

Another Cosmopolitanism

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their country of birth. Furthermore, long-term residents who are third-country nationals can naturalize if they wish to do so.

Democratic Iterations and the Dialectic of Rights and Identities

With the cases of the scarf affair and German voting laws, I have sought to elucidate processes of democratic iteration that attest to a dialectic of rights and identities. In such processes, both the identities involved and the very meaning of rights claims are reappropriated, resignified, and imbued with new and different meaning. Political agents, caught in such public battles, very often enter the fray with a present understanding of who they are and what they stand for; but the process itself frequently alters these self-understandings. Thus, in the scarf affair in France, we witness the increasing courage, maybe even militancy, of a group of women considered usually to be 'docile subjects,' in Michel Foucault's sense.³⁴ Traditional Muslim girls and women are not supposed to appear in the public sphere at all; ironically, precisely the realities of Western democracies with their more liberal and tolerant visions of women's role permits these girls and women to be educated in public schools, to enter the labor force, and, in the case of Fereshda Ludin,³⁵ to even become a German teacher with the status of a civil servant. They are transformed from being 'docile bodies' into 'public selves.' Although they struggle at first to retain their *traditional and given identities*, as women they also become empowered in ways they may not have anticipated. They learn to *talk back to the state*. My prediction is that it is a matter of time before these women, who are learning to talk back to the state, also will engage and contest the very meaning of the Islamic traditions that they are now fighting to uphold. Eventually, these public battles will initiate private gender struggles about the status of women's rights within the Muslim tradition.³⁶

These cases show that outsiders are not only at the borders of the polity but also within it. In fact, the very binarism between nationals and foreigners, citizens and migrants is sociologically inadequate and the reality is much more fluid, as many citizens are of migrant origin, and many nationals themselves are foreign-born. The practices of immigration and multiculturalism in contemporary democracies flow into one another.³⁷ Although the scarf affair both in France and Germany challenges the vision of the "homogeneity" of the people, the German Constitutional Court's decisions show that there may often be an incongruity between those who have the formal privilege of democratic citizenship (the *demos*) and others who are members of the population but who do not formally belong to the *demos*. In this case, the challenge posed by the German Court to the democratic legislature of adjusting the formal definition of German citizenship, such as to reflect the changing realities of the population, was taken up and the citizenship law was reformed. The democratic people can reconstitute itself through such acts of democratic iteration so as to enable the extension of democratic voice. Aliens can become residents, and residents can become citizens. Democracies require porous borders.

The constitution of "we, the people" is a far more fluid, contentious, contested and dynamic process than either Rawlsian liberals or decline-of-citizenship theorists would have us believe. The Rawlsian vision of peoples as self-enclosed moral universes is not only empirically but also normatively flawed.³⁸ This vision cannot do justice to the dual identity of the people as an *ethnos*, as a community of shared fate, memories, and moral sympathies, on the one hand, and as a *demos*, as a democratically enfranchised totality of all citizens, who may or may not belong to the same *ethnos*, on the other. All liberal democracies that are modern nation-states exhibit these two dimensions. The politics of peoplehood consists in their negotiation. The presence of so many migrants from Algeria, Tunisia, and Morocco, as well as from central Africa, testifies to France's imperial past and conquests, just as the presence of so many *Gastarbeiter* in Germany is a reflection of the economic realities of

Germany since World War II. Some would even argue that without their presence, the post-World War II German miracle would not have been conceivable.³⁹ Peoplehood is dynamic and not a static reality. A demos can alter its own understanding of citizenship, which in turn will alter the ethnos, understood as a shared community of fate.⁴⁰

Decline-of-citizenship theorists, such as Michael Walzer and David Jacobson,⁴¹ are just as wrong as Rawlsian liberals, in conflating the ethnos and the demos. They privilege the right of sovereign national communities to determine the rules of membership according to their cultural self-understanding and in accordance with desires to preserve cultural majorities. Human rights assume secondary importance in influencing the will of democracies.⁴² 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 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. Only polities with strong democracies are capable of such universalist rearticulation through which they refashion the meaning of their own peoplehood. Will French political traditions be less strong if they are now carried forth and reappropriated by Algerian women or women from the Côte d'Ivoire? Will German history be less confusing and puzzling if it is taught by an Afghani-German woman, as in the Fereshda Ludin case? Rather than the decline of citizenship, I see in these instances the reconfiguration of citizenship through democratic iterations.

Cosmopolitan Rights and Republican Self-Determination

I began with a puzzle, the first articulations of which I attributed to Hannah Arendt and Karl Jaspers. After the capture of Eichmann by

Israeli agents in 1960, Arendt and Jaspers initiated a series of reflections on the status of international law and norms of cosmopolitan justice. I summarized their queries in terms of three questions: What is the ontological status of cosmopolitan norms in a postmetaphysical universe (1)? What is the authority of norms that are not backed by a sovereign with the power of enforcement (2)? How can we reconcile cosmopolitan norms with the fact of a divided mankind (3)? I promised that I would begin by answering the last question first and then proceed to the others.

Ad. 3: My answer to the question as to how to reconcile cosmopolitanism with the unique legal, historical, and cultural traditions and memories of a people is that we must respect, encourage, and initiate multiple processes of democratic iteration. Not all such processes are instances of jurisgenerative politics. Jurisgenerative politics, at their best, are cases of legal and political contestation in which the meaning of rights and other fundamental principles are repositied, resignified, and reappropriated by new and excluded groups, or by the citizenry in the face of new and unprecedented hermeneutic challenges and meaning constellations. I have tried to illustrate such cases of "rights at work," in instances in which cosmopolitan norms that apply to the rights of residents or immigrant foreigners are rearticulated by constituted democratic legislatures. The French scarf affair and the German Constitutional Court's decision concerning the voting rights of resident foreigners are cases in which democratic majorities contested and redeployed cosmopolitan norms.

As we see in the French scarf affair, processes of democratic iteration do not invariably and necessarily result in political outcomes that we may want to endorse, whereas in the case of the German citizenship debate this has resulted in a liberalization of naturalization and immigration policies and in the enlargement of the boundaries of the demos. By contrast, with the passing of legislation banning the wearing of all religious symbols in the schools, the French state has intensified the confrontation with its observant populations, Jewish and Muslim alike. It is clear that future battles around this issue will take

place inside and outside France. Along with the debate that is unfolding in the new Europe about the separation of church and state within the EU Constitution, France's strict understanding of laicism, deplored even by its closest neighbors, will itself be challenged at the highest levels of jurisgenerative politics. This is the peculiarity of cosmopolitan justice: precisely because France is a signatory to the European Convention for the Protection of Human Rights and Fundamental Freedoms as well as to the European Charter of Human Rights, even the actions and decisions of its National Assembly, are not immune to future juridical challenges.

Such controversies reenact in practice the theoretical dilemma of discursive scope: universalist norms are mediated with the self-understanding of local communities. The availability of cosmopolitan norms, however, increases the threshold of justification to which formerly exclusionary practices are now submitted. Exclusions take place, but the threshold for justifying them is now higher. This higher threshold also heralds an increase in democratic reflexivity. It becomes increasingly more difficult to justify practices of exclusion by democratic legislatures simply because they express the will of the people; such decisions are now subject not only to constitutional checks and balances in domestic law but in the international arena as well.

The French courts and politicians find it necessary to ban the wearing of religious symbols on the basis of grounds that can be generalized for all: it is the future well-being and integrity of French society, as a society of *all* its citizens, which is appealed to. Reflexive grounds appeal to reasons that would be valid for all. This means that such grounds can themselves be recursively questioned for failing to live up to the threshold set in their own very articulation.

Ad. 2: To Arendt's and Jaspers's second question as to the authority of cosmopolitan norms, my answer is: *the power of democratic forces within global civil society*. Of course, the global human rights regime by now has its agencies of negotiation, articulation, observation, and monitoring. In addition to processes of naming, shaming, and sanctions that can be imposed on sovereign nations in the event of

egregious human rights violations, the use of power by the international community, as authorized by the UN Security Council and the General Assembly, remains an option. We are in a transitional period in the configuration of the world political community, when the doctrine of humanitarian interventions has pierced the shield of state sovereignty in problematic ways: on the one hand, that genocide in any country or region of the world triggers a generalized moral and legal obligation on the part of the world community to intervene is a fulfillment of cosmopolitan norms; on the other hand, this doctrine can be used inconsistently—why Bosnia alone? Why not Rwanda and Darfur as well?—and hypocritically—was the Iraq war of 2003 really a case of humanitarian intervention? We may need to envisage a transition from the ‘soft power’ of global civil society to the *constitutionalization of international law*.

Ad. 1: I come then to the final question: what is the ontological status of cosmopolitan norms in a postmetaphysical universe? Briefly, such norms and principles are morally constructive: they create a universe of meaning, values, and social relations that had not existed before by changing the normative constituents and evaluative principles of the world of “objective spirit,” to use Hegelian language. They found a new order—a *novo ordo saeculorum*. They are thus subject to all the paradoxes of revolutionary beginnings. Their legitimacy cannot be justified through appeal to antecedents or to consequents: it is the fact that there was no precedent for them that makes them unprecedented; equally, we can only know their consequences once they have been adopted and enacted. The act that ‘crimes against humanity’ has come to name and to interdict was itself unprecedented in human history, that is, the mass murder of a human group on account of their race through an organized state power with all the legal and technological means at its disposal. Certainly, massacres, group murders, and tribal atrocities were known and practiced throughout human history. The full mobilization of state power, with all the means of a scientific-technological civilization at its disposal, in order to extinguish a human group on account of their claimed racial characteristics, was

wholly novel. Once we name 'genocide' as the supreme crime against humanity, we move in a new normative universe. I would even dare say that we move into a universe which now contains a new moral fact—"Thou shalt not commit genocide and perpetrate crimes against humanity." I do not mean by this that the murder of innocent children, women, and civilians was never before considered a crime. That would be absurd. The taking of innocent life is one of the deepest taboos of many of the world's moral and religious systems. It is precisely because we as humankind have learned from the memories of genocide, extending from the African slave trade to the Holocaust of the European Jews, that we can name it as the supreme crime. Cosmopolitan norms, of which 'crimes against humanity' is the most significant, create such new moral facts by opening novel spaces for signification, meaning, and rearticulation in human relations.

Let us turn to Hannah Arendt once more. Although she was skeptical that international criminal law would ever be codified and properly reinforced, Arendt in fact praised and commended the judges who sought to extend existing categories of international law to the criminal domain. She wrote

... that the unprecedented, once it has appeared, may become a precedent for the future, that all trials touching upon 'crimes against humanity' must be judged according to a standard that is today still an 'ideal.' If genocide is an actual possibility of the future, then no people on earth . . . can feel reasonably sure of its continued existence without the help and the protection of international law. Success or failure in dealing with the hitherto unprecedented can lie only in the extent to which this dealing may serve as a valid precedent on the road to international penal law. . . . In consequence of this as yet unfinished nature of international law, it has become the task of ordinary trial judges to render justice without the help of, or beyond the limitation set upon them through, positive, posited laws. (*Eichmann* 1963, 273-74)

However fragile their future may be, cosmopolitan norms have evolved beyond the point anticipated and then problematized by Hannah Arendt. An International Criminal Court exists, although

the oldest democracy in the world, the United States, has refused to sign the Rome Treaty legitimizing it. The spread of cosmopolitan norms, from interdictions of war crimes, crimes against humanity and genocide to the increasing regulations of cross-border movements through the Geneva Conventions and other accords, has yielded a new political condition: the local, the national and the global are all imbricated in one another. Future democratic iterations will make their interconnections and interdependence deeper and wider. Rather than seeing this situation as undermining democratic sovereignty, we can view it as promising the emergence of new political configurations and new forms of agency, inspired by the interdependence—never frictionless but ever promising—of the local, the national, and the global.

Notes

1. T. H. Marshall, *Citizenship and Social Class and Other Essays* (London: Cambridge University Press, 1950). See also my essay, "Transformations of Citizenship: The Case of Contemporary Europe," *Government and Opposition: An International Journal of Comparative Politics* 37, no. 4 (2002): 439–465. I do not subscribe to the teleologism implicit in Marshall's catalogue of rights and have criticized his blind spots in *The Rights of Others. Aliens, Residents and Citizens*, pp. 171–173.

2. See Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton, N.J.: Princeton University Press, 2002), chap. 6; and Benhabib, *The Rights of Others: Aliens, Citizens and Residents. The John Seeley Memorial Lectures* (Cambridge: Cambridge University Press, 2004), chap. 4.

3. Jacques Derrida, "Signature, Event, Context" [1971], in *Limited Inc.* (Evanston, Ill.: Northwestern University Press, 1988), pp. 90 ff. I am indebted to the insights of Judith Butler and Bonnie Honig in highlighting the significance of iterative practices for democratic politics. See Judith Butler, *Excitable Speech: Politics of the Performative* (New York and London: Routledge, 1997); Bonnie Honig, *Democracy and the Foreigner* (Princeton,