good and the right will always give us the best guidance. In situations of strong economic interdependency it does for instance seem wrong to claim that grave economic inequality will not affect the mutual trust of society. In any case, in my mind, there is a distinction in principle between those obligations that should be rendered voluntary ethical commitments and those that should be considered legally binding in order to secure the necessary protection of the (possibility of) a civil condition.

The extreme case of a state of war exemplifies this distinction: Under such conditions one can hardly speak of any norms as “legally binding” in the sense of being enforceable by rule of law. However, the practice of “total war” is from a Kantian perspective still *unjust*, and not merely unethical, because even the voluntary commitment to the public right (in this case of interstate law) should be concerned with the regulative idea of a possible civil society (as a condition of

perpetual peace): “No state at war with another shall allow itself such acts of hostility as would have to make mutual trust impossible during a future peace [...]”⁷⁶

In the Kantian framework, cosmopolitan law seems to be associated with a similar idea of being legally binding and still only (due to the circumstances) a voluntary commitment to public right. The attention given, by Kant, to the fragile conditions for a society, such as trust, might seem naïve and superfluous in times of war and unrest. And, similarly, the idea of hospitality might seem equally naïve in times of mass migration, but – given that the regulative idea of civil society is not confined to the statist idea of domestic justice – we have to consider cosmopolitan obligations as necessary for the protection of a global civil society. The adequate content of cosmopolitan law should be articulated accordingly.

2.3 The provisional and compromising character of cosmopolitan law

As we move from a pure conceptual analysis of cosmopolitan law, to the question of its content, we simultaneously need to consider how concrete cosmopolitan laws respond to actual circumstances, which also implies that we need to articulate a regulative idea of public right that is more specific than merely “a just civil condition”. The notion of a federation of states is the typical Kantian answer on the level beyond the domestic. In the following, I will emphasize the global civil society, which is what this federation is arguably intended to protect.

First I will present Waldron’s argument for a provisional understanding of the content of cosmopolitan law, according to the historical changes of circumstance. Waldron argues that since a diversity of conceptions of justice is Kant’s starting point of public right the concretization of cosmopolitan law requires a universalist political attitude which is incompatible with communitarian or identity-political positions.⁷⁷

Second I will consider O’Neill’s critique of a statist conception of public reason. She argues that since the institutionalization of the state always takes on a character of compromise with given circumstances, the institutional arrangements might become outdated due to circumstantial changes. For instance, the globalization of the last decades seems to challenge the idea of a reasonable scope of the public. O’Neill emphasizes Kant’s understanding of the global scope of the public as a promising point of departure.

⁷⁶ P., 8:346, in Kant, Immanuel, and Mary J. Gregor. 1996 [1797]. *The Metaphysics of Morals (in "Practical Philosophy")*, The Cambridge Edition of the Works of Immanuel Kant. Cambridge: Cambridge University Press.
, ---. 1996 [1795]. *Toward Perpetual Peace (in "Practical Philosophy")*, The Cambridge Edition of the Works of Immanuel Kant. Cambridge: Cambridge University Press. PP hereafter.

⁷⁷ Waldron, Jeremy. 2000. "What Is Cosmopolitan?" *Journal of Political Philosophy* 8, no. 2: 17.

2.3.1 The provisional character of cosmopolitan law

According to the general idea that the rule of law of a civil condition is preferable to the rule of force, we have, according to Kant, a moral duty to leave the state of nature. This duty complies with the rather empty principle of justice and cannot be deduced *a priori* as an absolute moral norm. Rather, as Waldron notes, the content of this duty – according to public right – can only be adequately concretized in response to the circumstances. Depending on how strongly we affect each other, this duty should take on a correspondingly extensive content.

Today we have grown accustomed to the expectation of the rule of law within the domestic sphere. Similarly, the dominant view on international affairs involves the expectancy of certain standards beyond the state of nature or the “realist” conception of states as merely self-interested. Presuming that the domestic and interstate content of public right responds to the degree we affect each other, or perhaps rather the degree we *have* affected each other so far. The current rate of globalization seems to suggest an extension, in my view, not only of its content but of the category of emphasis. This can be further specified in terms of cosmopolitan law, according to Waldron:

Cosmopolitan [law], for Kant, is the department of jurisprudence concerned with people and peoples’ sharing the world with others, given the circumstance that this sharing is more or less inevitable, and likely to go drastically wrong, if not governed by juridical principles.⁷⁸

What does this moral-legal obligation entail? In general, this is a hypothetical requirement, according to Kant:

Public right is [...] a system of laws for a people, that is, a multitude of human beings, or for a multitude of peoples, which *because they affect one another*, need a rightful condition under a will uniting them, a constitution, so that they may enjoy what is laid down as right.⁷⁹

In other words, if a multitude of human beings affect one another, they need a rightful condition. And, as globalization takes on its strength, the duty to step into a civil condition seems to imply an increased content of cosmopolitan law. In a footnote to section II in PP, with reference to the triad of a rightful constitution, Kant qualifies the cosmopolitan right in the following manner: “the right of citizens of the world, insofar as individuals and states, standing in *the relation of*

⁷⁸ Waldron 2000, p. 230

⁷⁹ MM, p. 6:311, my emphasis

externally affecting one another, are to be regarded as citizens of a universal state of mankind (*ius cosmopolitanum*).”⁸⁰

As Waldron indicated in the quote above, the kind of situation which solicits this need for a rightful condition depends on empirical circumstances where we affect one another in a shared world. Said otherwise, we have an obligation to seek a civil condition when the circumstances require it, i.e. when we happen to ‘affect one another’ or happen to live ‘unavoidably side by side’. In the case of cosmopolitan law this implies the requirement of a rightful condition beyond state borders, in so far as the people on the surface of the globe affect each other.

According to Kant, the globalized circumstances at his time already met the requirements for the need of a cosmopolitan law⁸¹:

Since the (narrower and wider) community of the nations of the earth has now gone so far that a violation of right on one place of the earth is felt in all, the idea of a cosmopolitan right is no fantastic and exaggerated way of representing right; it is, instead, a supplement to *the unwritten code of the right of a state and the right of nations necessary for the sake of any public right of human beings and so for perpetual peace*; only under this condition can we flatter ourselves that we are constantly approaching perpetual peace.⁸²

The cosmopolitan law is “unwritten” and in this sense voluntary, but it nevertheless defines moral-legal norms that supplement the domestic⁸³ and interstate⁸⁴ law. Kant’s project must not be confused with the project of “natural law” which seeks to ground citizen rights in a universal and pre-institutional source. Cosmopolitan law is perhaps pre-institutional in the sense that it can exist as an unwritten rational code, but this moral-legal obligation does not however dictate its specific content. The specification of its content is best understood, according to Waldron, as a political concern:

Cosmopolitan [law] – one’s willingness to do what is required by the general principle of sharing this limited world with others – is rightly regarded by Kant as not just one ethical idea among others. [...] It imposes a certain juridically-based discipline in politics, a discipline rooted in our diversity, our potential disagreements, and our need nevertheless for law.⁸⁵

As Waldron notices, Kant’s starting-point for formulating public right is not the idea of self-interest (as in Hobbes) or a shared conception of justice (as in Rawls and Walzer), but the competing “banners of justice and right” which are held “independently of the opinion of

⁸⁰ PP, p. 8:349, my emphasis

⁸¹ I’ll go more into the details of these circumstances in chapter 4.

⁸² PP, p. 8:360, my emphasis

⁸³ “the right of a state”

⁸⁴ “the right of nations”

⁸⁵ Waldron 2000, p. 242

others”.⁸⁶ Because no party in a cosmopolitan discipline of politics can take for granted that their conception of justice is the most rational one, this has great implications for the kind of attitude that cosmopolitans are required to take. According to this implication, Waldron argues that a naively held belief in the universal validity of one’s parochial conception of justice is actually *more* cosmopolitan than the communitarian or reflexive identity-political stance, which defends “our way” independently of any ambitions to universalize their conception.

In the domain of cosmopolitan law, it seems plausible to claim, as Waldron does, that our current circumstances call for an even stronger consolidation of the public right. If this is the case, it presents us with the following practical challenge:

[In summary,] we share the earth with those who may have ways of doing things that are different from our own, perhaps ways of doing things that we can barely understand, and who may make demands on us, for cooperation or forbearance, that are quite different from the demands with which we are prepared to comply.⁸⁷

For “us” as affected parties, in lack of mutual understanding and agreement, provisional regulations seems to be needed in order to live peacefully side by side. This is to some degree, of course, already ensured by the implementation of domestic and interstatal law. There is however an additional need for law to ensure peace in circumstances where foreigners affect each other. As a first step, the provisional regulations of a cosmopolitan law, this will enable us (as a second step) to provide a further and adequate content to a shared cosmopolitan law. In the next section I will consider Kant’s law of hospitality as a candidate for such a provisional content of cosmopolitan law.

2.3.2 Compromises of public reason

In light of Waldron’s concern for the proper cosmopolitan attitude, we might consider how sensitive the conditions (of the provisional negotiations on the content of cosmopolitan law) are to our implicit limitation of the notion of “public” (such as to the “people”). This concern is explicated in O’Neill’s critique of Rawls’ notion of public reason. While she recognizes that Rawls is a pluralist, (and in this sense differs from a communitarian position) and that Rawls does not accept political arguments based on community or tradition, O’Neill still suggests that Rawls’ understanding of public reason seems to be grounded in some heteronomous source of a more institutional character, which remains an implicit premise in Rawls account of domestic justice.

With reference to *Political Liberalism*, O’Neill defines Rawls’ notion of public reason as follows:

⁸⁶ MM, §44

⁸⁷ Waldron 2000, p. 238

Public reason, as Rawls construes it, is ‘citizens’ reasoning in the public forum about constitutional and ‘basic questions of justice’. Evidently this conception of public reason as reciprocity between fellow-citizens presupposes the constitutive institutions that define not just citizenship but more specifically fellow-citizenship: the bounded society and the constitutional basis of citizenship (including liberal rights and democracy in just societies, on Rawls’ account).⁸⁸

O’Neill critically questions the extent to which the “bounded society” is detached from the state. Are not the boundaries, presupposed by this society, in fact state boundaries?⁸⁹

Almost as a consequential error of this state-bound assumption of the character of the public, Rawls assumes that “peoples” partakes in the reasoning in public on the international level.⁹⁰ Here as well O’Neill is skeptical as to what extent Rawls is able to successfully detach the “people” from the state. O’Neill readily accepts that Rawls is correct in distancing himself from the realist conception of the state, but she contests the notion that the state is irredeemably structured as a self-interested agent. According to O’Neill, Rawls argument relies on the weak, if not false, assumption that states cannot be agents of justice.

Although Rawls considers his position Kantian, O’Neill points out a core difference between Kant’s and Rawls’ understanding of public reason, with clear implications for their notions of justice across borders. Arguing against Rawls’ critique of Kant’s metaphysical presuppositions, O’Neill gives the following reading of Kant’s anti-metaphysical position⁹¹:

The central thought of Kant’s account of public reason is simply that the standards of reason cannot be derivative. Any acceptance of other, ‘external’ authorities of whatever sort as sources of reason must fail. [...] A would-be reasoner who leans on some socially or civilly constituted power and authority that lacks reasoned vindication fails to reason.⁹²

O’Neill points out that although Rawls’ position is not communitarian; his notion of “public reason” bears heteronomous characteristics. Since Rawls notion “presupposes the authority of civilly and socially constituted roles, institutions and practices”⁹³, Rawls seems to understand “public” the way Kant understands “private” (i.e. as institutionally dependent reasoning). In contrast, Kant has a global or borderless understanding of the public as the ‘world of readers’.

⁸⁸ O’Neill 2016, p. 104

⁸⁹ Ibid.

⁹⁰ Obviously, and as I’ll come back to in chapter 3 and 5, Rawls’ “people” was never intended as a realistic sociological concept, but rather as an analogue to the individuals of a bounded society as they were “prior to justice” in the hypothetical situation of the original position. Compared to Kant, this seems to put Rawls’ “people” and the agreement between them in a somewhat unclear position between interstate law and international positive law.

⁹¹ I take “metaphysical” here to refer to substantial assumptions, beyond the formal conceptual analysis (or perhaps necessarily intertwined with this). For O’Neill, the decisive point is the question of derivability from principles, which are in her reading essentially indeterminable.

⁹² O’Neill 2016, p. 108

⁹³ Ibid., p. 109

In addition to pointing out the ideal of autonomy from political authority in Kant's notion of public reason, O'Neill emphasizes the basic intersubjective character of autonomy in her reading of Kant. There is a minimal criterion of rationality in Kant's conception, she argues, which is that it should be communicable or possible for other to follow. Hence, to be free, in the sense of being able to reason by oneself (i.e. to be autonomous), is not the same as being alone: "how much and how correctly would we think if we did not think as it were in community with others to whom we communicate our thoughts, and who communicate theirs with us!"⁹⁴

The central significance given to intersubjectivity by O'Neill in her account of Kant's notion of autonomy is remarkable. Usually it is deemphasized in favor of his more formal, solipsistic accounts. Similar to the original position of Rawls, the general idea is that the primary step would be the rational individual making up its own mind, and only then it would make it public. The significance given to communication for autonomous thinking reveals a false dichotomy between the natural state of isolated individuals and the civil condition of bounded societies. According to O'Neill this has clear implications for the way we understand the basic requirement of justice; i.e. to leave the state of nature. As she makes clear, Kant rejected a Hobbesian view that *any* state is unconditionally preferable to a state of nature.⁹⁵ Rather: "On Kant's view, state power is not an intrinsic requirement of justice, but a compromise that we have to accept under actual conditions."⁹⁶

As a compromise, any realization of justice on the domestic or international level must be considered an approximation of the ideal civil condition. In regard to changing circumstances this approximation must be adjusted in public to allow for the best possible compromise. O'Neill concludes that Kant's conception, as it is not grounded in the state structure, is in this sense both more realistic and more open to continuous improvements than Rawls' account.

2.4 The cosmopolitan law of hospitality

To clarify the status of cosmopolitan law we may use the law of hospitality as an example. Compared to the two other aspects of the triad of 'public right' – domestic law and interstate law – Kant devoted only a few brief remarks to cosmopolitan law [*Weltbürgerrecht*].⁹⁷ In *Toward Perpetual Peace* it is articulated in this manner:

⁹⁴ Quoted from Kant's "What Does It Mean to Orient Oneself in Thinking?", p. 8:144, in O'Neill 2016, p. 111.

⁹⁵ Notice that Kant's requirement is not democratic in our terms, but requires a condition of equality of status for all citizens under law. Hierarchical societies like feudalism undermine this condition.

⁹⁶ O'Neill 2016, p. 115

⁹⁷ Kant's treatments of cosmopolitan law are found, to my knowledge, only in two places. In both places it is treated very shortly, as a supplement to the other concerns of a civil constitution. The first place is found as the third definitive article of the conditions for perpetual peace in *Toward Perpetual Peace* (1795). The second place is §62 in

“Cosmopolitan [law] shall be limited to conditions of universal hospitality.”⁹⁸

In my following discussion of this law of hospitality, I will discuss the character of the obligations that this law articulates and consider if it presents us with an adequate content of a cosmopolitan law of admission. Further, I will consider some elements of this law of hospitality that, in my opinion, can be read as provisional aspects of a cosmopolitan law of deliberation, provided that Kant seems to have given the global public a quite central role in the public reasoning on issues of justice.

2.4.1 The right to visit - hospitality as a cosmopolitan law of admission

The law of hospitality specifies both duties and rights of the hosting and visiting parties. The most common reading of this law tends to emphasize the parts that revolve around the question of the cosmopolitan rights of the foreign immigrant. Naturally, these rights are concerned with the right to enter the territory of an alien state for short-term visits (first admission) and the right to remain on the territory with some kind of membership status (second admission).

For instance, Seyla Benhabib reads the law of hospitality in this manner, i.e. as a cosmopolitan law of admission. She stresses the distinction Kant makes between being a guest (second admission) and being a visitor (first admission).⁹⁹ Quite explicitly, according to Kant, the law of hospitality concerns the right to *visit* [*besuchrecht*], not the right to be a *guest* [*gastrecht*].¹⁰⁰ This distinction is related to the character of the obligations corresponding to these rights. Kant recognizes the right to visit as part of cosmopolitan law, since it implies a perfect, negative duty of the hosting country not to send someone to their “destruction”. The right to be a guest is given less protection as it is considered by Kant to correspond merely to an imperfect, positive duty

“The doctrine of right” [*Rechtlehre*] (1797), the first part of *The Metaphysics of Morals*, which situates the cosmopolitan right as the third part of the public right, the part of the external law (contrary to the moral law of conscience). Kant also mentions the notion of a “cosmopolitan system of general political security” in the essay “Idea of a Universal History”.

⁹⁸ PP, p. 8:357, my insertion (replaced “right”)

⁹⁹ Benhabib, Seyla. 2004. *The Rights of Others : Aliens, Residents, and Citizens*, The Seeley Lectures. Cambridge: Cambridge University Press.

¹⁰⁰ One is easily confused with the different uses of terms here. Kant distinguishes the right to visit (*besuchrecht*) from the rights of a guest, or to reside (*gastrecht*). Benhabib uses correspondingly “the temporary right to sojourn” (*besuchsrecht*) and “the right to be a permanent visitor” (*gastrecht*). (See Derrida, Jacques. 2002. *On Cosmopolitanism and Forgiveness*. Reprinted. ed., *Thinking in Action*. London: Routledge.) Derrida distinguishes the two as an internal tension to the right of hospitality, on the one side unconditional and on the other side conditional. When Benhabib uses the “right to hospitality” she seems to refer to both simultaneously, and as her general approach to immigration indicates, the Derridian aporeic premise of ‘closure as the very possibility of openness’ seems to be central to her understanding of the problem. See for instance “The paradox of democratic legitimacy” (Benhabib 2004, p. 43. ff). When Garrett Brown uses the term “laws of hospitality” he also includes six further specifications.

I tend to read ‘the right to visit’ as the cosmopolitan right (unconditional claim), while ‘the right to be a guest’ is a qualified moral-philanthropic right of mutual aid.

conditioned by the will of the hosting state. Hence, the right to be a guest is not properly speaking a “right” in moral-legal terms of public right.

To be a “guest” equals here the “right” or contractual private privileges to a long-term or permanent residency. To be a proper guest requires the good-will of the host to agree to a contract with the temporary visitor in order for him/her to become a part of the national household or (eventually) a permanent member. The reason for this weaker obligation toward foreign guests seems to be that their stay affects the hosting state not only as a civil union, but also and perhaps primarily as a community of interest (a common wealth) and as one of inheritance (a nation). As a guest, the foreigner is treated as a member of the “household” (or welfare state), and may presumably affect the welfare of the inhabitants. Potentially, as mentioned in the discussion on residency on humanitarian grounds, it could be a self-undermining decision to allow too many to enter and settle.

According to this distinction between the perfect duty of the state toward the visitor and the imperfect duty toward the guest, I suggest a minimal reading of the law of hospitality that is restricted to the right of “a foreigner not to be treated with hostility because he arrived on the land of another”¹⁰¹. Considered as a law of admission, the law of hospitality is limited to a negative duty not to inflict harm on others in accordance with the principle of justice. As long as foreigners approach us in a peaceful manner, they should be met likewise. Not to be treated with hostility does not exclude the possibility of being turned away by immigration officers, but only if it does not lead to the “destruction” [*Untergang*] of the foreigner. This formulation is usually interpreted according to the principle of non-refoulement, which implies that the state sovereignty of immigration control is restricted when the mere rejection or deportation of a foreigner to their country of origin (including transit states) is likely to put them at risk of losing their life or their basic freedoms. That is, to expose them to the risk of inhumane treatment like political persecution and torture. This right might be summarized as an unconditional right not to be harmed when entering or residing on foreign territory, including harmful deportation and refoulement. The corresponding duty does not imply a duty to open the borders, but it is similar to the basic requirement of the asylum system we have today. In the next section I will consider a wider reading of this law of hospitality concerned with the communicative aspect of public reason and the right of a foreigner “to present oneself for society”¹⁰². I suggest we call this second aspect of cosmopolitan law the law of deliberation.

¹⁰¹ PP, p. 8: 357-8

¹⁰² Ibid., p. 8:359

In general, this minimal reading seems to go quite well with Benhabib’s reading of the ‘law of hospitality’ as Kant’s specification of the cosmopolitan law of admission. There seems however to be a disagreement about the character of the duty involved. I hold it to be moral-legal and perfect in character, whereas Benhabib states that “The universal right to hospitality which is due to every human person imposes upon us an imperfect moral duty to help and offer shelter to those whose life, limb, and well-being are endangered. This duty is “imperfect” – i.e. conditional – in that it can permit exceptions, and can be overridden by legitimate grounds of self-preservation.”¹⁰³ On the one hand, it seems Benhabib considers the right to visit to imply more than the corresponding unconditional (i.e. perfect) duty associated with non-refoulement. If so, it is a matter of disagreement on content. On the other hand, and in addition to the first possible disagreement, what Benhabib implies with the use of “conditional” seems to be something to the effect of assigning this duty an ethical-humanitarian character, rather than a moral-legal one. Every moral-legal norm does not have to be “perfect” in the sense of an absolute rule, but they cannot (according to Kant’s framework) be conditional in the sense that it relies on the goodwill of the agents involved. The motive of self-preservation seems to me to be a limit-case of “good will” or virtue, depending on how wide “the self” is considered.

Either way, if we consider the provisional character of the law of hospitality as an adequate compromise with the actual circumstances of his time, we would expect the content of Kant’s law to be outdated by the current circumstances. As O’Neill states: “Many of Kant’s specific institutional suggestions are inadequate to the twenty-first century: in particular we can no longer imagine that rights to hospitality deal adequately with justice to those who are beyond the boundaries of their own states.”¹⁰⁴

Whereas O’Neill seems to aim beyond the law of admission all together, Benhabib seeks to revise it. She criticizes Kant on a similar account for not including a right to permanent residency, i.e. a guest right. She even identifies what appears to be a basic conflict in Kant’s own conception:

The right to seek human association, or in the literal translation of the German, “to offer oneself to civil association [*Gesellschaft*] with others,” and to seek “approach” – *Zugang* – rather than entry – *Eingang* – is for Kant a fundamental human right. This is to be distinguished from the *res nullius* thesis¹⁰⁵; in fact, the right to seek human association is at the core of what it means to be a *Weltbürger* [a cosmopolitan; a world citizen].¹⁰⁶

¹⁰³ Benhabib 2004, p. 36

¹⁰⁴ O’Neill 2016, p. 117

¹⁰⁵ Regards Kant’s critique of Locke and relates to the notion of the common possession of the surface of the earth. I’m uncertain as to what is the scope of this restriction, but I would at least agree to it when it comes to settling on and appropriating foreign land (i.e. to be a guest).

¹⁰⁶ Benhabib 2004, p. 38

Benhabib nonetheless acknowledges that the soundness of the appeal to this distinction between visiting rights and guest rights depends on the context.¹⁰⁷ When the hosting party is a powerful and affluent state, this weakening of one's obligations might seem like a cynical excuse for a lack of commitment to fellow world-citizens. Especially if the individuals in question are stateless and have nowhere else to go, no association to return to or no free spot to establish a new, it seems difficult to legitimize the rejections of someone seeking "civil association". But the picture is different when the relation of forces is reversed. Weak and poor states (even nations without much state structure) could certainly be in need of such a privilege to deny second admissions as a protection against the rule of force of international corporations and foreign settlers.

To understand the arguments for not admitting "guest rights" as a moral-legal norm, it is important to understand the historical context Kant was writing in. His main concern was not a "stream of poor migrants" to the industrialized (and soon to be automatized) global north. Kant's main concern was the impact of western settlements and commercial endeavors (which later led to the full blown imperialism in the 19th century) in the newly "discovered" land elsewhere. Kant describes his concern this way in *Toward Perpetual Peace*:

If one compares [the cosmopolitan condition] with the *inhospitable* behavior of civilized, especially commercial, states in our part of the world, the injustice they show in *visiting* foreign lands and peoples (which with them is tantamount to *conquering* them) goes to horrifying lengths.¹⁰⁸

He continues by referring to the cases of American slave trade ("negro countries,"¹⁰⁹ "spice Islands") and the colonization of India ("Hindustan"). The problems involved in settling elsewhere seem to have motivated Kant to make a clear distinction between "the right to visit all regions of the earth" and "the right to make a settlement on the land of another nation." The latter right requires, according to Kant, a specific contract. The "good intentions" of forced christening (salvation), expelling of the corrupted to Australia (New Holland) and exploitation of a lack of juridical competence on the part of Native Americans (civilization), did not justify these means in Kant's view.

Although the world is more or less decolonized today, Kant's argument can still be considered relevant: For instance, the attempt to institute a lawful condition by means of violence has repeatedly proved disastrous in the last decades (for instance in Afghanistan, Iraq, Libya). More prominent still, international corporations have strong economic incentive power to motivate

¹⁰⁷ Benhabib 2004

¹⁰⁸ PP, p. 8:358, my insertion

¹⁰⁹ This term was used as in derogatory manner by the abolitionist movement against slavery.

states to lower wages, environmental standards and standards of working conditions in order to compete in the global investment market.

If we recognize Kant's ambition as the establishment of a reciprocal relation, with protection against exploitation going both ways, the conditioned right to be a guest is primarily understood as an unconditioned right of sovereignty of the hosting state, and the corresponding perfect duty of the visiting side not to harm the host. These aspects considered, there is still good reasons to agree with Benhabib that the cosmopolitan law of admission should be extended to something similar to the right to be a guest, or more precisely as a right to be a member. (See chapter 5)

2.4.2 The right to present oneself - hospitality as a cosmopolitan law of deliberation

Waldron's and O'Neill's readings of Kant are interesting because they suggest an original specification of cosmopolitan law; one that emphasizes the *communicative* aspects as well as the agents of civil society. This reading conceives the liberal argument for freedom of movement, or the general discussion of a cosmopolitan law of admission, as a provisional regulation as a mean to actualize and protect cross-border communication according to the regulative idea of the emergence of a global civil society. In sum, rather than promoting the *rights* to visit and to move freely, based on the needs and life opportunities of the individual,¹¹⁰ Kant's argument ultimately rests on the regulative idea of a lawful condition on the cosmopolitan level; i.e. a cosmopolitan condition.

The articulation of the law of hospitality as the right "to present oneself for society" indicates a broader orientation of cosmopolitan law beyond the "no harm"-principle. "To present oneself" alludes more directly to the cosmopolitan spirit that promotes free communication across physical and formal borders. Whereas the sailing ship and the camel (the ship of the desert) contribute to overcoming physical barriers, the right to present oneself (as a visitor) facilitates not only a safe arrival, but a successful one. This aspect of the right to visit would correspond more closely to the kind of freedom of movement that we see within academia, than to the kind we see within regional agreements like the EU.

To understand why the law of hospitality has a provisional function in this context, Garrett Brown's argument is helpful. Brown argues that the main purpose of Kant's law of hospitality is not to set the final content of cosmopolitan law. It is rather, in line with Waldron's perspective, a provisional law to establish the "conditions of hospitality". These conditions are defined by

¹¹⁰ For argument against this position, see Carens (this thesis: 5.3 Radicalizing Rawls: the "Open Border" cosmopolitan response) and Oberman, Kieran. 2016. "Immigration as a Human Right." In *Migration in Political Theory: The Ethics of Movement and Membership*, edited by Sarah Fine and Lea Ypi, 32-57: Oxford University Press.

Brown as “the ethical conditions to establish a sense of mutual consistency between visitor and visited.”¹¹¹ This is important, because it secures a relation (ideally) free from domination, which is meant “to allow for the possibility of a *future deliberation* about cosmopolitan justice to take place.”¹¹² As such, the conditions of hospitality secure the conditions for deliberation. In other words, it articulates the basic, provisional conditions for an emerging cosmopolitan legal order.

In “What is Enlightenment?” Kant associates these conditions of hospitality with the “freedom to make public use of one’s reason”.¹¹³ According to Brown, the use of public reason is a necessity “that allows for humanity to rightfully associate, trade, communicate and exchange experiments in living without conflict.”¹¹⁴ The quoted passage summarizes quite clearly the instrumental value of being able to visit peacefully. Its function is not primarily to allow people to escape one’s own country, to travel or to realize one’s life-plan, but to establish peaceful relations with other societies and bring us all as a global community closer together. The law of hospitality thus protects the possibility of communication, i.e. the process of building and maintaining relations. In this sense the law of hospitality is not just an adequate compromise with the current status quo, but the moral-legal norms it entails are also formulated with the intent to change the future circumstances in a direction which is more favorable for an extension of the content of cosmopolitan law. In this sense, the law of hospitality is not only the basic content of the law of admission, but also the basic content of the law of deliberation.

The law of hospitality can be seen as providing a balanced relation between foreigners and states, in contrast to imperialism, which manifested the globalized rule of force. In addition to serve as a normative contrast to a *proper* civil condition, the global consequences of imperialism strengthened the circumstantial need for cosmopolitan law. It actualized the relevance of a shared world in the weak sense that Kant refers to when he describes how troubles and violence experienced by settlements in foreign territories, are located “in one place on our globe [but are] to be felt all over it”.¹¹⁵ With this circumstantial understanding in mind, Brown emphasizes the future situation as decisive:

This ‘conditioned’ limitation on hospitality by Kant was not an effort to promote a xenophobic nationalism, but was an attempt to limit imperial colonialism abroad. Thus, Kant’s distinction between *gastrecht* and *besuchsrecht* could be read as a necessary

¹¹¹ P. 314, in Brown, Garrett. 2010. "The Laws of Hospitality, Asylum Seekers and Cosmopolitan Right." *European Journal of Political Theory* 9, no. 3: 308-327.

¹¹² *Ibid.*, p. 316, my emphasis

¹¹³ P. 55, in Kant, Immanuel, and Hans Reiss. 1991. *Political Writings*. 2. enlarged ed., Cambridge Texts in the History of Political Thought. Cambridge: Cambridge University Press.

¹¹⁴ Brown 2010, p. 321

¹¹⁵ MM, 6:353

precondition for a more mutually consistent and universal application of cosmopolitan norms. This mutually consistent application of cosmopolitan right is a necessary condition for future justice, in that justice and the corresponding condition of public right are ‘the sum of conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom.’¹¹⁶

It is on this note that Brown develops a reading of Kant where “[...] the laws of hospitality could be seen as being specifically designed to act as a minimal foundation from which future discussions about cosmopolitan justice might take place between a plurality of world voices in an increasingly globalized world.”¹¹⁷ The law of hospitality is from this perspective understood as a cosmopolitan law that protects cosmopolitan interactions in its very initial stages: “This [law], since it has to do with the possible union of all nations with a view to certain universal laws for their possible commerce, can be called cosmopolitan [law].”¹¹⁸

Seen in this light, the right to visit is quite different from the current right to asylum. In addition to the negative duty of non-refoulement, it would imply the legal passage of asylum seekers “to present themselves” by applying for asylum. It would also allow economic migrants and intellectuals from all over to go where they want. Given that they have the resources to sustain themselves. Hence, it is a considerably wider notion of the right to first admission. It allows any individual to move freely between countries on a short term basis¹¹⁹, but without the guarantee of acquiring rights of second admission (i.e. long-term residency or membership rights). If we consider it as a moral-legal right it is indeed a radical proposal, consistent with a liberal cosmopolitan position on freedom of movement, but far from the actual practice of the international community of states.

It should also be noted that “possible commerce” refers to a wider notion of communication than the current use of “commerce” would indicate. Specifications of the cosmopolitan law of hospitality like ‘the right to present oneself for society’ or ‘the right to approach others with a view to engage in commerce’ are also intended to include deliberations of public reason on a global level and hence serve to protect the basic conditions of establishing a possible cosmopolitan legal order as a common framework.

When we consider the law of hospitality as a cosmopolitan law of deliberation, the main issue is concerned with the scope of the content. The question of a narrow or wide interpretation of the right to visit is relevant in this regard because a wider interpretation provides the basic and provisional content for the law of hospitality as a cosmopolitan law of deliberation, and not just of admission. The question of the character of the obligation implied takes on a secondary

¹¹⁶ Brown 2010, p. 314, Brown quotes from MM, 6:230

¹¹⁷ Ibid., p. 310

¹¹⁸ MM, 6:352

¹¹⁹ A global “*allemansrett*”.

significance. Given that the content of cosmopolitan law is moral-legal norms, any philanthropic or ethical-Samaritan elements in the content suggested would merely indicate a categorical mistake.

What is at stake in a wider interpretation of the right to visit is the *reflexivity* implied in the openness of the content of cosmopolitan law: The content is reflexive in the sense that it is not only concerned with the dignity of each human individual, but also with the social conditions that sustain the deliberations which may improve the adequacy of the content of the law. The deliberations which specify this content are important because it is futile to trust any one of us to determine the content of the law in isolation. This content cannot be determined by deduction from the principles of human dignity that should guide our public reason. We have to come to a compromise together and in terms that we can share.

Conclusion

In this chapter I've provided an answer to the question of the state's obligations toward foreign immigrants within the Kantian conceptual framework. Within this framework, the scope of justice is defined by the triad of public right. It implies that a cosmopolitan scope of obligations (of states toward foreigners, and individuals toward alien states) is seen as necessary in circumstances where foreigners affect each other to a certain degree. In conceptual terms this demand is distinct from the kind of obligations we associate with ethical-humanitarian duties. It is also important to note that any specification of this content is a compromise with outer circumstances. Such compromises are somewhat detached from positive law. The content of cosmopolitan law will never articulate perfect justice and are always open to further improvements and adjustments according to shifting circumstances. In light of these insights I have suggested two ways to read Kant's own specification of the cosmopolitan law (i.e. the right to visit): In a narrow reading it can be seen as a law of admission, and in a wider reading as a provisional content of a law of deliberation.

In the following chapters I will consider our current circumstances along two main lines. First, I will discuss how principles of justice have been given expression and concrete content within the dominating institutional order of the modern nation-state (chapter 3), and second, I will consider more specifically how the outer circumstances have changed after Kant's time in ways that are relevant to the question of extending the content of cosmopolitan law, as suggested by Benhabib's argument for a law of second admission. I will primarily consider Arendt's perspective on the experience of totalitarianism in this regard (chapter 4). Together, these lines will serve as the background for my discussion of the academic debate on immigration in chapter 5.

Chapter 3: We the people – A State-centric perspective on democratic participation

We are cultivated in high degree by art and science. We are civilized to the point of excess in all kinds of social courtesies and proprieties. But we are still a long way from the point where we could consider ourselves morally mature.

- Kant, *Idea of Universal History*

An implication of accepting that states are morally obliged to the cosmopolitan law of deliberation is that the state must secure foreigners' right to participate in the decision-making processes. In this chapter I will pursue how this conception of cosmopolitan law challenges the dominating state-centric conception of politics. By describing in detail some of the central aspects of a statist position, I will attempt to clarify how deep-seated assumptions in our public self-understanding make it difficult even to conceive of the possibility of a democratic cosmopolitan reform.

First of all, I will explain the notion of “state-centrism” and distinguish it from statism and nationalism. Further, I will address the state-centric conception on three levels: the methodological, our social imaginaries and theory. Regarding the methodological level, Rawls' conception of justice represents a state-centric paradigm. Although his conception can be considered a semi-cosmopolitan view, like Kant's, it could also, as I will show, be described as clearly state-centric in its methodological or procedural concerns. In other words, Rawls recognizes that the scope of justice is wider than the state (or “bounded society”), but he does not recognize cosmopolitan interaction as methodologically relevant.

The second level concerns our state-centric social imaginaries, i.e. the way in which the moral-legal principles of freedom and equality are given a specific content not only in positive law, but also in prejudices and expectations of everyday social life. I identify the state-centric character of social imaginaries by pointing out a tension in the secular social imaginary of civil society between the market and the public sphere.

On the third level, I will consider more specifically how state-centrism has influenced the main political theories of democracy. Part of this influence can be explained historically, as the modern ideas of democracy emerged as gradual reforms of the absolutist state. In the current theory of democracy there are, broadly speaking, two defining elements: The procedures of will-formation (voting, interest aggregation, constitutional rights) and procedures of opinion-formation (deliberation). The emphasis on either of these elements – in the different theoretical positions on democracy – is not only guided by principles, but also inspired by the secular social

imaginaries of civil society. In the end of this chapter I consider how the “deliberative turn” in democratic theory might open up for the recognition of the perspective of the foreigner by emphasizing the democratic significance of the public sphere.

3.1 The state-centric attitude

There is a historical background to the way liberal-democratic societies address political issues. It is the history of a political culture where the state apparatus has developed parallel to the implementation of a new moral order. Part of this modern order regulates the relation between political communities according to certain internationally recognized principles, such as state sovereignty and liberal-democratic norms of government. This is a combination we have grown accustomed to and usually take for granted in the form of the liberal-democratic nation-state.

It is symptomatic for most perspectives within the modern democratic tradition that they conceive of the state as the taken for granted location for political interaction. In the next section (3.2) I will present Rawls’ liberal-egalitarian, political conception of justice as an example of such a conventional *state-centric* approach. Although Rawls explicitly distances himself from the realist conception of the state on the normative level, his conception is in several ways still related to the influence from contractual theory and the implicit concept of state sovereignty inspired by the early modern absolutist political thinkers such as Thomas Hobbes.

A central feature of the way our sedimented tradition has formed our notions of political issues is detectible in the categories that are given primacy. By “state-centrism” I mean a perspective that gives (usually implicit) primacy to the state apparatus in the definition of political issues. In distinction from *statist* positions, *state-centric* approaches are not directly concerned with the scope of justice. Rather, these approaches tend to take for granted that there is a distinction between political and moral issues. To be ‘centric’ is a term that relies on a comparative relation to other perspectives. It points at aspects of habitual styles of thinking and implicit procedural preferences that manifest themselves in certain tendencies rather than in explicit arguments. The main tendencies that are relevant in this context are to exclude individual foreigners from issuing consent on the question of justice, to marginalize transnational issues –such as migration– as political phenomena, and the neglect of the epistemological relevance of the ‘view from elsewhere’.

To give primacy to the state apparatus in the definition of political issues implies, for instance, that imaginary extra-political entities, such as “the people” or “the civil society”, are confined by the limits of the territorial border. Rather than viewing borders as arbitrary lines in a continuous terrain, the state and its institutional infrastructure is seen as the defining source of boundaries. In

historical and geographical terms, this view seems to be confirmed by the diversity of languages and cultural identities normally found within a “people”. In the case of nationalism this diversity is countered by a political project of ethnic homogeneity within these territorial and institutional borders.

The imaginary of the nation-state is globally dominant,¹²⁰ but the state-centric attitude is not essentially defined by nationalism. First of all, the specification of “for whom” and “for what purpose” is to some degree detached from the “nation”, in the sense that “the state” – the instrument – encompasses anything from a city state to a multi-national federal union. Second, the character of “the people” is subject to political negotiations that are specific to the circumstances in each particular state. The relation between the “*for whom*” the state is the supreme legislative and sanctioning competence (as a *populous*; population), and the “*by whom*” the state offers privacy and the freedom to participate in democratic will formation (as a *demos*; sovereign people)¹²¹ is constantly renegotiated. After World War II the idea of homogeneous nation-states has been contested. Third, the defining trait of state-centrism is not the blood-line of its people, but, in Benhabib’s words: “the policing and protecting of state boundaries against foreigners and intruders, refugees and asylum seekers.”¹²² National belonging is but one of several competing concerns to legitimize this border-policing.

State-centric approaches tend to view the state as a self-sufficient entity, i.e. as a closed, self-sufficient system. This is conceptually questionable given that a state is part of a relational international order. Each state relies on being recognized by other states and hence to be part of some interstatal system. This order was given a recognizable form, at least for the European state system, in the Westphalian treaty of 1648. Within this international order of sovereign states, a state-centric definition of politics is fairly accurate in the sense that it adequately describes “politics” as those domestic issues that are habitually related to the territorial state. But from a critical perspective, this way of organizing political activity is clearly of a “second” or conventional nature. The basic disadvantage of state-centrism is a certain negligence or blindness for the political character of issues outside the accustomed institutionalized range of “politics” (domestic and interstatal issues). In other words, it characteristically ignores the actual mismatch between the conventional definition of politics and what I will call the cosmopolitan level of politics. The latter appears from a state-centric perspective either as an abstract utopian ideal of a global state, or as a practical anomaly due to non-ideal conditions. As an organizing assumption

¹²⁰ This imaginary is of course not always responsive to the actual diversity within the states, especially those that resemble more an empire or federation than a single state, or that bear the demographic marks of colonial history..

¹²¹ See for instance Nussbaum 2006.

¹²² Benhabib 2004, p. 2

of social reality, the state-centric conception of politics is in conflict with the possibility of a civil society with a “trans-statal” character.

3.1.1 The state of the people – distinguishing state from nation

While it is quite accurate to say that the modern notion of ‘the sovereign people’ developed parallel to democratic reforms of a state structure inherited from absolutist regimes, the idea of ‘the state of the people’ understood as a *nation-state* is a quite recent combination of two concepts with separate histories.

The historical cross-breeding of these two concepts into the nation-state, has infused the otherwise quite formal-egalitarian state-centric notion of politics with a socially integrating mythical appeal to homogeneity. The constitutional democracy of the nation state is in practical terms a successful and efficient combination of the ideas of the sovereign, self-constituting people (“we, the people” of the constitution) and the national myth of homogeneity.¹²³ This is a powerful combination that solves two basic societal tasks quite well. First: How to legitimize the secular state? And second: How to evoke a sense of solidarity and social integration within the population of such artificial mass societies as states?

In the next sections I will look closer at how the answer to the first question is addressed by Rawls and how his answer is related to some central traits of the historical development of the liberal-democratic theory in general. But, to avoid conceptual confusion, I will first take a look at the ambiguous way we use the term “nation” and compare its conceptual history to that of the “state”. As already discussed in chapter 2, if we look at the common use of the terms “nationality” and “international”, they both imply a conflation of two distinct terms: the nation and the state. “International relations” usually refers more precisely to “relations between states”.

On the one hand “nation” is originally related to the notion of being a native (from latin *natus*, which means birth). To be “a native” thus symbolizes authentic belonging to a group and a place. In its modern conception this mode of belonging is associated with the substantial, extra-political community (from latin *gens*; which means people, or the polity) that “aspire for, or exercise, comprehensive self-government”.¹²⁴ The extra-political people is also thought to lend its legitimacy to an established democratic government. In addition to the “classical nation-states” – which evolved from states to nations (such as France) we find within aspiring nations everything from regions seeking independence (ex. Norway, from Denmark and later Sweden, with

¹²³ Exactly what this idea of homogeneity is based on can be negotiated and revised, as the civil rights movement of the US is an encouraging example of.

¹²⁴ P. 704, in Bauböck, Rainer. 2003. "Towards a Political Theory of Migrant Transnationalism." *The International migration review* : IMR 37, no. 3: 24.

similarities to the post-colonial states), regions of states uniting (such as Germany and Italy) and (perhaps most spectacular and controversial) projects of “reconstruction” such as Israel and the South-African “Bantustans” (or pure constructions like the India/Pakistan-divide).

On the other hand, “nation” is also used as a synonym for the territorially bounded state. Often national self-determinacy is taken as synonymous with the status of being a sovereign state, and sometimes these do also (more or less) coincide. Still, we should be aware that the way we talk about ‘the nation’ assumes this coincidence in a hyperbolic manner. For instance, when we ask for someone’s “nationality”, we usually ask which state the person has citizenship in, but at the same time we strengthen the impression that all states are homogeneous (or mono-geneous; mono-national). Likewise, when we speak of “international” agreements, we usually intend the kind of agreements made *between* states, and not the kind of agreements made within multinational states, such as Spain, Belgium and the United Kingdom. If we look at how separate the conceptual stories of “state” and “nation” are, the inadequate conflation of these terms becomes even clearer.

The “state” emerged as the executive branch of the royal household. In addition to protecting external borders, its primary function was to uphold internal order by the measures of a standing army, a police force and a penal system. The democratic reform, promulgated by Locke, Rousseau and Kant, among others, implied that the executive branch was combined with a new legislative arrangement. In the liberal tradition, the state was also conceptually separated from civil society. At first, this conceptual separation was driven by the opposition against the mercantile regime. The liberalists understood civil society primarily to be the market and promoted accordingly the functional specification of the state apparatus as a purely administrative institution. Consequently, the state should no longer control the market from above, but secure and facilitate the infrastructure of production, without direct involvement in the productive tasks. Subsequently, other parts of society were recognized as independent from the state, such as the public sphere.¹²⁵

The “nation”, in contrast to citizenship (*civitas*) or the populace, was originally associated with communities of shared decent and heritage, and with a common geographical and cultural background. A nation was thus not necessarily associated with a political people, constituted by law. In early Middle Ages into early modern times “nations” functioned mainly to designate ‘country of origin’ that is, as internal differentiations in trans-border organizations, such as

¹²⁵ An indication of the wide acceptance of the latter is that even authoritarian regimes like the Russian and Chinese that aims to control the public sphere (through firewalls and state-run “civil” organizations), simultaneously wants to give an impression of the opposite. Hypocrisy is usually a reliable indicator of hegemony.

universities, monasteries, merchant settlements, etc.¹²⁶ In this practical context, national identity was ascribed rather than proclaimed by oneself¹²⁷: “[...] national origin ascribed by others was from the very beginning linked in a conspicuous way with the negative demarcation of foreigners from one’s own people.”¹²⁸ For instance, Bergen was a Hanseatic town with a designated district for “Germans” (or the “German harbor”) long before Germany was formed as a nation-state.

During the 19th century, popular national consciousness gained in strength,¹²⁹ and the old, non-political ideas of decent and origin increased in political relevance. The concept of nation “became an efficient mechanism for repudiating everything regarded as foreign, for devaluing other nations, and for excluding national, ethnic, and religious minorities, especially the Jews.”¹³⁰

According to Habermas, the combination of these two concepts into ‘nation-state’ gave our current political system a Janus-face. One face is turned forwards, as it were, to the coming actualization of a “we” as a democratic people: A sovereign people set to rule by legislation and supervise the state in order to fill the lacuna of the old divine legitimacy. But, as it turns out, most states has not been able to transform the idea of a political association of the free and equal into a sufficiently strong ground for patriotism and social integrity. The somewhat arbitrary ‘people of the territory’ do not seem to have had the driving force to establish a convincing second-nature “we”, especially when facing the social challenges of urbanization and economic modernization (economic inequity and class conflict). The second face is turned backwards toward the nation which the state is for. The idea of a pre-existing people has taken on, with the US as at least one clear exception, the function of dealing with the task of social integration. It fills a conceptual gap, according to Habermas, between the legal construction of the constitutional state and the arbitrary social boundaries of those gathered. In retrospect, this notion of a national community quite easily takes on the natural appearance of a common heritage; a common language and historical destiny, and thus infuses the people of the state with a sufficient degree of authenticity.¹³¹

This sense of (mechanic; in-group based) authenticity facilitates a certain level of trust which seems to make it easier to reach political consensus on, for example, a welfare-state definition of a common good. But, as Roger Brubaker has pointed out, this comes with a price: “[b]y inventing the national citizen and the legally homogenous national citizenry, the Revolution simultaneously

¹²⁶ Habermas 2001, p. 110

¹²⁷ Today: ethnicity has to a large extent replaced nation in this function. For instance: Facebook is ethnocentric and designates/tracks ethnicity as relevant behavioral factor unless you’re white (i.e. normal).

¹²⁸ *Ibid.*, p. 110

¹²⁹ It reflects a change in the imaginary from “Adelsnation” to “Volknation”.

¹³⁰ *Ibid.*, p. 111

¹³¹ *Ibid.*

invented the foreigner.”¹³² By interpreting the people as a nation, the citizen and the foreigner was symbolically coded in a particular manner that discriminated and excluded heterogeneous persons, potentially regardless of formal membership. “Nationals” that happened to be members of other states were more easily included, while citizens with an “originally” foreign nationality – such as minorities with cultural affiliations to other geographical regions – was met with suspicion.

As such, the “nation-state” reflects a specific collective self-understanding that defines the door-keeping function of the state in a particular manner. Hence the reference to Janus, the mythological god of gates and doorways, takes on a richer metaphorical sense: With one face turned toward the “authentic” past of national homogeneity, migration is turned into the antithesis of the nation-state and the corresponding vision of the future, where: “Every nation is called and therefore authorized to form a state [...]. Just as humanity is divided into a number of nations, so should the world be divided into just as many states. Each nation a state. Each state a national entity.”¹³³

This might appear as a neat and coherent idea, but has as potentially terrifying consequences in form of exclusions that cut across a complex interwoven social reality with a pair of scissors that merely follows the arbitrary lines drawn on the fabric. Similar to the imperialist division of Africa, nationalism disregards most of the social fabric by lifting up some features as non-arbitrary.¹³⁴ When naturalized, the right to national self-determination tends to make no distinction between nationals and rightful citizens. Minorities, indigenous or migrants, hence live on the mercy of *ad hoc* grounds of belonging and attachment.

3.2 Rawls’ state-centric conception of justice

If we return to Rawls’ account of the political conception of justice as presented in *Political Liberalism*,¹³⁵ we see clearly how the idea of a constitutional democracy qualifies the right to

¹³² P. 46, in Brubaker, Rogers. 1992. *Citizenship and Nationhood in France and Germany*. Cambridge, Mass.: Harvard University Press. See also Joppke, Christian. 2010. *Citizenship and Immigration*, Immigration & Society. Cambridge: Polity.

¹³³ From H-Schulze’s *Staat und Nation* (p. 225); quoted by Habermas 2001. The quote seems to be based on the statement of Johan Caspar Bluntschli, a liberal constitutional theorist.

¹³⁴ It should be mentioned that the colonial and nation-state form of government disregards the social fabric in different ways. Whereas the nation-state is a way to implement an unjust rule of the majority over minorities, the colonial strategy is formed by the ambition to implement the rule of force *as* a minority. The colonial strategy was sensitive to the multi-ethnic fabric of the territory (informed by ethnography) and exploited it to create or enhance internal antagonism. From a perspective which takes the nation-state model as its paradigm, the solution to the political problems of multi-national decolonized states seems to be to divide each territory into numerous sovereign states. A more civic approach would address the need to reform the sedimented colonial infrastructure of the state apparatus to ensure a better representative system.

¹³⁵ Rawls, John. 1993. *Political Liberalism*, The John Dewey Essays in Philosophy. New York: Columbia University Press.

participate in cases that affect us. First of all, the element of democracy is qualified as the sovereignty of a people. The “people” is here understood a semi-formal group of those parties that have given their acceptance to the political community as their hypothetical or continuously constitutive agent.

In contrast to a spontaneous democratic assembly or voluntary associations, the idea of “the people” already imbues democratic interaction with a sense of a substantial cultural – almost natural – boundary. The related problematic tendency is not that “the people” takes on the sense of a habitual second nature, but that it is often confused with a “first” nature (i.e. something essential and unchanging, like the classical laws of physics). In other words, in regard to most issues there is certainly a practical convenience in “the people” for granted, but this should not lead us to take it as a natural kind. This is a sensitive issue since the idea of a people is central to the (state-centric) legitimation of the state, which in its modern form, is *for* and *by* the people.

Rawls defines the people in *Laws of peoples*¹³⁶ as a liberal democratic people. The “people” bears a relational symmetry to the citizens as agents of justice on the domestic level. Rawls designates three basic features of “peoples”: “a reasonably just constitutional democratic government that serves their fundamental interest; citizens united by [common sympathies], and finally, a moral nature. The first is institutional, the second cultural, and the third requires a firm attachment to a political (moral) conception of right and justice.”¹³⁷ Characteristic of a modern-secular account, the people is understood as partly the constituent of – and partly external to – the state. Accordingly, this account understands the “peoples” on the international level as acting both through their respective governments and independent of them. Symptomatically, Rawls’ choice of title complies with the Kantian interstate level (“rights of nations” or “*ius gentium*”), and indicates the marginalized concern for the cosmopolitan category in his state-centric conception of politics.

It should also be noted that Rawls, in commenting on “common sympathies”, is careful to avoid any deep-rooted assumptions of the people as *ethnos*.¹³⁸ Rawls points out how conquest and

¹³⁶ ---. 1999. *The Law of Peoples: With "the Idea of Public Reason Revisited"*. Cambridge, Mass.: Harvard University Press.

¹³⁷ Rawls 1993, p. 23

¹³⁸ The latin word *natio* has given us the word most commonly used in the political context, namely people as “nation”. But, nation has historically retained the ambiguity expressed in two Greek words for people: *demos* and *ethnos*. The *demos* is associated primarily with the collective agent that is aspiring to or has been constituted as a political community, while *ethnos* adheres to the idea of a people sharing a history and social tradition. In a brief historical summary, the *demos* established the liberal constitutional states, and the *ethnos* reconstructed the founding act as a genuine expression, in nationalist retrospection. See Habermas 2001 133-43, and 494-5 in Habermas, Jürgen. 1996. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Studies in Contemporary German Social Thought. Cambridge, Mass.: MIT Press. I will later refer to this ambiguity as the Janus-faced conception of the nation-state.

immigration have caused an historical intermingling of groups with different languages and historical memories. The cultural feature of unity through sympathy is thus quite weak, and probably closer to what Habermas call the “ethical-political self-understanding of the citizens” (*demoi*) [civil religion of the US]¹³⁹, than a “full range local culture” (*ethnos*).¹⁴⁰ Hence, Rawls is not a nationalistic theorist, but takes the state-centric view that the “people” might be multi-ethnic.

As indicated by the first of Rawls’ three features of ‘the people’, the democratic idea of a sovereign people is institutionally married to the liberal constitutional state. While this intimate bond to the state is more implicit in *Political Liberalism*, it is noticeable already in the manner in which Rawls formulates the fundamental problem of political liberalism:

How is it possible for there to exist over time a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical and moral doctrines?¹⁴¹

The political conception of “justice as fairness” aims to answer this fundamental question. More precisely, it intends to provide an accepted measure, a shared reason or a “point of view from which all citizens can examine before one another whether their political and social institutions are just.”¹⁴² Hence, even though Rawls takes distance from a strong nationalist conception of the people, the basic question of justice is nonetheless provided with a limited location internal to the state: i.e. *between citizens*. Universal participation or consent is acknowledged within the formal criterion of affectedness as including “all citizens”.¹⁴³

The close association between the political and the question of justice provides the connecting link between the political and the constitutional state in Rawls state-centrism. Rawls defines the domain of justice as the “basic structure of society”, and this basic structure is defined as “a society’s main political, social, economic institutions, and how they fit together into one unified system of social cooperation from one generation to the next.”¹⁴⁴ The paradigmatic case is the

¹³⁹ Habermas 2001, p. 228

¹⁴⁰ Rawls 1993, p. 9

¹⁴¹ *Ibid.*, p. 4. For theoretical implications of putting the question in the manner of the possibility of a stable society and on the critique of Rawls’ transcendental institutionalism, see Sen, Amartya. 2009. *The Idea of Justice*. Cambridge, Mass.: Belknap Press of Harvard University Press.

¹⁴² P. 229, Rawls, John. 1985. "Justice as Fairness - Political Not Metaphysical." *Philosophy & Public Affairs* 14, no. 3: 223-251. <Go to ISI>://WOS:A1985APA8500001.

¹⁴³ The critique of Rawls which concerns the marginalization of groups within the domestic domain, such as women and handicapped, are obviously important issues addressing the assumed neutrality of a liberal perspective on diversity. See for instance Nussbaum 2006. There is a relation to the issue of immigration in this critique to the extent that foreign residents, and especially irregular migrants, represent one of the most vulnerable groups in this regard. I’ll get back to this issue in chapter 6.

¹⁴⁴ Rawls 1993, p. 11

modern constitutional democracy.¹⁴⁵ In sum, Rawls defines the scope of political issues according to the domain of justice, which is explicitly determined by the scope of the modern state.

3.2.1 Rawls' explicit methodological state-centrism

So far, I have merely indicated how implicit state-centric presumptions form the basic premises of Rawls' political liberalism. This is not particular to Rawls. He is, however, noticeable in his explication of the state-centric perspective as a procedural preference because of its abstracting effect. Explaining how the basic structure orients his further considerations, Rawls assumes that this basic structure – the main political, social and economic institutions – belongs to a “closed society”. In other words, the perspective is not merely state-centric, but it methodologically assumes that this center is given the substantial character of a “self-contained” realm, isolated from other societies, where we enter and exit only by birth and death.

This explicit, methodological state-centric approach is part of Rawls' procedural terms that define the famous thought experiment of ‘the original position’. It is legitimated as an analytical device: “That society is closed is a considerable abstraction, justified only because it enables us to focus on certain main questions free from distracting details.”¹⁴⁶ To be clear; the concept of a closed society is not intended as a sociological description or normative model, it has a *methodological* purpose. It works in the manner of an *epoché* in that it puts in brackets or suspends all distracting concerns and thus allows for a certain focus:

Other questions we can discuss later, and how we answer them may require us to revise answers already reached. This back-and-forth procedure is to be expected. We may think of these other questions as problems of extension.¹⁴⁷

This tendency to postpone “other questions” is perhaps the clearest implication of what we might call an explicit methodological state-centrism. It organizes some questions as primary and central and others as secondary and peripheral. Among the peripheral, distracting details we would assume to find cosmopolitan issues, but we have to look outside the work of Rawls to find examples that address the cosmopolitan problems of extension.¹⁴⁸

In my view, there are consequences of the methodological preference for a “closed society” which are not so easily redeemed by the subsequent consideration of “other problems”.¹⁴⁹ This

¹⁴⁵ In a globalize context, the state-defined scope of the basic structure can be questioned, see for instance Fraser, N. 2012. "On Justice. Lessons from Plato, Rawls and Ishiguro." *New Left review*, no. 74: 41-52.

¹⁴⁶ Rawls 1993, p. 12

¹⁴⁷ *Ibid.*, p. 20

¹⁴⁸ The most famous accounts are given by Charles Beitz and Thomas Pogge. Concerning migration Joseph Carens' work is most relevant. I will return to Carens' argument in chapter 5.

¹⁴⁹ See Sen 2009 for critique of this preference as procedural parochialism. Addressed in chapter 4.

kind of bracketing of the external world when answering the big questions of justice leaves a mark on the subsequent re-concretization when lifting the ‘veil of ignorance’; including the voluntary neglect of the external world. It bears semblance to planning the basic infrastructure for private cars and only then include environmental concerns and concerns for pedestrians. Most noticeably in Rawls case, all interactions still seem to take place within a state-centric order.¹⁵⁰ For instance, the suspension of the external world suggests that all non-domestic issues are either subject to interstate law or to ethical-humanitarian norms. As suggested by O’Neill’s critique of Rawls’ notion of public reason, there is hardly any room for relevant cosmopolitan or transnational relations. The idea of a global public is at best marginalized.

Rawls’ methodical approach is perhaps the clearest case within the moderate political spectrum of a state-centric bias, but, as I claimed initially, I take it to be symptomatic for the whole tradition of democratic theory. The idea of a sovereign people as well as the combination of democracy with a liberal constitution runs deep in our tradition. However, the state-centric position is often, associated with political realism which conceives of states as strategic agents, seeking security and prosperity for its subject in an antagonistic international environment and we should note that Rawls’ notion of “the people” deliberately takes some distance from this realist conception of the state.

Since Rawls is recognized as one of the most influential theorists on domestic issues of justice, he has often been a target of critique from cosmopolitan perspectives. For instance, an important thinker on immigration like Seyla Benhabib is very critical to Rawls’ “closed” account. She argues that Rawls’ concepts of “the basic structure” and “the people” makes the question of political membership invisible, and hence the phenomenon of immigration is relegated to the margins of political reflection as an insignificant, non-ideal anomaly. Rawls even assumes that the causes of transnational migration will vanish in the ideal state of “the Society of liberal and decent Peoples”.¹⁵¹ In a footnote in the paragraph on the “Role of Boundaries” (§ 4.3), Rawls briefly mentions a qualified right to limited immigration (defined by the imperfect, Samaritan duties of “well-ordered societies” to “burdened societies”) and basically agrees with Michael Walzer’s the communitarian position on the concern for protecting a people’s public culture and

¹⁵⁰ A similar defect is noticeable in the performance of the transcendental epoché in Husserlian phenomenology. Whereas the intension might be a provisional suspension of realism in order to thematize the environment according to its character of being performed by the transcendental subject, the subsequent release of the brackets have a tendency to leave the impression that all must relate to the ego. We might call it a ‘substantialist bias’ of the performance of an epoché or, in Rawls terms, the procedural bias of a “considerable abstraction”.

¹⁵¹ For instance, there is little from the latest experience of globalization that indicates that bringing Asians and Africans out of extreme poverty will stagger migration. The reverse seems to be the case: the more affluent we are, the more mobile we are.

constitutional principles.¹⁵² It is, in other words, a conception that hardly could be said to take cosmopolitan issues seriously.¹⁵³ It is also a surprising position, given Rawls' general critique of communitarian positions and his commitment to public reason.

3.2.2 The public political culture

Rawls' argument in *Political Liberalism* relies on the assumption that we have grown accustomed to a liberal state-centrism. Rawls claims that his political conception of justice should be generally accepted on the basis that it explicates values and virtues already inherent in the culture of constitutional democracies. As reflected in my initial discussion in this chapter, I agree with this notion of a shared political culture on the descriptive level, without acknowledging its normative legitimacy beyond its coherence.¹⁵⁴ I think it is possible to argue against Rawls' normative position in two ways: First, by questioning the soundness of grounding a conception of justice in a shared public political culture. I address this as *the problem of autonomy*. Second, even if we grant the possible universal validity of such a political culture, we cannot trust Rawls' procedure to provide a sufficient guarantee against parochial biases in the cosmopolitan revision of this culture. Rawls' cosmopolitan position is at best naïve, and his methodology must answer to *the problem of procedural parochialism*.

In order to explicate the first argument, Rawls' notion of a public political culture must be clarified. In addition to defining the subject of justice as 'the basic structure of society', Rawls adds two additional features to his 'political conception of justice': First, the political conception of justice is presented as a "freestanding view" based on political values and virtues of society. While the political conception of justice relies on support from more comprehensive, reasonable¹⁵⁵ doctrines, it is not derived from any doctrine in particular. Second, and most relevant in our context, these *specific political values*, or "ideas", are implicit in "the public political culture of a democratic society". Hence, the ground of the political conception is presumed to have an implicit general acceptance, in distinction from values and virtues related to more particularly held comprehensive doctrines of the "background culture". The background culture of the social is the culture of daily life and associations of civil society, while the culture of the

¹⁵² Rawls 1999, p. 39

¹⁵³ Nor did Kant, if we consider the insignificant amount of paper and ink spent on the issue. But, at least for Kant it was a central issue and a regulative idea.

¹⁵⁴ Jorgen Pedersen has made clear to me that, contrary to Habermas' reading of Rawls as an analytical desktop constructivist, that Rawls should be understood (at least in his turn from theory to conception of justice) to take on a Hegelian project of foundation, where the validity of the conception rests on its consistency with the ideas implicit in the historical-institutional emergence of political life. In this reading, the idea of the political as defined by the institutional reality is not surprising at all. My aim is to contest the assumption of its foundational value, but without pretending to regain the privileged "theoretical" point of view of justice.

¹⁵⁵ In Rawls' specific use of the term.

political is related specifically to those aspects of society that are related to the basic structure (i.e. to justice).

The “specific political ideas” are for Rawls basically linked to the articulation of the principles of liberty and equality. The strength of his account is that it allows a diversity of competing doctrines to agree on a minimal common framework, to which each party may give a more comprehensive ground according to their specific doctrines. If we consider its descriptive accuracy, it seems to have a well-founded support in the historical accounts of political ideas. For instance, Charles Taylor’s historical description of the evolving ‘social imaginaries’ in Western political culture depicts a development along these lines. Basically, the theoretical ideas of the Enlightenment and the French revolution has spread and intensified to the extent that it has become part and parcel of our everyday life and social practice.

Taylor’s descriptive account (3.3), confirms a deep embeddedness in the public political culture of the political ideas that Rawls aims to explicate. However, the fact that the background culture relies on the historical dialogue with the ideas that inspired the French revolution and the primary institution of the democratic nation-state should make us cautious about their alleged neutrality. If the idea is to explicate the values and virtues that accompany the modern (successful) establishment of a democratic public order on the state level, this might be reasonable enough. However, if we want this historical answer to the question of the scope and character of justice to guide a cosmopolitan reform, we have to raise the concern that these Enlightenment ideas were, for the most part, articulated to address issues of domestic law. In other words, I accept Rawls’ claim that he articulates the conventional view in a clear manner, and I could even be willing to grant that he does so in a way that reflects its ideal institutions. But I do not accept that we should trust our conventions – our old maps – in all matters, and the issue of transnational migration makes the inadequacy of our conventional conceptions of justice particularly acute. How can we rely on our political tradition to provide guidelines if it did not evolve in an environment concerned with cosmopolitan law?

Following Waldron’s view (see 2.3), Rawls’s conception could face this challenge in one of two ways: It could appeal to a multiculturalist and traditionalist view, arguing that “this is our people’s peculiar way of public life”, which would lead to a position similar to the communitarian, which seems unacceptable in light of Rawls’ general commitments. Or, it could concede that this conception *is* universalist, but cosmopolitan naïve. This would imply that Rawls conception is seen to hold a universal truth of practical political wisdom, although it has not taken cosmopolitan concerns into proper consideration. This could to some degree redeem the

problem of autonomy which O'Neill has raised. To acknowledge that the conception of justice is cosmopolitan naïve would not require it to give up its universalist ambitions, but it would require that the conception could be judged as an inadequate compromise of justice given actual cosmopolitan circumstances. In other words, it could be seen as a plausible answer to the basic structure of society (including domestic law and interstate law), but it would be vulnerable to critique from cosmopolitan conceptions of justice. And, in competition with such other conceptions, it would intuitively be left unattractive due to its lack of a balanced concern of public right in regard to cosmopolitan law.

Furthermore, even if Rawls' conception is able to deal with the problem of autonomy, there is still an epistemological problem with the lack of procedural guarantees against parochial biases. I will address this critique in the next chapter (see 4.4.2). In the following I will elaborate in more detail on Taylor's account of the modern social imaginary. Taylor gives, in many ways, a historical account of the development of the shared public political culture and explains how the theoretical ideas of justice could evolve into a shared social imaginary of everyday political life.

3.3 The state-centric, democratic social imaginaries

Taylor's historical account of how the modern moral order of mutual respect and mutual benefit has reformed political and extra-political practices, gives support to Rawls claim to explicate principles of the 'public political culture'. If Taylor's account of how theoretical ideas of the enlightenment have spread into almost every aspect of our everyday life is accurate, this resonance is however not very surprising. Rather, it seems to question the adequacy of Rawls distinction between a public political culture and the cultural background of various doctrines. With the concept of "social imaginaries", Taylor describes how secular modernity implied a radical shift in our whole way of relating to each other, our "common sense" so to speak, far beyond the formal political sphere. This might not contradict Rawls account, but through the perspective of social imaginaries we get a clearer understanding of how different the various spheres of civil society are and how civil society should not be thought of as merely defined by – or instituted through – the state. In fact, an important aspect of the secular social imaginary is the capacity of human individuals to establish civil society on their own initiative. The imaginaries of a free market and the free public sphere reflect this idea, and in terms of cosmopolitan reforms, the question of basic structures should adapt to the globalizing development of these spheres, not the other way around.

In his essay *Modern Social Imaginaries*¹⁵⁶ Charles Taylor aims –in the context of the increasingly relevant notion of a multi-centered global community and of multiple modernities¹⁵⁷– to clarify Western modernity on the level of the social imaginary, The essay follows in extraordinary detail the history of the transition from the old to the modern moral order. In brief, this story is accounted for along three axes: First, the moral order expands from the niche of political legitimacy to all areas of modern life. Second, the moral order expands from the level of theory to the level of everyday-life imaginaries and recipes of social practice. Third, it goes from giving interpretative guidelines for recognizing the legitimacy of *status quo* (both social differences and equality), to provide normative guidelines for realistic improvements (ideal solutions).

In content, the new moral order breaks with the old in numerous ways. The aspect most emphasized by Taylor is the move from an idea of a hierarchical order with its inherent teleological form, to an idea of an egalitarian order where the members articulate the common good themselves. The old order was based on the idea of harmony among different social orders (for instance: those who prey, those who fight, and those who work) as complementary parts of an organic totality. Self-interest and conflict was seen as unhealthy to the political body. The new order is based on the mutual benefits of free individuals that use the social order as an instrument for self-preservation. The common goods of security and economic prosperity were most broadly recognized. Accordingly, the pursuit of self-interest and differences of opinion is no longer seen as unhealthy, but rather as essential sources of a vibrant and diverse communal life.

How could this extraordinary social transformation take place? How could it be that these ground-breaking ideas, introduced a few centuries ago, already infiltrates our social practices and outlook to such an extent that another way of life is hardly conceivable? Or, as Rawls would put it, to the extent that, any reasonable doctrine would agree to it? Taylor answers these questions in detail; but I will limit myself to some brief remarks on a few critical points: First on the general character of the modern social imaginaries, and second on the more specific imaginaries of civil society as economy and public sphere.

¹⁵⁶ First as article: "Modern social Imaginaries", Public culture vol. 14/1 (2002), then as book: *Modern social imaginaries*, Duke press 2003. Last as chapter of a book: *Taylor, Charles. 2007. A Secular Age. Cambridge, Mass.: Belknap Press of Harvard University Press.* The last version from 2007 is extended with a discussion the three main aspects of the modern social imaginaries: the economy, the public sphere and the sovereign people.

¹⁵⁷ See Gaonkar, Dilip Parameshwar. 2001. *Alternative Modernities*, A Millennial Quartet Book. Durham, NC: Duke University Press. See also Eisenstadt, S. N. 2000. "Multiple Modernities." *Daedalus : proceedings of the American Academy of Arts and Sciences* 129, no. 1: 30. Taylor's account suffers from this restriction in his analysis. Especially: 1) I find it questionable that the analysis does not account for the significance of a co-constitutive outside, see for instance Lewis Gordon on the development of the notion of Europe, and the distinction between *humanitas* and *antropos*. 2) In a somewhat similar line, I am critical to the lack of the way the redactions are unmotivated. For genealogical account of citizenship, see Isin, Engin F. 2002. *Being Political : Genealogies of Citizenship*. Minneapolis: University of Minnesota Press.

3.3.1 The modern moral order and social imaginaries

Similar to Newton's introduction of homogeneous¹⁵⁸ time and space in the physical universe, the early modern political thinkers introduced ideas of a social order founded on – and consisting only of – events on the same secular-historical plane.¹⁵⁹ To Newton, the same laws applied in heaven and on earth, and analogously, in modern political thought, there is no “time of origin” or “higher time” that explains how the current social order was implemented. It was still common to presume a privileged historical event, mostly quite hypothetical (in varying degrees from pure abstract speculation to historical hypotheses), that led ordinary men to go from a natural state to civil society. To some, this was seen as the articulation of God's will or the Law of Nature, but the crucial point, even in the religiously motivated positions, was that the secular political society was formed by human capacities alone. It was human made and could be established and improved only within secular history. There was no normative value inherent to the order, rather, political society served as an *instrument* for common, pre- or extra-political purposes.¹⁶⁰ Consequently, the assumption that the family or the state are institutions that *by necessity* carries certain moral and political norms with them, which is found in statist positions, bear traces of the old moral order. The modern moral order assigns to these institutions a mere functional value according to extra-political purposes. In the case of the modern state, it serves the interests of the civil society. Hence, *how* we understand this civil society to be, have direct consequences for the way we understand the proper character of the modern state.

Taylor points out that a reason for telling this story, is that we should avoid the modern parochial bias of thinking of modern society as the result of a “subtraction” from the old regime. This assumption tends to tell a story where the removal of social oppression and the corresponding deceptive imaginary leaves us naturally with individualism, i.e. the state where individuals seek conventional agreements based on mutual benefit. Taylor rejects this assumption and insists that the transition involved, and still involves, an inventive and constructive effort.¹⁶¹ These were not truths waiting to be discovered.¹⁶² For instance, the secular imaginaries are not merely the

¹⁵⁸ “-genous” is used here according to the Greek word for “kind”, *genos*. So far I've used the term playfully as synonym to the Latin “*gens*”, which means people or more precisely “family/tribe with a shared forefather” (*nomen*).

¹⁵⁹ The specific way Taylor uses the word “secular” gives us an important clue: “Where the constituting factor [of an association] is nothing other than [those common, worldly actions this group of people engages in] – whether the founding acts have already occurred in the past, or are now coming about is immaterial – we have secularity.” (2007, p. 194)

¹⁶⁰ I prefer to call some of these, especially those related to opinion-formation, proto-political. But, this relies on a non-state-centric premise of the definition of the political which I have yet to account for properly.

¹⁶¹ Taylor 2007, p. 168-169

¹⁶² These perspectives are very similar to Louise Dumont's studies of India. The idea Taylor pursues is to view the modern egalitarian order from the perspective of the traditional hierarchical, rather than accepting the lazy “subtraction story” of the modern perspective about the traditional.

standing result of removing God or spirituality from the equation. It rather implies a radical reinvention of civil society and the way we inhabit social time and space.

To tell the history of expansion indicated above, Taylor adapts the notion of “social imaginary” to be able to describe it in fuller detail. Distinct from *social theory* or the conceptual level of justice, social imaginaries is intended to draw our attention to the historical dimensions of lived experience and how we think and act politically in typically modern, everyday-life situations. Put differently, with “social imaginaries” Taylor aims for something closer to the perspective of ordinary life, i.e. the street-level perspective of the citizen, rather than to the classical master perspective of social theory.¹⁶³ In a Kantian perspective, the concept of social imaginaries describes the process where principles of justice are not only given concrete expression in positive law, but are also manifested in the content of actual face-to-face interaction.

Social imaginaries give us a sense of the social terrain and how we all fit together. Since it is not only a theory held by a few, it has the practical value of a widely assumed reciprocal image, i.e. common sense (*doxa*). They have in this sense a descriptive aspect to them, they help us interpret and grasp our social surroundings. In addition, the social imaginaries also provide the prescriptive capacity to point out wrong-doing and ideal cases of collective practices.¹⁶⁴

Taylor distinguishes between roughly three levels within the notion of social imaginaries. There are the specific recipes of collective actions (such as how to organize a demonstration), and there is the contextual understanding of the function of such actions, which can subsequently be nuanced in a narrow and wider background¹⁶⁵:

The immediate sense of what we’re doing, getting the message to the government and our fellow citizens that the cuts must stop, say, makes sense in a wider context, in which we

¹⁶³ “[Social imaginary refer to] the ways in which people imagine their social existence, how they fit together with others, how things go on between them and their fellows, the expectations that are normally met, and the deeper normative notions and images that underlie these expectations. [...] I speak of *imaginary* because I’m talking about the way ordinary people “imagine” their social surroundings, and this is often not expressed in theoretical terms; it is carried in images, stories, and legends. [...] It incorporates a sense of the normal expectations that we have of one another, the kind of common understanding which enables us to carry out the collective practices that make up our social life.” (Taylor 2002, p. 106, see also Taylor 2007, p. 171-2)

¹⁶⁴ Although Rawls moderated his early analytic theory-oriented view to a more dialectic history-oriented one, Taylor’s approach here is quite different. Whereas Rawls still aims for a conception that may articulate a possible overlapping consensus of the principles of the public political culture, Taylor aims to describe the impact of these principles from a street-level, lifeworld perspective. Where the former seeks to find unity in the manifold, the latter seeks to elaborate on the diverse parts of a shared whole or background.

¹⁶⁵ Dreyfus discusses Heidegger in context with Polanyi and Wittgenstein (in general we might discuss the anthropological turn in philosophy and the emphasis on tacit knowledge, natural language and lifeworld as pre-given features that we cannot break loose from.) The anthropological turn of Husserl implies the conceptual reform of the notion of “horizon” from a psychological to a sociological and anthropological concept. “Constitution” [*Horizontbildung*] is not a mere isolated function of the ego, but a collective performance (linguistically and corporatively).

see ourselves as standing in a continuing relation with others, in which it is appropriate to address them in this manner, and not say, by humble supplication, or by threats of armed insurrection.¹⁶⁶

In terms of concrete gestures, as civilized moderns we don't fold our hands to beg for mercy, nor do we threaten with violence, we symbolically negate the offer by shaking our heads and claim our rightful demands. Further, the social imaginary spans from the kind of immediate and implicit grasp of a social map¹⁶⁷ that makes the current social situation meaningful – such as the role I have in the demonstration and what is appropriate to say and do under these specific circumstances, to a grasp of a wider context of where we are in “time and space”. The former can be understood as an intuitive understanding of social relevance,¹⁶⁸ and it is the lack of this intuitive situation-dependent relevance which makes “strangers” or people unfamiliar to the circumstances act a bit weird and sometimes even appear to be rude. The latter can be understood as the way we imagine our history and the society of which we are members and participants. When we encounter people with different imaginaries of society – the “wider context” – we easily go from awkward to incomprehensible or unreasonable, and ultimately intolerable.¹⁶⁹

Taylor's main historical thesis is that through “the long march” from the Enlightenment to the contemporary situation, the explicit map of the Enlightenment has been woven into and transformed into an implicit map of social and political life. The way we understand particular actions today in light of the relations we have to other people, to power, to other nations, and the way we understand them located in space and time, is colored by the theoretical ideas of people like Grotius and Locke. It should also be noted that this is not a one-way process; the theories have also been transformed (“glossed”) down the road. Even in academic environments where historical progress is generally questioned, this transformation is commonly accepted as a process

¹⁶⁶ Taylor 2007, p. 174

¹⁶⁷ “This implicit grasp of social space is unlike a theoretical description of this space, distinguishing different kinds of people, and the norms connected to them. The understanding expressed in practice stands to social theory the way my ability to get around a familiar environment stand to a (literal) map of this area. I am able to orient myself without ever having adopted the standpoint of overview that the map offers me. And, similarly, for most of human history and most of social life, we function through the grasp we have on the common repertory, without benefit of theoretical overview. Humans operated with social imaginary well before they ever got into the business of theorizing about themselves.” (Taylor 2007, p. 173) In a footnote connected to this paragraph, Taylor refers to the social trust of economy, and the decisive difference between social trust based on kin and that based on imagined societies of strangers.

¹⁶⁸ Schutz, Alfred. 1944. "The Stranger: An Essay in Social Psychology." *American Journal of Sociology* 49, no. 6: 499-507.

¹⁶⁹ A particularly difficult question is how to deal with imaginaries that combine religion with nationalism; such as Israeli Zionism, Chinese Confucianism, Indian Hinduism, Islamism of Arab nations, and Russian and American Christianity (more or less corresponding to Samuel Huntington's map contemporary civilizations). Taking these imaginaries seriously, we should nonetheless also appreciate the significant degree of simultaneity and secularity on a global level today. The scenario of a clash might be plausible, but I don't see it as inevitable.

of moral progress or maturing. To draw a simple line of development in modern political theory, it has evolved from supporting the absolutist state, through its liberal-international critique and to a cosmopolitan redaction.¹⁷⁰

There are of course competing social imaginaries in our current globalized society as well (similar to Rawls notion of ‘doctrines’). A central political question is how we should deal with this variation and – given that imaginaries provide not only interpretative keys, but normative guidance – and how far one can tolerate deviating imaginaries. In the following I will present two central modern social imaginaries that represent paradigmatic solutions to these problems. First, we have the social imaginary of *the economy*, which solves the question of diversity negatively by restricting the scope of mutual benefit to a minimum. Within a political framework where people feel secure, individuals might engage in trading and civil production in pursuit of their own interests. A common conception of the good life is not seen as necessary, but is normatively grounded in the systemic idea of a common wealth. Second, we have the social imaginary of *the public sphere*, which approaches the question of diversity positively by allowing for the expression and confrontation of different conceptions (or doctrines) of the common good. The latter model would be critical to the lack of publicity and controversy around the tacitly held common good of the market as the general prosperity or providence of society.

3.3.2 The economy and the public sphere – harmonious order and collective agency

In the next section (3.4) I will discuss at some length how the principles of freedom and equality have developed within democracy theory. To prepare this discussion it is useful to sketch out how these conceptions have transformed in relation to the “bifocal” modern social imaginaries of the civil society “outside” the governmental institutions – the economic system and the collective agency of the public sphere. To give a simple sketch we might say that the social imaginary of the economic system co-evolved with the modern notion of liberal freedom. In light of the idea of a cosmopolitan law of deliberation, we might say that the right to present oneself to society, or simply the liberal freedom of movement, is inspired by the idea of the need for restrictions on state interference in the free market. In a roughly parallel manner, the imaginary of the public sphere co-evolved with the modern notion of (republican) equality.¹⁷¹ In recent the recent

¹⁷⁰ Benhabib draws this developing line in *The Rights of Others* (2004).

¹⁷¹ Although the old republican ideal of direct participation in the public assembly of free men is unfeasible in the modern society, the ideas of liberation from necessities and the equality of free men can still find its relevance within and outside the representative system of government. Given that freedom in the old mode of production implied dependence on the slavery of others, it is clearly not desirable in its original form. In its modern form the emphasis is more on the equality of opportunities. In this light the increase in domestic economic inequality is a democratic problem to the extent that it reduces the middle-class. This concern rests on the assumption that fairly economically secure and well-informed citizens are crucial resources for a democratic society, because they are able to participate

decades the deliberative turn in democracy theory¹⁷² has made it clear that the equality of participation implies more than the individual right to vote and the negative duty of the state to abstain from censorship. On a cosmopolitan level, this implies that the “further deliberations” on the content of cosmopolitan law should be actively facilitated in the transstatal public sphere and not just passively allowed by the states. In order to defend this extended account of cosmopolitan law, it is necessary to detach “the political” from the conventional political institutions and connect it the life of civil society. Hence, in terms of the “basic structure of society”, the divide between the political and the social and economic institutions will be blurred to the point where we could say: State- and international institutions should be conceived as means to protect the political. The political should not be seen as a means to run the state.

To suggest how this conceptual detachment is possible, I will describe how imaginary of the civil society (“the social and economic”) is already in the process of detachment from the state according to secularization. The first sphere of civil society to emerge as separated from the state in the modern imaginary was “the economy” or the market. The transition from a mercantile system to a free market was not just the “subtraction” of royal (or any central and absolute despotic) regulation of the production; it also involved – and partly presupposed – a radical change in how we understand human society. This sphere is already to some extent globalized in our imaginary. The second sphere, which is still in large connected to the state, is the public sphere.

3.3.3 The economy – the paradigm of an extra-political social system

The basic idea of the modern economy is that a systematic coordination of free, self-interested and rational agents will benefit the general level of wealth. The participants engage in commercial activity for their own benefit, but from an observer’s standpoint it has the side-effect of generating increased total wealth.¹⁷³ The early models understood this effect as an expression of “God’s providence”, but as Taylor points out, there were some clearly secular and groundbreaking traits defining these models. The economy was no longer perceived as part of a harmonious social order, but as a system of interlocking causes. The system itself was morally blind, but has famously been ascribed to the workings of an “invisible hand”. However, this image suggested the workings of the hand of a good engineer (mechanics) and not some esoteric source of order (teleology).

beyond giving their vote every now and then. To be “liberated from necessities” defines a criterion of the middle-class which is not related to what you do for a living, but under which conditions one is able to hold a vocation.

¹⁷² See also 3.4.

¹⁷³ If the observer relies on tax-revenues, such as the state apparatus, it quite clearly creates its own rationale for tending to the vitality of the market.

Although the market is no longer understood as part of a predefined social order, the modern imaginary of the market still has a tendency to appeal – by its systemic character– to the idea of the market as nature. This is also clear in the way the individual agents of the market are defined by their generic, psychological makeup. The hand of God (and later: natural evolution) introduced the “happy design” of human life, especially of human passions. Mainly, our “search for individual prosperity” and “impetus for money-making” was associated with productivity and peace. Conveniently, as to secure the order with meritocratic legitimacy, we were also naturally inclined to admire the rank and fortune of the rich and well-born.¹⁷⁴

Although these naturalizing psychological hypotheses remain controversial, the rhetorical purpose of the arguments is quite clear: They were meant to convince people that state interference in the market was unnecessary. This separation from the state is also detectible in the altered moral code of civil society and the rejection of military glory as a virtue. As part of the civilizing process,¹⁷⁵ the economic understanding of society “dethroned war as the highest human activity, and put in its place production.”¹⁷⁶ A more subtle change involved the radically secular understanding of the economic system as a self-sufficient social order consisting entirely of ordinary actions of production and trade.¹⁷⁷ God might be working in mysterious ways in the background, but the society (the market) was itself not established in another time or relying on any order besides human nature. It would rather emerge spontaneously as a sphere of coexistence, and – if treated properly – play out freely and naturally as an extra-political society, i.e. a *civil* society.

This imaginary of the market as an extra-political sphere is at the core of the classical liberalism of John Locke: “The main goals of organized society were security and economic prosperity. But because the whole theory emphasized a kind of profitable exchange, one could begin to see political society itself through a quasi-economic metaphor.”¹⁷⁸ This transformation of the imaginary – and the corresponding ideas of political theory – seems to have introduced a new understanding of border-regulation. There is an interesting tension in this regard between the spontaneous and border-crossing character of the market as civil society, and the quasi-economic

¹⁷⁴ Based on Taylor’s account of Smith, Taylor 2007, p. 190

¹⁷⁵ Elias, Norbert. 1978. *The Civilizing Process*. 1st American ed., Mole Editions. New York: Urizen Books.

¹⁷⁶ Taylor 2007, p.197

¹⁷⁷ Related to the reformation and the sanctification of ordinary life (Taylor 2007, p. 179): gives the economic a central place in our lives, in addition to the importance of family life and relationships (for equality, see chapter 13 in Taylor, Charles. 1996. *Sources of the Self: The Making of the Modern Identity*. 8th printing, ed. Cambridge, Mass.: Harvard University Press.) No vocations or rituals that rank higher due to connection with “higher time”, neither the king (those who fight), nor the church (those who prey). The metaphysics of hierarchical order was dismantled by “Newtonian” imaginary.

¹⁷⁸ Taylor 2007, p. 177

model of political society which remains interested in securing its tax income (as a common wealth).

In general, we might say that this liberal model has the advantage that it relies on a kind of social interaction that does not require the same degree of trust, common sense and shared commitments as more encompassing and intimate kinds of interactions do.¹⁷⁹ This border-transgressive character of trade makes it useful both to for overcoming domestic and global economic diversity, and creates incentives for a greater tolerance of plurality. On the individual level, the economy has the advantage of transgressing territorial and cultural borders more easily than “thicker” kinds of interaction. Similar to natural science and arts (at least music and gastronomy), exchange can be made without necessarily presupposing any shared commitments to deep-seated values or background imaginaries. Economic interactions deal with goods that are easily moved across cultural borders and hence are quite easily imagined as potentially establishing a global market or global neighborhood. This presents a challenge to state-centric conceptions, especially as the economic terrain is increasingly globalized.¹⁸⁰

Historically, the state has taken a “master”-position in relation to the market, as the establisher and regulator of the activity at the borders or within the domestic sphere. Given the modern understanding of economy as a mechanistic system, the state has taken on a corresponding facilitating role of an observer and social engineer. Analogous to the managing of natural processes in agriculture, the state should sustain economic growth, but not interfere unnecessarily. In terms of the law of admission, this has been done by implementing a selective policy of immigration in order to promote trade and strengthening the inner market, by welcoming for instance high-skilled workers and tourists.

In terms of a law of deliberation, the implied objectification of the master-perspective has the elitist function of regulating society according to parameters that are measured “behind the back” of the agents. For instance, from the perspective of the individual economic agents, the total increase of domestic wealth and increased tax revenues is a distant side-effect of their street-level

¹⁷⁹ This advantage is sometimes polemically and dismissively labelled “artificial”, “superficial” and “inauthentic”. I find this to be misleading, since a secular imaginary would understand these traits to be essential characteristics of all communication. It is more appropriate to speak of thin and thick kinds of interaction. And economic interactions tend to be, or at least do not require more than thin interaction in terms of the required scope of shared assumptions/imaginaries.

¹⁸⁰ By terrain I mean a field defined by a specific kind of normal interaction, but thought without the boundaries (such as borders) that draw certain territories on this terrain. This idea of terrain is inspired a phenomenological analysis of attitude toward ones surroundings and can be illustrated by the notion of different cultural “scapes” in Appadurai, Arjun. 1996. *Modernity at Large : Cultural Dimensions of Globalization*, Public Worlds. Minneapolis, Minn.: University of Minnesota Press..

engagement.¹⁸¹ This does not, of course, entail that the agents are in fact completely blind, but a political model based on the free market tends to de-emphasize the value of participation on the part of the individual agents in deliberations on the relevant political questions of how to regulate their interactions.

3.3.4 The public sphere – the paradigm of extra-political deliberation

As discussed in chapter 1, the moderate positions on either side of the public debate on immigration would recognize that the state still plays a significant role in dealing with globalizing tendencies, and on the question of how to regulate the cross-border flow of people and goods. In the modern social imaginary of the public sphere we find a rival paradigm to the economy and the political imaginary of the commercial sphere/the market, which is also reflected in different models of representative democracy (see chapter 2). Partly, this competing imaginary can be said to rely on an influence from the humanist tradition and the ethic of republican self-rule. But it would be a mistake to ignore the revisions of these republican ideas in the modern promoters of this imaginary of the public (the forum). There is a parallel development of the public sphere as an extra-political entity to what we find in the emergence of an understanding of the economy as part of civil society. We see this tendency clearly in thinkers like John Stuart Mill, Hannah Arendt and Jürgen Habermas.¹⁸²

Habermas describes the emergence of a new concept of *the public opinion*. This is the imaginary of a common view formed by people that are dispersed physically, but still associated in the same common space and time by media (printed and electronic). Tellingly, the ritual performance of the community is not saying one's morning-prayer, but reading in the newspaper about the contemporary world. The concept bears clear parallels to early contractual theory and the understanding of how public opinion legitimizes the social contract, but it has undergone important revisions along the way.

Most importantly, the character of the given public consent changes dramatically. The modern contractual theory, although at the beginning hypothetically and once and for all, breaks with the assumption that the consenting people already existed. The mundane, historical act of the contract is seen as *the* constituting act of society itself. Pushed further, the secular requirement of public consent was intensified: “The original demand for once-for-all historical consent, as a condition of legitimacy, can easily develop into a requirement of current consent. Government

¹⁸¹ Similar alienating parameters of government are found in the biopolitical measures based on demographical information on army reserves, work force, health services, etc.

¹⁸² Taylor's account of the public sphere also relies heavily on Habermas' analysis in *Habermas, Jürgen. 1989. The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society, Studies in Contemporary German Social Thought. Cambridge, Mass.: MIT Press. [German version: 1962]*

must win the consent of the governed; not just originally, but as an ongoing condition of legitimacy.”¹⁸³

In Habermas’ account, the ‘public sphere’ served as the imagined location where the legitimizing public opinion could be formed and manifested. On the one hand, the imaginary of the public sphere is descriptive and hermeneutic, in that it provides a new understanding of how communicative actions and media are linked together in a single space as its wider context. On the other hand, it is normative in that it suggests how such a public debate should be conducted in order to reach (ideally) an impartial and enlightened public opinion.

First of all, and most importantly, the public sphere is a *secular* imaginary. It is a kind of social interaction which does not presuppose any extra-ordinary foundation or intervention (other-worldly or merely times of origin). This might seem quite trivial and commonsensical today, but as mentioned above, the notions of a ‘time of origins’ or a ‘higher time’ were essential to pre-modern imaginaries. We still find traces of them in the way we imagine and speak of a nation’s “founding fathers”, or the “timeless character” of places, ideas or ritual traditions. In this light, national myths have a “non-secular” character, alluding to something existing before, or transcending, the homogeneity of time. In contrast, the public sphere is – like the economy – *self-constituting*.

The public sphere [...] is an association that is constituted by nothing outside of the common action we carry out within it: coming to a common mind, where possible, through the exchange of ideas. Its existence as an association is just our acting together in this way.¹⁸⁴

This “coming to a common mind” has a normative epistemological aspect to it that is peculiar to the Enlightenment notion of public opinion as rational, impersonal and impartial. This common viewpoint or general will that defines the common good is not a mere aggregation of preferences (like a survey or opinion poll), but is seen as representing the best that the public has to offer. Hence, political authority is assumed to be wise to follow its advice and to make its decisions available for public scrutiny (the “principle of supervision”). Contrary to the economic system, this part of the process should not happen “behind the back” of the agents involved. This recognition of the reflective perspective of the participating agents is crucial to a notion of political integrity that is not directly derived from the representative system of decision-making procedures of the state.

¹⁸³ Taylor 2007, p. 188

¹⁸⁴ Ibid., p 192

The requirement that political power must be controlled from some “outside” is not a new idea, but the nature of the supervision certainly is: “It is not defined as the will of God, or the Law of Nature (although it could be thought to articulate these), but as a kind of discourse, emanating from reason and not from power or traditional authority. [...] Power was to be tamed by reason.”

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The location of this “outside” is crucial to understanding its inventive character. Taylor clarifies the location of this “outside” by qualifying it as an imagined, “metatopical” space. It has a similar character to some topical social spaces, such as a forum or stadium, concrete locations where we meet and organize for a shared purpose and collective action, but *the public sphere* is more abstract. It’s imagined, and links dispersed discussions together as parts of one great exchange: “We might say that it knits together a plurality of spaces into one large space of non-assembly. [...] I want to call this larger kind of non-local common space “meta-topical”.”¹⁸⁶

Metatopical social organization was already part of the old imaginary, in the church and the state. In order to constitute an *outside*, the public sphere had to be understood as a metatopical space separated from the political institutions.¹⁸⁷ Obviously, public discussion continued in more informal terms in the ancient *polis* and republics as well, but these discussions were taking place among the same people who wielded institutional power. In a sense the difference between the old and the new notion of public debate follows the modern distinction between lobbying and public debate. The latter is for everyone and to everyone; the former is more partisan and always involves representatives of the state. The public sphere would voice the concern and opinion of those detached from and outside the institutional interests of the state – and in some cases even include foreigners, at least from other civilized countries.

This last point touches on the issue of a cosmopolitan law of deliberation. In a similar manner to the way the economy, the public sphere easily spread in a cross-border pattern. The deliberations of public reason can be border-transgressing and transnational. For instance, the following holds equally well for a “republic of letters” as a national public: “It is understood that widely separated people sharing the same view have been linked in a kind of space of discussion, wherein they have been able to exchange ideas together with others and reach this common end-point.”¹⁸⁸

However, even if the public sphere to some degree transcends national borders, it is more dependent than economic transactions on translation of languages. And, translation is not a

¹⁸⁵ Ibid., p. 190, paraphrased from Habermas.

¹⁸⁶ Ibid., p. 187

¹⁸⁷ Ibid., p. 189

¹⁸⁸ Ibid., p. 186, see also p. 191.

simple alternation of information, as if it was convertible according to something like the exchange rate of different currencies. Communication has its own boundaries defined, in addition to language barriers, by different regional, historical-specific backgrounds (such as the conception of authority, international relations, cosmopolitan tradition, etc.). Hence, the transnational public sphere tends to be segmented according to affiliations of a cultural, religious, intellectual or ideological character. The transnational public sphere also creates its own kinds of asymmetry and discrimination, such as the main direction of translation (from western to other), the location of global cultural centers and spokesmen/academic stars; “where it’s at”, so to speak.¹⁸⁹

In the course of the 19th century this metatopical space (or sphere) became increasingly nationalized in terms of language and political function. Benedict Anderson describes this historical development from the time of Kant, when the printing press was still sustaining an international Latin “world of readers”, to the nationalization of the printing press (which seems to define Rawls perspective).¹⁹⁰ This gives an example of how states can regulate civil spheres and how the introduction of language standards influences the possibility of domestic and cross-border relations. The border-transgressing possibilities are still of course partly there, and increasingly so today, given the internet, social media and the function of English as a cosmopolitan language. In these terms, Rawls’ idea of a public debate among “peoples”,¹⁹¹ where the communicative interaction happens on a strictly international level or through public representatives, seems straight-jacketed and restricted to very specific forums, like the EU or the UN.

...

Taylor describes how our Western background culture during the last centuries has become secularized and integrated the Enlightenment principles of freedom and equality in a secular imaginary of time and space. I’ve here given two central examples of how the legitimacy of the political is defined in relation to specifically secular, extra-political social spaces: the market and the public sphere.

Although these secular spaces can be understood to have a border-transgressing potential, they are also marked by their historical development within the international order of states and the associated regulation of borders through taxation, homogenizing national languages, etc. In this

¹⁸⁹ See Sakai, N. & Solomon, J., *Traces 4: Translation, Biopolitics, Colonial Difference*. Hong Kong: Hong Kong University Press, HKU, 2006. Project MUSE

¹⁹⁰ Anderson, Benedict. 2006. *Imagined Communities: Reflections on the Origin and Spread of Nationalism*. Revised edition. ed. London ; New York: Verso.

¹⁹¹ Rawls 1999, p. 54 ff (§6. Societ of Liberal Peoples: Its Public Reason.)

sense “extra-political” has partly taken on a nationalized or domestic character as in national markets and national publics. In the following, I will explore in more detail how the democratic ideas of the intellectual elite of the Enlightenment have adopted to this historical development. Especially, the next section highlights how the deliberative turn in democracy theory has reformed the paradigm of political theory from one civil sphere to another; from the market to the public sphere.

I should perhaps make clear that this paradigm is related to the imaginaries of the economy and the public sphere, and not to the sociological reality of these spheres. Since Rawls conception of justice answers to the same question of justice that the theoretical ideas of the Enlightenment attempted to answer, i.e. the question of the legitimacy of the state, Rawls’ reliance on a public political culture seems to rely on the historical echo of these ideas through the development of the modern social imaginaries.

3.4 The theory of democracy and its deliberative turn

The historical context of the articulation of the Enlightenment ideas suggests that the main reason for the state-centric notion of politics is found already in the early articulation of the modern ideas of freedom and equality in Locke and Rousseau. Their liberal and republican principles were not simply adapted to a new spontaneously assembled sovereign people, but were situated within an already established state apparatus related to the Westphalian system of absolutist states. In this context they can be read as pioneer reformers of the modern state through liberalization and democratization. These reforms can be said to be based on universal principles, but these principles were configured to address specifically domestic political issues and not, strictly speaking, cosmopolitan ones. Their reforms also inspired, eventually, the emergence of an international order defined by certain normative expectations regarding how each state conducted their internal affairs. But, to a large extent, these reforms did not address cosmopolitan problems associated with interactions between states and non-citizens. As reformers, their ideas challenged and renewed the normative ground for the legitimacy of the state, but they did not address the basic premise of locating politics *within* the state as such. The scope of justice remained taken for granted.

The basic idea of democracy – the rule of *demos* – can be articulated as the rule of popular sovereignty, which primarily refers to a set of practices associated with a representative and constitutional system of government. This idea of democracy implies certain institutions and norms, such as elections, holding politicians responsible, having rights as citizens and the rule of law. In short, the modern notion of democracy evokes a whole range of ideas and practices that

refers mainly to the way political life is organized in the democratic liberal state. In this context democracy does not simply mean rule by the majority vote, but has also built into it institutional and legal functions that intend to secure everyone against abuse and concentration of power (here understood either as force of incentive or physical force, in contrast to communicative power). To some degree, this functional protection has not been established by democratic participation. It would for instance not make sense to say that minority rights are legitimate only if recognized by the majority vote.

Democracy as a form of government might be distinguished from democracy in a performative sense, as a way to discuss and solve public issues. Considered purely as a form of *government*, democracy is a system for making decisions in a political community. The purpose of this decision-making procedure is external to the system. Hence, the value of democratic procedures is instrumental and, depending on the conditions, other forms of government might serve this purpose more appropriately. In contrast, as a type of interaction or performance, democracy or *democratic participation* is understood as the way a political community manifests itself through deliberation. Because deliberation is a political form of communication, it cannot simply be reduced to its instrumental function of transmitting information or making decisions. It also has a value in itself, in the sense that actualizes the condition which we might refer to as a “community” or a “public”; i.e. a common space where reasons and perspectives can be shared.

3.4.1 The constitutional democratic ideas of the Enlightenment

Jean Jacques Rousseau’s republican contractual theory, as revolutionary as it was, is an interesting example in this regard. It is also, compared to Locke’s version, the clearest secular account of the two. Rousseau’s critical engagement with Hobbes’ theory can be said to mark a theoretical parallel to the later political transition from the absolutist to the democratic state during the American and French revolutions. His ideas also no doubt influenced the revolutionary movements themselves. Nonetheless, Rousseau’s thinking inherited Hobbes’ absolutist definition of the political.

As with most contractual thinkers, the question of the legitimacy of the sovereign state is at the center for Rousseau. Like Hobbes, Rousseau understands this legitimizing ground to be inherent in the civil contract itself. The political is seen as identical to a civil state order. In addition to conceiving the state – legislation in particular – as the obvious locus of politics, he adopts from Hobbes the idea that the initiation of the political order is simultaneously moral in character.¹⁹²

¹⁹² For instance, both Rousseau and Hobbes identifies legal norms as unconditional norms (Kant later adopts the same idea under the heading of the categorical imperative), essentially backed up by an executive and sanctioning

There is, in other words, no pre-political moral reason in the natural state (as Locke's conception of a normative 'natural law' suggests), which for Rousseau is thought as prior to the emergence of a common language and social-economic dependency.

Further, Rousseau thus preserves Hobbes' idea of the savage man as self-sufficient,¹⁹³ but rejects that he is either naturally good or wicked. Nonetheless, the drive for self-preservation (*amour de soi*) and natural sympathy (*pitié*) for others, lays certain generic psychological premises for a good civil order. In the pre-political state men are free from substantial and formal dependency on each other, and they are equal insofar as their substantial inequalities have no social-formal relevance. So even if the freedom of the natural state is understood as mere independence from others, and the natural equality is seen as the mere lack of social order, it sets certain premises for how Rousseau assesses the transition to a legitimate political state.

Famously, Rousseau states that "man is born free, but everywhere in chains". Although the metaphorical "chains" here evoke a sense of constraints opposed to freedom, Rousseau's account is more nuanced than this indication would suggest. First of all, as with Hobbes, moral equality and moral freedom first become relevant questions when the substantial conditions (of scarcity¹⁹⁴ or mode of production¹⁹⁵) imply dependency and inequality of a moral/formal import, as Kant says later: when people cannot avoid interacting with each other. At this point there is no turning back from the chains, the "fundamental maxim of all political right" is that people constitutes a

state apparatus. Similar to the Ten Commandments, which has the categorical form of a legal code, law in general is impersonal (an abstract "thou") and unconditional (no one is excused). In contrast, natural rights or individual and group interests can be articulated in the hypothetical form of "If you will X, then you should Y". For instance: If you will survive, you should seek to initiate a social contract of security with others (minimal state). If you (in addition) aspire to a stable and functioning democracy and civil society, you should seek to establish an egalitarian welfare model (Nordic model).

¹⁹³ Hobbes assumed that the eternal nature of Man was both self-sufficient and disposed with a range of "civilized" emotions, Rousseau emphasized the historical conditions of Man as part of a community and reason as part of civilization. Similar to Rawls' *epoché* of other states, Hobbes' atomistic design of the hypothetical scenario leads to substantial assumptions about the natural, pre-political individual. These assumptions are not easily remedied as the veil is lifted. The key-interpretative effect of this individualist abstraction is easily noticeable in Locke's revision of the pre-political individual rights as given with thick moral significance (including property rights). Rousseau is also an individualist, but in a more minimal sense, admitting only self-preservation (*amour de soi*) and concern for others (*pitié*; *pity*) as first-nature. In contrast to Hobbes, vanity (*amour propre*) is not a natural passion for Rousseau.

¹⁹⁴ Hume is clearer on this criterion by defending the need for right to property from "circumstances of justice". Rousseau and Hume share a similar moral psychology and critique of Locke's moral understanding of pre-political natural rights.

¹⁹⁵ Rousseau points out large-scale agriculture Harari supports this old biblical claim to a large extent, although foresters/nomads too had quite advanced forms of small-scale social organization. See Harari, Yuval N. 2015. *Sapiens: A Brief History of Humankind*. First U.S. edition. ed. New York: HarperCollins Publisher.

sovereign “to defend freedom and not to enslave themselves.”¹⁹⁶ To be free from enslavement and arbitrary rule some mutual constraints are necessary.

This urge to preserve some kind of independency (as freedom, or more precisely: *autonomy*) is paramount to Rousseau’s project¹⁹⁷ and is reflected in his formulation of the political problem of state legitimacy:

The problem is to find a form of association which will defend and protect with the whole common force the person and goods of each associate, and in which each, *while uniting himself with all, may still obey himself alone, and remain as free as before.*¹⁹⁸

The kind of freedom assumed here is inspired by the old republican idea of freedom; the establishment of the state through conventional agreement. The aim is freedom from enslavement and domination (rule of force), through the establishment of rule of law. As such, freedom is achieved through constraints associated with the legal status of the citizen, and not through the solitude of the highland walker or the travelling merchant: "Let us then admit that force does not create right, and that we are obliged to obey only legitimate powers."¹⁹⁹ The legitimacy of these constraints was not defined by liberal norms, but by democratic procedures.

Furthermore, there is implied in Rousseau’s account of contractual theory a critique of Hobbes’ reliance on the psychologically implausible²⁰⁰ and normatively intolerable assumption that the contractual subjects would accept a once-and-for-all, unconditional subjection to the sovereign. To be sure, Hobbes also sought a similar freedom from dominion through the rule of law: the first and fundamental law of nature according to Hobbes, is “to seek peace and follow it”,²⁰¹ and the second includes the obligation “to be contented with so much liberty against other men as he would allow other men against himself.”^{202 203}

¹⁹⁶ From Rousseau’s *Second Discourse*, p. 176 in Rousseau, Jean-Jacques, and Victor Gourevitch. 1997a. *The Discourses and Other Political Writings*, Cambridge Texts in the History of Political Thought. Cambridge ; New York: Cambridge University Press.

¹⁹⁷ Leo Strauss calls him the first philosophers of freedom because Rousseau holds (like Kant after him) the individual free will to be a good in itself.

¹⁹⁸ Rousseau, *The Social Contract or Principles of Political Right*. Book 1, chapter 6, my italics, in Rousseau, Jean-Jacques, and Victor Gourevitch. 1997b. *The Social Contract and Other Later Political Writings*, Cambridge Texts in the History of Political Thought. Cambridge, U.K. ; New York, NY, USA: Cambridge University Press.

¹⁹⁹ Rousseau 1997, Book 1, chapter 3. “The Right of the Strongest.”

²⁰⁰ Contrary to Locke’s response to Filmer, Rousseau agrees with Hobbes that we are not born with a rational and political nature (or inherent value). But, he rejects Hobbes “thick” notion of natural capacities by arguing that Hobbes pre-political model still retains the passions and needs of the political (such as vanity, or amore proper). The bracketing of the scaffolds of the political civilization does not make the correlating, “other-depending” passions natural.

²⁰¹ Hobbes, *Leviathan I*, chapter 14, p. 98 [64], in Hobbes, Thomas, and Aloysius Martinich. 2005. *Leviathan. Parts 1 and 2*, Broadview Editions. Peterborough, Ont. ; Orchard Park, NY: Broadview Press.

²⁰² Hobbes 2005, p. p. 98 [64]

The idea of a human-made political order is thus central to both Hobbes and Rousseau. This idea was not new, but the secular idea that its legitimacy rests merely on the ground of free men giving their consent is a clear break with a patriarchic notion of natural order, as found for instance in Robert Filmer's work.

In Rousseau we see a clear continuity from Hobbes criterion of popular consent, but with a clearer drift toward democratic realism.²⁰⁴ In this way, Rousseau radically democratizes Hobbes' secular contractual approach by insisting that the community – the people – remained the legislative power of the state. Rousseau's reform of the contractual theory is in this sense not an unchaining from the constitutional, absolute state, but a democratization of it.²⁰⁵ In other words, Rousseau agrees that some chains are necessary, but that the chains should consist only of laws that would retain the autonomy of the subject (in order to avoid domination and unsustainable inequality).

Whereas Hobbes sees the sovereign as the servant of the people and public interest, mainly its security²⁰⁶, Rousseau comes close to identifying the sovereign state with the people itself. There is a deep and crucial assumption that leads Rousseau to this conclusion. Inspired by Hobbes' absolutist conception of the political, Rousseau seems to accept the requirement that the private interest of those in government should not be in conflict with the public interest. And, even though he is reluctant to accept an absolute sovereign, Rousseau does not reject the underlying ambition of aligning private and public interest.²⁰⁷ Unlike the modern, liberal idea of civil society, Rousseau does not make the distinction between state and society clear.

²⁰³ It refers to the negative Golden rule, which is basically the 'harm-principle'. Both Locke and Kant adopts this as the principle of negative liberty. If we compare it to the "universal principle of rights", as mentioned above (3.2.1), it is quite similar. The latter makes sense though, both interpreted with a negative and a positive concept of liberty.

After all, Kant adopts his notion of autonomy and the categorical imperative from Rousseau.

Kant breaks decisively with Hobbes on two interconnected points: 1) External, linguistic acts do not necessarily reveal the same idea or image in me as in others, or in any case, there is no way we could tell. 2) Freedom of conscience (as Rousseau): the sovereign does not stand in a position to dictate faith because it is hopeless to sanction the internal will by law.

²⁰⁴ They both shared the conception of equality of human nature based on physical strength (*animalis*) and practical wisdom (*techné*), in contrast to legal equality, through constitutional order (political act, *praxis*). For Rousseau this political action or participation is continuous (and the natural inequality becomes relevant first within a 'nascent society' where this equality of participants is not yet the case), as for Hobbes it is a once-and-for-all, hypothetical act.

²⁰⁵ For instructive discussion, see Krefting, Ellen. 2015. "Rousseau – Equality and Freedom in the Community" " In *Philosophy of Justice*, edited by Guttorm Fløistad, *Contemporary Philosophy: A New Survey*, 191-211: Springer Netherlands..

²⁰⁶ "The difference between these three kinds of commonwealth [monarchy, aristocracy and democracy] consisteth not in the difference in power [equally sovereign, varies in stability], but in the difference of convenience or aptitude to produce the peace and security of the people, which end they were instituted." (Hobbes 2005, p. 141 [95])

²⁰⁷ As Peg Brimingham shows, Arendt understood this assumption as part of an old imaginary of sovereign power and the notion of a "powerful will" also found in Augustine. According to the underlying idea, a power full will must be one with itself. A divided will is impotent. (2006, p. 42-43)

Rousseau is in this sense still on the “old” side, compared to the modern appreciation of actions motivated by mere private interest as more than just expressions of a corrupted will. The imaginary of a free economy, as discussed by Taylor above, is still somewhat strange to Rousseau and associated primarily with the way the right to private property tends to create inequality and oligarchic accumulation of capital. In this sense it is understandable that Rousseau was both a radical democratic thinker and skeptical to trust the public debate to ensure rational decision-making. To avoid that legislation should favor any particular individual or group interest, Rousseau seems to have put his trust in the private reasoning of the educated elite. Only the few were able to take the view point that should represent the genuine will of the whole political body. If we follow O’Neill’s reading of Kant’s notion of public reason this calls for a clear point of departure from Rousseau.

To nuance this point, we might say that as long as the general will is merely conceptual, i.e. formal, empty and unspecified, it more or less complies with Kant’s analysis. For instance, a general requirement such as equality before the law seems evident, independently of public scrutiny. As long as we derive principles of negative freedom from the innate right to individual autonomy, equality before the law seems uncontroversial. The controversy arises when ‘the general will’ goes from expressing certain analytical boundaries (implicit to the concept of autonomy), to the ambition to determine a specific content of the public right, not to mention the determination of the general good. On this ground, Rawls critique of the dependency of metaphysical presuppositions seems to hit Rousseau much harder than Kant. In any case, there seems to be a gradual development within the concept of democracy with an increasing weight given to rational debate and public scrutiny. However, even as we reach the deliberative turn, the state-centric approach remains strongly influential.

If we look closer at the modern concept of “constitutional democracy”, we see, as John Rawls and Jürgen Habermas notes, a deep conflict²⁰⁸ or dialectics²⁰⁹ in the current theory of democracy between two traditions on how to interpret liberty and equality: *liberalism* and *radical democracy* (egalitarianism, civic republicanism)²¹⁰. Both Rawls and Habermas identify the democratic tradition in with Rousseau’s republican answer to John Locke’s liberal interpretation of liberty and equality. What unites them as “contractual” thinkers is the concern for state constitution and the establishment of a rule of law to keep the sovereign in check.

²⁰⁸ Rawls 1993, p. 4

²⁰⁹ P. 44 in Habermas, Jürgen. 1997. "Popular Sovereignty as Procedure." In *Deliberative Democracy: Essays on Reason and Politics*, edited by James Bohman and William Rehg, xxx, 447 p. Cambridge, Mass.: MIT Press.

²¹⁰ See Berlin, Isaiah. 1966. *Two Concepts of Liberty: An Inaugural Lecture Delivered before the University of Oxford on 31 October 1958*. Oxford: Oxford university press.

Rawls understands both these traditions as attempts to answer the fundamental question of political justice²¹¹, briefly put: the question of the fair terms of social cooperation between citizens.²¹² “Justice as fairness” is a way to answer this question by specifying two principles of justice in lexical order.²¹³ Rawls aims at a balanced account between formal constitutional rights (liberty) and substantial guarantees of equal opportunity and mutual advantage (equality). His proposed conception is still situated within the liberal tradition, however, which tends to emphasize the primacy of constitutional liberties. It is important to note that Rawls offers, as he sees it, a political conception of liberalism that seeks to transcend the conflict between the liberal and republican divide. He does so by introducing the principle of equal opportunities and economic equity, hence his conception is considered to be liberal-egalitarian.

In “Popular Sovereignty as Procedure”²¹⁴ Habermas’ account of these traditions differs in an interesting way from Rawls’ deliberative conception, which reveals a revolutionary aspect of the idea of democracy that is not so tightly related to the imaginary of “a sovereign people” and “a constitutional state”. Habermas takes his point of departure in Rousseau’s understanding of liberty as “the autonomy of the people, as equal participation of each person in the practice of *self-legislation*”²¹⁵ From this egalitarian perspective (also found in Kant) the exercise of popular sovereignty as a unified will is seen as primary, and the constitutional protection of diversity through the articulation of liberal rights as secondary.

The advantage of Rousseau’s account is that the legitimate source of political authority is no longer anchored in the natural law of some imaginary state of nature (as in Locke). Rousseau expresses in this sense an early and radically secular version of democracy. The source of legitimacy is located in *history*, not some mythical or hypothetical time which resonates with a transcendent “human nature”.

The standard objection against Rousseau is that he takes for granted the homogeneity of modern society.²¹⁶ In Habermas’ reconstructed narrative, this acknowledged weakness led to a liberal redefinition of popular sovereignty in the mid-19th century, by figures such as Julius Fröbel (1848) and John Stuart Mill (1859) which sought to conceptualize how “sovereignty should express itself

²¹¹ It is «fundamental» on state-centric terms.

²¹² Rawls 1993, p. 3

²¹³ *Ibid.*, p. 6

²¹⁴ Habermas 1997

²¹⁵ *Ibid.*, p. 44

²¹⁶ See also original critique in Benjamin Constant’s essay (1819) on the liberty of the ancients [primarily as citizens of the state] and the moderns [primarily as members of society].

under the discursive conditions of an internally differentiated process of opinion- and will-formation.”²¹⁷

While emphasizing the importance of individual liberal rights as normative constraints on government, this new position of Fröbel and Mill also sought to retain Rousseau’s republican conception of autonomy: That one should only obey laws that are self-imposed; otherwise they become (heteronomous) orders or commands. This autonomy is in turn – due to the fear of a tyranny of the majority rule – subordinated to a legal, systemic framework that regulates the transition from opinion-formation to will-formation. This implies a system that disperses power on several governing departments, and that minority opinions should be considered. Given the need for practical agreement in the procedural decision-making in the state apparatus, the participants that hold a minority opinion are forced to accept the consensus, but only as a conditional and provisional decision. Ideally, this system is open-ended and constantly in re-negotiation on previous decisions. This secures the self-legislative aspect not so much by direct participation in the will-formation (i.e. by vote), but in the preceding and to-be-continued process of opinion-formation (i.e. by continuous public debate).

In short, there seems to be a line of liberal and republican reforming ideas of the absolutist state, which has led to a quite rich account of how the public sphere (of the secular imaginary) can be integrated in the will-formation on a state level, both to improve and to legitimize the state as democratic. Primarily, this public sphere is understood in ways similar to the “res publica”, as the people’s opposition to the crown. Hence the scope of the public sphere seems to follow the “demos” and as an entity challenging political power from the outside.

3.4.2 The lifeworld and the system: Opinion- and will-formation

As Jon Elster points out in the article “The market and the forum”²¹⁸, the tension between opinion- and will-formation is still a characteristic of the central dilemma within deliberative democracy theory. This dilemma corresponds quite well to the two sides of democracy that we mentioned above: as system and as participation.

As *system*, democracy is considered the adequate form of government in a nation-state to address the failures of the modern ‘free market’ economy. From this rather instrumentalist perspective democracy is understood as a set of political institutions designed to solve tasks of social choice that involves interest struggles and compromise between otherwise irreconcilable preferences. In

²¹⁷ Habermas 1997, p. 46

²¹⁸ Elster, Jon. 1997. "The Market and the Forum: Three Varieties of Political Theory." In *Deliberative Democracy : Essays on Reason and Politics*, edited by James Bohman and William Rehg, xxx, 447 p. Cambridge, Mass.: MIT Press.

other words: democracy is understood as an instrument of systemic will-formation. Its advantage is that it offers efficient procedures for aggregating the preferences of all. It provides a pragmatic solution to decision-making in a mass-society sieged by time-pressure. It can force agreements between unsolvable differences of opinion when a quick decision is better than none. The disadvantage is related to how reliable these aggregations are (such as polls). For instance, the set of alternatives available to the voters might affect the reported preferences – providing the polls with an unreliable impression of neutrality. The main objection is, however, that it approaches the political tasks of the forum by simulating the task of the market. In the market, the alternatives are valued primarily by how they affect the buyer, whereas in the forum the alternative outcomes also differ in the way they affect other people and the community at large.

As *participation*, democracy is understood as informal or procedural conditions of opinion-formation, i.e. as ways to refine the normative perspectives on the common good.²¹⁹ In terms of the system, Elster articulates Habermas' discourse-ethical emphasis like this:

The core of [Habermas'] theory is that rather than aggregating or filtering preferences, the political system should be set up with a view to changing them by political debate and confrontation. The input to the social choice mechanism would then not be the raw, quite possibly selfish or irrational, preferences that operate in the market, but informed and other-regarding preferences.²²⁰

The basic assumption is that public reasoning over contesting conceptions will give a decentralizing effect on the perspectives and preferences of the participants. Aware of the fact that the political system of mass society only allows for participation in quite formalized and representative/indirect forms, Habermas seeks the participatory element of democracy in its purest and perhaps most radical form: the anarchic model of the voluntary association. Predictably, considering the regulatory and organizational needs of modern society (carried by economic and bureaucratic systems), Habermas does not consider anarchism a viable project, but he nevertheless recognizes its methodological usefulness. The idea of voluntary associations is valuable because it articulates an informal, prototypical communicative and constitutive process at its basic level:

The horizontal contacts at the level of face-to-face interaction were supposed to coalesce into an intersubjective practice of deliberation and decision making strong enough to

²¹⁹ On aggregation versus formation of preferences, see also Young, Iris Marion. 2000. *Inclusion and Democracy*, Oxford Political Theory. Oxford ; New York: Oxford University Press.

²²⁰ Elster 1997, p. 11

maintain all the other institutions in the fluid condition of the founding phase, more or less preserving them from coagulation.²²¹

The main concern about “coagulation” in the cosmopolitan context would be that political institutions get fixated on the statist scope, which serves the rights and interest of its own citizens exclusively. Further, this potential institutional lack of flexibility and adaptation is reflected in coagulated attitudes and imaginaries on how the social world is rigged. The statist conception of justice and state-centric conception of politics then becomes self-confirming elements of a coagulated institutional condition, adapted to a situation where cosmopolitan problems were less urgent.

In a cosmopolitan public such parochial “banners of justice” should perhaps be expected. As long as these competing conceptions of justice are cosmopolitan naïve and not appealing to a strong cultural relativist position, a living global public should be able to offer the necessary dynamic to somehow transcend these conflicting perspectives. In the participatory model, this transcendence is not forced by systemic aggregation of irreconcilable preferences, but by “the willingness to solve problems and coordinate action through mutual understanding.”²²² Could this model also be applied in also the process of deliberating on the content of cosmopolitan law?

3.4.3 The pure ideal of participation

For Habermas, this radical idea of participation and mutual understanding serves as a contrast to bureaucratic systems and formal legislative, decision-making processes. Contrary to the individualistic natural law-tradition, the participatory model enables us to appreciate the spontaneity and informal processes of opinion-formation in civil society (the public sphere), “outside” organized politics. Parallel to the liberal idea of politics as the task of facilitating a free market, the idea of democratic participation implies a political concern for the flourishing of civil society (presumably regulated through education and public media, and the amount of spare time from paid work). Ideally, these horizontal network-processes can exercise their “communicative power” in the manner of a siege (as Habermas puts it): “It influences the premises of judgment and decision making in the political system without intending to conquer the system itself.”²²³

The advantage of the participatory approach is that it gives – in contrast to a preference-formation of consumers – a “thick” account of political opinion-formation. Consider for instance the uncoordinated demands in a market compared to a coordinated consumer campaign. The communicative coordination of the latter cannot be explained simply as a process of aggregation.

²²¹ Habermas 1997, p. 52

²²² Ibid., p. 53

²²³ Ibid., p. 59

In a way, it bears more resemblance to a siege of the “free market”-system. A similar coordinated corrective is also possible when addressing the formal procedures of will-formation in the political system of government. In this sense, civil society has supervising and legitimizing functions for the state, and potentially also for international institutions.

The participatory approach also considers the public opinion as a valuable legitimating source for the political system. The disadvantage in terms of will-formation is that it relies, at least in Habermas’ case, on the assumption that communicative rationality will force the participants of a debate to agreement. Even if we grant this assumption some ideal validity, it will never be actualized under realistic conditions.²²⁴ Hence, the approach would (due to the shortage of time) rely procedurally on the market-like aggregation of preferences. In a pluralist society we might very well imagine an endpoint where we all agree, but for all practical purposes the discursive transformation of preferences is perhaps best understood as a valuable supplement to the articulation of actual options.

Hence, the reasonable point of emphasizing the participatory aspect would not primarily be to replace in a mass society the bureaucratic system or the formal-procedural legislation with something else. Whether the opinion formation takes place in a national or global public sphere, it must somehow establish a kind of symbiosis with the system of (fairly) autonomous states. For instance the public sphere could reform this symbiosis by articulating new rights of domestic and cosmopolitan law to protect its own conditions.

3.4.4 Strong democracies and the cosmopolitan reform of the state

As discussed in chapter 2, Benhabib has promoted a contribution to the further deliberations on cosmopolitan law. Benhabib’s main argument against Kant is that his conception of the cosmopolitan law does not go far enough. To overcome the unbridgeable gap between the right to visit and the right to be a guest, Benhabib suggests a cosmopolitan right to political membership as a way to articulate the right of foreigners to second admission. This right corresponds to the state obligation not to hinder foreigners from seeking civil association.

Further, Benhabib argues that if we restrict our concerns to how cosmopolitan law can be addressed and developed within an international order, then the relevant question of future deliberation on cosmopolitan justice should first of all be addressed in the context of state reforms. Developing a promising account within the deliberative tradition, Seyla Benhabib incorporates *collective self-reflexivity* as a central feature of a strong democratic community that

²²⁴ Elster 1997, p.14

conceives itself as an “open society” – that is, a society that tends to appeal to cosmopolitan values and that seeks to adjust the activities of the polity to how it affects the global community.

To even consider the actual option of extending the cosmopolitan law requires, according to Benhabib, a moral learning process where the citizens are able to perform repeating interpretations or *iterations* of their political identity.²²⁵ They have to realize that the collective first person, “we, the people,” is a reflexive concept: i.e. “a concept that anticipates self-transformation through encounters with others”.²²⁶ This indicates that Benhabib is not only concerned with the issue of admission alone, but appreciates the way an extended cosmopolitan law of admission will protect and promote deliberations of a cosmopolitan character. An open society is in her account a reflexive, cosmopolitan self-conception of participants that are concerned with the global effects of their collective actions and appreciate the educative encounters with foreigners.

From a cosmopolitan perspective the potential consequences of a strong and open democracy – i.e. the strengthening of civil society and education of its members – are not arbitrary side-effects. From a domestic perspective these side-effects might not be the primary motive of politics,²²⁷ but in regard to the emerging cosmopolitan domain they provide the fertile soil of sustainable transnational interaction. In a field like the cosmopolitan with no direct institutional address in the form of a global state, the way states operate and facilitate democratic participation both formally and informally is crucial to the emergence of a transnational public sphere.

Benhabib conceives the implementation of cosmopolitan law as a reforming process of an open society. According to her account, it is characterized by mitigation between universal moral principles and democratic legislation. Benhabib’s concept of “democratic iterations” is inspired by the legal concept of “jurisgenerative politics”, which “refers to the dialectics between constitutional norms and democratic will formation.”²²⁸ This juridical term describes the political

²²⁵ The notion of iteration or iterative acts has a clear phenomenological influence. Benhabib refers to Derrida’s term “iteration”. “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, adds to it, 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.” (Benhabib 2004, p. 179, restated p. 454 in Benhabib, Seyla. 2007. “Democratic Exclusions and Democratic Iterations.” *European Journal of Political Theory* 6, no. 4: 445-462.

²²⁶ Means 2007, p. 409

²²⁷ See Elster 1997 for argument against the paradoxical and incoherent notion of “politics for its own sake”.

²²⁸ Means 2007, p. 406

process associated with the constitutional court. It is a legal concept that is intended to transcend the oppositions between natural right and legal positivism.²²⁹

Democratic iteration is meant to describe an analogous political process where the norms of international law – including cosmopolitan norms – are interpreted and “scheduled”²³⁰ in an individual polity. It is defined by Benhabib as:

[...] a complex process 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. These 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.²³¹

It refers to the “iterative acts through which a democratic people that considers itself bound by certain guiding norms and principles reappropriates and reinterprets these”²³² in concordance with the principle of public autonomy, i.e. as co-authors.²³³ In Benhabib’s framework, the cosmopolitan norms are conceived as moral (not ethical) norms that present universal claims of inclusion and participation. Combined with the principle of public autonomy, which implies some sort of exclusiveness and closure, these ideas create a conflict or a dilemma in any given situation of practical implementation.

To exemplify the notion of democratic iteration, Benhabib describes in some detail three cases from France and Germany. In each case, universal norms and the way they are understood within the respective political community, are challenged and renegotiated in the light of questions presumably brought up by immigration. There’s the scarf affair in France, and a German

²²⁹ In this way Benhabib complies with a non-metaphysical reading of Kant. When it comes to the anti-essentialism of iteration, Benhabib seems to have her own agenda, addressing the “various constitutive illusions such as the homogeneity of the people and territorial self-sufficiency” (2004, p. 171). This addresses deep-seated social imaginaries, which Benhabib nonetheless understands to be transformable through a self-reflexive process of interpreting the “rights of others”.

This agenda is demanding because it adopts the complex relational analysis of social science. From these analyses Benhabib attacks substantial notions of peoples as moral agents, i.e. as self-sufficient and unified agents. And, it promotes a reform of political concepts into complex and dynamic notions defined by interpretive acts in relations to “others”.

Benhabib refers to T.H. Marshall’s classic works on citizenship to stress the significance of social struggle in the evolution of cultural solidarities. Only a more static vision of the formation of collective identity allows Walzer and Rawls to assume that aliens are a threat. I think this point is particularly strong when she contrasts the idea of liberal democracy to the promotion of the high degree of cohesiveness and culture-centeredness they both promote. (see 2004, p. 173)

²³⁰ In Kantian terms this would imply the process of articulating principles according to a concrete content. Taylor uses the term “schematizing” to illustrate the same process. A term that is usually associated with perception and understanding, and not concepts of reason, such as principles of practical reason.

²³¹ Benhabib 2004, p. 179

²³² *Ibid.*, p. 181

²³³ See also p. 413, Means 2007 for refers to Habermas & Derrida’s use of the term democratic iteration

equivalent, both concerning the display of religious symbols in public (mainly concerning the hijab or foulard). In these cases, the reflexive self-understanding of a public finds itself in negotiation with the principles of religious freedom and tolerance for diversity.

The third case involves a case in the German constitutional court regarding the right of non-citizen but long-term resident foreigners to vote in provincial elections in Schleswig-Holstein. The argument *against* this right of foreigners to vote appealed to the role of national belonging in a democracy. This argument is interesting to Benhabib because it represent “the swan song of a vanishing ideology of nationhood”.²³⁴ The following quote states clearly the distinction between a cosmopolitan and the nativist-ethnic interpretation of politics:

In an almost direct repudiation of the Habermasian discursive-democracy principle, the court declares that [the constitutional law] does not imply that “the decisions of state organs must be legitimized through those whose interests are affected in each case; rather their authority must proceed from the people as a group bound to each other as a unity.”²³⁵

The position of Habermas that Benhabib refers to in this passage corresponds to Habermas’ methodological emphasis on the principle of participation of the affected parties. The argument of the court, on the other side, seems to rely on a principle of participation grounded in being a stakeholder. It implies that participation in “strong” publics like elections, require reciprocally binding relations such as those of citizenship. To admit foreign residents as relevant subjects of law in this manner is to me clearly a case of mitigating between this universal democratic principle and the competing political norms. As discussed earlier, it is however not clear to me that to extend the right of participation to foreign residents is a case of applying cosmopolitan law. It seems rather to depend on an extension on the concept of “member” within domestic law. The court clearly did not accept this extension of membership when it came to the issue of the right to vote. In order to change the scope of voters, the court concludes, one would have to alter the laws regulating the acquisition of citizenship.

To Benhabib, this case addresses the core of the dilemma mentioned above, as “the paradox of democratic legitimacy, namely that the outsiders (whose rights to inclusion or exclusion from the *demos* are being decided upon) will not themselves be the ones to decide upon these rules.”²³⁶ According to the democratic principle of universal inclusion, the question of how to include foreigners in a democracy does certainly provoke the kind of dilemma Benhabib refers to. But, is this specifically a cosmopolitan dilemma? If we follow the Kantian framework, would not

²³⁴ Benhabib 2004, p. 205

²³⁵ Ibid., p. 205. The quoted section is from the constitutional court ruling.

²³⁶ Ibid., p. 206

inclusion in terms of reforming the notion of citizenship also imply that the cosmopolitan relation is converted to a domestic relation? In my mind, the question of how to include the foreigner *as* a foreigner, or as a world-citizen with his or her own implied sense of being a stakeholder, is not addressed by Benhabib.

To be sure, Benhabib's notion of "democratic iterations" is first and foremost a descriptive term. It draws on a complex relational social ontology which is broadly accepted within social science, but can hardly be said to have acquired the status of common sense in the general public. Her agenda is, however, also normative in the sense that she thinks that a self-reflexive community would improve its understanding of its cosmopolitan responsibility and dependency on other state and non-state agents. Benhabib articulates certain normative constraints which ensure a "just, fair and open process of democratic iteration". These concerns are related to cosmopolitan law, at least in the sense that the cosmopolitan rights of admission (i.e. to visit and to membership) are understood to affect the morality of the legislating process.²³⁷ In this way, the descriptive critique against the constitutive myths is integrated into the way we assess the very process of democratic meaning formation. The idea of a homogenous citizenry, the original assembly of consent, is not only a distorting description of history; it also undermines the normative potential of democratic constitutionalism.²³⁸ In particular, it affects the capacity of self-transformation through encounters with foreigners.

Although deliberative approaches appreciate the value of democratic participation in the public sphere and the qualitative opinion-formation of public right it entails, this is by no means – as we have seen with Rawls – a guarantee against state-centrism. In other words, the promotion of deliberative democracy does not imply recognition of the need for deliberations on the content of cosmopolitan law. Nor does it necessarily recognize the need to protect the conditions of a transnational civil society.

In this context, Seyla Benhabib represents a moderate cosmopolitan position. She explicitly criticizes state-centric approaches and the lack of attention given by other cosmopolitan political theorists to the need for an extended cosmopolitan law. She also articulates options for an extended content of cosmopolitan law of admission which situates her thinking clearly within the "further deliberations" on cosmopolitan law after Kant. Furthermore, she recognizes a central

²³⁷ The internal relation of the two-folded normative constraints is not so clear. Means might be helpful: "Discursive scope or the question of who is a rightful co-legislator is the meta-principle of democratic iteration, a human right of special standing." (Means 2007, p. 408)

²³⁸ Benhabib 2004, p. 175

epistemological value of cosmopolitan deliberations in the way democratic social imaginaries are transformed in the encounter with foreigners' perspectives. Although this expresses a deep cosmopolitan concern in Benhabib's thinking, her main distinction between moral and political norms leaves her position somewhat unclear on the distinction between universal moral norms in general and the specific moral-legal character of cosmopolitan norms. Since the process of democratic iterations is understood as consisting of mitigations between moral and political norms, the epistemic value of foreign perspectives is situated within this domestic mitigation. Expressed in Kantian terms, the implication of this lack of clarity between the universal and the cosmopolitan seems to lead Benhabib to emphasize the content of cosmopolitan law merely within the law of admission, whereas the law of deliberation remains domestic in its content.²³⁹

Conclusion – the democratization of cosmopolitan rights

In many ways Benhabib's notion of democratic iteration describes a process where the cosmopolitan and statist concerns are repeatedly and continuously in negotiation. The task of finding a middle ground, or some acceptable balance between the competing concerns, defines the political situation.

As discussed in chapter 2, if we accept the situational ontology of conventional politics, it only allows us to define cosmopolitan law in formal terms as the moral-legal norms that regulates interaction between a state (and its citizens) and non-citizens. Given the specific character of this domain, it requires laws and individual rights that are distinct from the laws and rights issued to solve domestic or interstate problems. In this sense, cosmopolitan rights are neither the universal ground of domestic law, nor its ethical supplements. They are better understood as a distinct type of universal moral claims of foreigners, analogue to the claims of citizens, but addressing other kinds of insufficiency and injustice in the positive law of the state or international institutions. If cosmopolitan rights are claimed without a specific addressee, the corresponding duties of the states seem to be quite weak in character. But, 'territorial residency' gives a relevant criterion for specifying which state is obliged to protect these rights. In the next chapter I will also consider systemic obligations of states which go beyond this territorial criterion.

Although it is problematic to speak of reciprocally binding agreements on the cosmopolitan level, I've suggested we distinguish between the kind of moral-legal norms that address the cosmopolitan problems of cross-border migration directly, as the cosmopolitan laws of admission, and those norms that seek to protect the relations of transnational civil society, i.e. the cosmopolitan laws of deliberation. In regard this last point, this chapter has discussed the

²³⁹ For further discussions on this issue, see chapter 4 and 6.

obstacles of democratizing the domain of cosmopolitan law. As Benhabib's examples indicate, this democratization is already on its way, but the association of democracy with the status of national belonging is still quite strong. And, even if the criterion of national belonging has been widely questioned after the Second World War, the state-centric idea of politics is still dominant. Citizenship is still seen as the taken-for-granted marker of being a stakeholder and having a right to participate. A cosmopolitan reform of democracy would have to challenge these assumptions by asking questions like: Do not all affected parties have a right to participate? Are not all of us stakeholders in a globalized world?

If we look to Rawls for answers we are bound to be disappointed. We might grant that Rawls accurately describes the current legitimizing ground of the secular state, but we have seen how his appeal to the political culture leaves his position relying on the heteronomy of tradition in a situation that calls for renewal. If we ignore the problem of autonomy, and Rawls reliance on a historically shared public political culture, we might even be open to the possibility that his conception have universal validity in the domains of domestic and interstate (or inter-popular) law, without thereby having any relevance or validity for cosmopolitan law. Does his conception give us any normative guidance as to how to reform the statist nation-state? Indeed, in *The Law of the Peoples* Rawls even provides an account of how a state should deal with foreign affairs, i.e. with international law regulating relations between "peoples". I also agree with the anti-utopian position of Rawls, that we should take a reformist approach to the current international order rather than aiming for a global state.²⁴⁰ However, in terms of prescribing how we should deal with phenomena like immigration and the globalization of civil society, I hold Rawls state-centric conception to be increasingly inadequate.²⁴¹ Rawls' conception marginalizes cosmopolitan problems related to the physical and political exclusion of foreigners. Because of this, I hold his position to be cosmopolitan naïve.

There are generally two reasons supporting the extending the cosmopolitan law with a law of deliberation, which would include the right of foreigners to participate in the decision-making processes of an alien state. First, it complies with the democratic ideal that subjects of law should also be the authors of the law. Even if this consent is given only hypothetically, this ideal

²⁴⁰ We could for instance follow Habermas' thought-provoking analogy between the two conceptions of individual freedom and national sovereignty. This presents us with two ways of conceiving the freedom of nation-states: "[...] whether in analogy with the liberty of private persons who differentiate themselves from, and compete with, one another, or on the model of the cooperative self-legislation of autonomous citizens". (Habermas 2001, p. 114)

²⁴¹ Even if I will not call Rawls a nationalist, nor a pure liberalist, the "considerable abstraction" made in the beginning of his procedure influences the way Rawls address issues as the veil is lifted and the basic structure is increasingly revealed as not closed at all. In the next chapter I will consider more carefully a revised version of Rawls Original Position by Joseph Carens that is able to address the issue of migration in a more adequate (and less dismissible) manner.

delegitimizes the use of brutal force and pure orders against foreigners. Since foreigners are subjected to the laws of immigration, this concern is relevant to the cosmopolitan law of admission. Second, there is an epistemological value associated with reflexive self-transformation in considering the perspectives and standards of justice of others. The democratic participation of foreigners helps us avoid the risk of naïve cosmopolitan positions. Neither of these arguments implies that we should simply let foreigners dictate our immigration laws, but it does suggest a concern for potential improvement in the practical implementation of a cosmopolitan order through state reforms. As a third argument in support of a democratic cosmopolitan law of deliberation, it also gives its own reason for a generous freedom of movement. This reason is not founded in the aim of fulfilling the needs of an individual life, but argues in favor of freedom of movement on the ground that it promotes and protects the concern for a strong transnational public sphere.

Chapter 4: We refugees – The actuality of cosmopolitan law

So far I've presented the cosmopolitan law – i.e. a theoretical specification within public right – as the moral-legal domain which is most relevant to the debate on immigration. I've also indicated that understanding cosmopolitan law as the provisional legal protection of a new public domain, challenges state-centric assumption in dominant political theory as well as in our shared and deep-seated social imaginaries. This assumption – namely that politics is properly located within the public of a sovereign state, between individual citizens – is perhaps what is most clearly provoked by the suggestion of democratizing the domain of cosmopolitan law.

In chapter 3, I considered some of the obstacles that make it difficult to conceive a cosmopolitan reform of democracy, which would involve the political inclusion of foreigners. In this chapter, I will argue that there are nonetheless good reasons to extend the cosmopolitan law beyond Kant's 'right to visit'. This implies taking issue with the legitimacy of marginalizing the phenomena of cross-border migration and political exclusion of foreigners from deliberations on public right.

First, I will consider those migrants who are worst off, i.e. people that are subjected to forced displacement and long-term encampment. Two ways of facing these challenges on the conceptual level will be discussed: On the one hand, we might widen the notion of a refugee in order to make it more inclusive, and on the other, we may consider extending the content of the cosmopolitan law of admission beyond the right to asylum. The right to asylum is here understood as the only generally recognized cosmopolitan law in the current framework of international law. Second, I will consider Kant's account of the circumstances of justice that led him to conclude that the cosmopolitan law was actualized as a moral-legal obligation already in his time. These circumstantial considerations led Kant to argue in favor of a right to visit as an adequate content of cosmopolitan law, which, at least in some readings, have a wider content than the right to asylum. Third, I will elaborate on Arendt's historical witness to how the need for an extended cosmopolitan law actualized itself in its radical negation through the totalitarian regimes and Holocaust. The circumstances had reached a point where the right to visit simply could not respond adequately to the harms caused by the international order at the time. At the end of this chapter, I will present a response to these circumstances, following two interconnected paths. The first path is concerned with Arendt's own response within the legal discourse, issuing the fundamental "right to have rights". This path solves the problem of autonomy by criticizing the old doctrines of right and introducing a new political principle. The second path is concerned with the epistemological relevance of foreigners' perspectives. The latter path is inspired by Amartya Sen's procedural critique of Rawls' original position and the

procedural alternative Sen finds in Adam Smith's 'impartial spectator'. This path is concerned with the problem of procedural parochialism. Both of these paths prepares my discussion on immigration in political theory in chapter 5 and the subsequent critique of Benhabib: To what extent is Benhabib's notion of a strong democracy and self-reflexive deliberation captures the adequate response to the issues at hand?

4.1 We refugees

Undeniably, the current institutional regulation of cross-border migration is an imperfect compromise. But although the current system causes some to live in intolerable situations, we should be careful not to paint too gloomy a picture. In a broader historical perspective we find ourselves today in a generally peaceful period.²⁴² The numbers of refugees were on a stable yearly decrease until the civil war in Syria led extraordinary numbers of civilians to flee their country.²⁴³ Also, if we look at the general line of policies on immigration, most groups have experienced a positive improvement. For instance, most cross-border migration within the EU-region is free and legal.²⁴⁴ Compared to the situation that Arendt describes in the first half of the 20th century, we might also argue that the legal integrity of stateless and irregular migrants has improved within the regime of international law. A state is – at least within reasonable limits – responsible for the human rights of any human being residing on their territory.

Still, for some groups the regional and bilateral agreements on migration among states imply inhuman and strategic measures are applied in order to limit immigration. The non-arrival measures described in chapter 1 seek to reduce the amount of asylum seekers arriving at state territory is one clear example of this. For these undesired groups –in general from the global south– the legal and physical access to crossing borders is worsened and the measures taken to prevent them from travelling irregularly are hardened. The recent agreement on border-regulation between EU and Turkey reflects this darker side of the current situation.

The most vulnerable of these groups are the victims of forced displacement, or “refugees” in the wide sense of the term. They count currently somewhere between 65.3 and 72 million

²⁴² Pinker, Steven. 2011. *The Better Angels of Our Nature : Why Violence Has Declined*. New York: Viking.

²⁴³ The count of displaced persons has increased dramatically since the start of the Syrian war (for illustration of UNHCR numbers, see <http://www.aljazeera.com/indepth/interactive/2016/06/refugee-crisis-160620083009119.html>) In Europe, the number of asylum seekers in 2007 was comparable to the 1987 level (http://ec.europa.eu/eurostat/web/asylum-and-managed-migration/data/database?p_p_id=NavTreeportletprod_WAR_NavTreeportletprod_INSTANCE_sFp6GUtlbBHg&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=column-2&p_p_col_count=1)

²⁴⁴ In 2015, the immigration to the EU of non-members was 2.7 million. (http://ec.europa.eu/eurostat/statistics-explained/index.php/Migration_and_migrant_population_statistics) The estimates within Europe is about 40 million for 2015. (http://www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/MigrationReport2015_Highlights.pdf)

displaced/refugees in the world, which amounts to about 1 % of the global population.²⁴⁵ What makes forced displacement a relevant cosmopolitan issue, even when they reside within their domestic territory, is that they present the world society with individuals that have nowhere to call their own. However, since internal displacement is a more complicated issue in terms of cosmopolitan law (related to the asymmetry between the right to emigrate and the lack of a corresponding right to immigrate), I will base my further argument on those situated outside their own country.

The reintegration of displaced persons is a “systemic” practical matter because even though we assume – hypothetically – the good intentions and moral soundness of the way each nation-state operates within the international order (as in an ideal-theoretical setting); it concerns every member of this order that most victims of forced displacement within the current system are likely to find themselves in a long-term situation of rightlessness. Put otherwise, if we recognize the issues of irregularity and statelessness as cosmopolitan issues, the legal status of foreigners should not rely solely on the goodwill of the parties involved. All beneficiaries of the public system are responsible for the situation of those excluded from it, especially if those excluded have nowhere else to go.

4.1.1 The definition of a refugee – narrow and wide terms of worthy victims

If we look closer at the definition of a refugee in the “UN convention relating to the status of refugees”, the term “refugee” is restricted to persons who qualify in respect to one of the following reasons of “well-founded fear of being persecuted”: race, religion, nationality, membership of a particular social group or political opinion. In other terms, the UN convention recognizes individuals as refugees when the persecution is based on features generally held to be non-alterable or that one should not be forced to alter. In addition, there is the territorial condition of displacement, which excludes the internally displaced from this definition of “refugee”.

Compared to the right to visit (in the wide reading), the conventional right to asylum is considerably narrower. Given the unconditional character of the corresponding duty to the right to asylum, such narrowing restrictions might be expected from a state-centric international community, but it also leads to weakened loyalty to the cosmopolitan spirit that accompanies this “lex specialis” on refugee issues. From the start, this right was initially designed to deal with the refugee problem in Europe after the Second World War, and it was only later extended as a global convention. Second, the right to asylum has, due to its restrictive conditions, highly

²⁴⁵ About 65 million people are considered «refugee-like» according to UNHCR, including internally displaced.

discriminating consequences within the group of displaced persons. The convention might not have much to say on who is allowed to enter a refugee camp, but it is decisive for the kind of entitlements²⁴⁶ and worthiness²⁴⁷ individuals are met with further on.

As Serena Parekh points out, there is an important exclusionary side-effect of this conventional distinction between genuine and false (illegal, rejected) refugees: Those denied legitimate status both suffer the harm of displacement and are placed in “a unique state of vulnerability” (as stateless).²⁴⁸ In the worst cases we might speak of being socially dead. Unlike victims of genocide, the displaced persons – i.e. those who cannot find a state to recognize them as members (Benhabib), or those who belong to no internationally recognizable community (Arendt) – *continue* living as the undead or as the living dead.²⁴⁹ Genocide has been recognized in recent times as a crime against humanity, the same should be the case, in my opinion, for those treated as human waste. In becoming in Arendt’s terms “superfluous people”, these individuals are deprived of their humanity, excluded not only from “our” political community, but from humanity as such.

The narrow conventional definition of “refugee” – or of “those in need of protection” – seems to have a broad support both legally and morally (although it varies somewhat according to context). The consensus seems to overlap two different positions on the character of the obligations in question: on the one side the cosmopolitan positions that recognize the negative duty of states implied; on the other side the moderate statist positions that recognize it on the conditional ground of mutual aid. In a new situation of mass migration, the consensus is challenged because the statist and the cosmopolitans tend to react differently to the question of how to adapt and reform the response to it. On the one side, the statist will insist on the weak character of the obligation associated with the right to asylum, and consider it as part of register of positive (supererogatory) humanitarian duties to aid those in need. On the other side, the cosmopolitans who hold the right to asylum to be a strong obligation, will tend to seek to extend this obligation in one of two ways: Either through widening the definition of refugees, such as already briefly discussed above (in 1.3), or to argue for a more general widening of the cosmopolitan law (which I tend to support), which would follow the line suggested by Kant (cf. Chapter 2) and argued further by Arendt and Benhabib below in this chapter.

²⁴⁶ Non-refoulement is such an entitlement; a principle of international law, which prohibits the return or exclusion of a true victim of persecution (i.e. a refugee) to his or her persecutor.

²⁴⁷ The group considered worthy of sympathy and compassion (and mutual aid) is usually much larger than those fitting the narrow category of genuine refugees.

²⁴⁸ P. 11, Parekh, Serena. 2017. *Refugees and the Ethics of Forced Displacement*, Routledge Research in Applied Ethics.

²⁴⁹ Arendt compares the effect on human rights on these people as equal to animal rights. If our dignity is based on human nature, being left stateless amounts to being treated as a specimen of the human race, and no longer as a political/human person.

4.1.2 Widening the definition of refugees

Widening the definition of “refugee” would address the problematic consequences of strategically ‘leaving out’ those fleeing from generalized violence and war. This wider definition already has some institutional support; The African Union has since 1969 operated with such a wider definition, and the UNHCR includes all persons in “refugee-like” situations.²⁵⁰ Parekh supports Joseph Carens²⁵¹ definition, which corresponds quite well to the broader account of UNHCR, defining refugees as: “[...] people who are outside their own countries and unable to return, “owing to serious and indiscriminate threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing public order.”²⁵²

To give some impression of how this group of co-world citizens are treated by the international community, Parekh highlights two alarming examples: First, within the wider category of refugees, the average duration of this excluding state of displacement (either urban or in camps) is 17 years(!). Second, only less than 1 % of the official refugees (in the narrow, conventional definition) are likely to be resettled in a third country – that is, without having to travel illegally.²⁵³ Obviously, these examples go together. If the issue of resettlement is solved, the average duration of long-term displacement or encampment is also likely to decrease. By widening the definition of those “in need of protection” one would be able to get better numbers on those in actual need of resettlement.

From a cosmopolitan perspective, i.e. to the extent that “we the people” understand itself to be collectively committed to assist refugees and displaced people, we should not be content with treating those that reach our shores and border with decency. Given that we are members of an international community and morally obliged to comply with the cosmopolitan law, we should in my view be highly concerned with the fact that encampment is still the standard approach toward displacement and question how our own immigration policies contributes to these systemic failures.

4.1.3 Widening the cosmopolitan law

The problem of the systemic failure that long-term encampment represents seems somehow to escape not only the statist positions, but also those that we might call state-centric cosmopolitan positions. While this neglect is predictable when it comes to statist positions, which deny any systemic or binding obligations whatsoever, there is also a tendency in some cosmopolitan

²⁵⁰ Parekh 2017, p. 12-3. To be cynical: There is obviously an interest in UNHCR, like in all client-based institutions, to define their base of clients broadly.

²⁵¹ P. 201, in Carens, Joseph H. 2013. *The Ethics of Immigration*. Oxford University Press.

²⁵² Parekh 2017, p. 13

²⁵³ *Ibid.*, p. 17

positions to ignore this problem. Whereas the statist would deny any strong obligations toward foreigners, the state-centric assumption seems to lead some cosmopolitans to restrict the cosmopolitan law to a set of laws of admission. Because politics is still considered to take place primarily between citizens, foreigners are considered moral equals as individuals, but are not recognized as stakeholders in a larger whole. Hence, when we discuss widening the cosmopolitan law, we are not primarily discussing whether it has a humanitarian or moral-legal character. The decisive issue is whether the obligations on the part of the state answer to the needs of individual foreigners, or to foreigners as parts of a globalized whole, i.e. a civil society. Although an individualist conception of the cosmopolitan obligation might capture the restrictions of a life project in long-term encampment, it seems less able to capture the problematic political exclusion involved.

If we consider Kant's right to visit as a widening of the cosmopolitan law, it could perhaps – in a generous reading – provide a few additional entitlements compared to the current legal situation of refugees. If we read the right to visit as a right to safe passage, refugees would at least be protected against the most inhumane non-arrival measures and allowed to travel more freely. Still, if we restrict our reading of “the right to visit” to its content concerning the law of admission, it adds little to the UN conventional protection: The right to visit does not commit states to provide a right to permanent residency. The practice might be quite generous in some states in terms of “guest rights” and even membership provisions, but it is not considered a moral-legal duty required by Kant, nor by the current international law. Furthermore, similar to the right to asylum, the right to visit implies a specified corresponding duty only when the foreigner stands at the border or resides within the territory of the given state. Neither of these rights addresses the kind of international arrangement that would be necessary in order to avoid the systemic problems associated with long-term encampment.

In distinction to the UN convention, the right to visit does not only address refugees, but any foreigner seeking to establish peaceful cosmopolitan relations. In this cosmopolitan spirit; I have argued in chapter 2 that it hardly seems reasonable to limit the interpretation of the right to visit to the scope of the cosmopolitan law of admission. It can also be read as part of a law of deliberation, which seeks to protect not only the foreign individual from harm, but the emerging civil society with a cosmopolitan character. This may open up for a strengthening of the political integrity of the foreigner, which is not explicitly articulated in the conventional right to asylum. However, this would require another view on the possible widening of cosmopolitan law, than the current state-centric notion of “politics” would allow.

The development since the Second World War has no doubt strengthened the status of temporal residents and their guest rights, compared to the preceding periods. In at least some aspects, we might even speak of a “mellowing of citizenship’s exclusive edges”²⁵⁴ and more “porous borders”²⁵⁵ which goes beyond the scope of Kant’s right to visit. With a concern for the transnational civil society and the systemic issues excluding some of its stakeholders, it is worrisome that most of the extensions are issued within the law of admission. It should, however, be noted that a recent statist counter-tendency – focus on security-aspects, which has been increasingly influential since 9/11 2001 – has challenged even this moderate cosmopolitan reform of the state. What we might call the “nativist backlash” in current politics, challenges even the bear minimum of cosmopolitan law as implemented in international law. This seems to make further extensions of cosmopolitan law in international law unfeasible for the moment.

On these terms, an ambitious widening of cosmopolitan law might not seem very realistic. This is particularly clear when it comes to the critique of long-term encampment as a kind of political exclusion of foreigners. This is an unusual idea because we are accustomed to think of political exclusion or misrecognition as violations of citizen rights, located within state borders.²⁵⁶ A cosmopolitan recognition of the political integrity of foreigners (both as affected and as stakeholders) obviously also requires circumstances that are considerably more globalized than those faced by Kant.

In the following I will argue that the current circumstances require us to reform the state, as well as our collective self-understanding in this cosmopolitan direction. Historically, there is a tendency toward increased relevance and sometimes urgency of an extended cosmopolitan law, indicated by the comparison of Kant’s and Arendt’s account of the circumstances of their times. Arendt’s response was to suggest a widening of the cosmopolitan law from a right to visit to a ‘right to have rights’; exactly how to understand the character of this response will be a central concern for the rest of this dissertation.

4.2 Kant’s cosmopolitan right – The outer circumstances of justice

To recap the argument presented in Chapter 2: In addition to the purely conceptual clarification of cosmopolitan law as distinct from Samaritan duty and positive international law, there is an empirical premise in Kant’s argument regarding the circumstances of justice. The question is whether there are in fact interactions between states and foreigners that actualize the content of cosmopolitan law. More specifically, the question is whether these interactions are *necessary* in the

²⁵⁴ Joppke 2010.

²⁵⁵ Benhabib 2004.

²⁵⁶ Lysaker, Odin. 2013. *Menneskeverdets Politikk: Anerkjennelse Av Kroppslig Krenkbarhet*. Oslo: Abstrakt.

morally relevant sense. That is, if the interacting individuals stand ‘unavoidably side by side’. Hence, it is not enough to confirm positively that there is cross-border migration, and that there are in fact empirical incidents which fit the formal category of cosmopolitan interaction. We also have to confirm that the outer circumstances define these interactions as part of an unavoidable moral co-existence. If these two premises can be fulfilled, it follows from Kant’s concept of public right that a state is morally obliged to pursue the legal protection of cosmopolitan relations. The first premise has been discussed at length in chapter 2, and I take it as the conceptual framework of the current discussion. Within this framework it seems undoubtedly true that we do, in fact, interact with foreigners. The following discussion will be concerned with the second premise.

As indicated in Chapter 2, Kant understood this second premise to be fulfilled already in his own time: “Since the community of the nations of the earth has now gone so far that a violation of right on one place of the earth is felt in all, the idea of a cosmopolitan right is no fantastic and exaggerated way of representing right [...]”²⁵⁷ I will continue by elaborating on Kant’s argument before discussing how Arendt understands these circumstances to have gained in moral relevance in our times.

The main circumstance is almost too obvious to mention. The content of the cosmopolitan law is first of all actualized by the fact that we happen to inhabit the earth. According to Kant, the cosmopolitan right to visit:

[...] belongs to all human beings by virtue of the right of possession in common of the earth’s surface on which, as a sphere, they cannot disperse infinitely but must finally put up with being near one another; but originally no one had more right than another to be on a place on the earth.²⁵⁸

When we consider the physical premise of Kant’s argument, the spherical shape of the earth, it becomes quite clear that the law of hospitality practically relies on empirical circumstances. If the world had the shape of an infinite plane, i.e. a flat earth with no ends, the problems of conflict could be solved simply by keeping a distance. From this physical-geographical premise of the spherical earth it hypothetically follows that the conditions of “*Lex iustitiae*” is fulfilled when all land on our spherical earth is occupied, and we “cannot help but associating with others”.²⁵⁹

To be clear, Kant’s argument is not based on a simple naturalistic fallacy, which would imply that Kant was inferring normative principles from merely empirical state of affairs. The point is that

²⁵⁷ PP, p. 8:360

²⁵⁸ Ibid., p. 8:358

²⁵⁹ MM, p. 6:237

the spherical shape of the earth represents a relevant fact for the ‘circumstances of justice,’ which defines “the conditions of our possible agency” to which external laws must adequately respond.²⁶⁰ Hence, we might think of space in terms of scarcity: “Nature has enclosed [all the nations] together within determinate limits (by the spherical shape of the place they live in, a *globus terraqueus*).”²⁶¹

The specific idea of the cosmopolitan law is that the earth’s surface not only encloses states together (which solicits the need for an interstate law), but also each one of us as individual members of the human species. We inherit the earth as a common “possession”²⁶². This implies that we might interact with other states (or its citizens) as world-citizens (not representing our state) as long as we behave in a civilized or hospitable manner, both as visitors and as hosts. Correspondingly, Kant rejects the idea that we have a natural right to behave inhospitable toward foreigners or foreign states. Further on, not all interaction beyond the domestic sphere is defined by states. This is provokingly clear in cases of displaced persons, with no specific belonging to any state, but the economic and communicative relations of civil society also counts.

Corresponding to the fact that we live in a “community of possible physical *interaction (commercium)*”, individuals have “a right to make this attempt without the other being authorized to behave toward it as an enemy because it has made this attempt.”²⁶³ Beyond stating that there is a potential for interaction, Kant’s assumption that the circumstances of cosmopolitan justice are actualized relies on the degree to which states are in fact bounded and closed systems. This is of course a matter of discretionary judgement which is difficult to prove in absolute terms. The guiding normative idea would be that the more interdependent individuals and states are, the more relevant does it become to establish peaceful relations and to avoid the kind of harmful events that would affect us all. In this sense, we see in Kant’s work the emerging intellectual recognition of a global interdependence. This is especially noticeable in his concern for to the imperialist endeavors of the European nations, which displaced a lack of hospitality as guests, inflicting harm through uncivilized practices of brute force, such as slavery and forced appropriation of occupied land.

Even if we were to accept Kant’s suggested content of the cosmopolitan law as adequate according the circumstances of his time, this does not necessarily remain the case today. As

²⁶⁰ See Waldron 2000, who compares Kant analysis to Hume’s notion of outer circumstances of justice. See also Flikschuh, Katrin. 2000. *Kant and Modern Political Philosophy*. Cambridge: Cambridge University Press.

²⁶¹ MM p. 6: 352

²⁶² Kant rejects the absolutist or libertarian idea of territories as private properties. The common possession of the earth is then consistent with this specified as the possibility of physical interaction.

²⁶³ MM, p. 6:352. Corresponding to the transition from a Westphalian to a liberal *vie won* foreigner, Kant here marks a watershed according to Benhabib.

discussed in Chapter 2, due to the historical contingency of the international order and the shifting circumstances, I do not think we should understand the law of hospitality as the final form of the rationally willed cosmopolitan civil condition. It seems rather to serve as a provisional content which promotes the regulative idea of a civil order in its early stages. At the same time, it is not simply a positive law bound to be outdated. It is a law thought of as an unwritten code, which is privileged in its uncorrupted truthfulness to the principle of justice and to its regulative idea of global civil condition:

[...] this right to hospitality – that is, the authorization of a foreign newcomer – does not extend beyond the conditions which make it possible to seek commerce with the old inhabitants. In this way distant parts of the world can enter peaceably into relations with one another, which can eventually become publicly lawful and so finally bring the human race ever closer to a cosmopolitan constitution.²⁶⁴

“Commerce” here refers to relations in civil society in general, including the extra-political parts in the market and the public sphere. It should not be read exclusively as *economic* interaction – although trade was at the time thought to have a calming and civilizing effect. “Commerce” here alludes more broadly to the Enlightenment notion of *communication* and its assumed positive epistemic or educating effects. As a child of the early stages of globalization, this notion might be said to have the characteristic optimism which is rare in our days.

In specific cosmopolitan terms, this regulative idea is not merely any kind of international order, but requires a balanced international order that complies with all three domains of public right (domestic, interstatal, cosmopolitan). In practical terms, we should of course admit that the aspiring “community with all” is not possible as a full institutional reality. The cosmopolitan federation of states is a *regulative idea*, which, since Kant’s time has (for the most part) only been weakly implemented as a collective pressure of the international and global society by “naming-and-shaming”. In recent times it has also to some degree been implemented as positive international law under the sanctioning protection of international courts. The content of cosmopolitan law, however, has not been extended considerably (if at all) since Kant’s proposal.

In fact, Kant’s law of hospitality can still be considered quite radical and progressive. If we take Kant’s claim seriously as a right to first admission, the current international system is highly discriminatory in its distribution of the cosmopolitan right to seek commerce or interaction elsewhere.²⁶⁵ Large parts of the global population are currently kept out of the process of

²⁶⁴ PP, p. 8:358

²⁶⁵ This is defining the current relation between north and south, which is based on highly selective terms of inclusion. After the “immigration stop” in Europe, the right to visit is reserved to economically similar regions. Only high-skilled workers and exchange students are allowed from poorer countries (guest rights).

establishing a global community. This stagnation in the implemented content of cosmopolitan law does, however, not reflect the increased relevance according to the changes in the globalized circumstances of justice.

4.3 Arendt and the impossibility of finding a new home

In the discussion above I considered the right to visit as the adequate content of the cosmopolitan law, and as a proposal it could reasonably be considered as an extension of the current portfolio of conventionally recognized cosmopolitan rights. According to Arendt's diagnosis of our changing circumstances, however, this Kantian extension is far from sufficient. The circumstantial changes are depicted by Arendt in the following way:

The first loss which the rightless suffered was the loss of their homes, and this meant the loss of the entire social texture into which they were born and in which they established for themselves a distinct place in the world. [...] *What is unprecedented is not the loss of a home but the impossibility of finding a new one.* Suddenly, there was no place on earth where migrants could go without the severest restrictions, no country where they would be assimilated, no territory where they could found a new community on their own.²⁶⁶

Whereas Kant's law of hospitality to some degree could be seen to respond to the consequences of losing one's home (as a right to asylum), it has no adequate response to the new experience of the devastating consequences of the systemic impossibility of finding a new one. For instance, as argued above, the provisional cosmopolitan right to visit could be understood to recognize the cosmopolitan integrity of individual non-citizens, regardless of their affiliation to a foreign state, but it does not, however, respond to a global situation where the nations are enclosed to such a degree that it is impossible to find a new home.

The crucial difference between Kant's circumstances and those described by Arendt, were reflected in the experienced horror of the Nazi-regime, Arendt's personal escape and subsequent life as a refugee. Arendt bore witness to how the formal perplexities of the international system that proclaimed its moral support of human rights, created a humanistic vacuum where ordinary people were treated as a "new kind of human beings – the kind that are put into concentration camps by their foes and internment camps by their friends"²⁶⁷ as she phrases it. This probably contributed to her clearer recognition of the distinction between "humanity" as a factual community, and Kant's notion of humanity as a regulative idea.²⁶⁸ The international state-order had "civilized" (i.e. territorialized) the whole planet to the point where it had become an

²⁶⁶ Arendt 1968, p. 293

²⁶⁷ P. 111, in Arendt, Hannah. 1994 [1943]. "We Refugees." In *Altogether Elsewhere : Writers on Exile. Writers on Exile*, edited by Marc Robinson, xxii, 415 p. Winchester, MA: Faber and Faber.

²⁶⁸ Arendt 1968, p. 296

inevitable fact. For those seeking a new home, there was nowhere to go. As such, humanity as a fact became the condition under which any weakness of the implemented order had unforgiving consequences. Hence, the inadequacy of the current compromise led to unprecedented degrees of exclusion. It put individuals in a state of rightlessness, which manifested in practical terms the aporia of human rights: That the stateless, those left only with their status as human beings, found these human rights inapplicable. The globe was organized, but not in a way that was able to respond adequately to the stateless.

4.3.1 The loss of a home and the impossibility of finding a new one – depoliticization and dehumanization

As is well known, Arendt was critical to the “human rights”²⁶⁹ as we know them from the French and the UN declaration of human rights.²⁷⁰ The historical events that confronted Arendt in her life, confirmed her skepticism: “For Arendt, the central experience of the twentieth century is this crisis point: that whoever ceases to count as the citizen of a particular state loses not only his or her civil rights in that particular state, but paradoxically also his or her human rights.”²⁷¹

This striking impotency of human rights is usually explained as a lack of international sanctioning power, and this is of course part of the reason, but according to Arendt there is a deeper habit of thought associated with the international society that fails to provide conceptual clarity or guidance, especially in those situations where its assistance is most needed:

The conception of human rights, based upon the assumed existence of human being as such, broke down at the very moment when those who professed to believe in it were for the first time confronted with people who indeed has lost all other qualities and specific relationships – except that they were still human. The world found nothing sacred in the abstract nakedness of being human.²⁷²

On one side, this quote reveals a republican influence in Arendt’s thinking, a “naked” human stripped of the functionary roles and personal features that society provides, is no longer a moral-legal equal. We could perhaps compare it to how pornography, either of the body or the social (reality-TV), rarely (if ever) leaves us with the impression of something sacred, but rather tends to

²⁶⁹ To avoid further confusion, I will use “citizen rights” or “rights of Man” when talking about rights in the domestic sense of universal rights, as these are associated with the nationalist interpretation of French and American revolutionary constitutions. I will use “human rights” when referring to the declaration and conventions of the UN, and I will use “cosmopolitan right” to refer to the specific rights articulated in the philosophical arguments made by Kant and Arendt. These last ones are ideas that have had some influence in the literature on immigration and global justice, but they are not dominant in society as such. They are both based on a moral idea of humanity.

²⁷⁰ She was more positive to the American “bill of rights” which is more explicitly a set of restrictions on the state (primarily duties of the state, and not rights founded in human nature).

²⁷¹ Quoted from p. 743 in Menke, Christoph. 2007. "The "Aporias of Human Rights" and the "One Human Right": Regarding the Coherence of Hannah Arendt's Argument." *Social research* 74, no. 3: 24.

²⁷² Arendt 1968, p. 299. Menke refers to the article from 1949, “The Rights of Man, what are they?” and quotes this passage in a manner that is only slightly edited in the latest version from 1951.

evoke a sense of one-dimensional attraction or mere disgust (depending on one's preferences). On the other side, the quoted "nakedness" bears witness to a missed opportunity. The naked and undetermined can, like when we receive a newborn child, be a source of wonder, curiosity and hope. The international community of human rights failed to find this response to it.²⁷³

The process that leads some people to appear as 'nothing but human' is sketched by Arendt as a two-step process of loss. In the case of displaced persons, the first loss is the loss of a home, which implies the loss of the "entire social texture" and their integrity as political and speaking animals.²⁷⁴ They lost their status as legal persons, and the relevance of their actions and voice as a responsible being. In "We Refugees" Arendt describes this in a more personal, collective first-person address to her own Jewish community:

We lost our home, which means the familiarity of daily life. We lost our occupation, which means the confidence that we are of some use in this world. We lost our language, which means the naturalness of reactions, the simplicity of gestures, the unaffected expression of feelings.²⁷⁵

The second loss is negatively described as the unprecedented "impossibility of finding a new one" and to be rendered, even worse than a slave, as utterly useless and superfluous. To understand the severe harm inflicted by this second loss, Parekh introduces a useful distinction between a formal (*de jure*) deprivation of legal status and the substantial (*de facto*) deprivation.²⁷⁶ The loss of a home entails a loss of a political community and the corresponding legal identity. The subsequent incapacity to find a new home entails the additional existential deprivation of appearing as a human person as such. This second loss is therefore sometimes referred to as being reduced to "mere life", which deprives the individual of his or her integrity as a person, reduced to a mere specimen of the human species (*homo sapiens*). This corresponds to Arendt's suspicion against grounding human rights in human nature. Not to put a too fine point on it; human rights are in way reduced to a subcategory of animal rights, which, while recognizing the vulnerability and bodily integrity of embodied creatures, fail to recognize the vulnerability of human persons and the fragility of human affairs. If human rights are conceived as akin to a

²⁷³ Birmingham elaborates on this second notion of *zōē* as the "disturbing miracle of the given". (see 2006, p. 75 ff.) With reference to Arendt's doctoral dissertation on Augustine, Birmingham points out the central significance of "love" in Arendt's early account of naked life. This love is not primarily related to the biological drives of mating and child-care, but to the existential and unconditional "I want you to be".²⁷³ In other words, we can only respond to this difference – as Arendt refers to Augustine – with an attitude of love or gratitude of the mysteriously given (i.e. the non-human made).

²⁷⁴ Schaap 2011

²⁷⁵ Arendt 1994, p. 110

²⁷⁶ Parekh 2017, p. 83 ff

subcategory of animal rights, we are unable to see long-term encampment clearly a moral problem, as long as the specimens are treated well and given a proper habitat.

Arendt analyses the context of Holocaust as a series of events that eventually led to the perverse conclusion that denaturalizing the superfluous and unwanted implied that the state could treat them as if there was nothing “sacred” present. The circumstances for this horrific event were partly the unwillingness of the states that had announced their loyalty to the Human Rights to receive those excluded from the states that denounced these rights. To the extent that they did receive them, the refugees remained stateless and interned in camps. Hence, to be deprived of one’s legal status implied in many cases expulsion from humanity. The regulative idea of Humanity was contrasted with the grim consequences of the inevitable fact of the “completely organized humanity”:

The trouble is that this calamity arose not from any lack of civilization, backwardness, or mere tyranny, but, on the contrary, that it could not be repaired, because there was no longer any “uncivilized” spot on earth, because whether we like it or not we have really started to live in One World. Only with a completely organized humanity could the loss of home and political status become identical with expulsion from humanity altogether.²⁷⁷

The enclosed inter-state order on a spherical earth had become an inevitable fact in the unforgiving sense. It became clear that the problem was not that of space, but of political organization.²⁷⁸ One could say that it is first in a completely organized world that the problem of the superfluous emerges.²⁷⁹ Physically, the scarcity of land forced the expelled to seek to enter the civil society of a foreign state. Provided that no state was willing to receive them except from the inhospitable treatment of encampment, the circumstances could not “forgive” the systemic inadequacy by providing the excluded with new territories. There was nowhere to go for those who had fallen victim to the civilized order. For the first time people could be permanently expelled from humanity.

In Kant’s time, one could still perhaps to some degree send off the undesirable and expect them to “stop associating with others (us included) and shun all society (to settle on their own).”²⁸⁰ After all, this is how religious sectarians and political opponents were treated in Europe. As Arendt describes in extensive detail, the imperialist area involved superfluous men following superfluous capital to new continents. In the historical situation of the mid-war period however, this was no longer an option. In the end it actualized the potentially excluding consequences of

²⁷⁷ Arendt 1968, p 297

²⁷⁸ *Ibid.*, p. 294

²⁷⁹ See also *Ibid.*, p. 293

²⁸⁰ paraphrased from Ulpian; *Lex iuridica*, MM, 6:236, my insertions

the inadequate self-conception and institutional compromises. Hence, the idea of the need for a civil international order on a global scale was no longer based on global sympathy for the occasional victim of transgressions of cosmopolitan law, made by hostile states or powerful guests. It was based on the recognition that statelessness the current international order, unavoidably implied disastrous and unprecedented exclusions from humanity as such.

4.3.2 The mismatch: human rights as response to homelessness

The central question in Arendt's critique of human rights could be formulated like this: How could an international community of democracies, proclaiming their loyalty to "the rights of Man", fail in such a disastrous manner? Arendt's original answer is found in the missed opportunity of responding adequately to the "nakedness of being human". This missed opportunity seems to express a kind of surprise and un-readiness in the bad sense that the international community did not stand prepared in a time of emergency. Arendt's main explanation is not that the human rights lacked the institutional force of a monopoly of violence. Rather, she explains it as due to human rights' state-centric character. Both prior to, and after the horrific experiences of the first half of the 20th century, the content of human right took the form of domestic and not cosmopolitan law.

Because of this lack of adequate content to addressing the problems at hand, Arendt was worried that the UN declaration would contribute nothing more than a futile clinging to old moral doctrines. There was no clear conception of what the general human rights, which the rightless people had lost, really were.²⁸¹ From a cosmopolitan perspective, the question of what human rights "really where" was not just a matter of the traditional dispute between the political right and left over separating the right from the good; the civil and political from the economic, social and cultural. It should also, more to the point, concern the deepest character of the human rights as a specific domain of public right: The majority of the rights declared, were designed to solve *domestic* problems; they were citizen rights. And, as is tautologically true of citizen rights: "Only the members of a political community can be bearers of rights."²⁸²

The notion of the "human" in human rights was in this sense not only too abstract, but misleading. It relied on an abstraction of human dignity from a tacitly assumed and specific notion of the political. To some extent, Arendt gives her consent to the English critique of the French declaration in 1789, associated with Edmund Burke and Jeremy Bentham. According to this critique, "rights" are only meaningful as legal claims raised within a community with

²⁸¹ Arendt 1968, p. 293

²⁸² Menke 2007, p. 745

corresponding duties, such as the “rights of an Englishman”. In this perspective, human rights merely refer to normative demands that distort the political conditions on which such claims rests and under which they could be realized.

This distortive effect is made painfully clear in the short-comings of the individualist conception of human dignity and rights.²⁸³ As Arendt critically points out, these short-comings amount to an incapacity to express the right that corresponds to the loss of a polity and the subsequent exclusion from humanity:

Man, it turns out, can lose all so-called Rights of Man, without losing his essential quality as man, his human dignity. [...] The decisive factor is that these rights and the human dignity they bestow should remain valid and real even if only a single human being existed on earth; they are independent of human plurality and should remain valid even if a human being is expelled from the human community.²⁸⁴

To Arendt this is an absurd consequence of founding rights on a notion of individual autonomy. It seems conceptually unconcerned with the dehumanizing consequences of being expelled from the human community. In this way, Arendt is not only concerned with the inadequate content of international law. While it is clearly problematic that cosmopolitan law becomes generally conflated with the universal status of (and/or the international agreements on) citizen rights. A more deep-seated problem is however that the guiding conception of dignity and political principles was unable to guarantee against the exclusion from the human community. Unless one is willing to reproduce the state model on a global level, as a global state with us all as its citizens (which neither Kant nor Arendt supported), it follows that “these supposedly inalienable universal human rights were from their inception inseparably tied to the sovereignty of a people”²⁸⁵ in an inadequate, state-centric manner. This could be seen as the background for the title of chapter 9 in Arendt’s *Origins*: “The Decline of the Nation-State and the End of the Rights of Man”.

Contrary to the English critique of human rights, Arendt seems to recognize that there is nothing wrong in establishing agreements on citizen rights on the international level. There are good reasons as to why states should supervise each other’s compliance with certain standards for

²⁸³ The theoretical starting point for most political philosopher of the modern tradition of natural law and human rights, was the individual. Arendt’s notions of a right to a framework of action and a right to belong to an organized community, are, on the other hand, fundamentally relational terms. That is to say, these terms are not reducible to some pre-modern idea of a social body, but conceive the individual distinctness of a human being as a mode of being that requires the presence of others. (See Chapter 6).

²⁸⁴ Arendt 1968, p. 297-98

²⁸⁵ Quoted p. 36, in Birmingham, Peg, 2006. *Hannah Arendt & Human Rights : The Predicament of Common Responsibility*, Studies in Continental Thought. Bloomington, Ind. Chesham: Indiana University Press ; Combined Academic, distributor.

domestic problem-solving. After all, this is how a state is conceived as legitimate within a liberal international order. Domestic affairs are as such not merely a concern of each sovereign state. We should however be careful with naming them “human” rights, because it gives the conceptual impression that these are rights that are guaranteed even for foreigners. This becomes urgently clear in the case of the most vulnerable, the stateless or “naked” foreigners.²⁸⁶ Correspondingly, the experienced rightlessness of the stateless reveals how worthless human rights are without citizenship. That is, without a specified state carrying the duty corresponding to these rights.²⁸⁷

Commenting on the Universal Declaration of Human Rights of 1948, Arendt points out its conceptual confusion and lack of clarity.²⁸⁸ Arendt expressed a certain disappointment, but also a deep concern for the inadequacy of turning to the eighteenth century ideas of “the rights of Man” without rethinking these rights in light of their complete failure in the face of totalitarian politics. Obviously, if we look at the preamble of the UN declaration, the Nuremberg process and the later consolidation of a soft international law based on human rights, it suggests that the view on human rights had changed considerably.²⁸⁹ They were to be understood as existing independently of any state’s positive law and the citizenship status of any individual. To understand why this would not silence Arendt’s concern, we have to spell out her critique of the underlying conception and sense of reality in the declaration. In brief, the denationalizing practices of the totalitarian regimes of (Hitler’s) Germany and the Soviet (of Stalin) put the civilized order to an extreme test never before encountered. To Arendt, the UN-declaration was conservative to the point where it seemed like nothing new had happened.

As Menke points out, the article from 1949 is interesting because it precedes the more famous articulation of the same critique in chapter 9 of *Origins* published two years later (1951). In *Origins* Arendt captured in her formulation of the “perplexities” or aporias of the Rights of Man, the way in which totalitarian politics called into question not only the practical feasibility of human rights, by the very idea of such rights. Arendt’s title might suggest that this anti-human right politics was in the end successful and that it indeed marked the end of ‘rights of man’, which would suggest a

²⁸⁶ Interestingly, Arendt points out that initially their status as stateless ensured the migrants with the status of being world citizens. They were perceived, in this account, as an innocent mass of potentially assimilated new national citizens (without baggage; like blank slates). When this assumption was negated by experience; when they insisted on their foreign nationality, their statelessness was also rejected by the European states (first with the Russian and Armenian refugees), and their status and situation radically deteriorated. The current language of ‘illegals’ or ‘rejected’, and so on, still has a flavor of this refusal to conceive the migrants as “stateless”. They are undesirable, damaged goods, potentially non-assimilating, and at best deportable (“back home”/to where they belong). Hence, similarly to “sans papiers”, being “stateless” is an activist term, adopted for protection (or deception) and a claim of being treated as human independently of any specific affiliation.

²⁸⁷ [ex. right to emigrate without the right to immigrate, or duty to allow immigration]

²⁸⁸ Arendt 1949, quoted from Menke 2007

²⁸⁹ Moyn, Samuel. 2010. *The Last Utopia : Human Rights in History*. Cambridge, Mass.: Belknap Press of Harvard University Press.

flat out rejection from Arendt's side à la Burke.²⁹⁰ However, if we look at the German title of this early text it expresses a more optimistic view: "There is only one Human Right".²⁹¹ As Menke argues, this suggests an alternative understanding of the idea of human rights which does not depend on the modern natural law or on the idea of individual liberal rights in general.²⁹²

The "one human right" refers evidently to Arendt's notion of "the right to have rights". Exactly how we should interpret this right is a complicated question. The crucial point is to recognize that although Arendt takes distance from the statist conclusion of the English critique of the rights of Man, she is also eager to distance herself from conventional moral cosmopolitan positions which derive the status of human rights from the simple fact of being human:²⁹³ "Equality is not an attribute of people as individual natural beings, but an attribute of political members, and therefore the very reference to the natural human being destroys every claim to equal rights."²⁹⁴ Hence, the most obvious answer to what Arendt could have understood as 'the one human right' is the cosmopolitan right to political membership.

4.3.3 Facing the totalitarian regime – the distillation of rightlessness

To explore further the experiential, historical background to Arendt's response, we may look closer at her discussion of "denationalization" in *The Origins of Totalitarianism* (1968). Without dwelling on the complex historical circumstances of the interwar period, it should suffice to point out that Arendt refers to the "nationality problem" that occurred after the First World War and the collapse of the Russian, Ottoman and Hungary-Austrian empires.

The nationality-problem emerged through the establishment of nation states in the wake of the old empires. It was further provoked by the – in Arendt's view – inadequate response by the League of Nations in the form of a minority treatise that only seemed to confirm that every properly represented nation had its own state. The "Nansen-passports" solution speaks to this as well. These passports were travel documents intended to give people a safe passage "home". Unable to satisfy all nationalities, the amount of "nationally frustrated peoples" were significant and the level of mistrust increasing.

²⁹⁰ Ref. to someone who reads Arendt this way? (Ranciere? Agamben?)

²⁹¹ «Es gibt nur ein einziges Menschenrecht.», Menke 2007, p. 741.

²⁹² Menke 2007, p. 741. See also Gündođdu, Ayten. 2015. *Rightlessness in an Age of Rights: Hannah Arendt and the Contemporary Struggles of Migrants*: Oxford University Press.

²⁹³ The fundamental point however is this: That the declaration of rights of man tried to reduce politics to nature. A point that becomes much clearer in the Human Condition. [sameness = implosion of distinctness into a "mass" = the extinction of humanity]

²⁹⁴ Menke 2007, p. 746

In this context, denationalization (or denaturalization, i.e. to deprive someone of their citizenship) was used as a powerful political tool both to homogenize one's own population and to destabilize neighboring states. And in Arendt's view it was also a tactic test to the ability of the democratic states to uphold their promised guarantees for human rights. To localize the root of evil here, Arendt does not merely criticize this practice, which is possibly the cruelest form of depoliticization, but she also attacks the very presumption that defines the "nationality problem"; the nationalist ideal of a harmonious nation-state order²⁹⁵:

The worst factor in this situation was not even that it became a matter of course for the nationalities to be disloyal to their imposed government and for the governments to oppress their nationalities as efficiently as possible, but that the nationally frustrated population was firmly convinced – as was everybody else – that true freedom, true emancipation, and true popular sovereignty could be attained only with full national emancipation, that people without their own national government were deprived of human rights.²⁹⁶

Although Arendt rejected this nationalist interpretation of a political community, she regrettably confirmed that it stated the character of human rights as they were understood at the time.

The subsequent decline of the nation-state implied - in concordance with the social imaginary – the end of the rights of Man. The first sign of this was, according to Arendt, the abandonment of the cosmopolitan right "par excellence": the asylum right.

The first great damage done to the nation-states as a result of the arrival of hundreds of thousands of stateless people was that the right of asylum, the only right that had ever figured as a symbol of the Rights of Man in the sphere of international relationships, was being abolished.²⁹⁷

In other words, one of the few rights that could actually pass as designed to solve cosmopolitan, and not just domestic problems, was the first to be abandoned.

The second step of denaturalization implied in many cases a full collapse of the distinction between stateless refugees and normal resident aliens (historically those with guest rights). Statelessness spread like a disease and deteriorated the status of all who were not considered to

²⁹⁵ In *The inclusion of other* (2001), Habermas also notes that precisely because nationalism is such an efficient instrument; it is also easily misused by elites (European imperialists, Nazi-populists, international oligarchs) for propaganda purposes, which hardly comply with republican principles. Reflecting on the post-war German experience in particular, Habermas therefore argues that we have entered a post-national period where the awareness of the horrific dangers associated with playing with the nationalist fire has made us more careful. Today this post-national understanding of the situation is more contested both in Germany and in the rest of Europe. We should therefore, in my view, look for more peaceful and less alienating variants of state-centrism.

²⁹⁶ Arendt 1968, p. 272

²⁹⁷ *Ibid.*, p. 280

“belong” – among them the German Jews.²⁹⁸ This created an unprecedented situation of homelessness, which Arendt describes as a fundamental deprivation of human rights. It’s a situation so unbearable and degrading, that you would even benefit from committing a crime.²⁹⁹

In this way, the nationalist understanding of political membership – based on “the homogeneity of the population and the rootedness in the soil” – was creating an unforeseen problem, i.e. masses of stateless (of national minorities or expatriates). The nation-state interpreted cohabitation in a very strict manner, irresponsive to the heterogeneity and diversity of human life, and with potentially devastating consequences.

The denaturalization policies created a situation where the stateless, a group of innocent people deprived of political and legal integrity, could emerge. According to Arendt, the inhumane treatment of this group from all European states, became, for the despotic and totalitarian regimes, the confirmation “that no such thing as inalienable human rights existed and that the affirmation of the democracies to the contrary were prejudice, hypocrisy, and cowardice in the face of cruel majesty of the new world.”³⁰⁰ This was further confirmed by the betrayal by the democratic states against the stateless, leaving them with nowhere to go. In practice, this confirmed that human rights could not guarantee the stateless integrity, neither as world-citizens, nor as neighbors in need of Samaritan aid.

The practical inertia of human rights idealism is also reflected in the recorded experiences of the victims of this denaturalization policy. Partly based on her own experiences as a stateless, German Jew encamped in southern France, Arendt pinpoints the contrast between belief and practice in her description:

No paradox of contemporary politics is filled with a more poignant irony than the discrepancy between the efforts of well-meaning idealists who stubbornly insist on regarding as “inalienable” those human rights, which are enjoyed only by citizens of the most prosperous and civilized countries, and the situation of the rightless themselves. Their situation has deteriorated just as stubbornly, until the internment camp – prior to the second World War the exception rather than the rule for the stateless – has become the routine solution for the problem of domicile of the “displaced persons.”³⁰¹

²⁹⁸ See for instance Nuremberg laws.

²⁹⁹ Arendt 1968, p. 286 Today this option of illegality is easily imaginable through human smuggling, illegal residency, and so on, but Arendt has in mind the rather simple fact that as rightless, being brought to a court is in itself an improvement of one’s depoliticized situation. Committing a crime then, is one of the few ways to be taken seriously and actually become recognized as a legal subject with certain rights associated with the “courtesy” of the court house.

³⁰⁰ Arendt 1968, p. 269

³⁰¹ Arendt 1968, p. 279

Arendt describes a situation where Europeans seemed helpless in their attempt to deal with the growing numbers of stateless persons. We might think of it as a situation of the past, but as noted above, encampment is still a common way to deal with refugees. It is as if the moral shock has left us stuck in a moral paralysis when it comes to thinking about the obligations states have to foreigners. The UN declaration reflects at best the good intentions of an international society worn out by war. In Arendt's view it was merely a re-coating of old doctrines (of rights of Man) without adapting them to the new circumstances.

4.4 Two possible responses – extending the cosmopolitan law and acknowledging the view from elsewhere

Given the severity of the harm inflicted on people in long-term encampment, we owe them a proper response. I will present two theory-oriented options at the end of this chapter, and situate them in the more practically oriented debate on migration in the next chapter.

First, we might respond, inspired by Arendt's analysis, by recognizing the right to have rights as a necessary extension of cosmopolitan law. It should be noted that this is a specific Kantian reading of "the right to have rights" which emphasizes Arendt's republican view on equality as associated with belonging to a political community.

Second, if we consider displaced persons not only as a problem of the legal and social status of each individual victim of dehumanization, but as a problem associated with the character of the international order itself, we could also respond in an epistemologically minded fashion by asking: By which procedures can we arrive at the best answer to the cosmopolitan reform required by the circumstances? Could we not, for instance, consider the most vulnerable group of migrants, which are at risk of the inhumane consequences of the current order's selective immigration policies, as a "worst off"-group in this international order? According to Rawls' procedure in the original position, this group would have a privileged position in a cosmopolitan version of this thought experiment. Rawls did however only recognize the domestic and interstatal (or interpopular) version of this procedure.³⁰² To address the problematic aspects of this procedural constraint, I will present Amartya Sen's argument against Rawls' procedural parochialism.

As we will see in the next chapter, the first response relates to Benhabib's position in the immigration debate Benhabib interprets and promotes Arendt as the central contributor to the

³⁰² Sen seems to accept Rawls' argument against this cosmopolitan version that entail global membership entitlements to the original position, because he argues against it on more pragmatic terms of an institutional lacuna. (Sen 2009, p. 140-1) In the next chapter I will present a similar concern against Joseph Carens application of this cosmopolitan version in the immigration debate.

extension of the cosmopolitan law of admission. The second response addresses more indirectly the epistemological position of Benhabib, which recognizes the relevance of foreigners' perspective in self-reflexive collective deliberations.

4.4.1 The cosmopolitan right to political membership

With the fundamental deprivation of human rights, that of rightlessness, Arendt refers to an experience that reveals the notion of "human rights" in a more concrete and deeper sense than those we might refer to as the liberal-democratic individual rights of citizens. This becomes clear in the following famous quote:

Something much more fundamental than freedom and justice, which are rights of citizens, is at stake when belonging to a community [...] is no longer a matter of course [...]. This extremity, and nothing else, is *the situation of people deprived of human rights*. They are deprived, not of the right to freedom, but of the right to action; not of the right to think whatever they please, but of the right to opinion. Privileges in some cases, injustices in most, blessings and doom are meted out to [the rightless] according to accident and without any relation whatsoever to what they do, did, or may do.³⁰³

This kind of personal disempowerment turns into a severe, dehumanizing form of exclusion which affects even one's sense of human agency. On this background, and because this dehumanizing process involved millions, did we, according to Arendt, become aware of *the human right*³⁰⁴ in its most basic sense as 'a right to have rights'. Before these atrocities, Arendt notes, this basic notion of a "human right"³⁰⁵ was thought of as the taken-for-granted *human conditions* that no political circumstances could possibly deprive us of.³⁰⁶

In contrast to the traditional liberal set of civil rights, Arendt articulates the rights of action and opinion as the adequate content of public right in order to capture the transgression experienced in denationalization. The articulation of this human condition answers to Arendt's diagnostic remark in the beginning of *Origins*, which indicates that this is not merely a question of the content:

[...] human dignity needs a new guarantee which can be found only in a new political principle, in a new law on earth, whose validity this time must comprehend the whole of humanity while its power must remain strictly limited, rooted in and controlled by newly defined territorial entities.³⁰⁷

³⁰³ Arendt 1968, p. 296, my emphasis

³⁰⁴ Note that "human rights" in the quote refers to the right to action and opinion, which are elements of the right to have rights.

³⁰⁵ Menke (2007) underlines the lack of plurality in this «right» by referring to the German translation of «The Rights of Man: What are They?» (1949), later part of *Origins*, chapter 9: "Es gibt nu rein einziges Menschenrecht."

³⁰⁶ Arendt 1968, p. 297

³⁰⁷ *Ibid.*, p. ix.

As noted above, Arendt was dismissive to the individualist notion of human dignity based in a human nature, transcending the history of political communities. This notion was unable to articulate a right that could guarantee against the dehumanizing consequence of being expelled from the political organization of the ‘family of nations’. Her famous response to this need for a new political principle is articulated in the context of a “we” that has experienced the thought-provoking horror of the Second World War:

We become aware of the existence of a right to have rights (and that means to live in a framework where one is judged by one’s actions and opinions) and a right to belong to some kind of organized community, only when millions of people emerge who had lost and could not regain these rights because of the new global political situation.³⁰⁸

There are several ways to interpret this response. Why does Arendt, who is clearly skeptical to the individualist notion of rights, use the same language to express her new political principle? What does it mean “to live in a framework”? Is it the same as “belonging to some kind of organized community”? Did Arendt have the state-centric notion of a modern state in mind?

What in any case seems quite certain is that the reference to terms “action” and “opinion” point to her influence from the Greek notion of *praxis*, and her attempt to revitalize its political significance. This is a central feature of Arendt’s philosophical project, which seeks to redefine political thinking from *poiesis* – i.e. politics understood as social engineering – to *praxis* – i.e. politics understood as communication. It is also quite clear that her reference to “newly defined territorial entities” and “organized communities” she speaks of non-nationalist, civic states, where nationality is not a relevant criterion for membership. The only relevant affiliation is that of belonging to humanity.

Since Benhabib’s interpretation of “the right to have rights” has been influential in the debates on immigration, I will start by presenting her reading of it. This will exemplify how “the right to have rights” is usually understood in the current debate. I will return to the controversies on how to interpret Arendt in chapter 6, and suggests an alternative reading as preferable to Benhabib’s moral reading.

Benhabib’s interpretation of “the right to have rights” situates this fundamental right as an extension of the Kantian cosmopolitan right to visit.³⁰⁹ In terms of immigration, Arendt’s notion addresses a short-coming in Kant’s minimal account of cosmopolitan law of admission. Given the new historical circumstances discussed above, the right to visit (including the right to asylum)

³⁰⁸ Ibid., p. 296-97

³⁰⁹ Benhabib 2004, p. 55 ff

addresses more accurately than most human rights the problems of a cosmopolitan character. Still, it is not adequately designed to address the issue of statelessness. Simply put, it does not guarantee a right of the foreigner to become a member somewhere else, a guarantee which is urgently needed by those foreigners with nowhere to go.

In this light, Benhabib seems to understand the right to have rights to belong to the same moral-legal domain that Kant distinguished as cosmopolitan law. It has an unspecified address, and is at best addressed to humanity as such. It calls us “to recognize membership in some human group”.³¹⁰ In contrast to legal norms that are enforced by a state apparatus, Benhabib identifies “the right” as a moral imperative. More specifically, it is a moral claim to membership: “Treat all human beings as persons belonging to some human group and entitled to the protection of the same.”³¹¹

While Arendt did not support the metaphysical presumptions of Kant’s notion of human dignity, the right has a clear universal appeal. It concerns us as human beings and seeks to transcend cultural and historical contingencies. Further, Benhabib refers to the humanity-formula of Kant’s categorical imperative – namely, to act in such a way that you treat humanity in all your actions as an end, and never as a means only – which legitimizes the “the right of humanity” in one’s person.³¹² And it is along this line, according to Benhabib, that Arendt provides a positive specification through “the right to become members of civil society” (and the negative duty not to refuse others from seeking it).³¹³ This association with Kant is decisive for Benhabib’s determination of what it is that gets violated in rightlessness: the basic condition of human agency is denied when one is refused to enter into civil society with others.

Accordingly, in addition to the “right to become members” there is a second kind of “rights” which is interpreted by Benhabib as the kind of rights we enjoy within civil society. That is, it refers to entitlements that create reciprocal obligations among consociates as members of a legal

³¹⁰ Ibid., p. 56

³¹¹ Ibid., p. 56

³¹² This is somewhat confusing, given Kant’s conceptual framework. Arendt’s basic moral right emphasizes a certain “framework” and “organized community” [Benhabib tends to conflate the two] of which protection we are all entitled to. Although Benhabib situates Arendt’s “right” as an extension of a moral cosmopolitan law, she also compares it to a political version of Kant’s right of humanity: “This right [of humanity] imposes negative duties upon us, i.e., duties which oblige us never to act in ways that violate the right of humanity in every person. Such violations would occur first and foremost if and when we were to refuse to enter into civil society with one another, that is, if we were to refuse to become legal consociates.” (Benhabib 2004, p. 58) This is confusing in the sense that on the one hand, Benhabib seems to compare the right to have rights with a general principle of moral norms (i.e. the right to humanity, see 2.2.1, although she refers to the ethical notion of an “end-in-itself”), whereas the form it takes, can also be read as an extension of the more specific cosmopolitan law, as a content of a cosmopolitan law of second admission. With the risk of misunderstanding Benhabib, I’ve chosen to emphasize the latter alternative.

³¹³ Benhabib (1996) notes that Arendt uses “civil society” sometimes also to include the formal-institutional structure, and not merely the “extra-political” public.

community. Benhabib understands this reciprocity as defined by the triangular relation between the subject of rights; the others upon whom this obligation creates a duty; and the protection of rights through the state. Hence, the right to have rights is a moral right to citizen rights. Or, as specified in the context of Kant, “the right of humanity entitles us to become a member of civil society such that we can then be entitled to juridico-civil rights.”³¹⁴

4.4.2 The public sphere and the view from elsewhere - Sen on procedural parochialism³¹⁵

In addition to the option of extending cosmopolitan law to offer protection against dehumanization, there is also the option of giving a positive argument for the “politicization” or strengthening of the democratic integrity of the foreigner, which is especially relevant when it comes to deliberations of cosmopolitan law and cosmopolitan reform of the current legal order. The benefit of this epistemological argument is that it has a more clearly “civil” character in the sense that it can appreciate the openness of a global civil society, as in the shape of an extra-political public sphere, without relying on the legal entitlements of the foreigner as such. The concern for the practical necessity of this legal protection is analytically “bracketed” so to speak.

Although Benhabib clearly recognized the epistemological value of the perspective of the foreigner, it is Amartya Sen that presents the most explicit critique of Rawls’ procedural parochialism. By “parochialism” I refer to a mentality that focuses on, or favors, partial perspectives, rather than considering the whole context.³¹⁶ Unlike the implicit egocentric character that comes with being a situated, embodied consciousness³¹⁷, parochialists embrace this centeredness as a non-universalist ground of legitimacy. Some particular, traditional way is legitimate because it is “our way”. Epistemologically, parochialism has connotations to being narrow-minded or having a narrow outlook. In ethics it is associated with the tribalism or ethnocentrism of favoring “us” over “them”, termed for instance “parochial altruism”. In politics this is related to taking the common point of view of a certain community, either as a state or as an “aspiring” nation. It is in this last sense that Sen uses it, to draw attention to a specific procedural weakness in Rawls’ design of the original position as a thought experiment. Hence, although Rawls did not take an explicit statist view, his methodological setup seems to make his position vulnerable to parochialist or ethnocentric biases. This confirms the state-centric tendency in Rawls’ theory to marginalize the perspective of foreigners and the concern for his naïve cosmopolitan attitude (see 2.3 and 3.2).

³¹⁴ Benhabib 2004, p. 59

³¹⁵ An earlier version of this text has been published as part of the paper titled: ...

³¹⁶ The Latin root of “parochial” translates into parish, which is associated with small communities or division, such as a church parish.

³¹⁷ I.e. one that intuitively prefers the destruction of a whole, distant world (such as China), to a scratch in one’s little finger.

It is in particular Rawls' abstraction of the subject of justice; the basic structured of society, as a "closed system" that Sen addresses. As seen in chapter 3, Rawls allows for considerable ethnic diversity within a state. When he talks about a political culture shared by a people, we might therefore speak of a "democentric" conception rather than an ethnocentric conception. Sen is however, not convinced by Rawls guarantee of a fair procedure, because the original position has no procedural protection against such *demo-centric* biases. In this manner Sen pinpoints the epistemological neglect characteristic of state-centric perspectives.

4.4.2.1 The Original Position as an expository device – open and closed impartiality

Rawls 'original position' is an expository (or representational) device with a certain procedural setup. To specify Sen's diagnosis, it is important to note that he is not addressing all elements of the original position, such as lifting of the veil of ignorance or the requirement of reflective equilibrium. What Sen is worried about is the conflict between on the one hand the ambition of impartiality, and on the other the initial state-centric constraints imposed by the application of the contractual principle of reciprocity. This constraint is part and parcel of the way 'the veil of ignorance' is designed in the two variants that Rawls applies. In other words, Sen is concerned quite specifically with a methodical restriction in the way Rawls invokes impartiality.

To clarify this point, Sen makes a distinction between two ways of invoking impartiality: open and closed impartiality. *Closed impartiality* is associated with the contractual principle and refers to the procedure of making impartial judgments which invokes only the positions of members within a bounded society or, as we have seen in the international version of the OP, the positions of peoples as members of the international community. No outsiders are involved. In contrast, *open impartiality* may invoke the judgment and perspective of both insiders and outsiders, in some cases generalized as the "view from elsewhere" or "the eyes of the rest of mankind" is considered ideal in order to avoid parochial bias.³¹⁸

Within the domain of domestic law, the first variant of the veil of ignorance addresses perfectly well the domestic problem of impartiality: How to go from the self-centered individual to the best collective equilibrium of interests? It enables individual agents to see beyond their personal interest. It might even do quite well in finding the analogue equilibrium of the international community of peoples, enabling each people to see beyond their specific group interests.³¹⁹ But, it does not address adequately the cosmopolitan issue where the collective interest of a people is in conflict with individual (or non-governmental groups of) foreigners.

³¹⁸ Paraphrased Sen 2009, p. 123.

³¹⁹ We're here facing a problem analogue to Greene's challenge of transition from the problem of the commons (Me and Us), to the problem of common sense (Us and Them).

More precisely, there is no “procedural barricade” against prejudices of this state-centric kind:

[...] the procedure of segregated ‘original positions’, operating in devised isolation, is not conducive to guaranteeing an adequately objective scrutiny of social conventions and parochial sentiments, which may influence which rules are chosen in the original position.³²⁰

How can Rawls restrict his ambition of reaching a general standpoint, “from afar,” in such a manner? It is, as already indicated, related to the state-centric confinement of the procedural preference of the contractual principle, where the focal group is identical to the (native) members of bounded society. As O’Neill pointed out, the notion of “the people” does not seem to escape this assumption. Those recognized as “mutually disinterested” behind the veil of ignorance are limited to the persons directly involved in the contract.

To defend the open impartiality as the preferable attitude when answering the question of justice, Sen presents three arguments. The first is that “closed” conception of justice, which accounts only for the statist obligation we have to others within our territorial neighborhood, is too narrow. Sen shares with Kant the recognition of cross-border affinities. Obviously, the legal borders of a national state are central in-group cues, but we (now more than ever) identify and share “common sympathies” with people across national boundaries as well (through cues such as class, language, literature, professions, etc. – even humanity). This could be called a sociological argument, as it criticizes the descriptive state-centric premise that the public sphere necessarily is a national sphere. It basically refutes the idea of the public sphere as organized in ‘Stoic circles’, where citizen/foreigner is the most relevant distinction of social distance:

There is something of a tyranny of ideas in seeing the political divisions of states (primarily, national states) as being, in some way, fundamental, and in seeing them not only as practical constraints to be addressed, but as divisions of basic significance in ethics and political philosophy.³²¹

The second argument concerns the circumstances of justice in cosmopolitan terms. Sen points to the fact that the institutions (both domestic and foreign) and policies of one country influence lives elsewhere. This is particularly clear when it comes to issues involving cross-border migration and the policies concerning entitlements and political membership to non-citizens, as discussed in this chapter. It does of course also relate to a wide range of global issues, such as environmental damages and economic exploitation, which I do not address directly in this thesis.

Third, with reference to Adam Smith, Sen presents the epistemological argument that “objectivity demands serious scrutiny and taking notice of different views from elsewhere, reflecting the

³²⁰ Sen 2009, p. 127

³²¹ Ibid., p. 143

influence of other empirical experiences.”³²² Not all outsiders’ views are unconvincing or irrelevant. We might summarize this third point as *the enlightenment relevance of the view from elsewhere*.

³²³ This stands in contrast to what Sen calls “membership entitlements” and in potential conflict with the advantages of the contractual element when it comes to commitment and loyalty.³²⁴

Rawls problem, according to Sen, is not that he does not recognize the value of impartiality, – Rawls account of publicity and public scrutiny is after all central to his political conception of justice– the problem is his lack of recognition for the enlightenment relevance of positions outside the group sharing political membership entitlements, as if the public was circumscribed by the same constraints as the basic structures of society.

4.4.2.2 Three problems of closed impartiality

According to Sen, closed impartiality deals poorly with three problems: exclusionary neglect, inclusionary incoherence and *procedural parochialism*.³²⁵ Inclusionary incoherence is related to the non-identity problem and the concern for future generations. The non-identity problem deals with the issue of how the group size itself is sensitive to the decisions made (for instance on environmental issues and migration). It is too complex to be given proper treatment here, so I’ll restrict my discussion to the problem of procedural parochialism and distinguish it clearly from the problem of exclusionary neglect.

Exclusionary neglect refers to the epistemological injustice of excluding voices of those people who are affected, but do not belong to the focal group and do not possess membership entitlements. The gravity of the transgression is relative to the degree to which the actions or decisions of a state (and civil society) have influence on the situation of outsiders and the general environment. Similar to Kant’s argument, neglect of foreign perspectives does not pose a problem in the extraordinary circumstances of completely separated communities (similar to “divided world”-problems), i.e. in circumstances that do not fulfill the conditions that actualize cosmopolitan law.³²⁶

³²² Ibid., p. 130

³²³ This point has strong parallels to Arendt’s political reading of Kant’s notion of common sense in § 40, in Critique of the power of judgement. Especially the second maxim of common sense, which emphasize the condition of taking the position of the other in order to reach a general point of view. (See chapter 9)

³²⁴ In the end, this raises a series of questions regarding motivation and theoretical preferences which we will not go into here. It is related to Sen’s critique of ideal theory and the transcendental institutionalism that strives toward principles that firmly establish the basic structures of society through common agreement. Sen has a more pragmatic attitude (distinguishing “*niti*” from “*nayaya*”) and is willing to admit a lack of full agreement and unresolved conflicts of ordering preferences, in favor of open impartiality of differently situated perspectives.

³²⁵ Sen 2009, p. 138-9

³²⁶ The question of non-relational obligations is in this sense not relevant to cosmopolitan problems.

Given that we live in an interdependent world, the consequences of decisions taken in one particular polity will affect parties that are non-members. We have two ways to mediate these interests within the Kantian framework: through interstate and cosmopolitan law. The problem with ‘closed impartiality’ is that it insists on the social contract model, which is based on binding, reciprocal agreements among members. By giving the institutional structure primary – as that which is in need of legitimacy – the social contract model also tends to conflate the level of public right with the level of institutional implementation. Hence, for Rawls, there is no clear difference between the interstate accounts of the interest of affected foreigners and the international level of implementation of them. This is perhaps most clearly detectable in Rawls’ rejection of the “cosmopolitan” version. For Rawls’ position, the cosmopolitan way to mediate interests of foreigners is primarily understood as the institution of a global state. Hence, it follows that the cosmopolitan way is unrealistic. Many have addressed the lack of a cosmopolitan account in Rawls’ conception of justice, and *The Law of Peoples* does not seem to give us a satisfying answer because it is restricted to the interstate (or inter-geneous) domain.³²⁷ But few, if any³²⁸, have deliberately addressed the possibility of implementing cosmopolitan law on both institutional levels: the state and international level.

This possibility also goes well with the idea of open impartiality and a global public. In contrast to Rawls’ closed impartiality it would agree that the scope of the relevant public should follow the character of the problem (according to public right; domestic, interstate, cosmopolitan) and not the institutional framework (state or international). Hence, a cross-border, “extra-political” public is relevant and should be influential (in some cases more than others). Sen is inspired by Smith’s open “public framework of thought”, which concurs with O’Neill’s reading of Kant’s global notion of public reason.

Benhabib would also agree on this appreciation of a cosmopolitan openness to foreigner’s perspectives in the “weak” publics, arguing that we have a moral (although not moral-legal) obligation to consider their voices. One might criticize open impartiality for downgrading the institutional integrity of the interest and perspectives of foreigners. What is gained, however, is independence from the rigid mediation of perspectives through the bottle-neck structure of state (people) representatives. With the idea of a cosmopolitan law of deliberation in mind, I will argue that there are moral-legal norms that oblige states to protect the conditions of these weaker publics of the transnational civil society.

³²⁷ See for instance Nussbaum 2006 and Fraser 2012

³²⁸ Arendt and Benhabib can be read in agreement with this line, but none of them are explicit in this regard.

In distinction to the problem of exclusionary neglect – i.e. the problem of how to include the perspectives of those that are actually affected – Sen also criticizes closed impartiality for dealing poorly with procedural parochialism, mainly addressing the procedural design of the original position (for discussion on methodological state-centrism, see 3.3.1). Procedural parochialism refers to the problem of providing guarantees of the theoretical procedures against cultural relativist (explicit parochialist) or naïve universalist (implicit parochially biased) views. Sen suggests that his notion of open impartiality might contribute to solving this problem in a pragmatic and comparative manner through the appreciation of what he calls “the enlightenment relevance of the view from elsewhere”. It could, in other words, improve the future deliberations on cosmopolitan law on the level of contemplative procedures (i.e. thought experiments).

Sen’s epistemological argument is, in other words, not so much concerned with the *actual* inclusion of all affected, as it is with the problem of procedural parochialism. This problem is not so frequently addressed in the critique of Rawls. Sen’s critique does not directly address the problem of asymmetry between those with membership entitlements (citizenship) and those indirectly affected by the policies (irregular migrants, low-skill workers, etc.), but it addresses an epistemological consequence of the exclusionary neglect in procedural terms. Sen points to a theoretical contradiction between Rawls non-parochial (or non-statist) intentions and the lack of a procedural guarantee against local group prejudices and interests.

Sen guides our attention to an unattractive procedural preference in Rawls: “that the basic structure is that of a closed society: that is, we are to regard it as self-contained and as having no relation with other societies.”³²⁹ In this sense, the diagnosis of procedural parochialism points toward a kind of epistemological solipsism: The “failure to have any systematic procedure for correcting the influence of *parochial values* to which any society may be vulnerable when detached from the rest of the world.”³³⁰

Are the ideas and experiences from elsewhere merely distracting details? This is a question concerned not only with the fairness of the decisions made by a policy. Unlike exclusionary neglect, the problem of procedural parochialism is not primarily concerned with the extent to which policies like infanticide, torture or subsidies for fossil fuels are procedurally fair by taking all affected into consideration. The primary concern is the implied epistemological lack of comparative perspectives when foreign perspectives are excluded. The point being that thought experiments that exclude foreign perspectives has a lower guarantee against parochial bias than

³²⁹ Rawls 1993, p. 12

³³⁰ Sen 2009, p. 90

procedures that parochially valued policies are actually the best options compared to other ways of organizing society.

4.4.2.3 The impartial spectator – an alternative procedural device

As mentioned, Sen suggests that the “view from elsewhere” offers a promising barricade that is lacking in Rawls conception. The general idea is expressed elsewhere by Sen in an article on Smith:

It is this limitation of reliance on parochial reasoning [ignoring or neglecting many challenging counterarguments], linked with national traditions and regional understandings, that Adam Smith wanted to resist by using the device of the impartial spectator, in the form of the thought experiment of asking what a particular practice or procedure would look like to a disinterested person – from far or near.³³¹

In order to achieve this in contemplative terms, it is not enough to use the impartial spectator in order to gain a common point of view. In a footnote, Sen attends to a subtle difference that seems to have escaped many readers of Smith.³³² Smith’s device requires a stronger sense of psychological concreteness of a perspective than what the generic “view of everyone” can offer. The use of the “impartial spectator” is therefore also used as a “dialectical device to question and dispute commonly agreed beliefs.”³³³

There is a connection between the “impartial spectator” and “the common point of view” in the sense that they both rely on a psychological capacity to understand the perspective of others. Primarily this is the perspective of particular others, but as we grow up, this perspective is habituated into a “generalized other”. Smith refers to this generalized ability to imagine oneself from the position of the other as the “*self as spectator*” – as the man-within, the viewpoint of human kind – contrasted to oneself proper as an agent. While obviously useful as a capacity of conscience (not to mention the concern for one’s public reputation), the “self as spectator” in its generalized form also runs the risk of being colored by the unavoidably egocentric or democratic character of one’s life experiences.

³³¹ P. 63, in Sen, Amartya. 2010. "Adam Smith and the Contemporary World." *Erasmus Journal for Philosophy and Economics*, no. 3: 50-67. And he continues: “Smith was particularly keen on avoiding the grip of parochialism in jurisprudence and moral and political reasoning. In the chapter in *The Theory of Moral Sentiments* entitled “On the influence of custom and fashion upon the sentiments of moral approbation and disapprobation” Smith gives various examples of how discussion confined within a given society [for instance the Greek philosophers about infanticide] can be incarcerated by a seriously narrow understanding.” (Sen 2010, p. 63, my comment)

³³² For instance, in Rawls’ consideration of a cosmopolitan version of the impartial spectator as an alternative procedure to the contractual principle, he seems to be operating only with two options; the contractualist and the utilitarian. His misreading of Smith as a utilitarian seems to have led him to avoid considering a third alternative to invoke impartiality through the “view from elsewhere”.

³³³ Sen 2009, footnote p. 125

To provide a remedy for this parochial blindness of our “man-within”, Smith suggests that we need to (re-)introduce the presence of an *ideal* spectator, this time not as a controversial metaphysical construction (as an omniscient or Archimedean point; a “view from nowhere”) but as a real spectator, preferably in the figure of a stranger or foreigner. In *The Theory of Moral Sentiments* we find an illustrating and frequently quoted description of how the ability to recognize the presence of another through the sympathetic imagination, may sober up and reorient our attitude:

In solitude, we are apt to feel too strongly whatever relates to ourselves [...] The conversation of a friend brings us to a better, that of a stranger to a still better temper. The man within the breast, the abstract and ideal spectator of our sentiments and conduct, requires often to be awakened and put in mind of his duty, by the presence of the real spectator: and it is always from that spectator, from whom we can expect the least sympathy and indulgence, that we are likely to learn the most complete lesson of self-command.³³⁴

We might say that the real presence of the stranger sets up the most favorable circumstances for revision of the impartial spectator – “the man within the breast.”

If we want to implement this insight – based on the best psychological knowledge available – we seem to have two distinct options: On the one hand, we might think of it in terms of a contemplative device. As such, it will of course be less than convenient to seek a stranger’s company every time we want to repeat the “view from elsewhere.” We might understand Sen’s proposal therefore, as suggesting how we imaginatively can exploit this effect in individual exercises. On the other hand, we might also think of it in terms of public procedures of opinion-formation, which brings us closer to the discourse-ethical position of Benhabib. In this sense, the concrete ‘view from elsewhere’ is appreciated for its sobering and comparative effects, even when the foreign perspective is not considered as an affected party or a representative of another state/group.

As a thought experiment, ‘the impartial spectator’ has first of all the advantage that it does not rely on our ability to take the point of view of everyone or anyone within a certain community, global or local. By relying on the imagination of one or several specific alternative perspectives it draws on the critical reflections of comparisons. Second, it encourages us to accept the value of different views and to appreciate the decentralizing epistemological effect of being open to the views of outsiders. The point is not to rely on foreigners to be virtuous manifestations of the perspective of the ideal spectator, but to engage in comparative dialogue with perspectives that

³³⁴ Quoted in Sen 2009, p. 125, from III.3.38 Smith, Adam. 1759. *The Theory of Moral Sentiments*. London.; A. Millar.

are less likely to share our parochial prejudices with the same “sympathy and indulgence” as those equally minded to us.³³⁵

If we consider the relevance of the “real spectator” as mentioned in the quote above, it seems at least plausible to understand this contemplative device as part of a practice associated with, and depending on, interaction in the public sphere. Whether or not this was Smith’s original intension, a discourse-ethical understanding of the value of the perspective of others would certainly appreciate both the ideal discursive setting of a thought experiment, where we imagine a dialogue partner, *as well as* the real setting of actual communicative practice in the public sphere, where we engage in a dialogue with real strangers. What is genuinely valuable in the contribution of Sen’s reading of Smith is that he stresses the cosmopolitan point of not restricting this rehearsal to strangers (from “elsewhere”) within the same modern state.

Conclusion

As we saw in chapter 2, Kant defined the right to asylum (the right to visit) as an unconditional cosmopolitan right. In other words, it is held to be a duty without exceptions of the hosting state to allow foreigners to seek refuge if necessary, and, depending on the reading, also a right to present oneself to society. In either case it is one of the first expressions on an idea of a legal order constituted by the status of each individual as a world-citizen.

Hannah Arendt’s appropriation of this idea is interesting because it situates the cosmopolitan idea in a crisis of mass migration facing European modern states; states holding humanism and human rights in high regard. The way millions of national minorities were left homeless and “excluded from humanity”, bore witness to a great betrayal of these ideas. Tellingly, the first step was to abandon the right to asylum, which created a class of stateless with nowhere to go. Disastrously, the second step was the abandonment of the right to state citizenship, which rendered minorities (and potentially everyone) without formal protection against statelessness.

Arendt is in line with Kant’s empirical premise of the public right when she claims that the problem of statelessness is not simply lack of space, but rather a problem of political organization. We could say that there is an institutional and conceptual mismatch between the state-centric international order and the cosmopolitan problem of the stateless.

The parallel to today’s situation is in many ways striking: The strong democracies – which are loyal to universal core principles – are again under pressure by authoritarian states to abandon

³³⁵ It addresses the enlightenment relevance of outsiders, but perhaps not so much of the interested and affected outsiders (such as irregular immigrants), as any outsider with an epistemologically privileged perspective.

their international obligations and cosmopolitan ideals. The crisis has, as of now, not yet turned into a complete disaster, but some parallels are worrisome. For instance, the right to asylum is compromised by a hardened rhetoric and non-arrival measures against undesired groups of immigrants.

Arendt aimed to explain why we have a problem with recognizing the mismatch mentioned above as revealed by the cosmopolitan problem of the stateless. The problem is located in what she calls the *aporia* of human rights, which refers to the paradoxical experience that at the very time people are thrown into a position where they have nothing but their world-citizenship left, the apparent cosmopolitan rights accompanying them, their “human rights”, turn inapplicable. Arendt’s critique of the UN declaration was that it had learned nothing from the preceding disaster. This might be too harsh, but it carries a kernel of truth: The cosmopolitan discourse applied in the re-articulation of citizen rights as human rights, conceals their reliance on state membership and gives the false impression that all human rights are applicable to cosmopolitan issues. It creates a false sense of readiness to meet similar situations in the future.

Usually, the problem of rightlessness is seen as an institutional lacuna: Since these individual rights cannot be backed up by a global monopoly of violence, there is no enforceable inalienable rights attached to being “stateless”, “irregular migrants”, “sans papiers”, etc. Hence, in practice the transposition of citizen’s rights to the cosmopolitan level seems to rely on the charity of foreign states. There is no perfect moral-legal duty corresponding to the human rights.

As Arendt argues, part of the reason for this failure is also a conceptual confusion, which could be dissolved by making it clearer which human rights count as citizen’s rights and which count as cosmopolitan rights. The current language of “human rights” is confusing, because the discourse in general refers to international agreements that combine both civil and cosmopolitan rights. If we take the UN declaration of universal human rights from 1948 as an example, only § 14 would be considered a cosmopolitan right proper according to Kant’s framework.³³⁶ The other rights are for the most part an articulation of a universal standard of interaction between a state and its citizens.

I have here addressed the problem of democratic deficit in the cosmopolitan domain based on the idea of the democratic legitimacy of law. By evoking Sen’s notion of “the enlightenment relevance of the view from elsewhere” we may more easily capture the state-centric tendencies in our understanding of politics. As an illustration of these tendencies, one might speak meaningfully of a democratic deficit on the domestic (state) and international levels, including

³³⁶ § 13-15 touches on issues with clear relevance to transnational migration.

regional (EU) and global (UN) organizations. However, to actually recognize a foreigners' right to democratic participation in state policies, may seem quite outlandish. In general, this reaction seems reasonable, given that foreigners are not always affected by the legislation of a state. But when it comes to immigration policies, this is definitely not the case: these policies affect foreigners more directly than citizens. Should we not, at least in cases involving severe depoliticizing and dehumanizing consequences for those involved, acknowledge the democratic deficit and the epistemological value of taking the perspectives of the worst-off into consideration?

These are in my view the basic elements of a proper cosmopolitan conception of justice: First of all, such a conception should establish the kind of problem that can only be properly responded to by cosmopolitan law. Second, the proper conception should issue responses that ensure legal protection against the dehumanizing consequences of the international order, and promote the democratic participation of foreigners in deliberations on issues that affects them.

As we have seen, within Kant's cosmopolitan framework, the right to settle (or to be a neighbor) is weighed against the potential exploitation by powerful global actors.³³⁷ We might read 'the right to have rights' as a proposed step toward adjusting the balance for the guests that are in the "worst-off" position in this border-performing relation: the "scum of the earth", the superfluous, the stateless, the denaturalized or denationalized, the outcasts, and we could go on. How do we avoid "savage conditions" created in the midst of civilization?

In a relational perspective, the problem of statelessness concerns us all, because if we exclude someone from humanity, we do in effect also exclude ourselves. To guarantee against this it is conceptually helpful to articulate a cosmopolitan right to political membership, but how can such a right be implemented in practice? Is it feasible in the current situation? To consider this question, I will situate this concept of cosmopolitan law in the debate on immigration. The debate on immigration is relevant because it represents the central cosmopolitan issues and forces us to explicate the implications of extending cosmopolitan law and balance these implications it against other principle and pragmatic concerns.

³³⁷ It is quite essential, especially these days to distinguish the problems associated with the privileged global elite of "frequent flyers" and tax-evading international corporations, etc. on the one hand, from the problems associated with the "scum of the earth", and those escaping impossible material conditions on the other; either as "economic migrants" or as "refugees" on the other. They still converge in one sense: a border regulating policy must deal with both groups at the same time.

Chapter 5: The academic debate on immigration - the distributive justice of membership and the question of just membership

The initial question, and main problem of this thesis, was concerned with the state's obligations toward foreigners. So far, I've mainly considered the argument for a Kantian inspired cosmopolitan scope of justice. I have presented competing statist views on the question of the scope of cross-border obligations and discussed how state-centric assumptions about politics and binding legal agreements tend to weaken the obligations a state might have to people beyond its borders. These state-centric assumptions can be found also in more moderate positions on both sides of the statist-cosmopolitan axis. I've also considered the concrete content of cosmopolitan law along two lines, according to the shifting circumstances of justice: One line answers to the issues of admission, immigration and membership. The other line answers to the issues of involvement of affected parties and the epistemic value of outside perspectives, especially when it comes to further improvement of the content of cosmopolitan law.

In the absence of a global state, there seems to be no "hard public" to which foreigners can claim a right to participation as an affected party without either a) acquiring membership in an alien state or b) mediate one's opinion through government representatives in international arenas. According to the idea of an open impartiality, there is an obligation (at least of a non-sanctioned character) to acknowledge the foreigner a right to partake in the softer spheres of the public debate (including their mediation through NGO's). This soft public spheres might even be considered global in character. I will argue more strongly still that a global public is a concern for a cosmopolitan law of deliberations, and that the current circumstances implies that states have moral-legal (sanctionable) obligations to promote and protect the interactions of the transnational public sphere.

In this chapter I will sidestep the issue of a cosmopolitan law of deliberation and discuss the issue of admission. I will reconstruct the debate between the communitarian and liberal standard positions on immigration through academic representatives of statist and cosmopolitan positions.³³⁸ In the end I will promote Seyla Benhabib's discourse-ethical mediation of these opposing positions of the liberal and communitarian. From Benhabib's position we can say that each standard position emphasizes one horn of the dilemma of democratic legitimacy as the solution to the issue of immigration policies. The communitarian position, *the conventional "closed"*

³³⁸ In the immigration debate these positions are more or less overlapping. To clarify Rawls' position, which is only marginally part of this debate, he is clearly positioned as a liberal thinker in general. But, due to his state-centric tendencies, Rawls seems to end up in a communitarian position, quite close to Walzer, when it comes to the issue of immigration. Carens develops his liberal position partly from an adaptation of Rawls 'original position', but re-designs it in a way that alters its state-centric character.

view, tends to emphasize the autonomy of a self-defining political community, while the *liberal “open border” position* promotes our cosmopolitan commitment to the right to free movement for all. Benhabib seeks a position which does not aim to solve the dilemma, but to emphasize the value of continuous democratic renegotiation of the dilemma, preferably in ways that opens up this process to the influence and inclusion of foreigners. This offers a *“porous border” position* on migration policies.

The issue of migration policy is highly complex. To give a superficial impression of the field we should at least distinguish two central, but closely interconnected aspects: *first admissions* and *membership distribution*. First admission refers to the regulation of territorial border crossing (visa, asylum seeking), while membership distribution involves the (usually subsequent) formal recognition (naturalization) of a person as a citizen of the state (also called “second admission”). These aspects are interconnected in the sense that admission often leads to informal attachment to society, and informal attachment (it can be argued) gives one a claim to formal membership.

There is a certain asymmetry between the positions in the debate in the sense that the communitarian position regards membership distribution as the primary issue from which regulation of first admission can be derived, whereas the liberal “open border”-position, takes point of departure in free first admissions and make certain non-ideal qualifications, including on membership distribution, according to this.

Although I will in the end be critical to Michael Walzer’s framing of the debate on immigration as primarily a question of *membership distribution*, his framework has been too influential to ignore it. The advantage of Walzer’s definition of the issue of the debate is that it brings to the forefront the peculiar character of immigration as a distributive issue: “membership” sets the framework through which other distributive issues are dealt with. But, it also has the narrowing implication that “first admission” is given disproportionate weight as the political question – due to Walzer’s understanding of attachment and social justice. After presenting Walzer’s definition of the framework, I will present the three positions in the debate.

- 1) The conventional view holds that states have broad discretion on immigration policies and that they by and large are unencumbered by moral restrictions (what I have called a statist view). This view has the advantage of protecting public sovereignty, but risks ending in an irresponsible ethical particularism.
- 2) The “open border” cosmopolitan view holds that states have a prima facie duty to admit all. Any restrictions must be conditioned by morally sound concerns. This position deals

well with the concern for moral equality, but tends to devalue borders as a condition for democracy and political decision-making.

- 3) The “porous border” cosmopolitan view emphasizes – like the conventional view – the value of public autonomy and appreciates the implicit dilemma between public autonomy and a commitment to universal values. This dilemma is moreover seen as an inherent aspect of the responsible formation of a reflexive democratic self-understanding.

Although the two latter positions represent perspectives that are grounded in a methodology that takes a global point of view, I will in the end argue that cosmopolitan views that are restricted to the content of cosmopolitan law related to issues of admission are not able to properly address the problems of transnational migration. Even the “open” and “porous borders” positions suffer from a peculiar state-centric bias in the sense that they constrain the issue at hand by defining it in terms of “immigration”. It narrows the scope of migration to the concern for those foreigners residing within the hosting state’s territory. In the end this leads these perspectives – although critical to the conventional view on migration – to neglect the systemic outcomes of current admission policies (long-term encampment included) and more generally the need to protect the political integrity of the foreigner through a cosmopolitan law of deliberation.

5.1 Membership as a distributive good

In *Spheres of Justice*³³⁹, Michael Walzer presented what has become a central reference in the debate on the ethics of immigration. Even though Walzer’s communitarian definition of the problem at hand is not uncontested, his account is widely recognized as the main articulation of the problem and its conventional response.³⁴⁰

First of all, Walzer presupposes that membership “in some human community” is a *primary good* because it sets the necessary boundaries within which all our other distributive choices can be made. It is, in other words, the proper site of justice. Distribution of membership defines the scope of other issues of distributive justice. Second, assumed that membership in “our” community is already a given, it *is a social good*, constituted by our understanding. “[Its] value is fixed by our work and conversation; and then we are in charge (who else could be in charge?) of its distribution. But we don’t distribute it among ourselves; it is already ours. We give it out to

³³⁹ Walzer, Michael. 1983. *Spheres of Justice: A Defense of Pluralism and Equality*. New York: Basic Books.

³⁴⁰ Peculiar to the debate on immigration is that the communitarian view (often taken as the controversial proponent of group rights in the discussion of rights on the domestic level) in this case is the most widely held position. It is so dominant, that even most proponents of a liberal view hold a communitarian or, at least, a state-centric position on this particular question. John Rawls is one prominent and highly criticized example.

strangers.”³⁴¹ Unlike most other goods, such as material goods, this social good cannot easily be exported. It requires the foreigners to move instead.

Unlike the possibly unlimited distribution of first admissions (i.e. temporal legal territorial residence; visa), which could – at least in principle – leave the political community intact³⁴², the distribution of membership (naturalization; i.e. formal citizenship, or at least partial entitlements) regulates who “we, the people” are, in both material and symbolic ways. Materially, by altering the demographic signature of the group that defines itself, and symbolically by altering the narratives and images that mediates the representations of the “we” (closed/homogenous vs open/heterogenous).

Since the normative distinction of “us” and “them” is essential to the distribution of membership, we might say that it has an irreducible parochial or group-centric character to it. In this sense, the issue of membership distribution easily comes in conflict with the more well-known and established cosmopolitan accounts of redistributive justice that we find in the works of Charles Beitz and Thomas Pogge. As Benhabib points out, although these cosmopolitan accounts have criticized the state-centric approach of Rawls, none of them have addressed the “cornerstone of state centrism”: The conventional view on transnational migration, which is strictly regulated, non-liberal and non-cosmopolitan. On this issue these accounts have been “curiously silent”.³⁴³

There are of course good reasons to think of migration in the context of global redistribution, but this relation is not essential to the issue of immigration and it is beyond the scope of this thesis to treat it adequately.³⁴⁴ In order to provide a certain background to Walzer’s argument I will briefly mention one possible and quite common solution to the conflicting concerns between migration control and redistributive justice in particular, or political closure and moral equality in general.

A possible way to redeem the conflict between migration control and cosmopolitan redistributive justice is found in the consequentialist camp, which regards the issue of migration not primarily as an issue of membership distribution, but as one among several means of redistributing

³⁴¹ Walzer 1983, p. 32

³⁴² It is of course highly unlikely that the membership of a state would be unaffected by large amounts of non-member territorial residents.

³⁴³ Benhabib, 2004, p. 2, see also p. 94 ff.

³⁴⁴ It is non-essential in the sense that migration is not likely to stop or cease to be valuable if the redistribution of wealth is ideal. There are certainly good reasons to think of economic inequity as push- and pull-factors in migrational behavior analysis. The same is probably true of an instrumental redistributive function of migration. But, neither is exhausting the phenomenon of migration and does not directly address the political integrity of the foreigner as such. Nor should the value of migration be reduced to the individual level, as Joseph Carens and David Miller tends to do.

wealth.³⁴⁵ Within the utilitarian framework, there are no principle restrictions on free distribution of membership. Nor are there any principle restrictions on a very strict distribution of membership. Any utilitarian ‘law of hospitality’ would rely on the dependable predictions of its redistributive (and other relevant) consequences.

This is of course perfectly legitimate within a utilitarian procedure, but it relies on dependable predictions of the consequences. More precisely, the procedure presumes reliable predictions on how the hosting community will behave and deal with immigration. Unless the community reacts to immigration in an institutionally stabilized manner (which implies a conventional consensus on these issues), how can we rely on behavioral prediction for normative guidance? To me, it seems unlikely that we can rely on behavioral prognosis of policies that change the pace of immigration. It seems unlikely that sympathetic and xenophobic reactions should be considered simply natural phenomena, devoid of contextual and interactive factors.

I will not go into an extensive discussion on a utilitarian ‘law of hospitality’, but only briefly mention its advantages and disadvantages. The main advantage is that it quickly adapts new knowledge about migration and membership distribution into its answer. A universalist utilitarian position is also less attached to state-centric prejudices.³⁴⁶ A disadvantage associated with the ability of the utilitarian approach to include new knowledge, is its reliance on the predictability of highly complex interactive systems. For instance, the redistributive effect of immigration relies on a fairly stable and predictable response to the immigrants in the hosting community. The main disadvantage is still, as I see it, that the utilitarian approach offers no guarantees to migrants. Migrants are, unless the global society collapses, a global minority whose interests will be weighed against those who stay put. Hence, on the one hand the utilitarian approach gives us no stable criteria to assess the value of social cohesion or public autonomy against freedom of movement. And, on the other hand it offers no principled protection of vulnerable individuals in a highly complex interactive – and I would add: highly unpredictable – context.

³⁴⁵ In an overview article, Shelley Wilcox summarizes the debate on open borders by including her own position as the third, which is referred to as the distributive argument. She promotes the mediating position that argues that liberal states have broad external duties on grounds of distributive justice, but not open borders per se. See Wilcox 2009.

Although this position seems able to solve the conflict between migration and distribution, Wilcox’s approach also postpones the central issues of the other positions in the debate: the decrease of internal cohesion in the receiving country (Sidgwick, Walzer), the inherent value of freedom of movement to each world co-citizen (Carens, Oberman), and the public autonomy of the receiving political community (Benhabib). These concerns are postponed in the procedural sense that they are reduced to (extremely complex) consequential issues that the calculus measuring the total effect of migration will have to include (or reject as metaphysical nonsense).

³⁴⁶ Although it has a tendency, like Sidgwick’s position, to take existing models of social distance for granted, where the distinction between citizens and foreigners is central.

In the following I will present Walzer's articulation of the conventional, state-centric view on immigration as a defense of the inherent value of state membership. This view is characterized by its emphasis on the sovereignty of the political community and strong restrictions on any commitment to external principles that might constrain the state's autonomy. In opposition to this view I will present the most well-known response to Walzer, articulated by Joseph Carens. This is essentially a cosmopolitan revision of Rawls' original position that, (in contrast to both Beitz and Pogge) addresses the issue of migration as *the* central question. I will refer to Carens' position as the "Open Border" account. Finally, I will suggest that Seyla Benhabib's "Porous Border" account is a promising mediating position between the two.

5.2 The conventional view: the self-determining community

The principle point of departure for the conventional view that Walzer represents, is quite clearly located within the Westphalian tradition that conceives each state as sovereign. And, there seems to be no good reason to divert from convention:

The distribution of membership is not pervasively subject to the constraints of justice. Across a considerable range of the decisions that are made, states are simply free to take in strangers (or not).³⁴⁷

Walzer's argument is based on the conventional assumption that the exclusion of foreigners is justified by the right of communities to self-determination.

The idea of public autonomy has a strong position in modern liberal democracies. Usually, however, the liberal perspective also includes commitments to a liberal international order of justice that defines external principled constraints on each state. It is quite clear from the quote above that Walzer's holds no such constraints to be backed by a strong consensus with regards to laws of admission, and that in most cases the states are "simply free" to make up their own policies. This is not very surprising given a communitarian position. What is more striking, however, is that this communitarian view in fact represents the *conventional* view of modern liberal democracies on the specific issue of immigration. The conventional view in other words combines the respect for a liberal international order on citizen rights, with a denial of any strong obligations to foreign immigrants. In consequence, the conventional view does not recognize any cosmopolitan rights.

Although Walzer defends the conventional view that allows political communities "to distribute membership for their own particular reasons"³⁴⁸, he also admits that one should recognize the

³⁴⁷ Walzer 1983, p. 61

³⁴⁸ Ibid., p. 35

external principle of mutual aid to put constraints on these particularities in some cases. The right to asylum seems to correspond to an obligation of mutual aid in Walzer's framework. As a group of "needy outsiders", refugees are peculiar in Walzer's understanding, because they're in need of the membership itself: "The liberty that makes certain countries possible homes for men and women whose politics or religion isn't tolerated where they live is also non-exportable."³⁴⁹ This idea of goods that are non-exportable is quite concretely a case of how the issue of refugees are defined and restricted to an issue of admission from the perspective of the hosting state.³⁵⁰ The question becomes: "What may the host offer the visitor?" Correspondingly, it exemplifies how the debate on migration is construed as a debate over the ethics of admission, which for Walzer implies a dilemma between moral equality and political closure.³⁵¹

Walzer understand "mutual aid" to be a formalized principle based on the historical acknowledgement that strangers from beyond our political boundaries "sometimes might be entitled to our hospitality, assistance and good will."³⁵² Historically speaking this is a considerable improvement: Strangers are no longer necessarily enemies, but mere "persons in general" outside our group of members. However, I would hold – with the cosmopolitans – that today's circumstances call for more than this Samaritan revision.

In a descriptive manner, Walzer simply points out that even though mutual aid could serve as an external principle of distributing membership, it lacks the cohesion of a cooperative arrangement:

Given the indeterminate requirements of mutual aid, these decisions are not constrained by any widely accepted standard. That's why the admissions policies of countries are rarely criticized, except in terms suggesting that the only relevant criteria are those of charity, not justice.³⁵³

In other words, the principle of mutual aid might be universal in its obligation, but it is restricted to the conditions of charity, not moral-legal obligations. That is, it commits no one to give assistance or hospitality that would imply excessive costs to the host, be it economically or

³⁴⁹ Ibid, p. 49

³⁵⁰ It is also striking how Walzer confirms the conventional, narrow definition of a refugee by emphasizing the non-material conditions as "non-exportable". Intuitively it seems correct that one cannot export the rule of law or basic liberties in the same manner that one exports material goods, such as vaccine, clothes and food. It relies on institutions that are domestic and protected by the sovereignty of the state. However, it also reflects the prevailing asymmetry between political and moral relations. It is as if political relations are defined by immaterial conditions (such as respect for human dignity, autonomy and basic liberties) while moral relations are to be defined in terms of material needs. In some exceptional cases, such as the refugees, the political boundary might be crossed and new relations established. But, the idea of extending political relations across these borders seems unthinkable within this imaginary, as if foreigners are somehow ontologically (and not just legally) different from "us".

³⁵¹ Parekh 2017, p. 53-4

³⁵² Walzer 1983, p. 33, Parekh considers this a break with the conventionalist assumption of mere negative duties toward foreigners. I tend to think of it as a revision, which adds a humanitarian obligation to the cosmopolitical one.

³⁵³ Ibid, p. 34

otherwise. At the same time Walzer admits the precariousness associated with being stateless. “Being without membership is a condition of infinite danger”.³⁵⁴

Since immigration potentially affects the very shape of the community, Walzer holds charity in this context to be a *political* matter. It is political in the sense that it is a matter addressing “us” as a political community, regarding our duties to admit (and in some cases this means to help) foreigners into our territory. Admission is not considered a *cosmo-political* matter,³⁵⁵ insofar as the foreigner still retains a non-political status as a passive subject of charity. The distribution of membership must be seen as politically organized charity, agreed upon by the original members. Since it is organized, Walzer argues, the charity is more coercive than individual charity. It is legitimate because it involves a “range of benevolent actions” that would affect the current members only in an impersonal, distant and marginal manner.³⁵⁶ In other words, the extent of mutual aid can be stretched much further before it involves “excessive costs” to the provider of aid, in this case the members of the hosting country.

To identify the costs of immigration, Walzer points beyond the economic aspects. He draws on the classic sociobiological insights of Henry Sidgwick to emphasize the effects on social cohesion. In line with the old liberal ideal of minimal state interference, Sidgwick held open borders to be an ideal line of policies. But, when considering the reality of the current society, one has to consider the concrete consequences of such a policy-line.³⁵⁷ Sidgwick argued against a 19th century globalist political economy (similar to that of Milton Friedman) that promoted a view of free migration in a “global neighborhood”. Sidgwick’s consequentialist argument is reconstructed by Walzer in this manner:

Immigration might lead to

- 1) lack of cohesion/risk of anomie and decrease of patriotic sentiments³⁵⁸
- 2) welfare stagnation or decrease
- 3) destabilization of political institutions due to de-homogenization of moral and intellectual culture

³⁵⁴ Paraphrased Parekh’s (2017, p. 54) reading of Walzer (1983, p. 32).

³⁵⁵ From the strict distinction made between humanitarian and cosmopolitan issues discussed in chapter 1 and 2, I would claim that this discussion of mutual aid tends toward the kind of issues brought up in the use of § 38 and the practice of humanitarian exceptionalism.

³⁵⁶ Walzer 1983, p. 45

³⁵⁷ Sidgwick argument was based on the assumption of an increased social distance measured in the gradually decreasing distribution of benevolence. It should however be noted that this presumption relies on a citizen/foreigner-distinction as a predetermined and dumbfounded factor of social distance.

³⁵⁸ A possible line: compare the Durkheimian moral psychology of Jonathan Haidt against Seyla Benhabib’s critique of Walzer’s reliance on the ‘lack of cohesion’-argument.

Sharpening the focus, Walzer points out that the two last of Sidgwick's arguments rest on the first.³⁵⁹ They describe the expected consequences of the lack of cohesion, or de-homogenization.

Walzer accepts the idea that lack of cohesion may be a serious cost of liberal distribution policies on membership. Walzer is however critical to the way concern for cohesion is reduced to an instrumental value for something else (presumably for the sum of utility for the individual members) in Sidgwick's argument. By recognizing lack of cohesion merely as a consequential argument, Sidgwick's account undermines the inherent value of political communities. It is this inherent contingency of Sidgwick's conclusion that worries Walzer:

It is only if patriotic sentiment has *some moral basis*, only if communal cohesion makes for obligations and shared meanings, only if there are members as well as strangers, that state officials would have any reason to worry especially about the welfare of their people (and of *all* their own people) and the success of their own culture and politics.³⁶⁰

Hence, we might read Walzer as a critical response to the utilitarian-liberal view on immigration, which gives –as mention above – no such morally principled basis. What Walzer sets out to do – in order to describe or perhaps also secure such a moral basis – is consequently to explain the nature and the value of the political community. For instance, Walzer claims that there are certain membership criteria that are impermissible and clearly undermine the legitimacy of patriotic or xenophobic sentiments, such as race, bloodline, ethnicity, sexual orientation (i.e. criteria based on immutable characteristics that one cannot deliberately alter).

Positively, he will have to defend why the distinction between members and strangers is not a morally arbitrary one. Walzer's argument is based on an assumption of the value of homogeneity and cultural distinctness as conditions of identity. From this perspective, the justified exception against homogeneity is made (similar to Rawls) with respect to the historically contingent heterogeneity of people already within the territory. In other words, he does not propose denaturalization and expulsion of indigenous people and historical minorities (such as former slaves or guest workers). Still, the claimed value of homogeneity is stronger than that of a purely civic community based on constitutional patriotism.

³⁵⁹ In the latest decades of globalization one might argue that there are other factors than lack of cohesion that drives immigration to cause welfare stagnation. In the old industrialized countries, such as the US, it seems the "governments courting of international financial markets and transnational firms rather national wage-earners and their organizations" (Jordan and Düvell, 2003) has left the national labor-markets vulnerable to "social dumping" and in some countries, slavery-like conditions for illegal immigrants. In large globalization has implied free trade, i.e. free float of goods and finance, rather than free movement of people. Hence, lower wages and standards of working conditions have been turned into a valuable competitive asset on the international market. In some cases, the welfare stagnation caused by globalization seems rather to decrease social cohesion by giving blame to the immigrants (who tend to take the lowest paid jobs in the market, and hence becomes a symbolic symptom of the problem). These xenophobic tendencies has clear anti-social and anti-patriotic implications in pluralist state societies.

³⁶⁰ Walzer 1983, p. 37-8, my emphasis

5.2.1 Three analogies of the political community: the neighborhood, clubs and families

In order to defend his communitarian view, Walzer defines and describes the nature of a political community. The analysis takes its starting point in the common experience of the modern state society as meta-topical in its character:

[...] few of us have any direct experience of what a country is or what it means to be a member. We often have strong feelings about our country, but we have only dim perceptions of it. As a political community (rather than a place) it is, after all, invisible; we actually see only its symbols, offices, and representatives. I suspect that we understand it best when we compare it to other, smaller associations whose compass we can more easily grasp.³⁶¹

By appealing to the abstract character of a modern political mass-community, Walzer evokes associations to the discussions on social imaginaries that are based on phenomenological concepts. As discussed in chapter 3, this is associated with the emergence of an imagined people or imagined community, which was taken to provide the state with continuous legitimacy. Insofar as Walzer would describe how the political community is actually seen through “its symbols, offices, and representatives”, this could be recognized as a project of social science on nationalism or civic religion/constitutional patriotism. Walzer’s recommendation of comparisons must however be scrutinized beyond their obvious illustrative value. They become problematic when they take on the paradigmatic effect of a guiding analogue or proto-type.³⁶² I struggle to find a critical distance on these matters in Walzer’s comparisons. The risk is consequently that the comparison with the smaller associations takes on the function of mediating certain features to the imagined society that is commonly attributed to topical associations based on face-to-face interaction.

It is for instance well-known historically that family-life has been used as a model to attribute certain features to the political community. This has also been a central part of nationalist propaganda, appealing to *motherland*, *fatherland*, *homeland*, etc. I do not claim that Walzer makes exactly *this* mistake, but rather that he uncritically risks making similar mistakes when comparing

³⁶¹ Walzer 1983, p. 35

³⁶² My concern is here that the comparison takes on the character of analogies or “darstellungen”/manifestations, in which the idea of the state community (which can never be experienced directly) gains content by seeing the “neighborhood”, “club” or “family” as manifestations of the state. We see the state *as a family*. This also easily takes on an idealized form, as mentioned in Taylor’s discussion on social imaginaries, where a peculiar kind of neighborhoods, associations and family-structure becomes associated with the culture and virtuous life of good citizens.

the modern state community to neighborhoods, clubs and families.³⁶³ With this critical concern in mind, Walzer's comparisons are at the same time illuminating and thought provoking.

The Neighborhood

The choice of the neighborhood-analogy is motivated by the way economic cosmopolitanism have embraced the idea of a 'global neighborhood', modelled after the state-bordered version of a free and open market. Walzer responds to this idea by referring to the imperial and colonial experience of open borders. It had, he argues, a tendency to result in closed neighborhoods (regulated associations; segregation). As far as we know, Walzer claims, open neighborhoods that behave as random associations, presuppose the presence of closed or regulated borders on a state level.

Walzer's point seems to be that open neighborhoods and free internal migration requires strict border regulation on a state level, otherwise the neighborhoods will gate themselves.³⁶⁴ A potential state of affairs he refers to as "a thousand petty fortresses". There is a possibility that the open neighborhood might be realized on a global level, according to Walzer, but only by the means of extensive cohesion against the emergence of closed neighborhoods. In practical terms this would imply a strong global state. Hence Walzer draws the following conclusion:

If [the distinctiveness of cultures and groups] is a value, as most people (though some of them are global pluralist, and others only local loyalists) seem to believe, then closure must be permitted somewhere. At the level of political organization, something like the sovereign state must take shape and claim the authority to make its own admissions policy, to control and sometimes restrain the flow of immigrants.³⁶⁵

Similar to the imaginary of a nation-state, Walzer understands the cultural distinctness of a community to serve as the corner stone of the moral basis for patriotic sentiment. Presumably with reference to the segregated pattern of neighborhoods in the US, it also seems reasonable to say that he prefers the distinctness of a political culture to the tribalization that we might associate with the fragmented landscape of an open-border state. One way to put this concern is to assess the level of cultural competence expected in a political community. The communitarian perspective tends to emphasize a quite high threshold of competence, while the cosmopolitan perspectives tend to negotiate closer to its sustainable minimum.

³⁶³ These analogies have been criticized (quite predictably) from a liberal position. See for instance see Benhabib (2004, p. 124ff). And, p. 266-7 in Carens, Joseph H. 1987. "Aliens and Citizens - the Case for Open Borders." *Review of Politics* 49, no. 2 (Spr): 251-273. <Go to ISI>://WOS:A1987K262000005.

³⁶⁴ Significant economic differences seem to have similar effects. It would be interesting to compare the increasing inequality of distribution of economic resources with the rate of gated communities, and "hostile", security-oriented urban architecture.

³⁶⁵ Walzer 1983, p. 39

The argument then goes something like this: If a distinct and highly competent political culture (i.e. a thick context) has a value, the necessary closure (between “us” and “them”) in the form of enforced immigration control is a non-arbitrary and legitimate discrimination in moral terms. If migrants come in small numbers, there is no problem. And, if they are needy refugees we have a strong moral obligation to help them. However, this obligation is Samaritan not only in the economic sense of costs; it is also trumped by the concern to preserve “communities of character”. High rates of immigration, Walzer fears, will lead to the decrease of cultural distinction and ultimately the loss of a communal “self”. Hence the regulation of admissions is essential to the idea of collective *self*-determination (and, we might say, self-designs). If we consider how adequately this position responds to the problem of extensive statelessness, Walzer would readily admit, in line with the current “nativist backlash”, that when numbers are large “their” way of life must be sufficiently similar to “ours” in order for the Samaritan obligation to remain strong.

Clubs

Further, the club-analogy is intended to address the constraints that this right to immigration control might entail. In other words, given that we accept that border control and limited distribution of membership is morally permissible in a non-arbitrary manner, are there any criteria that should be seen as morally arbitrary and hence impermissible as criteria for exclusion?

First of all, Walzer notes that there is a moral asymmetry between immigration and emigration. In most states, like in a club, the right to emigrate or to withdraw one’s membership freely is respected (although this might also have quite profound effects on the shape of the political community in question). The right to immigrate corresponds to the right to seek membership in a club in the sense that the admission committee in both cases may present legitimate criteria for exclusion and selection.

Distinguished from a private club and with reference to some historical cases of restricted immigration in the US context – which promoted the categories of “white” and “Protestant” (i.e. race and religion) – Walzer suggests that these are potential illegitimate claims.³⁶⁶ Before qualifying further what kind of constraints these cases might entail in general on the legitimate criteria, Walzer stresses the political character of these decisions. The distribution of membership and its criteria are essentially political matters of self-determination.

³⁶⁶ Walzer 1983, p. 40. See also Walzer’s critical discussion of “White Australia” policies (p. 45-47) against poor migrants from South-East Asia.

Similar to the founders of a club, the community has to answer the question of what kind of community they want to have. Walzer genuinely conceives this as a matter of collective self-definition. This might have decisive consequences for immigration policy. For instance, depending on the level of cultural competence the community ends up aspiring to, the degree of political and cultural affinity required of the immigrants would vary correspondingly. There is also an obvious rhetorical aspect to the way a definition of a political community structures the image of that community. Being a “country of immigration” or “multinational” sets the framework quite differently from “our fatherland”, not to speak of the derogatory notion of “Fortress Europe”.

This point is of central importance to Walzer, and here I think his statist position is quite different from Rawls semi-cosmopolitan position in the sense that Walzer is sensitive to the dilemma universal moral equality poses on self-determination. Walzer in this sense shares a presumption with the cosmopolitan position: the decision on immigration policies is not just any political matter; it is at the very core of political matters. Admission policies are situated at the basic level so to speak, which goes beyond the matter of pursuing national interest of security and prosperity. It is a matter of identity:

At stake here is the shape of the community that acts in the world, exercises sovereignty, and so on. Admission and exclusion are at the core of communal independence. They suggest the deepest meaning of self-determination. Without them, there could not be communities of character, historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their common life.³⁶⁷

Interestingly, Walzer qualifies the limit of the analogy by pointing to the special bond between the political community and the territory. This implies a certain constraint that private clubs don't have. Since the legitimacy of the territorial state is derived from the individual's right to a place (according to Walzer's reading of Hobbes, and in line with Kant), a new state or government cannot denaturalize or expel inhabitants that interrupts its homogenizing gaze.³⁶⁸ Some heterogeneous elements literally “come with the territory”.

In the end, it is also important to notice another central assumption in Walzer's argument that goes against a purely ethno-centric position. He seems to hold that informal attachments to the economy and attachments of social membership in a state provide foreigners with the rightful claim to acquire formal citizenship/membership.³⁶⁹ By accepting this criterion, Walzer argues that

³⁶⁷ Walzer 1983, p. 61-62

³⁶⁸ It mirrors § 15 (2) in the UN Universal Declaration of HR from 1948.

³⁶⁹ Similar to Kant's concern for the circumstances of justice.

the relevant political issue is moved from membership distribution (second admission) to legal residency (first admissions). This is because legal residents quite easily get attached and integrated as social members, and consequently if you let them in you're very likely to grant them membership by default. In other words, for Walzer the right to be a visitor is intimately linked to the right to be a permanent guest and eventually a full political member.

Families

Although Walzer seems to defend the trinity between nation, state and territory, he opens up with "families" the idea of extended relations of the nation beyond the state borders. In this way Walzer articulates certain positive moral duties that seem central to the admission policy of political communities. This could for instance be illustrated by the close cultural affinities by the Scandinavian countries or the German community. Today, the global English-speaking community seems to challenge these older linguistic boundaries.

The main point Walzer develops by this comparison is based on the cultural proximity of ethnic or national "relatives". With relatives is meant individuals or groups that are culturally and historically affiliated, but that does not necessarily share a formal political membership. Historically, Walzer comments, such affiliations have been observed, especially in times of trouble. The case of Germans fleeing from the Königsberg-region during the WW 2 is a well-known example.

Furthermore, the kinship principle is taken in a less metaphoric sense when it comes to family reunification. This is thought of, as Walzer accurately points out, not a cosmopolitan concern, but a domestic one. Family reunions are grounded in the recognition of the needs of those who have already acquired a membership in the community.

A quite different and clearly cosmopolitan case is the ideologically affiliated. For instance, liberal democracies have a tendency to prefer political refugees (i.e. the paradigm of dissidents) that are promoting their world-view in not so like-minded parts of the world. Walzer formulates the dilemma of cosmopolitan right by presenting 'the right to have a place' as a conflicting concern to state sovereignty, formulated as no right to external cohesion of hosting states. The right to asylum is one of very few institutions that mitigate this dilemma. Still, as discussed above, the primary ground is for Walzer state sovereignty as the protection of the culturally distinct and communal character of the state as a membership organization: "The principle of mutual aid can only modify and not transform admissions policies rooted in a particular community's

understanding of itself.”³⁷⁰ In other words, when the claim of someone’s universal rights challenges the national identity of a state, the national identity always wins.

5.2.2 Summary

Since Walzer is hesitant to take a clear stance on the question on what can be considered a legitimate self-understanding of a community, the normative conclusions reached are usually negative (in the form of certain uncontroversial constraints). It is nonetheless quite clear that he goes quite far in promoting an external obligation of mutual aid, which is intended to go beyond the current line of policy, insofar as it does not threaten the ability of the community to maintain its cultural distinctness.

Whether one agrees with Walzer or not, his communitarian-historical approach has the benefit of giving a quite realistic account of the way “we” – i.e. those situated in a modern state, globalized social imaginary – actually think about immigration and the dilemmas it evokes. Walzer’s project is certainly quite successful when it comes “to describe the internal and external principles that govern the distribution of membership.”³⁷¹

The disadvantage of his approach is that since it relies on the existing “widely accepted standard” it tends to become embedded in our historical situatedness, and hence fails to address the possible biases and parochial prejudices that cannot be avoided by repeated self-confirmation among those with shared opinions. Critical, reflexive exercises seem to rely on – or at least benefit from – outside perspectives. Hence, the underlying statist position in Walzer’s account is problematic: “Membership is important because of what the members of a political community owe to one another and to no one else, or to no one else in the same degree.”³⁷² This is a presumption has state-centric implications, based on a map that guided us in very different circumstances from the global contemporary ones.

³⁷⁰ Walzer 1983, p. 51

³⁷¹ Ibid., p. 34

³⁷² Ibid., p. 64. See also Rawls TJ, p. 115 & p. 339. See David Miller for contemporary defense of a similar view. Miller more readily admits the problem of long-term encampment and the rightful claim of refugees to make a decent life, but is not ready to commit to revision of state sovereignty to address it. See Miller, David. 2016a. "Is There a Human Right to Migrate?" In *Migration in Political Theory: The Ethics of Movement and Membership*, edited by Sarah Fine and Lea Ypi, 11-32: Oxford University Press. ---. 2016b. *Strangers in Our Midst: The Political Philosophy of Immigration*. 1. printing. ed. Cambridge, Mass.: Harvard University Press. ---. 2007. *National Responsibility and Global Justice*. Oxford ; New York: Oxford University Press. Parekh discusses Miller (2017, p. 58ff) and is quite dismissive about Miller’s ability to provide a theoretical response to the moral challenges and defects of the status quo.

5.3 Radicalizing Rawls: the “Open Border” cosmopolitan response

If we turn to Walzer’s opponents, we find several cosmopolitan theoretical positions that provide us with valuable resources for responding to the issues in question. Joseph Carens pioneering work has promoted a liberal argument against the conventional position defended by Walzer.³⁷³ Carens’ main idea is that immigration policies should respect the moral equality of all. This implies that freedom of movement is a default moral position, and that any constraints on this freedom must be justified as exceptions. Based on the principle of equal moral worth Carens defines the basic scope of justice this way: “[...] anyone who wants to be moral will feel obliged to justify the use of force against other human beings, whether they are members of the same society or not.”³⁷⁴ To be sure, the enforced border control of a state is precisely such a case of using force and hence in need of justification.

Carens is critical of the “closed” conventional view, which he defines as follows:

The power to admit or exclude aliens is inherent in sovereignty and essential for any political community. Every state has the legal and moral right to exercise that power in pursuit of its own national interest, even if that means denying entry to peaceful, needy foreigners. States may choose to be generous in admitting immigrants, but they are under no obligation to do so.³⁷⁵

If we compare the concrete policies suggested by Carens and Walzer, they are not that different, and Carens point is not to criticize Walzer for having a restrictive position on the pace of migration as such. The disagreement concerns the question of the scope of justice, and in the context of the immigration debate the issue can be summarized as follows:

Is it the sovereignty of the state or the universal freedom of movement that is the primary principled concern?

³⁷³ As Angelia Means interestingly points out, the current *liberal* articulation of the problem of immigration takes its point of departure in Grotius’ formulation of the legal fiction of an original commons. The interstate system and private property is derived from this fiction, and not from the conception of individual property as natural law (as in Locke and Nozick). This leads Kant to provide the world inhabitants with residual rights, such as the general right of visitation (the law of hospitality). (Means 2007)

Interestingly, on the issue of migration the Libertarian approach reveals its quite purely globalist understanding of property in the radical sense that it deals with the problem of commons on an *individual* level. Consequently it reduces all migration to a question of trespassing on private property. As attractive as this might seem to international corporations, it does not seem well-suited (at least not in its neo-liberalist form) to protect the middle-class structure of well-functioning democracies. It also speaks against a valuable institution in the Nordic context called “*allemannsretten*”. In terms of migration I take this to be a very interesting paradigm.

³⁷⁴ Carens 1987, p. 256

³⁷⁵ Carens 1987, p. 251, Carens repeats the exact definition from 1987 in 2014. See p. 555-56 in Carens, Joseph H. 2014. "An Overview of the Ethics of Immigration." *Critical Review of International Social and Political Philosophy* 17, no. 5: 538-559.

Carens' liberal argument promotes the primacy of the latter.³⁷⁶ In general, Carens argues that all liberal standard positions – the Rawlsian, the libertarian and the utilitarian – would be committed to an open border, cosmopolitan position. Whereas the libertarian reduces the problem of migration to a case of trespassing private property, and the utilitarian tends to rely on the contingency of whether the economic benefits of migration outweighs the downsides, the Rawlsian position must undergo a certain revision in order to demonstrate this commitment to principle. Because Carens emphasizes and endorses this revision of the set-up of the Original Position (OP) in a cosmopolitan way, one might sum up his position as a radicalized Rawlsian.

In the following I will present Carens argument in more detail.³⁷⁷ Second, I'll look at his argument against Walzer more directly, and at the end I'll refer to Carens later work on the issue of resettlement as a way to pinpoint that the theoretical resources that Carens provides may also have practical implications that distinguishes his from Walzer's position.

5.3.1 The analogy-argument and the moral equality-argument

We find two main arguments in Carens work: an 'analogy'-argument and a 'moral equality'-argument.³⁷⁸ If we look at the pioneer article "Aliens and Citizens" from 1987, Carens applies the 'moral equality'-argument first. When demonstrating how the three different liberal approaches can support the "open borders"-argument, he points out that the basic, shared assumption is the equal moral worth of individuals. As mentioned, the Rawlsian approach is most extensively treated. Carens demonstrates how Rawls' approach can be used to reveal the arbitrary moral character of borders and citizenship (comparable to the what Carens calls "feudal birthright" when considering the poor and rich countries).

The 'analogy'-argument is presented on two occasions: First, it occurs in the elaboration of the principles chosen from "the global view of the original position". Second, it is brought up in Carens' discussion of Walzer's neighborhood-analogy. Rather than concluding that we would

³⁷⁶ The conventional view holds that "morality has little role to play with regard to admissions". See ---. 2003. "Who Should Get In? The Ethics of Immigration Admissions." *Ethics & international affairs* 17, no. 1: 95-110.

I deliberately explicate "Carens' argument from the liberal position" because he tends to separate his arguments in two: 1) the Rawls-inspired argument represents an ideal-theoretical perspective and the gradual lifting of the veil, and 2) an internalist perspective from the conventional point of view.

³⁷⁷ Even though Carens has a tendency in his later work to begin within the conventional position (as a political theory from the ground up), I'll follow the original sequence and begin with his revision of Rawls.

For instance his last book, *The Ethics of Immigration* (2013), begins with a part on the concrete practices of naturalization and acquisition of citizenship and rights as a resident. The second part treats the question of how democratic states ought to control admissions. Similar to Walzer, these questions can be seen as intertwined, since admitting entrance leads to the question of rights and consequently the threshold of attachment.

³⁷⁸ Wilcox 2009. See also book review of *The Ethics of Immigration*, by Matt S. Whitt (in *Ethics and Global Politics* 7:384-384), that support a similar structure in the most recent argument presented by Carens. According to the principle of autonomy and equal moral worth, freedom of movement is an inherent value. It may also have an instrumental value, as a redistributive effect. Since these arguments are widely accepted within borders, within the closed account of justice, they should also be accepted on a global scale.

have chosen the principle of free movement from behind the veil of ignorance, this second argument takes its departure in the general public opinion that supports freedom of movement on the domestic level. The analogical structure is as follows: If the argument for domestic freedom of movement holds, then the same should be applicable to the cosmopolitan level.

The underlying, tacitly presumed assumption in this analogy is that state borders are morally irrelevant for the individual life project. To the extent that this premise holds, the analogy is basically a matter of consistency.³⁷⁹

In the following I will primarily consider Carens' revision of Rawls and the implications of his moral equality-argument in the debate on immigration and the long-termed encamped in particular. Similar to Rawls, Carens utilizes the OP not only to seek consistency, but also to take the position of the other.

5.3.2 The cosmopolitan original position

The basic idea of Joseph Carens is to revise Rawls procedure of the OP to adjust it to the cases where we think about justice across different societies.³⁸⁰ In cases such as cross-border migration and trade, we do, like Kant also assumed, address a different kind of interaction than domestic or interstatal interactions. Hence, the background conditions, the legal framework or the basic structure in question, is also of a different kind.

This difference is reflected in the various ways one might define the original position. It is worth noticing how radically the relevance and preferences related to migration alters, depending on the way this thought experiment is set up. Carens does not make explicit the threefold distinction between the domestic, interstatal and cosmopolitan,³⁸¹ but jumps from the domestic level to the global quite effortlessly: “let us assume a global view on the original position”.³⁸² To give it a more systematic reading, we should consider the three options available within the Kantian framework and how neatly they fit Rawls' and Carens' overlapping use of the OP:

(1) The original use of the OP, as we know it from *Theory of Justice* and *Political Liberalism*, is as we might call it, *the domestic variant*. It addresses the question of “citizen rights” as principles that regulate the basic structures of a state society. The OP is taken by the “citizen to be”. From

³⁷⁹ See Miller 2016 for argument against this analogy-argument. To the extent that Miller is correct in questioning this analogy-argument is irrelevant for the cosmopolitan project of Kant, which is based on the emergence of a global civil society. Carens' premise is in this conceptual framework an ethical argument, whereas Kant's argument is moral-legal.

³⁸⁰ Carens 1987

³⁸¹ To be fair, Carens wrote this essay before Rawls published his final version of the proposal to an account on international law, based on the OP-approach.

³⁸² Carens 1987, p. 257

behind a veil of ignorance, they should pretend to know nothing about their own personal situation (class, race, sex, natural talents, religious beliefs, individual goals and values, etc.). Quite obviously, they do not have to neglect their nationality, but in order to make it more generic they are encouraged to think about their community in general terms as a liberal democratic society. The intent of this procedure is to exclude any natural or social contingencies, which are considered arbitrary from a moral point of view, and present the principles that will be preferable for anyone willing to repeat the same procedure. In this version of the OP, migration is in principle excluded as a topic, since the state society is described as a closed system.

(2) In *The Law of the Peoples* we find *the international variant*. In this case the person inhabiting the OP relies on the imaginary character of the non-statal people. A ‘people’ (acting through the state) can be conceived as a moral agent with the capacity to engage in reciprocally binding agreements.³⁸³ The situation of the interstate OP-design is in this sense analogous in structure to the domestic. The basic structure in question is the content of interstate law and the corresponding international institutions. The case of migration is briefly mentioned, as we have seen, and in general seen as an anomaly that would be a quite marginal phenomenon in an ideal world setting. Migration is in other words held as a subject of non-ideal theory, a product of the unjust actions of others and historical conditions.

(3) Rawls did not himself present any *cosmopolitan variant* of the OP.³⁸⁴ The main reason given by Rawls is that this design would render the sovereign state in an unrealistically weak institutional position, considering the current world order. Seeking to balance the statist realism with what Rawls conceived as a utopian cosmopolitanism, this rejection of a cosmopolitan variant might be an adequate response to the redistributive cosmopolitan designs found in Beitz and Pogge. Rawls’ objection, based on realistic idealism, seems also to affect Carens’ set-up, which has a quite utopian character as well. Carens point is however not to articulate a realistic ideal, but rather (perhaps in more analytic terms than the late Rawls) to articulate an ideal as such. Carens is

³⁸³ There is a nuance in Rawls revision of Kant that is worth noticing: Rawls prefers to refer to the moral person of the interstate design as a ‘people’. The people acts through the state and its representatives. In other words, it appeals to the extra-political or pre-political sense of ‘the nation’ or sovereign people before its marriage to the state institutions. The title ‘The laws of the Peoples’ also bears clear associations to the age old ‘*ius gentium*’ which served as an external corrective standard to power long before the modern ideas of natural rights and civil society. In Kant’s work it is also used to refer to international law or ‘rights of nations’. ‘People’ is however, for Kant, primarily defined quite neutrally as ‘a multitude of human individuals’.

³⁸⁴ To be clear: When Rawls speaks of a cosmopolitan variant, it seems to be with a utopian global state in mind, where every individual is included in the same order and on the same level. The same is true for Carens as far as I can see. They both deviate from the Kantian idea of the cosmopolitan as specifically the perspective of the foreigner and understand cosmopolitan as synonym to a globalist position.

Accidentally, Carens emphasis on immigration makes his design very close to what a cosmopolitan variant (properly speaking) would look like. And, similarly some of Rawls formulations of ‘urgent rights’ in LP, might be read as cosmopolitan rights. See for instance Birmingham 2006.

also the only one who applies the cosmopolitan variant to address immigration and hence faces the state-centric, domestic variant heads on.³⁸⁵ Carens' ambition is not to undermine the institutional integrity of the sovereign state, but rather to address cosmopolitan duties associated with the international system from the perspective of a world-citizen.

More or less similar to the domestic OP, Carens' cosmopolitan design of the OP situates the subjects as world-citizens. The question of justice is considered from a highly abstract position in which they would not know their place of birth or their particular membership-status, circumstances that are morally arbitrary from behind the veil of ignorance. The global view would neglect particular concerns or interests like: "Whether one is a citizen of a rich nation or a poor one, whether one is already a citizen of a particular state or an alien who wishes to become a citizen – this is the sort of specific contingencies that could set people at odds."³⁸⁶

Carens pinpoints the poor-rich divide of countries as the most relevant issue, and does even compare being born in the rich countries to the birthright privileges of feudal societies.³⁸⁷ I think he is right to point this out as a potential bias for all cases when one is considering cosmopolitan rights from the perspective of the global north/1st World. In any case, these economic circumstances are much easier to grasp as possible sources of partisan bias, than the more complex cultural-historical aspects that forms us as members of a particular nation-state.³⁸⁸

In Carens' set up each individual is recognized as a world citizen. Compared to the conventional view the burden of proof is turned around; from this perspective, to be a member of a political community is a social contingency, and purely arbitrary from the moral point of view. Hence, behind the "veil of ignorance" one may reasonably assume that people would choose freedom of

³⁸⁵ It is a further question whether any of these applications are compatible with the two first versions of the OP, or perhaps better still, if they could be made compatible, given that the "closed society" in the domestic and "people" in the international were revised. As I see it, a strong interpretation of Kant's three requirements of a legitimate nation state, would require consistency in order for a Rawlsian framework to be cosmopolitan responsible. In the critique that Benhabib confronts Rawls with, it becomes clearer that Rawls' design cannot be understood as merely theoretical restrictions, which are of course in general legitimate for any kind of analysis. The reduction of the domestic and the international to closed accounts have intolerable normative consequences that in the end betrays, according to Benhabib, Rawls' own liberal position.

³⁸⁶ Carens 1987, p. 256

³⁸⁷ See Carens 2014, p. 556, for recent version of this one. He argues that the open borders argument is especially strong in the north-south case where poor migrants besiege and enter the rich states. He compares citizenship in the global north to the feudal birthright privileges, born into nobility: "Citizenship in Western democracies is the modern equivalent of feudal privilege – an inherited status that greatly enhances one's life chances."

³⁸⁸ This second difference is often oversimplified as a modern-traditional division. There are of course significant differences between modern constitutional traditions as well. For instance, there is a difference between former colonies uniting together to constitute a current superpower (the US), and a former colony/estate becoming a small sovereign state (like Norway).

movement as a basic liberty.³⁸⁹ In contrast to the state-centric methodology of Rawls, Carens does not have to presume society as a closed system. Or, if he does, it is of the global society as defined by the basic circumstances of justice as mentioned in chapter 2: the contingent practical limitation due to the spherical shape of the earth (and our relative – for most of us (for now) – incapability of going anywhere else).

5.3.3 A qualified position within the Rawlsian framework

Within a Rawlsian approach the moral equality of all is one of the presuppositions (or egalitarian moral intuition) that the procedure is meant to help us stay consistent with in our choice of principles of justice, and subsequently, our preferred institutions based on said principles. The procedures are intended to mute conditions that otherwise might distract or distort our reflections. A main concern is to avoid specific individual- or group interests that depend on who you are. On a global scale this also entails the kind of group interest associated with the political communities. Hence, the veil of ignorance is especially useful in my view, for those of us who are lucky enough to be born in an affluent country (with a functioning system of redistribution) and who must – if we seek consistency with our intuition about moral equality – be prepared to share our current use of the limited global resources with others.

From the global view of the original position, Carens assumes (like Pogge and Beitz) that one would still choose the same two principles of justice as in the domestic variant: 1) basic liberties and 2) social and economic equality (or more precisely *equity*).

The next step is to decide – still within an ideal theoretical setting³⁹⁰ – which institutions best implement these principles, this time from a cosmopolitan perspective. First of all, Carens admits that for the sake of decentralization of power we could recognize linguistic, cultural and historical differences in order to justify the existence of political communities fairly similar to the sovereign states we are familiar with.³⁹¹ But, unlike the communitarian position of Walzer that recognizes no strong duties based on external principles, Carens suggest that both liberal rights (like the freedom of religion) and an international difference principle (regulating economic inequality among states), should be implemented precisely as external commitments of the state. Carens

³⁸⁹ As part of the privileged part of the world's population, it would be dramatic obstruction against "my plan of life" if this freedom was taken away from me. I can (quite literary) *only imagine* how humiliating the current asymmetry of mobility must be for those "worst-off".

³⁹⁰ Within ideal theory:

- 1) All people will accept and generally abide by the principles chosen in OP
- 2) No historical obstacles to the realization of just institutions

³⁹¹ Carens 1987, p. 258

tends to address economic inequality on a state-level, so it is consequently somewhat unclear exactly how Carens thinks about the cosmopolitan character of these principles.

When it comes to freedom of movement his position is much clearer. Carens forwards his argument against the original Rawlsian account on migration: “Even in an ideal world people might have powerful reasons to want to migrate from one state to another.”³⁹² A number of possible circumstances are mentioned: economic or cultural opportunities, falling in love with a foreigner, belonging to a religion with its main community abroad, in large, circumstances that “might prove essential to one’s plan of life.”³⁹³ This freedom is clearly linked to how each of us – as world-citizens – should be able to move across borders.³⁹⁴

In this context Carens presents the first form of the ‘analogy’-argument:

More generally, one has only to ask whether the right to migrate freely within a given society is an important liberty. The same sorts of considerations make migration across state boundaries important.³⁹⁵

Since the freedom of movement seems to be in line with the implementation of the two basic principles of justice, we would have to take the position of the worst-off in order to justify restrictions. That is, any restrictions on the freedom of movement must also be acceptable for those most disadvantaged by the proposed restrictions. In the case of immigration, the most relevant worst-off positions are arguably those suffering from long-term encampment and de facto statelessness. But since the cause of this suffering is related to non-ideal conditions, this discussion is postponed in the Rawlsian procedure.

In the context of ‘ideal theory’ Carens detects only one possibly valid restriction on the freedom of movement, which draws on a general argument that Rawls makes, grounded in liberties’ dependency on the public order and security.³⁹⁶ Carens refers to this as the “public order restriction”. It is basically a worst-off argument that assumes that a pace of immigration that would lead to chaos would leave everybody worse off, including the immigrants. This entails that there is room for restricting the liberty of movement in order to promote this liberty in the long run. This is a consequential concern, quite similar to the one raised by Sidgwick (See also Singer in Chapter 1). However, there is an important qualification in ‘public order’-restriction that is quite relevant to the case of xenophobia:

³⁹² Carens 1987, p. 258

³⁹³ Ibid, p. 258

³⁹⁴ Notice how all reasons given are grounded in the liberty of the individual. Unlike Kant, no explicit concern is given to the civilizing or epistemological (egalitarian, democratic) relevance of migration/diversity.

³⁹⁵ Ibid., p. 258

³⁹⁶ Ibid., p. 259, paraphrasing Rawls *Justice as Fairness* (1985, p. 212-3)

Restrictions would be justified only if there were a “reasonable expectation” that unlimited immigration would damage the public order and this expectation would have to be based on “evidence and ways of reasoning acceptable to all”. [...] Finally, the threat to public order posed by unlimited immigration could not be the product of antagonistic reactions (e.g. riots) from current citizens.³⁹⁷

So, similar to Walzer’s argument against Sidgwick, Carens recognizes the value of some internal cohesion. At the same time (at least within ideal theory), there are certain common sense- or public opinion-requirements related to this value. The decline of citizenship or lack of cohesion would have to be the cumulative effect of individually just actions. Xenophobia surely is a real phenomenon, but within this ideal theoretical framework it is seen as an unjust ground for actions or reactions and counts as an element of the non-ideal world. For instance, we might acknowledge a sense of fear when faced with the phenomenon of mass migration. This fear becomes unjust only if we act on it in ways that are not founded in reasonable expectations of the consequences for the public order.

When Carens considers the restrictions to freedom of movement in non-ideal theory³⁹⁸, the range of possible public order restrictions grow quite considerably. Under real world conditions – without globally shared standards of liberty and fair distribution – the case of state sovereignty is significantly strengthened, though the demand of “reasonable expectations” remains. To justify restrictions one would still have to prove that the damaging consequences of unlimited immigration are more than hypothetical possibilities, i.e. that they are built on well-founded and generally acceptable reasons.

For quite obvious reasons this restriction can be misused for partisan interests. Along these lines Carens considers the risks of damage to the public order in cases where the consequences of migration from culturally distant societies – people that might not share our democratic values – is quite weakly founded. Historically it used to be the Jews and the Catholics, Asians and Africans, now³⁹⁹ it is perhaps most present in the guise of the Muslims. According to Carens, a more strongly based concern is sheer numbers, especially of poor people migrating to the rich

³⁹⁷ Carens 1987, p. 259

³⁹⁸ Within non-ideal theory:

- 1) Actions of others might be unjust
- 2) Historical obstacles (See Stranger on this one, organized hypocrisy)

³⁹⁹ If we are able to look beyond the security risk of terrorist attacks from extremist who perceive themselves in violent conflict with the West or the Secular.

countries. Restrictions might be legitimate here, not to maintain the current state of unequal welfare distribution, but to protect the public order in the receiving states.⁴⁰⁰

This is a considerably weaker claim than the one Walzer makes regarding the right to self-determination. In a similar manner, Carens draws on a Rawlsian argument to claim that no particular culture can claim the right to be protected from migration, due to the non-preferable nature of the principle of perfectionism in the original position.⁴⁰¹

In his later work, Carens is also aware of the moral obligation toward the worst-off in terms of migration that might be located outside one's own territory. In this manner the cosmopolitan concern is relocated from the narrower focus on the issue of immigration and admission. Addressing the problem of long-term encampment, he argues that resettlement ought to be a duty and not merely an act of charity.⁴⁰² In addition to the kind of obligations that are attached to direct responsibility of harm or more general philanthropic/humanitarian concerns, there is also a third kind of obligations related to the "normative propositions of the modern state system": "Because the world is divided into sovereign states where each state is responsible for its citizens, obligations arise when this system breaks down, as it does in the cases of refugees."⁴⁰³ This leads Carens to the conclusion that states have a collective (cosmopolitan) responsibility to resettle refugees that can be organized internationally.

5.3.4 "Bounded justice" – a meta-ethical digression

Accordingly, even if the non-ideal theoretical account of historical obstacles, etc., allows for stronger commitment to state sovereignty, Carens is generally critical to a case made for the moral distinctiveness of the nation-state as an organized community.⁴⁰⁴ In addition to the principle argument based on Rawls procedure, Carens also sometimes argues from an 'internalist' perspective.⁴⁰⁵ From this perspective, Carens appeals in this approach to freedom of movement as a widely held liberty within society. The intention, it seems, is to attack the communitarian

⁴⁰⁰ I think the combination of cultural difference and economic inequality must be the worst. When these coincide, there is a stigma in being different that works in a self-enforcing manner of stereotypes in the general society. Being different becomes associated with being poor and unskilled. In this environment the presumed lack of democratic values might prove to be a self-fulfilling prediction due to the looking-glass effect in majority-minority relations.

⁴⁰¹ A similar question has been raised in comments by Fabricio Pontin on my thesis. For instance, is the strong democracy (which Benhabib promotes) a case of perfectionism? Could the same be said about the Nordic model? I don't have a good answer to this challenge at the moment, except I think "emerging national economies" such as Brazil would benefit from taking their inspiration from models of thick democracy and extensive redistribution, rather than models of thin democracy and free-market economy that has been the dominating paradigm of development in the last decades. What is recognized as "good enough" should be pushed further in order to benefit those that are in the middle and lower classes.

⁴⁰² Parekh 2017, p. 70ff

⁴⁰³ Ibid., p. 71

⁴⁰⁴ Carens 1987, p. 267

⁴⁰⁵ I.e. non-foundational, immanent critique of immigration, see: Carens 2003, p. 95

position from the inside. It exploits how liberal principles are already an integral part of our current dominating self-understanding. Consequently, the emphasis on the primacy of state sovereignty is problematic according to Carens. In more recent works, this critique has developed into a general attack on the state-centric position of “bounded justice” as represented by Michael Walzer, David Miller and John Rawls.⁴⁰⁶

Michael Blake, among others, has answered this critique by appealing to the peculiar status of a membership in a political community enforced by a legalized (and sometimes coercive) sanctioning power. Citizenship is morally significant exactly because it marks out the boundaries of the state’s coercive authority (and the attached legitimizing privileges of its members).⁴⁰⁷

This critique is somewhat remedied by Carens’ claim that any defender of this sovereign authority confuses the question of who ought to have power to make a decision or sanctions (sovereignty), with the question of whether the decision is right (normative objectivity/legitimacy).⁴⁰⁸ In other words, a sovereign decision can still be morally flawed. This is, as I read it, an appeal to the distinction between the descriptive account of citizenship (as a place of justice regulated by the political norm, defined as the distinction between citizens and foreigners) and the normative account of citizenship (as regulated by a set of external principles of justice). The problem of bounded justice is not directly that the monopoly of violence is limited within certain boundaries, but that the debate and answers to questions like “What kind of a people are we?” and “How should we treat foreigners?” are valid as long as the “we”, the sovereign people, has formed an unconstrained public opinion on the matter. In other words, the character of the external obligations is not decided in communication with foreigners.

...

When Carens appeals to widely held liberal principles, he appeals to the normative conception of citizenship. The question is not about the popular support or legality of a political decision, but its moral-legal soundness. Curiously, the way Carens makes this appeal – mainly as a non-metaphysical description of opinion (which both OP and the internalist approach ultimately relies on) – makes him vulnerable to the criticism that his theory is dependent on heteronomous sources of reason, in a way similar to the communitarian position. More specifically: liberal values seem to rely on support from a specific community.

⁴⁰⁶ “[...] the bounded justice view provides only ‘some contingent and self-limiting arguments that justify restriction on immigration under certain circumstances’ (287). [...] in light of Carens argument, political theory’s widespread assumption that state boundaries inscribe the appropriate site of justice is revealed to be just that – an assumption” (Whitt, p. 139)

⁴⁰⁷ Wilcox 2009, p. 817

⁴⁰⁸ Carens 2003

As Peter C. Meilander points out,⁴⁰⁹ this creates a methodological paradox: A communitarian position might end up as liberal as long as the communities involved are liberal. On the one hand, Carens utilizes the fact that “our culture” (the American) is “contained” by the liberal tradition in the communitarian approach. Since Walzer is committed to let each society form their policies according to their shared, particular conception of membership, Carens could imply an indirect support for liberal principles. That is, in cases where the distinct culture is liberal and universalist, the consequence seems to be that the communitarian position would also have to admit an open border immigration policy. Meilander, on the other hand, counters this strategy by arguing that what Carens gains in the cases of already liberal democratic societies, he loses in critical power against societies that are far from liberal. In other words, the appeal to liberal and Universalist principles from *within* does not seem to contradict Walzer’s larger claim about communal self-determination.⁴¹⁰

Can we find autonomous reasons for Carens universalism? In this context his answer to the “constructivist” critique of Rawls (which challenges the heteronomous source of legitimacy in traditional values) is not very comforting, but it might be the best we have without making ourselves dependent on a strong metaphysical program.

In “Alien and Citizen”, Carens claims that the OP does more reflective work than merely summarizing a culturally influenced and shared intuition.⁴¹¹

The “veil of ignorance” offers a way of thinking about principles of justice in a context where people have deep, unresolved disagreements about matters of fundamental importance and yet still want to find a way to live together in peaceful cooperation on terms that are fair to all.⁴¹²

It is unclear how strong this claim is. Does it claim that the OP is a procedural device that might straighten out deep and unresolved global disagreements? Probably not. But does it promise to identify principles that might provide an overlapping consensus? Quite plausibly yes, at least if we restrict this consensus to states that already have a democratic human rights culture that recognizes liberal-democratic values. To what extent this consensus is marked by the

⁴⁰⁹ Meilaender, P. C. 1999. "Liberalism and Open Borders: The Argument of Joseph Carens." *International Migration Review* 33, no. 4 (Win): 1062-1081. <http://dx.doi.org/Doi.10.2307/2547363>.

⁴¹⁰ Could this dispute be solved by arguing that Meilander’s response is basically moving the communitarian position to a meta-ethical level (similar to a cultural relativist position), whereas Carens paradoxical argument seems to be closer to a *reductio ad absurdum*? The absurdity would be: How could a liberal and pluralist society emphasize their cultural distinctness as the primary concern of justice without contradicting itself?

Terje Tvedt argues, on the other side, that the Norwegian state contradicts itself by giving the impression – as a pluralist state – of having no culture. (*Det internasjonale gjennombruddet. Fra “ettpartistat” til flerkulturell stat.* (2017))

⁴¹¹ Check Rorty’s article on HR for a claim in this direction.

⁴¹² Carens 1987, p. 257

interpretation of justice from the point of view of the affluent, Western and modern, Carens does not address.

In his article summarizing *The Ethics of Immigration*, Carens reflects on the cosmopolitan perspective in the following manner: A commitment to democracy and moral equality does not require every action or institution to consider all human beings. But, “[i]t does [...] entail a commitment to justification through reason-giving and reflection that does not simply presuppose the validity of conventional moral views or the legitimacy of existing arrangements or our entitlements to what we have.”⁴¹³ Perhaps the global view of the OP can help us achieve this to some degree?

5.3.5 Summary – comparing Walzer and Carens

Carens admits to some degree that historical circumstances make relevant the institutional level of sovereign political communities, similar to the international order that dominate today. In disagreement with Walzer, Carens hold that sovereignty should be constrained by external moral principles and obligations. We are not only obliged to provide help to needy foreigners as far we can without sacrificing our cultural distinctness, we also have a collective moral duty to care for those who suffer the worst consequences of our international system. Similar to the way owners of property are obliged to assist those with no property within the domestic system of property rights, states (and its political members) have an obligation to assist and include those with no place to go and no membership to claim.

In this manner, Carens provides a valuable critique of the state-centric premises found both in John Rawls’ and Michael Walzer’s works. My concern is, however, that where Walzer tends to put too much emphasis on the moral significance of the value of ‘communities of character’, Carens might go too far in his lack of concern for the formation of collective self-understanding that is required by a strong democracy, which seeks to establish will-formations beyond the mere aggregation of opinion. In short, whereas Walzer has a too thick requirement of these conditions, Carens’ requirements seem too thin.

This is where Benhabib’s balancing approach becomes interesting, not only on a meta-ethical level regarding the grounding of norms for political communal life, but also on a practical level in the sense that her approach sheds light on how we form and secure the conditions of a reflexive self-understanding as a political community. Ultimately, how we do this affects our ability to

⁴¹³ Carens 2014, p. 556

make adequate practical judgments about the pace of migration in general and the obligations toward refugees in particular.

5.4 Rejecting Rawls: the “Porous Border” cosmopolitan view

In *The Rights of Others – Aliens, Residents, and Citizens* (2004) Seyla Benhabib advances an argument for the right of foreigners to political membership. The argument is inspired by Kant and Arendt and is developed within the framework of Habermas discourse-ethical revision of Kantian rationalism. In agreement with Carens, Benhabib understands migration as a normal feature of human life. She also shares with Carens the cosmopolitan assumption that immigration should be conceived from a global point of view, or rather (which is an important nuance in Benhabib) from the “world society”-perspective, which includes broadly the global civil society, including international legal institutions. Benhabib’s notion of an ideal state can be summarized as follows: “[...] a federal republic (Arendt) [...] situated within a cosmopolitan federalism (Kant).”⁴¹⁴

Regarding the circumstances of justice, Benhabib’s position also clearly differs from that of Rawls. Benhabib emphasizes the radical interdependence of states and individuals in a global market and civil sphere as a guiding premise for the question of justice. On the state level this implies that Benhabib rejects the state-centric idea of states as self-sufficient entities which makes unilateral decisions without impacts on foreigners. “Sovereignty is a relational concept.”⁴¹⁵ In a world with radical economic and political interdependence all decisions have *multilateral* consequences. According to the notion of circumstances of justice, Benhabib holds that our moral responsibility increases with our knowledge about these circumstances: “The more we become aware of our interdependencies and the effects of our actions on others, the more responsible we become.”⁴¹⁶ As we become aware of new cosmopolitan problems, it appears then that we have both a responsibility to elaborate on the proper scope of cosmopolitan rights and to secure the epistemological conditions for more knowledge about these interdependencies.

Benhabib is also a radically secular thinker (in Taylor’s sense) in that she situates the emergence of the legitimacy and principles of politics within a thick historical context. Through the descriptive notion of “democratic iterations” human rights and moral norms are formed and given a worldly content through the interpretative practices of people that understand themselves as members of a self-constituting community. The “people” is, unlike the mechanic “we” of traditional identities, a reflexive “we” that participates actively in the narrative of its own becoming. It understands itself, not only to be guided by binding norms and principles, but –

⁴¹⁴ P. 410, in Means, Angelia. 2007. "The Rights of Others." *European Journal of Political Theory* 6, no. 4: 406-423.

⁴¹⁵ Benhabib 2004, p. 21

⁴¹⁶ Parekh 2017, p. 66

according to the modern idea of revolution – to be able to agree upon theoretical principles that may remake our political life.

This thick account of norms finds resonance in a modern communitarian position, such as the one represented by Walzer. There is however a crucial difference, since Benhabib understands this historical process to include interpretations of moral norms (such as human rights) that obliges the political community to a much stronger degree than Walzer admits. To exemplify this disagreement: whereas Walzer holds that a sovereign state has the privilege to limit admissions in order to preserve a community of character, Benhabib understands the way a community regulates its relation to non-members as a crucial feature *of its character*. Further, in disagreement with Walzer, Benhabib holds that this character can be judged according to external standards of justice. The mediation of these standards into the political domain implies certain restrictions related to just regulations of cosmopolitan relations (between state and foreigners).

In sum, we might say that Benhabib aims to find a balance between a “thin” cosmopolitan and a “thick” statist position. Through description of concrete membership practices she points out certain tendencies that she values normatively as guiding for further cosmopolitan revisions of our citizenship models.

5.4.1 Political membership from the perspective of global society

We might say that Benhabib’s discourse-ethical account is based on a fundamental critique of Rawls state-centric position. Since Rawls does not even seem to recognize immigration as a relevant problem, Benhabib’s critique of Rawls on these matters is more intricate than her critique of Walzer. As seen in chapter 3, Rawls’ response to the issue of distribution of membership or migration in general is quite limited and is generally in line with Walzer’s account, i.e. it does not go beyond the “duty to assist”. Migration is from the state-centric perspective an anomaly, and Benhabib rejects this premise by changing the perspective.

Like Carens, Benhabib does not consider transnational migration as a marginal phenomenon, revealed first when the veil of ignorance is lifted and the “real world” dawns on the participants in the OP. Benhabib criticizes Rawls for grounding his account and the procedural designs on a state-centric and closed conception of justice. In the domestic version of the OP (the first considered above), this is quite explicit, as Rawls defines the society of the domestic version as *complete and closed*. In the second, interstate version, it is to be found in a more subtle way in Rawls choice of “people” as the relevant level of unity (as the relevant moral agent).

Unlike Carens, Benhabib does not merely revise Rawls procedural approach. Rather than extending the individualistic procedure to the next level as Carens does, Benhabib offers a balanced critique that seeks to maintain and appreciate the normative significance of both the individual and collective levels. In this way Benhabib’s critique responds not only to the domestic account of OP, but also the interstatal (or inter-popular) version in *The Laws of the Peoples*. Her main point is that the self-understanding of a political community should be thought of as self-reflexive, iterative and standing in a relational interdependency to other communities of the same character. Rawls’ account of “people” is in this context, according to Benhabib, historically inaccurate, sociologically inadequate and normatively irresponsible.⁴¹⁷

If we accept the distinction between an interstatal and a cosmopolitan setup of the OP, one might argue that Rawls’ concern for the “people” is not really relevant for the distribution of membership. After all, Carens’ redesign of the OP seems to address the issue at hand quite adequately from a liberal point of view. While Benhabib recognizes Carens’ contribution, she seems to consider his account of moral cosmopolitanism as too radical. Carens’ account is not adequately balanced against the concerns of public autonomy and the need for democratic closure. In short, it is unclear what political implications Carens derives from his ideal-theoretical, moral cosmopolitan account.⁴¹⁸

To avoid this pitfall of utopian cosmopolitanism, Benhabib accepts Walzer’s articulation of the problem as a dilemma between state sovereignty and moral equality, but she emphasizes the *relational* character of political communities, and how the self-reflexive understanding of membership is deeply entangled with the way foreigners are conceived. Benhabib points out – quite accurately – that there is an inherent risk in determining membership as a distributive good: One might end up with the impression that membership is a good that has substance without – and before – its performative manifestation. Rather than speaking of a just distribution of (our kind) of membership, she prefers to discuss the issue of “just membership”.

⁴¹⁷ I support the rejection of state-centrism, but I do not necessarily agree with Benhabib though, if this implies the rejection of individualistic TE’s, like OP, as such. I think Rawls position might have a value as a simplifying, didactic device. The relational account of the social is highly complex when it operates on a metatopical level. Individualism should not be viewed as an attempt to describe social interaction on a topical, but to solve a problem of social imaginary on the metatopical level of categorical identity. At this level the question of inadequacy is to me less obvious because the pragmatic aspects of time-consumption and common sense (being shareable) come into play. Like a complex algorithm, the relational model might solve the problem in the richest and most distinct manner, but it is not given that it will solve it within reasonable time and in a way that is accessible for the public.

⁴¹⁸ It should be noted to Carens defense that he also offers a conventionalist perspective, wherein the Rawlsian approach is meant to clarify certain ideal solutions and not to offer a full conception of justice. Further, Benhabib does not state this explicitly, but it also seems likely that there are different procedural preferences here between the communicative-dialogical and individualistic-abstractive designs

To underline this point, Benhabib offers her own definition of political membership which emphasizes the border-performing aspects of it:

By political membership, I mean the principles and practices for incorporating aliens and strangers, immigrants and newcomers, refugees and asylum seekers into existing polities. Political boundaries define some as members, others as aliens. Membership, in turn, is only meaningful when accompanied by rituals of entry, access, belonging and privilege.⁴¹⁹

When Benhabib speaks of the reflexive character of the political community, it is closely related to the self-understanding of the community and its membership practices. Unlike a general public without border, the self-reflective reform of the political community is intimately connected to the critical assessment of its own performative procedures of membership. According to Parekh, “[Benhabib] aims to lay a moral foundation for democratic states to mediate between the legitimate claim of outsiders who seek entrance into a given state with the will of citizens that, often at least, would prefer to exclude many or all outsiders.”⁴²⁰ From this moral foundation she offers a critique of membership practices that incorporates or excludes foreigners in an unjust manner. This makes her approach a promising cosmopolitan conception of justice, since it is sensitive to both the need for cosmopolitan law and the procedural challenge of including views from elsewhere.

5.4.2 Solving the dilemma by mitigating three normative concerns

As Benhabib understands it, transnational migration brings the core constitutive dilemma of democratic legitimacy – between universal norms⁴²¹ and the sovereign people – to the forefront of our attention. This dilemma is also reflected in *the paradox of democratic legitimacy*. On one side, democratic sovereignty draws its legitimacy from a constitution that refers to principles that are context-transcendent and somehow commits the sovereign from “outside” the formalized political sphere. These principles are universal in the sense that they potentially include all human beings (although they mainly articulate citizen rights). On the other side, a constitution is the ground for a particular political community “circumscribed in space and time, sharing a particular culture, history and legacy”⁴²². It constitutes the “demos”, which is defined by its arbitrary social boundaries.

Benhabib summarizes the debate on immigration by pointing out how each standard position ends up on each horn of the dilemma, and consequently how they overemphasize one

⁴¹⁹ Benhabib 2004, p. 15

⁴²⁰ Parekh 2017, p. 64

⁴²¹ It's important to note the difference here between universal norms in general and cosmopolitan law is particular. The dilemma of democratic legitimacy may concern other norms of public right which are not cosmopolitan in the strict Kantian sense. It is mainly a dilemma between universal and particular norms.

⁴²² Benhabib 2004, p. 43

constituting element at the expense of the political as a distinct normative domain. First, the communitarian position of Walzer argues for the primacy of state sovereignty by appealing to the legitimizing function of the “ethnos”. The reconstructive imaginary of a distinct political community and culture is emphasized as the starting point for considerations on immigration policies and criteria of membership. Second, the liberal-cosmopolitan position of Carens argues in favor of the primacy of freedom of movement by appealing to its consistency with the universal principle of moral equality. Both approaches seem to forget the “demos” as a self-legitimizing, secular community with its inherent norms of exclusion.

To give a concrete example of what she’s aiming at, Benhabib refers to how the German Constitutional Court engaged in reflexive negotiations regarding the right of foreigners to participate in local elections. Although the Court held a classical model of national citizenship, where the rights to participate in elections were closely connected to “nationality” (which outranked the principle of being affected), it also recognized the procedural legitimacy of the demos to redefine itself by altering the criteria for membership. In the German case, this led to a process of rearticulating German citizenship “in line with the composition of the population”, presuming that the old ideology of national belonging did not recognize adequately the residents of foreign origin as proper members of our people.

Benhabib interprets this decision as a progressive event in the reformation of citizenship as we have been accustomed to think of it in state-centric terms, to an understanding of citizenship more inclusive to foreign residents and also involving dispersing democratic agency to supranational levels. On a deep level, and here Benhabib relates to a broader Enlightenment narrative of expanding recognition, these steps are related to an assumption of moral progress associated with the ideal of universal emancipation (or universal inclusion). In its conventional form, the progressive narrative involves the way demos, as the group in possession of public autonomy, includes larger and larger parts of the populous that were earlier excluded from participating in the sovereign decision.⁴²³

Curiously, the presence of the foreigner re-actualizes the kind of struggles and redefinitions of the demos that we have seen historically related to the political status of workers and women. On the one side, this resonates with the paradox facing domestic struggles for emancipation: that those affected by the democratic decision of inclusion are not themselves to be the authors of this decision (beyond the persuasive power of an unjustly excluded outsider). The inclusion into a democracy is not based on a democratic decision, i.e. it is not able to live up to the democratic

⁴²³ Benhabib 2004, p. 206

ideal of emancipation. This is the paradox of democratic legitimacy in its purest form, “[...] namely that those whose rights to inclusion or exclusion from the demos are being decided upon will not themselves be the ones to decide upon these rules.”⁴²⁴ Foreigners are in this sense like workers and women before them, subjects to laws that they are not themselves the authors of. Benhabib claims that the “sovereign people” will never be a fixed quantity: “it is of the essence of democracy that the boundaries between the “we” who decide and the “they” about whom decisions are made will always be subject to questioning and contestation.”⁴²⁵

On the other side, according to Benhabib, the presence of foreigners also provokes a new conflict of principles at the heart of the democratic legitimacy. With the other groups (the workers and women), the argument of moral equality could be met on the domestic level of *populous* without being confronted with the basic principle of closure in any sovereign state, namely the exclusion of foreigners. There is in other words a conflict between the universal ideal of inclusion and the partial need for democratic closure. Simply put, if foreigners’ claim of the universal right of inclusion is met fully, it will undermine the distinctness or integrity necessary for the public autonomy of the community to which they claim inclusion. In consequence, the border-performing rituals between the domestic and cosmopolitan domain would lose their content.

To be clear, Benhabib’s notion of just membership does not rely on a definition of political membership that is morally grounded. Rather, Benhabib’s critique of the standard positions must be understood through her view of the non-foundational relation between three normative domains: the ethical particular, the moral universal and the political. The relation between these norms is not understood as hierarchical or foundational, but one of “simultaneous disjunction and mediation”.⁴²⁶

Briefly, *the ethical domain* is associated with particular claims of group concerns and our “close ones”. Benhabib criticizes Walzer for reducing moral demands to such claims of specific, ethical, cultural and political communities.⁴²⁷ In this way the “cultural-communitarian” approach apparently solves the dilemma of membership distribution (between sovereignty and moral

⁴²⁴ See also Bauböck, Rainer. 2007. "The Rights of Others and the Boundaries of Democracy." *European Journal of Political Theory* 6, no. 4: 398-405.. On the republican argument against a global state, see also Benhabib, 2004, p. 219 ff. It seems to rest on the idea that, unlike an empire without boundaries, the republic requires a limited territory and smaller scaled community.

⁴²⁵ P. 206, in Benhabib, Seyla. 2000. *The Reluctant Modernism of Hannah Arendt*, Modernity and Political Thought: AltaMira Press.

⁴²⁶ Benhabib 2007, p. 451. The idea of equi-primordality or co-originality [*Gleichursprünglichkeit*] is also instructive here.

⁴²⁷ Benhabib 2007, p. 447, 2004 p. 15

equality) by claiming that the primacy of self-determination rests on the grounds of ethical particularism. The cultural and social proximity of the group trumps any external principles and founds the legitimacy of the normative distance between members and foreigners. This is however, Benhabib argues, achieved at the cost of conflating the ethical particularism of cultural communities with politics.⁴²⁸

The moral domain has a universal and context-independent character. Benhabib's suggest that the extension of cosmopolitan law is located here. Associated with this domain, Benhabib addresses the problems of devaluing the democratic self-determination of political processes. This is a problem that we find in a wide range of accounts, from the natural right libertarians, to the liberal cosmopolitans. Joseph Carens radical "Open border"-account is also criticized for reducing the question of membership to a moral question by Benhabib. However, Benhabib does not seem to rely on a conceptual distinction between universal moral norms in general and moral-legal norms in particular. For instance, she reserves the notion of legally binding norms for the political domain of positive law (with its own inherent norms).

The political domain is associated with the system of formal procedures of law making and legitimate decision-making. The central norm of the political domain is, as we have seen, the norm of membership, which distinguishes insiders from outsiders. In defense of this domain Benhabib criticizes other conceptions of the "political". She criticizes the "realists" and the "postmodernists" for being skeptical to any external moral constraints to the political. Similarly, she also criticizes "civic-republicanism"⁴²⁹ for holding that the value and meaning of the institution of citizenship is intrinsically linked to the "bounded community". The problem in the latter case seems to be that self-determination is not based on universal principles of democracy, but on the inherent value of the political norms themselves (which ends in a kind of legal positivism). In other words, the political membership is given a self-legitimizing status, detached from the international regulation by human rights.

Overall, Benhabib holds that the standard positions in the debate, including those that take the political domain to be a normatively isolated domain, all overemphasize one normative domain at the expense of the others. Benhabib promotes a less conclusive balance between several concerns. The relation between these concerns is not understood as a foundational hierarchy as it

⁴²⁸ Still, Benhabib acknowledges that Walzer was the first to recognize this dilemma between the universal values and the communitarian or particular concerns. See also Benhabib 2004, p. 122 for references to long debate among them on this issue, and on p. 123 Benhabib questions the way Walzer eliminated the conflicting or fractured identities of members of democracies by favoring the right to collective self-determination to the point where there is no balancing anymore.

⁴²⁹ In the figure of David Jacobson's *Rights across Borders* (1997)

is an interpretative endeavor situated in history. It follows the model of “the hermeneutic circle” rather than infinite the regress of a foundational questioning. From the perspective of the political domain, this implies a balancing of concerns:

Just as we cannot cease to mediate the needs of our loved ones with the demands of impersonal, institutional obligations; just as *we cannot cease to measure the actions of our polities in light of the claims of strangers*; just as we cannot cease to participate in dialogues with those who worship different gods than ourselves, so too we cannot collapse the moral universal into the particular, the legal and the functional.⁴³⁰

In this passage it is tempting to understand Benhabib to acknowledge that the state (or the political “we”) has obligations to take moral claims of *foreigners* into account. This moral obligation is not foundational to the political domain as such, but should mitigate the policies of a state when called for.

If this reading holds, one might assume that Benhabib would agree with the idea that the “claims of strangers” would imply mediation internal to the moral-legal domain of public right, given the Kant’s conceptual framework (as discussed in chapter 2) between the domestic and cosmopolitan law. Hence, the state’s obligations to its own citizens would be balanced against its obligations to foreigners (or to every human individual). Yet, Benhabib seems to have another understanding of this mediating relationship.

In *Situating the Self*⁴³¹ Benhabib uses “stranger” in a more generic sense of “people we don’t know”, and which primarily would imply “other citizens of the same state that I don’t interact with in everyday life.” In this context, Benhabib understands recognition of the claims of the stranger as a way to mediate between moral right and ethical virtue; or between the public virtue of impersonal justice and the private virtue of goodness. In this sense, the stranger stands somewhere in-between the “generalized other” (the legal subject of moral-legal norms) and the “concrete other”:

Between the basic institutions of a polity, embodying principles of the morally right, and the domain of moral interactions in the lifeworld, in which virtue often comes to the fore, lie the civic practices and associations of a society in which individuals face each other neither as pure legal subjects nor as moral agents standing under ties of ethical obligations to each other but as public agents in a political space. The gap between the demands of justice, as it articulates the morally right, and the demands of virtue, as it defines the

⁴³⁰ Benhabib 2004, p. 16-7, my emphasis

⁴³¹ Benhabib, Seyla. 1992. *Situating the Self: Gender, Community, and Postmodernism in Contemporary Ethics*. New York: Routledge.

quality of our relations to others in the everyday lifeworld, can be bridged by cultivating qualities of civic friendship and solidarity.⁴³²

In this quote Benhabib uses the “political” in a way very close to Arendt’s notion (which I will come back to in part 2). The political is here seen as the intersection between the institutional public and the private; between the equality of legal subjects and the uniqueness of concrete persons. For Benhabib, this way to “personalize justice” is closely connected to the moral /discourse-ethical obligation of the “enlarged thought”: to think from the standpoint of everyone else. It is also related, Benhabib argues, to the political requirement (here “political” in the more ordinary sense) to create “institutions and practices whereby the voice and the perspective of others, often unknown to us, can become expressed in their own right.”⁴³³

The claims of the foreigner is in this sense a somewhat exceptional case of the claim of strangers, since it is not strictly speaking (as a citizen) even a “pure legal subject” in the first place, and one would usually not think of the political institutions and practices as obliged to guarantee the perspectives of involved foreigners. As we will see in 5.4.5, Benhabib is somewhat positive to the idea that some communities are able to extend their sympathy and affects to groups beyond the political community itself and thus recognize moral and political obligations toward the claims of foreigners.

To provide an overview (which includes all three domains; the moral, political and ethical), I should also mention that Benhabib proposes overall the cosmopolitan-federalist approach (Kant, Arendt) as preferable. Unlike the idea of a global state of world co-citizens, this approach balances the moral recognition of world-citizens against the principle of public autonomy on a state level. The principle of public autonomy implies a commitment to ‘the logic of representation’: “Representation involves demarcation.”⁴³⁴ From Hobbes, Benhabib borrows the idea that there must be a unit that authorizes some representatives to act in their name. Whether this unit is defined by national borders or some other kind of organization is an open-ended question to Benhabib. In any case, Benhabib defines the cosmopolitan-federalist approach by a twofold constraint on the political process:

The normative constraints I defend are twofold: respect for universal human rights principles and a just, fair and open process of democratic iteration which mediates between interests of all those affected and the democratic citizens.⁴³⁵

⁴³² Benhabib 1992, p. 140

⁴³³ Ibid., p. 140

⁴³⁴ Benhabib 2007, p. 448

⁴³⁵ Ibid., p. 449

In order to retain the constitutive tension between the normative fields, Benhabib proposes that the way we understand democratic sovereignty must undergo a reform – exemplified by the German case above – from a closed, ethnos-based account to an open, demos-based account. It is in this context that Benhabib proposes the idea of the human right to membership, which is inspired by her interpretation of Arendt’s ‘right to have rights’. It is the central idea of the porous border-account; a cosmopolitan right to second admission that would give residents of foreign origin a right to political membership. This right is qualified under certain criteria, which will be discussed in the following. I’ll begin by explaining Benhabib’s procedural approach (and the notion of communicative freedom) and her notion of democratic iteration.

5.4.3 Moral discourse as methodology – a discourse-ethical approach

If we want to make a simple contrasting comparison between Benhabib’s discourse-ethical approach and Rawls procedural approach, one way to do this would be to read them as different post-metaphysical, quasi-transcendental⁴³⁶ adaptations of Kant. Rawls (and Carens) integrates the morality of legality into his framework of ‘justice as fairness’ via the contemplative procedure called the original position. Benhabib, however, draws on another hypothetical scenario to exemplify how taking the position of the other is relevant to moral insight.

First of all, Benhabib draws on Habermas’ intersubjective reinterpretation of Kant’s Universality formula of the categorical imperative. On these terms, the discourse-ethical approach is based on an appropriation of a deontological claim, expressed in the meta-norm “(U)”:

[...] only those norms and normative institutional arrangements are valid which can be agreed to by all concerned under special argumentation situations named discourses.⁴³⁷

Both procedural approaches are different techniques which take into account the perspectives of all concerned by the outcome. Similar to other liberal accounts that presume the equal moral value of all human beings, the discourse-ethical procedure has incorporated an egalitarian criterion of accounting for “all concerned”. Quite distinct from Rawls’ thought experiments and utilitarian calculus, the discourse-ethical procedure takes the form of a justificatory process through *dialogue* between the concerned parties. The inclusion of all concerned is not just a requirement of a fair procedure of political consensus; it also articulates a moral-epistemological requirement of “enlarged thought” to think from the perspectives of others. This second requirement defines the actual confrontation with others point of view in public as essential.

⁴³⁶ Based on how self-performative contradictions reveal norms that are already constitutive for the practices that we are a part of and take for granted. Procedures are designed mainly to achieve higher degrees of consistency and clarity in our understanding of these norms.

⁴³⁷ Benhabib 2004, p. 13. See also Habermas 1990, Moral Consciousness and communicative action. It is understood as a discourse-ethical revision of Kant’s principle of justice, i.e. the “universal principle of rights”.

Hence, although dialogue can be simulated, it is a requirement that ultimately cannot be met practically in solitary thought experiments.⁴³⁸ In this way it responds better to epistemic conditions that Sen recognizes in the impartial spectator and the deliberative theory of democracy. Still, these justificatory processes are considered, by Benhabib, to be moral argumentations of a specific kind called “discourses”. The normative component drawn on by Benhabib in these discourses is the “constraints which a discourse ethic imposes on any deliberative process in order for it to be deemed justifiable”⁴³⁹, such as the quasi-transcendental aspects revealed by performative self-contradictions.

Benhabib clarifies the relation between these hypothetical scenarios and actual political procedures in the following manner: In the case of articulating moral rights such as universal human rights, these discourses take on a quite abstract character. They are situated in an imagined, ideal speech situation and should, in a non-forced manner, be valid for (or at least agreeable to) all human beings. Obviously, one cannot demand that all human beings give their actual concern. The criterion of actual consent, or at least of procedural legitimacy, takes us to the real speech situations of civil society and the political institutions of representation. This is where the notion of democratic iterations comes into the picture, in order “to analyze how real processes of democratic discourse within and across state boundaries can create or *fail to create* justification through legitimation.”⁴⁴⁰

Every negotiation on how to mediate the relation of moral rights to the norms of specific “juridico-civil” communities can be seen as a realization of this potential affirmation.⁴⁴¹ According to Benhabib, there is a noticeable tension in the discourse of liberal democracies between the moral principles (such as “the principle of right”) and the specifically articulated variations of norms in a particular political community – called “the schedule of rights”.⁴⁴² The degree of the realism of the “discourse” seems to correlate with which end of this scale of rights one is addressing; from the principle to the scheduled right. Along this continuum, the cosmopolitan right to political membership will be located somewhere on the more conceptual side. The notion of “democratic iteration” is assigned to account for the concrete negotiating and

⁴³⁸ Benhabib 1992, p. 140

⁴³⁹ Benhabib 2007, p. 455

⁴⁴⁰ Ibid., p. 456 For ‘jurispathic’, see Bonnie Honig in *Another Cosmopolitanism* (2006)

⁴⁴¹ Benhabib 2004, see p. 133-34

⁴⁴² In «Situating the Self» Benhabib terms this «scheduling» a «political ethics» which concerns «the creation of institutions, the formation of practices, and the sustaining of civic values that cultivate the ability of enlarged thought and the universalist-egalitarian commitment which inspires them». (Benhabib 1992, p. 139) Benhabib breaks with Arendt at this point, because of a concern for the lack of attention Arendt devotes to the normative principles in her political theory. I think Benhabib is mistaken on this point and underestimates the influence of Montesquieu in Arendt’s thinking. (See also Birmingham 2006)

reflexive processes as they actually take place within a specific community. The normative component that defines a justified process in the discourse-ethical approach is more generally based on the integrity of the communicative freedom of every individual. In general this can be articulated as a formal dialogue between “you” and “me”, where “your” communicative freedom is respected as the capacity to agree or disagree with “me” on the basis of reasons which equally apply to us both.⁴⁴³

To provide an example of the abstract level of the moral kind of arguments, the following is how Benhabib articulates the justificatory frame of the human right to membership in an ideal, imagined context:

If you and I enter into a moral dialogue with one another, and I am a member of a state of which you are seeking membership and you are not, then I must be able to show you with good grounds, with grounds that would be acceptable to each of us, why you can never join our association and become one of us. These must be grounds that you would accept if you were in my situation and I were in yours. Our reasons must be reciprocally acceptable; they must apply to each of us equally.⁴⁴⁴

Notice how this discourse has a form quite close to a thought experiment. It is a formalized and hypothetical conversation, not relying on the actual participation of any other person. Actually, the performance seems to rely on their absence. Still, the design is quite distinctly different from that of Carens’ re-design of Rawls’ individualistic procedure.

In the following I will look closer at how Benhabib’s approach plays out in the debate on immigration. As will become clear, her originality is not necessarily in the concrete criteria for membership that Benhabib articulates, but rather in her understanding of the process that articulates and affirms these criteria. Hence, the emphasis will be put on Benhabib’s account of *the communicative freedom of the foreigner* and its procedural recognition. As we will see, the recognition of the foreigner is quite unproblematic when we consider ideal and ‘soft public’ contexts, whereas the integrity of the foreigner in terms of a moral-legal cosmopolitan right becomes more difficult within the “hard public”. The issue of scope (of who ought to be included) comes to the center when we consider the legitimacy of decisions made by a sovereign democracy.

As Walzer pointed out, it is a widely shared assumption that norms of membership (including citizenship) are articulated by those who are in the position to distribute it. If one still wants to sustain the claim of accounting for “all concerned,” this seems to confront the discourse-ethical

⁴⁴³ Benhabib 2004, p. 132-33

⁴⁴⁴ Ibid., p. 138

theorist with the democratic dilemma. Any decision on where to draw the line of closure will inevitably lead to a compromise with excluding consequences: Those directly affected by the articulation of membership norms involves also those who are excluded, either they risk deportation or are deprived of the future possibility of seeking admittance.⁴⁴⁵ Does it not unavoidably lead to cases of exclusionary neglect? And, can this be sensibly remedied by appealing to the epistemological value of a global public debate?

5.4.4 “Porous Borders” and communicative freedom – the middle way of discourse ethics

Based on the discourse-ethical approach, Benhabib articulates her own account of immigration policies in terms of a set of cosmopolitan rights that is justified by the notion of communicative freedom. Her account is in close dialogue with Kant and Arendt, and can be read as an attempted improvement of their respective contributions:

Do the communicative reformulation of basic or human rights help us resolve the puzzles which Kant and Arendt were struggling with? Kant could not bridge the gap between the right of temporary visitation and the right of permanent residency, Arendt saw the practice of denaturalization and the condition of statelessness as being almost equivalent to the loss of rights altogether.⁴⁴⁶

The puzzles Benhabib is referring to is in Kant’s case the problem of imperialism (presented in chapter 2) and for Arendt the paradox of Human rights (presented in chapter 4). As a response to his particular puzzle, Kant promoted a cosmopolitan right to first admission and short-term visits, but was critical to a right to permanent residency if it conflicted with the autonomy of other peoples. In other words, the distribution of membership was for Kant a voluntary matter of each sovereign state (including distinct peoples without agriculture and a modern state structure). Arendt, on her side, proposed an extended version of the cosmopolitan law in the wake of what she understood to be the revealing of the helplessly abstract character of an individualist conception of human dignity in the face of processes of massive denationalization.

Benhabib’s puzzle is defined by her own context: the increasing transnational migration of “real” refugees (i.e. conventionally recognized) and other forced migrants (such as war refugees, economic migrants, climate refugees, etc.). Benhabib also points out that Arendt’s concern for the poor legal status of the stateless has been addressed (at least to some degree) institutionally through the UN system and the founding document of the Universal declaration of Human Rights from 1948. Hence the new political principle, which Arendt saw as the only solution, is now somewhat met by soft international arrangements of every state to treat foreigners as human

⁴⁴⁵ Benhabib 2004, p. 15.

⁴⁴⁶ Ibid., p. 134

rights-subjects when residing on its territory. Despite this positive development, especially when it comes to the conventions protecting refugees and stateless, Benhabib also recognizes the low status of unwanted migrants: “Even in one of the most developed rights regimes of our world [referring to the EU], refugees and asylum seekers still find themselves in a quasi-criminal status.”⁴⁴⁷

The ‘soft-law’ international order relies heavily on nation-state institutions. Still, Benhabib optimistically claims, the acceptance of rights, such as cosmopolitan rights, has a tendency to change how we think about ourselves as a political community.⁴⁴⁸ In other words, they have the potential to reform the political self-understanding reflexively in a more cosmopolitan and open direction. Appealing to consistency, Benhabib for instance points out that if we are ready to condemn homogenizing practices of denaturalization (such as ethnic cleansing), we should also be ready to accept the heterogenizing practices of naturalization (such as policies promoting diversity). Unlike Kant, Benhabib is not too concerned with the potential imperialist domination. Consequently, Benhabib revises Kant’s (and Walzer’s) closed account of membership distribution and proposes a “porous” migration policy in accordance with a human right to political membership. “You may stipulate criteria of membership, but they cannot be of such a kind that others would be permanently barred from becoming member of your polity.”⁴⁴⁹

An open cosmopolitan account of migration thus need not be an ‘open border’-account, nor necessarily take open borders as the default position. To illustrate this, Benhabib imagines having a dialogue with a foreigner: If I were to agree with you in a non-forced situation on fair immigration policies, what could they be?

At first, this seems to imply more or less a conventional view. For instance, Benhabib claims that the current distinction between immigrants and refugees is in agreement with the communicative freedom of the foreigner: “Clearly, first admission conditions for immigrants are of a different sort from those of refugees and asylum seekers. States have more discretion to stipulate conditions of entry in the case of immigration than they do when facing refugees and asylees.”⁴⁵⁰

⁴⁴⁷ Benhabib 2004, p. 168

⁴⁴⁸ This might sound too optimistic these days, but I guess it should be noted how split the inhabitants of Europe is, and how the other side of this split has a remarkably open attitude toward migration and membership distribution.

⁴⁴⁹ Benhabib 2004, p. 135

Curiously, one effect of this right to membership is, according to Benhabib, that “voting with one’s feet” is not only recognized by the sending state (via the right to emigrate), but also by the right of the receiving state (via the right to immigrate). This is to some degree already recognized through the practice of political asylum, but then in quite small numbers and preferable to the ideologically affiliated. The hosting of Islamic extremist or other totalitarian/fascist political refugees have less support by public opinion.

⁴⁵⁰ Benhabib 2004, p. 137, Benhabib continues, clarifying her distinction between the legal and moral: “Their obligations to the latter groups are moral and for those states who are signatories to the Geneva Convention on the

When it comes to the criteria of second admission, Benhabib sorts out morally relevant criteria in line with a just membership practice. The basic distinction is between criteria related to those attributes that are ascribed and non-elective (such as race, gender, religion, ethnicity, language community, or sexuality) and to those attributes that are (at least partly) relying on personal responsibility (such as certain qualifications, skills, and resources, for instance length of stay, language competence, a certain proof of civic literacy, demonstration of material resources, or marketable skills).⁴⁵¹ This is not very far from the selective, ‘high-skill’-preferring membership practices between the global north and south.⁴⁵²

There is however a potentially radical critique of the current system in Benhabib’s approach. Benhabib holds that the human right to membership entails a critique of Kant’s distinction between the temporary right of sojourn and the longer-term right of visitation, because Benhabib finds no good reason (acceptable in this imagined discourse) that would justify that “you” should remain a permanent stranger.⁴⁵³ The current transformation of membership which extends rights in terms of residency (populous; *jus soli*), rather than cultural identity (ethnos), is perceived by Benhabib as a sign that (moral) cosmopolitan norms are becoming embedded in our polities.

Further, referring to the criminalization of undocumented migrants, refugees and asylees, she claims:

The right to universal hospitality is sacrificed on the altar of state interest. We need to decriminalize the worldwide movement of peoples, and treat each person, whatever his or her political citizenship status, in accordance with the dignity of moral personhood. This implies acknowledging that crossing borders and seeking entry into different polities is not a criminal act but an expression of human freedom and the search for human betterment in a world which we have to share with our fellow human beings. First admittance does not imply automatic membership.⁴⁵⁴

In this passage, Benhabib offers the outlook of a radical reform of the current framework, where a right to visit (in its radical form) is combined with the right to membership, which given certain criteria implies that all human individuals have the opportunity to seek membership elsewhere.

Status of Refugees (UN 1951) and its 1967 Protocol they are legal.” For Benhabib, in other words, moral norms would include norms that according to Kant’s terminology have a legal *form*, but is unwritten.

⁴⁵¹ Benhabib 2004, p. 138

Compared to Walzer and Carens, these criteria are quite similar. [see Benhabib 2007 for comments on these criteria: p. 452: two principles of this selection]

⁴⁵² Is this the price of maintaining the perfectionist ambition of strong democracy?

⁴⁵³ The consequence is quite similar to Walzer’s argument for closed borders: “once admission occurs, the path to membership ought not to be blocked.” (Benhabib 2004, p. 140) Quite obviously, Benhabib arrives at a different conclusion on the question of first admission, represented in the term “porous borders”. But, on closer inspection, Walzer and Benhabib are not very far off in these matters. Walzer would also recognize the right to asylum as an exception to the general discretionary sovereignty on first admissions.

⁴⁵⁴ Benhabib 2004, p. 177

We might call this a general, idealized specification of the principle of rights. However, how they are to be ‘scheduled’ in a particular context, Benhabib leaves quite open. In the debate following *The Rights of Others*, she has not, to my knowledge, been willing to determine the specific pace of migration beyond her notion of porous borders.⁴⁵⁵

5.4.5 Strong democracy and the inclusion of foreigners

As mentioned earlier, Benhabib’s position on immigration is closely linked to a meta-historical (“historiological”) account of how the self-understanding of a political community develops through what she calls “democratic iterations”. This is understood as a process of reinterpretation that may open for new modes of political agency and interaction. In some passages Benhabib quite clearly suggests that migration and the naturalization of newcomers will itself have positive effects on this process. For instance, it actualizes a kind of diversity in the domestic sphere which brings the ‘view from elsewhere’ nearer: “Elsewhere is here”.

As history has shown, the meanings of right claims can be altered when someone outside the expected scope of subjects (the domestic “others”) perform the same claims. The main expansions in the standard-progressive HR-narrative include the eventually successful claims of residents without legal property, such as slaves, workers and women⁴⁵⁶. Benhabib also assumes that the presence of individuals that are culturally distant from the majority may introduce a similar process, perhaps first through changing the laws (“jurisgenerative politics”) and parallel through changing our shared self-understanding (democratic iterations in general). We (i.e. us and the foreigners) become, according to Benhabib, hermeneutical partners that interpret our institutions and cultural traditions in new ways.⁴⁵⁷

As a condition for this positive reflexive, epistemic/hermeneutic effect of immigration, Benhabib specifies that “only polities with strong democracies” possess the reflexivity to view even the right of citizenship as open to reinterpretation.⁴⁵⁸ In other words, the condition of being a “strong democracy” becomes essential to the cosmopolitan rescheduling of “the right to membership” where the view from elsewhere is appreciated.

⁴⁵⁵ In concrete terms this results in a “porous borders”-account and admits only that labor market condition might allow for constraints on first admissions (Benhabib 2007, p. 453). There might specific historical and group obligations as well (Ibid., p. 454).

⁴⁵⁶ The legal property of women is likely to be more extensive and nuanced than the other groups, but historically their property rights have generally been inferior to men.

⁴⁵⁷ paraphrased, Benhabib 2004, p. 169

⁴⁵⁸ Benhabib 2004, p. 212, see also Means, p. 408

Commenting on Benhabib's work, Angelia Means explains how "reflexivity" involves that citizens understand themselves as a sovereign people in a quite strong deliberative meaning-formation. "We, the people" is a reflexive concept:

[It is] a concept that anticipates self-transformation through encounter with others who not only visit 'us' and interact with 'us' in civil society but becomes one of 'us' in the *political* sense.⁴⁵⁹

The leap taken from Kant's Enlightenment idea of communication, from short-term visiting to membership, is quite striking. This contrast tells us something about how reflexivity is historically sensitive to the specific understanding (the particular iteration or redaction) of the idea of public autonomy. This criterion of success can be vaguely expressed as the democratic strength of a community: "[...] only strong democracies can achieve integration while minimizing discrimination, including cultural discrimination. The weaker a democracy, the more it is compelled to hold onto its natural transitional object, the close ties that bind 'us'."⁴⁶⁰

Benhabib understands this integration to be performed by some historically situated collectivity, driven by the tension within the paradox of democratic legitimacy and aspiring to find a common ground of peoplehood. She does not accept the homogenizing analogy between moral person and peoples that the interstatal OP presumes. Rather she emphasizes how 'people' develops through history. The diversity within a people drives the development of making sense of a common "moral nature" through contestation of its current terms and meanings.⁴⁶¹ This is the classic story of moral-political progress in Benhabib's account, emphasizing the role of "others":

The normative content of collective identity is thus a product of the increasingly self-conscious iterability of identity, a consciousness that has occurred because others have demanded their rights and proclaimed that their differences are relevant to the interpretation of democracy's moral horizon and the laws that affect us all.⁴⁶²

Benhabib stresses this point, especially the tension between *ethnos* and *demos*.⁴⁶³ She accuses both Rawls' notion of a self-enclosed society (including the "people") and Walzer's notion of the decline of citizenship for neglecting this tension in the constitution of peoplehood. In doing so, the status of the foreigner is also neglected:

The presence of others who do not share the dominant culture's memories and morals *poses a challenge to the democratic legislatures* to rearticulate the meaning of democratic

⁴⁵⁹ Means 2007, p. 409

⁴⁶⁰ Ibid., p. 413

⁴⁶¹ Benhabib 2004, p. 80

⁴⁶² Means 2007, p. 411

⁴⁶³ *Ethnos* is the idea of a community of shared fate, memories, and moral (or shared) sympathies. The concept of *demos* is the democratically enfranchised totality of all citizens; the civic community.

universalism. Far from leading to the disintegration of the culture of democracy, such challenges reveal the depth and the breadth of the culture of democracy.⁴⁶⁴

She immediately qualifies this bold statement by underlining that only strong democracies have this capacity. The ideal characteristic of such a democracy is not found in the imaginary of states as homogeneous entities. This imaginary, Benhabib warns, is not merely a bad sociological concept; it also excludes those who reject the hegemonic moral code, and in so doing, it betrays the liberal principles that made the historical development of the culture of democracy so vibrant in the first place.⁴⁶⁵

In my view, this conditional requirement (for openness) of a strong democracy seems to imply that such iterations require a quite high degree of cultural competence in terms of language skills and civic competence. In terms of tolerance and non-discrimination of foreign perspectives (cultural or otherwise), this competence should apparently be preferred. But, it also introduces a conflicting concern because, as Means points out, it gives us good reason (in line with Walzer's perspective) to restrict the pace of civically unskilled or culturally distant migrants. In other words, the right of membership that is to provide porous borders, rests on presuppositions that are potentially quite restricting in relation to the pace of immigration. According to Means, these potentially restricting presuppositions reveal an ambivalence in Benhabib's position in the immigration debate:

While Benhabib is clear that certain reasons for excluding others are justifiable, the difference between her principle of closure and the principles of closure provided by political liberalism and left communitarianism, on the one hand, and the radical democracy thesis, on the other, remains ambivalent. I think this ambivalence occurs because she is more comfortable detecting unjustifiable exclusion than justifying *democratic* exclusion.⁴⁶⁶

Benhabib answers this concern by insisting on the difference between the various reasons given for being restrictive. In Walzer's case, it is the assumption that political communities are based on ethnic communities and their shared understanding that is perceived as threatened. Especially, as we have seen, by the imperial effects of an "open border", that is, the thin and liberal order of a global neighborhood. In the case of civic-republicans it is the devaluation of citizenship that is considered to be the cost of absorbing too many immigrants. It is not the diversity of cultures, but the diminishing of civic life into a community of strangers that must be remedied.

Benhabib situates her own discourse-ethical position in relation to the paradox of democratic legitimacy. Historically, this paradox has been associated with a question of the difference

⁴⁶⁴ Benhabib 2004, p. 212, my emphasis

⁴⁶⁵ Ibid., p. 81, see also Benhabib 2004b, p. 1767

⁴⁶⁶ Means 2007, p. 410

between the residents subjected to territorial jurisdiction (the “for whom”; the populous) – including the “others” of democracy: slaves, workers, women – and those privileged to be citizens and hence included in the “political discourse” (the “by whom”; the demos).⁴⁶⁷ Benhabib points to the “logic of democratic representation”.⁴⁶⁸ She accepts this premise, but only to the extent that the communicative freedom of each individual is respected. Clearly the political exclusion of adult residents cannot be justified from Benhabib’s position. Non-residential foreigners can still be excluded as long as the terms are acceptable for both parties. Briefly put: Democracies are inherently bounded, and ought to be so to the extent that people might flow legally across its borders. “Porous borders” are hence not a non-ideal alternative to open borders, but a compromise that stays true to the logic of democratic representation.⁴⁶⁹

Means criticizes Benhabib for being hesitant on the question of the pace of migration. It seems reasonable enough to claim, as Benhabib does, that this is a question best answered by the citizens themselves. As long as the citizens are committed to the twofold normative constraints on the “democratic self-reflexivity of politics” – the human rights and the norms of the process of democratic iteration – Benhabib has no further answer.

I still think Means has a case when she addresses the deep interdependency between the pace of immigration and the character of the process of democratic iteration. Too little migration and you get a closed society where the iterative process stagnates. Too much, and the process presumably goes into hyper-drive and results in postmodern radical democracy that has low cultural competence and is threatened by populism. The latter, in the form of defensive reactions to open or porous borders are highly relevant today, and perhaps something Benhabib does not take seriously enough.

5.4.6 Summary – Benhabib’s version of a cosmopolitan reform of the statist representational system

In an effort *not* to solve the dilemma of democratic legitimacy – as it is actualized by the debate on immigration – Benhabib accepts the distinction between a moral and political level of normative discourse. From the perspective of a moral hypothetical dialogue, Benhabib includes foreigners in the articulation of certain moral constraints on “the scheduling of rights” in the

⁴⁶⁷ For similar treatment from a capabilities approach see *Frontiers of justice*, (Nussbaum 2006). The problem of scope is a general problem for discourse ethics. Since the metanorm presupposes the principle of universal moral respect, which again relies on ‘the capacity for speech and action’, very young children (literary “infants”), the mentally ill, even religious and sentimental people, present hard cases to this approach. Benhabib argues that most of these can be solved by moral advocacy and representation.

The case of the foreigner is similar in the sense that the principle of democratic closure will not allow non-members to make the final decision on policies, especially not on the criteria for membership. On the other hand, the foreigners are different in the sense that they do not depend on moral advocacy or representation. That is, as long as they are recognized as co-citizens of the world, and not misrecognized (depoliticized) or non-recognized (dehumanized).

⁴⁶⁸ In this sense, Benhabib maintains the state-centric prejudice, and one might also question to what degree it reflects a practical distinction between national publics of strong and weaker democracies.

⁴⁶⁹ Benhabib 2007, p. 448

national policies on first admission and membership distribution. In practical terms, Benhabib also invites the foreigner into the public discussion in the media and the institutionally weak fora of civil society. All those who are affected by a norm, a law, a practice, should have a say.

When it comes to the strongly institutionalized level of political discourse, the right to participation is still restricted to the members of the community, i.e. its citizens. When it comes to the representational systems of government and parliament, as well as the right to vote on a national level, all which involves the formal procedures of decision making in a democratic system, Benhabib is quite restrictive. A legitimate decisional structure requires democratic closure. The opening for participation of residential non-citizens on the local level, as the German example illustrates, indicates nonetheless a development in the democratic iterative process that may develop further.⁴⁷⁰

Although Benhabib does not propose a way to untie the Gordian knot tying territoriality, representation, and democratic voice together, she agrees with Sen that the ideal of territorial self-sufficiency underestimates the tremendous interdependence of the peoples of the world. She also recognizes that there can be non-territorial based models of representation, for instance based on the “community of those affected”. I’ll take this as a guiding clue for possible new sites and new logics of representations in relation to global issues, such as environment, taxation and migration.

By and large, Benhabib promotes a revisionary account of the state-based order of “bounded justice”. She aims to reform the political institutions according to certain moral concerns, and providing space for our ethical commitments to our close ones. A central aspect of this reform is the implementation of the cosmopolitan right to membership, which secures the political integrity of long-term residents of foreign origin.

Conclusion

In general we might say that immigration laws are of a specific significance since they regulate the border between the domestic and cosmopolitan domain of public right. As explained, Walzer represents a statist communitarian position in the debate on immigration that emphasizes the moral value of group integrity on nation-state level. He defends the state as the proper site of justice. Walzer’s account of immigration is relevant because he (unlike Rawls) acknowledges the problem of membership distribution as a primary issue for the collective self-understanding of a political territorial community. This position enables Walzer to specify membership as a distributive good in itself, and not just as an instrument of distribution. Although Walzer’s view is statist and communitarian, he still holds a moderate position in the sense that he recognizes some external obligations of the political community. These obligations, and the corresponding rights,

⁴⁷⁰ See the study of the emergence of “disaggregated citizenship,” practices such as providing foreigners with the right to vote in local elections could be a sign of a transition to a more cosmopolitan system.

such as the right to asylum, are nevertheless lexically subordinated to the sovereignty of the state. As such, external obligations are understood within the framework of Samaritan or imperfect moral duties. For these reasons, Walzer's position relies in the end on moral confinements that contradict the cosmopolitan idea. These confinements are criticized by Benhabib for their reliance on an ethnically grounded ethical particularism.

Carens – in diametrical contrast to Walzer – represents a cosmopolitan individualism that emphasizes the moral value of individual freedoms. Carens attacks the state-centric restriction of the political question of justice to the state. He coins this restriction the apt term “bounded justice”. Carens' position is moderate to the extent that it, from within the procedure of the original position, recognizes the value of maintaining public order. This constraint is considerably thinner than the concern for the moral value of social cohesion that grounds Walzer's position.

Carens helps us realize that Rawls' procedural approach, when based on the assumption of a “closed system,” excludes questions about immigration.⁴⁷¹ And Carens acknowledges the cosmopolitan duty to resettle displaced persons more explicitly than both Walzer and Benhabib. There is, however, a clear disadvantage in Carens position in that it only offers a limited account of a cosmopolitan conception of justice, limited to a promotion of the freedom of cross-border movement as an individual right to immigration, and leaves little concern for the epistemic value of the comparative perspectives of the other. According to Benhabib's critique, these shortcomings are located in Carens' strong reliance on an individualist moral cosmopolitanism, which tends to undermine the political domain as a distinguished normative field. It reduces the question of democratic legitimacy, provoked by immigration, to a question of moral foundation.

Compared to these two positions, Benhabib seems to come closest to address the cosmopolitan problem of exclusion in an adequate way. In a way, Benhabib offers a middle ground that respects both the non-instrumental value of membership emphasized by Walzer, and at the same time seeks to mediate the moral commitments of cosmopolitanism. Consequently, Benhabib has a fairly open conception, which endorse the essential value of diversity in the community and rejects permanent exclusion of residing foreigners. In terms of the basic elements of a cosmopolitan conception of justice, her account provides a wider range of state obligations to protect foreigners – which explicitly includes the right to political membership, as well as hypothetical and democratic procedures that, at least to some extent, include the comparative perspectives from elsewhere.

⁴⁷¹ Carens 1987, p. 255

Part 2 Rethinking human dignity – A phenomenologically informed revision of the right to have rights

As discussed in part 1, articulating an adequate content of the cosmopolitan law of admission requires a balancing concern between state obligations toward foreigners and the obligations concerning the citizens. It seems we have to accept an imperfect compromise. Benhabib's account of "porous border", I've argued, provides us with the most adequate compromise available, given the current circumstances. There are, however, problematic aspects of Benhabib's position, which suggests room for further improvements. More specifically, there seems to be a mismatch between the institutionalized politics and the scope of justice required by the actual circumstances. In this second part of the dissertation I will argue that an adequate extension of cosmopolitan law might require that we take Arendt's ambition to rethink Kant's conceptual framework more seriously when interpreting her "right to have rights".

As quoted in part 1, the whole phrase goes: "[...] a right to have rights (and that means to live in a framework where one is judged by one's actions and opinions) and a right to belong to some kind of organized community, [...]".⁴⁷² I suggest a reading of "the right to have rights" that considers the human condition of plurality and the principle of meaningfulness as the interpretative keys. According to this reading "the right to have rights" is understood to express the aspect of uniqueness of plurality, also articulated as "*the right to appear*" or "the right to distinguish oneself", whereas "the right to belong to some kind of organized community" is understood as the expression of the aspect of equality, which can also be articulated as "*the right to belong*" or "the right to humanity". Although the latter, i.e. the right to belong, can be understood to include spontaneous assemblies, it is more clearly connected to the institutionalist aspect of Arendt's thinking and relates quite well to Benhabib's proposal of a right to membership. The former moral-legal claim, i.e. the right to appear, seems to appeal to another, more performative and agonistic aspect of the political relation. This aspect is not reducible to formal equality and even tends to escape formalization in a way similar to the notions of freedom, autonomy and dignity. I read the "right to have rights" not so much as a suggested content of cosmopolitan law, as Arendt's basic notion of public right or human dignity.

To contextualize the motive for promoting a reconceptualization of human dignity, I will present three possible objections against Benhabib's account:

(1) The first possible objection concerns the sophistication of Benhabib's account. As discussed above, Benhabib recognizes the value (both epistemological and moral) of including the

⁴⁷² Arendt 1968, p. 296

foreigner's perspectives and claims of justice in domestic decisions-making processes. In order to actualize this value, Benhabib's position relies on the strong criteria of the presence of collective self-reflexivity, a characteristic of strong democracies. Although I support Benhabib's account as a normative ideal, it might face pragmatic challenges for at least two reasons:

First of all, the notion of "democratic iterations" provides us with a sophisticated descriptive and diagnostic concept, a concept which reflects the highly complex historical and social dynamics of the way in which a modern imagined community continuously integrates abstract rights into its legal and political self-understanding. This concept is, however, also – cognitively speaking – highly demanding and requires a certain level of intellectual finesse, both as a descriptive concept and as a normative guide for the future inclusion of foreigners. Hence, its sophistication might diminish its usefulness for most public debates, including those among the global public outside the academic "world of readers".⁴⁷³

Second, even if we do find communities where the public debate is able to adapt Benhabib's conception, strong democratic publics would require a high level of cultural (or civic) competence among its participants. Such competence levels could, in turn, also serve as a strong communitarian argument for restricting immigration. From an egalitarian position one could argue that this leads us toward a democratic perfectionism that has unattractive costs of exclusion. The communitarian argument of competence rests on the empirical premise that foreigners are less democratically competent than the citizens of strong democracies are. Although there are regions, such as failed states, where the level of education and practice of democracy is low, it does not seem plausible as a general premise.⁴⁷⁴ It is, however, likely that it could legitimate a selective immigration regime, similar to the positive discrimination of high-skilled immigrants we're facing today. In other words, one is free to move and settle elsewhere as long as one is economically self-sustained and politically competent. I fear that an empirical ranking of political communities could have a self-enforcing discriminating effect, grounded in the fear of undermining the very condition of a strong democracy, where strong democracies welcome foreigners from other strong democracies, while employing more restrictive immigration policies toward presumable weaker democracies and authoritarian states.

⁴⁷³ From a Rawlsian perspective, the discourse-ethical approach has been criticized for presuming a too complex account of social reality. Counter wise, Benhabib questions if the Rawlsian is not oversimplifying it to the point of the irresponsible.

⁴⁷⁴ This is obviously a question of where you set the bar. Proponents of moderate epistocracy, like Jason Brannan, would probably hold that the competence of the electorate in well-established democracies is also worryingly low. The election of Trump for presidency seems to have proven their point.

(2) A second objection is concerned with the inadequate restriction of the content of cosmopolitan law to the law of admission. Although this is understandable if we locate Benhabib's position in the debate on immigration, it reflects a general limitation of positions within this debate: the positions deal poorly with systemic problems of transnational migration. As Parekh has pointed out, there is a tendency in this debate to conceive the phenomenon of transnational migration as a question of *immigration* and view it primarily from the perspective of the hosting state.⁴⁷⁵ So, even if Benhabib critically addresses the "curious silence" in most other cosmopolitan positions on the issue of migration, she also tacitly commits to a state-centric perspective by accepting Walzer's defining framework of the debate as a dilemma between universal moral commitments and the parochial restriction of the scope of justice associated with democratic sovereignty. This seems to expose Benhabib to her own critique of a state-centric tendency in political philosophy because it leaves little concern and low political integrity for extra-territorial foreigners.

As discussed in chapter 3, this may be explained by the deep-seated state-centric tendencies in our secular social imaginaries. Within cosmopolitan law these tendencies are manifested in the way cosmopolitan rights – the right to asylum and the right to political membership – are understood as restricted to the territorially proximate foreigners. My point here is not to reject implementation of cosmopolitan reforms on the state level, but to raise concern about this emphasis on the rights to first and second admission as the complete account of its adequate content. In general, this emphasis seems to protect the interests of foreigners primarily by converting their status to 'quasi-domestic' members. This conversion seems to suggest that states will provide the best protection of cosmopolitan relations by treating them as domestic relations. In other words, this mode of state provision of foreigners' interests makes cosmopolitan relations implode.

Parekh labels this dominating emphasis in the debate on migration "the ethics of admission".⁴⁷⁶ It gives the whole discussion a state-centric character where transnational aspects of migration are given scant attention; the specific issues attended to – such as emancipation of legal immigrants and the 'sans papiers' – simulate domestic problems and historical struggles of emancipation. This simulation may solve some problems related to a cosmopolitan reform of the state, but it also marginalizes problems related to the systemic consequences of the international order, such as the problem of long-term encampment. Partly, this could be addressed by a reform within the

⁴⁷⁵ See also Bauböck 2003 for analysis of this process from the perspective of the sending country. It is for instance not necessarily in the interest of the sending state that their expatriates change or have to give up their original citizenship.

⁴⁷⁶ See Parekh 2016, chapter 2.

law of admission that includes systemic and transnational perspectives. The implementation of an extensive reform on the international level seems unfeasible, but it can nonetheless be defended as a sound moral-legal requirement. I will argue that Benhabib's reading of "the right to have rights" fails to stress this systemic issue, which seems to be crucial to Arendt's ambition of articulating a new guarantee of human dignity.

(3) A third possible objection – which might be considered an implication of the state-centric bias of 'the ethics of admission' – Benhabib's conception of "politics" seems to imply a depoliticization of the cosmopolitan domain beyond the law of admission. This problem is not related directly to the problems of admission or statelessness, but to a concern for the democratic character of the future deliberations on cosmopolitan law. By establishing a sharp distinction between the moral and the political, and relating the latter (quite strongly) to the current institutional framework of sovereign states, Benhabib seems reluctant to release the political domain from its state-centric chains in the dominant imaginary. I argue that this restricted scope of politics has procedural and epistemic implications relevant to the content of the cosmopolitan law of deliberation.

Considering that Benhabib is certainly open to democratic reforms on the non-state level, this restriction is somewhat puzzling. But, even if we understand Benhabib's narrow notion of politics as motivated by a pragmatic concern of institutional realism, it nevertheless leaves Benhabib's conception with few openings on the cosmopolitan law as a distinct political field of moral-legal norms, entitled to its own specific legal and institutional protection.

In this light, Benhabib can be said to promote a "weak cosmopolitanism", strongly moderated by a demarcation of the political domain derived from the "logic of democratic representation". By acknowledging only the *moral* obligation to take the claim of the foreigner into account, the recognition of the moral-legal character of the cosmopolitan domain risks being lost. The moral obligation to recognize the foreigner as a participant in the soft public does to some extent counter the nationalization of the "extra-political" public sphere, but at the same time, the state's obligations to protect cosmopolitan deliberations on the content of cosmopolitan law might be obscured by assigning them a non-political (or merely morally negotiable) character.

In terms of democratic procedures, this weak cosmopolitanism narrows the scope of possible institutional and representational protections of foreigners' perspectives. (We could imagine several possible implementations like for instance the institutional representation of an ombudsman; participation in semi-public 'civil society'-processes (such as hearings [*höringsrunder*]) and parliamentary seats on the state level; veto-rights and court appeals of affected parties on the

international level; and so on.) There is thus an epistemological concern that could be raised against the emphasis on second admission: Whereas it might solve the problem of exclusionary neglect for the territorially proximate foreigners⁴⁷⁷, it also favors these perspectives compared to affected foreigners in general.

As an epistemological privilege of the territorially proximate foreigners, this favoring is problematic and can be understood as a case of procedural parochialism. Procedurally it marginalizes non-residential foreigners. On the level of systemic exclusion associated with admission policies, this tends to weaken the integrity of those worst off and leave the deliberations on these issues less informed. In general, the political privilege given to residential foreigners weakens the adequate comparative perspective. For instance, the situational interest of the newcomers might even give them socio-economic incentives to promote quite restrictive immigration policies. This creates a conflict between the concern for exclusionary neglect and procedural parochialism: On the one side the perspectives of immigrants seem to have a legitimate claim to be taken into account. On the other side, it is not given that these newcomers (being here) are representative of the global diversity of views from elsewhere merely because of their foreign background. Benhabib's insurance that "elsewhere is here" does not answer this problem convincingly.

In order to face these objections I will suggest an alternative, constructive reading of Arendt's "right to have rights" which emphasizes the "proto-political" character of the global public sphere. It primarily contests Benhabib's reading of "the right to have rights" as "the right to political membership". Compared to the conventional interpretations, such as Benhabib's, the alternative reading of Arendt emphasizes her ambition to redefine the political principles that give political institutions legitimacy. The idea is to make it clearer how the cosmopolitan domain should be understood on its own terms and given institutional protection accordingly, implying for instance the extension of cosmopolitan law beyond addressing territorial admissions.

To separate this proto-political reading from Benhabib's position, I will maintain Benhabib's use of "the political" as referring to the conventional, state-centric location of politics to the "hard" public. My alternative reading of Arendt will in distinction emphasize the political character of the "softer" public sphere in general as its "proto-political" character. I doubt this reading will be able to fully remedy the first objection against conceptual sophistication. This alternative reading stresses even more than Benhabib, the need for a relational revision of the concept of human

⁴⁷⁷ Second admission can be justified as an exception to democratic closure on the basis of the territorial proximity and the way proximity specifies the holder of the duty in question.

dignity. It does however have advantages when it comes to addressing the systemic and procedural issues of exclusion of foreigners.

A decisive difference between the state-centric and proto-political location of politics is related to Benhabib's distinction between political and moral norms. This distinction fails to capture a crucial difference between universal moral norms in general and universal moral-legal norms in particular. The latter set of norms has an irreducible political character which is captured by the proto-political concept of Arendt: It is moral-legal not because of the possibility to sanction, but because of the character of the relation. Further, cosmopolitan norms should not be understood as synonymous with the entire set of universal moral-legal norms. It refers more specifically to a subset of these norms.

The difference can be illustrated by considering the dominating political imaginary which Benhabib's account relies on. The public and intellectual debate on immigration policies could be said to manifest a negotiation of the democratic self-understanding of a community in terms of cosmopolitan law. As Walzer quite precisely captures this imaginary, the core of this debate is a dilemma between the universal moral obligations and the statist commitments of a sovereign state. This dilemma reveals a certain tension in the modern social imaginary of the state and its legitimacy, which corresponds to the positive institutional levels of domestic and international law (mediated by constitutional courts). But, if we follow the threefold framework of public right in Kant, this dilemma should be nuanced: In so far as the legitimacy of the state is considered to rest on *universal* liberal-democratic principles, the state has traditionally found itself primarily in a tension in relation to its obligations toward its own citizens (domestic rights) and toward other states (international law). The difference in the case of state obligations toward foreign immigrants is that this tension is here (strictly speaking) regulated by *cosmopolitan* norms - such as the right to asylum. Hence, the relevant conflict of obligations does not have the structure of a dilemma (between political and moral norms), but rather as a *trilemma* of obligations internal to the public right.

Arendt's critique of abstract human rights relies on this nuance between universal moral-legal norms in general and cosmopolitan norms in particular. Arendt criticizes most articulations of human rights for being designed to solve domestic issues. Hence, as I understand her critique, Arendt does not criticize civil domestic rights for their universal character as such, but for their inadequacy regarding cosmopolitan issues such as statelessness and mass migration. The reasons why human rights are inapplicable can thus be explained by the lacuna of cosmopolitan rights in

the conventional international protection of human rights. Benhabib recognizes the lacuna, but she restricts her response to the issue of second admission.

To remedy the limited protection of foreigners in international conventions, Arendt aims to articulate ‘a new political principle’ which can guarantee human dignity and ensure the protection against exclusion from the international community. This response can be interpreted as original on two levels: On the first level, it seeks to extend the content of cosmopolitan law. In this sense, ‘the right to have rights’ is understood, in concordance with Benhabib’s reading, as a cosmopolitan right to domestic rights and political membership, which protects the status of foreigners, including the stateless. This fills a gap in the current portfolio of conventional human rights, but provides only limited protection. On the second level, the articulation of this new political principle also takes issue with the way human dignity is conceptually understood in individualist moral cosmopolitanism. On this level Arendt does not merely seek to articulate a cosmopolitan norm, but to rethink the general *principle of humanity* (also articulated as a “right to humanity” by Kant) that reflects a competing, *relational* conception of human dignity grounded in the human condition of plurality.⁴⁷⁸ It is relational in the sense that it stresses the degree to which we depend on others, rather than our individual attributes.

The notion of “human dignity” is still seen as the conceptual framework to which the duties, and corresponding individual rights (of public right), must comply. Since the condition of plurality is irreducibly “political” (i.e. proto-political) in its character, there is no clear distinction in Arendt’s rethinking between the principle of humanity and ‘the new political principle’ as a principle of justice. I understand the principle in question to be “meaningfulness”, which corresponds to the human condition of plurality (I will hereafter mainly refer to this principle as the principle of plurality). Accordingly I interpret “the right to have rights” as a general principle of public right, and not as a specific cosmopolitan right. “The right” in question refers in my view primarily to “the right to appear”, and the “rights” accordingly to the rights to action and to an opinion. This basic right might be given specific content in the form of individual rights of both domestic and cosmopolitan law, especially concerning the public presence of perspectives of people we don’t know personally.

To avoid confusion it should be made clear that although Arendt’s “right to have rights” is obviously articulated in an individualist legal language, the new conception of justice Arendt seeks to provide as its guidance and legitimacy clearly is not. This non-individualist conception does

⁴⁷⁸ I could have added the interconnected terms of natality and narrativity here to reflect the broader account Arendt makes of political action and political change and renewal. I’ve chosen to use plurality, because it is most directly related to action and speech, and hence to the framework or guarantee required by the right to have rights.

not imply a flat-out dismissal of individual rights as such. It is rather an attempt to explicate philosophically (or metaphysically)⁴⁷⁹ the human reality of the public space (i.e. as a human state of being) and the way this space constitutes the necessary conditions for such individual rights (including domestic and cosmopolitan rights) in the first place. In terms of the legitimacy of a state (of law), we might still appreciate the way individual rights express the state's obligations toward its citizens and foreigners, but the primary ground of legitimacy will shift from the protection of the interest of separate individuals to the protection of the relational, public spaces that enable their appearance as individuals.

In my view this proto-political reading suggests a more adequate response to stateless foreigners, faced by the extreme exclusion from humanity. This reading captures the severe violation involved in this kind of exclusion as transgressions of the basic public rights of action and opinion (including, as it will hopefully be redundant to mention in the future, the *global* public). According to this reading, 'the right to have rights' guarantees not only domestic rights (such as the "juridico-civil" rights to freedom and to think), but also cosmopolitan rights (such as those articulated in the cosmopolitan laws of admission and deliberation).

An interpretation of 'the right to have rights' on this second, cosmopolitan level further opens for the widened content of cosmopolitan law. As such it does not reduce the level of sophistication associated with Benhabib's account, but it does in my mind offer a clearer conception of the moral-legal domain and its possibilities. It further specifies the need for an extension of cosmopolitan law according to actual circumstances.

First, Arendt's relational concept of human dignity explicates the severe violations of human dignity associated with the systemic exclusions from the international community. It conceptually clarifies that the kind of harm suffered by exclusion from humanity, as experienced in long-term encampment. In positive terms it explicates the political integrity of the foreigner and the corresponding right to participate in the global public sphere in terms of the cosmopolitan law of deliberation.

In chapter 6, I will address this comparative advantage of Arendt's conception to Benhabib by specifying the normative level of the corresponding rights to appear and to belong. I argue that they belong to a level of obligations which are detached from the specification of obligations associated with territorial proximity and citizenship. In chapter 7 and 8 I will defend this reading of Arendt in terms of a phenomenologically informed account of the mentality of action and the legitimacy of political institutions according to the principle of meaningfulness.

⁴⁷⁹ Provided Arendt's reserved support for these terms.

Second, Arendt's wider conception and clearer recognition of the political character of state obligations as according to cosmopolitan law, is also better suited to address problems of deliberation on the cosmopolitan level. These problems include those raised against Benhabib's account, such as the procedural neglect of the view from elsewhere. By explicating the political (and not merely moral) integrity of the foreigner, the burden of proof shifts from defending their inclusion to defending their exclusion from domestic decision-making. This possible implication can be articulated as a content of the cosmopolitan law of deliberation: the cosmopolitan right of foreigners to participate in decision-making processes that affects them. This extension of cosmopolitan law will be discussed in the concluding chapter 9.

In sum, I argue that Arendt's conception provides the adequate specification of the moral-legal character of state obligations beyond the territorial sphere, both in terms of cosmopolitan law of admission on the systemic level and the cosmopolitan law of deliberation beyond foreign participation in the domestic "hard" public. Although these obligations might face us with highly demanding institutional tasks, I understand the circumstances to require no less of us as members of the current political order.

In practical terms, this account does not pretend to provide a perfect compromise of the trilemma of public right. It does however imply an ambition to articulate the provision of an institutional protection of the global public space in order to improve the political integrity of the foreigner as a normal member of humanity. Hence, the idea would be to contest a social imaginary that does not recognize the civil society (or public life) as the main political concern.

In minimal terms this could provide a buffer against the severe harm caused by dehumanizing practices of encampment by pointing out the harm caused already by the preceding depoliticization of individuals. From the perspective of a hosting community, if we start down-scaling our standards for treatment of the most vulnerable foreigners, there is also an inherent risk of transmitting the same arguments and techniques of alienation to vulnerable domestic groups.⁴⁸⁰ From the perspective of a potential group of refugees, and with a sense of reciprocity of justice, we risk being met with the same practices in return from our potential hosting states.⁴⁸¹

⁴⁸⁰ The extreme case – used by Arendt – is how the rule of force of imperialism and its techniques of dehumanization was imported back to Europe. But, a more actual (and less physically violent) concern is in my view the discursive dehumanization of foreigners as purely strategic agents, which has already been imported to the domestic sphere by the administrative rule of force through economic incentives. In this sense we are all becoming "foreigners" with a contingent economic attachment to the political community.

⁴⁸¹ The historical version of this argument emphasizes how the European communities, such as the Norwegian, have previously benefited from generous migration policies of other states in times of need.

Chapter 6: The right to have rights – a proto-political interpretation

In this chapter I will develop my argument further by considering a proto-political reading of Hannah Arendt's thinking in detail. Primarily, this reading seeks to go beyond the conventional interpretation of "the right to have rights" as "the right to political membership". This has at least two main implications. First, by making clearer that "the right to have rights" refers also to a more basic "right to appear", the "right to belong to an organized community" can also be nuanced to include both informal and formal political associations. As such, the right to have rights explicates the deep violation of humanity associated with rightlessness, beyond the violation of the right to membership associated with statelessness. This explication promotes a scope of justice that includes victims of the international system and makes clearer the intolerable and dehumanizing consequences of long-term encampment. Second, by emphasizing the importance of membership in the civil society as an informally organized community, the implied scope of justice associated with the right to have rights expands more naturally to all members of the global civil society. States have responsibility to protect the global civil society in ways similar to their responsibility to protect the environment. My aim is to show how the secular imaginary of spontaneously emerging public spheres can play a decisive role in understanding the obligations associated with further deliberations on cosmopolitan law. The emergence and protection of a global public sphere is a central concern in this regard.

I will criticize the conventional reading of Arendt's 'right to have rights' that emphasizes this "right" as a cosmopolitan response, and rather suggest that this right reflects a more fundamental ambition; to revise the conception of rights according to a new political principle. Benhabib's interpretation, in this perspective, seems to skip the grounding philosophical significance of the 'in-between' and plural character of the human condition of action in Arendt's thought. Benhabib's interpretation jumps, somewhat impatiently, to the significance of this "right" for the content of a cosmopolitan law of second admission.⁴⁸² I argue that Benhabib's interpretation mistakes the levels involved in expressing this new political principle, and that this leads her account to narrow the scope of cosmopolitan law in an inadequate manner.

To identify the conceptual weakness of the conventional "political" reading of Arendt, I will consider the problem of non-recognition as a central objection against Arendt's position. This problem is concerned with the aporia of human rights and the implied rightlessness of those excluded from humanity. In addition, and more seriously, this objection attacks the relational

⁴⁸² It should be noted that Benhabib's earlier reading of Arendt (1992) is more in line with my argument that her later reading (2004).

premise of Arendt's conception of human dignity by questioning the possibility of political actions for those who are not recognized as able to speak.

I will answer this objection by arguing that it mistakes a diagnosis of rightlessness for a deprivation of 'the right to have rights'. According to this assumption, statelessness implies the loss of all "rights". By offering a proto-political reading – which emphasizes the basic human rights of action and opinion – the loss of political membership is not identical to absolute rightlessness. My preferred reading seems to correspond better with Arendt's critique of the kind of mentality that led the conventional understanding of human rights into such an aporia.⁴⁸³ The reason millions of stateless found human rights inapplicable when they were most needed, Arendt explains, is related to a conceptual weakness in the understanding of these rights. I argue that "the right to have rights" should be read as part of the constructive response that seeks to avoid this unsolvable problem, and that seeks to issue a new guarantee of human dignity against its ultimate violation in the state of rightlessness.

To be clear, statelessness certainly entails a strong violation of the cosmopolitan law and can be addressed by a human right to political membership. In the circumstances Arendt describes, statelessness also implied a deprivation of a homely framework for action and speech, but these are not conceptually identical. In order to recognize the difference between them, I will argue that we have to develop a reading of Arendt that focuses on the *emergence* of public spheres, rather than on their already established institutional "coagulation" on the state level.

This emphasis on the pre-institutional character of politics does to some degree also answer the additional objection against Arendt's relational account of human dignity and the implied problem of the contingency of recognition by others. That is, since the proto-political reading detaches human dignity from the status of citizen, and relates it primarily to political integrity as a member of humanity, citizenship is not the only relevant form of political recognition. This reading does not solve every problem associated with severe cases of mis- or non-recognition, but stresses the importance of the moral-legal integrity of foreigners on the level of the social imaginaries and the regulative ideas of political society.

6.1 Conventional and proto-political readings

In chapter 4 I discussed Arendt's critique of human rights. Arendt identifies the "fundamental deprivation of human rights" quite originally with "the deprivation of a place in the world which

⁴⁸³ The aporias is used by Arendt, it seems, to uncover inconsistencies or ruptures in the conceptual framework of the dominating social imaginary. In this case the aporia is caused by the mismatch between the conceptual understanding of human rights (as citizen rights) and the international system of nation states at the time.

makes opinions significant and actions effective”⁴⁸⁴. What is deprived in the basic violation of human dignity is not an individual property but a “home”. It is not as in the individualist conception of human dignity the deprivation of bodily needs or formal rights of citizenship. The relevant human rights are in this context, Arendt specifies, not the traditional citizen’s rights, but the basic human rights that secure the human condition for all, including foreigners. According to my proto-political reading, these rights count as follows: First, “the right to have rights”, which entitles every human being to the right to action and the right to opinion. These answer to the basic conditions for making oneself at home within a “framework”, in other words; to distinguish oneself or to deliberate. It is “home” both in the sense of “the familiarity of daily life”⁴⁸⁵ and in the sense of a “public life in which the right to opinion and action is guaranteed”⁴⁸⁶. Second, “the right to belong to some kind of organized community”, which can be further specified, as Benhabib suggests, as “the cosmopolitan right to second admission”, but it expresses primarily a general right to belong to humanity (given the fact of a completely organized humanity, see chapter 4).

As Arendt phrases it in *Origins*:

We became aware of the existence of a right to have rights (and that means to live in a framework where one is judged by one’s actions and opinions) *and* a right to belong to some kind of organized community [...].⁴⁸⁷

I have emphasized the “and” in order to question the obviousness of the identical meaning of these two expressions of a “right”. Is the “right to live in a framework where the rights to action and opinion are enacted” (presumably a “home”) the same as “the right to belong to some kind of organized community”? The conventional reading tends to take the identity of these two rights for granted. For instance, Benhabib assumes, like most other commentators, that a “right to have rights” means, in Benhabib’s words: “the right [...] to become a member of civil society such that we can then be entitled to juridico-civil rights.”⁴⁸⁸ As pointed out in the last chapter, this seems to imply a conflation of “civil society” with a modern state community. To the extent that the conventional reading recognizes the difference between “the right to have rights” and “the right to belong” it seems to amount to the complementary relation between “the right to have civil rights” and “the right to citizenship”. I do agree that these are complementary, one can hardly think of a framework outside an organized community, the crucial point in my opinion is that

⁴⁸⁴ Arendt 1968 [1951], p. 296

⁴⁸⁵ Arendt 1994

⁴⁸⁶ Benhabib 1992

⁴⁸⁷ Arendt 1968, p. 296-97, my italics

⁴⁸⁸ Benhabib 2004, p. 59

this “organized community” is not synonymous with “citizenship”, but can range from fairly spontaneous assemblies to global organizations.

If we isolate the first part of the quoted passage from Arendt, the conventional interpretation of “the right to have rights” distinguishes between two classes of rights. On the one hand, we have the fundamental moral “right in virtue of humanity” as Kant would put it. Michelman refers to this “right” to have rights as an *acquisition right*; i.e. it refers to a class of moral obligations or entitlements (background rights) that rests on an idea of the inherent dignity or humanity of every human individual. On the other hand, we have the “further” rights, as the positive legal rights of an institutionalized civil society.⁴⁸⁹ Michelman identifies these as *object rights*; which refer to a class of rights as empirical matters of actual social practice (positive law; institutional rights).⁴⁹⁰ Within the Kantian framework we might speak of the “right” (to have rights) as an acquisition right of both domestic and cosmopolitan rights. Benhabib seems to interpret or specify this acquisition right as a cosmopolitan right to second admission.

Admittedly, Benhabib’s interpretation makes perfect sense within the context of the immigration debate. In light of the problem of the stateless, it seems obvious that the “right to have rights” should be read as a moral right of non-citizens to a membership which grants them further rights. From this conventional interpretation we get to the idea of a “universal abstract human moral right” as a moral right to the precondition of having empirical rights. So far, I think the conventional and proto-political understandings of rights are in agreement. The misguided “jump” occurs when “empirical rights” are directly associated with the actual state of affairs, i.e. ‘the right to have rights’ becomes the right to the acquisition of “membership in the society of a law-dispensing state”.⁴⁹¹ It jumps from the level of moral-legal norms of public right in general to the domestic level by conflating the acquisition right with the issuing of citizenship. This hasty skip, neglects the possibility of the rights of non-residential foreigners.

To be fair, this hasty association is also found in Arendt’s own work. Arendt is quite explicit here; the only right that does not spring from within the nation is “the right of every human being to membership in a political community.”⁴⁹² The right to have rights simply means the acquisition “right of men to citizenship.”

⁴⁸⁹ Note that Benhabib and Michelman uses “civil society” in a different manner than Taylor. Taylor’s use is closer to the original modern use of “civil society” to describe the state-independent character of first the free market, and later the public sphere and the sovereign people.

⁴⁹⁰ Michelman, Frank I. 1996. "Parsing "a Right to Have Rights"." *Constellations* 3, no. 2: 200-208.

⁴⁹¹ Michelman 1996, p. 202

⁴⁹² Menke 2007, p. 748 [from Arendt 1949, p. 34, the English version: “The Rights of Man: What are they?” Modern review, p. 24-36]

As Menke has pointed out, this understanding of this ‘one human right’ responds to some of the central points in Arendt’s critique of the “rights of Man”. It establishes that Arendt’s critique does not imply a straight-forward rejection of human rights⁴⁹³, but that it insists on a distinction: “[...] between appearance and reality; between what is called “human rights” but in fact refers to the rights of the members of a political community, and what really is a human right.”⁴⁹⁴ This seems to succeed in providing a guarantee for applicable human rights which transcends the historical dependency associated with citizen rights of particular political communities, such as “the right of an Englishman”. This transcendence is crucial to the legitimacy of the Nuremberg-process and the prosecution of crimes against humanity in general. It confirms the universality of state obligations toward its own citizens, and adds a (institutionally vague) systemic guarantee to those unfortunate enough to lose their citizenship.⁴⁹⁵

The conflation of the moral acquisition right with a right to citizenship is, however, problematic. In the conventional reading, the human right to citizenship is understood as a fundamental moral right that grounds the legitimacy of citizen’s rights. It informs for instance Benhabib’s account of “just membership”. To question this conventional reading, we could ask what is made of the notions of action and opinion within this framework. Is it not too convenient to ignore the significance of a framework, i.e. a “home”, referred to in the parenthesis? Does it not allow one to move effortlessly from the paradoxical phrase of “the right to have rights” to the seemingly more familiar “right to belong to some kind of organized community”?

I argue that this interpretation neglects Arendt’s ambition to express a new political principle in her articulation of these rights (the right to appear and the right to belong). And, that this conventional interpretation reduces Arendt’s conception of human rights to a question of the content of a cosmopolitan law of admission. Hence, it narrows Arendt’s possible contribution to the public right in general, and to cosmopolitan law in particular, included the cosmopolitan law of deliberation.

There are good reasons to read Arendt in this conventional manner. Superficially, it provides us with an answer that seems to address the problem of statelessness directly. At times, Arendt is also quite explicit in her demand for the equalizing institutional protection of a state for the sake of maintaining a space of appearance. In this way, Arendt aligns the civil condition of a state with the proper framework for action and opinion. The stateless would then be the perfect example,

⁴⁹³ As some readers tend to suggest, see: Giorgio Agamben, Jean Cohen.

⁴⁹⁴ Menke 2007, p. 749

⁴⁹⁵ The specification of the subject of duty (the responsible state) is presumably connected to territorial proximity of the subject of right (the foreigner). Hence, it is similar to Benhabib’s account.

theoretically speaking, because they explicate the state as a proper home for human beings. However, on other occasions Arendt refers to the possibility of public spaces (or “frameworks”) on a *pre*-institutional level. Some commentators describe this level as the “ontological” character of public space; i.e. the sociality of action.⁴⁹⁶ I’ve referred to this pre-institutional level as *proto-political* to emphasize its moral-legal character (rather than the mediation of the political and the moral). This character is clearly manifest in underground movements, but can also be described as the “living” aspect of coagulated public spheres.

To be clear, this proto-political concept of the public does not address the problem of statelessness as such (although this amounts in most cases to losing one’s home), but to the permanent condition of rightlessness (i.e. the *unprecedented* impossibility of finding a new home).⁴⁹⁷ A state-centric conception of politics will not be able to see the difference between these two conditions, whereas the proto-political account sees it as crucial to understand Arendt’s systemic critique and the dominating view on the adequate scope of justice. The new problem, which raised awareness of “the right to have rights”, was not statelessness as such, but the way the organization of states in a complete international order left millions in a condition where the re-entrance into the public as a human being (and not necessarily as a citizen) was made impossible.

The proto-political understanding of publicity places its emphasis on “the political” in a different manner compared to the conventional reading. What one is deprived of in a condition of rightlessness is not merely a formal right of acquisition, but the very framework which makes human life possible at all. It suits the deliberations on cosmopolitan rights very well, because it describes a public sphere with a pre-institutional (or extra-institutional) character that maintains its political character in a similar manner to the way Kant assigns the status of cosmopolitan law as an unwritten code of the global public sphere.⁴⁹⁸ According to this reading, states have moral-legal obligations toward foreigners as members of this global civil society.

To be sure, on a proto-political level the global public sphere is institutionally unprotected, but it also has the potential of being assembled “wherever you go”.⁴⁹⁹ Like the market and alternative or underground public spaces in a domestic context, the global public sphere is understood in the modern social imaginary to be self-constituting. If this is accepted, the primary obligation of a state, according to the cosmopolitan law of deliberation, would be not to hinder this constitution. The empirical fact that most states do not live up to this negative obligation is hardly a sound

⁴⁹⁶ See Benhabib 2000 and Parekh 2016

⁴⁹⁷ See chapter 4 for details on this distinction.

⁴⁹⁸ See chapter 2.

⁴⁹⁹ P. 198, in Arendt, Hannah. 1958. *The Human Condition*, Charles R Walgreen Foundation Lectures. Chicago: University of Chicago Press. Hereafter HC.

counter-argument. The second, extended obligation would be to protect the global public sphere institutionally. In other words, the concept of the proto-political enables us to describe the kind of interaction that could emerge between anyone, including between citizens and foreigners, and the cosmopolitan space that emerge out of this interaction has a structural similarity to, but is institutionally distinct from, the relations between citizens. Consequently, it is in need of a distinct set of cosmopolitan laws to protect it (i.e. a law of deliberation).

If we reserve the use of “political” to its conventional use, i.e. as the domain institutionally protected by state membership, boundaries and laws, the “proto-political” points to the aspect of the political that is found in the performance of a human action (in *praxis*) and the shared space that emerges “in-between” us in its wake:

[...] the political realm rises directly out of acting together, the “sharing of words and deeds.” Thus action not only has the most intimate relationship to the public part of the world common to us all, but is the one activity which constitutes it. It is as though the wall of the *polis* and the boundaries of the law were drawn around an already existing public space which, however, without such stabilizing protection could not endure, could not survive the moment of action and speech itself.⁵⁰⁰

A polity makes human deeds imperishable, walls and laws take on the function of a kind of organized remembrance. This endurance can be provided on various levels. Today we are accustomed to think of the territorial state level as the proper institutional level, although this requires a tremendous leap of faith toward strangers compared to the old city states. The actual circumstances seem to call for a similar leap toward strangers on the international level of protection.

Further, Arendt makes an interesting comment, which points toward the crucial *metatopical* character of the proto-political element of the “polis” as a “web of relationships”:

The *polis*, properly speaking, is not the city-state in its physical location; it is the organization of the people as it arises out of acting and speaking together, and its true space lies between people living together for this purpose, no matter where they happen to be.⁵⁰¹

This passage continues with the clearly cosmopolitan minded phrase: “Wherever you go, you will be a *polis*.” This could be read in the narrow sense of people of affiliation, be it the Hellenic traditions or Liverpool-fans. But, the term “proto” intends to suggest a more open character to this affiliation, in the sense that it “predates and precedes all formal constitution of the public

⁵⁰⁰ Arendt 1958, p. 198

⁵⁰¹ Ibid., p. 198

realm and the various forms of government”.⁵⁰² It is related to political power in the sense that power is what keeps the public space, the potential proto-political space of appearance, in existence.⁵⁰³ Institutional power is however legitimate, in Arendt’s account, only to the degree that it manifests political principles that reflects these proto-political conditions. This opens, in my view, for the possibility of reading Arendt’s ‘right to have rights’ in a way that rests on a wider conception of rights than the right to citizen’s rights.

To nuance the picture somewhat, we should add that what is characteristic of the conventional reading of Arendt is that it questions the possibility of uniting the praxis-inspired proto-political elements with the radical institutionalist approach that Arendt brings in with Burke’s critique of human rights. The conventional reading seems to opt out the parenthesized “framework”, which underlines the praxis-inspired terms of action and speech/opinion, and emphasize the cosmopolitan revision of the institutionalist aspect, i.e. the institutional implications of “the right to belong to an organized community”. The theoretical consequence of this is, at least in Benhabib’s case, a separation of Arendt’s political solution (the right to have right as a moral acquisition right) from a philosophical grounding in a new political principle (or more specifically in Benhabib’s reading: the lack thereof). Benhabib identifies at least two main weaknesses in Arendt’s theory:

First, it does not give an answer as to *why* we should recognize someone as human.⁵⁰⁴ Benhabib readily admits that Arendt’s thinking is deeply grounded in “plurality”, which Benhabib associates with an “anthropological universalism”.⁵⁰⁵ This universalism implies an ethical gesture toward other members of the same species. It is operating on a level of abstraction where one is coming to one’s senses regarding some elements of what it is to be human,⁵⁰⁶ including: being fundamentally dependent and embodied creatures immersed in a human condition of plurality (of

⁵⁰² Ibid., p. 199

⁵⁰³ This is Arendt’s own and quite original definition of political power.

⁵⁰⁴ Benhabib 2000, p. 196

⁵⁰⁵ Ibid., p. 195-6

⁵⁰⁶ I think this is true, but Benhabib ignores a ready possibility developed by one of her students, Anthony Steinbock: That this anthropology is an anthropology not of the species (and the implied abstraction of any specimen of it), but of the encounter (which gives us the abstraction of a relational structure, and this leaves us with a very different conceptual vantage point). The notion of the encounter is irreducibly normative, since it relies on the responsiveness of each part to the limit-claims of the other. See Steinbock, Anthony J. 1995. *Home and Beyond : Generative Phenomenology after Husserl*, Northwestern University Studies in Phenomenology and Existential Philosophy. Evanston, Ill.: Northwestern University Press.

This notion is, however, not so easy to adapt in the social imaginary in a highly productive manner. It’s not like the mature principle of harm, which has basically infiltrated every little situational redaction of tolerance, micro-aggression, etc. (a heightened sensitivity to harming others which I celebrate, but which is met with resistance in parts of the reactive members of the public sphere). The point is that Arendt’s theoretical idea is on a very different generative stage, with barely any back-up within the current social imaginary (i.e. roughly speaking with no common sense or *doxa*). It has barely reached the state of common sense, i.e. of publicity.

equality-in-difference); an ethics of radical intersubjectivity (related to Arendt's critique of Heidegger, see chapter 7). Still, there is something lacking according to Benhabib:

It is the step leading from the constituents of a philosophical anthropology (natality, wordliness, plurality, and forms of human activity) to this attitude of respect for the other that is missing in Arendt's thought. [...] Arendt does not examine the philosophical step that would lead from description of the equality of the human condition to the equality that comes from moral and political recognition.⁵⁰⁷

Arendt does not clarify the step from "is" to "ought" according to Benhabib. To be equal (in terms of being human) is not the same as being equal (in terms of moral dignity or formal equality). However, Benhabib's critique relies on the assumption that Arendt's concept of the "human condition" is merely part of a descriptive anthropological universalism. A proto-political reading of Arendt offers a defense against this objection by arguing that it is a mistake to read Arendt's account of the "constituents" or human conditions as morally neutral in character. In chapter 7 I will explicate this argument by clarifying the decisive difference between the various human activities and mentalities inspired by principles based on the constituents associated with these activities. The key to understand the philosophical step that Benhabib calls for is the relation between the principles of action and the human conditions. The new political principle that Arendt promotes is *meaningfulness*, which corresponds to the human condition of plurality. It is according to this political (or moral-legal) principle Arendt aims to rearticulate the concept of human dignity, our imaginary of legitimate institutions and regulative ideas of territorial and global collectives.

Second, in the context of the immigration debate, Benhabib claims that it is clear that Arendt provides us with an "ought", but it is a *political* "ought" that is not clearly philosophically grounded:

Arendt herself was skeptical about such justificatory philosophical discourses, seeing in them a form of metaphysical foundationalism. For this reason, she was able to offer a political but not a conceptual solution to the problems posed by the state prerogative of denationalizations.⁵⁰⁸

And,

Just as Kant leaves unexplained the philosophical and political step that could lead from the right of temporary sojourn to the right of membership, so too Arendt could not base

⁵⁰⁷ Benhabib 2000, p. 196

⁵⁰⁸ Benhabib 2004, p. 59

“the right to have rights,” i.e. to be recognized as a member of some organized human community, upon some further philosophical principle.⁵⁰⁹

This second theoretical problem will of course partly be addressed by responding adequately to the first since it is partly caused by the alleged lack of a conceptual bridge between Arendt’s anthropology of *praxis* and the moral-legal right to have rights. I argue that a successful bridge-building will be able to address the concern of the first quote above. The conceptual solution is to be found, I argue, in Arendt’s preference of the principle of *praxis* – which I will call the principle of meaningfulness, which answers to the condition of plurality⁵¹⁰ – to the alternative principles available. This point is crucial in order to understand Arendt’s recognition of the significance of abstract concepts for adequate acting and thinking. Her distancing from some metaphysical *styles* did not lead her to dismiss the value of such concepts. This is made quite explicit in Arendt’s discussion of Montesquieu (see also 6.3.2).

The second quote does however also concern how we interpret Arendt’s right to have rights in the first place, and how it compares to Kant’s cosmopolitan law of hospitality. In Kant’s case we could defend his inadequate account as a matter of changing circumstances. The extension Benhabib suggests is clearly in line with Kant’s regulative idea of a global civil condition, but I see this less as a theoretical flaw on Kant’s part than a sign of Kant’s suggested content of cosmopolitan law as clearly provisional and open to “further deliberations”, for instance over the possibility of a right to membership.⁵¹¹ The missing philosophical principle in Arendt’s case, relies in my view on Benhabib’s own reading of Arendt. When Benhabib reads ‘the right to have rights’ as “the right to membership”, she explicates in an exemplary manner the steps needed to secure an extension of cosmopolitan law by a law of second admission. The problem in my view is that her reading also suggests that Arendt’s whole ambition was to articulate a moral-legal norm as an addition to the content on the level of cosmopolitan law.

My proto-political reading will contest this suggestion. By arguing that it seems more reasonable to read ‘the right to have rights’ as an expression of the principle of meaningfulness on a more generic level of justice, I hold that this right must be placed conceptually above the threefold distinction of public right into different moral-legal domains. As mentioned, it is partly unclear exactly how Arendt herself understood the conceptual status of the right to have rights. I will

⁵⁰⁹ Ibid., p. 65

⁵¹⁰ See chapter 7 for detailed discussion on the principle of meaningfulness.

⁵¹¹ This reading of the right to have rights understands it to imply an imperfect duty, Michelman argues, because “there is no ascertainable agent [...] who specifically bears the duty (of admission somewhere) correlative to the claim (against exclusion everywhere) of any particular refugee.” (Michelman 1996, p. 203) Unless, we might add, they stand on the border, or are already within the territory of a specific foreign state. Michelman concedes, we would be close to a Kantian moral law of freedom, as an obligation of reason; the “duty to accept [or allocate to a specific other state] into juridical membership each stateless person who comes along.” (Ibid., p. 203).

defend a proto-political reading of Arendt by suggesting that this lack of clarity is improved by reading *Origins* in dialogue with *The Human Condition*. In some early passages from 1949 it seems clear that Arendt understood the right to have rights as a cosmopolitan right of second admission. In order to defend a proto-political reading, I will argue that this identification did not seem to satisfy Arendt, and that her later work suggest a conception of this right which is more in line with the development of a new, relational notion of human dignity according to the notion of political action (and speech or opinion) and the corresponding principle of plurality. This was already indicated in the introduction of *Origins*, written the summer of 1950.⁵¹²

Hence, as an answer to Benhabib's critical designation of a lack of a philosophical principle in Arendt's account of rights, a proto-political reading claims that this lack is solved by a different reading of "the right to have rights" and "the right to belong to some kind of organized community". A proto-political reading understands these rights as general moral-legal rights that attempts to articulate the central elements of the condition of plurality within the limitations of a conventional rights-discourse of political theory. The right to have rights is read as the right to have the rights to action and opinion, or more precisely to the framework of the performing activity of action. This is the only human activity, according to Arendt, which allows us to distinguish ourselves as human. The right to belong to some kind of organized community is read as the right to some institutionalized equalizing recognition and protection of being a member. Together they articulate the right to equality, understood both as an equality of power (which refer to the capacity to act and speak) and the equality of dignity (as a protected member of public life).

To support the point that the critique of Arendt seems to be misguided by a certain reading of her political theory, I will in the following section present a central critique of Arendt, which is more dismissive than, but at the same time seems to share the central premises of Benhabib's reading of Arendt. In the last section I will counter this critique by outlining an alternative and preferable reading of Arendt in more detail.

6.2 The problem of non-recognition

As mentioned above, Benhabib's critique of Arendt seems to rely on a reading of the right to have rights as expressing a political solution to denationalization and the succeeding exclusion from the international community, but that this solution is philosophically unsupported or in lack of a conceptual bridge to the existential anthropology of praxis.

⁵¹² Arendt 1968, p. ix

So far I've considered how this can be articulated as a theoretical challenge to the proto-political reading of Arendt. There is however also a practical problem implied in the separation of *praxis* (and especially the agonal aspects of it) from the political "ought". In general we might say that this separation is what distinguishes Benhabib's position from more radical and anarchic democratic theories. In this context, I want to concentrate on a well-known critique of Arendt voiced by Rancière, which, in a similar fashion to proponents of radical democratic theory, holds a notion of politics which emphasizes the agonal, performative aspect of political action.

Critical to the conventional notion of "politics", Rancière promotes a notion that understands "politics" as contesting the current political compromise. Politics does not happen inside the compromise, but in the negotiations on the implicit line between the included and the excluded. According to Rancière, politics is not something happening merely *within* the walls of the *polis*, but it is rather seen as an ongoing negotiation on the character of the protective borders of the community. Rancière's position contests the validity of democratic closure and the paradox of democratic legitimacy (see chapter 5). And, by criticizing Arendt under the assumption that she held a conventional notion of politics (as something taking place within the walls), this critique actually comes to the aid of my proto-political reading as it explicates the problematic implications of the conventional reading.

Rancière's argument is basically that if we depoliticize the anthropology of *praxis* – i.e. of the human being as a speaking animal – and turns it into a neutral, ontological ground for politics, we basically risk concealing *the* central issue of political struggles for emancipation and recognition. The practical implication of this concealment is of crucial significance to foreigners because they are rendered without political status and with no voice to contest the violation of their human dignity.⁵¹³

The problem of non-recognition is associated with Arendt's description of dehumanization, i.e. the exclusion from humanity and the implied loss of human rights. In the conventional reading this has the implication that a loss of citizenship and the status of being stateless or "de jure" "rightless" also implies the loss of the *capacity* to be political. The state-centric and institutionalist connection between 'being political' and 'being a citizen' consequently rejects the value of human rights as a strategic means in the struggle of the non-recognized to be included. This leaves the non-recognized, the "socially dead", in a hopeless situation in which they have (de facto) no rights and with no way to claim (de jure) the rights they *should* have had. In other words, they not

⁵¹³ Rancière, Jacques. 2011. "The Thinking of Dissensus: Politics and Aesthetics." In *Reading Rancière*, edited by Paul; Stamp Bowman, Richard, 1-18. London ; New York: Continuum.

only lose their human rights, but also their right to political action at the very moment they need it the most: “If statelessness corresponds not only to a situation of rightlessness but also to a life deprived of public appearance, how could those excluded from politics possibly claim the right to have rights?”⁵¹⁴ If you are excluded from the space of appearance, how do you claim the right to appear?

Following Rancière’s argument,⁵¹⁵ it is a mistake of Arendt (as she is presented in the conventional reading) to deduce a conception of a fully human life from an understanding of the human as a speaking animal. ‘To be political’ is in Rancière’s terms not a form of life, but a way of staging disagreement. For instance, evoking the claim to be “human” is to assert a fundamental equality not currently recognized. On these terms, he can claim that Arendt depoliticizes human rights (including cosmopolitan law) and stands left only with constituting civil rights (domestic law):

Arendt understands (ordinary) rights as a precondition for politics since they institutionalize an artificial equality that is constitutive of the public sphere. This is why the right to have rights amounts to the right to politics. For Rancière, in contrast, politics is fundamentally about contesting political exclusion by enacting equality.⁵¹⁶

The basic disagreement here is based on the assumption that Arendt completely dismisses the idea of human rights and keeps only citizen rights. The conventional reading confirms this impression of Arendt to the extent that her account of “human rights” is reduced to a right to citizen rights. In consequence, in order to have a right to politics, i.e. to have a say, one must be a citizen. Although this is close to the accurate description of the circumstances which lead Arendt to a bitter agreement with Burke, it does not reflect well Arendt’s basic ambition to revise the conception of human rights.

Rancière represents in this context a defense of the French notion of human rights,⁵¹⁷ which implies a notion of equality that is less dependent on institutions. This notion of human rights suits the case of ‘sans papiers’ very well.⁵¹⁸ How else could we account for the political character

⁵¹⁴ P.22, in Schaap, Andrew. 2011. "Enacting the Right to Have Rights: Jacques Rancière's Critique of Hannah Arendt." *European Journal of Political Theory* 10, no. 1: 22-45.

⁵¹⁵ And, supported by Andrew Schaap’s reading of Rancière.

⁵¹⁶ Schaap 2011, p. 23

⁵¹⁷ Rancière’s notion is qualified by his own strategic account, and in contrast to Arendt’s existential account and to “natural law”-accounts),

⁵¹⁸ See Archibugi, Danielle; Held, David. 2015. "Cosmopolitan Democracy: Paths and Agents." In *Politics and Cosmopolitanism in a Global Age*, edited by Sonika Gupta and Sudarsan Padmanabhan, *Ethics, Human Rights & Global Political Thought*. From a liberal cosmopolitan position Archibugi and Held discuss how foreigners might, and to some degree already are allowed to, participate in their own cases. They notice how immigrants are often supported by civil society in their struggle for rights in the hosting community (such as the ‘Sans Papiers’- movement, p. 27-8). Peculiar to the ‘sans papier’-movement is however the fact that they’ve chosen strategically to deemphasize their status as

of the protests of territorial residents without papers, unless these rightless individuals still have a sense of political agency and a capacity to contest the current political order by enacting equality?

Rancière's argument is relevant because it actualizes a clear danger in Arendt's thinking to fall victim to the essentialist fallacy of assuming that the excluded, the denationalized, the refugees, etc., are "world-poor" (to speak Heideggerian) without the capacity for politics. There is thus an ontological trap here in Arendt's reliance on Aristotle: the risk that one "identifies politics with the form of life of those who are already destined for it."⁵¹⁹ The basic idea is that the division between those that can speak and those that have no political voice, is already organizing the social order.⁵²⁰ Since the way of life of those that are non-liberated – be it women, slaves, workers, or the encamped or irregular – are associated with unpolitical activities, the uncritical appropriation of this notion of the social order might lead one to assume the excluded to be without the capacity to act and speak. The political struggle of the "unpolitical" is then running the risk of being undermined and reduced to an apolitical or anti-political struggle, unfit for a proper political life. Arendt's reliance on these ideas, might lead her conception to reproduce the relations and the crimes of humanity that she sought to combat:

While everyone has the capacity for action and speech, not everybody makes something of this capacity. Moreover, when they do act politically, those preoccupied with sustaining life are likely to act in the wrong way, approaching politics with the mentality of labour and work.⁵²¹

I readily admit that this is a problem and that Arendt sometimes makes such mistakes based on conceptual prejudices.⁵²² Since Arendt relies on Aristotle's notion of action, associated with the political life (*bios politikos*), several commentators have questioned the status of naked life (*zōē*), in her works.⁵²³ This is of central importance to political theory because it points to a basic distinction between the political and the apolitical. What is it that makes some sounds turn from 'mere noise' into 'voices making sense'? To 'make sense' is defined by quite demanding

immigrants, travelers, refugees, foreign origin, and so on, and appeal instead to their lack of a formalized status in the hosting state. The strategy is in other words to simulate and reiterate historical emancipation-movements for citizen rights of workers, women, and so on. Hence, in the case of this movement it is strikingly clear how a cosmopolitan issue is converted (as a political performance of activism) to a domestic one. This might be one reason why this case also fits Rancière's model of human rights, as they are historically associated with domestic struggles for emancipation.

⁵¹⁹ Schaap 2011, p. 30

⁵²⁰ As Schaap points out: "The split that Rancière discerns in the apparently 'common capacity' of speech thus opens up between speech and the account that is made of speech: 'the account by which a sonorous emission is understood as speech, capable of enunciating what is just, whereas some other emission is merely perceived as a noise signaling pleasure or pain, consent or revolt.'" (Schaap 2011, p. 30; quoted from Jacques Rancière, *Disagreement: Politics and philosophy*, p. 23, 1999)

⁵²¹ Schaap 2011, p.32

⁵²² See for instance Benhabib 2000, p. 141-155 for similar critique.

⁵²³ Such as Rancière, Agamben, Birmingham, etc.

requirements in Arendt's framework. Unlike the individualist idea of human dignity of an inherent character, Arendt relates dignity to the capacity to act. Does this imply that those occupied with other a- or non-political activities remain voiceless?

As Benhabib pointed out as well, there is an inherent risk in Arendt's taxonomy of activities that sometimes mistake the psychological profile of the activities themselves for the essentialist psychology of an entire group or class. Laborers takes on the anti-political mode of labor; workers the apolitical mode of work, etc. How could those who speak and act according to the mentality of labor and work be included in political discussions without making political nonsense in public? Similar to basing human dignity on rationality (like Kant), one also encounters problems of marginalization of those who are considered abnormal according to the standards of political action. Although these problems should be taken seriously, I do not think it accurately address Arendt's main ambitions. First of all, the essentialist psychological assumptions about how entire groups tends to think, mistake the labels of activities for the political critique of certain mentalities that dominate the actual public debates. It is simply false (for reasons I will explain in more detail in the next chapter) to assume that people occupied with a certain activity will adapt the corresponding mentality. Second, that Arendt sometimes seems to make the same mistake should not count as an argument against her main concern, which is the way some fractions were able to pervert the public presence of the social movements and depoliticize them.

This critique is relevant to foreigners who are excluded from political membership in other states. To the stateless, a proto-political account of Arendt seems to respond in a similar way as Benhabib's account, by appealing to the right to political membership. To the rightless, it still remains to defend the claim that a proto-political reading will imply a notion of the "right to have rights" that addresses those deprived of a home, and hence deprived of the framework of action and opinion, or deprived of the opportunity to make a public presence. And, that addresses the invisible "homeless" in such a way that their human dignity is still guaranteed – at least negatively by articulating the clear violation of their right to have rights. To do so, I will have to make plausible a pre-institutional notion of human equality beyond the descriptive notion of a general human capacity to act.

6.3 Defending the proto-political reading of Arendt

Schaap summarizes a problematic state-centric assumption of the conventional "political" reading when he claims (as quoted above) that "Arendt understands (ordinary) rights as a precondition for politics since they institutionalize an artificial equality that is constitutive of the public sphere." A basic point of promoting a proto-political reading is to nuance this picture and

claim that the public sphere is actually able to constitute itself without institutional protection.⁵²⁴ I hold this to be true independent of Arendt's opinion on the matter, but I've also indicated that we find passages in Arendt that suggest that she would agree. The point is not to reject the political character of institutionalized communities, but to extend "politics" beyond it and specify the value of institutions and the protection and regulation of a space capable of emerging on its own. This emergence is clearly in need of institutional protection to endure. This institutional protection is, however, legitimate only if it is guided by principles that allow this space to prosper.

If we stage the disagreement within the conventional reading as a disagreement between Benhabib and Rancière on how to read Arendt, we could say that it is a disagreement about where to place the emphasis regarding two different aspects of Arendt's notion of the political. Benhabib contributes to a richer conventional reading by her emphasis on the narrative-linguistic character of the phenomenology of the everyday "space of appearances", while Rancière – in attacking the "conventional Arendt" – emphasizes (and is unintendedly in agreement with) the agonal aspect of her thought. An implication of a proto-political reading would be acknowledging Rancière's emphasis, at least to a certain degree.

Benhabib recognizes the agonal aspect of political action, but marginalizes it by considering it exceptional and episodic:⁵²⁵

Narrative action is ubiquitous, for it is the stuff out of which all human social life, all life together in the "mode of speech and action," is constituted. Agonal action is episodic and rare; only some human actions attain that quality of "shining forth" and "manifesting a principle" that Arendt associated with agonal action. The "space of appearances" corresponds to the human condition of plurality, that is, that we are many and not one; it is only under certain very specific historical and institutional conditions that the human space of appearances assume the form of a public space.⁵²⁶

This passage summarizes in many ways Benhabib's reading of Arendt and draws the background for Benhabib's critical, institutionally oriented, reading of the right to have rights. Benhabib appreciates Arendt's phenomenological-existentialist account to the extent that she recognizes Arendt's contribution to our understanding of human action as linguistically structured (which is

⁵²⁴ This claim is in line with the secular or mundane concept of sociality accounted for in "3.3 The state-centric, democratic social imaginaries".

⁵²⁵ This distinction of aspects relies on Benhabib's critique of Habermas reading of Arendt. In her reading, Benhabib points out that Arendt's conception of action is richer and more complex than Habermas distinction is able to reflect in his notion of communicative action: "This "web of relationships and enacted stories" combines the constative as well as the expressive dimensions of speech acts; its rational core cannot be as clearly extricated as Habermas would like and as he attempts to do with his concept of validity claims." Benhabib 2000, p. 125

⁵²⁶ Benhabib 2000, p. 127

to say something more than that speech is a form of human action).⁵²⁷ The following insight is central to Benhabib's reading of Arendt: "The philosophical thesis [in Arendt's work] is that actions can only be identified through a narrative that is disclosed to others and to ourselves."⁵²⁸

Although I agree with Benhabib on the emphasis on the narrative structure of the pre-institutional "space of appearance" (which in Benhabib's context would be synonymous with the ontological or proto-political), I think her separation of this (private) space from both the agonal and institutional public space is too strong.⁵²⁹ I will end this chapter by following two lines to defend the need for a proto-political reading of Arendt, and qualify it further:

First of all, both the publicity of the "space of appearance" and the agonal action in a public space – the outstanding performance accessible to all – are *fragile*. While it is perhaps true that we "must appear" is some way to each other, we most certainly must not appear as *human*, i.e. as a plurality of unique human beings with a common world. This condition relies on certain obvious spatial and material conditions, but also – and less trivially – it relies on action, understood as a specific performative mode of disclosure. As such, the condition of plurality can emerge in "private", but not prosper, without public institutional protection of the space of performance. The institutional protection is however never perfect, since human situations cannot be fully subsumed under general laws. Hence, we (and usually some more than others) sometimes have to struggle, insist, or actively "stand out", in order to appear. We have to "make" our appearance as human.

Second, since the disclosing actions are guided by certain principles, actions take on a certain attitude or mentality that is related to these various principles of action. These principles are manifested in different ways and given expression in both the agonal and institutional aspects of action. Crucially, answering to the condition of plurality the principle of *equality* is, together with *distinctness*, the central moments of meaningfulness as the guiding principles of the mentality of action. Since some kind of artificial equality is required in order for action to be possible, and the framework of political membership is the only one that can provide this artificial equalizing, it seems reasonable to conclude that only citizens can act. In my proto-political account, this conclusion is contested by giving primacy to the pre-institutional sphere of appearance, which relies on the agonal performance of claimed equality. The institutional framework provides the

⁵²⁷ Ibid., p. 199

⁵²⁸ Ibid., p. 112

⁵²⁹ Is this strong distinction motivated by the emphasis Benhabib (in Benhabib, Seyla. 1992. *Situating the Self: Gender, Community, and Postmodernism in Contemporary Ethics*. New York: Routledge.) puts on the difference between the abstract and concrete other? Does she not in this sense seem to follow Habermas in a phenomenologically problematic distinction between "political"/legal and moral/face-to-face relations? (see discussion in chapter 8)

more permanent expression of this experienced equality. Hence, I see the agonal aspect of someone's appearance as human as an integrated part of every performance.

To be sure, we do not always act in such a way that the agonal aspect of our actions take on an outstanding character that contests the dominating political order and the current political (and excluding) expression of equality. But, if agonal actions were only episodic and rare⁵³⁰, Benhabib's reading would imply that our appearance *as* human in plurality would be an exceptional event. I think this is an unintended, but still unacceptable consequence of her distinction.

By removing the agonal aspect from everyday social life, Benhabib does in the conventional sense "depoliticize" the space of appearances, i.e. the proto-political public space. In this manner she isolates the ontological (or proto-political) space of appearances from the agonal performances that Rancière associates with political struggle. A proto-political reading aims to reintroduce the political character of everyday life as – at least potentially – parts of the soft public. Wherever you go, be it in the underground or in spontaneous public assemblies, there might be a "polis" that should not be hindered and that could eventually require public recognition and institutional protection. The fact that this relation is quite well established in the practices of strong democracies, as a relation between the domestic "extra-political" public sphere and the institutionalized procedures of government, seems to make it even harder to conceive of other public spheres, such as the global, that are in need of similar protection.

6.3.1 The manner of appearance

The first argument I present to defend the proto-political reading is related to Rancière's concern, because politics for him is exactly to contest the way we "must appear" to each other. The central feature of a given social order, according to Rancière, is that it defines *someone* ("who is"; who speaks) in excluding and violent terms as *something* ("that is"; that makes sounds). Every actualized political order is an imperfect compromise also in this symbolic sense of exclusion from the political "in-group".

A proto-political reading interprets the right to have rights as the right to action and to opinion, in short: the right to appear. As such, it seeks to address the fragility of human appearance by seeking to provide it with protection in a legal discourse. The right to have rights is not a cosmopolitan law, but expresses more generally the condition of politics (i.e. plurality, the condition for having a voice), that the institutionalized system of domestic and cosmopolitan law

⁵³⁰ "Action is agonal when it embodies or lets "shine forth" a principle or a virtue like justice, generosity, wisdom, and kindness, or when it expresses a passion, an emotion in its quintessential form [...] Such action is rare; it transcends and in many ways transfigures everydayness and our understanding of ourselves." (Benhabib 2000, p. 129-30)

(or the system of organized communities at large) should *protect*. And, since the space of appearance corresponds to the human condition of plurality, this is the space to be protected.

Benhabib might then be right in holding that the best way to protect this plurality on the institutional level is to anchor a concern for diversity in a right to political membership. But, as long as we hold, with Benhabib, that we need institutions and civil rights in order to do politics, Rancière is right to criticize ‘the right to have rights’ for prolonging this underlying state-centric assumption. The strong distinction Benhabib relies on between the space of appearance and the public sphere, is also detectible in her reluctance to locate “the public realm” and political activity outside the protected hard or softer public sphere. The “soft public” can be understood, as mentioned in chapter 5, as a mediating political space between the impersonal formal relations of legal subjects and the personal ethical relations of everyday life. Apparently, only under extreme conditions does the public realm migrate into the unprotected private spheres:

Under totalitarianism, the public square is filled with the hollow signs of the regime’s power, but a common world is re-created elsewhere [in churches, drawing rooms, and cafés]. These regimes start toppling when the common world created elsewhere starts spilling over into the streets, the market-place, and into the city squares, thus constituting an alternative public sphere.⁵³¹

This is a very good illustration of how we might think of the institutionally unprotected public space under all conditions. But, compared with Taylor’s description of the Enlightenment notion of public sphere, isn’t the idea of the public realm, migrating into topical spaces like the cafés, very similar to the idea of a continuous debate in the public sphere? *Where* exactly does it stop being political? And, given that our social imaginaries constantly revises our theoretical ideas of justice, including in our private lives with partners, kids, consumption and waste, etc.; how does it make sense to say that our actions in the private domain only become inspired by political principles under totalitarianism? The kind of “common world created elsewhere” which starts “spilling over into the streets” would fit quite well as an image of countless political counter-movements – even the kind of quiet, high-income cosmopolitan individualists that drink single-origin coffee with enthusiasm, eat their vegetables with profound enjoyment and ride a bike with provoking ease.

This said, it is a misunderstanding of Rancière to assume that Arendt’s new political principle, which is reflected in ‘the right to have rights’, is “deduced” from the Aristotelian anthropology of man as a speaking animal. First of all, as Peg Birmingham has pointed out in her excellent discussion on Arendt’s influence from Augustine, Arendt does not share the kind of attributive

⁵³¹ Benhabib 2000, p. 129

ontology that Aristotle holds.⁵³² Further, Arendt's support of the institutionalist critique of natural human rights (inspired by Hobbes, Rousseau and Burke) is qualified and restricted by a peculiar anthropological universalism based on the highly unnatural, narrative-linguistic human condition of plurality.⁵³³ Hence, there is a crucial difference between the notion of "human" that Arendt criticizes for being too abstract (grounded in our biological nature), and the notion of human dignity that Arendt appeals to in approving terms (grounded in plurality). The former hides the privilege of citizens behind the label of "human rights"; the latter answers to the concrete conditions of the political affairs that make us human.

As mentioned in 6.1, a proto-political reading depends on the possibility of grounding the right to have rights in the experiences of this condition of plurality (as a normative anthropology). This must be understood both according to the narratively structured experience of agency, and to the agonal manifestations of a principle. In the next chapter I will clarify this normative ground by giving a phenomenological reading of Arendt's notion of action. According to this reading, Rancière's strategic concept of the politics of human rights, and the performative notion of "enactment of equality", seems compatible with the implications of Arendt's own phenomenological perspective. We might say that agonal actions are rare when seen as contesting a political order, such as Rosa Park's refusal to move from her seat. But, at least in a republic or a liberal democracy, the agonal manifestation of equality is also part of everyday life.

6.3.2 Mentalities and the manifestation of principles

Another consequence of Benhabib's depoliticization of the everyday space of appearance is that "the web of relationships and the enacted stories"⁵³⁴ is not clearly a home, i.e. social world where individuals are personally distinguished from others. I think Benhabib is right to hold the narrative structure to be the stuff the social world is made of, or the material out of which the social horizon is spun.⁵³⁵ It is, however, unclear to me how Benhabib understands the relation between actions and mentalities.

⁵³² Birmingham 2006

⁵³³ Benhabib emphasizes the philosophical significance of human plurality as the basic human condition, and understands it to have universalist pretensions in terms of identifying general anthropological features and a ground for normative standards. (See 1996, p. 195) It claims in other words a decentralized/general validity.

⁵³⁴ See Arendt 1958, p. 182-3. Benhabib reads "web" as horizon (see 1996 p. 112).

⁵³⁵ To be sure, this world is nothing like a coherent philosophical account of reality. Correspondingly, nor should one, according to Arendt, think politically in such a rigorous manner: "Arendt herself no longer thought it either desirable of even possible to fit the world into a coherent "philosophical Weltanschauung." For her, political philosophy became a method of narration to "cull meaning from the past," an exercise in establishing distinctions that would enable us to think the meaning of our times and our actions, to "think what we are doing." (Benhabib 2000, p. 118, reference to "Preface: The Gap Between Past and Future" in Arendt, Hannah. 1961. *Between Past and Future, Six Exercises in Political Thought*. New York; Viking Press.

On the one hand, Benhabib seems to recognize that the attitudinal reading of Arendt's activity types is the only one that is "sophisticated and rich enough to do justice to the sociological complexity and variety of modern institutions"⁵³⁶ The attitudinal reading emphasizes that the various activities is reflected in various mentalities,⁵³⁷ and objects to the idea of distinct activity types that correspond to properly designated realms because it is sociologically untenable and phenomenologically essentialistic. In other words, to assume that laborers in the household are determined by the mentality of labor, and that the workers and bourgeoisie at the market place are determined by the mentality of work, is simply misguided.

On the other hand, since mentalities relies on and are guided by principles, it is unclear how the agonal aspect of action can be seen as exceptional. It does not make sense to claim that we act according to a certain mentality or appear as useful, or even as human, only in some exceptional and outstanding performances. Certainly, we may live most of our everyday life in ways that make ourselves and our surroundings remain gray and undistinguished. But, there is no essential necessity to this lack of color and richness of everyday life. It also makes sense to say that the agonal contestation of a political order is quite rare and episodic. Still, it would be strange and alarming to describe our human appearance in this everyday life as rare and exceptional (although it certainly is a possibility under extreme, "everyday life"-conditions such as those in the totalitarian regimes of Hitler and Stalin). If anything is clear from Arendt's use of "humanity", it is that an everyday life without activity guided by the proper mentality has a disastrous and depriving character associated with uncanny images such as the "living dead".

My impression is that Arendt borrows the old cases of principled action of virtue, honor and glory to illustrate a possible alternative to the modern mentalities of consumerism and instrumental rationality. Similar to the way Arendt appeals to *isonomia*, her reference to republican virtue (or the "love of equality"), is not meant – as I see it – as expressions of nostalgia, but as expressions of a common human experience that gets lost in the mentalities grounded in the condition of life or worldliness.⁵³⁸ For instance, in an essay from around 1953-54, "On the Nature of Totalitarianism", Arendt seems to relate the notion of equal value to the common experience of plurality:

The common ground of republican law and action is [...] the insight that human power is not primarily limited by some superior power, God or Nature, but by the powers of one's

⁵³⁶ Benhabib 2000, p. 141

⁵³⁷ For first development of this reading of Arendt, see Pitkin, Hanna Fenichel. 1998. *The Attack of the Blob: Hannah Arendt's Concept of the Social*. Chicago: University of Chicago Press.

⁵³⁸ See chapter 7 for detailed discussion.

equals. And the joy that springs from the experience that only because this is so, only because there is equality of power, is man not alone.⁵³⁹

This equality of power is, as discussed earlier, not depending on institutional law as such. The republican law is rather one of several expressions of a common experience of men (in plural) living together and acting in concert as equals. In this sense the mentality of human agency, and the personal mode of appearance, would exactly “stand out” from the background of the anonymous life of labor and work. This alternative mentality should be worked out, in my view, on all levels, including both the exceptional level of “outstanding individuals” and in the more quiet routines and social imaginaries of everyday life. On both levels the “outstandingness” is crucial for the subsistence of plurality. In concrete relations Arendt seems to draw on Augustine, as the principle of humanity takes on the agonal manifestation of “love”: *I want you to be*. On the political level, the manifestations are perhaps less hazardous, but also more complex.

As Birmingham makes clear, Arendt is greatly in debt to Montesquieu in her understanding of political agency and its essential dependency on principles of action.⁵⁴⁰ Political agency and living institutions, Arendt holds, depend on principles that move and guide them. The original idea of Montesquieu was, according to Arendt, his attention not only to the particular structure of various governments but to their guiding principles of action:

[...] he adds that in a republic the principle of action is virtue, which, psychologically, he equates with love of equality; in a monarchy, the principle of action is honor, whose psychological expression is a passion for distinction; and in a tyranny, the principle of action is fear.⁵⁴¹

Montesquieu’s notion of an innate principle, a spirit or an ethos, in each form of government, gives us the clue to how a new political principle could be implemented. First of all, his notion of ‘principle of action’ is not static (where all deviations would be seen as degeneration), but is seen as a principle of motion (which opens the changes in the structures of governments as a historical process open to improvements). Second, by introducing the principle divisions of power, Montesquieu himself demonstrated how a new political principle could be established.

A crucial point for Birmingham is that this understanding of principles of action bridges the clear divide between the public and the private in political theory. While Arendt seems to agree with Montesquieu on the rejection of the essentialist psychological assumption that “all people behave at all times according to the principles of the government”, she also criticizes him for being

⁵³⁹ P. 336, in Arendt, Hannah. 1994. "On the Nature of Totalitarianism: An Essay in Understanding." In *Essays in Understanding, 1930-1954*, edited by Jerome Kohn, xxxi, 458 p. New York: Harcourt, Brace & Co.

⁵⁴⁰ Birmingham 2006, p. 13 ff.

⁵⁴¹ Arendt 1994, p. 330

caught in the problem of the conflict between man as citizen and man as individual. Arendt compares this problem to the double standard of the modern realist conception of international relations, which rejects arbitrary sovereignty in the domestic domain, but fully accepts the principle of domination (“might is right”) in the international domain.⁵⁴² In a similar way, modern political thought seems to be caught in a double standard of the public and private: “The distinction between the citizen and the individual becomes a problem as soon as we become aware of the discrepancies between public life, in which I am a citizen like all other citizens, and personal life, in which I am an individual unlike anybody else.”⁵⁴³

In contrast to public laws (or legal recipes), which might protect and define the boundaries of the private but not regulate it directly, principles are the general guidance of human agency – even in the personal sphere, where the cases cannot be subsumed under nor guided by general laws.⁵⁴⁴ Hence, in this essay, Arendt is much clearer on this than she is in the *Human Condition*: there is a common ground, a human “*arche*”,⁵⁴⁵ which provides our principles, even fear, with a recognizable and reliable character, both in personal and public life.⁵⁴⁶ This “common ground” clearly has many facets, as it can ground so different governmental types as republics and tyrannies. In the end, the question is:

How do the types of human activity that Arendt identify, serve as a ground for her new political principle?

As found in the quoted passage above on the common ground of republican law, Arendt mentions characteristics of the experience of power of equality which are essential to the human activity of action, such as “living together” and “acting in concert as equals”. But, since the “political-public” sphere which is regulated by law is insufficient in its responsiveness to the uniqueness of each in their personal sphere of life, it cannot alone provide the sufficient conditions for political change:

⁵⁴² It should be noted that Montesquieu’s principle of divisions of power led him to an idea of a world federation of international relations, which inspired Kant’s view discussed in chapter 2.

⁵⁴³ Arendt 1994, p. 333

⁵⁴⁴ *Ibid.*, p. 335

⁵⁴⁵ *Arche* refers to «beginning» or «origin» in Greek. Similar to Aristotle Montesquieu and Arendt seems to use it as an quasi-transcendental term, of a principle (for instance of government) which is in itself indemonstrable and intangible, but still provides it with its conditions of possibility.

⁵⁴⁶ Birmingham 2006, p. 14, Birmingham identifies this common ground with the “event of natality”, where plurality is one aspect of this event. Although I am greatly in debt to Birmingham’s understanding of Arendt’s work, I do not follow her analysis all the way. I think it relies too much on Heidegger’s notion of ontology, which in phenomenological terms gives her analysis a genetic rather than generative character. This is noticeable in the way “natality” takes on the character of an existential, rather than a generative and non-egological event with transcendental significance. Unfortunately, an elaborate discussion to do Birmingham’s position justice is not possible within the scope of this thesis.

[...] it is [an entirely different, non-public, sphere of life] from which the sources of action and motion, as distinguished from the stabilizing, structural forces of law and power, spring. Hedged in by law and power, and occasionally overwhelming them, lie the origins of motion and action.⁵⁴⁷

I read “non-public” here to imply the kind of public sphere that is protected by, but not regulated by law. I interpret this emphasis on the “non-public” as an early attempt to revise the republican principle of virtue, and the legal protection of the private sphere, by nuancing the conception of the common ground, from the experience of equality of power to its implied fact of plurality. The latter is later developed in *The Human Condition* as a conception of political action and publicity that requires both equality and uniqueness for someone to come “into his own” and appear as fully human.

Arendt’s conception seems to improve considerably in clarity between her early critiques of the Human Rights Declaration (1949-51), where the view of Aristotle is briefly mentioned, to her fully worked out conception of human dignity in *The Human Condition* (1958) and the last chapter of *Origins* (added in 1958). In the former texts Arendt is mainly critical to the conventional grounding of human rights and seems preoccupied with presenting the suggested extension of cosmopolitan law as the one human right. As Menke points out, Arendt understands the one human right to belong to a distinct sphere of positive law, “above the nations”. It is distinct from interstate law (in the Kantian sense of “intercourse of sovereign nations”), but still initiated and guaranteed by “a comity of nations” and the “emergence of mankind as political entity”.⁵⁴⁸ In other words, Arendt seems to locate the “right to have rights” in the domain of cosmopolitan law enforced by an international federation.

In this cosmopolitan argument, Arendt clearly distinguishes herself from the position of Burke, but still moves within the bounds of the same structural level of a state-centric institutionalist account. Arendt’s early conception of the new principle is very close to the old republican ‘equality before the law’. With this institutional grounding, Menke argues, Arendt seems to run into the same risks as any reliance on factual historical conventions; the norms loses their function as an external normative guidance and turns into positive historical law with the same inherent risk of exclusion of imperfect compromises as state institutions. It simply relocates the problem to a higher level of political entity, that of “mankind”.⁵⁴⁹ Even if this political entity is understood as a legitimate international federal order, the institutionalist dependency on historically introduced rights cannot serve as a conceptual guarantee against the aporia of human

⁵⁴⁷ Arendt 1994, p. 335

⁵⁴⁸ Menke 2007, p. 750

⁵⁴⁹ Ibid., p. 751ff

rights. Since such a comity of nations would rely on positive law, it might implement legal guarantees for both citizen rights and cosmopolitan rights, but it cannot serve as its autonomous conceptual grounding.

According to the Kantian conceptual framework that I developed in chapter 2, cosmopolitan law does not ground citizen rights (on the international or state level); they complement them and might address individual or systemic outcomes of an international regime of citizen rights. Crucially, if the right to have rights is to be understood as a right articulating a new political principle – which serves as a guide and inspiration for both these categories of rights – it cannot be read as a cosmopolitan right. If we interpret this new principle as a cosmopolitan right, the very ‘verticality’ of the principle is lost into the horizontal levelling of public right. On the other hand, if we read it as a right to the basic activity of human appearance (i.e. action and speech), it seems to comply quite well with a principle of meaningfulness, which answers to the human condition of plurality, and hence to the new regulative idea of humanity. The cosmopolitan law of second admission would still be recognized as in compliance with this new political principle, but no longer as identical with it.

To clarify this new conception, Birmingham’s exegesis of ‘the right to have rights’ could serve as a helpful starting point: “Significantly, for Arendt, the right to have rights is more than merely a juridical right. For her, the right to have rights is a fundamental political right; it is the right to belong significantly to a political space.”⁵⁵⁰ To Arendt, the traditional citizen rights of freedom and thought are seen as a specification (within domestic law) of the right to action and speech; and the right to sovereignty (as an autonomous individual and sovereign collective), is replaced with the relational right to belong to an organized political space (plurality against the unified will).⁵⁵¹ While Birmingham seems to retain the assumption of a foundational human right, she detaches this right from the conventional understanding of these “further rights” as citizen rights: “[...] the law of humanity (understood as the appearance of the actor among a plurality of actors in a public space of freedom), demands that the actor have the right to appear, or, as Arendt so succinctly puts it, the right to have rights.”⁵⁵²

⁵⁵⁰ Birmingham 2006, p. 59

⁵⁵¹ Paraphrased Ibid., p. 36

⁵⁵² Ibid., p. 57. For reasons that I cannot discuss properly here, I’ve left out Birmingham’s notion of “event of Natality” as the “carrier of the principle of publicness”. The main reason is that Birmingham, despite doing an excellent exegesis and contextual reading of Arendt, remains within the Heideggerian framework of “existentials” in her interpretation of Arendt’s notion of Natality. The radical break with Heidegger in Arendt, which is reflected in the generative-transcendental significance of the influx of newcomers, is not properly addressed by Birmingham. I thank Anne Granberg for discussions on this point.

I read this “right to appear” as an attempt to explicate an aspect of human dignity that is not captured in the conventional interpretation and that could be given content by articulating both citizen rights and cosmopolitan rights. As discussed in chapter 4, I understand this conception of human rights to answer to the new circumstances experienced in a completely organized world. The world has become “one world” and exclusion from this community implies a kind of deprivation of the basic human conditions which the conventional conception of human rights stands unprepared to answer. The right to appear and the right to belong is, in my view, Arendt’s general conceptual answer to these circumstances. In the next chapter I will consider the relation between activities and principally guided mentalities in more detail.

6.3.3 Grounding citizen and cosmopolitan rights

To appreciate what is at stake we have to interpret the rights to appear and to belong in the context of Arendt’s project to rethink the conceptual justification of political (including cosmopolitan) rights. This conception should inspire us to treat each other with humanity, but it cannot rest on a foundation of an individualist metaphysics. In other words – and Arendt is persistent in this view – there is nothing in our individual nature that will ensure our default membership in humanity. We do not appear as human by revealing our true, inherent material or mental nature. Only by being included in the proto-political “in-between” space of appearances do we appear in this mode. A formally organized community does not provide this framework, but protects it. In this space, shared with others, we are *someone* by manifesting our responsible agency through action. Hence, the proto-political indicates the political “*arché*”; the stable and universal human experience of action and speech. Action and speech furthermore relies on plurality, *the* human condition which any political principle of justice can and should take as its point of departure.

The point here is not to claim that we have to require a proto-political performance of foreigners in order for them to be included in humanity. This would require us to exclude both newborns and victims of non-recognition; rather it implies a moral-legal obligation to listen to every newcomer (in the sense used by Arendt in *On Revolution*⁵⁵³: i.e. as someone who makes their public appearance, which could potentially be anyone). Hence, the point is to let the most appropriate aspects of the human experience ground the principles that inspire the way we treat each other in private and organize our communities in public.⁵⁵⁴ Arendt finds these aspects in the experiences where we appear most fully as human beings to each other. This must not be

⁵⁵³ P. 36, Arendt, Hannah. 1965. *On Revolution*, Compass Books, New York; Viking Press.

⁵⁵⁴ This is why a sense of pain or embodied vulnerability might serve as a good common ground for animal rights, but not, in Arendt’s view, as a common ground for human togetherness and human dignity.

understood as an essentialist attributive determination of human nature, but as an experientially based, comparative preference of experienced aspects of life. She finds inspiration in the Greek notion of *praxis*, as a concept that captures some of this experience in the most political mode of human activity. In her appropriation, “action” and “speech” is the key terms that refer to the type of activities where such optimal experiences emerge.

Michelman suggest that we have to account for this “proto-political” aspect to make the best exegetic reading of Arendt. While more interesting than the conventional reading, it does not solve the problem of political exclusion that it sets out to do, according to Michelman. This reading is interesting, Michelman argues, because it contests the attributive model where rights are grounded in some aspect of human nature (such as sense of pain or human reason).⁵⁵⁵ It does not, however, solve the problem of exclusion associated with the “rights of Man” as positive citizen rights. By emphasizing the performance of agency and enactment of rights, it rather seems to describe the social contingency of political inclusion and leaves us pointing to an “irreparable groundlessness of rights”.⁵⁵⁶ I basically think this is a mistaken assumption on Michelman’s part. The reliance on agency and enactment does not make rights “irreparably groundless”; it simply reflects their guidance by comparatively preferred principles and not some static doctrine. It describes a central feature of the lived and highly artificial life, guided by political principles that can be given content (but never determined) as duties and rights of states and individuals.

As mentioned above, Benhabib shares Michelman’s qualified pessimism of philosophical groundlessness and is quite dismissive about the possibility of developing a theoretically sound proto-political account.⁵⁵⁷ Benhabib criticizes Arendt for being conceptually vague on her notion of the public, and not to distinguish clearly enough between the exceptional agonal aspects and the everyday narrative form of plurality – and correspondingly between the institutional and the ontological levels of public space. Andrew Schaap also seems to take the position of Michelman, admitting that Arendt’s ambition was most plausibly a proto-political⁵⁵⁸ reading and then criticizing her for not succeeding with it, based on her inadequate solution to the problem of non-recognition (following Rancière).

⁵⁵⁵ It breaks with the Kantian view: “each human being’s attributed capacity for rational agency is a “feature of us,” [...] that serves as a ground or “source” for the moral judgement that others ought to accord us certain kinds of respectful treatment or, in other words, that we have certain moral rights.” (Michelman 1996, p. 204)

⁵⁵⁶ Michelman 1996, p. 207

⁵⁵⁷ Benhabib refers approvingly to Michelman’s article in *The Right of Others*, without however clarifying the difference between the most interesting and the most conventional reading of Arendt.

⁵⁵⁸ To my knowledge he is the first to coin this term of “proto-political” in relation to Arendt, referring to Michelman’s article. The proto-political is not mentioned in Michelman’s text.

Schaap is clearly aware of the “proto-political” level in Arendt, and explicates it quite succinctly: “For Arendt politics properly concerns the constitution and preservation of a space of appearances in which individuals can act and speak.”⁵⁵⁹ And further: “While the political depends on institutions for its preservation, the space of appearances is primordialily dependent on political action: it is there where men and women come together to act and speak in public but it begins to disappear with each individual’s withdrawal from the public realm.”⁵⁶⁰ Then he concludes by pointing exactly at the ground that Benhabib calls for (while rejecting *praxis* as a sound possibility):

If the right to have rights can be said to have a ground at all, it is in praxis and the space of appearances that emerges contingently when men in the plural get together to act in concert. This space of appearances is, fundamentally, prior to the establishment of institutions.⁵⁶¹

Although Schaap is exceptionally clear on the proto-political reading of Arendt, he dismisses, like Benhabib and many others⁵⁶², the possibility of reconciling the agonal and institutional aspects of the political. Schaap seems to suggest that it is almost like “praxis” supplied Arendt with the necessary distance from the institutionalized principle of equality (Burke’s ‘right of an Englishman’). Associating praxis with the “anarchic principle of *isonomia*” (which means “not to be subject to the necessity of life or the command of another, and not to be in command oneself”)⁵⁶³ Arendt is also able to distance herself from Aristotle and the conventional view on politics as partaking in ruling and being ruled. Hence, the distance taken from both the institutionalist and substantialist notion of rights, seems to leave her however with no reliable alternative.

To counter this pessimism, I’d like to argue that the interpretation of “the right to appear” and “the right to belong” as expressions of the principle of meaningfulness is promising. According to this reading, these rights moderate the dichotomy between the institutionalist and the praxis-based approaches. Rather than focusing on the incommensurability of the topical and metatopical levels of sociality, it understands the framework of action and its organized protection as two expressions of the same principle (and indirectly of the same kind of basic experience and human condition).

I’ve already suggested that this principle should be understood as the principle of meaningfulness, which correlates to the common ground of experience defined by the condition

⁵⁵⁹ Schaap 2011, p. 27

⁵⁶⁰ Ibid., p. 27

⁵⁶¹ Ibid., p. 28

⁵⁶² See for instance Etienne Balibar, who points the irreconcilable tension in Arendt’s combination of a strong institutionalism (from Burke) with the anarchic notion of *isonomia* and *praxis*: Etienne Balibar (2007)

“(De)Constructing the Human as Human Institution: A Reflection on the Coherence of Hannah Arendt’s Practical Philosophy”, in *Social Research* 74(3): 727–38.

⁵⁶³ Schaap 2011, p. 28

of plurality. A central clue to how this principle connects to ‘the right to have rights’ is Arendt’s notion of “home”, as the framework for action and speech. She describes this framework as “the entire social texture into which they were born and in which they established for themselves a distinct place in the world”⁵⁶⁴ It is a notion that is clearly wider than the legal situation guaranteed by a political membership. Accordingly, to be displaced and encamped is not primarily to lack a place to stay or to lack citizenship, nor the basic needs like shelter and food, but rather to lack a place in which to make oneself “at home”. Arendt’s ambition of articulating a new conception of human dignity, or to restore its meaningfulness, is reflected in this notion of “home” in the sense that it seeks to explicate what is violated in rightlessness, but which one cannot be deprived of as a fundamental moral claim without ceasing to be human.

We find traces of this idea in Arendt’s work already in the text from 1949, as a conception of “human being” that is neither referring to a natural state, nor to a historically developed entity (such as “a comity of nations”). This rules out the strong anthropological sense of “praxis”, as if its constituents had the character of an unchangeable universal nature. Similarly, it qualifies the institutionalist notion of “rights” as not reducible neither to “the rights of an Englishman” (or any other nation with legal institutions) nor to the positive international law of cosmopolitan rights. In its most general expression, it is perhaps best expressed in the regulative idea of humanity.

Arendt’s point in referring to “praxis” is not to determine anything like an attributive feature of the essential nature of Man. The point is not to grounding human dignity in the “unnatural” character of the political and speaking human being, as if “political” and “speaking” were contingent attributes of man. Arendt does not speak of the rights of Man, but of the rights of *men*. The idea with “praxis” is rather, as I see it, to point out the kind of activity, or rather *mode* of activity, which actualizes the human condition of being together, i.e. of plurality. This leads us, as I see it, to a profound phenomenological insight. Menke points out that the foundational significance of praxis is to be found in the experience of the value of political existence, from an insiders’ perspective, in comparative relation to other experiences we have of human existence.⁵⁶⁵ I take this to be very precise, but to appreciate the point fully, I will establish the central phenomenological distinction in the next chapter.

The grounding function of comparing experiences also specifies the significance of Arendt’s interest for “*isonomia*”, which, analogous to the concept of “praxis”, has significance as an inspiring concept for rethinking the principle and mentality that answers to the condition of plurality. Since the right to have rights cannot be a “bestowed” or empirical right, like the rights

⁵⁶⁴ Arendt 1968, p. 293

⁵⁶⁵ Menke 2007, p. 754

of citizens or even of world-citizens in the positive, historical sense of subjective rights, Arendt must present some way to qualify the status of this right. And, since Arendt dismisses the possibility of natural rights (like the unbestowed subjective right), Menke's solution is to define "the one human right" as an articulation of what is right for human beings, rather than as individual right *claims*.

Although Menke's account clarifies Arendt's conception negatively by dissociating it from other traditional conceptions of right, I am critical to the implication he draws from it: that it is right for human beings to be members of a political community, grounded in "the experience that political membership is the true human condition".⁵⁶⁶ If we accept Menke's conclusion at face value, we find ourselves very quickly in a paternalistic version of the conventional reading. It relies on the contingent claim to have discovered what is good or right for all human beings in the modern state (or some historical equivalent). And, even if we do accept that there are certain general conditions to a good life that can be qualified and agreed upon (such as environment, food, moderate rates of homicide, etc.), what is meant by a "political community" in this context and how is it nuanced from a "home" is unclear.

In contrast, I think that Arendt's concept of the political is primarily attitudinal,⁵⁶⁷ implying that (proto-)political actions can happen anywhere there is a "home", and a home is not necessarily an organized polis or nation, it could also be a class room, a spontaneous revolutionary assembly, a secret community or a diaspora. As I've suggested by the notion of the proto-political, Arendt's concept of the political is not located on the institutional level. By "attitudinal" I understand the "the political" as a mentality, guided by a principle grounded in the *arabé* of action; i.e. in the condition of plurality. This principle can be given content on several levels. On the level of the insiders' experience (or the lived experience) it is given expression in the way we appear to each other, primarily as individual types. On the level of imaginaries, this mentality is given expression in the way we imagine the social and institutional context of concrete interactions. On the conceptual level it is articulated as regulative ideas and general norms. I'll explicate these levels in broader detail in chapter 8.

Conclusion

The problem of statelessness presents us, according to Arendt, with an apparent *aporia* of human rights. When we are most in need of guarantees that rests on our membership in humanity, the human rights fail to provide this protection. From the perspective of the "eighteenth century categories" (of individual, civil rights) the problem that statelessness leads to rightlessness seems

⁵⁶⁶ Menke 2007, p. 755

⁵⁶⁷ Benhabib 2000, p. 139: Attitudinal reading of "action".

insolvable. Arendt does however not accept this aporetic diagnosis as the final word. She seeks to base a new conception of human dignity in the human condition of plurality, which requires a framework of action and speech, i.e. a “home”.

In this chapter I’ve discussed the conventional reading of Arendt’s ‘right to have rights’. This reading is characterized by taking Arendt’s solution – the articulation of the right to have rights – as a cosmopolitan right to citizenship, which implies an emphasis on the institutionalist aspects of Arendt’s work. It recognizes the necessity of institutional protection of the public space, and defends this institutionalist emphasis by criticizing Arendt’s appeal to the agonal aspects of *praxis* and topical public spaces as essentialist and exceptional. Sympathetic readers of Arendt, such as Habermas and Benhabib, tend to leave these aspects to the side and embrace the aspects that better suit their own agenda.

Further, the problem of non-recognition presents Arendt, according to some of her critics, with a fundamental critique that might lead to a wholesale rejection of her position. According to this critique, the aporia of human rights (i.e. that they are inapplicable when needed the most) is not solved by de-emphasizing the agonistic and performative aspects of Arendt’s appeal to *praxis*. According to this less sympathetic reading, such as Rancière’s, the favoring of the communicative and narrative aspects – which are well-suited to an established institutional context – risks contributing to the excluding order that led to this apparently unsolvable problem in the first place. To the contrary, the performative aspects are exactly the core of political actions, which according to Rancière, is missing in Arendt’s account. But, as I argue in my discussion of Benhabib’s reading of Arendt, these are exactly the aspects that are filtered out in the conventional reading of her position. If anything, the problem of non-recognition reveals a weakness of the conventional reading; it operates with a notion of political action that excludes the capacity to contest the political order and establish new publics from *outside* “the political”.

My proto-political reading of Arendt seeks to loosen this close connection between citizenship and political action. One way to do this is to insist that the distinction between domestic rights and cosmopolitan rights articulates complementary constraints of the state. This point makes the conception of the public sphere more malleable and less “bounded” or “closed” because it recognizes the need for protecting spontaneously emerging public outside the conventional domestic sphere. Cosmopolitan rights imply an obligation to protect political actions that are not already protected or enabled by citizen rights. More fundamentally, if we read the right to have rights, reflected in the wider notion of “home”, as a general right to appear, it becomes clear that the cosmopolitan right to political membership is but a partial articulation of the protection required by this wider framework.

To qualify the phenomenological point of grounding principles in experience, we have to consider this phenomenological approach more carefully. This is what I will do in the next chapter (chapter 7). I aim to show that this approach can be defended, if we read Arendt's understanding of *praxis* as a normative term. In the following chapter I will argue that this normative aspect comes to expression in Arendt's work on two distinct levels: First, the communicative activity of action and speech is compared to other human activities associated with survival and production. On this level, action and speech (i.e. *praxis*) is rendered the most human activity in terms of the degree to which it relies on being with others. Second, on the level of mentalities, the principles that spring from the experience of action are judged in comparison with other general human experiences and condition in terms of their adequacy as political principles. The principle of meaningfulness is not simply found preferable 'in itself'. It *stands out* in comparative relation to how the other principles manifest themselves in actions, institutions and governmental forms. In other words, the political mentality (guided by the principle of meaningfulness) is found preferable due to its ability to provide a thoughtful concern for the sustenance of plurality, the condition of action and speech, and hence to protect and preserve the proto-political public space. The right to have rights is Arendt's central articulation of this principle.

If we accept the interpretation of Arendt's right to have rights as a basic human right, or rather as a right to humanity, the basic injustice toward the refugees is not that we deprive them of something that we have, namely state membership. What we actually fail to provide is a social context where we are, to each other, not merely "Norwegians" and "foreigners", but co-humans.⁵⁶⁸ Hence, what we violate in the case of the stateless or the long-term encamped is not primarily some specific individual rights, whether they are the rights of citizens or foreigners. What is violated is the humanity that we are all presumably members of. Both those subjected to inhumane exclusion and the inhumane excluders, lose their membership in the violation. Only when this basic right to humanity is recognized should we consider how to protect this primary belonging by "further rights".

To give content to this "further rights" I still find Kant's threefold distinction of public right relevant, and hence the protection could be provided in the form of both domestic rights and cosmopolitan rights. Further, I argue that the account of cosmopolitan rights should be extended beyond the content of both the cosmopolitan law of admission (including the law of second admission) to include the cosmopolitan law of deliberation.⁵⁶⁹

⁵⁶⁸ Menke 2016 (Zurück Zu Hanna Arendt – Die Flüchtlinge und Die Krise Der Menschenrechte)

⁵⁶⁹ See



Chapter 7: Hannah Arendt's non-instrumental notion of the political – a phenomenological reading

*"Every black child born in Mississippi
You know the poor child is born dead"*

J.B. Lenoir

In this chapter I will defend the view that Arendt presents us with a normative account of politics that is adequately grounded, although its primary purpose or source of legitimacy cannot be located outside the political activity itself. This must be understood, in my opinion both in light of the extraordinary wide notion of politics that Arendt uses, and the in light of the way she grounds its normativity. The purpose of politics is for Arendt not instrumental, hence it is not grounded on goals of the common wealth, the nation nor ultimately on the individual as an end in itself. It is rather, I argue, articulated in the new political principle of meaningfulness, which finds its expression primarily as the individual right to a framework that makes political interaction possible. "Politics for the sake of politics" implies therefore, in my reading of Arendt, that the state's primary obligation is to promote and protect the constitution and preservation of the political action and the space that makes this "motion" possible. The framework of action and speech is also indicated by the notion of home, as that which displaced persons must leave behind, and which they in an unjust and 'completely organized world' hardly find anywhere else. This framework is usually understood as "political" in so far as it is organized within the conventional perimeters of a modern state. As argued in chapter 6, the proto-political interpretation provides in my view a more open conception of the character of this framework because "politics" for Arendt includes the pre- or extra-institutional publics as well.

To establish the ground of the principle of meaningfulness, I aim in this chapter to elaborate on Arendt's notion of political activities according to my proto-political reading and defend the normative value of plurality, beyond its value as a description of pre-institutional public spaces or spaces of topical interaction. I will argue that the normative judgement that leads Arendt to the political principle of meaningfulness is phenomenologically informed. Simply put, this means that the typology of activities – labor, work and action – that Arendt presents in the *The Human Condition* should not be interpreted as categories that define "what" these activities are (their essential features, location, psychology, etc.). This would reduce this typology to a set of descriptive terms and leave any normative ranking among them as an expression of arbitrary preference. Rather, the typology refers to various ways of "how" an experiencing agent discloses aspects of its intentional object.

Correspondingly, the most relevant intentional object of Arendt's phenomenological analysis is not the activities per se, but the object *correlating with* these activities, which can in principle be anything – since these modes of disclosure are quite open. However, I think that if there is a clear line in Arendt's work, it is her concern with the human being and the way we appear to each other. In other words, the most relevant intentional object of these various modes of activities is “us” (in plural). This point is related to the normative grounding of the political in Arendt's thought for the following reason: The “political” is synonymous with the kind of activity that make us appear to each other as of human agents in plurality, and make us experience each other as “fully”⁵⁷⁰ human.

In her analysis of these activities, Arendt's thinking is primarily oriented toward various human practical, and not so much the contemplative, activities. This is widely held as a characteristic trait of Arendt's work. In this chapter I also nuance this picture by considering how Arendt's analysis of practical activities as the various modes of disclosure, finds parallels in her conception of ‘thinking’. Most importantly, there seems to be a close and consistent correlation in Arendt's work between her analysis of various mentalities (of *animal laborans*, *homo faber*, the political agent) and the various modes of contemplative activities she identifies (logic, cognition, thinking).

As noted, crucial to my argument is the idea that Arendt's analysis can, on the modes of practical human activities, be described as a phenomenologically informed analysis. These analyses are on one level almost purely conceptual. With affinity to ‘eidetic reductions’, Arendt explores the conceptual core of the main modes of human activities – labor, work and action – and determines the necessary moments that constitute their conceptual character as a specific type of activity and more importantly what sustains their quality as “human” activities. The central distinguishing criterion of the three types of activities, I explain, is their varying degree of constitutive dependency on the meaningful presence of others.⁵⁷¹

On the level of everyday life, this other-dependency seems trivially true. We are born and brought up by others, beginning in utter dependency. We learn a language and appropriate a social imaginary. In the tradition of western thought, however, this dependency on others is seen as an obstacle of objective knowledge and autonomous reasoning which must be escaped somehow by finding another secure ground. Arendt's thinking draws on the response of a phenomenologically

⁵⁷⁰ Which I read as closely related to the phenomenological terms of modal experience with normative significance, such as evidence, optimality, normality, familiarity, etc.

⁵⁷¹ It should be noted that the presence of others (as plurality) can be understood as a human condition both in the sense of the human way of life or state of affairs (such as acting together or communicating), and in the sense of a necessary condition, which makes it possible for us to appear as human. I will mainly use “condition” to refer to the latter.

informed transcendental philosophy (or in Heidegger's case: fundamental ontology) which understands intersubjectivity to be an unavoidable constitutive requirement for the self and a common, objective world. As Sophie Loidolt argues, what makes Arendt's thinking original is her understanding of this presence of others (*as someone unique*) to be closely linked to the human activity of action (and speech), and her interest in the way these activities actualize the "we" as composed of a plurality of co-present and unique accesses to the world.⁵⁷² I take this insight of Arendt's to have great implications for her evaluation of the adequate mentalities of both the contemplative and the practical life. I also agree with Loidolt that it expands her notion of the political far beyond the usual distinction between the private and the institutional public. It equals in many ways politics with genuine co-existence⁵⁷³, which – as I will discuss in more detail in chapter 8 – finds its distinct expression on the various levels of social life.

Experientially, the comparative optimality of the human activity of action and speech as most "human" relies on more than the physical presence of others. It also depends, as noted, on "how" further aspects the other are disclosed. Further, within the mode of action, Arendt makes another decisive distinction: Due to the narrative and agonal structure of action, and in particular its reliance on principles, the optimal mode of human appearance also depends on the mentality that guides our actions. Hence, to appear as "fully human" in Arendt's terms requires both the actual bodily presence of others, the mode of action and the proper mentality. In other words, to appear as 'unique beings in plurality' implies, in my reading of Arendt, a manifestation of certain principles. So, when Arendt speaks of basic human experiences of being among equals, she is not referring to the "naked" (i.e. purely sensual) presence of others, rather she refers to experiences of a life already embedded in concrete practices, mentalities and history.

On the level of mentalities, I argue, the paradigm of action and speech is relevant beyond the topical space of face-to-face interaction. Mentalities and their associated principles of action are also relevant to metatopical interaction as they might be given expression through different forms of government and social imaginaries. In this way the normative significance of the mode of action, and the fully human appearance, takes on relevance on both the theoretical and institutional level. To give examples of less preferable theoretical mentalities, I will refer to Arendt's critique of the solipsistic tendency of Heidegger's existentialism and the instrumentalist mentality of modern political thinking, initiated by Hobbes. In both cases, Arendt identifies

⁵⁷² See Loidolt, Sophie. 2016. "Hannah Arendt's Conception of Actualized Plurality." In *Phenomenology of Sociality: Discovering the We*, edited by Thomas Szanto, *Routledge Research in Phenomenology*, 42-55. New York: Routledge, Taylor & Francis Group. For her more developed account, recently published: ---. 2018. *Phenomenology of Plurality: Hannah Arendt on Political Intersubjectivity*, *Routledge Research in Phenomenology*. New York: Routledge, Taylor & Francis Group.

⁵⁷³ Similar to Aristotle distinction between genuine friendships, as distinct from friendship of pleasure and utility.

mentalities modelled by the mode of work (*poiesis*), rather than action (*praxis*). These mentalities are associated with the self-understanding of man as *homo faber*, a figure spanning from the secure foundation and mastery of the (social) engineer to the authentic way of being in poetic expression. In contrast to these mentalities, of which Arendt was highly critical, she sought out concepts and principles that better responds to the specific sociality of action, i.e. plurality. Her ambition was, as I understand it, not to reject the modern public sphere as such, but to re-conceptualize it according the proper mentality.

In short, I understand Arendt to develop a notion of “we” – more specifically as “a plurality of unique beings” – which reflects a basic human experience of interaction with equals and that represents (in its actualized form) the most precious of human conditions. From this experience Arendt develops – as I see it – a principle of action, the principle of meaningfulness, which informs a proper political way of acting and thinking. The mentality guided by this principle is then contrasted to solipsism and instrumental reason, such as political thinking based merely on the ideals of social engineering and measurements of utility. In this way Arendt both enables us to appreciate the basic character of the political community – both as a fact and as a human condition⁵⁷⁴ – that requires legal protection, and develops an original understanding of the principle that gives expression to a new, non-individualist conception of human dignity by giving us guidance on “how” to do politics.

7.1 Sociality as the central concept in Arendt’s thinking

As argued in the introduction of this chapter, I understand sociality (i.e. in the form of the condition of plurality and factual co-presence of others) to be a central, organizing concern in Arendt’s thinking. I hold it to be organizing in the sense that Arendt relates different types of activities and ways of thinking to sociality of plurality as the condition which make the activities *human*. That she provides sociality, or intersubjectivity, with central philosophical significance gives her thinking perhaps a closer affinity to Edmund Husserl than to Martin Heidegger.⁵⁷⁵ Ultimately, I think a full appreciation of Arendt’s notion of intersubjectivity will have implications both for the moral soundness of our practical judgments (moral epistemology) and the character of human dignity (moral anthropology). In this section I will initiate such a study by considering

⁵⁷⁴ According to Arendt, the condition of action (i.e. plurality) is both that which is constituted and sustained by action as a political human *condition* (in the sense of a factual lifeform of distinguished beings), and the *condition* (in the transcendental sense) of action as such.

⁵⁷⁵ A full comparative analysis of Arendt with Husserl and Heidegger is beyond the scope of this thesis. Loidolt’s work seems to indicate a support to this point. At least, reading Arendt in the company of the phenomenological tradition leaves her less alone than when reading her work in the company with existentialist like Heidegger and Sartre, which both have a rather pessimistic view on the significance of the other for one’s genuine self-experience.

the central role plurality plays in Arendt's conceptual analysis of the various practical experiential modes.

The central examples of the conceptual organizing function of 'sociality' is found in *The Human Condition*, where Arendt systematically organizes the threefold typology of human activities according to the social modes of the mass/loneliness, isolation/solitude and togetherness/plurality. These social modes in their experiential aspects are all carefully studied in Arendt's work. For instance, these modes correlate consistently with different layers of a common world, and a sense of self (or in the case of loneliness; the absence of both). I will spend most of the following section illuminating these aspects, but I will also briefly point out that a similar, parallel organization is found in Arendt's understanding of a threefold distinction of modes of thinking.⁵⁷⁶

7.1.1 Modes of action and mentalities

In *The Human Condition* Arendt distinguishes three modes of human activity of everyday life – *labor, work and action*.⁵⁷⁷ Each respective mode relies on its specific human condition – life, worldliness and plurality. In everyday life we might shift unnoticeably and dynamically from one mode to the next and will probably find ourselves engaged in hybrids of these ideal types at any given moment. Since Arendt's threefold distinction has been extensively criticized, it's important to stress that these modes are not, in my phenomenological interpretation, understood as straight forward empirical categories of say economic, sociological or psychological studies of behavior. Arendt's distinctions are organized, or so I argue, not from the "what" of these activities, including their attributes, location or the social pattern they generate as seen from an observer. Rather, they are organized by "how" each activity discloses oneself, others and the material environment from a first-person perspective.⁵⁷⁸ Hence, it is first when these activities are analyzed

⁵⁷⁶ Based on p. 170-171 (1958), where Arendt distinguishes thought from cognition, and the both from logical reasoning. Connected to "thoughtlessness", which for Arendt was associated with clichés and the complacent repetition of "truths"; a characteristic not only famously attributed to Eichmann, but also taken to be the "outstanding characteristic of our time" (Arendt 1958, p. 5). So, thoughtlessness is, as I see it, related to Arendt's general Socratic concern for a public where understanding and judgment is replaced with indoctrination, and words are used for fighting and has lost their quality of speech (p. 308, in Arendt 1994). Arendt also relates a threefold notion of thinking politics. Her general concern is that the distinction between understanding and knowledge is lost, but she also indicates a further possible degeneration of the public into a realm of totalitarian lawlessness, that only follow the logic of the laws of history or nature. (Arendt 1994, p. 339)

⁵⁷⁷ Benhabib (1996) discusses the different ways to interpret Arendt's distinction of human activities. She concludes that only an attitudinal reading can be defended to avoid essentialist consequences. These are not sociological terms; and they do not pretend to give normative prescriptions on how to behave in certain settings or areas.

⁵⁷⁸ This interpretation is inspired by Anne Granberg's reading, who distinguishes more clearly between modes of activities (as modes of disclosure; existentials) and human conditions (such as plurality), than other phenomenological readings of Arendt (such as Birmingham and Parekh). See Granberg, Anne. 2013. "Kategorier Eller Avdekkingsformer? Et Forsøk På En Nylesning (Og Forhåpentligvis Avklaring) Av Noen Av Arendts Grunnbegreper Og Distinksjoner." *Instituttets skriftserie (Bergensnettverket for kvinner i filosofi)* nr. 32: 63-94.

as modes⁵⁷⁹ – i.e. as distinct ways of *orienting oneself* in the world or *setting the problem* in a situation – that we might speak of them as distinct forms.

As experiential modes these activities represent three basic and fairly historically stable features of human existence, similar to the way equality, distinction and fear are basic experiences that finds expression in the remarkably stable variety of governmental forms. Yet, Arendt’s appreciation of Montesquieu’s notion of principle of action seems to be grounded in the way they are open for revision and renewal of these forms: in the worst thinkable case, as the possibility of totalitarian government; in the best case, as a form of government that gives expression to the experience of action and the human condition of plurality. Like forms of governments, the mentalities of the different activities give expressions to these modes in a relatively stable, but still historically alterable way. To Arendt the shift in emphasis from the mode of action (*praxis*) to the mode of work (*poiesis*) marks the broad lines of the western tradition of thought. The shifts or reversals of modes of activity also take a central place in Arendt’s historical diagnosis of modern political thinking. Since the Greeks, Arendt claims, philosophers have promoted the mentality of work (*homo faber*) at the expense of the mentality of action (political being). In the modern age of the mass society, it is even threatened by the mentality of labor (animal laborans) – or, rather the substitute for a mentality in ideology.

Contrary to the common critique of Arendt, which emphasizes her seemingly conservative distinctions between private and public, social and political, activities for the household and the public sphere, etc., the phenomenological reading that I am promoting takes interest primarily in locating the organizing principle of Arendt’s modal distinction. In the following I will suggest that it makes good sense to locate this principle in the optimal experience of the other as “fully human”. Although all three types of activity depends on the existence of contemporaries (the potential presence of others) to remain human, they vary to a high degree on how their performance depend on the direct presence of others.⁵⁸⁰ To emphasize this point, I will specify the character of this presence – beyond the merely bodily presence of the other – by drawing on the phenomenological terminology, so to specify: others might also be *co-presence* as subjects of their singular access to a common world.⁵⁸¹

⁵⁷⁹ Similar to the kind of modes or «cognitive styles» as Schutz puts it, which includes orientations such as wide-awakeness, dreaming and contemplation (which correlated to different virtualities or modes of the world). See p. 12, in Schutz, Alfred, and Thomas Luckmann. 1973. *The Structures of the Life-World*. 2 vols., Northwestern University Studies in Phenomenology & Existential Philosophy. Evanston Ill.: Northwestern University Press. Each style has its own way of explicating and altering the surrounding environment, and with its own specific form of sociality, self-experience and temporality. (Schutz and Luckmann 1973, p. 27)

⁵⁸⁰ Arendt 1958, p. 22-3

⁵⁸¹ Steinbock 1995, cf. Loidolt 2018.

To sketch out the levels briefly: Labor might be performed in the concrete bodily presence of others, but does not rely or reveal the *co*-presence of others as distinct subjects. The mode of labor correlates to the social mode of “the mass”, which leave each individual subject in the experiential state of “loneliness” unless assisted by the other modes. This social state of labor (considered alone) is therefore associated with the loss of self and the deterioration of a common world. The mode of work, according to Arendt, is best performed in “isolation” from the presence of others and in the experiential state of “solitude”. In general, the social state of work is associated with a functional sense of the self, as more or less useful, and the common world of artifacts. Hence, the mode of work does obviously not rely on the concrete presence of others, and is not able to disclose the distinctness of others beyond their functional merits. Only the mode of action relies on and at the same time reveals the *co*-presence of others. The social state of action is “togetherness”. As correlating to a performative event, “togetherness” can be seen as both a human condition, i.e. “plurality”, and as that which is revealed by action as its correlating object, i.e. as fully human or unique beings.

A central example of how Arendt can be read as a phenomenologist, is the way she discusses metaphysical distinctions (or the regional ontologies of experience) by emphasizing that which makes objects distinct, rather than identical or equal:

Otherness, it is true, is an important aspect of plurality, the reason why all our definitions are distinctions, why we are unable to say what anything is without distinguishing it from something else. Otherness in its most abstract form is found only in the sheer multiplication of inorganic objects, whereas all organic life already shown variations and distinctions, even between specimens of the same species. But only man can express this distinction and distinguish himself, and only he can communicate himself and not merely something – thirst or hunger, affection or hostility or fear. In man, otherness, which he shares with everything that is, and distinctness, which he shares with everything alive, becomes uniqueness, and human plurality is the paradoxical plurality of unique beings.⁵⁸²

I see in this quote the perspective of a thinker that is concerned with more or less making the same distinctions as Husserl was in *Ideas II*.⁵⁸³ Hence, the three level of distinctness (or lack thereof) associated with the modes of labor, work and action is located in a larger formal map of “otherness”⁵⁸⁴. It is an ontological map that follows the typical experience from the material region of all spatio-temporal objects, through the animalistic region of organic specimens [*animal*

⁵⁸² Arendt 1958, p. 176

⁵⁸³ See Husserl, Edmund. 1989. *Ideas Pertaining to a Pure Phenomenology and to a Phenomenological Philosophy - Second Book: Studies in the Phenomenology of Constitution*. Translated by R. and Schuwer Rojcewicz, A. . Dordrecht, The Netherlands: Kluwer Academic Publisher., and perhaps especially supplements IV and XIII.

⁵⁸⁴ I understand Arendt’s use of «otherness» here to be close to the use of ‘Great kinds’ in Plato’s *Sophist*, where “the Stranger” proposes “difference” as one of five great kinds to organize other kinds or forms. They represent in a sense a grammar of metaphysics (i.e as formal analysis).

laborans], to the kind of objects that distinguishes themselves, either indirectly through objects made [*homo faber*] or directly through meaningful action [*biographical subjects; political beings*].

The “political” is closely related to this capacity to actively distinguish oneself through action, and not the least the concern for this “how”. Legally, this finds expression in the protection of the opportunity to distinguish oneself. Yet, this capacity is clearly also central to Arendt’s understanding of what it means ultimately to be human and to be treated as one. The political implications of this point is perhaps not so clear in the original edition of *The Origins* (from 1951), but it is quite explicit in the central significance plurality, and its anti-thesis in loneliness, finds in the last chapter (which was added in 1958, in the second edition, the same year *the HC* was first published). Here in this last chapter, we find the significance of plurality expressed in its negation: the sociality of “loneliness” was identified as the basic experience that found its political expression in totalitarianism as a new form of government.

The dehumanizing effect of loneliness is linked to the deprivation of human relations and its corresponding consequences for our self-experience: “What makes loneliness so unbearable is the loss of one’s own self which can be realized in solitude, but confirmed in its identity only by the trusting and trustworthy company of my equals.”⁵⁸⁵ This loss of self, and the corresponding loss of a sense of reality, is the extreme consequence of being deprived of the human condition of plurality. Loneliness corresponds to the permanent loss of a home and the implied “social death” associated with the incapacity to establish proper relations with others: “A life without speech and without action [...] is literary dead to the world; it has ceased to be a human life because it is no longer lived among men.”⁵⁸⁶

Arendt’s point here is not primarily based on sociological or psychological studies, but relies on experiential analysis of the human activities and is given expression in a formal, threefold conceptual distinction⁵⁸⁷: “All human activities are conditioned by the fact that men live together, but it is only action that cannot even be *imagined* outside the society of men.”⁵⁸⁸ To use of “imagine” is an interpretative cue to a phenomenological reading here. Plurality is an essential feature of action as a mode of activity, in the sense that we couldn’t conceptually imagine action

⁵⁸⁵ Arendt 1968, p. 477

⁵⁸⁶ Arendt 1958, p. 176

⁵⁸⁷ Arendt’s conceptual analysis of the human activities is very similar to an “eidetic reduction”, where the integrity of a concept is tested by an imaginary variation of possible cases to determine its essential features. A sign of the loss of conceptual integrity is the “unimaginable” case. This conceptual analysis should not lead us to think of Arendt’s approach as merely formal in character. The phenomenal or material features of Arendt’s thinking is perhaps most clear in her critique of ideology and the emphasis on the significance of basic experiences and the historic events of birth and death. These features point toward topics more relevant to generative analysis, which had been developed but systematically by both Heidegger and Husserl.

⁵⁸⁸ Arendt 1958, p. 22, my emphasis

without plurality. In other words, if we imagine ‘action’ in a space of free variation, removing the condition of plurality would not only narrow the range of variation but simply cause the conceptual space to disintegrate. Hence, in this passage Arendt identifies – in my opinion – a limit to our conceptual imaginary which is very typical to the eidetic reduction in phenomenology.

In the following I will demonstrate in closer detail how Arendt’s typology of human activities is related to her threefold distinction of sociality and self-experience. As we seen, the mode of loneliness is associated with the loss of self and is defined by the incapacity to establish relations with others. In the mode of labor I might be social, according to Arendt, in the sense that I am in the physical presence of other individual bodies, and still be lonely in the sense of living in the absence of co-present others. Arendt sometimes refers to this state as “complete solitude”. In general however, the mode of *solitude* simply refers to a temporary absence of or isolation from others. This second mode is not univocally destructive. It enables for instance certain productive activities of excellence and contemplative, monastery modes of thoughtful withdrawal. In distinction from loneliness, I can at any time break the isolation of work and join the company of others. Togetherness, or *plurality*, refers to the direct presence of others in the specific mode of simultaneous distinctness (personal uniqueness) and equality. There is therefore a complex dynamic tension to the mode of togetherness that Arendt articulates as the paradoxical character of human community: a “plurality of unique beings”. It’s paradoxical I take it because being in the company of “equals” usually imply equivalence, whereas uniqueness implies the very lack of an equivalent. We might there for ask what is meant by equality in this context? (see chapter 8)

7.1.2 Labor

To dwell briefly on the types of activities that Arendt develops, I will begin with the mode of labor, which corresponds to the sociality of loneliness. Labor does not require more than the kind of distinctness that we share with “everything alive”. In satisfying our needs and reacting to basic desires, we are basically distinct variations within the same species. This mode is associated with the sociality of *loneliness* in two ways:

First, the character of labor does not require us to be able to establish proper relations with others: “The activity of labor does not need the presence of others, though a being laboring in complete solitude would not be human but an *animal laborans* in the word’s most literal significance.”⁵⁸⁹ A life in “complete solitude” might still be a life according to its conditions as mere life, but it is no longer a human life. Notice how Arendt makes a nuance here between the

⁵⁸⁹ Arendt 1958, p. 22

laboring animal as a deprived human condition (a lifeform), which taken in its literal sense is distinguished from “animal laborans” as the mentality of labor, which I’ll return to in the next section. It seems Arendt’s use of loneliness is closer related to the mentality of labor, then to the kind of momentary self-loss associated with the mode of labor.

Second, the laboring activity is associated with the mode of appearing as “the same”, or as a mere specimen of the same species, i.e. *Homo Sapiens*. For instance, Arendt reminds us that in the Greek context the household was designated as the proper private sphere of this type of activity. “[...] Man existed in this sphere not as truly human but only as a specimen”⁵⁹⁰ “Sameness” is a kind of equality that we have as specimens, independently of a legal or proto-political framework. The human condition of life is in this sense clearly part of what makes us “equal” in an anthropological sense, but – and crucial to Arendt’s ambition to establish a new guarantee for human dignity – this equality would not serve as a guarantee against loneliness (or totalitarianism).

This indicates why Arendt is worried about the abstract character of human rights and their grounding in human nature. The experience of “sameness” is reflected in a mentality of labor that reduces men to specimens, entitled to a specific category of animal rights. We might agree with the animal rights movement that all living organisms (or at least the sentient ones) should have certain rights and recognize their inherent value on the ground of this basic experience. Arendt’s point is that this would not be enough for human beings, if the ultimate goal is to secure their opportunity to distinguish themselves.

As a mode of activity, the biological sameness of labor inflicts loneliness, unlike temporary solitude, with an experiential loss of self. Under the right conditions, this loss of self can be provoked as a collective state of mind, as ‘being one’ or ‘a mass’:

The sameness prevailing in a society resting on labor and consumption and expressed in its conformity is intimately connected with the somatic experience of laboring together, where the biological rhythm of labor unites the group of laborers to the point that each feel that he is no longer an individual but actually one with all others.⁵⁹¹

In this phenomenological description of labor, Arendt compares the homogenizing effect of labor with marching and the sense of becoming one with the group.⁵⁹² She also tends to think of

⁵⁹⁰ Arendt 1958, p. 46

⁵⁹¹ Ibid., p. 214

⁵⁹² This is a well-known psychological effect, which is reported in states induced both by certain kinds of activities and the intake of psychedelic drugs See Haidt, Jonathan. 2012. *The Righteous Mind: Why Good People Are Divided by Politics and Religion*. 1st ed. New York: Pantheon Books. Haidt describes it as a psychological function which he calls the “Hive-switch”, alluding to the sense of sameness and collectivity of a bee-hive.

sympathy (or pity)⁵⁹³ as a boundless and consequently indiscriminating sense of the sociality of the mass.

7.1.3 Work

The second type of activity that Arendt distinguishes is “work”, which refers to the productive activities that make artificial things that are durable and represents a break with nature’s cycle. It answers to the human condition of “worldliness”, that is, we are not only depending on the material in order to sustain our life, but also to make stuff and build a common cultural world that may last through generations.

To be clear, the “world of things” cannot be reduced to simple actuality. It has a certain cognitive depth which is lacking in labor. Central to Arendt’s definition of work is that it is performed and interpreted under the guidance of a model – a shape or a form. This point is central to the parallel Arendt draws between the practical mode of work and the contemplative mode of cognition. Cognition (or, as I will add, imagination) are distinct from “logic” and “thinking” in that it is oriented toward objects that have (at least potentially) an ostensive index. Similar to the Greek notion of idea [*eidōs*] – which was primarily associated with the activity of work [*poiesis*] –, cognition operate with models that can be actualized (or, like in memory, have been actual at some point). These models is understood both to precede and survive (i.e. transcend) the object that is constructed. Such models rely on a linguistically constructed world, which – at least indirectly – indicates a reliance on other people. Hence, cognition also shares with work a similar sociality, in the sense that cultural artifacts and ideas imply an indirect dependency on others.

Compared to the sociality of action, Arendt notes early in HC that we can imagine a world where man “working and fabricating and building a world inhabited only by himself would still be a fabricator”.⁵⁹⁴ In other words, the concept of “work” does not disintegrate in the same manner as “action” when deprived of plurality. It is not unimaginable without it. However, she is also clear on the fact that man in this imagined situation would have lost his human qualities. Here as well, Arendt is careful to point out that the condition of worldliness is not enough to live as fully human.

7.1.4 Action

As the third and last type of activity, “action” refers to communicative activities, including speech, which allows us to appear as distinct persons and weave/spin the web of human

⁵⁹³ Arendt does not however develop a psychological (individualistic, genetic) account of empathy, like Husserl and other phenomenologist do. Arendt’s emphasis on the political or historical level (social, generative) might call for interesting studies that elaborate on their differences and possible mutually informing relation.

⁵⁹⁴ Arendt 1958, p.22

relationships through stories. The human condition of action is a social mode. It actualizes “togetherness” through its performance, and relies at the same time on this concrete state of togetherness as its condition, i.e. *plurality*. This co-dependency might sound unusual, but makes sense when we consider the peculiar temporality of action: In a thin sense, even the trade and barter of the marketplace have this character. But action, unlike work, has no end-product. Like the performance of an act or a piece of music, like the actuality of the drama, the melody, etc., the “end” of action is in its performance. In the case of action, the actuality in question is of the agent and her intentions and opinions; of her story.⁵⁹⁵

Further, the outcome of human action is highly unpredictable. Since I depend on others for myself to be actualized, my actuality is hardly my own achievement. In contrast to the achievement of the isolated master, the power of action – the potential of public appearance – is irreducibly relational: “[...] the strength of the beginner and leader shows itself only in his initiative and the risk he takes, not in the actual achievement.”⁵⁹⁶ That is, an actor can only *initiate* an action alone. It depends entirely on the unpredictable response of co-present others for its outcome.

Although Arendt, in a phenomenological reading, situates her analysis from a first-person perspective, it is clear that it is not always the subject itself that has the epistemological privilege when it comes to understanding “who” he or she is. Similar, the “meaning” of an act is not reducible to its psychological content for the agent. Hence, the achievement of an act is usually better grasped and narrated from the view of the storyteller. Arendt distinguishes in this sense the meaningfulness of an act (for the agent) from the meaningfulness of the story that follows (its common sense so to speak). It is in this sense similar to a consequentialist ethics; it sheds the individual intentions little importance. Arendt’s notion of action differs however crucially from this ethical notion of action, in the sense that the consequences of actions are highly unpredictable and hence not subjectable to ethical mastery. Arendt was highly critical to a utilitarian perspective on ethics (see also 7.3.2).

Arendt’s exploration of the sociality of action and speech, as togetherness or plurality, presents the distinctive features of action compared to the other human activities. We can divide this into three main moments. First, the public space – the proper framework for action – rests on a non-Weberian concept of power associated with *human appearance*, rather than physical or incentive

⁵⁹⁵ Arendt 1958, p. 206-7: “full actuality” and the end in itself.

⁵⁹⁶ *Ibid.*, p. 190

force. As mentioned earlier, according to Arendt “power” is what sustains the space of appearance.

Second, action is conceptually unimaginable without the co-presence of others. Isolated from this togetherness, we are simply deprived of the capacity to act: “Action and speech need the surrounding presence of others no less than fabrication needs the surrounding presence of nature for its material, and of a world in which to place the finished products.”⁵⁹⁷ In this quote, we see how Arendt uses “world” in a sense unfamiliar to natural science. The “world” is for Arendt the world of things, i.e. artifacts or natural objects (such as fruits), experienced in the depth of its practical significance to us. The mode of labor is in this sense “world-poor” to Arendt, because it does not depend on providing this cognitive depth, beyond what facilitates the satisfaction of certain drives. In a similar comparison, we could – with Arendt – that the performative act must be “placed in a world”, which Arendt calls “the web of relationships”. This social context or situation shed a specific light on our body or lend a special ear to the sound of our voice. This light is not simply daylight, but it might in an analogue fashion to the experience of color be said to present the object of experience under optimal conditions. There’s an irreducible concreteness to our dependency of other’s co-presence, just like the way making a common cultural world of objects depend on the concreteness of matter.

Third, action is the constitutive activity of the realm of human affairs, the common world of political life, described as “the web of relationships”⁵⁹⁸. As Arendt articulates it, it is as if the world of things (the objective in-between) is “overgrown” or that it hosts an augmented reality. This reality of human affairs can be phenomenologically described as a conceptual depth to the things constituted by deeds and words. This subjective *in-between* is the intangible reality which Arendt calls the “web of human relationships”. This web is structured by stories and “populated” by persons with unique biographies.

Since action and speech constitutes a conceptual depth to reality, this mode is – unlike the other modes of activities – irreducibly marked by a certain mentality. A “mentality” is perhaps best understood as certain orientations – guided by certain principles – in the overgrown or

⁵⁹⁷ Ibid., p. 188

⁵⁹⁸ Is the web a horizon or a collective? This question anticipates the distinction made in chapter 8 between contemporaries and collectives. Partly I think Schutz is right to think of collectives mainly as a horizontal indication, which in some cases are simply irreducible to individual types, but can be given manifestations through the actions of individual types. But, partly the web is also the horizon itself in the generative sense of a pre-given world, existing before we were born. In this manner I think Birmingham is right to speak of the web of relationships as a kind of cultural givenness (p. 93 ff, one we shouldn’t deny) or *pregiveness* (see Steinbock, Anthony J. 1995. *Home and Beyond : Generative Phenomenology after Husserl*, Northwestern University Studies in Phenomenology and Existential Philosophy. Evanston, Ill.: Northwestern University Press.).

augmented world of human activities. Unlike action, the modes of labor and work are not accompanied by a mentality. Mentalities are narratively structured and might frame the activities of labor and work in different ways according to the orientation. Consequently, one can not only perform a certain activity in the mode of labor, but one may also act in the mode of action *guided* by principle of comfort, that is, according to the mentality of *animal laborans*. In the same way, one can perform a certain activity in the mode of work, but also act as guided by the principle of usefulness, according to the mentality of *homo faber*.

Because of their narrative structure, actions are guided by “principles of action”. This is why actions can also be guided by the conceptual modelling of the activity of work. We may act and speak *as if* these activities had the same character as work led by a projected end. The activity of work is understood as driven by the specific and concrete cognitive motives (or ideas). We work “in-order-to” achieve some end; to actualize some model. In contrast, Arendt understand the actual moving element of action as “for-the-sake-of” some principle. In other words, to conceive ideas as motives of action and speech requires a certain conversion (or modelling) of such cognitive motives into principles. This is possible, according to Arendt, because principles of action may correspond to basic experiences that reflect stable human conditions (including life and worldliness, associated with labor and work).⁵⁹⁹ In the case of totalitarianism, the basic experience of loneliness is given expression in the (mis-)guidance of ideology (as a substitute for a real principle).

Playing with the plural meaning of the Greek word *arche*, Arendt connects ‘principle’ both to beginning and to a common ground. Like other ideal objects, principles of action in general depend on manifestations; which Arendt understands to be “actions” in her specific sense of the term:

To act, in its most general sense, means to take initiative, to begin (as the Greek word *archein*, “to begin,” “to lead,” and eventually “to rule,” indicates), to set something into motion (which is the original meaning of the Latin *agere*). Because they are *initium*, newcomers and beginners by virtue of birth, men take initiative, are prompted into action.⁶⁰⁰

Through actions the principles are set into motion and brought to life, but never fully realized or actualized. Principles can be repeated inexhaustibly (which, like iterations, give ideal objects a character of atemporality and metatopicality), but are still at the same time embedded in history and the artificial world of linguistic reasoning and virtual memory (artifacts, books, archives, etc.).

⁵⁹⁹ See 6.3.2

⁶⁰⁰ Arendt 1958, p. 177

So far, Arendt's understanding of principles seems to comply with Kant's notion of the "supersensible", as the difference between "sensible" concepts of understanding (cognitions; images; regulative ideas) and concepts of reason (principles).⁶⁰¹ They make everyday life meaningful, but are disclosed as such only in rare moments of historical significance.⁶⁰²

Although there are clear influences of and affinities to Kant's understanding of principles in Arendt's thinking, there are a few possible conflicts that are worth noting:

First, Kant's position seems to hold that there is a divide between metaphysical and empirical enquiries, i.e. of form (*noumena*) and content (*phenomena*). For instance, as considered in chapter 2, the concepts of reason related to moral norms can be analyzed in a purely formal manner. In contrast, Arendt draws on a phenomenological and existential tradition that rejects the idea of purely transcendental a priori. For Arendt, principles are always historically embedded and cannot be completely detached from their content (or basic experiences). Although it can be argued that Kant could agree to this – at least to the extent that the changing circumstances and content given to these principles may alter our understanding of them –, it seems less likely that Kant would be open to radical revisions of the metaphysical framework, say for instance to revision of the innate right to humanity or the principle of justice. But, as discussed in chapter 6, such revisions are exactly what Arendt's ambition of a new political principle implies. Hence, Arendt is more open to the historical possibility, and sometimes moral necessity, of altering even the conceptual framework. This implies also seeking out new ways to conceptualize the basic notions of human dignity and political principles of action.

Second, the rejection of the pure transcendental a priori is motivated by the basic organic phenomenological assumption that the form is constituted by the organic relational synthesis of a unity in a manifold content. On the level of perception this implies an interpreting activity of the perceiver to constitute "laws" of experience in a more open and dynamic manner than the Kantian account would allow.⁶⁰³ On the level of constituting and judging principles of action this is obviously a much more complex process, but the basic genetic assumption remains relevant: principles are constituted by and develop in relation to the manifold of their manifestations. New experiences or circumstances might call for the constitution of new principles, and not just the

⁶⁰¹ Concepts of understanding are for Kant still reducible to examples with a phenomenal content, whereas concepts of reason or principles are supersensible in the stricter sense that they are irreducible to such "sensible" content, but can still be giving living illustrations or manifestations.

⁶⁰² Arendt 1958, p. 42

⁶⁰³ Miettinen, Timo 2013. "The Idea of Europe in Husserl's Phenomenology : A Study in Generativity and Historicity." University of Helsinki.

extended content of law. It might, for instance, be the case that certain horrific experiences actualizes the protection of certain human conditions, previously taken for granted.

Further, this grounding has implications for the way the principles are identified. Whereas Kant seems satisfied by relying on a set of basic ontological distinction to formulate the conceptual framework of cosmopolitan moral-legal norms, Arendt's conceptual analysis relies on a normative verticality of competing modalities and principles – guided by the optimality of appearing as fully human – to be able to make a judgement on the preferred principles of action. In this sense principles are, for Arendt, always preferred in relative approximation to the optimal in comparison to a manifold of competing principles.⁶⁰⁴

Since actions are always entangled in an interactive web of relations, their outcomes are highly unpredictable. And, since they might initiate new beginnings, even of an uncanny character like the totalitarian projects, we need to be prepared for experiences never before encountered. This is a moral-existential challenge, given that new historical experiences are always interpreted in relation to the (pregiven) laws and principles constituted by previous experiences. The normality of our pre-given principles is not only given as the optimal preference of a set of competing principles, but are also “normal” in the sense of a common ground, which is taken for granted and integrated into our social imaginaries of everyday life. Positive laws are, to Arendt, a central part of this common ground: “they guarantee the pre-existence of a common world, the reality of some continuity which transcends the individual life span of each generation, absorbs all new origins and is nourished by them.”⁶⁰⁵ Hence, approximations toward the optimal principles are always situated in a pre-given, normal lifeworld, and will unavoidably be colored by this. As such, the approximated principles might also be misguided and criticized.

In the case of the totalitarian projects, this is exactly what Arendt sets out to do. These projects might share some of Arendt's pessimistic view on a decadent and decaying modern society. Their corresponding preference of principles of action was, however, – and independent of the correctness of the diagnosis – completely misguided in Arendt's opinion. The crucial point in Arendt's perspective was not that the project invented new political principles, but that these principles answered to aspects of the human condition which were anti-political. As such, their actual implementation actively undermined the political conditions of action and speech; of history and lawfulness. This undermining was “thoughtless” and “banal” to Arendt. Partly, I take it because the totalitarian mentality was negligent to the political conditions as such, and partly

⁶⁰⁴ See Steinbock 1995 for theoretical framework on competing norms.

⁶⁰⁵ Arendt 1968, p. 465

because horrific and calculated experiments in dehumanization carried out by the totalitarian regimes were guided – not by truth – but by the simplest ideologies and their logical force of non-contradiction. If you accepted the basic idea of the struggle of classes or the struggle of races, Arendt observes warningly, the path was already laid out – with no room for the hesitations and interruptions associated with thinking or the capacity to begin something new.

As can be noticed, there is a self-referential structure inherent to Arendt’s argument, where Arendt’s critique of competing principles relies on the requirement that principles of action should answer to the conditions of action. If not, these principles take on a self-undermining (anti-political) or self-neglecting (a-political) character.

7.1.5 The sociality of thinking

Although Arendt is mostly known for her contribution to a philosophy of action that confronts the intellectualist and monastic mode of thinking, she should not be read as a political theorist that wants us to stop thinking. Rather, Arendt urges us to think in a way responsible to the co-presence of others.

To separate the practical and contemplative concerns distinctly, it is helpful to note that Arendt sometimes refers to “thinking” as the kind of activity that withdraws from the presence of others, and instead relies on the kind of cognition and images that she associates with the social mode of work, i.e. isolation or solitude.

[Thinking] always deals with objects that are absent, removed from direct sense perception. An object of thought is always a re-presentation, that is, something or somebody that is actually absent and present only to the mind which, by virtue of imagination, can make it present in the form of an image.⁶⁰⁶

This creates an interesting practical conflict in Arendt’s conception, since proper thinking, like excellent work, relies on solitude: “[T]o think about somebody who is present implies removing ourselves surreptitiously from his company and acting as though he were no longer there.”⁶⁰⁷ I take this temporary withdrawal to be a conspicuous feature of the ability of taking the position of others, associated with the notion of “enlarged thought” (or in general impartiality) and the second maxim of Kant’s notion of common sense.⁶⁰⁸

⁶⁰⁶ Arendt 1971, p. 423

⁶⁰⁷ Ibid., p. 424

⁶⁰⁸ In her later work Arendt draws on Kant’s *Critique of Judgment* to make this point even clearer. In the §40 on “the maxims of common sense” [*Maximen des gemeinen Menschenverstandes*], Arendt emphasizes particularly the political significance of the second maxim. The three maxims are:

- 1) Think for yourself (Selbstdenken, Maxime der vorurteilfreien).
- 2) To think from the position of every other. (An der Stelle jedes andern denken, Maxime der erweiterten.)

Thoughtful actions in the presence of others seem to rely on a reflective process, where the change of social mode and cognitive attitude is able to shift frequently and effortlessly. I might start off with a very clear idea of the situation, whereas interaction with others might lead me to pause and try to put myself in the perspectives of my fellows and adjust my own idea accordingly. In everyday life the implied social withdrawal of thinking might not even be noticeable, unless we are “caught” by it:

For thinking’s chief characteristics is that it interrupts all doing, all ordinary activities no matter what they happen to be. [...] the moment we start thinking on no matter what issue we stop everything else, and this everything else, again whatever it may happen to be [within “being among my fellow-men”], interrupts the thinking process; it is as though we moved into a different world.⁶⁰⁹

This interruption might also take on a mode closer to the first of Kant’s maxims, namely to think for oneself. As a type of the contemplative activities, thinking for oneself has a peculiar character of sociality: Since it presupposes a withdrawal it is left only with the possibility of communicating in a twosome dialogue between “me and myself”. Although not all of us find it attractive to seek solitude in a cabin at the deepest end of the longest Norwegian fjord, we should (as philosophers) be familiar with this mode, for whom the duality and equivocality of thought in solitude is our “way of life and a condition of work”.⁶¹⁰ This twosome dialogue cannot, however, stand on its own. Beyond logical consistency “my” perspective relies on the ‘company of my equals’ to be confirmed and unified as one:

The problem of solitude is that this two-in-one needs the others in order to become one again: one unchangeable individual whose identity can never be mistaken for that of any other. For the confirmation of my identity I depend entirely upon other people; and it is the great saving grace of companionship for solitary men that it makes them “whole” again [...].⁶¹¹

What is at stake is not so much limited to moral concerns of a clear and unified conscience,⁶¹² as it concerns the integrity of the very moments (i.e. dependent parts) of being human: the self and the world. This becomes painstakingly clear in the state of loneliness, the negation of the company of equals: “In this situation, man loses trust in himself as the partner of his thought and

3) To always to think in concordance with oneself. (Maxime der konsequenten Denkungsart).

To take the position of others enlarges the mind and makes us able to take general or decentralized positions.

⁶⁰⁹ Arendt 1971, p. 423

⁶¹⁰ Arendt 1968, p. 476

⁶¹¹ Ibid., p. 476

⁶¹² As Benhabib seems to read «Moral and thinking» (Benhabib 1992, p. 138), see also discussion in 9.1 and 9.2.1.

that elementary confidence in the world which is necessary to make experience at all. Self and world, capacity for thought and experience are lost at the same time.”⁶¹³

Hence, unlike logical inferences, which rely merely on self-consistency (or concordance) – thinking still requires the co-presence of others to gain a proper sense of objectivity and reality. We might say that, in the same way as the shoemaker anticipates a costumer, the inner dialogue anticipates true communication and have, as conscience, the capacity to respond to the co-presence of others. To act thoughtfully could therefore be said to relate to a kind of thinking which, in its doubt, anticipates the other’s point of view and that manifests a mentality which seeks to answer to this anticipated presence of others, not as mere bodies but as simultaneously present persons.

Our “habits of thought” are certainly convenient in our interaction with others in the sense that we depend upon prejudices and expectations not to be caught in surprise and thoughtful withdrawal at every turning corner of a social situation. But, the lack of social interruptions, according to Arendt, also bears witness of an irresponsible mentality:

Clichés, stock phrases, adherence to conventional, standardized codes of expression and conduct have the socially recognized function of protecting us against reality, that is, against the claim on our thinking attention which all events and facts arouse by virtue of their existence. If we were responsive to this claim all the time, we would be exhausted; the difference in Eichmann⁶¹⁴ was only that he clearly knew of no such claim at all.⁶¹⁵

This is the extreme case of thoughtlessness for Arendt. Eichmann’s declaration of a clear consciousness was morally absurd to Arendt, and a manifestation of the superficiality or “banality” of evil. His clear consciousness expressed to Arendt, it seems, the lack of the interruption of thought, of doubt and hesitation about the rightfulness of his actions. Arendt’s critique of the universal declaration of human rights, after WW2 and Holocaust, follows a similar line in the sense that it expressed the desire for restoring the world as if no interruption had taken place. Hence, Arendt accuses the declaration for a similar *superficiality*, since it reflects old habits of thought and adherence to conventional codes proven inadequate to the task at hand. To remain ‘uninterrupted’ at such a disastrous turn of the shared historical situation (of *one* global world) seems utterly irresponsible.

⁶¹³ Arendt 1968, p. 477

⁶¹⁴ Adolf Eichmann was of course one of the major organizers of Holocaust and responsible for the efficient deportation of Jews to the extermination camps. In 1960, he was captured in Argentina by Mossad and sentenced to death for war crimes in a trial Arendt famously gave her controversial report to the New Yorker, later published as “Eichmann in Jerusalem”. Arendt, Hannah. 2006. *Eichmann in Jerusalem : A Report on the Banality of Evil*, Penguin Classics. New York, N.Y.: Penguin Books.[1963]

⁶¹⁵ Arendt 1971, p. 418

Obviously, the declaration of human rights expresses, unlike Eichmann, a deep moral concern for the events. The similarity lies in the shared inability or lack of courage to actually rethink our basic principles without the old doctrines as bannisters of our judgment. It is this courage to rethink that Arendt seems to require of her own thinking when encountering the experience of speechless wonder, which is this time not motivated by the beauty of the world (*theumazein*) (as for the old philosophers), but by its uncanny horror.

Arendt does not dismiss metaphysics or philosophy as such. She considered the acclaimed “death of metaphysics” in her time to imply, not “the death of the capacity to think”, but rather “the rejection of certain ways of thinking”.⁶¹⁶ At least in this text, Arendt is certainly critical to certain ways of thinking, including the individualist conception of human rights, but she is equally critical to the extreme positivist dismissal of metaphysics as such.

On this point she reveals her influence from Kant as she draws on his distinction between thinking and knowing, and appropriates it in a way that suggests a parallel to the distinction between action and work: “The activity of knowing is no less a world-building activity than the building of houses.”⁶¹⁷ Hence knowing (cognition; concepts of understanding) corresponds to the worldliness of work and the durability and stability of a common, regular world. We need knowledge to build a public and a home for human beings. Nevertheless, a further depth is required if this world is to be filled with a sense of moral soundness and meaning. To achieve this, Arendt appeals to a performative aspect of thinking which has similarities to the temporality of action and speech, and that aspires to conceptual entities (concepts of reason) that can be given expression and manifestations, but never exemplified and stabilized like knowledge in doctrines:

The inclination or the need to think, on the contrary [...] leaves nothing so tangible behind, nor can it be stilled by allegedly definite insights of “wise men”. The need to think can be satisfied only through thinking, and the thoughts which I had yesterday will be satisfying this need today only to the extent that I can think them anew.⁶¹⁸

Hence, the responsibility of thoughtful actions relies not on frozen moral doctrines, but on the re-iterations of yesterday’s thinking. This rejection of moral doctrines must be understood as consistent with Arendt’s distinction between knowledge and thinking corresponding to the distinction between motives (of cognition) and principles (of thought). As much as our everyday life relies on ready-made social recipes, we should also be open for the unpredictable

⁶¹⁶ Arendt 1971

⁶¹⁷ Ibid., p. 421

⁶¹⁸ Ibid., p. 421-422

interruptions at the turning of a social situation. This might even in rare cases reveal new political relevance of aspects of our common experience as human or sentient beings. Unlike rules and doctrines, the spirit of a principle is malleable and enables us to respond thoughtfully to cases which cannot easily be subsumed to ready-made recipes. This includes both responding to the rare events that make history, but also the way each of us are unique and begin the world anew.

To sum up the way I think it is plausible to organize Arendt’s concepts according to her phenomenology of plurality:

Human activities:	Labor	Work	Action
Condition	Life	Worldliness	Plurality
Project	Sustenance	Fabrication	Communication
Sociality	Mass/Loneliness	Isolation/ Solitude	Togetherness/Men in plural
Self-experience	Loss of self	Master/duality	Unique/in-one
Mentalities of			
Principle of action	Comfort	Usefulness	Meaningfulness
Contemplative activity	Logical deduction	Cognition of ideas	Thinking/judging (Sociality = isolation)
Contemplative capacity	Intelligence	Knowledge	Understanding

Figure 2: Tentative table of the human activities and mentalities

Since this table of concepts might give the impression of a complete systemic account of Arendt, it should be stressed that this table simplifies a multilayered and multi-contextual analysis. The main purpose of this systematization is to support the argument that the way Arendt uses these three terms is not coincidental. The modes of sociality are quite consistently ranked in Arendt’s work, *The Human Condition* in particular, and seem to organize the other categories of the table in terms of vertical hierarchies (which are oriented horizontally in the figure toward the right as the most preferable).

7.2 The principles of action as a necessary condition

Since actions are linguistic-narratively structured, they are also able to be inspired by – or performed “for the sake of” – more abstract reasons than other human activities. Arendt refers to these general, unspecified reasons as “principles of action”. And, given the character of thinking, action is consequently the only activity that requires us to think (in this specific sense). Based on the contrast Arendt makes between usefulness (in-order-to) and meaningfulness (for-

the-sake-of)⁶¹⁹, and the case that usefulness is the principle corresponding to the condition of worldliness, I've chosen to extend the line and call the principle corresponding to the condition of action 'the principle of meaningfulness'. It has a somewhat unattractive self-referential structure if we spell it out: "the principle of acting for the sake of principled action", we might also understand it as the principle of human agency or of human appearance.

I suggest that we understand the implied layers of reasons⁶²⁰ as a dimensional ladder of increasing experiential depth. In order to appear fully as human beings, it is not sufficient to act in the physical presence of others (perceptual depth), nor in their mediated representation as an image (depth of cognition or imaginary depth, including their functional value). We must also 'act thoughtfully', i.e. according to the right principles (symbolic or rational depth). The way we orient ourselves and define the situation is decisive for the way others appear to us and how we together are able to sustain the conditions of action. What Arendt calls 'apolitical' mentalities, are those that neglect the concern for the conditions of action, while 'anti-political' mentalities are those that are outright destructive and self-undermining of it.

7.2.1 Labor as mentality – the anti-political principle of comfort

The loss of self and the sociality of the mass are reflected in the *mentality* of labor, which is associated with the superficial indistinctness of consumption and the radical dehumanization of groups or individuals as "naked life". In her description of modern society, Arendt draws on the notion of "labor" to highlight some characteristic features of mass society. Most importantly, the rise of civil economy introduced the admission of "housekeeping activities" to the public realm. That is, the economy takes on a defining function for the community as an undifferentiated "common wealth". "This unitedness of many into one is basically anti-political; it is the very opposite of the togetherness prevailing in political and commercial communities [...]"⁶²¹

The problem, I take it, is not linked directly to the free market as a part of modern civil society, which Arendt views primarily as the apolitical public of work. The problem is that the human condition of labor, namely *life*, inspires a new model of politics based on "comfort" or "welfare" as the defining *purpose* of political co-existence. This mentality of labor is "anti-political" in Arendt's view, because it tends to see the community as an entity determined by natural laws and the sameness of the human species. It reduces politics to the bureaucratic regime of "pure

⁶¹⁹ Arendt 1958, p. 154

⁶²⁰ The notion of mentality makes more sense from the perspective of the historian (or the story-teller), than from the perspective of the agent or the psychologist. Principles of action may, however, be understood in both senses. I think Taylor's notion of social imaginaries captures the way principles of action can be part of everyday life in an exemplary manner. (see section 3.3)

⁶²¹ Arendt 1958, p. 214

administration”. No distinct voice could make a difference. The classical management of a refugee camp may serve as the paradigmatic example because it provides its residents with basic needs without much individual variation and distinctness beyond the biologically or medically defined differences of specimens.

In a mentality of labor, the human being takes on the self-understanding of a laboring animal (i.e. *animal laborans*) and turns life’s comfort into a principle of action. This has potentially disastrous consequences, because as a principle based on labor it is not fit to preserve the human conditions of action. Arendt loads the notion of “society” with these negative associations of the “communist fiction” of “one interest” and “one opinion”, thereby drawing a parallel to the notion of a completely organized humanity in the *Origins*, a possibility that is rather dystopic:

It is because this one-ness of man-kind is not fantasy and not even merely a scientific hypothesis, [...] that mass society, where man as a social animal rules supreme and where apparently the survival of the species could be guaranteed on a world-wide scale, can at the same time threaten humanity with extinction.⁶²²

The notion “social animal” must not here be confused with the human condition of the presence of others. It refers to a superficial and banal mentality where persons are reduced to members of a unified whole, and all distinctness and plurality is lost. The “extinction” of humanity does not refer to physiological undermining of life conditions, but to a *social* death, i.e. the deprivation of the condition of action associated with “humanity”. This finds its political expression in the totalitarian ambition to solve the old political dilemmas of the legal divides between domestic and foreign, and citizen and individual by simply abandoning them in the projected global and total rule.⁶²³ As an antithesis of the cosmopolitan order of Kant, it exceeds the imagination of a global tyranny.

The problem is that the mentality of labor ignores the peculiar character of political equality. The *sameness* of labor is more similar to our “equality before death” (as a part of natural life):

In these instances (of death – based on the sameness of our inherent nature), no equalizer is needed because sameness prevails anyhow; by the same token, however, the actual experience of this sameness, the experience of life and death, occurs not only in isolation but in utter loneliness, where no true communication, let alone association and community, is possible.⁶²⁴

Accordingly, the problem is not that the attitude of labor, which dominates in mass society, is irresponsive to the factual conditions of life. For good or worse, this has changed our world by

⁶²² Arendt 1958, p. 46

⁶²³ Arendt 1994

⁶²⁴ Arendt 1958, p. 215

producing an immense surplus. The problem is rather the one-sided attention given to life in this attitude as a “job-holder”. The mentality of labor becomes, so to speak, detached from labor understood as concrete private activities. Society is in this sense not merely a world filled with laborers and housewives, nor with activities of agriculture and housekeeping. The point is rather that they manifest a certain aspect of being human, which in modern mass society has been raised to a guiding principle in its public organization. This aspect is associated with the common experience of cyclical drives and needs, and their correlating repetitious activities. This common experience is expressed in the principle of comfort, corresponding to the condition of life.

7.2.2 Work as mentality – the a-political principle of utility

What characterizes the project of *homo faber* is control of the production process. Distinguished from the perishable urges and products of repetitious labor, fabrication can multiply an object somewhat detached from the urgencies of life. And, it does so from the guidance of a mental image that transcends in its permanence and oneness the multitude of objects made in its image.⁶²⁵

Even though Arendt holds that most work in the modern world is “performed in the mode of labor”⁶²⁶ (which I read as activities depending on a common world performed in a mode that does not depend on or appreciate this world)⁶²⁷, work has at least the potential of being carried out by somebody with a clear image of its end-product. This distinction captures a characteristic alienating effect of the modern consumerist society, where most of us rely on others to have the material and technological competence to produce the objects that we use and depend on. Hence, the mode of work relies on an insight in the construction of the world that remains unnecessary to the mode of labor. Arendt goes as far as claiming that labor does not require a common world at all, no knowledge is – strictly speaking – necessary merely to live. Unless we consider the extreme cases, this is of course a quite abstract way of describing modern mass society. If the veil of abstraction is lifted somewhat to include the company of equals in a society of craftsmen, the sociality of workers (unlike that of laborers) does not appear as anti-political. Although the mentality of consumption undoubtedly has a strong presence in our days, we still find traces of the mentality of work, which Arendt labels “*homo faber*”:

⁶²⁵ It was this aspect of making (*poiesis*) that inspired Plato’s doctrine of eternal ideas.

⁶²⁶ Arendt 1958, p. 141

⁶²⁷ I’m thinking here in particular on the motivation for doing the work as a motive of day-to-day subsistence, which includes both physically demanding work (industry) and emotional (service) work. One works to get paid, not to increase one’s understanding of the images and ideas involved in the process or ultimately to build a common world. One might of course also consider the work in assembly lines as materially inducing a mode of labor in its monotonous and repetitive manner of work.

Unlike the *animal laborans*, whose life is worldless and herdlike and who therefore is incapable of building or inhabiting a public, worldly realm, *homo faber* is fully capable of having a public realm of his own, even though it may not be a political realm, properly speaking.⁶²⁸

In other words, a practice guided by a mentality of work (*homo faber*) will not cancel all human interaction.⁶²⁹ It allows for a limited public realm of the market (agora), where we don't meet as citizens but as producers and buyers of utilities. Here the craftsmen can show and exchange their products (and indirectly themselves as makers and/or owners). As an example of a hybrid, universities could typically be said to have a self-image which is somewhat caught between the paradigm of knowledge (associated with the market) and the paradigm of thought (associated with practical wisdom and political responsibility).

The public realm of work, i.e. the market, provides a sense of reality to the products of the workers. It is limited compared to the public realm proper of actions, because the products are ideally produced in isolation.⁶³⁰ As a 'principle of actions' the principle of *usefulness* is still strongly prevalent in the current understanding of politics; statistical measures of utility or socio-economic cost has a wide range of applications in the public management of a modern mass society. It is also a basic premise for the sense of justice that we find in the egalitarian sense of meritocracy and equality of opportunity. Accordingly there is also a sense of limited distinctness associated with the mentality of work, which is limited to the way the mode of work relies on the mediation of distinctness through the product or service. The limit-case for Arendt is the performative artists, which like any artist does produce unique objects, but objects that are of an ephemeral temporal character that relies, similar to action, on a simultaneous (or at least contemporary) audience.

⁶²⁸ Arendt 1958, p. 160

⁶²⁹ It is important to keep in mind the distinction between the *activity* or *mode* of labor and the *mentality* of labor here. I do not argue that the laboring activity cancel all human interaction, it does so only if accompanied with actions guided by the *mentality* of labor.

⁶³⁰ Somewhat puzzlingly and untimely, but consistent with the notion of sociality, Arendt holds that solitude is the sociality of production: "This isolation from others is the necessary life condition for every mastership which consists of being alone with the "idea," the mental image of the thing to be." (Arendt 1958, p. 161) "Only when he stops working and his product is finished can he abandon his isolation." (Arendt 1958, p. 162) This ideal-typical determination of the condition of production seems to be primarily oriented against the kind of "teamwork" that is associated with the industrial production and the alienating effect of separating the operations of the process. The solitude of the worker is later modified: "In his isolation, not only undisturbed by others but also not seen and heard and confirmed by them, *homo faber* is together not only with the product he makes but also with the world of things to which he will add his own products; in this, albeit indirect, way, he is still together with others who made the world and who also are fabricators of things." (Arendt 1958, p. 209)

7.2.3 Action as mentality – the political principle of meaningfulness

According to Arendt, the mentality of action is the only way of thought that guides action in a way that fully appreciates the self-referential problem of attending to its own conditions as the guidance of political activity. The problem can be articulated as follows: How do we maintain the possibility of actualizing ourselves as human beings in a common world? Presumably, only man can communicate and distinguish himself through words and deeds. But, why is communication – and the framework of action and opinions – so crucial to Arendt? The answer is found in the relative comparison of the mode of action to the other modes of human activities and how they all respond differently to the magnetic pole of Arendt’s moral compass, namely the conditions under which we appear most fully as human. We could rephrase the question accordingly: How do we maintain the conditions for the most vivid or rich mode of appearance of ourselves and others?

Due to the peculiar character of human appearance, this is not a solipsistic project. We would not expect to find the optimal conditions for the appearance of others in the mode of thoughtful withdrawal. Hence, Descartes discovery of “the ego” through his methodological doubt is very far (perhaps as far as you get?) from a human person in its full appearance. “Full appearance” is more likely to be found as an experiential equilibrium in the presence of and acting together with others. As Arendt points out, plurality, i.e. the condition of action, has a twofold character of equality and distinction.⁶³¹ On the one hand we must be able to understand each other and to identify as equals on the relevant level. On the other hand each of us must be able to distinguish ourselves as unique actors among equals. In this twofold character there is a dynamic tension which must be balanced for the human person to appear. Depending on the mentality, or the guiding principle of action, the interpretation of the relevant equality and distinctness will vary. Hence, the relative calibration of the equilibrium will vary and give outcomes with various degrees of depth and clarity.

The point here is not that we have to be concerned with the active revelation of each other in order to be political. Men are together, and retain their “agent-revealing capacity” also when they are oriented and concerned exclusively with “the matters of the world of things”⁶³² The activities of labor and work might be imagined as performed purely in modes without togetherness, but it is more commonly found in hybrid versions where we remain human agents. For instance, while eating or making stuff we may have a reflective awareness of the relevance of these activities

⁶³¹ Arendt 1958, p. 175

⁶³² Ibid., p. 182

within a framework defined by the mode of action guided by a political mentality. We might gather for lunch and produce materials before a political demonstration.

When we speak, we usually speak about the world, our common objective reality. We do not have to speak self-reflectively about ourselves and the conditions of appearance to reveal ourselves as persons, i.e. as acting and speaking agents. However, a strong political community, such as a strong democracy, stands out in the comparison with other governmental forms in the sense that they are more self-reflexive and responsive to the conditions of this being together as equals. Ideally, according to my reading of Arendt, the political community is organized “for the sake of” meaningfulness.

Every mentality (the mentality of labor and work included) relies on the conditions for the mode of action (plurality, natality, etc.). The mentality of labor, however, has a tendency to calibrate the appearance of human appearance according to the principle of comfort, which emphasizes superficial aspects of being together that we all share as specimens of the same species. Hence, this mentality might lead us to fulfill the ambition of a comfortable life, but at the same time to unintentionally undermine its own condition by extinguishing the circumstances that enable us to appear as unique individual beings. Similarly, a mentality based on the principle of fear, could – since fear is a basic human experience – be able to fulfill its ambition as a reign of terror. Nonetheless, such a reign is (rather more obviously than the welfare-state) anti-political and has a destructive effect on the public, which will ultimately make it politically impotent.

Correspondingly, the mentality of work has an apolitical or depoliticizing effect. According to the principle of utility it tends to calibrate the appearance of human agency in terms of functional value, i.e. as the functionary of some purpose or role. The main problem with the apolitical mentality seems to be that it defines action in predictable ways by determining human agency as motivated by certain predefined purposes (in the form of images; i.e. knowledge). The influential model of rational choice can illustrate the instrumental mentality. It gives a certain functional depth to the strategic agent beyond the basic comforts of satisfying life necessities, but it nevertheless relies on a limited assumption about the aspirations and end-settings of the agents. Usually the psychology is defined in terms of motives of quantifiable utility or more vaguely in terms of self-interest. In Arendt’s terms the agent acts “in order to” achieve some cognitively modelled goal. Hence, this mentality does not respond to the open character of acting “for-the-sake-of” principles (correlating to “thinking”), which gives action its characteristic unpredictable and initiating status.

In my reading I stress this distinction that Arendt makes between instrumental reason of work and the meaning of action to articulate the principle of meaningfulness.⁶³³ It is an interpretation based on filling an empty spot in the schematic web of related concepts that Arendt applies. (See grey box in Figure 1) In a way, I merely count to four, where Arendt has already counted to three, yet I leave it open if to further considerations whether the principle of meaningfulness should be complemented by other principles. Probably it should. In any case, only the mentality of action is able, according to Arendt, to guide the mode of action in a way that is responsive to its own condition of plurality. In contrast to the principle of usefulness, the principle of meaningfulness is able to guide actions in a way that sustains the material, worldly and social conditions for “how” we appear to each other as co-present. In other words, only the mentality of action has a self-reflexive character that might help us to distinguish between legitimate and illegitimate forms of action and power.⁶³⁴ It could be said to ground a *self-reflexive* form of political sociality.

7.3 Arendt’s critique of apolitical and anti-political mentalities

I think it is true, as Bernstein have pointed out, that Arendt’s project must be understood as deeply motivated by her historically situated response to totalitarianism as a new form of government.⁶³⁵ How is this related to sociality? A main aspect of Arendt’s critique of totalitarianism concerns the isolating and dehumanizing effects this new form of government had on its subjects. This form of government leaves the subjects in a state of loneliness associated with the social experience of the mass. For Arendt, totalitarianism was the manifestation of a complete disregard for, and active suppression of, the human condition of sociality as *plurality*; i.e. the condition for human action and moral thought. We could say with Arendt, that this was new because the guiding principle of totalitarianism was not anything like those of the old regimes. The totalitarian form of government was guided by historical determinism,⁶³⁶ and hence the crimes against humanity performed by these regimes had a particular character, previously unknown to mankind.

But, the most thought-provoking aspects of Arendt’s response to the horror of the totalitarian experience was the way she included this ideology and governmental form as an integral part of

⁶³³ Ibid., p. 154

⁶³⁴ Remember: principles of action inform both private and public, individual and citizen actions.

⁶³⁵ P. 11-12 in Bernstein, Richard J. 2011. "Hannah Arendt's Reflections on Violence and Power." *Iris* 3, no. 5: 3-30.

⁶³⁶ The reason or principle behind this, as it took on a shape as new form of government, was not utility or honor, and in the end not even fear, but the substitute of a principle, found in the simple logic of an idea, i.e. ideology. Either grounded in the idea of “classes” (and the necessity of history) or in the idea of “races” (and the necessity of evolution), the totalitarian ideologies was based on the human capacity to follow an idea to its necessary and dreadful conclusion. In mundane terms, this is truly a way of “thinking”, but what Arendt aims to show us, is that it is possible only in a banal and superficial attitude of thoughtless neglect of its own conditions.

modernity and humanity. It is part of being human in modernity in the sense that it reflects (the practical possibility of) the most extreme consequences of the solipsistic and instrumentalist modes of thinking and the corresponding incapacity of the mentalities of labor and work to appreciate meaningfulness as a principle, and plurality as its corresponding human condition. The totalitarian project reflects a basic experience in the sense that it gives political expression to the extreme possibility of which the tyrannical destruction of the public realm and isolation of men are merely its preliminary conditions: “[...] totalitarian domination as a form of government is new in that it is not content with this isolation and destroys private life as well. It bases itself on *loneliness*, on the experience of not belonging to the world at all, which is among the most radical and desperate experiences of man.”⁶³⁷ It is, as such, an experience to which – given the awareness of plurality as a human condition – it would be morally absurd and self-contradictory to give a life-confirming “yes”. Rather, it should make us *ashamed* of being human, according to Arendt.⁶³⁸

In the following I relate Arendt’s critique of totalitarianism to modernity by referring to Arendt’s response to what she regarded as solipsism in Heidegger’s thinking and her critique of the embrace of instrumentalist rationality in modern political philosophy (from Hobbes). These two thinkers – Heidegger and Hobbes – represent in this way the negation of the proper way, which Arendt seeks to articulate in the mentality of action. The problem with these thinkers is not what they think about, but “how” they think.

7.3.1 Solipsism and intersubjectivity

One of the clearest expressions of Arendt’s emphasis on the significance of sociality is found in her critique of Heidegger’s thinking as solipsistic. Heidegger was in many ways an excellent thinker, especially when it came to ‘thinking for himself’. He did, however, not seem to fully understand and theoretically appreciate the significance of the perspective of others in his thinking. This is recognized by Benhabib, but as I will come back to later, it seems as though Benhabib (perhaps with Habermas) draws the conclusion that this implies the “shipwreck” of a phenomenology of sociality as such – found both in Heidegger and Husserl. This is a relevant point, concerning Benhabib’s reluctance to recognize a philosophical project in Arendt’s thinking beyond her political concepts (which in Benhabib’s reading, Arendt also gets wrong)⁶³⁹. As I’ve explained in the previous sections (and will continue to defend in the next chapter), there seems to be good reasons to claim that Arendt grounds her political concepts in the normative comparison of common experiences in ways that demonstrate the strength of a

⁶³⁷ Arendt 1968, p. 475, my emphasis

⁶³⁸ She mentions this shamefulness in a famous interview with Günther Gaus.

⁶³⁹ See introduction to part 2 above.

phenomenologically informed analysis of the social, and that has principle relevance beyond its political expression in the form of government. This is most clear in the contrast between the experience of loneliness and of togetherness.

For Arendt, Heidegger was an apolitical thinker. According to Arendt, it was Heidegger's solipsistic existentialism that made him susceptible to the mass movement of Nazism.⁶⁴⁰ As Benhabib points out, whereas Heidegger's interest rested (along with the main line of western thinking) in the world of making (work; *poiesis*) and the preferred withdrawal from its inauthenticity through contemplation;⁶⁴¹ Arendt sought her antidote for the mass-mentality (associated with totalitarianism) in the world of action (*praxis*), which emphasizes the interactive and other-dependent aspects of the human condition. The point here is not simply that methodological individualism leads one to embrace totalitarian ideologies. Historically this seems to be an absurd claim given that liberal-minded philosophers clearly rejected the fascist projects. Rather, the point is that radical isolation (existentially speaking) – which for Arendt is manifested in Heidegger's inability to articulate the human condition of plurality – makes one *susceptible* to the false totalitarian "promises of solidarity and companionship".⁶⁴²

Trivially true, Heidegger did not reject the existence of other people and of the social world (*Mitwelt*) as such. Rather, it was his existential-philosophical project that led his thinking into isolation (perhaps as a potential hazard in line with the working conditions of philosophers mentioned above). Although Arendt and Heidegger seem to share a basic suspicion to the way the modern public society and political life developed – its idle talk, clichés, thoughtlessness, the anonymity of the mass, etc. – it nevertheless led them to diametrically opposed practical conclusions. Whereas Heidegger sought to escape the inauthentic world of others (of the "they"; *das Man*) through seeking out existential conditions that would remind the concrete Being [Dasein] of its finitude (as being-toward-death)⁶⁴³, Arendt sought to confront the anonymous sameness by articulating those actions that reminds the individual of its radical dependency on others. Whereas Heidegger answers to the involuntary "thrownness" into the world by withdrawing into thinking in finitude,⁶⁴⁴ Arendt redefines her understanding of this existential

⁶⁴⁰ Likewise there is a historical coincidence between Husserl's growing concern with the political situation in Germany and his break with a, until the late 1920's, quite apolitical and solipsistic orientation of philosophy.

⁶⁴¹ Plato's Cave allegory is paradigmatic in this context of depicting the self-understanding of the philosopher as withdrawing from the world of men.

⁶⁴² Paraphrased, Benhabib 2000 p. 104-5.

⁶⁴³ "Only the step of pulling oneself back out of the facticity of everydayness to a condition of resolute coming-to-one's senses (Besinnung), getting hold of one's existence, can enable Dasein to reach authenticity." (Benhabib 2000, p. 105)

⁶⁴⁴ And the notions of inheritance and collective identity. See "What is existenz-philosophy?" in *Essays in Understanding* (1994).

predicament as “birth”, which emphasizes how we are received by others rather than thrown, and thus carefully guided into the world that should be answered with the welcoming of genuine interaction.

7.3.1.1 A detour on Arendt’s intersubjective approach

As Benhabib reminds us, Arendt’s use of the term “space of appearances” – i.e. being as disclosure – is also heavily influenced by Heidegger.⁶⁴⁵ However, Arendt’s emphasis on plurality gives this epistemological aspect of “the public” an intersubjective character which is much closer to the perspectives of phenomenologist such as Edmund Husserl, Edith Stein, Paul Ricoeur, and Maurice Merleau-Ponty.⁶⁴⁶ Consider the following passage:

The presence of others who see what we see and hear what we hear assures us of the reality of the world and ourselves, and while the intimacy of a fully developed private life [...] will always greatly intensify and enrich the whole scale of subjective emotions and private feelings [such as our death-awareness], this intensification will always come to pass at the expense of the assurance of the reality of the world and men.⁶⁴⁷

In addition to being a devastating critique of Heidegger’s style of thinking, it resonates with the significance devoted to intersubjectivity in the Husserlian epistemology. The main point is that no aspect or perspective is epistemologically valuable on its own. The experienced aspects and perspectives must always stand in a contrasting or comparative relation to something or someone else. The method of justifying judgments of common and scientific knowledge is according to this model relational and not foundational, beyond the way a “web” of relations might serve as a ground. No single experience (even in a specifically evident mode) can be trusted alone. We depend on others to form a coherent/consistent world view and reliable evidence has to be accessible to others.

The following passages in *The Human Condition* seem to go in the same direction, and reveal the basic phenomenological character of the notion of plurality:

[...] the reality of the public realm relies on the simultaneous presence of innumerable perspectives and aspects in which the common world presents itself and for which no common measurement or denominator can ever be devised. For though the common

⁶⁴⁵ Benhabib 2000, p. 110-11

⁶⁴⁶ The work of Husserl: perhaps most well-known from CM, where he established the essentially intersubjective character of objectivity, but failed to give it (or intentionally demonstrated the impossibility of giving) a purely individualistic, genetic account.

⁶⁴⁷ Arendt 1958, p. 50, my insertion

world is the common meeting ground of all, those who are present have different locations in it [...].⁶⁴⁸

Only where things can be seen in a variety of aspects without changing their identity, so that those who gathered around them know they see sameness in utter diversity, can worldly reality truly and reliably appear. Under the conditions of a common world, reality is not guaranteed by the “common nature” of all men who constitute it, but rather by the fact that, differences of position and the resulting variety of perspectives notwithstanding, everybody is always concerned with the same object.⁶⁴⁹

These passages are written in the context of “the public” understood as “publicity”. Following these passages, Arendt discusses how *the common world*, the second phenomenon signified by “the public”, deteriorates when the sociality of plurality is replaced by isolation or mass society. That is, wherever the plurality of perspectives are replaced by one single perspective.⁶⁵⁰ Hence, we see in Arendt a concern for the political that is able to connect quite abstract epistemological discussions of objectivity to the notion of a proper collective self-understanding.

In general, we might say that our primary dependency on others is to be found both in acting *and* in thinking. To act and to think are other-dependent capacities that rely on togetherness/plurality, which is strengthened and made durable by institutional protection. The institutional protection of uniqueness and equality in plurality is grounded in something common. However, it is worth noticing here that the “public thing”, that which we have in common, is not primarily something already *in me (or in every one of us)*, but something *in-between us*.

So what happens when the common “in-between” deteriorates and gets lost? In the worst cases (such as in the regimes of Hitler and Stalin) we are truly in a “post-truth” situation where “people for whom the distinction between fact and fiction (i.e. the reality of experience) and the distinction between true and false (i.e. the standards of thought) no longer exist.”⁶⁵¹ Given Arendt’s diagnosis, that what is deteriorating in modernity is our sense of a common world, a withdrawal into solipsistic finitude seems to be the least adequate response. In the case of Heidegger this withdrawal in his thinking, seems to have made him susceptible to Nazism in his acting.

⁶⁴⁸ Arendt 1958, p. 57

⁶⁴⁹ Ibid., p. 57-8

⁶⁵⁰ A more extensive comparison of Arendt’s appreciation of the significance of intersubjectivity – as the concrete co-presence of other subjects – should be made with Husserl’s late work (with chapter 5 of *The Cartesian Meditations* as an important pivotal point of a new orientation of his interest.) A part of my dissertation that treats Husserl’s approach to intersubjectivity was removed in the process due to lack of space and time to work it out properly. There are clear parallels between Husserl’s notion of crisis and Arendt’s existential perspective on the general level of abstraction and shallowness in western thought.

⁶⁵¹ Arendt 1968, 474, quoted by Hinchman 1984, p. 321

On a more optimistic note, as the experience from totalitarian regimes has shown us, the public realm is never fully suppressed, but only fragmented. Under such conditions it becomes easier to distinguish the “institutional” dimension of the public from the “ontological”. Since the public space of freedom and action has imploded in these regimes, the alternative publics are forced to go “underground” without institutional protection. As Benhabib describes it, a new common world might be created elsewhere and start “spilling over into the streets”.⁶⁵² This capacity to start something new is what seems to give Arendt hope. That even in the darkest situations of loneliness under totalitarian domination, one can maintain a love of freedom and pockets of proto-political spaces of movement, of action and freedom.

Although the global civil society is certainly less subjected to total domination and rather suffering from institutional neglect, the lack of institutionally protected citizenship are similar. Both in the underground publics and in the cosmopolitan public, the public space is not sustained by the division and distance between private individuals and citizens. As institutionally protected, law provides “the framework of stability which human action and motion can take place”.⁶⁵³ But, in situations where we cannot simply rely on the pre-existence of a common world of legal institutions and public spaces we have to leave our hopes to the “underground” (such as the republic of letters), and learn to appreciate the “spilling over” of the global common world into the “public”.

To return from this detour, there are at least two important aspects of Arendt appreciation of intersubjectivity that have normative implications. The first one is epistemological, or what we might call a political epistemology. As Hinchman argues, Arendt employs the idea of intersubjective validity that she finds in Kant, in a wider range.⁶⁵⁴ Although this last is mainly thought of as a contemplative mode, it follows the same sociality or rather – as I see – it attempts to retain the condition of plurality in the contemplative activities, as discussed in 7.1.5.⁶⁵⁵

[Arendt] considers politics to be peculiarly concerned with human plurality, people joined together in an ongoing community and requiring each other to live well. Kant’s third *Critique* strikes her, by this standard, as the most political of his major works precisely because it is the only one that deals explicitly with “men” rather than “man”, with mutual dependence rather than with obedience to universal laws and rules.⁶⁵⁶

⁶⁵² Benhabib 2000, p. 129, quoted above as well

⁶⁵³ Arendt 1968, p. 464

⁶⁵⁴ Hinchman, S. K. 1984. "Common-Sense and Political Barbarism in the Theory of Arendt, Hannah." *Polity* 17, no. 2: 317-339. <http://dx.doi.org/Doi.10.2307/3234510>.

⁶⁵⁵ See also Arendt’s “Lectures on Kant’s Political Philosophy,” p. 27

⁶⁵⁶ Hinchman 1984, p. 322

As mentioned, the appreciation of presence of “men” (in plural) and not just oneself (in singular), and its epistemological relevance is something Arendt seems to share with a broader phenomenological revision of Kant, and something which the discourse-ethical tradition has developed as a well-established approach to political theory.⁶⁵⁷ It highlights an aspect of a meaningful life that cannot be replaced by autonomous will and impartial thinking. As Hinchman summarizes; “The only common good that we know is the shifting product of dialogue.”⁶⁵⁸

The importance of the political dimension of our lives – our speaking and acting in concert – cannot therefore be overestimated. Common sense is neither a spontaneous outgrowth of our life together nor the product of detached observations, but the result of an *activity* in which we compare perspectives on the world through speech.⁶⁵⁹

The normative implications extend, however, beyond the revision of the second maxim. To count only the epistemological implication would certainly be an underestimation of the political dimension. I think we find in Arendt’s work also the recognition of the presence of the other as something more than other individuals, instantiating possible perspectives available to me. Her work points, more importantly, to the effect of encountering concrete others (after the thoughtful withdrawal). These encounters have the potential to establish our ‘sense of objectivity’ in the existential sense of constituting the self and the world. In other words, the concern for the plurality of perspectives does not only make impartiality possible, it is in a sense what makes *anything* possible. Hence, “the public” signifies to Arendt two closely interrelated phenomena: “It means, first, that everything that appears in public can be seen and heard by everybody and has the widest possible publicity. For us, appearance – something that is being seen and heard by others as well as by ourselves – *constitutes reality*.”⁶⁶⁰

7.3.2 Instrumental and non-instrumental notions of politics

So far I’ve established that the sociality of plurality is a central, organizing concept in Arendt’s thought, which is reflected in her critique of solipsism and her emphasis on our other-dependency. I will now move on to her discussion of instrumental and non-instrumental notions of politics. Corresponding to the mentalities of work and action, the main difference between instrumental and non-instrumental notions of politics can be said to be whether politics is seen as a form of problem-solving (corresponding to the mentality of work) or something more (presumably corresponding to the mentality of action).

⁶⁵⁷ See also 9.1.

⁶⁵⁸ Hinchman 1984, p. 327

⁶⁵⁹ Ibid., p. 325, my insertion

⁶⁶⁰ Arendt 1958, p. 50

In the discussion on democracy in chapter 3, I made a distinction between two ways of understanding democracy: either as a system or as participation. The system-model of democracy has the procedural advantage of facilitating efficient will-formation. The cost is the conceptual threat of reducing democracy to an instrument, as merely one among several governmental forms, i.e. democracy is conceived simply as one mean to the same political end. In Arendt's perspective such a view corresponds to the mentality of work, which appreciates the *utility* of such a system, but fails to recognize its *meaningfulness*.

The participant-model of democracy tries to remedy this short-coming, and offers a more adequate account of opinion-formation. Habermas' methodological use of anarchism (see chapter 3) can be seen in light of the influence from Arendt and her reevaluation of "action" (as well as her critique of private reason – enlightened self-interest – as a ground for politics). Habermas' argument in favor of communicative action theory, compared to a purposive or instrumental rationality, seems to point in the same direction.⁶⁶¹ While one might discuss how much of Arendt's insight is actually retained in Habermas' theory,⁶⁶² what in any case is certain is that he maintains an instrumental notion of politics, and understands the communicative aspect mainly as an extra-political, moral corrective to the systemic will-formation of the sovereign.

To the extent that we hold the political to serve a non-political purpose, such as enlightened self-interest (contractual accounts), we have an instrumental idea of the political. From this perspective, the idea of democratic participation will be judged in the light of how efficiently or justly it responds to issues defined by the given substantive criteria (of security, wealth, etc.). In contrast, a non-instrumental conception of the political will claim that democratic participation has a value of its own, regardless of or in addition to being a means of decision-making in response to external goals.

As explained above there are two main camps of democracy theory which differs in their emphasis on the significance of participation. The thinner conceptions of democracy tend to emphasize the aggregation of preferences (polls, votes, etc.). John Rawls has shown how these

⁶⁶¹ "The concept of communicative action singles out above all two aspects of this situation management: the teleological aspect of realizing one's aims (or carrying out one's plan) and the communicative aspect of interpreting a situation and arriving at some agreement. In communicative action participants pursue their plans cooperatively on the basis of a shared definition of the situation. If a shared definition of the situation has first to be negotiated, or if efforts to come to some agreement within the framework of shared situation definitions fail, the attainment of consensus, which is normally a condition for pursuing goals, can itself become an end. In any case, success achieved by teleological action and the consensus brought about by acts of reaching understanding are the criteria for whether a situation has been dealt with successfully or not." (Habermas 1987, p. 126)

⁶⁶² Benhabib (1996) discusses this in her book on Arendt. The main point being that by separating the expressive from the communicative in the notion of "action", Habermas isolates and leaves behind the parts of Arendt's notion that does not fit his own model of rationality.

thin conceptions (in its extreme systematic form: as a purely utilitarian calculus) have problems with accounting for even the basic criterion of democratic participation of informed consent (i.e. the principle of publicity). From a utilitarian perspective it is strictly speaking a contingent matter whether or not the secrecy of an aristocratic republic (read: the rule of experts) is preferable to an open democratic one. According to Rawls, there are no inherent criteria that prevent a utilitarian from preferring an aristocratic government if it creates more utility (of some specified sort).

I would assume the pure utilitarian view to be contra-intuitive to most members of our “public culture” in the sense that most of us would not accept the governmental form of democracy to be simply replaceable with an aristocratic/epistocratic, not to mention autocratic or totalitarian, rule. To claim that it is more efficient is not a sufficient reason. What we do see, however, in democracy theory are different conceptual attempts to find a middle-ground between the principles inherent to democratic rule and the pragmatic advantages of efficient bureaucracy and will-formation.

When it comes to ‘thicker’ accounts of democracy, which are guided by a rights-based conception of justice, participation is to some degree protected by *the condition of publicity* that we find both in Kant and Rawls as a constraint of public right or the basic principles of justice.⁶⁶³ Only if it is based on this constraint, Rawls argues, is his political conception of justice preferable to a *pure* utilitarian account. As we have seen, Habermas develops this conception even further by giving a decisive role to participation as part of a free opinion-formation.

Arendt holds what John Elster calls a fully developed version of the non-instrumental theory of politics. Although I think Arendt would take this as a compliment, it is not intended as such by Elster. To identify the limit against too thick conceptions of democracy, Elster develops an argument to the effect that we should dismiss purely non-instrumental conceptions of the political that favor the inherent value of participation. Elster claims that a non-instrumental notion of politics takes on a narcissist attitude and neglects the “serious matters” that politics should be occupied with.⁶⁶⁴ This being true, it would leave us basically with one valid conception of the political: some form of deliberative democracy theory.

⁶⁶³ Elster 1997, p. 20

⁶⁶⁴ Ibid.. Elster argues that most non-instrumental arguments emphasize side-effects to democratic participation that lies beyond the motives of the participants themselves. When it comes to the observer-based perspective of the economic and educative effects on civil society (such as reported by Tocqueville and Mill) I think this is accurate. When it comes to Arendt, I struggle to recognize her position in Elster’s critique of it. To claim that she relies on an observers-perspective or that self-reflexivity in political participation is psychologically incoherent, simply does not hold. If Elster is right, the notion of sustainable politics is “debunked”.

If we take the anarchic conception of democracy (and the principle of *isonomia*) to represent Arendt's view, I am inclined to agree with Elster and Habermas that it is too thick. I would also agree with Elster's critique if Arendt was a mere proponent of a pre-modern, nostalgic conception of the topical politics of the forum, and the associated "joy of politics". Yet, the relevant question here is whether this picture adequately reflects what Arendt is setting out to do?

In my opinion, this is implausible. Arendt readily admits the favorable traits of instrumental reason: From the perspective of practical politics, "durability" and "instrumental competence" are clearly attractive traits. However, as a mentality of work, based on the project of making a durable world of things, it is also limited to appreciate the depth of things and agents *as* suitable or *as* useful. It is caught in the apolitical project of making, which "[...] is itself entirely determined by the categories of means and end."⁶⁶⁵ In other words, *homo faber* sees only the world of things, which is primarily a utilitarian world. Arendt also criticizes the regress of purposes implied by instrumental reason. Since all ends of fabrication can be transformed into means for some new end, utilitarianism has a build-in perplexity that "can be diagnosed theoretically as an incapacity to understand the distinction between utility and meaningfulness."⁶⁶⁶ Hence, the mentality of work fails to grasp the condition of its own possibility as meaningful action.

[...] the ideal of usefulness permeating a society of craftsmen – like the ideal of comfort in a society of laborers or the ideal of acquisition ruling commercial societies – is actually no longer a matter of utility but of meaning. It is "for the sake of" usefulness in general that *homo faber* judges and does everything in terms of "in order to".⁶⁶⁷

With the ambition to facilitate deliberation on the "serious matters" of politics in mind, an instrumental conception of politics hardly seems up to the task. The conception and discourse of instrumental reason is simply not able grasp the "objects of thought" implied by the notion of meaning:

Homo faber, in so far as he is nothing but a fabricator and thinks in no terms but those of means and ends which arise directly out of his work activities, is just as incapable of understanding meaning as the *animal laborans* is incapable of understanding instrumentality. And just as the implements and tools of *homo faber* uses to erect the world become for the *animal laborans* the world itself, thus the meaningfulness of this world, which is actually beyond the reach of *homo faber*, becomes for him the paradoxical "end in itself".⁶⁶⁸

⁶⁶⁵ Arendt 1958, p. 143

⁶⁶⁶ Ibid., p. 154

⁶⁶⁷ Ibid., p. 154

⁶⁶⁸ Ibid., p. 155

We can see how each level of mentality is organized as the addition of a new dimension, which is inaccessible to the lower levels. To make the distinction between the two higher levels (the mentalities of work and action) clearer, I suggest that we emphasize the distinction Arendt makes between a worker, who make something “in order to” [some idea; cognition; image], and an agent, who act “for the sake of” [some principle or regulative idea]. In my opinion, Arendt marks with this distinction a phenomenological shift of levels. In the phenomenological terms of Husserl, it’s a shift from what is called “real objects” (objects derivable from sensual experience or imagination), to “ideal objects” (objects which can only be manifested, but not reduced to sensation or cognitions as such).

To use a spatial metaphor, I think we could say that for Arendt, when the “work”-minded utilitarian attempts to act guided by a principle of utility, he dissolves its object in approximately the same way the depth of a black hole “disappears” (i.e. has no spatial dimensions) in a 3D-model of space. As a political project, *the man as a maker or craftsman* takes on a task he is not fit to solve. The mentality guiding the project simply lacks the conceptual depth to distinguish clearly between meaning and purpose. This is why, in my mind, Arendt can claim that “utility established as meaning generates meaningless.”⁶⁶⁹ Unable to grasp the depth of meaning, *homo faber* mistakes meaning for mere purpose. Hence, it does have the *a-political* consequences associated with the implementation of the principle of usefulness into politics, which tends to *depoliticize* our shared world. “The basic error of all materialism in politics [...] is to overlook the inevitability with which men disclose themselves as subjects, as distinct and unique persons, even when they wholly concentrate upon reaching an altogether worldly, material object.”⁶⁷⁰ Although this is certainly a radical critique of instrumental reason, I understand it as caution against leaving politics to this semi-superficial mentality of work, and not as an attempt to exclude the conditions of life and worldliness as serious matters of politics.

Often, a non-instrumental notion of politics is described in terms of “inherent value” or being an “end-in-itself”, or politics “for the sake of politics”. These expressions are all symptomatic, in my view, of the discourse of an instrumental mentality’s attempt to grasp the meaningful depths of the world in concepts that are too shallow for the task. According to Arendt, this paradoxical language of “end in itself” is – quite tellingly – the only valid or meaningful solution within this paradigm of utilitarian philosophy. The Kantian formula of ‘man himself’ as the ultimate end (as an “end in itself”) is in this sense an expression of the mentality of *homo faber* drawn to its very

⁶⁶⁹ Ibid., p. 154

⁶⁷⁰ Ibid., p. 183

limits of adequacy. The inherent value of man (individual dignity) is then an unsatisfying and paradoxical way to articulate the world of action from the perspective of the maker.⁶⁷¹

As much as Arendt admits that we need an artificial world of things to “house” the life process of men (because of their unstable and mortal nature), and appreciates the way it ensures duration and even permanence to human life (including texts, archives, etc.), she is highly critical to allow the project of *homo faber* to function as a paradigm or regulative idea for political philosophy. Arendt’s main opponent in this regard is Hobbes and the modern political philosophy that emerged after him.⁶⁷² Inspired by the Socratic philosophers, modern philosophers replace doing for making; action for work – even in politics:

The Socratic school [of Plato and Aristotle] turned to [legislation, foundation and execution of decisions by vote], which to the Greeks were prepolitical, because they wished to turn against politics and against action. To them [these procedural activities], are the most legitimate political activities because in them men “act like craftsmen”: the result of their action is a tangible product, and its process has a clearly recognizable end.⁶⁷³

In a sense, this decisive turn from the mentality of action to the mentality of work, made the institutional protection of the political synonymous with “politics”.⁶⁷⁴ In Arendt’s historical account this is also the background for the basic assumption that the ontology of politics is defined by the relation between the individual and the state. If we follow Taylor’s advice⁶⁷⁵, it seems impossible to resist the individualism of the modern social imaginary. It is basically too well protected and integrated into our social recipes and way of life. Even our language of politics can hardly escape it, and the discourse of rights is a good example. Arendt’s project is in a sense to defy this impossibility and attempt to infuse the public with new theoretical ideas.⁶⁷⁶

⁶⁷¹ Since there’s no God to balance this story, the price of this anthropocentric remedy to the short-comings of instrumental reason, is that the rest of the world is devalued as a mere set of means for man. The unintended consequence is that both nature and the world are consequently “robbed” of their independent dignity. Which, in addition to being a devastating existential deprivation of the political life, also implies the kind of disastrous relation that the (post-)modern men have to their environment on the scale of a geological event on the earth’s surface, mass extinction of biological species and potential extinction of all life.

Within this framework, we can perhaps better understand how disastrous it must be for a being, human or otherwise, to be rendered without rights, hence animal and human rights work on the same ontological level within this paradigm.

⁶⁷² See also Arendt 1958, p. 299, and Arendt 1971, p. 160ff, for comparison on Hobbes and Montesquieu, especially: p. 163.

⁶⁷³ Arendt 1958, p. 195

⁶⁷⁴ Foreign lawmakers and judges are not unknown in history. It has been conceived of as a source of perspectives with expertise and lack of local interests; i.e. impartiality. ‘The right of the foreigner’ points to another claim, suggesting the reversed: i.e. that we are no longer detached but “unavoidably side by side”.

⁶⁷⁵ Given its link to «societies of unprecedented power in human history”, see Taylor 2007, p.169.

⁶⁷⁶ A good example of this point, which there is little room to discuss here, is Arendt’s critique of the modern, liberal conception of freedom as an individual choice. Arendt dismisses the identification of freedom (as free will) with sovereignty, because it makes the principle of isonomia paradoxical. (Arendt 1971, p. 164ff) Conceptually, Arendt

In terms of the implications of these new ideas for the state obligations toward foreigners, I think it speaks for the recognition of the cosmopolitan laws of deliberation as the primary obligation of the state. I consider this to be in line with the regulative idea of a cosmopolitan society in Kant's work and developed further by Arendt with her emphasis on politics as primarily something we are engaged in for the sake of meaningfulness (and the constitution of our reality). Similar to the way law secures a distinction between citizen and individual, public and private, the border-keeping concerns of the cosmopolitan law of admission can still be understood as the useful complementary protection of the domestic sphere in compliance with a notion of just membership.

Concluding remarks

In order to articulate a positive project or “setting of the problem” from the mentality of action, I take the notion of a “full” or “full depth” appearance of the human agent to be the key to a systematic reading of Arendt's work. In my reading this functions both as an analytic leading clue to her conceptual organization of activities and mentalities, *and* as the location of a moral compass in her normative ranking of the different modes and mentalities.

Negatively speaking, this guiding notion of full appearance manifests itself in her critique of the instrumentality and assumed self-sufficiency of the basic entities – be it the individual or the state – in modern political philosophy. For instance, the political social imaginaries of the common wealth represent to Arendt a political expression of the mentality of labor, which reduces our human co-existence to society of indistinguishable individuals unified and guided by the principle of comfort. As such the state community takes on the character of the self-sufficient entity of the mass. Similarly, the imaginary of a sovereign will gives expression to the mentality of work. Defined by the perspective of the maker, politics is reduced to a matter of the strategic rationality of realizing or actualizing certain ideas or ends. Either in the figure of an individual monarch or a representing government, the will appears self-sufficient. Politics takes on the measures of the principle of usefulness, as something to be proven efficient and best carried out in solitude. At worst case, it turns politics into bureaucracy and the citizens into a populous, measured by its potential to breed, produce and fight.

seems to hold, “unified will” is just the other side of the coin to individual free will. Both notions reduce the question of freedom to the scope of the mentality of production. To find a conceptual escape from this binary binding of liberal and totalitarian models of freedom, Arendt points to Augustin's notion of natality as a nerve of antiquity undistorted by the modern notion of free will. (Arendt 1971, p. 167) Combined with Montesquieu's idea of principles of action, it has a guiding significance in Arendt's project: man is free, not because he has several, non-constrained options on the menu, but because he is a beginner.

Both of these imaginaries are deeply problematic, not because they are necessarily driven by any kind of ‘evil intention’ to extinguish humanity and the condition of plurality, but because they are characterized by a thoughtless forgetfulness of plurality as *the* human condition of political life. The infamous phrase “banality of evil” refers precisely to this; an unintended shallowness with a potentially disastrous neglect of meaningfulness and one’s political responsibility.⁶⁷⁷

Thus, Arendt’s emphasis on positive, non-instrumental ends cannot be interpreted within an individualistic paradigm without ending in paradoxes or incoherencies. A certain “mental revolution” is required, a change of mentality or perspective, where the co-existence of others is given primacy in relation to the individual genesis of meaning.⁶⁷⁸ This does not mean that there are no “serious issues” in politics regarding life and production, rather it basically entails that similar to the way in which environmental and distributive problems threaten to undermine the conditions of labor and work, action has its own problems of sustainability.

To underline this insight, Arendt continuously insists on the peculiar sociality and other-dependency inherent to our capacity to act and appear as a person: “Action, the only activity that goes on directly between men without the intermediary of things or matter, corresponds to the human condition of plurality, to the fact that men, not Man, live on the earth and inhabit the world.”⁶⁷⁹

This claim is not just part of a descriptive universal anthropology, but implies a clear normative priority of the human activities: We might live well personally without performing the activities of labor and work (even if we then rely on the slavery and terrible working conditions of others), but we cannot live a fully human life without action and speech in the presence of others. On the level of activities, the implications of this priority might be confined to a rather well-known Aristotelian ethical conclusion of a good life: We should speak and act, instead of labor and work. On the level of mentalities however, I’ve made the case that the implications of this ranking have

⁶⁷⁷ “Banal” is, in my mind, here used in a rather specific meaning, associated with the neglect characteristic of the mentality of work and labor. It does *not* imply that an action lacks premeditation or ideological motivation. Hence, an evil action is not “thoughtless” in these ordinary senses of the word. In the case of Eichmann, the fact that he was a fully convinced Nazi just proves the point (which has become clearer in interviews published more recently). The point of his banality was not that he was a blind pawn in a bigger game, but that the very totalitarian ideology infused its subjects with a racist shallowness, unable to see the plurality of people (including groups) as a condition for humanity. Race is, after all according to Arendt, not the beginning of humanity, but its end. (Arendt 1968, 157) Arendt seems to think of the concentration camps as the mentality of work taken to its possible extreme. (See Arendt 1994)

⁶⁷⁸ In terms of the epoché this means that the isolation of meaning and reason as something constituted in the mind of private experience, is replaced by a wider frame of sociological or anthropological reciprocity, similar to Schutz. Arendt remains however (unlike Schutz) philosophically interested, which implies that as much as she appreciates the value of reciprocity or common sense, she is continuously concerned with its human condition (natality and plurality)

⁶⁷⁹ Arendt 1958, p. 7

a less trivial significance for the preference of political principles, which seems consistent and central throughout Arendt's work.

The key political problem can be formulated like this: since states are modelled after “the maker” and the idea of sovereign individuals with free will, the political character of state communities as a plurality of unique beings, risks getting lost:

The famous sovereignty of political bodies has always been an illusion, which, moreover, can be maintained only by the instruments of violence, that is, with essentially nonpolitical means. Under human conditions, which are determined by the fact that not man but men live on earth, freedom and sovereignty are so little identical that they cannot even exist simultaneously.⁶⁸⁰

They idea of a polity as sovereign is then mistaken about the ontological character of the political community. We must correct this conceptual error in order to be free, according to Arendt: “Sovereignty” must be renounced! This seems indeed very revolutionary. As I read it (in a moderate reform-oriented Scandinavian way) Arendt urges us to rethink the character of the territorial entities that are meant to protect us. If the imaginary of sovereignty does not allow us to think plurality, how do we think these entities otherwise?

To answer this question, I think we need to take up the challenge which Arendt poses in the beginning of *Origins*: How to articulate a political principle that reflects the human condition and hence is able to guarantee a new conception of human dignity? In so far as sovereignty implies a mentality that does not reflect this condition, i.e. the framework of action – plurality – it is either a-political or anti-political. The point would be to emphasize the primary role of these polities, which is to establish the promoting and protecting infrastructure of an already established and continuously re-establishing public sphere.

According to Arendt's relational ontology, we are not primarily individuals and secondary someone who initiate relations with others, but we are primarily *in* relations to others, and it is these relations that enable us to stand out as distinct individuals. The traditional political ontology (of individuals and states) is not false, as much as it is a shallow abstraction which needs to be qualified and restricted when it comes to its assumed legitimizing function. And, although Arendt recognizes Kant's attempt to ground humanity in the inherent dignity of every individual as a step in the right direction, she insists that this ontological framework must be complemented by a greater depth in order to ground individual rights properly.

⁶⁸⁰ Arendt 1971, p. 164

This ground is unusual in its character (and to some extent reminiscent and inspired by pre-modern models), since it takes social relations – or more specifically the condition of plurality – as its point of departure. This has led some (like Benhabib) to criticize Arendt for basing too much of her political notion on topical, face-to-face relations. That is, Arendt's framework does not fully appreciate the distinct character and advantages of the impersonal levels of modern society (i.e. the way public discussion is oriented toward issues and bureaucracy is uncorrupted by personal relations).

In the next chapter I will flesh out Arendt's notion of "full appearance" from a Husserlian phenomenological perspective as it is found in Alfred Schütz's work. Relying on this perspective, I have to admit, implies a weakness in terms of the significance given to face-to-face relations. A phenomenological approach like Schutz' gives firsthand-experience a privileged status. I will however nuance the critique of a topical bias in Arendt by arguing that her project was not primarily to restore the "face-to-face"-character of politics, but to develop new principles of action, which are equally relevant to the street-level/topical interaction as to the imaginary of modern mass society. A political world and its public spaces (where we may appear as human and free agents) should be guided by general principles, not by a distinct and commanding will. A polity might assign institutional representatives, but in order to remain political they have to act according to the proper principles. In other words, genuinely political institutions must manifest those principles that sustain the condition of plurality.

The political character of institutions takes on a cosmopolitan relevance simply by acknowledging that the presence of others also implies, within the current international order, foreigners and relations with a cosmopolitan character. These relations should lead us to rethink the sovereign state in terms of the plurality of the global civil society. Cosmopolitan relations, for sure, face different problems and are not in need of the same type of protection as provided by state membership, but the same political principle apply and lead us to articulate complimentary obligations of the state in terms of domestic and cosmopolitan law.

Chapter 8: The personal, the mere contemporaries and the collective – various levels of the public

How do we appear most fully as human? When we act together as equals, Arendt claims, we appear to each other in a richer and more distinct sense as “fully human”. In the last chapter I argued that this claim indicates a phenomenological-philosophical grounding of the right to have rights in Arendt’s account of the human condition of plurality as *the* condition of human appearance (i.e. as an expression of “meaningfulness” understood as a principle of action). Further, in line with the general account of principles of action in chapter 6, I hold that this human appearance of ‘acting together’ is not merely a concern of private face-to-face communication, but a public one. The divide between the private and public is crossed, not by considering the specific types of activities directly, but by considering distinct modes of activities and how various mentalities are inspired by these modes through their guiding principles of action. These principles might be given both private and public expression. Arendt is critical to mentalities that, as she sees it, undermine the conditions of human appearance, but she’s less clear on the exact character of the condition of plurality itself. Beyond indicating that principles somehow are necessary in order to appear with the appropriate depth of presence as a meaningful agent, exact phenomenological descriptions are not presented. To flesh out the details of what constitutes a proper “humane” depth, I will in the following consider an ambiguity of the condition of plurality more carefully, that is, its two aspects of equality and distinctness.

According to my interpretation of ‘the right to have rights’ as the proto-political right (as “a right to appear”), it seems to me clear that this right is an expression of the principle of meaningfulness. This principle answers to the condition of human appearance, namely plurality. In the last chapter I emphasized the modal aspect of “how” we appear. In this chapter I will concentrate on the intentional correlate of the mode of activity, namely the “who”. It seems intuitive enough to claim that we should be responsive to the uniqueness of others in face-to-face situations and in close relations. The challenge in the following is to defend that what I’ve called “the principle of meaningfulness” has relevance for the way we think about and seek to manifest plurality in social spheres that has an enduring and metatopical character (and not merely topical, face-to-face encounters of say, spontaneous assemblies). The challenge is the following question: How can we think of plurality in a mass society consisting of the unimaginably many? Or, in other words, how do we provide content to the principle of meaningfulness – for instance in terms of regulative ideas, duties and rights – that answer to these (modern) circumstances?

To answer this question I will first consider the ambiguity of the terms “equality” and “distinctness” of the human plurality in light of what seems to be some their richest or “deepest”

accounts in Arendt's work: the notions of *isonomia* and freedom. These terms also explicate the challenge above of a transition from the topical to the metatopical, since they are both associated with the influence from the ancient Greek concepts of politics on Arendt. How can such experiences from spontaneous assemblies and relatively small city states – and characterized by the temporality and performative character of face-to-face relations – be held to ground political principles of action? How do we make this proto-political, praxis-inspired account relevant for politics in a modern mass society?

In order to defend Arendt's reliance on "full appearance" as something more than mere nostalgia, I will discuss her notion of plurality – with its elements of equality and uniqueness – in relation to Alfred Schutz phenomenological description of the "double character" of the way people appear. Compared to Arendt, Schutz' descriptive account of social relations is much more detailed and enables us to narrow down the intentional object approximated by Arendt. Through a comparison between Arendt's and Schutz' accounts the appearance of others, I aim to specify the most relevant notions of equality and distinctness associated the "fully human" appearance.

Second, I will use an original distinction developed by Schutz' between "contemporaries" and "collectives" to make a point that is often missed in the comparison of personal and formal public relations. When we speak about formal equality, we usually – or so I claim – tend to describe it in terms that places it on the scale of contemporaries. We imagine our fellow citizens as completely anonymous and empty indications of "someone", and correspondingly think of demos as a group of such formally defined subjects of rights and obligations. Schutz' distinction does not deny this possibility, but it nuances our understanding of the essential character of groups and membership by suggesting that "a demos" or "humanity" is something more than a sum of anonymous contemporaries. The point is not to deny that the ethical and moral-legal commitment might vary according to the kind of relations we have to others, but to point out that the artificial equality of plurality – that both personal and anonymous relations depend on for its parts to appear as "qua human" – is defined independently of these relational variations. According to this distinction, the scope of equality is not merely based on the reciprocity of some attribute (such as property, profession or blood) or capacity (autonomous reason or to act/to initiate), but it relies on the circumstantial extension of the world.

8.1 Freedom and equality – diving for pearls

Sharing Benjamin's view that the idea of history as a continuous line has (and must be) disrupted, Arendt's approach to the past has been described by herself as "diving for pearls" in the fragments we might access from our time. As argued in the previous chapter, Arendt gives

preference to the human activity of action and speech because of its normative quality as the mode of appearance where we appear “qua human”.⁶⁸¹ However, Arendt offers us little but negative definitions of this mode of appearance. For instance, she notes – inspired by Kant – that we have to understand the character of action in such a way that it manifest a free agent that “never appears in the phenomenal world”.⁶⁸² For Arendt this “phenomenal world” includes not only the immediate perceptions of someone’s physical presence. It also includes the phenomenal content of our cognitions and imaginations of someone (including ourselves).

Unlike the realization of the target of an instrumental agent, the appearance of a *free agent* cannot be – strictly speaking – actualized. To “actualize” some potential is for Arendt related to the mode of work. The free agent cannot be reduced to such a model of our imagination. Not even in our dreams, because there is a metaphysical (or ideal) component to human appearance, which in the previous chapter was connected to meaningfulness and the principles guiding action. There’s an affinity in Arendt’s thinking – and here I agree with Loidolt – to the general phenomenological notion of the other experienced as “intangible presence” or a co-present “inaccessible accessibility” to the world. And still, original to Arendt is the emphasis on the aspect that the other is not only a peculiar kind of intentional object to “me”, but someone who actively distinguishes herself to me (and herself) as a “we”. Hence, it is not just that some perceptual object of mine has a perceptual access to the world that escapes me. She also manifests through her actions a common sense beyond the perceptual depth of the experience.

In the following I will consider in some detail two concepts Arendt borrows from the ancient Greek tradition of thought to highlight central aspects of her own thinking. I understand these to indicate approximately the intended experiential and conceptual depth of Arendt’s notion of plurality. In order to provide Arendt’s notion of freedom with a positive content, I suggest we consider the comparison she makes between free agency and performing arts. This comparison also makes clear that there is a close connection between freedom and uniqueness in Arendt’s thinking through the ability to distinguish oneself. Freedom is to act, and to act is to distinguish oneself.

The second conceptual “pearl” that Arendt picks up from the ancient Greeks is the radically egalitarian notion of *isonomia*. Similar to the way she rethinks of freedom according to the condition of plurality, Arendt seeks a concept of equality that can be separated from the conception of individual dignity and its deep (and usually tacit) reliance on the guarantee

⁶⁸¹ Arendt 1958, p. 176

⁶⁸² Arendt 1971, p. 145

provided by the sovereign state. In a proto-political perspective, this radical notion of equality makes sense, since it emphasizes the possibility of political equality as a spontaneously emerging condition in civil assemblies. If we search for positive accounts of political equality in Arendt's work however, the institutionalist account of how we become equal through an organized community seems unavoidable. How do we reconcile these accounts?

When Arendt defines "plurality" as having a twofold character of equality and distinctness, there seems to be an inherent ambiguity to the way these terms are used:

If men were not equal, they could neither understand each other and those who came before them nor plan the future and foresee the needs of those who will come after them. *If men were not distinct*, each human being distinguished from any other who is, was, or will ever be, they would need neither speech nor action to make themselves understood. Signs and sounds to communicate immediate, identical needs and wants would be enough.⁶⁸³

First of all, in this passage Arendt speaks of equality and distinctness in terms of already given constitutive conditions of plurality. They are not something we are in the becoming of, but something we have already become.

On the one hand, we are (already) equal in terms of needs and embodiment. For instance, we might speak of a kind of pre-linguistic sociality (or social horizon), constituted by basic needs for care and sexual attraction (and their associated compass of emotions). In other words, there is a character of *sameness* to us as a species and as mammals that enable us to understand each other and appreciate the kind of living environment and common world across generations, and even across species, as a shared environment. If we follow Arendt's levels of sameness and otherness (sketched out in 7.1.1), the introduction of a long-term temporal horizon of a "future" and a "past", seems to indicate a character of sameness and distinctness associated with functionary roles of strategic agents. We make plans, develop and maintain a cultural world not only for our own generation, and we sense (to some extent at least) the purpose of artifacts, expressions and norms given to us by previous generations. Also, already as "workers" – as functionaries or makers – we would need a language beyond signals to indicate "identical needs". Further, we could push the interpretation of "equal" and "distinct" the top of the ladder by emphasizing Arendt's use of "who". This is also indicated by the way she uses "distinct" as synonym to "distinguished", which is associated with the modes of action and speech.

There is a temporality to this quote that complicates the matters. In *Origins* Arendt is known to have claimed that we are not born equal, we *become* equal. Here she takes this becoming for

⁶⁸³ Arendt 1958, p. 175-76, my emphasis

granted and claims “if men where not equal” (or distinct) it would have absurd consequences. To clarify, I suggest we consider the first claim as an answer to the genetic question of how we became equal by arguing that we become equal through organization, and that this organizing can emerge both in spontaneous configurations of assemblies and in institutional configurations usually formed long before we were born. The second claim answers to a constitutional question of the given: Given that we able to situate ourselves in a historical situation of generations, and given that we are able to make ourselves understood through action and speech, what are the conditions for this? Arendt’s answer corresponds to the two moments of the condition of plurality: equality and distinctness.

Given the adequacy of this interpretation, Arendt has in this quote reversed the direction of analysis in a typical phenomenological manner, start off from the most “evident”, the richest and most distinct experience of the given. From the experience “qua human” it follows: If we had not already distinguished ourselves as individuals (answering to a “who”), then the already established equality would amount to a form of distinctness limited to a “what” (of specimens or strategic agents). This level of equality could, according to Arendt, easily be communicated by ready-made code (or clichés as she sometimes puts it). Hence, Arendt’s notion of equality seems to call for the necessity of depths of equality beyond strategic reciprocity of a historical common world to actualize the condition of plurality. Further, what exactly this ‘already given’ distinctness amounts to, is not easy to articulate. As mentioned, Arendt tends to appeal to negative descriptions. The appearance of human agency is the appearance of the unpredictably new; the undeterminable unique; the non-reified and non-durable, and so on.

In the following, I will consider Arendt’s notions of distinctness in terms of freedom and equality in terms of *isonomia*.

8.1.1 Freedom as the performance of free agency

To appreciate Arendt’s notion of freedom, we must emphasize its character of other-dependency and dissociate it from the strong individualism associated with the Kantian notion of “autonomy”. However, if we accept O’Neill’s reading of Kant, the difference might not be as decisive as one would usually assume; in that public reason obviously relies on the presence of others,⁶⁸⁴ and taking the position of others seems to have a central epistemological significance in the “enlargement” of political thought for Kant. What distinguishes Arendt’s thinking from Kant’s is the emphasis she gives to the *conditions* of this presence of others and the recognition of

⁶⁸⁴ See chapter 2.

the central significance of these conditions in her call for a reconceptualization of the political principles in a globalized world.

An indication of this shift in emphasis is detectible in the way Arendt primarily associates freedom with human agency, and hence the way we appear to others, and not primarily to the autonomous will. Although Arendt recognizes Kant's notion of practical reason, she raises at the same time a question against Kant's apolitical notion of freedom as free will. According to Arendt, the Christian idea of free will (from Paulus, via Augustin, to modern philosophy) obscures the original meaning of freedom as the principle (or "ultimate end") of politics.⁶⁸⁵

Without freedom, political life would be meaningless, Arendt claims. This freedom is not primarily the freedom of the autonomous will or the freedom of thought, but the kind of freedom associated with action and speech. Hence, the political principle it implies does not merely define certain liberal boundaries (i.e. freedom as non-constraints), but reflects an understanding of politics as something closer to the building and maintenance of a scene where agents may display their performances, i.e. the establishment and maintenance of a public space.

Arendt's takes noticeable distance from the individualist notion of freedom in passages like this: "[...] wherever the man-made world does not become the scene for action and speech [...], freedom has no worldly reality. Without a politically guaranteed public realm, freedom lacks the worldly space to make its appearance."⁶⁸⁶ In this sense, freedom cannot simply be the political guarantee not to interfere in the private concerns of production and trade or of moral conscience and religious beliefs. It also implies a right "to live in a framework where one is judged by one's actions and opinions" (as discussed in chapter 6). In terms of my proto-political reading of the right to have rights, this passage indicates a critical notion of freedom which renders unfree any institutional protection of freedom that does not allow the world to become a framework for political relations. This reading comes with the cost, however, of the somewhat awkward notion of an informal political "guarantee" in cases where public realms emerge spontaneously or have to go underground.

Freedom, according to Arendt's conception, is located in the activity in-between individuals, and not inside them: "Men are free – as distinguished from their possessing the gift for freedom – as long as they act, neither before nor after; for to be free and to act are the same."⁶⁸⁷ Considering the dependency of freedom, in this sense, on the actualization of the space of appearance, it

⁶⁸⁵ It should also be distinguished from the ancient notion of liberty from necessities, which associated freedom with the necessity of exploiting the unfree and apolitical others as slaves, servants and housewives.

⁶⁸⁶ Arendt 1971, p. 149

⁶⁸⁷ *Ibid.*, p. 153

becomes a challenge to explain how freedom can take the form of a durable agent.⁶⁸⁸ The parallel to the artistic performance underlines the specific temporal character of the appearance of someone as a human agent:

Performing artists – dancers, play-actors, musicians, and the like – need an audience to show their virtuosity⁶⁸⁹, just as acting men need the presence of others before whom they can appear; both need a publicly organized space for their “work”, and both depend upon others for the performance itself.⁶⁹⁰

At first glance, the performing arts and action seems to share the same kind of sociality through the necessity of “the presence of others”. In the case of performing art this presence is, however, not necessarily an audience of equals acting together; i.e. a plurality of unique beings. What to the contrary seems to be a possible similarity from the comparison with artistic performances is that the level of organization, required by the framework of free agency, might not have to be identical to the state level. It can also be actualized proto-politically on a less protected scene (both physically and economically), but then in a more ephemeral manner.

Given the possibility of such a scene, we are left with a genetic question: How can this free agency “appear” if – as mentioned initially – a free agent never appears as a worldly phenomenon? In my opinion, we should understand this claim of the impossibility of appearance as a matter of qualifying the level of phenomenological depth required for us to appear as agents. The levels of equality and distinctness required for us to appear as human seem to not to be plainly presentable in the ordinary sense of pointing out an object in an ostensive manner. What Arendt points out, in my mind, is that it is not enough to superficially perceive the bodily presence (or absence) of someone in order to recognize them as agents. For a personal presence to take place, the behavior must be *seen as* the manifestation of someone who acts “for the sake of” some reason (the agonal aspect), and according to some story (the narrative aspect). But, for this to be possible we cannot simply be free and distinct, we also rely on a sense of reason that is “common” and open, in other words; possible to share with others. We have to be equal; i.e. we must share with (at least some) others a certain conceptual background and contextual understanding (a social imaginary) for their presence to make sense. Still further, is this all it takes to be acting and speaking “as equals”? As I will discuss in the next section, there seems to be a

⁶⁸⁸ It should be noted that in line with the “for the sake of” an enduringly free agent is nothing like an agent with a standing/potential capacity to act and speak. This might be true of an officer or a dictator, but given the condition of action in plurality, free agency is radically other-dependent and relies on the meaningful manifestations of principles in a way very different from agents with certain talents or functional capacities (such as masters).

⁶⁸⁹ Linked to Machiavelli’s notion of political «virtu».

⁶⁹⁰ Arendt 1971, p. 154

higher order equality correlating to the appearance of the biographical uniqueness of the free agent.

8.1.2 Equality – *isonomia* and the organization of equality

As Arendt states, “if men were not equal they could not understand each other”. If we understand this equality as not merely biological sameness, but also that we share some “common sense”, it is at least clear that the pre-given equality that political organization must respond to is not “natural” in any unchanging sense of original or pre-given, but rather conventional (and thus in a certain sense “artificial”). It also indicates a level of social organization that can emerge and change spontaneously on a pre-institutional level.

When Arendt appeals to the notion of *isonomia*, this proto-political character of plurality seems close to mind. In its definition as “a state where men are ruled by no one and rulers of none”, it is also negatively defined as an anarchic principle, closely associated with the radical notion of democratic participation that Habermas evokes methodologically. It evokes a sense closer to the community of rational debate and conviction, the free space of communication associated with the republic of letters, rather than the kind of state that rules by aggregation of votes and monopoly of violence.

The implied connection of this proto-political concept of equality to the spontaneous assembly seems to stand in conflict with Arendt’s institutionalist account of political equality:

We are not born equal; we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights. Our political life rests on the assumption that we can produce equality through organization, because man can act in and change and build a common world, together with his equals and only with his equals.⁶⁹¹

In contrast to the already given equality mentioned in the passage where Arendt spoke of plurality (discussed in 8.1.1.), equality is here described in its becoming. In this sense, *isonomia* is perhaps best understood as the term for the government of equals (which was labeled “democracy” by its opponents). In this sense, *isonomia* seems to represent a regulative ideal of an institutional protection of equality.

Arendt’s claim that we “become equals as members of a group” is often associated with an institutionalist aspect of Arendt’s analysis. Arendt was clearly influenced by the republican tradition found in Rousseau and Burke. But, the context also suggests that Arendt was clearly critical to a shallow institutionalist account. Arendt’s claim is part of a section where she confirms

⁶⁹¹ Arendt 1968, p. 301

(in bitter agreement with Burke) that history seems to have proved the nationalist interpretation of rights to be correct. Burke’s parochialist conception of “the rights of an Englishmen” as the only meaningful conception of right proved itself to be descriptively true in the moment where the guarantee of the existence of human rights was most needed.

In a harsh critique of the way this parochial idea of rights lead to the fatally misguided assumption of the later idea of national self-determination (that only members of a national state could have their human rights protected), Arendt made clear how the world of equals (that was produced through organization of nation states) could not live up to its regulative ideas and the guiding principles of political equality. The gap between this ideal and the positive law of organized equality was clear to Arendt, both in the ancient Greek variant and in our modern “globally, universally interrelated civilization”. To explicate this point, she presents organized equality with its ultimate test: to account for the fact that we are born (not as free or slave, Englishman or subaltern) but as “single, unique and unchangeable”⁶⁹².

As a consequence, Arendt’s confidence in the value of organized equality should be qualified with her critical concern for the guiding principle of meaningfulness that is given expression in the specific rights we agree upon, for instance as fellow citizens. This concern is given expression in the required responsiveness of the civilized notions of equality toward the already given distinctness of the newborn or “naked” life.⁶⁹³ In terms of being responsive to “newcomers” in a public that previously did not allow them the freedom of the public scene, this seems like a reasonable critique of the exclusion of groups, such as slaves, workers or women.⁶⁹⁴

I take the general point to be that an adequate concept of equality should reflect a mentality that answers to the conditions of action, namely plurality. If so, a unique being is also something we become, on the terms of the twofold requirement of plurality: equality and distinctness. Accordingly, the following figure suggests the corresponding forms of equality and distinctness on each level:

All objects	Biological specimens	Strategic agents	Distinguished persons
Sameness of objects	Sameness of species	Equality of force/ Functional reciprocity	Equality of power
Distinction of things	Distinction of biologically varying specimens	Distinction of merits	Whoness of agency

Figure 3: Table of correlating levels of sameness and otherness (equality and distinctness)

⁶⁹² Arendt 1968, p. 301

⁶⁹³ Arendt even describes this as an increased sense of unease with this distinctness, positively correlating to the increased degree of organization.

⁶⁹⁴ See *On Revolution*, Arendt 1965.

Given the performative character of the unique agent, the pre-given uniqueness of the newborn is however somewhat puzzling. Should we really provide a scene for the infant to appear as a meaningful, free agent? Or, should we somehow give respect to the potential capacity to act and speak by bringing up the newborn to become an equal?

To highlight the experiential aspect of these requirements, action and speech should be guided by principles that make us appear as simultaneously equal and unique: “Through [deeds and words], men distinguish themselves instead of being merely distinct; *they are modes in which human beings appear to each other*, not indeed as physical objects, but qua men.”⁶⁹⁵ There’s an important nuance in Arendt’s notions of the distinct and the unique, which corresponds to the distinction between the superficial (animalistic and instrumental), and the fully human (political) appearance worth noticing: The uniqueness of a free agent is distinct from the uniqueness of the finger print (or in general: our being as a unique specimen within the biological variation of the human species):

In acting and speaking, men show who they are, reveal actively their unique personal identities and thus make their appearance in the human world, while their physical identities appear without any activity of their own in the unique shape of the body and sound of the voice.⁶⁹⁶

In order to specify the level of equality and uniqueness implied in the “human world”, Schutz’s concept of the double character of personal appearance can be helpful. Schutz’s analysis of the double character situates different levels of equality (or what he terms “reciprocity”) within the social experience of the personalized other, where the equality is calibrated with the proper level of uniqueness.

8.2 The double character of personal appearance – Thou- and they-orientations

I will situate my reading of Arendt’s notion of the twofold character of plurality – equality and distinctness – in a dialogue with Alfred Schutz’s last work, *The Structures of the Lifeworld* (1973).⁶⁹⁷ Schutz’s core intention was to apply a Husserlian phenomenological method to “the social world, the product of human symbolic action and material work”,⁶⁹⁸ or as a “systematic description of *the common-sense world as social reality*”.⁶⁹⁹ Accordingly, Schutz’s analyses the communicative aspects of everyday life and provides a systematic account of how equality (“reciprocity”) enables us to understand each other. By developing a phenomenological account of distinct levels of reciprocity within social experience, Schutz provides us with an analytic perspective that may clarify Arendt’s notion of plurality.⁷⁰⁰

⁶⁹⁵ Arendt 1958, p. 176, my emphasis and insertion

⁶⁹⁶ Ibid., p. 179

⁶⁹⁷ Co-written with, and edited and published posthumously by Thomas Luckmann.

⁶⁹⁸ Schutz and Luckmann 1973, Preface vol. 1, p. xix

⁶⁹⁹ Ibid., p. xx)

⁷⁰⁰ See 8.1.2

According to Schutz, if we analytically dissect the play of aspects in the way we experience a concrete person (“a fellow-man”), we are able to isolate two formal orientations⁷⁰¹ of “thou”⁷⁰² and “they”. First, Schutz speaks of “thou-orientation” as how we experience someone “in person”⁷⁰³. Unlike an inference by analogy, which is the common model of empathy [or *Einfühlung*], Schutz underlines that the orientation toward “you” is a one-step grasp [*monothetisch*].⁷⁰⁴ It is a concrete apprehension which is immediate in the sense that “I” encounter “you” “here and now”.⁷⁰⁵ This is what distinguishes face-to-face situations from other kinds of social situations. And it is only “here and now” that I can grasp directly the singularity (or “thisness”) of “you”.⁷⁰⁶ The grasp can be expressed as the experience of “there is somebody there”. Further, according to Schutz, when “my” orientation toward “you” is reciprocated, “we” have a social relation (as a formal, reciprocal thou-orientation; a “we”-relation). This is the “encounter”; the *least* mediated relation to “you”; the firsthand social experience, from which any other kind of relation is in principle derived.⁷⁰⁷

Second, to distinguish the depth of the experience of a person from the superficial orientation toward “you”, Schutz also identifies the formal “they-orientation”. They-orientations rely on

⁷⁰¹ Synonym: *Einstellung*, attitude

⁷⁰² I’ll use «you» hereafter only because it seems more intuitive according to current English, which have normally no distinction between informal (thou) and formal (you) pronoun for the other. The use of “thou” in Schutz’ text refers to the German distinction between “Du” and “Sie” which are still being used. I also tend to read “they” with the ambiguity of “Sie” as the more formal and impersonal aspect of orienting toward someone.

⁷⁰³ Schutz and Luckmann 1973, p. 62

⁷⁰⁴ See Overgaard 2007 for comparison with similar views in Husserl, Wittgenstein and Levinas.

⁷⁰⁵ Notice how the relative terms are sought to indicate their status as social coordinates, which rely irreducibly on the concrete situation they indicate. I’ve chosen to use “you” instead of “thou”, which trades the precision of referring to the informal German “Du” for the everyday life sound of “you”. Notice also that Schutz is *not* using immediacy to argue for unlimited/unmediated access to the others mind: “Although we speak of the “immediate” experience of a fellow-man, this experience is internally, also in the precise meaning of the word, “mediated.” I grasp my fellow-man’s flow of lived experiences only “mediately,” in that I explicate his movements, his expression, his communications as indications of the subjectively meaningful experiences of an alter ego.” (Schutz and Luckmann 1973, pp. 63-64)

⁷⁰⁶ Lately, Zahavi (2014) and Overgaard (2007) have argued that there are kinds of empathy that works on quite minimal grounds of prior experience, as a spontaneous capacity to notice that “someone is there”. Although I agree to these analyses that isolate a basic temporally structured empathy (as animated body), this is situated on a minute and technical level that is less relevant for my discussion. It mainly serves the theoretical purpose of refuting the behaviorist and dualist assumption that we are somehow primarily and experientially separated from others; that we see first their material nature, and then have to infer their spiritual dimension. I take this to be an important part of a recovery from the shipwrecking. If my explanation gives another impression, it is unintended. See Zahavi, Dan. 2014. *Self and Other Exploring Subjectivity, Empathy, and Shame*. First edition. ed. Oxford: Oxford University Press.

⁷⁰⁷ This notion of *primacy* must not be conflated with normativity in the linguistic or ethical sense (as if the original meaning or value was already there in the first experience). It is merely based on a genetic assumption in phenomenology that abstract and imagined objects are derived from concrete experiences. In this sense it has a deep affinity with the empiricist tradition in philosophy. But, instead of explaining this derivation in the form of induction, it is explained (as above) as a process of typifications that involves mediation through signs (the indicative and expressive function of the body and language). The habituating, sedimenting process explains in this manner the genesis (or monadic constitution) of a world beyond actual reach. In complex phenomena like human interaction this world of potential reach (or even beyond any reach and merely imaginary) is quite obviously an important part of our situations, defining its invisible surroundings. Within this social space we might talk about distance in terms of spatial distance (near-far), temporal distance (predecessor-fellow-men/contemporary-successor) and level of anonymity. When the latter overrides the spatial and temporal proximity, such as in the case of the bridge players (or much worse, in the de-politization of people), the *relational and modal* notion of interactive social distance is most clearly profiled.

cognitions, which Schutz calls typifications; “they” refer primarily to the undetermined content of a type, such as “people like...”⁷⁰⁸ Unlike the encounter with “you”, the orientations toward “he/she” or “they” as contemporaries are characteristically “out of sight”. They are in this sense metatopical. Unless you are in love, the difference is hardly noticeable in everyday life,⁷⁰⁹ but it is essential to an adequate understanding of social reality according to a phenomenological perspective:

In the we-relation the fellow-man was bodily present; I could grasp her conscious life in the greatest abundance of symptoms. We were tuned in to one another in temporal and spatial community. I was mirrored in her, she in me; her experiences and my experiences formed a common course: we aged together.⁷¹⁰

As soon as “you” leave “me”, I stand left behind, relying on my memories and imagination of you. You have become an individual personal type for me, upheld and represented only by my cognition. A concrete apprehension of you is now out of reach, at least temporarily. “You” are no longer a particular, unique person upheld by my perceptual experience.⁷¹¹ Schutz’ we-relation is, similar to Arendt’s notion of action, dependent on the presence of others. And in this relation, the way we appear might vary from the quite superficial and functional to the intimate and personal.

The “thou”- and “they”-orientations make it possible to suggest the possible locations of the equality and uniqueness that Arendt refers to in her definition of plurality:

- Thou = singular/unique
- They = typical/equal⁷¹²

These are formal distinctions, and in most concrete cases there will be a combination of these orientations. When we encounter someone, the way they are given to us is always informed by certain typifications. The person appearing in front of me has in this sense a “double character”.

⁷⁰⁸ Or “he-orientation” in singular. (Schutz and Luckmann 1973, p. 75)

⁷⁰⁹ From this alteration between encounter and detachment, Schutz talks about a social relation as *repeatable*, rather than as *continuous*. With social media, this character of clear breaks is less obvious. We are always “online”, continuously engaged with our friends. Or, perhaps more precise still: the idealized unity of the other person has a stronger integrity because she is continuously accessible. “Idealization” means here the endless continuation of a sequence (2,4,6, and so forth or ...), the “...” (“and so forth”) is usually called stereotypes or prejudices in their social form. The noetic correlate (the corresponding subjective act) of such idealization is the available repetition of “I can always do it again”. This is of course not fully true of social relations, but it is only the loss of someone that makes us realize the “never again” of the life after death.

⁷¹⁰ Schutz and Luckmann 1973, p. 70. Notice the pretense, and yes I revised the gender of the “fellow-man”.

⁷¹¹ In a communicative interaction this indicates for Schutz a double context to the social situation. On the shared, common sense level of social reality “your” words are signs in a context we share with everyone else. Schutz calls this context “Objective”. On the specific, face-to-face level of the encounter, “your” words might also be given to me as indications or symptoms of a unique meaning, which Schutz refers to as “Subjective”. (Schutz and Luckmann 1973, p. 63, for more nuances of proximity and depth, see “The social encounter”, p. 64 ff)

⁷¹² The equality of “they”-relation is here meant to refer to sameness and lower levels of equality, and not primarily equality of dignity. I do however think of equal worth as located as a higher-order, ideal content of “they”-orientation, not reducible to typifications.

This framework of the double character can be compared with and might help us to flesh out the twofold character of plurality. At least it captures the tension discussed above between pre-given uniqueness of the perceived other and the equalizing aspects of the linguistic typifications that provide this perception with further conceptual depth.

In Schutz's analysis, there is however a tendency to assume that the relation between these two characters aligns with the genetic direction of constitution: from the manifold of topical experiences of "thou" to the constituted norms, or idealizations of types on the metatopical level of "they". In this way, the revision of my typifications of another's conscious life (her unique, subjective meaning-context) is primarily informed by face-to-face encounters (involving topical thou-orientations). This assumption relies on an analytical abstraction from the existential situation where linguistic types are already informing the immediate perceptions.⁷¹³ Hence, the conceptual constellations of thou-unique and they-equal are not always reliable in an everyday life setting.

Notice in the following passage how the double character of personal appearance is also taken on by orientations toward (metatopical) "mere contemporaries", where the sense of agency is brought to life even in their perceptual absence:

I grasp fellow-men as "people like...". But at the same time, I experience them in the we-relation as unique fellow-men whose conscious life manifests itself before my eyes. They thus have a *double character*. They are "people like..." and they are "thou's". On the basis of this double character of fellow-men there then occurs a third transposition: the mere contemporary, experienced by me as a type, is endowed with a conscious life like a fellow-man. But it must be established that I do not immediately experience the conscious life of the contemporary, but as it were "breathe" consciousness into the reference point of the they-orientation, into the type through an act of explication of mine.⁷¹⁴

In this quote Schutz uses several technical terms that need to be explained. As mentioned above, "thou" and "they" refer to formal orientations that usually combine, even, as Schutz notes here, in cases when the person is not "over there", but merely present through imaginative explication. In addition, "fellow-man" and "contemporary" have precise meanings in Schutz's framework. They are relative positional terms in social space.

"Fellow-man" refers to the person in the topical encounter. The key to understand the double character, as I see it, is to understand Schutz's notion of a "fellow-man" as referring to a concrete person that is simultaneously constituted by two formally distinguished orientations: the "thou"-

⁷¹³ This situation is genuinely historical in the sense that it relies on the generative events of birth and death, and the appropriation of a language, a social imaginary, and so on.

⁷¹⁴ Schutz and Luckmann 1973, p. 79, my emphasis

orientation (which grasps the individual and unique) and the “they”-orientation (which grasps the typical and equal). The typifications give the presence of the other a depth beyond the immediate grasp of the presence of another conscious being. For instance, individual types refer to experiences of the same person over several encounters.

Initially, Schutz treats the relation to individual types as fully based on personal encounters, but as the quote above reflects, these concrete encounters might lead to derivatives that are less dependent of such direct experiences. We may understand this as different degrees of presence and absence. The more absent – i.e. the further removed from a direct encounter – the more the individual types takes on an anonymous and general character. But also in the case of persons we know well, their presence is very different from their absence. This is perhaps most clear when their presence is negated: waiting for her in a café alone or not seeing her “there”, waiting for me. Detached from the contingency of her presence, I can think of her as a particular person (real object, individual type) that I happen at the moment to be waiting for (“it’s so typical of her to be late”), or as a group-member or gender “as such” (as an Academic or as a woman; both idealized types of real objects).⁷¹⁵ “Contemporary” refers to this imagined relation to the other, depending on cognitions of someone not “here”. The contemporary other is, as Arendt would say, simply an object of thought.

To isolate the typifications that constitute one orientation of the double character, it helps to imagine someone you’ve never met. This is how we relate socially to “mere” contemporaries: “I grasp the factual existence and being-thus-and-so of a contemporary *only* by means of derived typifications.”⁷¹⁶ These are people I’ve never experienced directly, but at best only second hand – i.e. their presence is not directly informed by any a previous “living we-relations”.⁷¹⁷ I can only *imagine* their factual existence.⁷¹⁸

The reference point of the they-orientation is a type for the conscious processes of typical contemporaries. [...] The reference point of the they-orientation is inferred from my

⁷¹⁵ See Berger and Luckmann for useful distinction in this regard between types of primary socialization and ideal-types of secondary socialization.

⁷¹⁶ Ibid., p. 74, my emphasis. For elaboration on typifications, see Ibid., chapter 3, C.

⁷¹⁷ Ibid., p. 72

⁷¹⁸ On the most general level of an individual contemporary type, I do not imagine any particular person. In other words, I am not concerned with the subjective experience of someone I know that just happen to be out of sight. I relate ultimately to the general individual type as a ‘human being in general’. They involve the most abstract levels of the thesis of reciprocity of perspectives – i.e. “assumptions of typical anonymous repeatability” (Ibid., p. 76). In its most general form it is merely an empty representation of “someone” free of attributes. Out of this Schutz formulates a law of social reality: “The anonymity of a typification is inversely proportional to its fullness of content.” Ibid., p. 80)

knowledge and from the social world in general, and is necessarily in an Objective meaning-context.⁷¹⁹

From this it is clear that when I'm alone, I have to rely on they-orientations, as I am without "thou-orientations" and have no fellow-men within my actual reach. Unless the social horizon of contemporaries has been broken completely, I still anticipate and relate to potential encounters in the future. But, if these potential relations rely only on very general, non-individualized typifications, they indicate a more permanent kind of superficiality of anonymity. In a mass society, in the city or in the nation, it is certainly convenient to be able to rely on objective meaning-contexts shared even with complete strangers. Still, a life with mere they-relations seems (at least conceptually) to be on the edge of dehumanization.

If we compare Schutz' notion of pure they-relations with Arendt's notion of solitude and loneliness, they-relations describe the social horizon of solitude. It captures the social mode of a master working alone, uninterrupted. Even taken to its limit of a life in company with mere contemporaries, it is not yet a life in loneliness in Arendt's terms because the objective meaning-context of types implies the existence of a shared world. Loneliness would, in Schutz' terms, amount to a social horizon that is weakened to the point where the situation reveals no indication of possible reciprocal social relations, not even beyond the actual reach. The situation is then no longer defined by the depth of a common world or a common sense.

As Arendt's distinction between mentalities indicates, the superficial character of anonymity might take on various forms of experiences of oneself, others and society. According to Arendt, a mass society, strictly speaking as a "mass", is characterized by the superficiality of others as undistinguished laboring animals, i.e. in undistinguishable sameness. At this level there is no distinct sense of self and other. But since we would usually speak of a mass society also as a functional system (as in the notion of "civil society" as a market), the superficial and anonymous relations to contemporaries in a modern society might take on the additional character of relations between working producers and artists (*homo faber*). In this sense "mass society" would no longer imply an undistinguishable mass, but a system of more or less distinct functionaries, or functional types as Schutz would call them. In this variation, members would share a common material world of production and even the limited public of a marketplace. The limit case on this level is for Arendt the performing artists, which are able - as indicated by the quoted passage above - to "breathing life" into personal types, even when these characters are based on the

⁷¹⁹ Ibid., p. 75

types of mere contemporaries. I take this last possibility as an important clue as to how the sociality of plurality can be understood under metatopical conditions.

Since to appear as fully human seems to be possible only under the condition of a certain balance or calibration between the unique and the equal, this clue must be further developed in order to understand how a space of appearance can be detached from the topical encounter with others. In the following I will consider mainly two specific aspects: First of all, to what extent can we apply Schutz's notion of reciprocity to approximate the character of a metatopical political equality? And second, how does the unique character of a human agent take on a durable character beyond the co-presence of a singular "you"?

8.2.1 Equality – reciprocity and political equality

When we interact and speak to each other, there is usually an implicit confidence in the fact that we understand words and actions to mean the same. They tend to follow the same recipes of social interaction, as Taylor would put it. Schutz labels this confidence of everyday life "the thesis of reciprocity".

Simply put, in everyday interactions we tend to take for granted that we share the same interpretative schema for actions and utterances. But since this is a moving and living field, it is constantly subjected to redefinitions and negotiations. The way each participant defines the situation overlaps with others, but should not be understood as identical. In a sense, every new utterance is a test of whether the definition implied by the speaker is "confirmed, modified, partly suspended, or generally placed in question."⁷²⁰ This background or horizon of utterances "within which communicative actions "always already" are moving" is called *the lifeworld*.⁷²¹ This "common sense" – an already established sense of sameness or reciprocity – is what Schutz seeks to describe.⁷²² "Common sense" is basically defined as certain everyday assumptions, which is structured by the "fundamental axioms of the social, natural attitude"⁷²³.

⁷²⁰ P. 121, in Habermas, Jürgen. 1987. *The Theory of Communicative Action : Vol.2*. Cambridge: Polity.

⁷²¹ Further, Habermas specifies the relation between a situation and the lifeworld in its widest sense: "Situations do not get "defined" in the sense of being sharply delimited. They always have a horizon that shifts with the theme. A situation is a segment of *lifeworld contexts of relevance* that is thrown into relief by themes and articulated through goals and plans of action; these contexts of relevance are concentrically ordered and become increasingly anonymous and diffused as the spatiotemporal and social distance grows." (Habermas 1987, p. 123)

⁷²² Schutz follows a similar path: "For the time being it is enough to establish that in the natural attitude I assume that objects of the outer world are in the main the same for my fellow-men as they are for me [...] since it is brought into a common frame of interpretation." (Schutz and Luckmann 1973, p. 4) And: "Since we cannot here enter into the phenomenological problems of the constitution of intersubjectivity, we must be content with the statement that in the natural attitude of everyday life the following is taken for granted without question: [...]" (Ibid.p. 5) Curiously this leads Schutz to be clearer than most phenomenologists on the point that the natural attitude implies a distinct social *epoché*. Such bracketing usually implies a narrow sense of a theoretical dissection of a mundane whole, an abstraction, and reflectively taking something out of its original context. But, Schutz understands it more generally as

The first of these axioms is the assumption of the existence of intelligent fellow-men, i.e. we usually take for granted that we are together as embodied and conscious beings. This level of reciprocity corresponds more or less to the level of physical and mental sameness that Arendt operates with.

The second axiom refers to the assumption that we have a similar experience of the things around us. This second assumption does not exclude that we see different aspects of the same object, and even have – according to the specific biographical situation of each of us – somewhat divergent and overlapping “systems of relevance” or “hierarchy of plans”. In Arendt’s thinking this would fit with the “common world” as the framework of working activities, which is also reflected in the mentality of work as a specific social imaginary of the civil society as a functional system and the state as the agency of social engineering.

Schutz’s main point is, however, that the problems that might occur on these levels in terms of subjective variations are usually set aside when we seek contact and interact with people in our daily life. Hence, the third assumption is that we take for granted that this interaction is possible and that we can make ourselves understood. This requires at least a shared repertoire of linguistic typifications on the level of cognition (as concepts of understanding or idealized types).

This natural, social attitude of everyday life, Schutz terms “the general thesis of reciprocity of perspectives”⁷²⁴. This thesis rests on two pragmatically motivated *idealizations*:

- 1) *The idealization of interchangeability of the standpoints*: We can take each other’s perspectives. They have an analogue character.
- 2) *The idealization of the congruency of the systems of relevance*: The differences of the individual interpretative schema are practically irrelevant for our current interactions and for those to come.

That we usually hold this thesis of reciprocity to be true without critical reflection expresses itself in a certain “objectivity” or natural character of our lifeworld. The objectivity of this world is strictly speaking not mind-independent, but must be understood as an “objective meaning-context” that – similar to grammar or the significance of a word – is not dependent on my

motivated by the *setting of a problem*, which in the natural attitude of everyday life is strongly associated to the pragmatic project of getting along with others in an effortless manner. Sometimes the natural attitude is therefore understood as a primary whole of possible and actual naïve experiences. But, Schutz stresses more accurately that the corresponding realm of the everyday lifeworld is merely primary in a relative sense to other orientations. It is in this sense generally “pre-dissected”, but it also has, strictly speaking, its own epoché: related to “the thesis of reciprocity of perspectives” and the neglect of pragmatically irrelevant subjective variations. Schutz so to speak “borrows” this social epoché in his own methodological abstention from the “problems of intersubjectivity”.

⁷²³ Schutz and Luckmann 1973, p. 59. Compared to Arendt’s notion of common sense, as discussed by Hinchman (see chapter 7), she seems to emphasize the common world based on taking the position of others. It’s an intimate part of “acting in concert”.

⁷²⁴ Ibid., p. 60

individual assumptions. Nor do they simply *accidentally* overlap with those of others, it is a context that we are brought up in or always-already thrown into.

Depending on the integrity of this “web of relationships” (Arendt’s term), we keep each other in position and depend on reestablishing a consensus when the objective meaning-context dissolves. To account for my meaning-context being at least partly objective and shared, Schutz points out – as a fourth assumption (or axiom of social relations) – that we in the natural attitude also take for granted that our social and cultural world is historically *pregiven* (always already) to “us” (in general: to everyone) as a common framework and only to some extent able to be formed/reformed by “me”. Within this framework we could also find concepts that are less dependent on the shared perceptual surroundings and that enable meaningful iterations across generations, such as mathematical concepts and principles of action.

Approximately we get a conceptual diagram like this:

Axioms of social relations	Assumptions	Comparative equivalents in Arendt’s terms
First axiom	The existence of other embodied, intelligent beings	Sameness of biology
Second axiom	The existence of a common, objective world.	A common world of materials and producers
Third axiom	The existence of shared meaning and the possibility being understood	The equality of plurality (at least insofar as reciprocity is a necessary aspect of this condition)
Fourth axiom	The existence of a pregiven and durable cultural world.	Stability of human condition across generations; common experience and plurality of peoples.

Figure 4: Table of Schutz levels of reciprocity

The notion of “equality” can be related to these axioms in several ways. The first and perhaps most obvious is that it makes perfect sense to speak about a political principle of equality as part of the interpretative linguistic schema that we presumably share with others. In this way the concept of “political equality” is located as an element of a common background in a historical lifeworld. We could think of this both as the public culture of a state community or in a wider sense as the social imaginaries of a linguistic-cultural sphere, such as the “western”. I’ve already discussed this aspect of equality as part of a public culture in the context of Rawls and Carens (see chapter 3 and 5) and considered the problematic heteronomy it seems to imply, if we say that we ought to be guided by the principle of equality simply because it is part of our tradition.

A second meaning of equality – as reciprocity – is related to the necessary similarity of members of a political organization (even in a spontaneous assembly). Equality is in this sense not a principle of action, but a condition for understanding, and hence an element of the condition of plurality. Since Schutz's axioms of social relations describe the structure of our relations to our fellow-men and contemporaries, our social world can be modelled as a topography of actual and potential relations of more or less reciprocity (including the sense of equal capacity to act and speak). Correspondingly, we could imagine how our expectations function as a relational distribution of reciprocity. On the general level we share a common world with wide circles of others (including other species), according to the reciprocity of the two first axioms. On a more specified level, the expected reciprocity of the third and fourth axioms draw more narrow circles. The distribution of the latter is politically relevant because the expected possibility of establishing a communicative relation is crucial to a political community. To claim to be "human" on the level of sameness (i.e. as a human specimen) is in this sense very different from claiming to be an equal (or fully human) on the level of a historically pregiven (and constantly renegotiated) framework (i.e. of ethnicity, culture, civilization, etc.). The latter is associated with being politically competent. There is usually no doubt about the status of slaves, women or foreigners as human specimens; historically there have, however, been various opinions on the status of each category as capable of reciprocal political relations.

A decisive difference between Schutz's notion of reciprocity and Arendt's notion of equality is their different applications: Schutz's project is mainly descriptive, and although his concept of reciprocity might have a state-centric bias (as most of sociology tend to)⁷²⁵, this is not an explicit concern. In contrast, Arendt's thinking has an explicit moral (or moral-legal) ambition. For Schutz, reciprocity is intended to be neutral with respect to the kind of social relations or situations it defines. For instance, the capacity to take an order requires reciprocity (at least of the kind implied by the second axiom, as in a master-slave, or employer-employee relation). The situation is in this sense defined by the reciprocity of a common world, not the kind of equality associated with communicative freedom (Benhabib) or free human agency (Arendt).

Evidently, the occasion for renegotiations of the content of a command is not the same as it would be if one was asked politely by an equal. One might still disobey and passively resist, but the interaction is clearly not situated in a proper framework for action and speech. For Schutz, this distinction between communicative and functional relations is merely a question of variations

⁷²⁵ In sociology this bias is known as methodological nationalism. See Alexandra Ålund for specific critique of Schutz's notion of communities and "strangers", in Ålund, Aleksandra. 1995. "Alterity in Modernity." *Acta sociologica* 38, no. 4: 12..

of possible social relations, whereas for Arendt the same distinction has a crucial normative significance. My guess is that they would both agree that reciprocity on *some* level is needed for people in order to understand each other. Where Arendt seems to depart from Schutz's account most clearly is in her insistence that to appear as human, and to co-exist as a plurality of unique beings, some further notion of equality as dignity or equal value is needed. This insistence corresponds to Arendt's critique of organizing equality that put too much weight on certain forms of reciprocity, such as that of a "nation". Similar to the blindness the mentality of work has to meaning, these modes of organizing equality seems irresponsible to the human capacity to start something new.

Although it seems reasonable to claim that the modern egalitarian state has been central to successfully equalizing its members (for instance in terms of equality before the law), it also seems plausible to claim that this mode of political organization has room for improvements. In light of the globalizing development of civil society (including both the market and the public sphere), a distribution of reciprocity within homogenous domestic spheres seems increasingly inadequate.

As a response to these changing circumstances, the ambiguity of equality associated with Arendt's right to have rights, as the right to appear, seems to imply both that the expectation of equality (as reciprocity) should be extended to foreigners, and that they should somehow be considered as equals. In other words, we should expect foreigners to be able to make themselves understood and their plans and needs should be considered. Furthermore, foreigners should be granted equality as members on some level, although all could obviously not become regular citizens of the same state community. The normative guarantee for equality is most urgently called for by the most vulnerable foreigners that are victims of systemic exclusion, such as those suffering from long-term encampment. These foreigners are at risk of being deprived of the condition of plurality. These foreigners might become "naked" – not merely in the sense that they are institutionally unprotected in an international order that tend to politically equalize insiders only (i.e. territorial members) – but also in the sense that they risk losing their human appearance. If so, they are left so to speak with their "native" character as "singular" and "unique" (as in pure you-orientations), i.e. as the uncanny figure of "naked life".

8.2.2 Distinctness – the given and the performed

Since the problems that occupy Schutz and Arendt are quite different, the significance of distinctness or uniqueness diverges in their accounts. Whereas Schutz give analytical significance to the uniqueness of the other as it is grasped by the "thou"-orientations in order to analyze the

dynamic of an emerging social horizon, the uniqueness of the other has a crucial moral significance for Arendt as an element of plurality that can be lost and that must be restored in order to appear as human. For Schutz, the implied variation of subjective meaning-contexts only becomes relevant when it occurs as a pragmatic distortion of the thesis of reciprocity. Schutz even sets aside the variations associated with the fourth axiom as irrelevant to his analysis of common sense. For Arendt however, these variations are of central moral-legal significance. On the level of individual distinctness, it implies the decisive possibility to be able to express or distinguish oneself (including one's subjective meaning-context) in a framework of equals. The moral-legal significance of this possibility is also expressed in its possible negation through the way organized equality excludes some individuals from the public. On the level of the cultural world, the variation of cultural reciprocity has moral-legal significance as the value of different traditions of expression (including different objective meaning-contexts) and the possibility of its negation in the form of genocide as a crime against humanity.

It seems to be a continuous concern for Arendt that people might be excluded and “thrown back” on their natural, naked (uncanny, and undistinguished) givenness: “This whole sphere of the merely given, relegated to private life in civilized society, is a permanent threat to the public sphere [...]”⁷²⁶ And further: “They lack that tremendous equalizing of differences which comes from being citizens of some commonwealth and yet, since they are no longer allowed to partake in the human artifice, they begin to belong to the human race in much the same way as animals belong to a specific animal species.”⁷²⁷

There is, however, an ambiguity in the way Arendt refers to the distinctness of human agents. On the one hand the formulation “if men were not distinct”⁷²⁸ seems to suggest that uniqueness is pre-given, as in: “If men were not *already* distinct, there would be no reason for them to perform it in public”.⁷²⁹ This interpretation finds some resonance in the passage referred to above⁷³⁰ (, where Arendt claims that we are born “singular and unique” and that we are able to express in actions our (presumably already given) “personal identity”. In Arendt's critique of the highly developed political communities of organized equality (such as the Greek polis and the modern state system), the equalizing achievement seems to come with the risk of an excluding intolerance of “mere existence” and “the alien”. These notions of what is excluded seem to imply the assumption on her part of an inherent uniqueness of the newborn or the newcomer.

⁷²⁶ Arendt 1968, p. 301

⁷²⁷ Ibid., p. 302

⁷²⁸ Arendt 1958, p. 175

⁷²⁹ My interpretation.

⁷³⁰ see 8.1.2, p. 284

As a symbol of the fact of difference, understood as “individuality as such”⁷³¹ to use Arendt’s phrase, the newcomer confronts the artificial human world with its limitations. Arendt brings this up in her discussion of how a civilization, which produces a world and equality through organization, becomes increasingly uneasy with the underlying individuality of our “unchangeable and unique nature”. This unease is caused, according to Arendt, by the hubris of the civilized world to “master” the fact of difference through equality. Often the criterion of ethnic homogeneity has been deployed as the regulating idea of equality, such as in the notion of “rights of an Englishman”.⁷³² This might have calmed the cause of “dumb hatred, mistrust and discrimination” within a group, but with the increasing risk of backfiring as the civilized world takes the form of an organized global world. Arendt opposed this ethnic grounding as an irrelevant form of equality on the terms that it – while enabling this political life – also has unjust excluding consequences for “the alien”.⁷³³ With nowhere else to go, this is not just insensitive to the political integrity of those excluded, it also presents a danger to the civilized world as the emergence of superfluous and rootless people in its midst.

This is the reason why Arendt suggests a civic form of government which remains neutral to the assumed ethnic reciprocity based on the fourth axiom of social relations. “The decline of the nation state”⁷³⁴ implies for Arendt exactly the replacement of political equality with ethnic reciprocity. In the worst cases, the excluding functions of this inadequate notion of political equality (as reciprocity) lead to the systemic loss of rights of those that stand out for the wrong reasons. It reproduces a state of exclusion as “mere existence” as in the institutional forms of slavery and encampment. To be born a slave or to be born a refugee is, in this sense, extreme cases of intolerance and non-recognition. It welcomes the newborn as a “born dead”.

On the other hand, Arendt seems reluctant to solve the problem of non-recognition by providing the inherent uniqueness with any content. Presumably, the reason is that any given content would be located on the lower levels of the social axioms of reciprocity, of “what” makes us different. Hence, it would give the newborn or the excluded newcomer attributes such as those based on biological sameness, a concern which is clearly manifested in Arendt’s worry that human rights

⁷³¹ Arendt 1968, p. 301

⁷³² In terms of Schutz’s axioms, we might say that the problem stems from converting the fourth axiom of ethnic reciprocity into a regulative idea for the distribution of political equality. Similar to the way the assumed reciprocity takes on the form of methodological nationalism in sociology, “nationality” becomes the guiding principle of the state.

⁷³³ Arendt’s analysis here is more accurate and relevant when she discusses the Jewish question than when she discusses the violent effects of the term “Negro”. On the latter issue she seems to comment only from a distance, and unable to present the relevant perspectives of both sides.

⁷³⁴ See Chapter 9, Arendt 1968

take on the same character as animal rights.⁷³⁵ In phenomenological terms, there is a similar problem associated with mistaking the singularity of the “you” (which is given genetic primacy) for a proper political concept of optimal human appearance (as a plurality of unique beings).

To avoid these pitfalls, we have to consider that Arendt understands this immediate presence of the other – experienced merely as co-existent or genuinely simultaneous – as a highly superficial presence. Only when accompanied by action and speech, i.e. with the implied depth of language, does the agent appear as fully human. In other words, speech is a central part of the way someone appears as a double character:

Speechless action would no longer be action because there would no longer be an actor, and the actor, the doer of deeds, is possible only if he is at the same time the speaker of words. The action he begins is humanly disclosed by the word, and though his deed can be perceived in its brute physical appearance [i.e. as “you”] without verbal accompaniment, it becomes relevant only through the spoken word in which he identifies himself as the actor, announcing what he does, has done, and intends to do.⁷³⁶

The political activities of speech and action are the modes of appearance through which we are given to each other as most human. This is not a point made to argue against Schutz’s qualification of the genetic primacy of “thou”-orientations, but a point made to qualify the optimal mode of the double character of personal appearance in normative terms.

If we ask for the general features of future deliberations on cosmopolitan reform, we might still find inspiration in Schutz’s account of the way first-hand experience molds (or schematizes) the pre-given types. Here we get a sense of the general character of this dynamic as a molding or schematization of the types, central to the human appearance:

Since I already bring a stock of knowledge [i.e. typifications] to every immediate encounter with a fellow-man, typifications also will necessarily play a role in the thou-orientation and we-relation. I also grasp the unique fellow-man who stands across me face-to-face, with the help of typifications. Basically, there still remains an essential difference [to second-hand images of one of my contemporaries]. My typifications of my fellow-man are brought into his uniqueness, which is immediately grasped in the living we-relation, and *they are modified by this uniqueness*. The typifications are “enlivened” in application to my fellow-man, are arranged and subordinated to the living reality.⁷³⁷

⁷³⁵ Arendt 1968, p. 292

⁷³⁶ Arendt 1958, p. 179, my insertion

⁷³⁷ Schutz and Luckmann 1973, p. 77, my emphasis. Later this modification is related to a degree of generality (of detail and determinateness), which defines the fullness of content. In relation to contemporaries, this is relevant because it defines a certain social distance in terms of anonymity. “The anonymity of a typification is inversely proportional to its fullness of content.” (Schutz and Luckmann 1973, p. 80) Further, it has a curious temporal component that reflects a deeper point that can be made on accessibility/imagination [which can be related to short-comings in Arendt’s own work – assumptions made about the situation of others; see Benhabib]: “The sooner I can

These analyses are still topical, but they allow us to appreciate the possibility of types that are responsive to the unique appearance of a fellow-man in first-hand experience. To convert this possibility to the metatopical level, there still remains a peculiar problem: How do we retain or convey the uniqueness of someone through words? Say, we have the adequate conception of equality (that calibrates sensitive synthesis of the types and the unique) in a way that includes the most vulnerable alien amongst us. How do we retain this experience on a metatopical level and make it objective? That is, how do we express or share the way someone makes an impact on our stock of knowledge to others? Arendt is clearly sensitive to this issue:

The manifestation of who the speaker and doer unexchangeably is, though it is plainly visible, retains a curious intangibility that confounds all efforts toward unequivocal verbal expression. The moment we want to say *who* somebody is, our very vocabulary leads us astray into saying *what* he is; we get entangled in a description of qualities he necessarily shares with others like him; we begin to describe a type or a “character” in the old meaning of the word, with the result that his specific uniqueness escapes us.⁷³⁸

It seems both Arendt and Schutz would agree that the unique is an irretrievable character of the encounter, and something that is only insufficiently manifested through language. This problem is related to the problem of thoughtlessness considered in chapter 7. In other words, how do we express uniqueness – or more precisely, the ephemeral experience of free agency – in a way that does not reduce the other to an object of knowledge and cognitions? How do we express, in the insufficiency of our language, the manifestations of a (in Kant’s empirical terms) “non-worldly” phenomenon?

The main way Arendt addresses this issue seems to be by claiming that stories and drama provides us with the best representations and manifestations of the unique agency of a person. Consider for instance the following passage:

The disclosure of the “who” through speech, and the setting of a new beginning through action, always fall into an already existing web where their immediate consequences can be felt. Together they start a new process which eventually emerges as the unique life story of the newcomer, affecting uniquely the life stories of all those with whom he comes into contact. [...] They tell us more about their subjects, the “hero” in the center of each story, than any product of human hands ever tells us about the master who produced it and yet they are not products, properly speaking.⁷³⁹

In this way, by telling someone’s life story or biography, we might convey the specific molding of types into a metatopical manifestation of the person, and not merely as an individual type. To be

immediately experience the typical characteristics of “someone” as properties of a fellow-man, as components of his conscious life, the less anonymous is the typification in question.” (Schutz and Luckmann 1973, p. 81)

⁷³⁸ Arendt 1958, p. 181

⁷³⁹ Ibid., p. 184

free, or to be recognized as an equal, amounts, in Arendt's terms, to be a "hero" in the original meaning of being someone whose story can be told. Drama is superior in the sense that it reflects better the temporality of the action: "[...] the specific revelatory quality of action and speech, the implicit manifestation of the agent and speaker, is so indissolubly tied to the living flux of acting and speaking that it can be represented and "reified" only through a kind of repetition, the imitation or mimesis, [...]. Only actors and speakers who re-enact the story's plot can convey the full meaning, not so much of the story itself, but of the "heroes" who reveal themselves in it."⁷⁴⁰ This seems paradoxical, given that artistic performances has the same ephemeral temporal character as human agency, but the key point lies in the possibility of reenactment.

Hence, full appearance as human does not rely only on the mode of action and speech, but also on the way it manifests a human agent in a story that can be re-enacted elsewhere.⁷⁴¹ As an expression of the new political principle of meaningfulness, 'the right to appear' implies the protection of the narratively structured framework of appearance. However, the stories told in this framework, especially those that manifest plurality in an exemplary manner, might also self-reflexively inspire and re-iterate the way we understand this principle and how to implement it. The final synthesis is not predetermined.

8.2.3 The problematic dependency on the spoken word

To be a "hero", or to stand out as someone whose story is worthy of being told, seems to repeat the problem of "speechlessness", brought to our notice by Rancière (see 6.2). It seems Arendt's concept of speech and reenactment, and the assumed reciprocity of the third axiom might lead to intolerable exclusions similar to those addressed in the case of political equality based on ethnic homogeneity. If we accept Rancière's solution, we should insist that the excluded still have the capacity to act (and speak). In general, I think Arendt would support this solution and judge it as preferable to solutions that appeal to universal vulnerability or to pleasure and pain. It also seems close, at least in my reading, to her critique of the modern notions of the inherent dignity of an autonomous will.

Still, in the most extreme cases of non-recognition, that of the "living dead", we might nonetheless have to consider the possibility of an absolute state of speechlessness. How do we account for the dignity of those that are truly incapacitated from speaking?⁷⁴² In these cases we might have to accept solutions based on the reciprocity associated with the two first axioms of

⁷⁴⁰ Ibid., p. 187

⁷⁴¹ Jackson, Michael. 2002. *The Politics of Storytelling: Violence, Transgression, and Intersubjectivity*. Copenhagen Denmark, Portland, Ore.: Museum Tusculanum Press, Distributor USA & Canada, International Specialized Book Services.

⁷⁴² See Lysaker 2013 for illuminating and systematic discussion on these cases.

social relations, even if it implies a compromise with the principle of meaningfulness. They are compromises in the sense that they imply transgressive assumptions of reciprocity of the type: We are similar to the point where there is no need to listen. These solutions must be considered emergency-solutions, as they do not address the institutionalized problem of exclusionary neglect. For instance, we might accept the provision of refugee-camps on the basis of recognizing universal humanitarian need. But, it would be unacceptable to allow such camps – based on paternalistic transgressions of meaningfulness – to become an institutionalized solution to avoid resettlement of the “superfluous”.

I’ve generally addressed such “transgressions” according to the issues of alienation and dehumanization implied by inadequate mentalities in Arendt’s work. Arendt explains other a-political or anti-political mentalities as possible conceptions that are grounded in other parts of human experience than the political life.⁷⁴³ In terms Schutz’s analytic terms, I’ve shed light on how these non-political modes of experience can be understood as other possible calibrations of the double character of experiencing others. Hence, we might distinguish different mentalities according to the depth and clarity the various modes they are based on, or conceptual designs of equality they are able to offer. The ability to promote and protect a plurality of unique beings will vary accordingly.

Further, I’ve also suggested that a person can appear on the metatopical level, given the right framework. The double character of personal appearance makes the difference between topical and metatopical appearance less radical. They both rely on typifications of they-orientations. And whereas topical encounters can combine this with the singularity and temporality of the concrete performance, metatopical encounters rely on simulations or reenactments in order to “breath life” into personal individual types.

8.3 Mere contemporaries and collectives

In the last section I considered how the synthesis of the double character in the encounter could be conceived and shared in such a way that the appearance of someone “qua human” could be maintained in the metatopical character of a contemporary through stories and re-enactment. The next question is how we can understand this durable aspect of face-to-face interaction to have any normative relevance on the level of the state?

⁷⁴³ i.e. in the narrow sense of the *bios politikos*, that Arendt describes in the classic appreciation of freedom. Other experiences are for instance related to honor and glory (monarchy), to fear (tyranny/despotism), to comfort (welfare state; mass society) and to utility (commerce; night watcher state).

This last detail is concerned with the required level of equality associated with the fully human appearance. Either topical or metatopical, the equality implied cannot – it seems – be reduced to reciprocity of typifications. The equality of an organized group might be given content through typifications, but the membership itself and the regulative ideal of a group of equals must be of a different character.

As discussed above, Arendt understands “equality” mainly to be something we become as members of a group, i.e. as something produced through organization. Taken in this sense, there is a decisive difference between equality and the individual type of “people like ...” that Schutz refers to. The former refers to the conception of a political principle of equality that should be sensitive to the manifestations of “non-worldly” free agency, and the latter to responsiveness to the concrete, immediate givenness of the other. When Arendt refers to the kind of equality that makes us understand each other – the reciprocity that Schutz refers to – these typifications might be relevant in order to indicate the extent to which we share the same objective meaning-context, for instance language. Most of our social life relies on such social stereotypes (of people like this and that) in order to adapt our behavior to the situation. We might also apply the imaginary of types to give content to absent or anonymous free agents.

The kind of equality achieved through organized membership, is, however, essentially different. It *cannot* be given a concrete example in the same way. If we recognize that someone is acting “for the sake of” some principle, we experience it – in contrast to the typical – as a unique performance and manifestation of a shared principle. The difference between imaginary individual types and the agency that manifests principles seems to me to be a crucial conceptual distinction. The implied difference in depth is exactly what Arendt critically addresses as lacking in the mentality of work. The “who” of a person escapes a mentality based on the principle of usefulness. Further, the concept of individual equality of the third axiom of reciprocity cannot remedy the shortcomings of, say, national sameness. Individual equality (as reciprocity) tends to reduce equality to the property of a generic and anonymous individual type, as knowledge of “what” someone is. Neither notion of equality (as cultural or individual reciprocity) is able to capture the normative status of the other as someone worth listening to.

To capture the fragile and intangible character of equality in plurality, Arendt appeals to the anarchic notion of *isonomia* in the spontaneous assembly. This appeal is not an expression of nostalgia, but refers to a manifestation of a principle of equality that can be re-iterated on various levels. To live according to such a principle of equality would presumably take on a different figure in the case of spontaneous assemblies compared to mass democracy. The general point is

that the principle in question does not demand institutional protection of certain (cognitively grasped) attributes of the other – not even in the paradoxical sense of being an “end in itself”. It rather seeks the protection of the in-between, the web, which makes thoughtful actions possible. Both in informal and formal situations, the decisive feature of equality is not based on some reciprocal functional capacity of communicating, but the equality of power in terms of equal availability to the scene of action and speech.

Even if we accept that the principles inspired by the human appearance of face-to-face encounter and the *isonomia* of the spontaneous assembly are topical manifestations of metatopical principles, we encounter a problem similar to Walzer’s reliance on topical metaphors.⁷⁴⁴ It is uncertain whether we should accept the analogies as valuable on the metatopical level. In essence: How should we think properly of a framework of equal and free agents in a metatopical community – such as a modern state or, even more challenging, humanity as such?

To answer this question I find it necessary to turn to how actions might manifest our membership in such communities. In the case of national membership, there seems to be certain actions and rituals, especially associated with border control (both internal and external) that manifests and reiterates the status of belonging to a metatopical community. This regulation might be marked by a state-centric distribution of political reciprocity, but the organized equality of citizens might take on more cosmopolitan-civic character. If so, we have to detach the possibility of human appearance from the distribution of equality associated with citizenship. To understand how plurality can manifest itself on this metatopical level then, we have to understand what it entails to appear as “human”, not merely as a unique individual type, but also as a member of humanity.

To address this challenge, Schutz’s structural distinction within the social horizon between “mere contemporaries” and “collectives” is useful. Compared to Arendt, this distinction corresponds to the distinction between the social space defined by cognitions and the social space defined by thinking.⁷⁴⁵ “Mere contemporaries” refers to the community of equals defined by imagined individual types (cognition), whereas “collectives” refers to the community within the idealized conception of the *un*-imaginably many (thinking). To specify the implication: There is a crucial difference between thinking of a metatopical community – such as a state or humanity – as a group of “mere contemporaries” (i.e. as an imagined manifold), and as a “collective” (i.e. a unity

⁷⁴⁴ See also 5.2.1.

⁷⁴⁵ As mentioned earlier, in Kant’s terms this is parallel to the distinction between concepts of understanding and concepts of reason (knowledge and faith/thinking). The central phenomenological parallel would be the distinction between real and ideal objects.

of the unimaginably many). In the following, I will argue that both topical and metatopical relations, and the appearance of persons within such relations, rely on a notion of equality associated with membership in collectives.

8.3.1 Imagined and unimaginable communities

In order to clarify a possible confusion, we have to distinguish between imaginable or presentable objects⁷⁴⁶ on one side, and unimaginable and non-presentable objects on the other. Individual types – either personal or anonymous – belong to the former. They are *presentable* in the sense that they are experienced or can be expected to be experienced, in some near or hypothetical future. Presentable objects are, as phenomenologists would say, related to objective time and a common world (associated with the second axiom of the natural attitude, in Schutz's terms). They bear resemblance to Arendt's notion of models or ideas in the sense that they refer to objects that can be located, and they have the peculiar temporality which implies that I sometimes have to wait for them to arrive within the proximity of my body. And individual type, even a "mere contemporary" that I've never met, might *travel* or *migrate*.

Some unimaginable objects have a similar, worldly character. A bureaucracy (guided by machine-like archival techniques) might be able to manage a mass society (as a population) while it maintains a conceptual, numeric precision of the unimaginable multitude of individual types.⁷⁴⁷

To be a member of humanity, seems, however, to refer to something other than simply being an individual personal type of a multitude. The difference can be explained, I suggest, by considering that some objects are not only unimaginable, but also non-reducible to presentable objects. They have no peculiar spatiotemporal location and are in a sense *everywhere*, always available and at the same time "irreal" and hence *nowhere*, in the sense that they cannot be located in space and time.⁷⁴⁸ That is, they cannot be given empirical examples as an ostensive "there" (as spatial objects) and "now" (as temporal objects). Nor does it make sense to refer to these objects in terms of processes or recipes that can be demonstrated (like unimaginable, but reducible objects).

Hence, when we speak of collectives, such as states, as "imagined communities" – what we seem to do, according to this conceptual analysis, is to refer to their metatopical status as *unimaginable* and irreducible.

⁷⁴⁶ To avoid confusion this would include the empiricist's notion of "ideas".

⁷⁴⁷ The analogue to counting an object with thousand sides is quite suiting. We cannot precisely imagine an object with thousand sides, but we can adopt techniques to reduce the complexity of the object to manageable operations such as counting.

⁷⁴⁸ P. 29, in Held, Klaus. 1998. "Einleitung." In *Phänomenologie Der Lebenswelt - Ausgewählte Texte*, edited by Klaus Held, 304 s. Stuttgart: Reclam.

To nuance this point, we might consider two possible ways of understanding metatopical communities: On the one hand, we have the conceptual option of understanding these communities in terms of their practical impossibility from the street-level perspective of the citizen. In Benedict Anderson's account this is given expression in the recognition of the contemporary strangers that we'll never meet: "[...] all communities larger than primordial villages of face-to-face contact (and perhaps even these) are imagined, because it will be impossible to meet most of their fellow-members."⁷⁴⁹ More precisely, according to Schutz: In a modern society, we cannot even *imagine* all the strangers that we will not meet.

On the other hand, we have the conceptual option of understanding these communities in terms of their non-reducible character. The curious hesitation of Anderson's "perhaps even these" suggest that he might be aware of the difference. We will find the "irreal" aspect of communities also in traditional societies. This option refers to society – not as a metatopical constellation of "mere contemporaries", i.e. as a society of individual strangers – but as a "collective".

Distinct from populations of strangers, a state is a *collective*. It can be said to be territorial, but it does not make sense to say that it *is* a territory. Similarly, we might say a modern state is constituted by its citizens (or that its citizens are constituted by it), but it does not make sense to say that it *consists* of citizens as its empirical content. Further, there might be processes and procedures closely associated with a state, such as democratic procedures of will-formation, but I struggle to see how we could say that the state can be demonstrated by an election or a parliamentary assembly, as if these were examples of a generic category or organs in a larger organism.⁷⁵⁰

Anonymity is a mode of social vagueness associated with imagined individual types; an "empty" type in our imaginary orientation toward absent individual others with a generic, unspecified content. The status of the presentable object can be clarified and specified by approximation, i.e. it can be made presented or exemplified. In contrast, un-presentable or ideal objects are not anonymous, they simply do not convert to presentable individual types at all. Their anonymity is – so to speak – *absolute*. From this we might tentatively say that corporations and states (agents of legal fiction) are ideal objects, while a human individual is a highly anonymous imaginable object.

⁷⁴⁹ Anderson 2006, p. 6

⁷⁵⁰ See interesting footnote, Schutz and Luckmann 1973, p. 83. Schutz makes a comment in a footnote here which I think is really to the point: how do you study a state? It certainly does not take the form convertible to a subjective meaning-context as such, which would amount to a totalitarian project, but it might be to some degree converted to the functionaries of the state. The way I understand it, it is a question of presentation of a "we" that is not presentable as such.

How can such ideal objects guarantee political equality? And, is “humanity” conceivable as a collective of this sort?

Based on these considerations we might specify a point concerning human appearance: Similar to the double character that Schutz models in his analysis of experience of the other, human appearance relies on the perceived distinctness of persons as singular beings and on the imaginable character of individual personal types. But since the human appearance, the appearance as unique, cannot be sufficiently grasped by such cognitive typifications, “equality” seems also to suggest something similar to a membership of an ideal objective character. In this sense human equality operates on the ideal level of objects, similar to principle that guides thinking and action, and reflects a conceptual status of political membership that is perhaps best captured by its symbolic status. It is actualized only through performances that manifest this conceptual equality. It should begin, as I read Arendt, by giving every member of the “one world” a symbolic status as members of humanity and the implied right to have rights.

In the following I will explore the two possible conceptual options of a political society in brief detail.

8.3.2 Mere contemporaries

How can we think plurality as a human condition among mere contemporaries?

Compared to familiar personal types, the problem with “mere contemporaries” is that it deals with high modes of anonymity of mass society that seems incompatible with plurality. As Schutz points out, this anonymity has a pragmatic function in our daily life that we hardly notice. Many of our daily relations are to “mere contemporaries”. For instance, we take for granted the interaction we have with mere “functionary” types that support our daily routine. We barely notice these services unless they fail to function according to their purpose.

The way we coordinate our behavior in this manner is useful in a mass society. When I put a letter in a mailbox, I expect some anonymous functionary in the postal service to carry out my intention.⁷⁵¹ The assumed functionary does not have to rely on my subjective intentions, nor do I have to care for his personal motives for doing his job as a postal employee. We need only to trust the objective meaning-context taken for granted in the postal system.⁷⁵² On the level of civil society understood as a functional system, this superficiality indeed seems necessary. However, if

⁷⁵¹ Schutz uses this example.

⁷⁵² Schutz clearly relies on Max Weber notion of ideal types in this analysis and refers to some of Weber’s own examples that reflect similar relations to functionary types, such as our assumption that commercial agents share the acceptance of money as a medium of exchange. (Schutz and Luckmann 1973, p. 76)

we consider it as an option for imagining a political society it seems clearly inferior to an imaginary of the public sphere, which enables us to “breathe life” into our mere contemporaries as personal types.⁷⁵³

In a modern society it also makes sense to say (in phenomenological terms) that we live in an *imagined* community to the extent that we rely on typification to organize our expectations regarding the strangers that are co-members of the same community. I might still meet these strangers someday under circumstances with a certain degree of shared familiarity (depending on the social trust and integration I have acquired). There seems to be no moral reason why we should seek to personify the individual type of all these anonymous strangers and functionaries that we implicitly rely on in our everyday life. Rather, it seems we have good ethical reasons, i.e. to the extent that it would affect those who do in fact rely on us, not to get lost in idle curiosity and indiscriminating concern for all.

We do, however, have a responsibility regarding the way we imagine the reciprocity and differences of those within and outside this community. This responsibility concerns the level of honesty and adequate precision of the interpretative schemas through which we appropriate knowledge about others. We do by necessity rely on stereotypes of each other, but there’s an empirical contingency to the question of whether or not these prejudices are fairly accurate and reliable in practical circumstances. An increased level of our stock of knowledge seems to be compatible with the condition of plurality in the sense that we become more receptive to the manifold of individual and cultural expressions in society, both domestic and global. It makes us better prepared to consider the perspectives of others, and to “think” in the sense of “enlarged thought”.

But although it is compatible with the condition of plurality, even a rich stock of knowledge of anonymous types cannot meet requirements of equality and distinctness associated with plurality. It seems we have to conclude that we cannot think plurality on the ground of cognitions of “mere contemporaries” alone.

8.3.3 Collectives

To consider the second option: How to think plurality in collectives?

⁷⁵³ We could for instance consider stories of personal interest cases where individual types are breathed into life in the metatopical sphere. This has certainly been part of the way the media has covered the recent immigration to Norway, especially in cases involving children, where the rhetoric effect of evoking sympathy was applied deliberately by both journalists and civil organizations.

The notion of collectives has a different character in the social experience than mere contemporaries. It operates more like regulative ideas, organizing experience without themselves being explicated in perceptions or images. This distinction between types of contemporaries and ideal collectives makes Schutz social ontology both original and provoking, in that he rejects the simple analogy between individuals and states as social agents. Some collectives, such as “the state” or “the economy” cannot be converted into imaginable individual types. They are not derived from experience, in the sense individual types – even mere unknown, contemporary strangers – are. They are, in a strict sense, *non-presentable*. Hence a state is of a completely different phenomenological order than individuals. What Schutz shows us, is that if we consider these questions from the premises of an individualistic methodology, membership categories such as “citizenship” or “humanity” are not empirically based nor experientially derived at all. They are symbolically ascribed to individuals according to the ideal concepts of membership in “the state” or in “humanity”.⁷⁵⁴

So, according to this distinction, what does it really entail to be a member of such a collective as “the state” or “humanity”? For sure, it is not enough to be a specimen of the biological category *Homo Sapiens*. The equality of citizens or human beings is not identical to or grounded in biological sameness, nor should it be understood as “equalizing” in the sense of functional equivalences. More precisely, the content of these memberships seems to be structured by narratives and exemplary performances that adhere to the principle of equality, without providing any definite determinable content of it. According to Arendt’s notion of political principles, the content and character of these membership categories are malleable to the way we re-iterate and re-enact them. For instance, while we do have stereotypical notions of “a Norwegian”, it would be an essentialist fallacy to say that the generic Norwegian “type” is grounded in what people are actually like in Norway. More accurately, since “Norwegian” here primarily refers to being a member of a collective of equality, it represents an imaginary of the practices and narratives that we think of as proper manifestations of the Norwegian collective. To be a good example in this manner refers to the manifestations of an ideal case, not an empirical category. Hence they differ from accurate stereotypes.

Given that thinking of society as collectives allows us to distinguish more clearly between the reciprocity of our “mere contemporaries” and the equality of our co-members, it seems plausible to say that we have specified the kind of equality required by the human condition of plurality.

⁷⁵⁴ Schutz and Luckmann 1973, see p.73 and 83 for schemes of degrees of anonymity (lack of individual type)

We still have to consider how these membership categories allow for the corresponding uniqueness that plurality implies.

On the level of state communities, the political responsibility of thinking plurality in collectives is confronted with the unfortunate implications of superficial assumptions on the various levels of reciprocity. For instance, the main problem associated with the mentality of work is that it is unable to conceptually grasp equality and uniqueness as aspects of the human condition of plurality. It is restricted to the specification of “the citizen” within the domain of functionary types, which tends to define a good citizen in terms of being a hard-working employer; an eager consumer, and so on. The subjective variation it leaves open is defined by the same level of reciprocity. It may self-critically leave these specifications open, as in the liberal notion of negative freedom, but the basic instrumental character of this mentality cannot be stretched, it seems, beyond the paradoxical notion of the individual as “an end in itself”.

Compared to other definitions of a richer character, the superficiality of the instrumental mentality of work has the advantage of being less susceptible to traditional imaginaries of reciprocity as defined by the narrative of a nation. The generic cultural type of a “good citizen” exemplifies this possible parochial bias of giving our “mere contemporary” co-citizens an increased depth based on assumed in-group reciprocity of “the nation”. Taking these inherent risks into considerations, I still think the question of a “good citizen” could be understood as a genuinely political issue in Arendt’s sense. I agree with Arendt that the question of a good citizen should not be resolved by reducing it to a question of being a good functionary. Rather, we should critically address the content of our current notion of a good citizen and consider to what degree it complies with the right to appear (i.e. the rights to action and speech). Simultaneously, we should consider what it implies to be a “good member of humanity”.

In either case, the content associated with these memberships should in my view be contested and open to as many perspectives as possible, given conditions and limitations similar to those approximated by Arendt.

Conclusion

If we were to agree with Benhabib that the political space defined by the in-between the relations between mere equals and private ethical relations, then the question of the good member of a state and of humanity are located outside the formal and procedural political sphere.⁷⁵⁵ At best, in this framework Arendt’s notion of “politics” seems to refer to something that takes place in the

⁷⁵⁵ See 5.4.2

outskirts, in the public space where personal interaction allows for personal distinctness. As a concluding remark to the discussion in this chapter, I think this model of the public space as “in-between” the anonymous meta-topical space of formal equality and the personal topical space of informal uniqueness is misguided.

“Formal equality” is not found on the same conceptual level as anonymous and personal types. Further, the private sphere – in so far as it hosts more than individual types of “mere difference” or “mere sameness” – is a space of appearance in the sense that it allows for the expression and distinction of personal uniqueness. And the political sphere, to the extent that it consists of subjects of positive law, is only political if it allows itself to “absorb all new origins” and be “nourished by them”.⁷⁵⁶ Hence, the public sphere (as a space of appearance) is not a specific social space among others (like the private and public; social and political), but a mode that any social sphere might take on if it finds the right balance between what we might call “equality of power” and “biographical uniqueness”. To appear as fully human presupposes a proper balance between both of these elements of plurality. Whereas the equality in question depends on the organization and its level of protection, the uniqueness is not something a political community can master, but rather something it must allow for the performance of.

Although Schutz’ is one of those within the phenomenological tradition (broadly speaking) that has, like Arendt, an interest in the field of the social, I do not pretend that their perspectives are in full agreement. What I have attempted here is to promote a constructive dialogue based on their similarities, and (perhaps a bit uncritically) allowed this dialogue to take place within the constraints of Schutz’s methodological individualism.⁷⁵⁷ I do, however, think that central aspects of Arendt’s thinking, such as free agency and the principle of equality associated with the concern for plurality, remains quite intact.

The continuous concern of this chapter has been the possibility of thinking human appearance in relation to metatopical and a-topical (or ideal) levels of sociality. If we cannot simply appear as agents; if actions are manifestations of non-presentable principles and memberships, what does it tell us about the relation between being member of a state and the possibility of appearing? How can we make sense of ‘the right to have rights’ as the right to act, or the right to appear (as human)? Is it the right to manifest oneself as part of an imagined community? What does that

⁷⁵⁶ Arendt 1968, p. 465

⁷⁵⁷ Arendt’s thinking pushes beyond the scope of a methodological individualism, this is especially evident in her notion of *Natality*

For instance, Arendt’s emphasis on the significance of the newborn and the new beginning, is not just a critique of historical determinism, but also reflects a new metaphysical conception of humanity. One which decentralize and deemphasize the transcendental significance of the individual constitution of meaning

even mean? Could we say that to appear *as human* (which certainly is not independent of the cognitions or typifications involved in personal appearance), also has a symbolic or virtual depth to it that enable us to assess the *way* we appear to each other in the light of principles of thought?

If so, to appear *as human* implies that we act and speak in such a way that we manifest ourselves as members of humanity. Depending on our conception of these principles, or which principles we understand to be higher-ranking, we may favor or marginalize various ways of acting and appearing. Arendt's basic point seems to be that the very possibility of being judged in this manner – i.e. by principles of action – relies on conditions of action. In order not to be a self-undermining (and not merely logically self-contradicting) performance, our chosen guiding principles – and their corresponding mentality – should reflect these human conditions and plurality in particular.

I still think a Kantian reading of Arendt, like Benhabib's, can be supported, but only if the 'right to humanity' is qualified by a proto-political reading. In this sense, "humanity" is, like the ancient notion of "glory", not referring to a bunch of specimens that could potentially be collected in a single concentration camp by some extra-terrestrial invading force. Rather, much like the individualist idea of seeing some phenomena as *ends-in-themselves*, it is concerned with how we appear and treat each other. As such, a forced encampment of the entire species of *Homo sapiens* would very likely leave us with anything but humanity. To be a human individual type is in this sense very different from being a member of humanity as a collective. To be a member of humanity is equal to have the right to be treated with humanity.

The point is here, I take it, not that the excluding or isolating system is simply able to turn people into animals (although this might be the objective in the most extreme cases of concentration camps). When someone is denied participation, the main implication is their denied status of belonging to humanity. In this case, the "alien" – the symbol or manifestation of the fact of difference – is received not as a part of humanity (according to the mentality of action), but merely as part of the human race (according to the mentality of labor). According to the mentality of labor we are recognized as "the same", but only in a biological way which renders unique difference politically indifferent. In the entertainment business, the human sameness of the activities of sex and violence (which assumingly triggers the psychological mechanisms of desire and fear) seems like an efficient recipe for addressing a wide audience.⁷⁵⁸ In political terms

⁷⁵⁸ Enjoyed and consumed today mainly in intimacy through the parallel distribution via individual devices offering a standing supply supported by "the cloud". If there is a moral-political problem here, it must be that the value of privacy as a space to form one's own thoughts is lost or at least challenged by the time-consuming consumption of entertainment.

this mode of addressing people is far from harmless. The difference was demonstrated in the horrific practices of the imperial and totalitarian regimes in a hereto unprecedented scale, forcing millions into conditions of mere sustenance.⁷⁵⁹

Furthermore, Arendt's notion of "crimes against humanity" only makes sense as crimes against humanity as an ideal objective collective. This is not an attempt to abstract away from the violations against individuals, but rather to explicate how an individual conception of human dignity is not able to grasp the wider consequences of such violations, and how they transgress the limit-claims of human integrity and ultimately destroys the framework that enable us to appear as humans to each other. In this sense, we are not only sympathetically affected by the violations of others, we are *all* violated by such crimes. To violate human dignity is not primarily a crime against an individual or a people, but it is a "crime against humanity"; it is a crime against human diversity or plurality as such.⁷⁶⁰

⁷⁵⁹ By "mere sustenance" I'm thinking of the kind of living conditions associated with slavery, colonial oppression and encampment. Today we might find similar conditions associated with extreme poverty and human trafficking.

⁷⁶⁰ See Arendt 2006, p. 268-269

Chapter 9: Conclusion of thesis - The proto-political and the new political principle

In part 1 I discussed the question of state obligations toward foreigners within the scope of cosmopolitan law of admission. I argued against humanitarian and narrow moral understanding of the character of cosmopolitan obligations, and promoted a view that supported a moral-legal conception of cosmopolitan law. I also suggested that according to the regulative idea of a global civil society, these moral-legal norms articulate obligations of a political character in the sense that they articulate the conditions which makes deliberations on the future content of cosmopolitan laws possible. This concern for further deliberations on cosmopolitan law was given support by a reading of Kant's cosmopolitan law of hospitality as provisional in character. The right to present oneself could be read as an early articulation of a provisional cosmopolitan law of deliberation, which seeks to protect transnational communication. In other words, I promoted in the end – based on the concern for a global civil society – a quite wide cosmopolitan account of the character of the state's obligation toward foreigners.

Further, I connected the depoliticization of cosmopolitan law to a state-centric tendency in modern political thinking. I raised concern for the conventional understanding of state obligations as defined in universal domestic terms (such as civil rights) and its ability to respond to circumstances dominated by cosmopolitan problems. In chapter 5 this concern was discussed in the context of the immigration debate. In this context the pace of immigration and the presence of foreign territorial residents exemplify how cosmopolitan problems challenge the state's obligations to its members and the regulation of membership. I considered three different positions on the question of how cosmopolitan obligations should be balanced with domestic obligations, and concluded that, within the premises set for this debate, Benhabib's position seems most attractive.

In part 2, I began by issuing some objections against Benhabib's position. First, I raised the pragmatic concerns regarding the applicability of highly sophisticated concepts. This can be understood as a practical dilemma between developing concepts reflecting the actual circumstances in an adequate manner and providing concepts that are shareable and accessible to public scrutiny. Second, I questioned the adequacy of the right to membership as the suggested extension of cosmopolitan law of admission. In this regard I pointed out the systemic problems of forced displacement and long-term encampment, which are not addressed by the law of admission. Third, these practical objections raised conceptual concerns regarding Benhabib's restriction of cosmopolitan law to the law of admission. Essentially, it tends to depoliticize the

significance of the voice of foreigners, and to give epistemological privilege to territorial newcomers.

In chapter 6 I argue that Benhabib's commitment to the ethics of admission seems to have colored her reading of Arendt's conceptual ambition. This is considered more specifically by how it constrains Benhabib's interpretation of "the right to have rights". Mediated by Rancière's critique of Arendt, which seems to share Benhabib's basic institutionalist premises in the reading of Arendt, Arendt's position is confronted with the aporia of rightlessness and the futility in solving this unsolvable problem by a concept of equality grounded in the capacity to speak. It is futile because the assumed capacity to speak is strongly tied to the recognition as a political subject in the first place. In short, Arendt's account seems to confirm the standing institutional order, where the political beings are already protected by citizenship and those excluded are so because they are non-political beings, unable to speak up because they are unable to speak properly.

I suggested an alternative, proto-political reading of Arendt as a promising way to answer Rancière's critique and consequently to improve on Benhabib's interpretation. This alternative reading relocates the political character of human relations to the pre-institutional public space. The conditions of political agency are as such not restricted to the institutionalized community of a state. According to this view, rightlessness is not an unsolvable problem, but a case of severe violation of the state obligations to protect human beings from the deprivation of the fragile intersubjective conditions that make us able to act and speak. Hence, Arendt's ambition to articulate a new political principle can be seen as an attempt to guide the development of a mentality or social imaginary of territorial collectives that enable us to recognize the intolerable harm of statelessness and depoliticization (before it turns into rightlessness and dehumanization).

Benhabib certainly also addresses the excluding institutional order of the globalized world, but she does so directly by reading the right to have rights as part of the *content* of cosmopolitan law. This answer operates, in my opinion, on a different level than Arendt's thinking. Regarding the interpretation of "the right to have rights", this implies a decisive difference. Whereas Benhabib emphasizes the complementary, institutional articulation of "the right to belong to some kind of organized community" (i.e. the right to belong), Arendt expresses, in my reading, in "the right to, have rights" a more general human right, which I've also called "the right to appear".

A proto-political reading of Arendt has, however, been criticized for its reliance on the agonal and performative aspects of political action, implying a lack of a proper philosophical grounding of the political principle in question. In chapter 7 I argued against the assumed groundlessness

implied in the proto-political reading of Arendt. This basic right is understood as an expression of a new political mentality that Arendt seeks to develop, guided by the principle of meaningfulness. Consequently, I've argued, along with Birmingham's interpretation, that 'the right to have rights' is not the ground in Arendt's political thinking. It is connected to Arendt's influence from Montesquieu and the central notion of the principle of action. Arendt's main concern, as I see it, is to introduce a new political principle, and to ground this principle in the basic human experience the condition of politics. This basic experience Arendt finds in the rich communicative interaction, which enables us to appear to each other as most human compared to other experiences. This comparison has a clearly normative element to it. Hence, Arendt's analysis does not depend, contrary to the assumption of the conventional reading, on a descriptive anthropology of human beings as speaking and political beings. Further, Arendt analyzes this experience through its mode of disclosure (the mode of action) and according to its human condition (the condition of plurality). Hence, comparable to the innate human right of autonomy that Kant articulated, this basic right expresses human dignity from the perspective of plurality. This general level of justice can *subsequently* be given content both in terms of domestic and cosmopolitan law, including Benhabib's suggested right to political membership.

My proto-political reading emphasizes Arendt's conceptual recognition of the public space as the necessary framework for taking political agents seriously as responsible and with something to say. Further it explicates that this framework is not essentially depending on a state community, but primarily depends on more informally organized communities that – due to the circumstances – also take on the (imaginary) character of a global civil society. However, it also acknowledges that the absence of or exclusion from state protection leaves the political subjects very fragile. Since the global civil society should not (preferably) be protected by a global state, the right to belong should also be given content in a wider range of cosmopolitan law than the traditional law of admission. The need for protection also obliges states to secure the political integrity of all, including non-residential foreigners.

The new political principle Arendt proposes, the principle of meaningfulness, finds its inspirations in the activities situated in the space of appearance. Thus, it is reasonable to question its relevance for organization of groups beyond the topical face-to-face relations. How do we retain our appearance as distinct persons in a modern state or a global civil society? To address this remaining issue, and to indicate the implications of this new political principle on these higher levels of sociality, I compared in chapter 8 Arendt's concept of plurality, and its elements of uniqueness and equality, with Schutz's phenomenological description of the double character of persons in everyday life experience. I argued that human appearance is related to a conceptual

depth of experience that cannot merely be derived from cognitive typifications of the topical experiences of the perceptual presence of others. To be a member of a human group, either it is topical, metatopical or essentially a-topical, implies also an ideal element that cannot – it seems – be traced back (or reduced) to experience. In this sense, to be member of a tribe, but more clearly of *demoi* or of humanity, implies taking part in an “unimaginable”, but only thinkable unity. If it is correct, as I argue, that this membership approximately represents the kind of equality Arendt holds to be an essential element of the condition of plurality, then it seems this condition depends on an a-topical, ideal-objective element at its core.

Further, since Arendt’s ambition of political renewal is not based on the activity of action per se, but on the principle of action, the basic experience of the mode of action might inspire our interactions within all kinds of social relations that Schutz’s framework distinguishes. This includes the topical interaction with fellow men that Benhabib describes as face-to-face interaction with concrete others in the everyday lifeworld. But, it also includes the metatopical interaction with anonymous and personalized contemporaries (of which the relations of public persons in the civil society seems most politically relevant) and the atypical interaction with other citizens and members of humanity as such in collectives of formally equals.

The political character of these collectives relies on their regulative ideas, and their ability to sustain a level of politically relevant equality. This equality represents in my view the most politically relevant aspect of appearing as fully human that is calibrated with the biographical uniqueness of the free agent. To appear as “naked”, implies to appear without the conceptual depth of a political being. “Naked” appearance is in Arendt’s sense nothing similar to pure or honest, but implies rather a kind of “shallow” and uncanny appearance of pure sameness. We might say that it corresponds to the mere perception of others, i.e. empathy, a psychological disposition Arendt associates with our digestive or respiratory system. To be “naked” in this sense implies to be excluded by the regulative idea of the collectives in question, and manifest as such the clearest negation of the political principle of meaningfulness.

In other words, we might conclude that even though the phenomenological-existential analysis is situated in a subjective experience that has, unavoidably, a topical situatedness, the particular conceptual depth that makes someone appear *as human* is depends on elements of typifications – that it shares with metatopical relations – and formal equality – that it shares with all collectives. Together they reflect the peculiar and artificial conditions of the human activities of action and speech.

To summarize: Arendt organizes her key concepts according to the basic elements of the human condition of plurality, namely uniqueness and equality. Primarily, the principle of meaningfulness – which guides the mentality of action – answers to plurality as the proper condition of political agency. To act according to the principle of meaningfulness implies to act for the sake of thoughtful and free actions, or implicitly for the sake of acting together. Further, the corresponding mentality of action is given its most general expression in the awareness of the right to appear⁷⁶¹ and the right to belong⁷⁶², motivated reflexively by its ultimate negation in the case of millions of the naked and rightless. Beyond the spontaneous organization of the pre-institutional public space of the assembly, the implementation of these rights implies some kind of institutional organization. In relations regulated by cosmopolitan law, the level of organization is still provisional, implying that the opportunity to appear is fragile and unprotected, and the belonging to humanity guaranteed by an unsanctioned code of human dignity.

I will end this dissertation with some open remarks on how the mentality of action can be given expression as legitimate forms of government and proper institutional protection of the public space and the human condition of plurality. I begin by critically considering the deliberative turn as a reception of Arendt's thinking. Further, I will structure Arendt's own account according to a proto-political reading by considering the implied scope of state obligations associated with the right to appear and the right to belong. In the final section I will consider some possible practical implications of these thoughts.

9.1 Arendt and the deliberative turn

In the context of democratic opinion- and will-formation I made a distinction between its systemic and performative aspects. Usually, when we speak of “the political”, we refer to the political system. That is, primarily we mean the institutions that ensure representative procedures of binding decision-making and legislation in modern democratic states. Whereas the systemic aspect is associated with aggregation by making decisions through direct or indirect vote, the performative aspect is associated with the deliberative forming of an opinion. This latter aspect has usually, as Habermas has pointed out, been considered to have a spontaneous and anarchic character to it. Within the framework of the modern understanding of the function of the political system, it thus seems reasonable to include these aspects only as a methodological consideration on the value of deliberation.

⁷⁶¹ I.e. the right to have rights

⁷⁶² I.e. the right to belong to some kind of organized community

The “proto-political” conception of politics could, nonetheless, be said to find its expression in a central aspect of the imaginary of a secular democratic society. In the imaginary of the self-constituting and opinion-forming civil society, we find a metatopical space that seems able to host the conditions of the mode of action. It is considered, as Taylor phrases it, to be “extra-political”, i.e. located outside and independent of those in representative positions of political power. Yet, the civil society might display its political power of action through a “siege” of the system, as Habermas would say. Since the conception of proto-political relations I’m promoting emphasizes the *mode* of performative, opinion-forming actions, it will not so easily be located to a specific localization. Still, I think it is fair to say that this political mode of activity is usually found in the extra-institutional space of appearance. Hence it contests the assumption that “the political” is synonymous with what we call “politics”. Unlike Arendt’s concept of political action, politics is an activity located in the institutional or systemic aspects of democracy and often portrayed as performed in a mode of strategic agents fighting with words. To Arendt, the system is not redundant, but takes on a secondary role of regulating and protecting the political actions in the public space.

When Habermas analytically isolates the performative aspects by considering the anarchic notion of democracy, he emphasizes the kind of assemblies that spring out of topical face-to-face interaction and solve problems through mutual understanding. Since Habermas seems to rely on a sociological location of these performative, proto-political aspects on the topical level of “fellow-men”, it leads Habermas to limit their relevance for the metatopical locations or spheres in the modern mass society. Hence, a decisive feature of Habermas’ deliberative account is that he – inspired by the proto-political – formalizes the performative aspect and redefines it as communicative rationality.⁷⁶³ This ensures perhaps the explication of the modes of justification in political deliberation, by extracting the aspects most suitable to the metatopical public sphere. To be sure, the identification and reevaluation of this sphere, is in itself a considerable contribution by Habermas, and one clearly inspired by Arendt’s work on the public space. It is, however, criticized for being too rigid in its definition of the kind of reason that is shareable in this sphere.

The affinity between the deliberative turn in democracy theory and Arendt’s thinking is also clearly manifested in Benhabib’s account. Benhabib is also able to remedy some of the rigidity associated with Habermas’ adaptation of Arendt, when she adds the narrative structure of agency as the decisive contribution of Arendt’s thinking. Benhabib criticizes Habermas for emphasizing too much the decentralized position of the generalized other, because it has an excluding effect

⁷⁶³ Habermas 1987 and 1989

on issues (such as gender issues) that do not so easily order itself under the label of “generalized interests”. In its place, Benhabib values the way narrative agency enable us to put ourselves in the position of concrete others, and emphasizes how this enables a moral standpoint that should be appreciated in the model of the public sphere.⁷⁶⁴ From this vantage point Benhabib develops her account of just membership and porous borders in a way that retains a richer conception of the performative aspect of politics. Hence, both Habermas and Benhabib lifts forward central features of Arendt’s thinking and discuss how these features can guide the articulation of adequate rights and the establishment of legitimate political institutions.

I claim, however, that both Habermas and Benhabib overlook the basic originality of Arendt’s project. There seems to be, so to speak, something “lost in translation” in the appropriation of Arendt’s thinking to a more applicable account. Both Habermas and Benhabib locate Arendt’s weakness in her reliance on a face-to-face model of the public, similar to the ancient topical public of the *polis*. By taking distance from the anarchic and agonal manifestations of the public, they both try to avoid the implied weakness of Arendt’s political theory. As I’ve argued in the previous chapters, I think this conceived weakness is somewhat misguided, since Arendt’s primary ambition seems to have been to re-conceptualize the basic political principle of action. This ambition seems to be silenced in the adaption of Arendt’s thinking to a conventional framework as merely a valuable supplement to an instrumental and formal notion of politics.⁷⁶⁵

“Humanity” is for Arendt not an entity taken for granted, but an ambiguous term. On the one hand “humanity” refers to the circumstantial fact that we have become one human society or one world, interconnected by the effects of our actions and co-destined by the shared problems. On the other hand, “humanity” refers to a regulative idea of a collective. As such an idea it breathes some life into the principle of meaningfulness, and the scope of which such a principle should inspire us to reenact and rethink it. Reflecting her ambition, I think this point is perhaps best captured Arendt articulates in the reformulation of the right to belong as “the right of every individual to belong to humanity”.⁷⁶⁶ It is also clear that Arendt has ambitions beyond the statist scope of domestic state obligations: “the idea of humanity constitutes the sole regulating idea of international law.”⁷⁶⁷

⁷⁶⁴ Benhabib 1992

⁷⁶⁵ Habermas seems to accept the value of communicative action, but from within the mentality of work, as its enrichment. Politics is primarily still of an instrumental and systemic character, whereas the communicative and lifeworldly aspects of life are designated to the moral sphere.

⁷⁶⁶ Arendt 1968, p. 298

⁷⁶⁷ *Ibid.*, p. 157

Complementing this manifestation of the principle of meaningfulness in humanity, I find the right to appear to articulate the other-dependency of the individual will by the emphasizing the importance of “acting together” in public space. This public space is not primarily related to the institutionalized public, nor the semi-formal public of communicative action, but has the peculiar cosmopolitan character of being potentially found “wherever you go”: “It is the space of appearance in the widest sense of the word, namely, the space where I appear to others as others appear to me, where men exist not merely like other living or inanimate things but make their appearance explicitly.”⁷⁶⁸ Accordingly, the right to have rights is not merely the unwritten code of cosmopolitan law, but the general protective human right to public spaces, wherever they might be.

The principle protection of this space is usually associated with the negative freedom of liberal civil rights. Arendt does not reject the values of these rights, but explicates their limitation due to their reliance on the right to belong, hence the protection of this space is connected to the way we imagine and think about social organization. To ensure this protection, we have to revise our state-centric notion of belonging on the metatopical and ideal level of society.

Although I recognize that Benhabib’s model of the public as an improvement of Habermas’, and also as a model closer to Arendt’s own understanding, I’ve argued that there is a state-centric tendency in Benhabib’s thinking that leads her to neglect certain possibilities of relevance to cosmopolitan law that Arendt’s work opens up for. The most importantly, is the one I’ve already discussed in chapter 6, concerning Benhabib’s impatient skip from the right to belong to humanity, to the right to political membership. There are however also some further points to be made that seems to indicate possible improvements from the perspective of a cosmopolitan, proto-political reading of Arendt.

First, it seems that Benhabib, along with Habermas, still locates the public as the “*res publica*” which gives scrutiny and legitimacy to the state. For instance, while referring to Arendt’s contribution, Benhabib describes the public as “a regulative ideal of the democratic form of self-government”.⁷⁶⁹ Benhabib admits that the boundaries of this public is contestable, but understands it as intimately tied to the body politic. As a descriptive term, I take this to be uncontroversial, but as a habit of thought is also have problematic normative implications concerning that modern politics are complex, multicultural, and increasingly globalized. In my mind, this should also lead us to strive for the articulation of a public sphere that is less attached

⁷⁶⁸ Arendt 1958, p. 198-199

⁷⁶⁹ Benhabib 2000, p. 209-10

to the idea of self-governance and distinct polities. To be sure, even the imaginary of a globalized civil society would rely on institutional protection on the state and international level. This protection should not, however, lead to a nationalization of the public.

Second, and in more theoretical terms, Benhabib's "break" with Arendt seems to be motivated by a somewhat misconceived understanding of Arendt's notion of plurality and the corresponding self-relation. In Benhabib's interpretation of Arendt's essay "Thinking and Moral Considerations", she understands Arendt to make a clear distinction between moral conscience on the one hand and political judgment on the other. Further, it is the case, according to Benhabib, that whereas harmony seems to be the relevant moral experience, plurality is the political principle *par excellence*. To me this seems like an implausible reading, given that Arendt's main condition for finding "harmony" of conscience and "to be at home with ourselves" *is* plurality. Accordingly, the model of simulated dialogue (between me and myself) or representative thinking (taking the position of others), are for Arendt what defines thinking as morally responsible – in its irreducible ambiguity and conflict. (see 7.1.5) The confusion might be grounded in different ways of distinguishing the public from the private. Whereas Benhabib seems to rely on a distinction of public actions (of the public sphere; of the morally right) and moral actions (of everyday life; of the morally good), Arendt tends to emphasize the distinction between the generality of law and the uniqueness of human situations. In relation to her early discussion on Montesquieu, she even attacks the idea of the implied double standard in distinguishing between public-political and privat-moral norms.⁷⁷⁰ In agreement with this view, the principle of meaningfulness should be considered relevant for both public and private actions.

In the section 9.2 I will consider some promising ways to implement the insights of a proto-political conception of justice in regard to cosmopolitan issues. First, I will summarize the proto-political account in contrast to the deliberative reception of Arendt.

9.1.1 Rethinking dignity and the new law on earth – the right to have rights and the right to belong to some kind of organized community

As I have discussed already, Arendt's notion of human dignity is quite unusual and hard to place in a traditional map of positions. As a concept of dignity, "humanity" does not merely refer to some aspect of our (biological) nature as human beings or some inner nature as free and rational, nor does it refer to a product of a specific culture, although the artificiality of the human condition presupposes both evolutionary and socio-historical processes. Hence, it does not

⁷⁷⁰ Arendt 1994

correspond to a thin individualistic notion, nor does it properly fit a ‘thick’ communitarian one. By giving Arendt a *proto-political reading* I’ve emphasized the basic insight she advances on what it means simply to appear as human and to belong to humanity. To be human refers for Arendt basically to the experience of being seen or being given the opportunity to appear as a person of equal power. This “appearing” is not like the shallow presenting of a specimen as an example of an empirical concept, such as the category of the human species. Nor is it reducible to the presentation of a set of functional capacities associated with the concept of a purpose (“in-order-to”) in a production process. Still, the proto-political integrity of the human person is not, or at least *not only* the historically embedded, legally protected and formal “citizen”.

Decisive to understand Arendt’s project in my mind is that “humanity” is for Arendt the regulative idea of the collective corresponding to the “new political principle, in a new law on earth”. This new law is basically given expression in the right to have rights and the right to belong to some kind of organized community. By guiding the articulation of basic political norms, the principle of meaningfulness is comparable to other principles of action and the way they serve as guiding principles of various governmental forms: monarchy to honor, republic to virtue, tyranny to fear. The principle of meaningfulness is distinguished from these traditional forms of government and their well-established principles by the historical contingency that its ground, i.e. the condition of plurality, has until recently been taken for granted and remained “hidden”, i.e. politically irrelevant. Only the horror caused by the newly emerging governmental form of totalitarian regimes, guided by the quasi-principle of ideology and situated in the reinforcing circumstances of the completely organized world, has so far provoked its relevance. The implied violent negation of the condition of plurality was, according to Arendt, so grave that it made the condition of plurality stand out clearly in its absence.

I will also suggest that the proto-political reading opens up for an understanding of rights that has a dynamic and creative character, which might easier pick up and address the unintended systemic consequences without marginalizing them as “questions for later” or as simply unsolvable (aporetic). This seem at least to be a central ambition of Arendt’s historical reflection and the way she confronts the conventional approach to human rights after the experience of totalitarian regimes and their concentration camps, which turned out to be industrial labs of dehumanization. By emphasizing the significance Arendt put on principles of action, new experiences which put our most highly cherished moral doctrines in utter embarrassment and redundancy can still be accompanied by meaningful thoughts. According to Arendt, concepts enable us to think what we are doing, and when we can’t rely on standard concepts (as bannisters), thinking is fragile.

If we read *The Human Condition* with an emphasis on Arendt's concern for a new conception of human dignity, her critique of the mentalities of labor and work is that they leave our action "meaningless". Because of this lack of meaning, our actions risk ending up as misguided uses of force, unable to articulate an adequate protection of the home which answers to the human condition of plurality. The problem of non-recognition, or exclusion from humanity, is in this sense central to Arendt's concern. Arendt addresses this problem both in its extreme form as the loss of a home, and in the moderate forms of alienation and reification of oneself and the others (i.e. as mis-recognition). The problem of inadequate mentalities is not that they represent the way of thinking of group or pre-defined apolitical lifeforms, but that they do not provide our own thinking with any guarantee against the processes of depoliticization and dehumanization.

The philosophical step that clarifies the political relevance of the grounding of the basic human right in the activity of action and the intersubjective space of appearance is related to Arendt's notion of principles of action. Arendt describes the peculiar character of free and meaningful actions as guided by principles. These principles find their source in various stable conditions of human life, and hence have a tendency to model the implied political mentality correspondingly. Although the activity of labor and production contribute to the condition of political agency through the conditions of life and worldliness, principles of action grounded in these conditions tend to inspire apolitical and even *anti*-political mentalities that neglect or undermine their own condition of agency. Within this framework I situated Arendt's critique of solipsism and instrumental reason, which are basically guided by anti-political and apolitical principles of action.

In contrast to these principles, Arendt articulates the political principle of meaningfulness in order to express a principle that corresponds to the stable intersubjective condition of action, namely plurality. The principle of meaningfulness is in this way not only the principle of narratively structured agency, but more precisely *the principle of principled actions*. This principle, that is given expression through the right to have rights and actualized through speech and meaningful action, is unavoidably self-referential. Since the human condition of plurality is artificial, there is no default or natural mode of human appearance which can serve as a secure, external grounding of moral-legal norms. And, since principled action relies on the presence of others, it cannot be reduced to an inner anthropological disposition of the individual (such as psychological unity, or sameness). The account of plurality as a stable human condition can only be guided by the relative comparison of a manifold of experiences of human agency. I hold this phenomenologically informed grounding of a political principle to be central to understand Arendt's conceptual ambition. Within the activity of action, there is a ranking of mentalities or attitudinal modes of action according to the conceptual depth of human appearance, from

dehumanizing shallowness, via depoliticizing instrumentality to the principled meaningfulness of agency.

Conceptually, Arendt acknowledges the possibility of being fully deprived of the capacity to act politically, but this would be the case only under the most extreme circumstances, such as the totalitarian environments. The situation of ‘sans papiers’ is clearly different and involves in many cases “irregulars” who are informally attached to the community from which they seek formal recognition as domestic citizens. Those unable to resettle and caught in the situation of long-term encampment are clearly more severe victims to a dehumanizing form of exclusion. Similar to other political movements, the problem of ‘sans papiers’ is not primarily their lack of capacity for political action, but the risk of using their power as a civil movement to promote mentalities that are ultimately self-undermining. One might, for instance, question to what degree the claim of emancipation by simulating domestic citizen relations will not defeat the improvement of cosmopolitan relations in the long run? To what extent is this movement able to change the imperfect compromise in a way that addresses the systemic aspects of the international order and the reproduction of difference from one generation to the next?

9.1.2 The compromise of law: the legal protection of the public space

As argued, the principle of meaningfulness is closely connected to the public space in the widest sense, and the human activities of action and speech. The principle has a guiding role in the sense that any actual protection of this space must be considered adequate and promoting the conditions of this space. Negative examples of the proper protection is indicated by Arendt’s critique of the protective walls and internal homogenization of the nation-state and the way this kind of protection led to “savage conditions” (i.e. to exclusion of human beings) in the midst of civilization. This savagery is not only linked to the consequential loss of human rights experienced by the de facto stateless. More precisely, “the savage conditions” refers to an exclusion from humanity and the associated loss of agency as such.

To be clear, Arendt’s new conception of the political should not be understood as some anarchic utopian vision that simply suspends the trilemma of public right.⁷⁷¹ It does however, in my view, accomplish to explicate the asymmetry in the distribution of political integrity, from citizens to members of humanity, in such a way that cosmopolitan law could be given a fairer share of the moral-legal whole. The demanded redistribution of political integrity (and corresponding distribution of duties and rights) is not simply determined by an ideal model of distribution, but by the need to respond to concrete circumstances and the historical experiences of actual

⁷⁷¹ Explain trilemma shortly: How to balance domestic, international and cosmopolitan concerns of public right?

exclusion within the current system. Arendt's conception enables us to articulate the severe harm experienced by the structural injustice of the current political order, and hence to define the circumstances in new ways. The adequate content of state obligations should be revised accordingly.

Historically, the imaginary of the state collective has undergone a considerable development. If the state collective understands itself primarily as situated in a state of nature among other nations – all states against all – (an absolutist sovereignty regime), then the foreigner is per definition an enemy, and in direct confrontation with the regulative idea of humanity. If the state is understood as a protection of the extra-political civil space, we get a more moderate tension between the protected public space of a state and the unprotected space of humanity (liberal international regime). Conventionally, the use of “political” is restricted to domestic law in the liberal redaction of the modern imaginary, rendering political relations to foreigners unprotected according to the depoliticized status of “merely moral” or humanitarian subjects. What Arendt specifies, and what has since been partly recognized and protected by soft-law on the international level, is the *political integrity* of the foreigner (a cosmopolitan international regime).⁷⁷² There is, however, still a decisive difference between giving foreigners a quasi-domestic status as subjects of universal domestic laws, and articulating norms that directly protect the foreigners' status as members of humanity according to cosmopolitan law.

This is at the core a question of what it means to be human and of what is lost in a state of rightlessness. What are the consequences of violating the right “to live in a framework where one is judged by one's actions and opinions”? In positive terms of cosmopolitan law, any protective policy should be articulated in such a way that foreigners are recognized as normal political subjects in cosmopolitan matters. In negative terms, and given that any actual institutional protection is an imperfect compromise, cosmopolitan law should reflect the intolerable consequences of the violation of the right to appear implied in rightlessness. Statelessness should be recognized as a situation of outmost urgency and vulnerability, and long-term encampment should be recognized as an intolerable and grave violation of the principles guiding cosmopolitan law.

9.1.3 Giving content to the right to appear and the right to belong

What does it mean to appear as a human person? How do we understand the ontological status of humanity? As discussed above, to appear as human is not merely “naked” appearance. It presupposes a certain artificial attitude (a mentality or normality) that is able to appreciate the

⁷⁷² I'm thinking in particular of the convention of asylum right and convention on statelessness.

appearing person at the same time as a biographically unique and as an equal in power. This implies that the experiences, which provide the grounding manifold of manifestations of the “new political principle”, are already conditioned by principles of action. In other words, we should not understand Arendt’s proposed right to appear and right to belong as an ex-nihilo creation. It should rather be understood as giving expression to old political principles of action – such as the republican principle of equality – reconfigured as the principle of meaningfulness. This new principle seeks to account for the new awareness of plurality as the human condition of political action and to provide public right with an adequately revised content according to the new historical circumstances. As a principle of action, it does however also have relevance for the moral judgment of interactions where “everything is permitted” according to law.

According to Arendt, we are able through meaningful actions to manifest principles of action, both as private persons and as citizens in public. Through the narrative structure of human agency, principles of action can go beyond the topical sphere of fellow-men and become relevant also for interactions in the metatopical sphere of contemporaries, to use Schutz’s term. The topical face-to-face interaction is certainly central to the way we appear as fully human. At least, the most effective manifestations of humanity rely on features that bear close affinity to these interactions, such as the temporality of narratives and artistic performances. But, since the presence of others – understood as plurality – relies on the equality of humanity, it is a highly artificial situation of face-to-face interaction. The “equalizing” component is guided by principles and hence does not depend on the face-to-face situation in order to manifest itself. For instance, it can also manifest itself in the presence of others in the “public sphere” of contemporaries.⁷⁷³

A more challenging question is how we could turn this regulative principle of humanity into a principle of politics and government. This question brings us right to the heart of the dilemma of preserving liberal democratic ideas *and* addressing the cosmopolitan responsibility of states at the same time. On the one side, the articulation of human rights associated with “strong democracy” as a preferred type of government, protecting our right to participate as well as our right to privacy – is probably the best answer we have at the moment to how the principle of meaningfulness can be politically implemented. On the other side, this public-political expression of the regulative idea of humanity relies heavily on their background as solutions to domestic problems. In other words, a strong democracy is well suited (though not always respected or enforced) to protect *citizens* against violations of their individual political integrity. It is – unless

⁷⁷³ For instance, whereas “identity politics” can be seen as a legitimate struggle against an ascribed depoliticized status, politics based on the politicization of certain group interests negates this regulative idea of equality of the collective. Still, a public sphere where the parties of interest are allowed to speak, seems better than silencing them as a- or anti-political movements (unless they actually cause damage). They should, however, be contested.

revised – less successful in addressing the problems of a cosmopolitan character that affects us as members of humanity or as *co-world-citizens*.

A reform that seeks to implement the regulative idea of humanity on a global level will therefore need to be quite precise regarding the state obligations that are *cosmopolitan* in character. If anything, this would clarify the lacuna of legal protection in this domain. Arendt's formulation of a basic *human right* is conceptually useful because it detaches the political status of being human from the status of being a citizen. What Arendt has not made so clear, and which I have stressed in my proto-political reading, is that it equally detaches the right to belong to humanity from the specific cosmopolitan status of being a foreigner. To be able to make this distinction we cannot simply understand the 'right to have rights' as a human right to political membership, as Seyla Benhabib proposes.⁷⁷⁴ We have to understand this basic right primarily, or so I argue, as the right to appear. The cosmopolitan right to political membership should certainly be recognized as an improvement of the content of cosmopolitan law, compared to the right to asylum. But it does not address precisely enough the specific non-formal character of belonging associated with *appearing as a human person*. Rather, it has for understandable reasons of applicability, already converted this basic right into a question of admission (i.e. of political membership as a "second" admission).

In order to more adequately remedy the asymmetry between domestic and cosmopolitan protection of the public, the protection of civil deliberations should also be addressed by a cosmopolitan law of deliberation. The exact content of such a cosmopolitan law, including the law of deliberation, I understand as a democratic issue that should be articulated through opinion-formation and political negotiations in the global public. In this regard the cosmopolitan right to political membership is highly relevant. Nonetheless, the global public also requires a kind of institutional protection that does not simulate the domestic integrity of participants in the national public. In order to avoid that we protect the global public in a way that does not make the cosmopolitan relations implode into mere domestic relations, we also need to articulate a *cosmopolitan right to influence or participation*. This cosmopolitan right is intended to protect the political integrity of foreigners as foreign (including non-residential) members of humanity, in decision-making processes on policies that will affect them.

9.2 Practical implications of a proto-political account of justice

To draw a sketch of the practical implications of the regulative idea of humanity and the new principle of justice as laid out in the preceding discussion of the proto-political reading of Arendt,

⁷⁷⁴ See Benhabib 2004.

I will in this last section consider some promising approaches that seem to comply with the ambition of Arendt's thinking. The consideration is structured on three levels: first, on the level of individual contemplation; second, on the level of deliberations in civil society; and third, on the level of moral-legal state obligations.

The first level is concerned with the question of how to think impartiality in the context of the condition of plurality. Such contemplative practices has the practical advantage of being less dependent on a wide public, and can be meaningfully expressed and confirmed even in publics of quite few members (such as among political philosophers). The second level is concerned with deliberation and allowing the contest of competing conceptions of justice (including imaginaries) in a global public sphere. In practical terms, the implications of the right to appear and the right to belong depend on the more demanding development of a wider public, but not on strong institutional protection from states or global institutions. The third level is concerned with moral-legal norms of cosmopolitan law that states should respect, but that might be rendered unfeasible in the near future due to their institutional dependency. Implementations of state obligations are highly demanding because they require binding agreements on global systemic issues.

On all levels, the implementation of the regulative idea of humanity will emphasize the value of the political integrity of foreigners, in opposition to the depoliticizing tendency of state-centric approaches. In these terms, Benhabib's deliberative answer to the given circumstances is still within the conventional framework because of her emphasis on political membership. In effect, she interprets the right to appear and the right to belong in such a way that it converts cosmopolitan relations into domestic relations – i.e. the foreigner is allowed political integrity insofar as she becomes a citizen.

To be fair, Benhabib recognizes the moral responsibility that we have as citizens to listen to, and consider the perspective of foreigners when a *demos* forms an opinion on state policies. The notion of "porous borders" is grounded on this concern. Still, I understand the cosmopolitan law of deliberation as an important specification in the sense that we do not only have a *moral* duty to listen to the foreigner in the public debate and consider their perspectives in a fictive dialogue (a moral discourse), but also a moral-legal *cosmopolitan* duty to involve foreigners – somehow – in the actual process. In other words, the basic democratic ideal is *proto-political* to the extent that it recognized that we have a right to participate in the opinion-formation on issues that affect us – prior to, or rather; continuously independent of, the institutional framework that divides us into fellow-citizens and foreigners.

Epistemologically, this requirement of influence could be said to increase inversely proportional to the extent to which we can rely on a common human understanding of a situation. The less we share a “common stock of knowledge”, in Schutz’s terms, the more we depend on the actual co-presence of others to carry out a morally responsible judgment. In practice, the need to include foreign perspectives in the formulation on a legitimate opinion on cosmopolitan law is inversely proportional to the actual level of reciprocity between the positions. In other words: the harder it is to make sense of each other’s perspectives, the stronger the duty to listen to each other.

How should this be done? As Benhabib makes painstakingly clear to us, Arendt’s new political principle lacks the practical density of ideas “schematized” into our liberal-democratic social imaginary:

Arendt’s theory of action [not only] leaves the relationship between action and moral limitations unanswered, but also her view of political institutions at large [...] leaves questions of justice, equality, and mutual recognition unexplored. Not only are Arendt’s reflections on morality cursory and unconvincing, but the absence of a justification of the normative dimensions of the political, that is, of the question of social and political justice in her work, is deeply disturbing.⁷⁷⁵

Although I’ve attempted to moderate and counter the most serious of these allegations through the proto-political reading of Arendt, Benhabib is undoubtedly right in pointing out the need for further deliberations on how to implement the Arendt’s quite general and unspecified articulations of the new political principle. However, I think Arendt comes quite far in defining the problem of cosmopolitan law in a precise manner. She also articulates some general rights for the protection for the domain in question. But, when it comes to how this protection specifically should be implemented or how democratic deliberations on it should proceed, she is silent.

In the words of Taylor, we might say that Habermas and Benhabib are right to claim that Arendt’s ideas are far from schematized into a full institutional program. As Benhabib has critically addressed, Arendt does not sufficiently explicate the difference between a public, as a topical *space* where everyone participates in reciprocal communicative relations, and the mass, as a metatopical *sphere* where only the perspectives of a few are channeled one way, as it were, and where it is difficult to reciprocate from the periphery of the sphere. Arendt offers us, in the end, a provisional and highly conceptual notion of cosmopolitan justice.

What Habermas and Benhabib seem to neglect in their attempt to do so within the modern social imaginary, is that Arendt’s new political principle does not necessarily fit neatly into this (post-

⁷⁷⁵ Benhabib 2000, p. 194

conventional) imaginary. After all, the principle of meaningfulness implies a deep critique of the political thinking out of which these imaginaries are partly developed. The new principle is intended to guide us to rethink our acting; both in private and public, and both as private individuals and as citizens.

In line with Arendt's political principle and her notion of the public, Benhabib notes: "Deliberative rationality requires procedures as well as institutions that guarantee equality, freedom, and participation rights to all those who are affected by the outcome of certain decisions."⁷⁷⁶ But, although Benhabib to a far extent contributes to the schematization of this principle within the scope of democratic closure, she does not go far enough in considering a democratization of the deliberation on cosmopolitan law.

9.2.1 In terms of epistemological improvement (political thought experiments)⁷⁷⁷

According to Kant men are "unsocial" in the sense that they want to direct everything in accordance with their own ideas. This is an egocentric aspect of the hypothetical natural state in the sense that everyone follows their own judgment. Devoid of a common legal standard, there is no way to solve disputes between competing conceptions of justice. The concept of rights is only provisional without a sanction of public law, putting them into effect.⁷⁷⁸ In the contemporary global context, especially considering cosmopolitan law, the situation seems to be defined by unsocial states acting in a self-centric way independently of the opinion of others. This diagnosis can of course be nuanced by counter-examples, but the general state of affairs is defined by a lack of binding agreements and recognition of cosmopolitan obligations.

In order to increase our ability to assess the parochial character of our own assumptions, we might, while waiting for better times, turn to the few who are willing to acknowledge the regulative idea of humanity. Part of such an "underground" activity involves contemplative exercises of thought, such as political thought experiments. How do we perform such contemplative exercises in a manner that responds to the condition of plurality?

If we look to the history of political philosophy, we find that the theoretical ideas have been linked to contemplative exercises for quite some time. A central idea of Derek Parfit's discussion

⁷⁷⁶ Ibid., p. 209

⁷⁷⁷ Parts of this section has been published as a conference paper: Servan, Johannes. 2013. *Sympathy and Impartiality – Intersubjectivity as a Procedural Aspect of Political Thought Experiments*. . *Contratualismo moral e político na contemporaneidade: Anais do I Congresso Internacional*. Universidade Federal Rural do Rio de Janeiro: UFRRJ.

⁷⁷⁸ See § 44, MM, p. 6:312.

on impartiality in *On What Matters*⁷⁷⁹ is that principles such as ‘the golden rule’ and Kant’s ‘formula of the universal law’ are similar to the more obvious thought experiments, such as ‘the impartial spectator’⁷⁸⁰ and Rawls’ ‘consent principle.’⁷⁸¹ They all tell us to carry out certain thought experiments in order to make our moral or political thinking more impartial. How they do this, however, differ.

If we loosely define impartiality as the ability to avoid personal (or in-group) bias by taking a more disinterested and detached (and usually imagined) position, we will find this criterion in most moral and political conceptions (at least after Hume and Kant⁷⁸²). As Amartya Sen explains, “[I]n seeing the original position as ‘a device of representation’, Rawls attempts to address various types of arbitrariness that may influence our actual thinking, which have to be subjected to ethical discipline to arrive at an impartial point of view.”⁷⁸³ The problem for Sen, as we have seen, is that Rawls’ account is not able to address every kind of arbitrariness, especially when facing cosmopolitan problems. Rawls’ procedural design is not able to provide a guarantee against procedural parochialism.

Parfit designates cognitive empathy (or perhaps rather ‘social cognition’) with a central instrumental significance: moral impartiality depends on our empathetic ability to imagine that we are in the position of someone else. Based on this assumption he reconstructs the procedural design of the four moral principles as antecedents of thought experiments that instruct us on how to imagine ourselves in certain positions in order to become more impartial.

The common procedural problem of moral thought experiments is this: How are we to imagine that we shall be in the position of two or more people? As Parfit points out, we don’t think of these positions as mere expectations or predictions of the future. They are rather imaginative answers to the hypothetical and normative question of what we *would be rationally willing to if* we were in a position relatively like theirs. Further, an attempt to answer this question is decisive for the procedural design of these kinds of moral thought experiments. Parfit gives us a brief overview of our options: We could go for the amoeba-design, imagining we become two persons simultaneously (Nagel), or we could imagine living several lives in a serial order (Hare). These may both tackle small scale social situations.

⁷⁷⁹ See Parfit, Derek, and Samuel Scheffler. 2011. *On What Matters*. Vol. 2, The Berkeley Tanner Lectures. Oxford ; New York: Oxford University Press. Especially pp. 321-343 (Chapt. 14) on “Impartiality”

⁷⁸⁰ Held to be a utilitarian perspective when added with desire.

⁷⁸¹ Taken to be a part the contractualist revision of Kant in the more complex account of the original position.

⁷⁸² Arendt’s political reading of Kant’s *sensus communis* in *The Life of the Mind* is relevant in this context. I do not see however exactly what it contributes to her perspective other than noticing that Kant recognized the relevance of others’ perspective, although in a more restricted manner than herself.

⁷⁸³ Sen 2009, p. 132

However, in order to solve problems relevant to modern political communities, we would need the ability to account for impartiality in situations involving millions of people. Our capacity to imagine distinct positions would fall short long before that. The equivalent of a chiliagon would suffice to make the point of unimaginably many perspectives. We quickly reach the point of the cognitively impossible or the *unimaginable* in Nagel's case. In Hare's case, a similar point will be made in terms of duration.

Parfit indicates a very important point here about how moral principles must design procedures in such a way that they tackle this limitation of the imagination. If one only seeks to give advice in face-to-face relations, this seems not to be an urgent problem. But, given the topic of political justice, it is hardly avoidable. One common way to deal with it is the veil of ignorance. Kant's universal law formula, as a modification of the Golden Rule, is another well-known and quite simple test of consistency, imagining that everyone either did or didn't follow the proposed rule (maxim).⁷⁸⁴ Similarly, the Equal Chance formula (John Harsanyi, associated with a utilitarian position) deal with the self-interest bias through a generalized self-positioning; we could imagine having an equal chance of ending up in either (or any) of the actual positions.⁷⁸⁵ We could say that we are not asked to be in *everyone's* position,⁷⁸⁶ but in *anyone's* anonymous position (within the contractual group; in the position of "(any-)one of us").⁷⁸⁷ As the implementation of the chosen conception of justice is revealed, the perspective taken becomes more concrete. In Rawls' case the "worst-off" position is given priority.

In contrast, the position of the impartial spectator is based on detachment or disinterest rather than contractual commitment. A version of this position exploits the value of being an outsider;

⁷⁸⁴ This is by all means not the best account Kant has of empathy. For an account of this, look for instance at *The Critique of Judgment*, § 40. I thank Lars Svendsen for this comment. Nor does Parfit seem to be in dialogue with the development of the political application of this paragraph on common sense, see for instance Benhabib 1992 on the notion "enlarged thought".

⁷⁸⁵ Rawls' veil of ignorance is arguably a more advanced version of the same because the former leads us to accept the Utilitarian Average Principle flat out, which is an unacceptable consequence, at least intuitively. In Rawls' alternative we are not given the probabilities of which position we will end up in (which involves a higher risk of ending in a worst-off position). Still, it is not random reincarnation. We do already know that we won't end up in the actual worst-off positions, such as the strongly disabled, the stateless foreigners, not to mention the industrialized animals. As long as we presuppose the consent principle, there are certain restrictions to the positions that are reckoned as capable of consent.

⁷⁸⁶ Rawls sees this option as a requirement to consider an endless amount of particular facts that would make the bargaining problem hopelessly complicated.

⁷⁸⁷ I understand this in general to imply that we don't know anything about our personal situation or relations, except the basics of primary goods and the impersonal, functional structure of stereotypical positions (i.e. a minimalistic empathic account of exchangeable social positions), and that we are taxpaying citizens in a reasonably pluralist society. We know that we could end up as anyone (of us), within a spectrum defined by a certain historically conditioned, social normality.

imagining everyone else involved as strangers.⁷⁸⁸ In this manner, one seeks, so to speak, to “flatten out” the biased effect of the near and dear by comparison with distant perspectives. This kind of procedure is realistic and rich, but also highly demanding because it relies on the stock of available knowledge about foreigners. Beyond the function of securing consistency, the value of imagining the impartial spectator will – similar to Benhabib’s moral discourse – rely on the amount of knowledge available. If ignorant, the value of such thought experiments seems close to none.

If we consider Arendt’s response to these contemplative exercises, it seems somewhat ambiguous. On the one hand, Arendt considers the absence of others as a condition for contemplation. Thinking requires solitude and hence we cannot contemplate on someone while acting in concert with them.⁷⁸⁹ In other words, the activity contemplation does not seem to go well with the condition of plurality.

On the other hand, Arendt recognizes the value of being able to put oneself in “the other fellow’s position” as part of what it means to think. As mentioned above, this seems to lead Benhabib to the idea that “enlarged thought” is possible only in interaction with others: “A major mistake of Kantian moral theory is to assume that the principle of enlarged thought can be realized via the isolated thought experiments of a thinker. These solitary thought experiments often substitute the standpoint of one privileged part for that of the whole.”⁷⁹⁰

Given that contemplation requires solitude, it seems Arendt remains a Kantian. But, this conclusion would not account for Arendt’s idea of the interrupting character of thinking. Indeed, Arendt’s view on contemplation is responsible – i.e. it only maintains its mode as a human activity – if it is performed in the expectation of an actual dialogue with others (much like labor and production). When I’m thinking alone, Arendt assumes, it’s like me having a dialogue with myself. This duality is relieved as soon as I can talk to others and rely on their confirmation of my thoughts (which allows me also to be one; undivided; in harmony).

⁷⁸⁸ If we want to keep the kind of worldview-neutrality that Rawls’ thought experiment offers us, we should be careful to avoid any dependency on divinity as a cross-boundary perspective. In Simmel’s classical article on the stranger we find a more secular figure than God/the priest to fill the role of the impartial, meta-topical stranger: the travelling merchant who stays for some time, but not for too long and never really gets set in the ways of the natives. Simmel, Georg. 1971 [1908]. “The Stranger.” In *On Individuality and Social Forms : Selected Writings*, edited by Donald N. Levine, 143-150. Chicago, Ill.: The University of Chicago Press. The danger here might be that we tend to go looking, like Joshua Greene (see Greene, Joshua David. 2013. *Moral Tribes : Emotion, Reason, and the Gap between Us and Them*: Penguin Press.), with the eyes of a merchant for a “common currency.” Panikkar’s comparative notion of “morphological equivalents” (in *Human Rights as a Western Concept* (2007)) is more promising.

⁷⁸⁹ Arendt 1994

⁷⁹⁰ Benhabib 1992, p. 140

As such it is not given (for Arendt) that the imagined dialogue with other is the most responsible way to account for two or more perspectives. Still, the procedures that are able to accomplish an equalizing effect of impartiality without giving up the distinguished character of one's individual position or perspective, such as 'the impartial spectator' and 'the moral discourse', seems to be in closest affinity with Arendt's account (of representative thinking). It also goes better with her view on how we should respond to cases that are unpredictable and not easily subsumed to principles based on self-consistency alone. In this sense, I see her position as in line with Benhabib's view on isolated thought experiments, but with the qualification that when a dialogue enable us, and even obliges us, to take the perspective of others, it tends to interrupt this dialogue and motivate the withdrawing mode of thinking. Our moral judgment depends on common sense, and the validity of our moral thinking thus relies on the confirmations from others on the distinctness of our own standpoint. At the same time, as a contemplative mode, thinking cannot be reduced to a practical mode of action.

In the current global context I agree with Waldron's description of an analogous challenge to the one assumed by Kant as implied when we constitute a civil condition on state level: In the global public sphere we are confronted with quite different and competing conceptions of justice, some of which we "can barely understand".⁷⁹¹ These circumstances suggest a limited relevance of isolated thought experiments in the proper formulation of cosmopolitan law.

I also agree with Waldron that the starting point of political interaction should not be a shared conception of justice, but individuals with competing conceptions which require moral-legal norms to regulate interactions among themselves. On the global level, it is tempting to think in terms of "peoples" (or in-groups of some character) with a shared conception of justice that stand in conflict with conceptions held by other, equivalent entities; as if cultures could be regarded as semi-persons (like moral agents; Rawlsian "peoples"). To avoid this temptation it might be useful to distinguish between *actual* and *assumed* reciprocity in Schutz's sense. The notion of a "people" tends to lead us to distribute our expectations in a certain static manner. We *assume* an actual reciprocity on the domestic level (especially according to the fourth axiom of social and cultural reciprocity or simply "common sense"), while the same is not assumed to be the case across people's. In a globalized world I take it to be increasingly difficult to maintain this static assumption about the actual distribution of reciprocity. Such a distinction between the actual and assumed would prepare us for the expected revision of the map of reciprocity on a transnational level according to a more dynamic notion of reciprocity.

⁷⁹¹ Waldron 2000

So the cultural borders have become less clear with globalization. But, without relying on these territorially based generalizations of reciprocity, it still seems reasonable to assume that a globalized public will actualize – to a stronger degree than the domestic public – the relevance of our relative historical situatedness and our ignorance of other conceptions of justice. Some conceptions of justice will be more difficult to comprehend than others, and hence more difficult to account for in the absence of competent representatives of these conceptions. How do we think in a way that “expects the company of others” in this cosmopolitan situation?

We can at least try to avoid some obvious mistakes: The first is the fallacy of what we may call “naïve parochialism”, which has been treated quite extensively in this thesis as expressions of a tacit state-centric attitude. This attitude differs from the statist attitude of parochial communitarian positions (i.e. a kind of cultural relativism). It does not take explicit distance (like parochial communitarianism) from the universal character of conceptions of justice by claiming the inherent value of “our way”. Still, the state-centric attitude is naïve in that it tends to marginalize cosmopolitan relations and problems associated with them. Waldron assumes that this naïve character of moral assumptions is something like a default position:

[Humans and human groups] make deep claims, powerful claims about what is important and what sort of things are at stake in the areas of life that they govern. Those claims are usually held to be true (by those who make them), which means that they claim to offer to give a better account of what really matters than the reasoning associated with the different norms and practices of the society next door or across the sea.⁷⁹²

Hence, the problem of naïve parochialism is not that such “deep claims” are assumed to be true, but that they are held without actual competition from other conceptions. If the mono-cultural veil of naïve parochialism is lifted and its claims subjected to the scrutiny of a global public, we get something closer to an adequate, comparative intercultural attitude. We are normal, others are abnormal, but might also be anomalous, i.e. a positive deviation that forces us to improve our own conception or adapt the anomalous conception.

The second fallacy is *explicit* parochialism, such as nationalism, where deep claims are held as valid, not because they are seen as evidently true, but because they are “ours”. To the extent that identity politics are based on such assumptions, it is multicultural in the bad sense of the term as the promotion of a segregated nation-state order. Each “people” is assumed to share a political conception of justice and should live segregated from peoples of other conceptions.

⁷⁹² Ibid., p. 235

In comparison to naïve and explicit parochialism, the cosmopolitan attitude is a mean,⁷⁹³ somewhere between the intercultural comparison⁷⁹⁴ of and the transcultural transgression of differences into a universal unity. There is however a limit to how far (beyond parochialism) contemplative exercises can get us. One can, perhaps, become self-critically aware of one's own ignorance through contemplation. But, given the character of politics, it seems like a performative self-contradiction to find oneself to be satisfied by contemplating on the political integrity of foreigners.

In order to develop a global “common sense” and a truly common world, we cannot simply expect the presence of others, we have to encounter them and live with them. To imagine how this can be done for the sake of meaningfulness and plurality, we might find inspiration in the way the domestic public sphere is understood in the deliberative approach:

The public sphere has always acted as the mirror in which a polity has seen its identity reflected, magnified, distorted, or clouded. [...] To recognize its own diversity, and to come to grips with the implications this diversity may have for its own self-understanding, a democratic people needs to reenact its identity in the public sphere.⁷⁹⁵

This identity of the polity that gets mirrored in the public sphere, I understand as the regulative idea of the state collective. In an analogous fashion, a global public sphere could mirror the diversified identity of humanity as a collective. As such, our (contemplative) imagination might manifest this diversity in a more or less adequate manner, within the limitation of the imaginable. The richness of humanity would, however, rely on its continuous performative reenactment in order for the assumed reciprocity and uniqueness to sustain the manifestation of this collective. To achieve this, communicative relations is obviously essential.

9.2.2 In terms of cosmopolitan democratization (political procedures)

Before considering the implications of Arendt's proto-political account of obligations and rights associated with democratic participation of regular and irregular immigrants in the last subsection (9.2.3), I will consider the possibility of a broader notion of cosmopolitan democracy. As discussed earlier, the debate on immigration tends to situate the question of the democratic rights of foreigners within the framework of domestic politics (for example by limiting cosmopolitan law to a law of admission).

⁷⁹³ In dynamic terms I think of the perfect balance as one oscillating between the intercultural (appropriation; plurality) and transcultural (transgression; anomaly as new normality), avoiding going back to the *multi* (normatively flat) from *inter*, or tip toward *mono* (normatively homogeneous) from *trans*. For detailed account, see Paulsen, Michael, and Johannes Servan. 2013. *Terra Nullius: Utopier I Et Hav Af Kultursammenstød*. 1. udgave. ed., Serie: Læring Og Filosofi., Aalborg: Aalborg Universitetsforlag.

⁷⁹⁴ Such as conceptions of justice, or its equivalents.

⁷⁹⁵ Benhabib 2000, p. 210

If we take a global perspective on democracy and the political integrity of foreigners, we should not only take arriving or residential foreigners into account, but any foreigner affected. The case of border regulations of a state serves as case of peculiar relevance because of its twofold character. It is not only one of the most central political issues where state law and policies affect foreigners directly, or indirectly. It also serves today as the main practice of the demarcation of who counts as subjects with political integrity. Hence, the case of border regulation has peculiar significance for the basic character of deliberation on cosmopolitan issues and is applied here as an example in order to sketch out the general framework that should be protected by a cosmopolitan law of deliberation.

Angell and Huseby⁷⁹⁶ have developed a useful taxonomy of different voting rights principles that might be relevant in the case of deliberation as well (corresponding to regulative ideas of the ideal demos/state collective):

- 1) All-affected principle (AAP): everyone who is (possibly) affected by a political decision should be allowed to vote over it.⁷⁹⁷
- 2) Subjected to coercion principle (SCP): any act of coercion should be justified and any subject to a law should also be its author (or partake in its decision)⁷⁹⁸

In the case of border regulation, AAP implies that all foreigners are potential stakeholders. In particular, it can affect those aspiring to migrate. These aspirations will for instance be affected by changes in border regulating policies in the preferred country of destination. In this manner such domestic decisions will affect foreigners and call for a quite broad inclusion of foreigners in the democratic process involved. This might not be feasible in terms of providing any aspiring foreign migrant with voting right in such matters, but as I will argue in the following, a political right to participate in the deliberative opinion-formation seems more realistic.⁷⁹⁹

SCP emphasizes the point that anyone subject to a law should also be able to partake in the decision-making of it. If we compare migration to other global issues such as climate change, this reveals a peculiar character of immigration policies. Whereas state policies on climate change will certainly affect foreigners, it does not subject foreigners to legal regulations.⁸⁰⁰ In contrast, state

⁷⁹⁶ Angell, K., and R. Huseby. 2017. "Should Irregular Immigrants Be (Rapidly) Enfranchised?" *Political Research Quarterly* 70, no. 2 (Jun): 363-373. <http://dx.doi.org/10.1177/1065912917695188>.

⁷⁹⁷ Foreigners are only affected if they have a "life interest" in traveling to this country.

⁷⁹⁸ They also develop two further models which I find less relevant in this context.

⁷⁹⁹ There's a range of possibilities from the weak, moral claim of hypothetical consent of foreigners, which Benhabib promotes, to the strong legal and institutional claim of direct vote. The more moderate road would allow for a greater indirect representation of foreigners' interests through parliament representatives, ombudsmen, civil organizations, inclusion in hearings and media, etc.

⁸⁰⁰ Unless the policies on climate changes involve travel regulations.

policies on border regulation will not necessarily affect most foreigners, but it will directly subject them to the legal regulation in question. Hence, if we are willing to follow the implications of this principle, in the case of immigration laws (or “laws on foreigners”) all foreigners are included as rightful participants in the democratic process.

To distinguish clearer between voting rights and rights of deliberation, we might distinguish, broadly speaking, between two models of cosmopolitan democracy:⁸⁰¹ The ‘liberal cosmopolitan’ model tends to emphasize the institutional and legal aspects, such as David Held’s multi-levelled system of cosmopolitan democracy. It conceives the democratization primarily in terms of aggregation of votes, and can be characterized as a top-down model of political organization.⁸⁰² The “deliberative democratic” model, on the other hand, sees the role of the public sphere as primary to the political organization of the transnational domain and as a means of democratic control of international institutions.

In the following I will briefly consider John Dryzek’s account of the latter position.⁸⁰³ Like the deliberative positions in general, Dryzek argues critically against the traditional liberal model of democracy. Decisive in the context of cosmopolitan issues, he defends the deliberative model as clearly preferable.

Deliberative democracy should be more at home in the international system than liberal aggregative models of democracy, though only so long as it can escape its ties to liberal constitutionalism, because there are no constitutions worth speaking of in the international system. A precondition of aggregation of preferences or interests is specification of the boundaries of the demos, the self-governing community. Such boundaries are very hard to specify in international politics. But while aggregation across boundaries is hard to conceptualize, deliberation across boundaries is straightforward.⁸⁰⁴

Expecting the objection raised by the institutionalist side as to how such deliberations can be translated into collective decisions (or perhaps rather decisions of the collective), Dryzek promotes a “discursive” model of democracy situated in an understanding of international politics that deemphasizes the significance of governmental organizations to the role of governance:

⁸⁰¹ For overview, see: Bray, Daniel. 2009. "Pragmatic Cosmopolitanism: A Deweyan Approach to Democracy Beyond the Nation-State." *Millennium-Journal of International Studies* 37, no. 3: 683-719. <http://dx.doi.org/10.1177/0305829809103239>.

⁸⁰² See: Held, David. 1995. *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance*. Cambridge, UK: Polity Press.

⁸⁰³ See: Dryzek, John S. 2000. *Deliberative Democracy and Beyond: Liberals, Critics, Contestations*, Oxford Political Theory. Oxford: Oxford University Press.

⁸⁰⁴ *Ibid.*, p. 116

[...] government in international politics may be defined as explicit and binding collective decision at the system level. Treatise, international courts, organizations such as the World Trade Organization with the capacity to impose penalties on states for noncompliance, and the Security Council of the United Nations are all examples of government. Governance, in contrast, may be defined as the creation and maintenance of order and the resolution of joint problems in the absence of such binding decision structures.⁸⁰⁵

Where liberal approaches tend to emphasize institutional frameworks (or lack thereof), the deliberative approach is more open to the proto-political activities of civil society in the fluid boundaries of the public sphere. Given the lack of an institutional framework of democratic decision-making on the international level, deliberations are more robust as they perform the controlling function. For instance, deliberations may contest the discourses of international governmental organizations (IGO's): "[...] discourses play a much greater role in co-ordinating action in international politics than they do in domestic society."⁸⁰⁶ In this manner, Dryzek understand the global or "transnational" public sphere as the *politicized* aspect of transnational civil society (mainly in contrast to the global market).

Dryzek's account bears many similarities to Arendt's thinking. The contested "discourses"⁸⁰⁷ in question are similar to her mentalities (or Schutz's "interpretative schemas" and Taylor's "social imaginaries") as "a shared set of assumptions and capabilities embedded in language that enables its adherents to assemble bits of sensory information that come their way into coherent wholes" that "act as sources of order by co-ordinating behavior of the individuals who subscribe to them."⁸⁰⁸ Although we should be cautious to take for granted that the individual subscription to certain discourses or mentalities are always a matter of (an active) choice, it is plausible to assume that political deliberations increases the explicit and, ideally, open character of this choice..

Further, although economic incentives (such as fear of capital flight) and asymmetric military strength constrains this public sphere, Dryzek claims that the discursive realm has political power, and its "effectiveness" is measured in its ability to answer constitutive, rather than instrumental questions.⁸⁰⁹ This resonates well with Arendt's distinction between instrumental and principled reasons for acting. Reflecting on the pre-institutional role of social organization in the web of relationships, Dryzek also emphasizes the role of network organizations in the

⁸⁰⁵ Ibid., p. 120

⁸⁰⁶ Ibid., p. 124

⁸⁰⁷ Dryzek presents discourses that model the international system in various ways (according to their regulative idea): anarchy, market liberalism, sustainable development (internally contested: economic vs green development). He also describes several cases where competing discourses influence, for better or worse, international politics: the law of the sea, the ozone layer, bio-prospecting (or bio-piracy), whaling, etc.

⁸⁰⁸ Ibid., p. 121

⁸⁰⁹ Ibid., p. 131

transnational public sphere and its essential plural character: [...] “deliberations across variety is a necessary, not a contingent feature of networks, especially transnational networks.”⁸¹⁰

Although the reliance on discourses seems to require some kind of reciprocity – as required by any communication and deliberation – Dryzek explicitly rejects the idea that a shared national identity is required in order to deliberate properly. I agree that transnational deliberations are possible. We could appeal to other kinds of identity to make the same point, and to the significance of English as a global language.

According to Dryzek’s model of discursive democracy, it is clear that the transnational public sphere could represent an important aspect of a global civil society in need of protection. Although it is still unclear exactly which institutional arrangements that would actually fulfill the political obligations to protect this political sphere, it is quite clear that it would have to take on a different form than the law of admission alone. To the extent that such a transnational public sphere depends on travelling across borders, the right to visit and to become a political member will be relevant but not exhaustive. To ensure cosmopolitan deliberations of further cosmopolitan laws to deal with the increasing globalization of political issues, I suggest we add the cosmopolitan law of deliberation. The content of such a law might be specified according to the democratic principle of all-affected, such as in the case of climate changes, and of those subjected to legal coercion, such as in the case of immigration law.

Another manifestation of such a cosmopolitan law of deliberation can be found in an interesting case from the ECHR⁸¹¹, where the article 16⁸¹² (on the *restriction* of the political influence of foreigners) were brought up on the issue of a German citizen supporting the Polynesian opposition against the French Nuclear bombing. The court gave its support to the right of the foreigner (at least EU citizens) to participate in civil protests.

The right to membership is not sufficient as an additional cosmopolitan right, for at least two reasons: It does not adequately address the problem of statelessness and long-term encampment properly, but tends to reduce it to a question of an ethics of admission. What is required here is not merely conscious self-reflexive charity on the part of strong democracies⁸¹³, but a coordinated

⁸¹⁰ Ibid., p. 135

⁸¹¹ <http://hudoc.echr.coe.int/eng?i=001-57925>

⁸¹² «**ARTICLE 16 Restrictions on political activity of aliens.** Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.»
www.echr.coe.int/Documents/Convention_ENG.pdf

⁸¹³ In terms of a self-reflective self-understanding of a collective, this would amount to avoid both an (unreflected) monocultural universalism and an explicated multicultural parochialism. The optimal balance seems to be somewhere between a comparative inter-cultural and a performative and temporary trans-cultural state. (Paulsen and Servan 2013)

effort of an international order. Nor does the right to membership adequately address the issue of democratizing the future deliberations on cosmopolitan law, which seems to be morally and epistemologically called for as global issues become increasingly more intrusive.

9.2.3 In terms of immigration politics and state obligations concerning transnational migration

Although the international system is not strong enough to implement binding agreements on the issue of transnational migration and forced displacement, one can still argue, within the Kantian framework, for a moral-legal obligation of states due to the level of interdependency associated with the global civil society (including the global market). Hence, we could argue that states have obligations to refugees beyond those cases where they have directly contributed to the cause of flight (and which follows the traditional model of responsibility).

As discussed in chapter 1, there are two main forms of obligations associated with providing arriving refugees with legal residency: asylum and residency on humanitarian grounds. We could say that they reflect two possible ways to ground the state obligations in question.

The right to asylum reflects, despite its narrow content, the kind of ground associated with being part of a certain institutional arrangement, such as the international system. In Kantian terms, states have a moral-legal obligation to individuals affected by failures in this system. As Parekh argues, this is an advantage of the relational conceptions of Arendt and Benhabib, as it reflects the circumstances of millions of displaced and excluded: “Many of the harms of the refugee regime result not from the actions of a single harmful policy, but are often the collective result of many different states and international organizations all serving their own purposes.”⁸¹⁴ Hence, the legitimacy of regulations of borders cannot be considered only in terms of the consequences of unilateral acts of sovereignty, but must also be considered in terms of relational and systemic consequences and possibilities of structural injustice.

Although this way of grounding obligations has the conceptual potential to recognize obligations concerning structural injustice (such as the resettlement of those suffering long-term encampment), the level of commitment required by these obligations will obviously make it difficult to gain acknowledgement for them in the international community. For instance, Benhabib seems to settle for a middle ground where people arriving or irregular residents are given extended rights by acknowledging that states have at least the obligation to ensure that no individual on their own territory is completely excluded. Her solution to this is “disaggregated citizenship”, or a gradual and transparent path toward full citizenship. Along similar lines, Angell

⁸¹⁴ Parekh 2017, p. 69

and Huseby has argued that there seem to be no convincing reasons, according to the most common voting rights principles, against rapid enfranchising of irregular immigrants.⁸¹⁵

Residency on humanitarian grounds, on the other hand, reflects a principle of mutual aid. It does not ground obligations in causation or systemic interdependency, but in the ability to help those in need. Basically, if we are able to help others at a low cost for ourselves, we have a moral duty to do so. These “Samaritan duties” have the advantage of balancing partial interests with the impartial concern for all human beings. As such, it is easier to gain acknowledgement for these obligations, since the level of commitment required is lower. For instance, Carens has promoted a view along these lines, as a possible argument for the moral-legal obligations of states to resettle displaced persons to avoid long-term encampment.⁸¹⁶

If we look beyond the law of admission (including the second admission to certain semi-citizen rights of voting and political participation), Parekh has promoted an obligation regarding encampment and “our treatment of refugees while they are awaiting a solution”⁸¹⁷. I find this obligation relevant in light of the proto-political account of justice for two reasons: First, it addresses a kind of state obligations toward non-residential foreigners that are excluded from the international system and left extremely vulnerable at the very outskirts of global civil society. The obligation to ensure a dignified life, even to the displaced, could be considered a minimum content of the cosmopolitan law of deliberation and the right to appear. Second, it grounds this systemic (or “remedial”) obligation in an original conception of harm, inspired by a reading of Arendt that is compatible with my proto-political reading. Hence, it contributes to the diagnosis of the gravest form of exclusion from global civil society.

Parekh points out that there is a clear distinction between Arendt’s first, institutionalist critique of statelessness and a more fundamental “ontological” critique. The first critique is associated with the kind of harm that the loss of legal identity and membership in a political community entails in terms of the positive protection of human rights. Although there have been made some improvements in international law since Arendt’s critique was formulated, refugees (which are usually *de facto* stateless) still find themselves in a highly precarious situation. This first harm is clearly a violation of the right to belong, and reflects the conventional reading of Arendt with its emphasis on the right to political membership. It also provides a reason for the obligation to resettle or find other ways to restore the formal status of the excluded.

⁸¹⁵ Angell and Huseby 2017

⁸¹⁶ Carens 2013

⁸¹⁷ Parekh 2017, p. 82

The second critique Parekh identifies in Arendt's work is associated with a more substantial kind of harm that she labels "ontological deprivation" and which is related to the core issue of the condition protected by the right to appear. Ontological deprivation is defined according to Parekh by three dimensions: "the loss of identity and reduction to bare life; the expulsion from common humanity; and finally, the loss of agency, understood not as a subjective disposition, but an ability to have your words and actions be recognized as meaningful and politically relevant."⁸¹⁸ These three dimensions seem to be organized according to the same axis as the three mentalities that Arendt describes in *The Human Condition*. The loss of identity is associated with the experience of loneliness, and with being defined as a human being merely as a specimen of the animal species or as a medical subject. The expulsion from a common humanity is related to the mentality of production in the sense that one is *deprived* of one's dignity as a co-producer or co-builder of the common world. The loss of agency is, however, the clearest expression of the violation of the principle of meaningfulness.

On the practical level, remedying ontological deprivation might prove easier than establishing an effective international regime of resettlement. Partly, this seems to be the case because remedial obligations can be justified as a systemic responsibility of all individual agents (individuals and states) that participate in the completely organized world. Even if we do not bear the causal responsibility for those excluded from this system, we bear a responsibility for regulating the system in such a way that no one gets excluded. Accordingly, Parekh suggests that one may use temporary local integration an interim measure and international support to hosting states, rather than producing camps (UNHCR) as closed enclaves, including economic integration of refugees.

Beyond these remedial measures of the most vulnerable, the states also have obligations to protect the global civil society as such. This would have to be developed in greater detail in the future. As part of a global community (as members of humanity), we could for instance ask ourselves (as members of a state): To what extent should we let foreigners be represented in our decision-making procedure? Should they have their own minister in government? A few seats in parliament? What about a right to veto in cases (such as immigration laws) where the policies affect foreigners more directly than the citizens represented? Does it suffice to let them speak in public or should foreigners be considered in procedural hearings? How do we – generally speaking – balance the protection of the public sphere and topical spaces without causing dehumanizing harm on the one hand, and at the same time not giving up the public autonomy to inhospitable guests (such as unregulated international corporations) on the other?

⁸¹⁸ Ibid., p. 85

9.3 Conclusion

As a contribution to the public debate, I've attempted to give a conceptual analysis of the domain of which immigration is a part. First I identified the field in question as that of cosmopolitan law, and then I suggested that – in order to improve on its future deliberations – this law could be democratized by including all affected parties, which in cases of immigration (and, I might add, economic and environmental policies) includes foreigners. I further described the state-centric tendencies to confine politics within the borders of a state, before making a defense for moral cosmopolitan obligations due to the global situation. I qualified this obligation by considering several positions in the academic debate on immigration, favoring the moderate cosmopolitan position of Benhabib.

However, this position can still be challenged on conceptual terms, which I did through a discussion on how to interpret Arendt's "right to have rights". In defending what I called a "proto-political" reading, I relied on a phenomenological analysis of the peculiar character of human appearance in a pre-institutional and hence unprotected framework. The endurance of this "home" – as "a place in the world which makes opinions significant and actions effective"⁸¹⁹ – relies in my opinion on the protection of all three domains of 'public right'. In order to defend that the right to appear is not confined to personal relations and topical spaces, I elaborated on the conceptual character of principles and collectives. And I further argued that principles and collectives which reflect the fundamental other-dependency of human agency are preferable to those guiding competing mentalities.

In the end, the proto-political reading of Arendt explicates how a relational conception of human dignity can be an original expression a political principle of plurality, which corresponds to a reformed understanding of the human collective and reflects what Arendt terms "the new law on earth", the human right to have rights. This human right articulates the value of the proto-political framework, which is in need of protection both from the state and the international society.

The political principle of plurality implies a conceptual detachment of the political public sphere from citizenship, and makes this conception of politics more open to cosmopolitan reform than conceptions which operates with an underlying state-centric notion of the political. As a first step in the articulation of the complementary protection of this sphere as the location of cosmopolitan deliberations, I've promoted the cosmopolitan right to influence in decision-making processes that affect us as foreigners.

⁸¹⁹ Arendt 1968, p. 296

If it is true that we are living in *one world* – and I think this fact is forcing itself through with increasing urgency – then we should also recognize the increasing political relevance of humanity as a political community. This is urgent, not only because climate changes indicate that we are about to undermine our common living conditions, but also because negligence of this political relevance leaves some of us in intolerable conditions.

Fortunately, globalization has led to a decrease of extreme poverty, but domestic economic inequality is on the rise, also in countries with historically low economic differences. This implies that the material conditions for a strong civil society – such as institutional trust, spare time, topical public spaces and humanistic education – are under pressure. More pressing, it might leave the larger part of the human population with not enough resources to see a future at home (as a stable middle-class), but with enough resources to travel elsewhere. Combined with the risk of climate changes, the outlook for non-leisure migration is astounding.⁸²⁰ This is a common responsibility.

⁸²⁰ The common number is around 200 million forced displacement due to climate related issues, however these numbers are obviously uncertain and contested: <http://www.bbc.com/news/magazine-23899195>

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