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Why International and Transnational Law Is Not a Threat to Democracy

1. Introduction

Is international and transnational law inherently undemocratic? Discussions of “law beyond the state” almost inevitably run into objections from those who believe that supra-national legal orders necessarily subvert local democratic governance. Self-proclaimed populists and others express concern that the “will of the people” will be unduly subjected to the dictates of “cosmopolitan elites” or corporate capture.

These objections range across the political spectrum. Those on the right tend to focus on arguments that transnational orders will impose human rights or immigration rules on a national polity, while those on the left worry about trade regimes that might create local labor or environmental harms, allow too much industry self-governance, and so on. But at root level, most of the critiques reflect concerns that non-state regimes are inherently illegitimate as a matter of national democracy or state interest.

Paradoxically and tragically, this move towards greater insularity and tribalism comes at a time when many of the problems facing the world increasingly require coordinated solutions and *more* interaction among legal and political systems, not less. Such problems include: issues of how we will effectively maintain life on this planet (climate change, threats to biodiversity, ecosystem losses, and water deficits); issues of how human beings will sustain themselves on it (poverty, armed conflicts, and global infectious diseases); and issues of how we will develop global cooperative rules for living together given that much human activity crosses territorial borders (nuclear proliferation, toxic waste disposal, data protection, artificial intelligence regulation, trade rules, finance and tax regimes, and so on). These sorts of problems cannot plausibly be addressed solely within one legal system.

Thus, the legal challenge of our time is how to build mechanisms for engagement among legal, political, or cultural systems that recognize at least a limited set of shared values and promote mutual respect, dialogue, and cooperation without requiring all systems to be homogenized into one universalistic legal order. We must create what David Held calls “the ethical and political space which sets out the terms of

reference for the recognition of people's equal moral worth, their active agency and what is required for their autonomy and development."¹ But at the same time, we must recognize that the meaning of principles such as equality, human dignity, and so on cannot be specified once and for all, separate from the diversity of traditions, beliefs, histories, and cultures that make up human societies. In the end, therefore, what we need are institutions, procedures, and practices that are both *cosmopolitan* and *pluralist*: mechanisms that allow for dialogue and cooperation under conditions of diversity.

Developing these cosmopolitan pluralist institutions, procedures, and practices requires a form of constitutionalist thinking, focusing on the systemic structures that foster the sorts of interactions among communities that are required. But this constitutionalist thinking will be stymied from the start if we cannot imagine any institutions beyond the nation-state just because we are in the thrall of believing that the nation-state and only the nation-state can be the repository of democratic legitimacy or the protection of core values.

Therefore, instead of shrugging off criticisms that non-state governance necessarily subverts democracy, this article takes such criticisms seriously and points to possible responses. In particular, I argue that cosmopolitan pluralist institutions, processes, and practices, if properly designed, can actually strengthen democratic values, so long as democracy is not confused with simple majoritarianism.

2. Understanding what democracy means

When people say a particular decision or system of governance is "undemocratic," what exactly do they mean? Here, I sketch three broad understandings. Then, I argue that each of these understandings potentially leads to a very different set of conclusions about governance, and in particular about institutions and legal arrangements that transcend one polity. I call these broad understandings: democracy as majoritarianism; democracy as equality; and democracy as participation.

2.1. Democracy as majoritarianism

Critics of transnational or non-state governance systems, tend to adopt – implicitly or explicitly – a conception of democracy that equates democracy with simple majoritarianism. This conception is what Ronald Dworkin calls the majoritarian premise.² Behind this premise, Dworkin argues, is the idea, simply stated, that the morally correct outcome of a democratic process is the choice that a majority (or plurality) of members favor, or would favor if they had full information. This goal sounds

¹ D. Held, *Cosmopolitanism: Ideals and Realities*, Cambridge 2010, p. 49.

² R.M. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*, Cambridge 1996, p. 15.

reasonable, and, as Dworkin notes, many people reflexively assume that majority rule is the very essence of democratic governance.

Of course, even if one believes in this majoritarian premise, one might still think that there are times when the demands of the majority should be thwarted to pursue some other aim, for example the individual rights of a minority group. Thus, an adherent of the majoritarian premise might acknowledge that a counter-majoritarian institution, such as a court, should sometimes intervene to block popular legislation or executive enactments. But significantly, if one begins with the majoritarian premise, then any deviation from majority rule is deemed inherently undemocratic and therefore must be justified as morally necessary despite its undemocratic nature. On this reading it is always unfair for the majority will to be thwarted, so even when we decide to allow the majority will to be thwarted, unfairness remains because democracy itself is being subverted.

2.2. Democracy as equality

Dworkin, however, offers an alternative account of democracy, starting from a premise of equality, rather than majoritarianism. According to Dworkin, democracy requires that “collective decisions be made by political institutions whose structure, composition, and practices treat all members of the community, as individuals, with equal concern and respect.”³ This is, of course, sometimes coterminous with majoritarianism. Thus, when the processes of majoritarian institutions result in outcomes that treat individuals with equal concern and respect, those results are democratic under both definitions. But, significantly, on Dworkin’s account, when a decision reached through a majoritarian process does not treat all people with equal concern and respect, there would be no moral cost at all and no cause for moral regret if a counter-majoritarian institution, such as a court, or an international or transnational rule invalidated such a decision.

The distinction between these two views – democracy as majoritarianism and democracy as equality – is crucial. Indeed, it is easy to see that the majoritarian premise has unduly dominated political discourse on both the left and the right. Thus, we continue to hear that both counter-majoritarian domestic institutions such as courts and international and transnational governance institutions inherently compromise democracy. And if that is the premise, then it is always an uphill battle to justify why democracy should sometimes give way to these counter-majoritarian institutions or rules. On this view, majoritarianism is always the default, and so derogations from that default are inherently suspect – because they are seen as rules by distant elites thwarting the popular will – and so must always require justification.

But if we start from a conception of democracy as the treatment of all individuals with equal concern and respect, then there is no need to be suspicious of counter-majoritarian rules, institutions, or procedures. Instead, a transnational rule, a court judgment, or an international institution could actually *enhance* democracy rather

³ *Ibid.*, p. 17.

than thwart it. For example, from the perspective of democracy as equality, international human rights norms that protect minority interests support democracy. So, too, do multilateral institutions that help guard against the capture of government by minority factions. And while such international regimes will not always have these salutary effects, that is an argument to criticize or amend those particular regimes, not to reject international norms or institutions altogether.

2.3. Democracy as participation

While I whole-heartedly adopt both Dworkin's formulation and his critique of the majoritarian premise, I wonder if we can go further and consider a third understanding of democracy: that democracy is also about political and legal participation in the project of self-governance. And what that sort of conception demands is the existence of multiple ports of entry for multiple communities and multiple individuals to advance many different perspectives and interests. This is democracy as participation, and this conception of democracy focuses on fostering communication across difference in the process of decision-making, entirely distinct from the outcome reached.

From the perspective of democracy as participation, law functions in part to create the context for dialogue across difference. Rather than assuming either hermetically sealed homogenous communities, on the one hand, or a single universal polity, on the other, the idea of democracy as participation seeks, as Hannah Arendt does, the quality that "makes it bearable for us to live with other people, strangers forever, in the same world, and makes it possible for them to bear with us."⁴ Arendt argues that bearing with strangers "involves a mental capacity appropriate for an active relation to that which is distant,"⁵ which Arendt locates in King Solomon's gift of the "understanding heart."⁶ Understanding, according to Arendt, "is the specifically human way of being alive; for every single person needs to be reconciled to a world into which he was born a stranger and in which, to the extent of his distinct uniqueness, he always remains a stranger."⁷ Iris Young similarly imagines a state of "unassimilated otherness" in the ideal "unoppressive city"⁸ and seeks the "'[b]eing-together' of strangers."⁹ And Immanuel Levinas likewise focuses on the ethical obligation of the Self to respond to the Other.¹⁰ Mechanisms that encourage dialogue across difference help advance this sort of active relation.

⁴ H. Arendt, "Understanding and Politics (The Difficulties of Understanding)," *Partisan Review* 1953, vol. 20 [reprinted in:] *Essays in Understanding: 1930–1954*, ed. J. Kohn, New York–London 1994, p. 307.

⁵ P. Hansen, "Hannah Arendt and Bearing with Strangers," *Contemporary Political Theory* 2004, vol. 3, no. 1, p. 3.

⁶ H. Arendt, "Understanding and Politics...", p. 322.

⁷ *Ibid.*, p. 308.

⁸ I.M. Young, "The Ideal of Community and the Politics of Difference" [in:] *Feminism/Postmodernism*, ed. L.J. Nicholson, New York–London 1990, pp. 300, 317.

⁹ *Ibid.*, p. 318.

¹⁰ See: B. Waldenfels, "Levinas and the Face of the Other" [in:] *The Cambridge Companion to Levinas*, eds. S. Critchley, R. Bernasconi, New York 2006.

In this vision of democracy as participation, the relevant question becomes: *How might legal, governmental, or non-governmental systems seek to create or preserve spaces for productive interaction among multiple overlapping communities and legal systems by developing procedural mechanisms, institutions, and practices that aim to bring those communities and systems into dialogue, rather than dictating norms hierarchically?* Answering this question, in turn, suggests a set of principles for the design of political and legal procedures and institutions. Significantly, these principles are not derived from any overarching universal set of truths and do not require a commitment to universalism. They only require a pragmatic willingness to engage with other possible normative systems and potentially to restrain one's own voice for the sake of forging more workable, longer-lasting relationships and harmony among multiple communities. Sometimes, of course, such deference to the Other will not be possible; this vision of democracy as participation only seeks to embed habitual practices in which deference is considered and attempted, not in which it is always implemented.

This vision of democracy also recognizes that normative conflict is unavoidable, and so, instead of trying to erase conflict, seeks to manage it through procedural mechanisms, institutions, and practices that might at least draw the participants to the conflict into a shared social space. This approach draws on Ludwig Wittgenstein's idea that agreements are reached principally through participation in common forms of life, rather than through agreement on substance.¹¹ Or, as the political theorist Chantal Mouffe has put it, we need to transform "enemies" – who have no common symbolic space – into "adversaries."¹² Adversaries, according to Mouffe, are "friendly enemies": friends because they "[s]hare a common symbolic space but also enemies because they want to organize this common symbolic space in a different way."¹³ Ideally, law – and particularly cosmopolitan pluralist legal mechanisms – can function as the sort of common symbolic space that Mouffe envisions, and can, therefore, play a constructive role in transforming enemies into adversaries.

2.4. Cosmopolitan pluralism and democracy

These different visions of democracy have real consequences for the design of governance institutions. For example, consider a governing council of decision-makers popularly elected by citizens of a community. Assume that every council member happens to be a member of the same majority ethnic, racial, or religious group within that broader community. If the election were conducted fairly, then a view of democracy as majoritarianism would stop there and say that the subsequent decisions of this body properly reflect the views of the majority and therefore instantiate the appropriate values of a democracy. Further, if a minority group wanted to claim mistreatment at the hands of the majority, the majoritarian premise would require

¹¹ See: L. Wittgenstein, "§ 241" [in:] *idem, Philosophical Investigations*, trans. G.E.M. Anscombe, P.M.S. Hacker, J. Schulte, 4th ed., Chichester 2009.

¹² See: Ch. Mouffe, *The Democratic Paradox*, London 2000, p. 13.

¹³ *Ibid.*

that group to overcome procedural or substantive obstacles before it could justify subverting the will of the majority.

In contrast, a view of democracy as equality would automatically require that the council treat minority communities with equal concern and respect and therefore enforce legal rules, procedural devices, and institutions that would help ensure compliance with such requirements. On this view, respect for minority rights would be a core component of the legitimacy of the council itself, not simply an outer limit on the council's prerogatives. Yet, even this view of democracy would do nothing to change the basic composition of the council itself. Thus, the council would remain fully composed of the dominant group; there would just be limitations in place to make sure the council did not trample fundamental rights of the minority.

If one embraces a vision of democracy as participation, however, one might reach the conclusion that even if this rule solely by members of the dominant group is possibly legitimate, it is likely not preferable. This is because an approach based on participation adds to the mix a preference for greater dialogue among multiple communities to improve the quality of decision-making, to build habits of mind that inculcate interaction, and to make it more likely that the minority will acquiesce in whatever substantive decisions are ultimately reached. Accordingly, following this more pluralist approach, one might decide to set aside certain seats on the governing council for the minority group. Thus, the idea of democracy as participation adds an additional set of considerations to weigh in the institutional design decision.

So, what does all this mean for legal or institutional arrangements that place at least some decision-making authority outside of any one polity? Do such arrangements subvert democracy? The answer is that such arrangements are only truly problematic under the first vision of democracy outlined above: the majoritarian premise. Yet, as discussed above, that vision of democracy is severely limited. In contrast, under the vision of democracy as equality, it may be that counter-majoritarian rules imposed by non-elected officials actually reinforce democracy, so long as those rules help ensure that governments treat all people with equal concern and respect. And in the vision of democracy as participation, having a transnational, or international body that offers a different perspective or port of entry, or that provides a forum for greater dialogue among affected communities, might actually be more democratic than the governance arrangements within one polity.

Of course, these arrangements *could* subvert democracy depending on how they were organized. For example, rules or institutions that allow powerful corporations to avoid local environmental or labor rules enacted by a democratic majority might not be supportable under any of the conceptions of democracy described above. But that is not an objection to non-state governance per se. The important point is that there is nothing inherently undemocratic about governance that goes beyond (or even undermines) the majority will, especially if the majority will is itself undemocratic.

3. Unelected governance does not inherently subvert democracy

Governance, of course, is not always conducted by directly elected officials. To some who resist non-state governance, this fact also inherently undermines democratic self-government. For example, we often hear about the antidemocratic, oppressive bureaucrats in Brussels creating EU regulations that purportedly subvert the popular will of individual nation-states.¹⁴

However, there are obvious responses to this concern. First, this argument would also mean that no form of delegated decision-making to civil servants, even *within* a state, could ever be permissible. After all, an unelected administrator in Poland making a decision is just as unelected and elitist as an unelected administrator in Brussels. The fact is that all delegated decision-making within a government is going to be made by unelected bureaucrats, and unless one is willing to dismantle the entire administrative state, one needs to be willing to delegate some decision-making to unelected officials.

Indeed, in the modern nation-state it is almost impossible to conceive how all the many daily minute discretionary decisions that are necessary could possibly be accomplished only by directly elected legislators. So, again, unless the goal is to dismantle the whole idea of government regulation, one will need to accept some degree of delegated decision-making. But once you do that, then there is no difference in kind, from a democratic governance perspective, between elite civil servant bureaucrats within the nation-state and beyond it.

Second, as noted above, if the appropriate vision of democracy is not simple majoritarianism, but is instead founded in equality or participation, then a decision by a bureaucrat outside the nation-state can actually reinforce democracy, not subvert it. For example, if an EU regulation forces Poland to update its labor laws to provide greater workers' rights, that regulation is actually democracy-protecting. The regulation levels the playing field between workers and businesses in a way that might have been difficult to do within the polity because of government capture by powerful industry players. Indeed, we need to remember that government capture by special interests itself subverts democracy, and so sub-national, transnational, or cosmopolitan governance can actually sometimes lead to more democratic outcomes than are possible through nation-state regulation alone. This is true both because the non-state rule may promote equality within the state, and because the rule-making process outside the polity may provide greater voice for some members of the demos than is possible within it.

Of course, transnational regulation can also be used by powerful transnational entities to escape local equality-enforcing regulations through non-participatory processes, but that is more a question of the individual regulation and the individual process than of the location of the particular bureaucrat making the decision. In other

¹⁴ See, for example: R. Menasse, *Enraged Citizens, European Peace, and Democratic Deficits*, trans. C. Decker, London–New York–Calcutta 2016.

words, rather than assuming that administrative regulations enacted outside of the polity necessarily subvert democracy, we need to look at the actual content of the particular regulation, as well as how it was enacted.

This same set of arguments would apply to the counter-majoritarian rulings of judges. Once one accepts that such rulings by domestic judges might be democracy-protecting rather than democracy-undermining, there is no reason that the same could not hold true for the rulings of international or transnational judges.

Nationalists might respond by focusing on arguments either from *identity* or *process*. Arguments from identity will emphasize that it matters who is doing the administering or the judging. If that person is a member of the relevant nation-state, so the argument goes, then whatever decision the bureaucrat or judge reaches is necessarily more democratically legitimate than if the decision-maker were an outsider.

The argument from identity, however, is not an argument based in democracy at all; it is an argument based in nationalism. The unstated assumption is that a decisionmaker who is a citizen of a nation-state will innately reflect the democratic will of the people of that nation-state. This seems implausible as an empirical matter, and it is certainly not grounded in a theory of democracy. In addition, if a nation-state is an imagined community,¹⁵ and not a naturally occurring, fixed, and stable entity, then there is no necessary reason to privilege membership in a nation-state over other possible community memberships that might be relevant. After all, citizens of a nation-state may hail from many different ethnic, religious, economic, political, and cultural communities. Therefore, it would be odd indeed for any given citizen of a nation-state to reflect the will of the entire nation-state community. Thus, if our inquiry is about democracy, then the real question is the degree to which either the process or the outcome reflects some form of democratic participation or accountability. And the answer to that question, whatever it may be, cannot stand or fall purely on the nationality of the decisionmaker.

Turning to the argument from process, the nation-state sovereigntist might say that, while it is true that a bureaucrat or judge from within a nation-state is not intrinsically more democratically accountable, at least such decision-makers are placed in those roles through democratic processes: they are elected or appointed through a constitutionally or statutorily mandated structure. This is true, of course, but if it is simply the existence of a process that leads to democratic legitimacy, then what do we do about those transnational actors, such as European Union administrators or judges? They too are appointed through a process that the various member countries have agreed upon. Indeed, EU bodies are scrupulously representative in the sense that all member countries can name individuals who together then serve on most EU decision-making bodies. Likewise, judges or administrators who exercise delegated authority through treaties or bilateral or international agreements also do so based on agreements among states. And even administrators who wield authority through non-

¹⁵ See generally: B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, revised edition, London–New York 2016.

state entities, such as industry standard-setting bodies or trade organizations, generally do so based on the voluntary participation of business groups and corporations in those regimes. Thus, it is unclear why there is any true democratic legitimacy problem arising solely from the fact that administrators or judges from beyond the nation-state are sometimes the ones exercising power.

4. Legal institutions and doctrines that foster democratic participation

As discussed above, one of the values underlying law under conditions of democracy is the idea of fostering greater participation in the processes of decision-making. After all, one of the principal evils of a feudal structure, a monarchy, a theocracy, a dictatorship, or an autocratic oligarchy is the fact that most of the population has no agency in the policy decisions that impact their lives. This leads, of course, to abject unfairness. But, interestingly, it can also lead to poor decision-making. For example, the 2020 coronavirus pandemic focused attention on the fact that authoritarian regimes may be slow to respond to health crises because they do not allow for the free flow of information.¹⁶ Likewise, analyses of jury deliberations indicate that more diverse jury pools do not just consider a wider range of issues (an advantage in and of itself), but actually deliver more accurate results as well.¹⁷ And studies suggest that greater diversity, whether in scientific communities, corporate boardrooms, or government meetings, tends to lead to better decision-making overall.¹⁸

However, in some sense, every legal or policy decision is ultimately autocratic, or what Robert Cover would call jurispathic: it privileges one policy choice or one interpretation of legal doctrine and “kills off” the other possible choices or interpretations.¹⁹ Cover, for example, recognizes that judges are inherently “people of violence” because their daily activities are necessarily jurispathic in this way.²⁰

So, how to reconcile the idea of cosmopolitan pluralist law-making with the inevitably jurispathic nature of any ultimate decision? The answer, I think, is to create institutions, procedures, and discursive practices that encourage participation from multiple norm-generating communities and that foster dialogue among those communities. Such participation and dialogue will encourage decision-makers to be restrained in the exercise of their jurispathic power.

¹⁶ See: R. Lei, R. Qiu, “Chinese Bioethicists: Silencing Doctor Impeded Early Control of Coronavirus,” *Hastings Bioethics Forum*, 13 February 2020, <https://perma.cc/H5ZU-QATD?type=image> [accessed: 5.05.2026].

¹⁷ S.R. Sommers, P.C. Ellsworth, “How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research,” *Chicago-Kent Law Review* 2003, vol. 78, p. 997.

¹⁸ See, for example: E. Larson, “New Research: Diversity + Inclusion = Better Decision Making at Work,” *Forbes*, 21 September 2017, <https://perma.cc/A2H9-HV8D> [accessed: 5.05.2026].

¹⁹ See: R. Cover, “The Supreme Court, 1982 Term – Foreword: Nomos and Narrative,” *Harvard Law Review* 1983, vol. 97, no. 4.

²⁰ *Ibid.*

Indeed, some institutional designs, procedural mechanisms, and discursive practices are inherently more jurisgenerative. And while none is a panacea, the point is that these jurisgenerative mechanisms actually support democracy rather than undermine it, so long as democracy is understood, at least in part, as being about how best to facilitate dialogue across difference. Let us consider such mechanisms:

- *Mechanisms that encourage or require articulation of, and consideration for, multiple points-of-view.* These can include rules requiring the public distribution of dissenting opinions or requiring bureaucrats to formally consider all comments to a proposed rule, or requiring decision-makers to explain precisely how they balanced various considerations when applying a statutory balancing test, and so on;
- *Mechanisms that afford more opportunities for participation from different perspectives.* These can include provisions for relaxing standing doctrines to allow more people to intervene in a legal proceeding, or for allowing amicus petitions of affected parties, or for ensuring diverse representation on decision-making bodies, among many others;
- *Mechanisms that provide more ports of entry into decision-making processes for those pursuing a variety of different perspectives.* Such mechanisms include provisions for complementarity or overlapping jurisdiction, so that voices unheard in one forum might have an alternative forum elsewhere;
- *Mechanisms that require or encourage decision-makers to consider the possible efficacy of multiple norm-generating communities.* These mechanisms could include less parochial and less territorially based rules for jurisdiction, choice of law, and judgment recognition. They also might include recognizing the variety of ways non-state entities regulate behavior and then evaluating those non-state regulatory bodies as part of our understanding of law; and
- *Mechanisms that encourage self-consciousness about wielding jurisprudential power and therefore encourage that power to be exercised in a more restrained way.* Such mechanisms might include margins of appreciation to allow for local variation, subsidiarity doctrines to require consideration of other possible law-making bodies, and precautionary principles, or doctrines that encourage deference to other sources of authority or expertise, such as the U.S. Supreme Court's approach articulated in the now-overruled decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*²¹

Of course, these brief summaries only scratch the surface of the possible institutions, procedures, and practices that might help encourage greater dialogue across difference within a legal or governmental forum. But for the purpose of this article, they make the basic point adequately: these sorts of governance mechanisms tend to foster democracy; they do not undermine it.

To be sure, encouraging dialogue is only one of the aims of democratic governance. For example, consider Dworkin's focus on treating people with equal concern and respect. If a decision-making process seeks to bring multiple perspectives

²¹ See: *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), overruled by *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024).

into a meeting, but some of the invitees refuse to participate because, say, women are present, then the price of their participation might be the violation of gender equality norms, which might be unacceptable. So, I am not saying that the values of cosmopolitan pluralist dialogue always overcome any other democratic values that might be affected. Instead, I am simply arguing that these dialogic values should be considered relevant in understanding whether any particular governance mechanism is sufficiently democratic.

Significantly, if we look at the menu of mechanisms above, we can imagine a governance institution with representation from all constituent communities, developing policy through dialogic processes, employing procedural mechanisms such as margins of appreciation to accommodate local norms, deploying jurisdictional doctrines such as complementarity, subsidiarity, and precautionary principles to defer to local decision-makers, and providing ports of entry to individuals denied voice in their local systems, but always working to negotiate dividing lines among levels of decision-making authority so as not to over-reach. Such a governance institution would tick many of the procedural boxes listed above and therefore should in many respects be thought of as democracy-reinforcing. And of course, this imagined governance institution actually mirrors much of the design of the European Union. So, perhaps instead of seeing the European Union as a subversion of democracy, we might instead view it as a model for democratic participation and dialogue.

Likewise, many institutions and procedures of non-state governance and law-making might also score high on the democracy-reinforcing front if they deployed these sorts of mechanisms. And while there will always be political conflict both about how these mechanisms actually operate in practice and whether any particular decision constitutes a just outcome, the point is that objecting to such mechanisms on the ground that they are undemocratic is simply incorrect. To the contrary, depending on how they are designed, these mechanisms might be far more democratic than the supposedly majoritarian institutions within an individual nation-state, which may be captured by minority factions or powerful interest groups. The key is to look at the design of the institutions themselves, not whether they were created from within or without a nation-state framework.

5. Conclusions

Any discussion of governance requires a delicate balance between the universal and the particular. Cosmopolitan pluralist governance mechanisms need not elide cultural, historical, and sociological differences, but they do not allow retreat into pretend, hermetically sealed parochial localities either. Instead, they seek dialogue across difference, emphasizing the core value of democracy as participation and seeking to create a Wittgensteinian shared social space to turn enemies into adversaries.

Complaining that such governance mechanisms subvert democracy is, therefore, a lazy response. Democracy is not simply what a majority of voters in a particular

nation-state say they want at one moment in time. Indeed, there is no necessary democratic magic to the will of the majority at all. Democracy is deeper than that, implicating core values of equality and mutual respect, and providing opportunities for voice and participation in the project of self-governance.

Once democracy is understood in this more substantive way, then it is clear that non-state law-making and governance need not subvert democracy at all; to the contrary, it can be democracy-reinforcing. The important questions become the degree to which the chosen legal or governance mechanisms treat every person with equal concern or respect, and the degree to which they provide ports of entry for voice, contestation, and dialogue.

The answer to those questions cannot be answered by assuming nation-states are the only legitimate community for governance. As the Greek Stoics understood, we are all members of multiple overlapping communities, some local, some national, some international and transnational, and some epistemic. All of these communities are in some sense imagined, so one is not inherently more legitimate than the others. We must instead examine the various governance institutions these multiple communities put forward and evaluate how democratic they are in their design and practice.

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Summary

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Why International and Transnational Law Is Not a Threat to Democracy

Discussions of "law beyond the state" almost inevitably run into objections and critiques from those who believe that supra-national legal orders necessarily subvert local democratic governance. This article responds to these objections and critiques. In particular, I argue that international and transnational institutions, processes, and practices, if properly designed, can actually strengthen democratic values, so long as democracy is not confused with simple majoritarianism. Instead, democracy requires, first, that all persons be treated with equal concern and respect, and, second, that there be sufficient opportunities for participation in governance by a broad spectrum of the population so that there will be more sites for meaningful dialogue across differences. If democracy is understood in this more substantive way, then international and transnational law and institutions can potentially support, rather than subvert, democracy.

Keywords: international law, transnational law, democracy, democratic theory, cosmopolitanism, Global Legal Pluralism.

Streszczenie

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Dlaczego prawo międzynarodowe i ponadnarodowe nie stanowi zagrożenia dla demokracji?

Dyskusje na temat „prawa wykraczającego poza granice państwa” z reguły napotykać sprzeciwy i krytykę ze strony tych, którzy uważają, że ponadnarodowe porządki prawne z konieczności podważają lokalne rządy demokratyczne. Niniejszy artykuł jest odpowiedzią na tego typu zarzuty. Autor argumentuje, że instytucje, procesy i praktyki międzynarodowe oraz transnarodowe, jeśli zostaną odpowiednio zaprojektowane, mogą faktycznie wzmacniać wartości demokratyczne, pod warunkiem że demokracja nie będzie mylona ze zwykłym systemem większościowym. Demokracja wymaga przede wszystkim równego traktowania wszystkich obywateli z troską i szacunkiem, a także zapewnienia jak najszerzym grupom społeczeństwa realnych możliwości udziału w rządzeniu, tak aby sprzyjać merytorycznemu dialogowi ponad podziałami. Jeżeli demokrację rozumiemy w taki materialno-prawny sposób, wówczas prawo międzynarodowe i ponadnarodowe oraz instytucje mogą potencjalnie wspierać demokrację, a nie ją podważać.

Słowa kluczowe: prawo międzynarodowe, prawo ponadnarodowe, demokracja, teoria demokracji, kosmopolityzm, globalny pluralizm prawny.