

Seyla Benhabib Hannah Arendt and

“The Right to have Rights”

This article is an abridged version of the lecture that Professor Benhabib held at the Hannah Arendt Tage in Hannover (Germany) on October 16, 1999.

More than two decades after her death in 1975, Hannah Arendt has emerged as the political theorist of the post-totalitarian moment. The author of the first major philosophical treatise to deal with totalitarianism as a political regime that forever changed our understanding of politics and human nature (*The Origins of Totalitarianism*), Arendt emphasized the special importance of an autonomous public realm. She saw the public sphere, as distinct from the family and the economy, as the arena in which we are uniquely able to express our human capacity to jointly address common concerns. Totalitarianism has been its greatest enemy, but the distinctive values of public life have suffered as well from the pressures of the capitalist economy and administrative bureaucracy, and from the invasive presence, in the media in particular, of intimate sexual stories which are properly the concern of the private domain.

It is not only her insights about the significance of a vibrant and free public sphere in democratic civil societies, east and west, which earn Arendt the title of the “theorist of the post-totalitarian moment.” It is also Arendt, the theorist of minority rights and statelessness, of refugees and deported peoples, whose words strike the deepest chord in a world shaken by civil wars and ethnic massacres, by cultural self-determination movements and weak nation-states. In *The Origins of Totalitarianism*, she writes:

“Something much more fundamental than freedom and justice, which are rights of citizens, is at stake when belonging to a community into which one is born is no longer a matter of course and not belonging no longer a matter of choice, or when one is placed in a situation where, unless he commits a crime, his treatment by others does not depend on what he does or does not do. 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 ... *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.*” (Arendt, 1968 [1951]:177. My emphasis.)¹

My lecture today is an extended meditation on Arendt's phrase – “the right to have rights.” I want to use this phrase as an occasion to reflect upon the ethical and political dilemmas of the nation-state in a global world order.

The phrase “the right to have rights” and Arendt's resounding plea for the acknowledgment of the right of every human being to “belong to some community,” are introduced at the end of Part Two of *The Origins of Totalitarianism*, which is called “Imperialism.” To understand Arendt's philosophical intentions it is necessary to follow the broad outlines of

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Die Hannah Arendt Tage Hannover finden jährlich Mitte Oktober anlässlich des Geburtstages der Denkerin statt. Ihre Gastrede hielt Seyla Benhabib in deutscher Sprache. Eine entsprechende, gekürzte Version erschien am 29. Oktober 1999 in der Frankfurter Rundschau unter dem Titel „Eine spannungsgeladene Formel: Wir, das Volk“ in der Rubrik „Dokumentation“ (FR, Nr. 252, S. 22).

¹ All references in the text are to: Hannah Arendt, *Imperialism*. Part Two of *The Origins of Totalitarianism* (New York: Harcourt, Brace Jovanovich, [1951] 1968).

that discussion. In the opening sections of "Imperialism" Arendt examines the European "scramble for Africa." Her thesis is that the encounter with Africa allowed the colonizing white nations like the Belgians and the Dutch, the Germans and the French, to transgress moral and civil limits abroad which would normally control the exercise of power at home. In the encounter with Africa, civilized



Seyla Benhabib | Foto: Plümer

whites regressed to levels of inhumanity by plundering, looting, burning and raping the "savages" they encountered. Arendt uses Joseph Conrad's famous story "The Heart of Darkness" as a parable of this encounter. But the "heart of darkness" is not in Africa alone; twentieth century totalitarianism brings the center of darkness to Europe itself, where the lessons learned in Africa seem to be practiced. Arendt's attempt to locate in the European scramble for Africa some distant source of European totalitarianism, and in particular of racial extermination policies, is brilliant, but it remains historically as well as philosophically underexplored. Throughout this discussion she examines distinct historical episodes as illustrative cases of the breakdown of the rule of law: the destruction of the ideal of citizens' consent through secret administrative decisions and imperialist manipulations through British rule in India and French rule in Egypt;

the fragility of principles of human rights to govern interactions among human beings who, in fact, have nothing but their humanity in common, as evidenced by the colonization of Africa; the instrumentalization of the nation-state for the plunderous greed of the bourgeois classes, an experiment in which all major European nations more or less attempted to take part. Thus her discussion of imperialism, which begins with the European "scramble for Africa," concludes with "The Decline of the Nation-State and the End of the Rights of Man."

Through an analysis whose significance for contemporary developments is only too obvious after the events in the former Yugoslavia, Arendt turns to the nationalities and minorities question that emerged in the wake of World War I. The dissolution of the multinational and multiethnic empires like the Russian, the Ottoman and the Austro-Hungarian, and the defeat of the Kaiserreich, led to the emergence of nation-states that enjoyed neither religious, nor linguistic, nor cultural homogeneity. The successor states of these empires, like Poland, Austria, Hungary, Czechoslovakia, Yugoslavia, Bulgaria, Lithuania, Latvia, Estonia, the Greek and the Turkish republics, controlled territories in which large numbers of so-called "national minorities" resided. On June 28, 1919 the Polish Minority Treaty was concluded between President Woodrow Wilson and the Allied and Associated Powers to protect the rights of minorities who made up nearly 40% of the total population of Poland at that time and consisted of Jews, Russians, Germans, Lithuanians, etc. Thirteen similar agreements were then drawn up with various new states which "pledged to their minorities civil and political equality, cultural and economic freedom, and religious toleration."² But not only were there fatal unclaritys in how a "national minority" was to be defined; the protection of minority rights applied only to the successor states of the defeated powers, whereas Great Britain, France and Italy refused to consider the generalization of the minority treaties to their own territories, creating cynicism about the motivations of the Allied Powers in supporting minority rights. (Fink, 1972:334) For exam-

2 Carole Fink, "Defender of Minorities: Germany in the League of Nation, 1926-1933," in: *Central European History* 4 (1972), p. 330 ff.

ple, the German minority in Czechoslovakia could petition the League of Nations for the protection of its rights but the large German minority in Italy could not. The position of Jews in all successor states was also unsettled: if they were a "national minority," was it by virtue of their race, their religion, or their language that they were to be considered as such, and exactly which rights would this minority status entail? Besides rights to the free exercise of religion and instruction in Hebrew schools, what educational and cultural rights would be granted to populations as diverse as the Austrian Jews on the one hand, Russian Jews on the other, and the Turkish Sephardic community in the former territories of the Ottoman Empire, to name but a few instances?

For Arendt, the discord within and political ineptitude of the League of Nations, the emerging conflicts between so-called national minorities themselves, and the hypocrisy in the application of the Minority Treaties, all were harbingers of developments to come in the 1930s. The modern nation-state was being transformed from an organ which would protect the rule of all for all its citizens and residents into an instrument in the service of the nation alone. "The nation has conquered the state, national interest had priority over law long before Hitler could pronounce 'right is what is good for the German people.'" (Arendt, 1968 [1951]:155).

The perversion of the modern state from an instrument of law into one of lawless discretion by elites claiming to act on behalf of the nation was completed when states began to practice massive denaturalizations against unwanted minorities, creating millions of refugees, deported aliens and stateless peoples across borders. Refugees and minorities, stateless and displaced persons are special categories of human beings "created" through the actions of the nation-state. For in a territorially bound nation-state system, that is in a "state-centric" international order, one's legal status is dependent upon protection by the highest authority which controls the territory upon which one resides and issues the papers to which one is entitled. One becomes a refugee if one is persecuted, expelled, and

driven away from one's homeland; one becomes a minority if the political majority in the polity declares that certain groups do not belong to the supposedly 'homogeneous' people; one is a stateless person if the state whose protection one had hitherto enjoyed withdraws such protection, as well as nullifying the papers it has so far granted; one is a displaced person if, having been a refugee, stateless, or a minority, one cannot find another polity to recognise one as its member, and remains in a state of limbo, caught between territories, none of which desire one to be its resident. It is here that Arendt concludes:

"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 ... The right that corresponds to this loss and that was never even mentioned among the human rights cannot be expressed in the categories of the Eighteenth century because they presume that rights spring immediately from the "nature" of man - ... the right to have rights, or the right of every individual to belong to humanity, should be guaranteed by humanity itself. It is by no means certain whether this is possible." (Arendt, 1968 [1951]:177-178)

As Frank Michelman has observed in an illuminating essay *Parsing 'The Right to Have Rights'*: "As matters have actually developed ... the having of rights depends on receipt of a special sort of social recognition and acceptance - that is, of one's juridical status within some particular concrete political community. The notion of a right to have rights arises out of the modern-statist conditions and is equivalent to the moral claim of a refugee or other stateless person to citizenship, or at least juridical personhood, within the social confines of some law-dispensing state." (Michelman, 1996:203)³ But what kind of a moral claim is the one advanced by the refugee and the asylee, the guest worker and the immigrant to be "recognised" as a member? What kind of a right is entailed in the "right" to have rights?

³ Frank Michelman, "Parsing 'The Right to Have Rights,'" in: *Constellations. An International Journal of Critical and Democratic Theory*, vol. 3, No. 2 (October, 1996), pp. 200-209.

4 Seyla Benhabib, *Hannah Arendt. Die Melancholische Denkerin der Moderne*, aus dem Englischen übersetzt von Karin Wördemann (Hamburg: Rotbuch, 1998).

5 Hannah Arendt, *The Human Condition*, 8th ed. (Chicago: University of Chicago Press, [1958] 1973).

In the German translation of my book titled, *Hannah Arendt. Die Melancholische Denkerin der Moderne*,⁴ I suggested that Arendt's inconclusive ruminations on the perplexities and dilemmas of human rights; her admission that "the right to belong to humanity should be guaranteed by humanity itself," when it was by no means clear whether "this is possible," evidenced a certain "melancholia." The term "melancholia" was not intended to describe a psychological condition, a state of emotion or a mood. Rather, I meant by "melancholia" an attitude of philosophical reflection and meditation about the fragility of human bonds and institutions, a sense for the catastrophes and calamities of history, an appreciation for the profound contingency of those human institutions and practices which make freedom possible. I would still argue that, understood in this non-psychologistic sense, Hannah Arendt is a "melancholic" thinker, and that nowhere is this more evident than in her reflections on the "Decline of the Nation-State and the End of the Rights of Man." Arendt was not a foundationalist thinker; the discourse of philosophical justification as such did not interest her. Therefore she does not provide a strong philosophical justification of "the right to have rights," such as might convince skeptics and relativists. Nor does she argue against other discourses which would ground human rights on nature or history: instead she produces what we may call a "Zeitgeschichtliche Diagnose":

"Man of the twentieth century has become just as emancipated from nature as eighteenth-century man was from history. History and nature have become equally alien to us, namely, in the sense that the essence of man can no longer be comprehended in terms of either category. On the other hand, humanity, which for the eighteenth century in Kantian terminology was no more than regulative idea, has today become an inescapable fact. The new situation, in which "humanity" has in effect assumed the role formerly ascribed to nature or history, would mean in this context that the right to have rights or the right of every individual to belong to humanity, should be guaranteed by humanity itself." (Arendt, 1968 [1951]:178)

It is the political realities of the twentieth century which have rendered the ideals of nature and history as philosophical foundations hollow. The Kantian ideal of humanity, far from being merely regulative, has now become "an inescapable fact" with moral resonance. The addressees as well as claimants of the "right to have rights" are humans themselves. Having rejected conceptions of human nature, having placed in question teleological conceptions of history, what can Arendt offer us? Is she maybe a post-modernist avant-la-lettre? an anti-foundationalist existentialist, as Margaret Canovan and Martin Jay, among others, have claimed?

I have called Arendt's non-foundationalist mode of philosophical discourse on these matters a kind of "anthropological universalism," leading to an ethics of "radical inter-subjectivity."

In *The Human Condition*,⁵ Arendt puts forward her philosophy of humanity. It is the human condition, the unchangeable facts about being-human-in-the-world and its necessary features, and not some psychological attributes like benevolence or rapaciousness, goodness or evil, that concern her. She begins from the premise that human beings are members of the same species, to whom life on earth is given under the conditions of natality, plurality, labor, work and action. From the standpoint of Arendt's philosophical anthropology, all forms of cultural, social and historical differentiations are secondary when measured up against the fundamentals of this condition. There is an implicit ethical gesture in approaching the human condition from this level of abstraction, one that proceeds from our fundamental equality and commonality as members of the same species. This philosophical anthropology can be viewed as a form of coming to one's senses morally, that is, as a form of *Besinnung*, as taking hold of one's senses by grasping what it is to be human.

Arendt's anthropological universalism contains an ethics of radical inter-subjectivity, which is based on the fundamental insight that all social life and moral relations to others begin with the decentering of primary

narcissism. In the terms of St. Augustine, on whom Arendt had written her dissertation, we are not the “ground” of our own being. We are fundamentally dependent creatures, born promiscuously to others like us, and radically dependent upon the goodwill and solidarity of others to become who we are. Whereas *mortality* is the condition that leads the self to withdraw from the world into a fundamental concern with a fate that can only be its own, its own death, *natality* is the condition through which we immerse ourselves into a world at first through the goodwill and solidarity of those who bring us into the world and nurture us, and subsequently through our own words and deeds. But natality involves inequality and hierarchies of dependence. Furthermore, it is not the fact of birth alone that characterizes the human condition, but rather, that every birth is a new beginning, the beginning of a unique life-story of which we alone are the actors but never wholly the authors. Whereas natality grounds care, it is action, and the capacity to initiate new words and deeds, which grounds respect and politics.

In this sense, the “right to have rights” transcends the facticity and contingencies of birth which differentiate and divide us from one another, and can only be realized in a political community in which we are judged not through the characteristics which define us at birth but through our actions and opinions, by what we do and say and think. “Our political life,” Arendt writes, “rests on the assumption that we can produce equality through organization, because man can act and change and build a common world, together with his equals and only with his equals ... 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.” (Arendt, 1968 [1951]:181)

In contemporary terms Arendt is advocating a “civic” as opposed to an “ethnic” ideal of polity and belonging. It is the mutual recognition by a group of consociates of each other as equal right-bearing persons that constitutes for Arendt the true meaning of political equality. Despite its perversions through the Dreyfus affair, France, for this reason,

remained for Arendt “la nation par excellence.” Could it be then that the institutional, even if not philosophical, solution to the dilemmas of human rights are to be found in the establishment of principles of civic nationalism? Of course, civic nationalism would entail a *jus soli* based mode of acquiring citizenship, since *jus sanguinis* would mean the continuing conflation of the ethnos with the demos, of “membership in the state” with “belonging to a nation.” Undoubtedly, Arendt defends an ideal of the civic nation based upon a *jus soli* mode of citizenship acquisition. Yet her diagnosis of the tensions inherent in the ideal of the nation-state suggests that there is a deeper malaise in this institutional structure, a deeper perplexity about the “decline of the nation-state and the end of the rights of man.” To put the issue sharply: Arendt was just as skeptical about the ideals of world government as she was about the possibility of nation-state systems ever to achieve justice and equality for all. World government would destroy the space for politics in that it would not allow individuals to define shared public spaces in common; an assumption which underestimates the potentialities for planetary politics. The nation-state system on the other hand always carried within itself the seeds of exclusionary injustice at home and aggression abroad.

It remains one of the most puzzling aspects of Arendt’s political thought that although she criticized the weaknesses of the nation-state system, she was equally skeptical toward all ideals of a world federation. Arendt’s philosophical and political ambivalence toward the nation-states has several complex dimensions. The nation-state system, established in the wake of the American and French revolutions, and bringing to culmination processes of development at work since European absolutism in the 16th century, is based upon the tension, and at times outright contradiction, between ‘the state’ and ‘the nation’ one the one hand, and ‘human rights’ and the principle of ‘sovereignty’ on the other.

The modern state is always also a specific national state. This is the case even when this nationalism is civic in form, as is usually

associated with the American, French and Latin American models, or ethnic, as is usually associated with the German, and east-central European models. The citizens of the modern state are always also members of a nation – of a particular human group who shares a certain history, language, tradition, however problematically this identity may be constituted. Nonetheless, there is no analysis in Arendt's work which would show the close link between the development of the modern state apparatus and modern nation-formation. She does not analyze how the modern state creates the nation which it represents rather than finding it to be a "given." The modern state enables the formation of a modern bureaucracy in the schools, in the army, in hospitals, and other institutions which eventually transform the subjects of absolutism into the citizens of the nation-state. But if this is the case and there is an elective affinity, to use Max Weber's term, between modern nation-formation and the modern state, how can we understand the contradiction between the state and the nation, and the perversion of the state for national interests?

It is in her writings on Zionism that we find the key to Arendt's critique of nationalism. In an essay published in 1948 and called "To Save the Jewish Homeland: There is Still Time," Arendt criticised all nationalisms, Zionism of the Herzelian kind not excluded, for the thesis that "the nation was an eternal organic body, the product of inevitable growth of inherent qualities; and it explains peoples, not in terms of political organizations, but in terms of biological superhuman personalities." (Arendt, 1978:156)⁶ For Arendt, this kind of thinking was prepolitical in its roots, because it applied metaphors from the domain of prepolitical life, such as organic bodies and family unities, and blood communities, to the sphere of politics. The more nationalist ideologies stress aspects that precede the political, the more they base the equality of the citizens on their presumed sameness. Yet equality as consociates in a democratic *Rechtsstaat* should be distinguished from sameness of cultural and ethnic

identity. Civic equality is not sameness but entails the respect for difference.

It is important to note that after the Holocaust and the extermination of European Jewry, Arendt's support for a Jewish homeland changed. Although she never accepted Zionism as the dominant cultural and political project of the Jewish people and chose to live her life in a multi-national and multi-cultural liberal democratic state, the catastrophes of World War II made her more appreciative of the moment of new beginning inherent in all state formations. "The restoration of human rights has, as the recent example of the State of Israel proves, been achieved so far only through the restoration or establishment of national rights." (Arendt, 1968 [1951]:179) Arendt was too shrewd an observer of politics not to have also noted, however, that the cost of the establishment of the State of Israel was the disenfranchisement of the Arab residents of Palestine. She hoped throughout the nineteen-fifties that a binational Jewish and Palestinian state would become a reality. What then can she have concluded from the historical and institutional contradictions of the idea of the nation-state? Is her begrudging acceptance of this political formation a concession to political realism and historical inevitabilities? Yet there is an alternative way of analyzing the experiment of the modern state as well. Here I take my cue from Arendt but I depart from her. The so-called contradiction between the state and the nation needs to be reconceptualized today as the inherently conflictual process of the formation of reflexive collective identities in complex, and increasingly multi-cultural and multi-national, democracies. The formation of the democratic people with a particular history and culture could be seen as an ongoing reflexive transformation and experimentation with collective identity.

We can elucidate the contradictions behind the principle of popular sovereignty and human rights by looking at the famous lines of the American declaration of Independence: "We hold these truths to be self-evident. That all men are created equal and endowed by their creator with the rights to life, liberty, and

6 Hannah Arendt, "To Save the Jewish Homeland. There is Still Time," reprinted in: *The Jew as Pariah: Jewish Identity and Politics in the Modern Age*, ed. and with an introd., by Ron Feldman (New York: Grove, 1978).

the pursuit of happiness.” As Jacques Derrida has argued in his provocative reading of the Declaration of Independence, there is an irresolvable tension between the constative and the performative aspects of this statement.⁷ The authors of the Declaration speak of “self-evident truths,” thus suggesting that the entitlement of “all men” to certain rights is a fact of nature and reason, supported by God’s will. This is the *constative* aspect. Yet the Declaration also invokes a “we” who “hold” these truths to be self-evident. Is not the self-evidence of these truths then simply assured by the commitment that a group of consociates make to each other to be bound by certain principles? This is the *performative* aspect of the Declaration. The tension between the constative in the name of which the nation declares itself to be a sovereign people, and the performative act of republican self-founding which in fact gives these principles their historical actuality, is fundamental to the experiment of the modern nation. Note, however – and this is not a point illuminated by Derrida’s otherwise provocative reading – the constitution of the subject of the Declaration, “We, the people,” is dependent upon the content of the specific rights claims advanced as being self-evident. The “we” can constitute itself as sovereign in the modern nation-state only by invoking at one and the same time the principles of human rights. Why? Because membership in the modern nation, as distinct from membership in a polis and membership in a religious community, is formed by the commonality of strangers in imagining themselves to be participating in the same cultural community. Membership in the Greek polis was dependent upon the extended family structures, the tribes, the Deme, which anteceded the polis; membership in a religious community is defined either by descent or by faith and observance, but membership in the nation involves in the first place participation in the lifeworld of a “we,” the boundaries and limits of which are constantly contested, negotiated and redefined. The “we” who are sovereign are equal as rights-bearing individuals in relation to one another. The sovereign people are legal consociates, in the Kantian sense, as participants in

a regime of property relations as well as being subjects of a national bureaucratic administration. But between the imaginary community of the “we” and the purported universality of the declaration that “all men are created equal,” there are always and inevitably tensions and clashes which unfold historically.

The concrete nation, “we, the people,” bases the legitimacy of its own act of founding upon universal truths – “we hold these truths to be self-evident: that all men are created equal.” It is the commitment to a universality which is then immediately reinscribed within particularity – “we, the people” – which constitutes the “Janus face” of modern nation building, in Jürgen Habermas’ words. The sovereign people becomes a unit by declaring their allegiance to universal principles, which in fact paradoxically, can only be concretized through the specific legal, political, economic and cultural framework of a specific human community. This is the root tension between the universal and the particular, the principles of human rights and that of popular sovereignty.

“We, the people,” to just take the American case, did not originally include non-White peoples, the African slaves, who were granted only three-fifths personhood; nor did the Declaration grant full citizenship and voting rights to women. It made their civil and political status dependent upon that of their husbands through a procedure known as “couverture.” And in many cases, the state constitutions of the thirteen colonies did not grant members of the Jewish faith resident in the colonies full civil and political rights either. I have been discussing the American case; obviously the revolutionary age in Europe from 1789 to 1848, is marked by the struggles of various groups contesting these exclusions, and for the extension to them of full citizenship rights. The sovereign we of the modern nation did not include the workers, and the handyman (*die Arbeitsgesellen*), women and the propertyless. Neither were non-White-, non-Christian peoples considered capable of self-government. The history of political modernity is the history of the struggles of excluded groups to reinscribe

7 Jacques Derrida, “Declarations of Independence,” in: *New Political Science* (Summer 1986), pp. 6-15.

themselves within the circle of addressees of the universal suggested in the phrase "All men are created equal." They obviously are not; it is political struggle throughout history; institution building and learning from past struggles and defeats; cultural transformations and reconfigurations which establish this equality as a historical principle by transforming the constative of equality into a moral and political performative.

The struggle between the universal and the particular, between the principles of human rights and the sovereignty of a concrete people is one of inclusions and exclusions. The boundaries of the we are contested and contestable, but not only from within the imagined community of the "we, the sovereign people." Within the nation-state system sovereignty also always means control over a bounded territory. The "we" become one by defining, controlling and closing their borders to "others," strangers, aliens, and refugees. The modern state system is based upon the principle of "territorially-bounded" citizenship. There will be others within as well as without the sovereign people. Without this ability of the modern state to define and defend its territory, the principle of sovereignty becomes irrelevant. Yet the question today is: can the territorially defined principle of popular sovereignty which we have inherited from the Treaty of Westphalia be reconciled with the principle of respect for universal human rights in an increasingly globalized world? Can democracies live with the juridical illusion of closed borders? Clearly not. Precisely because the principles of sovereignty and rights are constitutive of the modern nation, it is their interplay, judicial as well as political, institutional as well as cultural, which will define the experience of democratic identities. Arendt saw the dissolution of the Westphalia model in Europe, but not its transformation; the old had collapsed but the new was not yet in sight. Where do we stand today?

When Arendt wrote that "the right to have rights" was a fundamental moral claim as well as insoluble political problem she did not mean that aliens, foreigners, and residents did not possess any rights. In certain circum-

stances, as with Jews in Germany, Greek and Armenian nationals in the period of the founding of the republic of Turkey (1923), with German refugees in Vichy France, to name but a few cases, entire groups of people were "denaturalized" or "denationalized," and lost the protection of a sovereign legal body. For Arendt neither the institutional nor the theoretical solutions to this problem were at hand. Institutionally, several arrangements have emerged since World War II that express the learning process of the nations of this world in dealing with the horrors of this century: the limiting and testing of parliamentary majority decisions through constitutional courts, particularly in the domain of human rights issues; the 1951 Geneva Convention relating to the Status of Refugees; the creation of the UN High Commissioner on Refugees (UNHCR); the institution of the World Court, and most recently of an International Criminal Court through the Treaty of Rome.

While procedures of constitutional review, which are becoming more prevalent in European political practice through the development of the European Court of Justice, can help protect the fundamental human and civil rights of ethnic, religious, linguistic, sexual and other minorities against the tyranny of the majority, the UN conventions remain non-enforceable humanitarian guidelines, as the tragedy of the War in Kosovo demonstrated very well. To this day the authority of the World Court in the Hague is contested, while the United States has refused to sign the Treaty of Rome leading to the establishment of the International Court of Justice dealing with "crimes against humanity." In this domain, voluntarily self-incurred obligations, that is international as well as multilateral treaties, pacts and agreements, remain the norm. The new world order is fragile, as the political always is, but a new consciousness about the significance of human rights is also prevalent.

As globalization proceeds at a dizzying rate, as a material global civilization encompasses the earth from Hong Kong to Lima, from Pretoria to Helsinki, world-wide integration in economics, communication, technology, information and armament is accompanied

by the cultural and collective disintegration of older political entities. With globalization and fragmentation proceeding apace, human rights and sovereignty claims are coming into increasing conflict with each other. On the one hand, a world-wide consciousness about universal principles of human rights is growing; on the other hand, particularist identities of nationality, ethnicity, religion, race, and language, in virtue of which one is said to belong to a sovereign people, are asserted with increasing ferocity. Globalization, far from creating a “cosmopolitical order,” a condition of perpetual peace among peoples governed by the principles of a republican constitution (Kant), has brought to a head conflicts between human rights and the sovereign self-determination of collectivities.

The citizenship and naturalization of foreigners, residents, and aliens within the borders of a polity, and the laws and norms governing such procedures constitute social practices around which the normative perplexities of human rights and sovereignty can be most acutely observed. Sovereignty means the right of a sovereign people to control its borders as well as to define the procedures for admitting ‘aliens’ into its territory and society; yet in a liberal-democratic polity, such sovereignty claims must always be constrained by universalist human rights considerations. Universal human rights go beyond the rights of citizens and extend to all persons considered as moral beings. What kinds of immigration and naturalization and citizenship practices are compatible with the commitments of liberal democracies to human rights? Can claims to sovereign self-determination be reconciled with the just and fair treatment of aliens and others in our midst?

Arendt’s considerations on the “right to have rights” inevitably lead us then to look into the dilemmas of immigration and naturalization policies. In contemporary debates around these issues two approaches dominate: the radical universalist argument for open borders and the civic republican perspective of, what I shall call, “thick conceptions of citizenship.”

Radical universalists argue that, from a moral point of view, national borders are

arbitrary and that the only morally consistent universalist position would be one of open borders. Are the borders within which we happen to be born, and the documents to which we are entitled, any less arbitrary from a moral point of view than other characteristics like skin colour, gender, and genetic make-up with which we are endowed? From a moral point of view clearly they are not, since the borders which circumscribe our birth and the papers to which we are entitled are not distributed among individuals in accordance with any criteria of moral achievement and moral compensation for which one is responsible through one’s actions.

Opposed to open borders universalism are a range of theoretical positions, articulating more or less “thick” conceptions of citizenship, community and belonging.⁸ Communitarian theories of citizenship, while not precluding or prohibiting immigration, will want to articulate stricter criteria of incorporation and citizenship of foreigners and strangers than the universalists. Only those immigrants who come closest to the model of the republican citizen envisaged by these theories will be welcome; others will be spurned.⁹ Of course, given how contested such thick conceptions of citizenship inevitably are, communitarian theories can easily lend themselves to the justification of illiberal immigration policies and the restricting of the rights and entitlements of immigrants and aliens.

My position for which I have argued in my recently published “Horkheimer lectures” *Kulturelle Vielfalt und demokratische Gleichheit*, is to steer a middle course between radical universalism and open borders politics on the one hand and sociologically antiquated conceptions of thick republican citizenship on the other. Instead, stressing the constitutive tension between universalistic human rights claims and democratic sovereignty principles, I analyze the principles and practices of political incorporation into liberal democracies. No liberal democracy can close its borders, I argue. The porosity of borders is a necessary while not sufficient condition of liberal democracies. By the same token, no sovereign

8 Joe Carens, “Aliens and Citizens: The Case for Open Borders,” in: Ronald Beiner, ed. *Theorizing Citizenship* (Albany, NY: SUNY Press, 1995), pp. 229-255.

9 Charles Kessler, “The Promise of American Citizenship,” in: *Immigration and Citizenship in the Twenty-First Century*, Noah Pickus, ed. (New York: Rowman and Littlefield, 1998), pp. 3-41.

liberal democracy can lose its right to articulate and define immigration and incorporation policies.

In this context, conditions of entry into a country, like the permission to visit, work, study and buy property, can be distinguished from conditions of temporary residency, and both in turn from permanent residency and civil incorporation, the final stage of which is political membership. These are different stages of political incorporation, very often collapsed into one another in theoretical discussions, but analytically distinguishable. At each of these stages the rights and claims of foreigners, residents and aliens will be regulated by sovereign polities; but these regulations can be subject to scrutiny, debate, contestation as well as protest by those to whom they apply, their advocates, and national and international human rights groups. There is no step of this process which can be shielded from scrutiny by interested parties. Democratic sovereignty in immigration and incorporation policy is not an unlimited right; the right to self-assertion of a particular people must be examined and evaluated in the light of the commitment of this very same people to universal human rights.

Although these considerations take the Arendtian concept of “the right to have rights,” down a path which she herself did not develop, they are consistent with her views on the nature of political community and membership. Recall that for Arendt “we are not born equal,” but that “we can produce equality through organization, because men can act and change and build a common world, together with his equals and only with his equals ...” (Arendt, 1968 [1951]:181) If human equality is a consequence of the human capacity for institution building, then membership in the circle of equals is not defined through pre-given and ascriptive characteristics, but can be attained through human action and initiative. The Arendtian political community is one which we can join freely and also leave freely. And I have argued this is also the vision of political community which underlies liberal democratic nation-states, which rest on the constitutive tension between universalist commitment to human

rights and popular sovereignty. Membership has its rules as well as burdens; privileges as well as obligations. But in a liberal democracy these are articulated publicly and are transparent for all to see. They are in the “public eye.”

The treatment of aliens, foreigners, and others in our midst is thus a crucial test case for the moral conscience as well as political reflexivity of liberal democracies. Defining the identity of the sovereign nation is itself a process of fluid, open, and contentious public debate: the lines separating “we” and “you,” “us” and “them,” more often than not, rest on unexamined prejudices, ancient battles, historical injustices, and sheer administrative fiat. The beginnings of every modern nation-state carry the beginning of some violence and injustice. So far Carl Schmitt is right. Nonetheless, modern liberal democracies are self-limiting collectivities which at one and the same time constitute the nation as sovereign while all the while proclaiming that the sovereignty of this nation derives its legitimacy from its adherence to fundamental human rights principles. “We, the people,” is an inherently fraught formula, containing in its very articulation the constitutive dilemmas of respect for universal human rights and nationally circumscribed sovereignty claims. The rights of foreigners and aliens, whether they be refugees or guest workers, asylum seekers or adventurers, define that threshold, that boundary, at the site of which the identity of “we, the people,” is defined and renegotiated, bounded and unravelled, circumscribed and rendered fluid.