

Diversity and cosmopolitan democracy: Avoiding global democratic relativism

L U I S C A B R E R A

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Abstract: Many recent arguments for trans-state and global democracy would offer broad leeway on constitutionalized right standards to states, and few formal mechanisms for individuals to challenge domestic rights rejections beyond the state. Such a stance, it is shown here, tends to be rooted in implicit presumptions of domestic consensus. Challenges are offered to this and related presumptions in accounts of cosmopolitan democracy, as well as global variants of liberal nationalism and political liberalism. An alternative, primarily instrumental approach to trans-state and global democracy is detailed. It would give emphasis to ways in which formal suprastate participation, complemented by challenge mechanisms for individuals, could play a crucial role in helping to strengthen individual rights protections within states. The case for adopting such an approach is reinforced through attention to the efforts of a persistent domestic democratic minority – Dalits in India – to reach out to the global human rights regime for help in pressuring their own state to better protect rights against exclusion and subjugation.

Keywords: cosmopolitan democracy; Dalit rights; global constitutionalization; human rights; political liberalism

Dalits have always fought, struggled [against caste prejudice] ... They have not said ‘oh this is just part of tradition.’ The upper caste say ‘this is part of our system,’ and the entire world believes that, in India, caste is a culture. ... We are saying that it is these traditions in India that are human rights violations. That is what to the world we wanted to highlight. If it is a culture, everyone should flourish in that culture. ... But here, our culture, our tradition, has negated the rights of human beings, negated the rights of a particular group of people.

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I. Introduction

As the theory, and to an increasing extent the practice, of democratic governance moves beyond the bounds of the nation-state, important questions arise. Prominent among these are questions around diversity within trans-state and global democracy. Many theorists, especially of global democracy, would reject the constitutionalization of comprehensive rights standards in the name of respect for cultural diversity among states, and they would provide few or no explicit mechanisms to individuals within states to challenge the rejection of rights claims. In this article, I seek to demonstrate that leading such arguments face significant coherence and other challenges. I then offer more general reasons to think that the omission of clear suprastate challenge mechanisms for individuals from a theory of global democracy is not ultimately defensible.

I begin by considering three approaches to global shared rule which give such emphasis to diversity concerns. The first, associated with cosmopolitan democrats such as David Held (1995; 2004; 2010), and to some extent found in recent accounts of global legal pluralism (Berman 2007; see Tamanaha 2008), would mandate the global constitutionalization of that minimum package of individual rights directly related to enabling democratic participation. It would, however, reject suprastate challenges based in provision beyond the minimum, or in more comprehensive schedules of rights. This is done generally on grounds of respecting global societal diversity. The second approach, grounded in theories of liberal nationalism (Tan 2008 2012; see also De Schutter and Tinnevelt 2010), would grant significant leeway to states within an ‘international, not cosmopolitan’ view of global democracy, where delegates of states negotiate in suprastate fora but there is no extension of individual participation. The third approach would advocate a partial extension of Rawlsian political liberalism, citing reasonable disagreement amongst competing world views as reason to grant a wide rights leeway to states (Nussbaum 2008; see Caney 2006b).

I raise some significant challenges to each, with a particular emphasis on coherence problems around presumptions of domestic democratic consensus. That is, an entire state citizenry is presumed to have made a unified choice on rights and related standards when only a democratic majority – and often only an authoritarian regime and its clients – have done so. Or, more comprehensive rights are rejected because they would not achieve consensus endorsement from all states. These presumptions have figured strongly in a sort of ‘global democratic relativism’ emerging in the recent literature. I outline an alternative which offers a primarily instrumental justification for extending formal democratic institutions and related participation beyond the state. This approach gives emphasis to the

more comprehensive protection of core individual rights, and to the development of robust global mechanisms, e.g., constitutional courts and ombuds procedures, through which those within states could challenge possible rights rejections. To demonstrate the potential practical importance of such global mechanisms, including in situations where a range of civil and political rights already are formally in place domestically, I offer details from a case study focused on a network of Dalit activist groups within India. These groups have reached out to the United Nations human rights regime and global human rights NGOs for support in contesting caste discrimination domestically. The case highlights circumstances under which a large but persistent democratic minority could benefit from supranational challenge mechanisms.

Thus, the focus here is on engaging some of the most influential approaches to supranational democracy, demonstrating how some suspect foundational assumptions lead them to reject the global constitutionalization of comprehensive rights and corresponding challenge mechanisms, and offering some *prima facie* reasons to support the development of both. A secondary set of questions will naturally emerge from such a discussion. These include questions relating to the categories of rights that should be constitutionalized globally, or which should be held up as a long-term constitutional aim. They also include important questions about how narrowly drawn specific rights should be within the constitutional categories, and how much deference should be given to domestic societal norms in formal supranational adjudication of rights-based challenges (Mayerfeld 2009: 75–86; Buchanan 2008; see also Scheuerman 2002).¹ Other questions will arise around the roles that supranational democratic deliberation could play in pressing challenges from below (Gould 2014: ch 11). It is not possible in the space of this article to offer a full treatment of these more fine-grained secondary questions. Some preliminary answers are indicated, however, in the discussion that follows, and subsequent work will treat such questions in detail.

II. Trans-state democracy and universality concerns in human rights

To begin, it will be useful to both highlight the practical salience of questions around diversity within trans-state democracy, and to distinguish

¹ In context of the European Court of Human Rights, for example, such questions are addressed under the margin of appreciation doctrine, where judges typically consider domestic norms or rights standards in their interpretations of international ones. A narrow margin would give more weight to supranational standards (Legg 2012; Stone Sweet 2012; see also Stone Sweet and Mathews 2008).

such questions from ones around diversity and the universality of human rights per se. In terms of empirical salience, we can note first the continuing evolution and expansion of the directly elected European Parliament. Its 766 members now represent more than 500 million persons across 28 states, and its 'co-decision' and other powers related to European legislation and governance have grown considerably in recent decades (Hix and Høyland 2013). Broadly similar institutions have begun to emerge in other regions. Mercosur, a two-decade-old customs union involving Brazil, Argentina, and several other South American countries, has committed to transforming its *Parlasur* from an inter-parliamentary union to a directly elected advisory parliament (Lucci 2013). The African Union's Pan-African Parliament, established in 2004 and now including more than 250 representatives selected by the parliamentary bodies of 47 member states, has adopted as its central mission 'evolving into an institution with full legislative powers, whose members are elected by universal adult suffrage' (Pan-African Parliament 2014; see Nzewi 2013).² At the global level, the Campaign for a United Nations Parliamentary Assembly has received support signatures from more than 1,400 parliamentarians, as well as majority support from the European Parliament and other suprastate bodies, in its drive to create a directly elected UN second chamber. The body would be consultative at first but gradually accrue legislative powers (Campaign for a UN Parliamentary Assembly 2014).

The European Parliament has come by far the closest to achieving domestic parliaments' powers to bind through legislation, but the empirical trends give one reason to think that the time is ripening to consider a range of questions pertaining to actual suprastate democratic governance at the regional level and beyond. Trends in recent democratic theory give another. In the past two decades, from roughly the end of the Cold War and coinciding with the emergence of intensive global economic and related forms of integration, scores of authors have offered accounts of democracy beyond the state. These range from straightforward treatises outlining the case for creating fully global democratic governing institutions (Held 1995; 2004; Marchetti 2008;

² More than 60 inter-parliamentary unions, composed of sitting members of parliament who meet in an international forum, continue to play advisory roles (Sabic 2008). These include notably the Parliamentary Assembly of the Council of Europe and the 125-year-old, global Inter-Parliamentary Union, as well as the Latin American Parliament (PARLATINO). Also of note here are the Parliamentary Network on the World Bank and International Monetary Fund, and the Parliamentary Conference on the World Trade Organization (see Krajewski 2010).

Cavallero 2009), to more institutionally limited projects designed to strengthen representation and accountability in global governance (Gould 2004; Bohman 2007; MacDonald 2012), to accounts offering broader conceptualizations of democratic deliberative publics in the global sphere (Dryzek 2009; see Scholte 2011). As I will seek to demonstrate, some hard questions arise for many such accounts, especially those advocating binding democracy within regional and global institutions, around diversity and the protection of persistent democratic minorities within states.

Similar diversity concerns are long-standing, of course, in the discourse around the universality of human rights. Numerous challenges have been raised to claims for comprehensive rights universality (see Walzer 1983; Brown 1997; Mutua 2001; Kapur 2006), and theorists of rights and global justice have responded with some highly elaborated defences of a universal approach (Caney 2000; Talbott 2005; Nickel 2007; see Buchanan 2014). There are several reasons, however, to treat separately issues of diversity and constitutionalized rights in the frame of global democracy.

First, the stakes will likely be much higher in the binding democratic context than in one of human rights, including international human rights law. That is because, while states are able to claim reservations from the provisions of human rights treaties, and they are able to opt out of specific treaties altogether (Goodman 2002; see Kutner 1954),³ in projects of supranational or fully global democracy, legislation is or would be binding on states and has some direct domestic effect within them. Thus, the issue of exceptions, or allowable variations in rights standards, would be more pressing and more immediately felt by those within states. That is the case, for example, with legislation passed at the supranational regional level within the European Union, with the binding judgments of the European Court of Justice and, to an increasing extent, the European Court of Human Rights (Douglass-Scott 2011).

Second, when trans-state or global democracy is the context, complexities are introduced by questions arising around democratic boundaries. These are focused on determining who ‘the people’ are for the purposes of participatory rule. A number of recent commentators have challenged assertions that current state boundaries set the proper

³ As Kutner observed in an argument for a global human rights court published when the two primary UN human rights covenants were in development, ‘States may avoid any obligation under the covenants by refusing to ratify them’ (1954: 424). The same remains true of the most fully elaborated global court designed to protect individual rights, the International Criminal Court.

geographic limits on democratic participation (see Goodin 2007; Näsström 2007; 2011; Abizadeh 2008; 2012). Such challenges are distinct from those raised in the human rights context, and significantly here, they will greatly complicate claims for simply accepting as legitimate the majority decisions made in existing states (see Barry 2003; Cabrera 2014).

Finally, the fundamentally supraprivate character of the body of theory in question adds complexities which are not fully replicated in the human rights debates. Most global democracy theorists presume that the boundaries of the nation-state have a significance, moral or otherwise, that lower jurisdictional boundaries do not. They would offer different prescriptions for rights leeway at lower levels than in, for example, even a strongly federal system such as the United States. Thus, I will address issues around the appropriate level for rights setting, interpretation and review as ones of ‘rights subsidiarity’. The general doctrine of subsidiarity, which dictates that governance should be conducted at the lowest possible level, has been most fully developed in the European Union’s multi-level, state and supraprivate governance configuration (see Scheuerman 2002: 448–50; Føllesdal 2013), and rights subsidiarity should be an apt framing for the approaches considered here.⁴

III. Global democracy and participatory enabling rights

We can consider first rights subsidiarity within the cosmopolitan democracy approach developed by David Held and others (see Held 1995; 2004; 2010; Archibugi 2008; Koenig-Archibugi 2011; Marchetti 2012). Held’s account remains the most frequently engaged by both advocates and critics of the approach, and it offers the most direct treatment of rights subsidiarity. Thus, it will be treated here as the exemplar, though I will discuss other accounts as salient. For Held, equal respect for human autonomy or agency is the key moral requirement. All persons should be viewed as morally equal, and as such, ‘they deserve equal political treatment; that is, treatment based on the equal care and consideration of their agency’ (2004: 170). This leads to an intrinsic justification specifically for democratic participation: showing

⁴ Subsidiarity is specified in art 5:3 of the Treaty on European Union (1992): ‘Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States ... but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.’

appropriate respect for individual autonomy means that all persons must be given a democratic say in those decision processes which affect their lives. Whatever instrumental value democracy may be said to have in achieving separate aims is not the primary consideration. Given that processes of globalization have intensified and multiplied such decision effects across borders, Held and others see strong reason to extend democratic participation and institutions beyond the state (Held 2004: ch 6; 2010: 72; Archibugi 2008: 57–59; Koenig-Archibugi 2012; see also Gould 2004: 210–16; Pogge 2008: 190–92; Falk and Strauss 2011).⁵

Held's approach to rights subsidiarity flows from his foundational justification for democratic rule. He argues for constitutionalizing above the state only those rights directly related to ensuring that an individual is equipped to act as a democratic participant, and thus to exercise autonomy (1995: 190–201; Koenig-Archibugi 2011; see Gutmann and Thompson 1996: 33–34).⁶ Such rights are said to fall into seven clusters, including health, social, cultural, civic, economic, pacific and political. Each is seen as vital to ensuring democratic participation at all levels of shared rule (Held 1995: 191; 2010: 81–83; see Scheuerman 2002: 444–45). Further, when participation is adequately enabled for individuals, there is a strong presumption of legitimacy for the decision outcomes emerging from participatory procedures (Held 1995: 145; see also Benhabib 2011: ch 4).

It is not obligatory for suprastate political institutions to reinforce or guarantee rights beyond the minimum needed to ensure adequate democratic participation, Held asserts.⁷ This leads us to the first of two consensus presumptions that I will argue are problematic for the approach. It arises in the context of Held's rejection of more comprehensive individual rights, on grounds of global dissensus:

⁵ A largely complementary intrinsic approach would move democracy to the trans-state or global level because of ways in which individuals can be subjected to coercion from decision processes, rather than simply affected by them, and thus also see their autonomy restricted (Abizadeh 2008; 2012; see also Fraser 2008: 64–67; Näsström 2011).

⁶ Gutmann and Thompson make a useful distinction between proceduralist theories of democracy and constitutionalist ones. Proceduralist theories admit only those rights integral to the democratic process or necessary for participation in it, while constitutionalist theories would constrain democratic outcomes in the name of protecting more comprehensive sets of rights.

⁷ Held has consistently included among lists of aspirational global institutions an international human rights court (1995: 279; 2004: 163; 2010: 105). Few details are provided on the court's expected powers or the scope of its rights remit, but it would be consistent with Held's account to presume that actionable rights would be limited to those closely related to democratic participation.

the notion that ‘rights’ advance universal values and are, accordingly, human rights – intrinsically applicable to all – is open to doubt. It is clear, for example, that many nations and peoples do not necessarily choose or endorse the rights that are proclaimed often as universal ... The tension between the claims of national identity, religious affiliation, state sovereignty and international law is marked, and it is by no means clear how it will be resolved (1995: 223; see Archibugi 2008: 108; Habermas 2008).⁸

There is in fact a core tension between the rejection of more comprehensive or robust individual rights and Held’s advocacy of universal democratic enabling rights within a scheme of global democracy. Neither, that is, would receive the consensus endorsement of all ‘nations and peoples’.

Held attempts to avoid this challenge by restricting his analysis to those sets of persons who live within societies that ostensibly have made the choice to govern themselves democratically: ‘if one chooses to be a democrat, one must choose to enact these rights’ (1995: 223). Here, the choice of democratic rule is presumed to have been made by a whole society. Thus, there is a strong implicit consensus claim of unified choice.⁹ This is problematic, however. In many countries, of course, democratic transition is resisted by the hierarchical regime and its supporters, by powerful religious and societal factions (see Linz and Stepan 1996). They do not and will not have endorsed democratic rule, yet if the country emerges from civil strife an electoral democracy, they will be understood in Held’s account to have ‘chosen’ democracy. The full package of democratic enabling rights will be secured for, or imposed on, all factions within the society, whether they actually would choose them or not. A majority, or perhaps a vigorous, pro-democracy minority, would effectively be ‘choosing’ democracy for the society and requiring that the set of democratic enabling rights be secured for all. If that is the case, then the argument against promoting a more comprehensive

⁸ Archibugi, Held’s long-time collaborator, likewise would reject the constitutionalization of more comprehensive rights, such as those found in the Universal Declaration of Human Rights, as ‘unlikely to be compatible with existing cultural and anthropological differences in the world’ (2008: 108); Habermas cites dissensus on economic rights as reason not to try to promote them beyond the supranational regional level.

⁹ The presumption becomes more explicit when Held describes the route by which cosmopolitan democratic institutions would be created: ‘It is the case that the creation of cosmopolitan democracy requires the active consent of peoples and nations ... If the initial inauguration of an international democracy order is to be legitimate, it must be based on consent’ (1995: 231). Once the institutional order itself is created, he stipulates, then the various peoples’ representatives may make decisions by majority rule within it. Again, presuming that all in a society will have consented to creating the broader institutions raises special problems for the account.

package of rights – that it could not achieve consensus, or would not actually be chosen by all in a society – has been significantly undercut.¹⁰

The second consensus presumption is perhaps more crucial, and it is found at the roots of Held's approach. His and other 'global intrinsic' accounts would again prescribe an extension of democratic boundaries on grounds that individual autonomy is not shown appropriate respect when individuals are affected by decisions in which they cannot participate. Individual autonomy is seen as appropriately respected when individuals are enabled to participate democratically. Yet, autonomy, the ability to lead a self-chosen life, or in the democratic context to live under laws one has legislated to oneself, would only *necessarily* be enabled for all persons in situations of actual consensus on political decisions. More typically, it is enabled for those who find themselves on the winning side of a participatory decision process, or who are not routinely the losers. Those who find themselves in a persistent voting minority can see their own aims routinely thwarted in the democratic process, however equal their ability to participate in it (Christiano 2006; see Beitz 1989: 155–63; Dworkin 1996: 21–23; 2000: ch 4; Caney 2005: 155; Bohman 2007: 6–8). If they are persistent democratic losers, then this offers a serious challenge to the idea of democracy as self-legislation, or more broadly as enabling individuals to lead autonomous, self-chosen lives (see Arneson 2009).¹¹

I will note that this critique does not depend on the particular characteristics of the persistent democratic minority. It could be a group whose members are excluded or oppressed because of the identity ascribed to them by the majority, or it could be an ideologically driven group aiming to impose a rigid system of beliefs on the full society. The narrow claim is that, in either case, the link between autonomy and democratic participation cannot be so clearly drawn, and thus the coherence of the intrinsic justification is in question. I discuss below reasons to focus on the oppressed group.

¹⁰ In more recent work, Held offers in place of democratic enabling rights a somewhat more general set of eight 'cosmopolitan principles'. These principles include equal worth and dignity, agency, personal responsibility, consent, voting rights, inclusiveness and subsidiarity, avoidance of serious harm, and sustainability (2004: 170–78; 2010: 69–75). The justification for the principles, however, remains largely an emphasis on autonomy that Held acknowledges is rooted in liberal democratic political culture (2010: 82–83). There remains a strong implication that the principles are fully applicable only in those societies which choose democracy, or that the principles 'constitute guiding notions or regulative ideals for a polity geared to autonomy, dialogue and tolerance' (2010: 81).

¹¹ Marchetti (2012), it should be noted, sees global democracy as in part a remedy for the potential domination of persistent minorities within states, through trans-state coalition building. The Dalit human rights case study below indicates how such coalition building might emerge, and also some of its likely limitations.

In closing this section, I will note that a broadly similar approach has emerged as ‘global legal pluralism’ especially in the sophisticated and influential treatment offered by Paul Schiff Berman (2007; see also Tamanaha 2008). Scholars of the sociology of law have long noted the prevalence of hybridity or a pluralism of legal forms, where multiple systems of law may inhabit the same territory and make competing claims for the authority to regulate the same actors. Such situations have been common in colonial and post-colonial settings, for example, where the state may make accommodation for the customary law of colonized groups; or where religious courts are granted some standing over adherents (see Keating 2011: ch 5). Berman develops a theory of legal pluralism for a globalizing era, where plural claims for legal authority often come from above or across states.

Berman argues for an approach to negotiating between competing authority claims that eschews both rigid sovereigntism, or state claims to exclusive jurisdiction over their inhabitants, and also universalism, which is said to ‘respond to normative conflict by seeking to erase normative difference altogether’ (2007: 1189). Rather, he argues, a pluralism of competing jurisdictions, both within states and beyond, should be embraced to some extent. Such pluralism can serve to empower less powerful voices within states, he argues, besides encouraging innovation in legal forms and practice, and promoting a sense of toleration in everyday contexts where such pluralism is formally recognized (1190–91).

Yet, there is a core tension in this account, much like the one identified in Held’s but perhaps more deeply embedded. Berman’s aim is to promote dialogue and negotiation of normative difference between plural legal cultures. To do so, however, as he concedes, will mean expecting all dialogue participants to embrace largely liberal procedural values, including rights to equal standing, equal voice, etc (1193). Yet, like Held, he would reject more comprehensive rights – equated with a rigidly universalist stance – on grounds of cultural diversity, or to some significant extent a presumed incommensurability of values between cultures. The latter claim again makes a strong presumption of internal consensus among cultures and dissensus between them. And again, it is difficult to square such a presumption with the broader claim that dialogue among plural cultures can and should be bounded by procedures embodying universal (liberal individualist) principles.

The tension is deepened by a further claim or acknowledgment that not all norms espoused by all legal cultures within a global legal pluralism deserve toleration and inclusion in the dialogue (Berman 2007: 1167–68). Berman argues that ‘embracing pluralism in no way requires a full embrace of illiberal communities and practices’ (1194). Such rejections should be

rare, he says, and accompanied by normative justifications from those rejecting. He does not, however, give emphasis to what would seem a necessary third party to the dispute: a disinterested arbiter able to judge the merit of the rejection according to mutually recognized and consistent principles. The presumptions of his argument lead in the direction of constitutionalized principles, and indeed some mechanisms by which those embedded in specific legal cultures could offer formal challenges according to the principles. Berman, however, appears to fall back on assumptions of domestic cultural consensus and some incommensurability between cultures in rejecting or at least omitting that more globally encompassing framework from consideration.

IV. Liberal-nationalism and global democracy

Let us then consider an alternate approach to rights subsidiarity within a global conception of democracy – though not a straightforward global extension of democratic institutions. A liberal-nationalist approach gives strong emphasis to the maintenance of a strong, stable *national* context in which to exercise shared rule. This is based in the presumed importance of such a context to individuals for meaningfully exercising their liberal rights (Kymlicka 1995; see Tamir 1993). From this premise, Kok-Chor Tan (2008) has gone perhaps farthest in exploring the suprastate dimension. He proposes a global ‘democracy of national democracies’ (see also De Schutter and Tinnevelt 2010).¹² The emphasis would be first on promoting liberal democratic transitions and consolidation in all nation-states, and then on promoting fairer and more democratic representation for those states in such multilateral institutions as the World Trade Organization and International Monetary Fund (Tan 2008: 172–73).

This is conceived fundamentally as a state-to-state form of participatory governance. Unlike many cosmopolitan democrats (Falk and Strauss 2011; see Archibugi 2008; Held 2010), Tan would reject a strong emphasis on empowering transnational civil society networks as democratic pressure groups at the suprastate level (2008: 170). Nor would he accommodate direct lobbying, testimony or other participation by ordinary citizens within states in the global institutions themselves. Thus, the model is not

¹² These authors offer a detailed argument for the compatibility of principles of liberal nationalism with principles of global democracy, though they do not offer a specific institutional scheme. Their treatment would count as liberal-nationalist much weaker demands for national self-determination and nationally based citizenship than would Tan’s, and they elide some important questions about how much leeway should be left for priority to compatriots in a liberal-national global democracy for it to count as liberal-national.

one where those within states would directly elect representatives to full parliamentary bodies attached to the WTO or IMF. Rather, it would remain based in diplomatic negotiations, where ‘Individuals will democratically elect representatives to represent them in the global deliberations, democratically decide on the sorts of issues that would be their concern, and their representatives can in turn democratically deliberate these matters with other democratically elected representatives from other nations’ (Tan 2008: 172).

Tan does not explore the implications of his model for a more encompassing but still multilateral global institution such as the United Nations General Assembly, but it would clearly be applicable. Indeed, the processes of economic globalization that he cites (2008: 164–65) as reason for liberal-nationalists to extend their theory beyond the nation-state – not to mention climate change, terrorism and other shared threats – likely would demand deeper deliberation and coordinated governance by states’ delegates in such a global forum. How then, would rights subsidiarity be approached in a liberal-nationalist but more robustly empowered and more democratic General Assembly? A related argument from Tan gives some clear indication.

In this argument (Tan 2012: ch 7), which is focused primarily on global distributive justice, national communities would be free to collectively determine a wide range of social goods or outcomes, as long as they observed some basic global egalitarian principles. These principles chiefly involve trans-state distributions, seen as incumbent on all societies in order to compensate for the effects of imposing global institutions on each other. In an earlier account (2004: 123–32), Tan argues that, for example, were greater distributive equality to be achieved between states, restrictive immigration policies would be justifiable. By extension, the rights subsidiarity in a global democracy grounded in liberal nationalism would entail leaving states to determine the rights of outsiders to cross borders in search of employment or other life opportunities.¹³ States also would interpret or set rights for their own citizens in a range of areas not directly related to the baseline global distributions, based in part on collective *national* priorities.

Special problems will arise, however, for such a liberal-nationalist approach, where non-elites’ participation would not extend beyond clearly demarcated national communities, and where those communities would be given considerable leeway to set standards – including on excluding outsiders – when the liberal minimum is met. These problems are related

¹³ In practice, several regional organizations now set at least some free movement standards (International Organization for Migration 2007), with the most integrated regimes located in Europe.

again to an implicit consensus presumption. In particular, boundary problems will be acute. As noted above, such problems focus on how to decide who ‘the people’ are for the purposes of rule by the people. Intrinsic justifications for democracy, which demand a democratic say in the name of respecting individual autonomy, have particularly significant problems in this context, in specifying who decides who belongs to a particular democratic community. If the process were to be appropriately respectful of individual autonomy, the deciders would already have to have been somehow democratically decided, and those deciders would have had to be democratically decided, and so on to infinite regress (see Cabrera 2014).

A liberal-nationalist offering a global democratic theory might claim to have solved this problem through simply drawing participation boundaries around those who belong to the nation in question. In the global democracy context, the claim would be that shared national context, or democratic ‘cultural fit’ (Miller 2009), is so vital to the effective operation of shared participatory rule that decision borders can be legitimately drawn around co-nationals but not others. Yet, even if we presume that shared national identity is so crucial to shared rule (cf. Weinstock 2010), some of the same problems arise in relation to definitively drawing borders. The problem is one of demonstrating that the set of communal criteria used to set decision boundaries is precise enough to justify exclusions (see Abizadeh 2012). If the criteria are contested, then the issue cannot be settled by simply designating some set of individuals as clearly belonging and empowered to decide on the broader membership. Some of their own membership credentials would invariably be challenged, and some process would have to be devised for settling those challenges, and for settling challenges to the inclusion of those designated to settle the challenges, and so on, again to infinite regress. It is only if we make some strong presumption of *consensus* on national membership criteria – that all persons who might conceivably challenge their own exclusion would agree on the criteria for national inclusion – that the model would stand up.

That is a high bar to cross. Even if we narrow the national-belonging criteria to strictly ethnic ones, the same sorts of problems will arise. Consider that there will be internal variation by ethnicity in any particular group. Some persons will have mixed parentage. Others may belong to a minority within the ethnic group that is marked by distinctive linguistic patterns, religion, caste or related social grouping, sexuality, etc. Some process would have to be devised – and again somehow justified – to determine membership exclusions and inclusions. Even if it were possible to designate an ‘ethnically pure’ group, of course, hard questions would arise around the justifiability of ethnicity-based exclusions for shared rule and in other contexts, as well as around the forced movement of persons that likely would be necessary to

create uniform ethnic enclaves (see Nickel 1995). These kinds of challenges raise hard and arguably insurmountable challenges to a liberal-nationalist approach for setting appropriate decision boundaries, and by extension the boundaries of rights subsidiarity, within a project of trans-state or global democracy. Even if individual rights are shown appropriate respect within states, and those are affirmed by democratic majoritarian procedures, claims for further rights to determine and exclude ‘outsiders’ will face significant challenges if grounded in shared nationality.

V. Global political liberalism

Let us consider then a third approach. This focuses not on the importance of national identity *per se*, but on toleration for those with different world views within a project of shared rule. In John Rawls’s (1993) seminal account, political liberalism is centrally concerned with how individuals of diverse beliefs – adhering to different comprehensive doctrines – in the same domestic sphere can come to endorse common democratic political institutions and processes (1993: xviii).¹⁴ Rawls emphasizes ways in which the ‘burdens of judgment’ or natural features of discourse and understanding can make agreement difficult even among reasonable and well-meaning persons. Evidence offered in favour of a position often is complex and difficult to assess. Different kinds of considerations may be given different weight within different traditions or by different persons, and moral and political concepts are by their nature subject to different interpretations. Thus, ‘reasonable disagreement’ is often the outcome of a public dialogue among reasonable persons, and it would be unreasonable to use state power to impose any particular comprehensive doctrine or conception of the good life on all persons (1993: 56). Instead, democratic societies are to draw from their shared public culture an overlapping consensus on a free-standing conception of political justice, one that is, ‘as far as possible, independent of the opposing and conflicting philosophical and religious doctrines that citizens affirm’ (1993: 9–10).

While advocates of a global political liberalism cannot build directly from some fully encompassing global democratic political culture,¹⁵ they do seek to apply core principles of the approach beyond the state.

¹⁴ Comprehensive doctrines, for example, various religious traditions, are viewed as offering encompassing conceptions of the good life, including codes of virtuous conduct, ‘as well of ideals of friendship and of familial and associational relationships, and much else that is to inform our conduct, and in the limit to our life as a whole’ (1993: 13).

¹⁵ Freedom House (2013) counts 118, or about 60 per cent, of states as full electoral democracies.

Particular emphasis will be given to Martha Nussbaum's account, as one which explicitly adopts a global political liberalism to inform a programme of global institutional reform (see also Caney 2006b).¹⁶ Significantly, however, Nussbaum cites global diversity as reason to *reject* a fully integrated scheme of global democratic institutions.

She arrives at this position from a starting point broadly similar to Held's, giving strong emphasis to individual autonomy expressed as collective institutional choice: 'we ought to respect the state, that is, the institutions of the basic structure of society that a given group of people have accepted and that are accountable to them. The state is seen as morally important because it is an expression of human choice and autonomy' (2006: 261–62). She diverges sharply from Held, however, in whether respect for autonomy demands the creation of suprastate democratic institutions. Because domestic institutions are the result of choices, she argues, they collectively constitute a global pluralism that is valuable in itself. She rejects world state institutions – and by extension the kinds of binding, fully global democratic institutions advocated by Held (2004: 162–63; see also Marchetti 2008: ch 7) – as inherently indefensible for ways in which they would ostensibly lead to a global homogenization through the elimination of such state pluralism (2006: 311–13). Thus, from within a frame of political liberalism, her concerns intersect with those of Berman (2007) and other legal pluralists.

Nussbaum would depart from accounts such as Berman's in specifying that all persons in the world should be provided with a set of basic resources and opportunities at a uniform threshold. Unlike Held also, she does not present her set of global entitlements as democratic enabling rights. Rather, they are expressed in terms familiar to Nussbaum's readers as basic capabilities, or 'central requirements of a life with dignity' (2008: 115) that all states should enable for all persons within. Capabilities include ones to life, bodily health and integrity; education sufficient to enable the use of 'senses, imagination and thought'; emotions, practical reason, affiliation with others, being able to show concern for the environment

¹⁶ Caney offers a hybrid account of global democracy that is partly instrumental and partly grounded in political liberalism. He argues that it would be insufficiently respectful of individuals for global institutions to impose any particular scheme of distributive justice that had not been affirmed through democratic participation. He cites a minimally redistributive, laissez-faire approach as one that might be so affirmed for the World Trade Organization, for example, in a dialogue 'about global distributive justice among reasonable and reflective persons' (2006b: 730; see also Caney 2000: 538–50). Tellingly, however, Rawls has rejected laissez-faire capitalism as inconsistent with political liberalism's emphasis on fair treatment for individuals in their roles as democratic political citizens (2001: 137). Elsewhere he rejects libertarianism on similar grounds (1999: 49–50; see Buchanan 2004: 196–98).

and other species, play, and political participation and entitlements to hold property (Nussbaum 2008: 115–16). Significantly, the list is introduced in the frame of political liberalism, as a ‘freestanding, “partial moral conception” introduced for political purposes only’ and not grounded in any specific comprehensive doctrine (2006: 297; see also Nickel and Reidy 2008).

The list of capabilities is to serve as a set of constraints on the exercise of state sovereignty (Nussbaum 2006: 316). In practice, however, because of Nussbaum’s rejection of binding democratic governance or other extensive institutional development above the state, they serve only as a set of aspirations, or goals to be promoted in the existing states system. Specifically, the capabilities inform a broad set of ‘Ten Principles for the Global Structure’ intended to guide reforms (2006: 315–24). These include an aspiration to enable broad-based political participation in each state, but also respect for state sovereignty within the constraints of capabilities (Principle 2). They also include aspirational duties for richer states to ‘give a substantial portion of their GDP to poorer nations’ (2006: 316), duties for multinational corporations to similarly devote more of their profits to realizing individual capabilities worldwide, the reform of the international economic order and practices of the WTO and IMF to improve fairness to poorer states; and giving more global emphasis to care for the ill, elderly, children and disabled. Nussbaum also calls for the development of a ‘thin, decentralized, and yet forceful global public sphere’ (2006: 319). This would feature such institutions as the still-developing International Criminal Court, as well as binding environmental regulations, environmental taxes on rich states to support pollution controls in poorer ones, and forms of global taxation to facilitate global redistribution (2006: 320).

Again, however, such changes are prescribed within a sovereign states system, where, ‘the whole world is under a collective obligation to secure the capabilities to all world citizens, even if there is no worldwide political organization’ (Nussbaum, 2011a: 167). It can be asked whether such stringent distributive duties would in fact be realizable in the absence of some cohesive global institutional system (Cabrera 2004: ch 4; see Ypi 2013). Nor does Nussbaum give emphasis to the justifiability of extending global governance so dramatically without also extending global input in the ways specified by Held and other cosmopolitan democrats (Held 2004: 162–63; Archibugi 2008; Marchetti 2008: ch 7). Most essentially, while she argues forcefully for the importance of judicial review and related checks on power domestically, Nussbaum appears to associate judicial review beyond the state with a world state, which she again dismisses as ‘far from desirable’ for threats to state pluralism and possibly oppressive

global rule (2006: 313). She does note that high internal pluralism would weaken the case for strong subsidiarity to states in matters related to realizing capabilities (2008: 137). At the same time, she offers no firm mechanism by which individuals within states who do not share the national identity, ideology, ethnicity, class, caste, religion or gender of the majority or dominant group could lodge a challenge outside the state context, drawing on the more encompassing principles of capabilities or rights.

I will suggest that Nussbaum has made a suspect simplifying assumption in her extension of political liberalism. It is, as in the first two approaches, an implicit assumption of domestic consensus. That is, she presumes that the domestic polity can be treated as unitary agent to whom respect and toleration is appropriately shown through some strong measure of non-intervention. She explicitly grounds toleration for states in the presumption that individuals have *chosen* their states' basic political institutions. Yet, that presumption would be implausible at best in the case of hierarchical states. Even within democratic states, it often will be suspect. We can note again the challenges to claims that all would choose democratic institutions, or that after they are in place that participation within them actually will promote or express autonomy for persistent democratic losers.¹⁷ In Nussbaum's frame, international toleration is prescribed for reasons of respecting autonomy, but it is not necessarily the case that autonomy has been enabled in arriving at the outcomes being tolerated. The presumption of unitary choice leads Nussbaum away from prescribing mechanisms of challenge to individuals within states, and to an impasse where the only justifiable response to oppression within states is full military intervention by other states, or weaker forms of diplomatic persuasion and incentive.¹⁸

I will close this section by looking at a more fundamental challenge to political liberalism per se, focused on whether the approach represents a more comprehensive doctrine than advertised, and thus whether its global

¹⁷ The account also would face boundary issues, in presuming that 'the people' have made institutional choices that must be respected. It would again have to first be determined that geographic boundaries do align with justifiable participation boundaries in order to make any firm claims that collective choices are themselves justifiable.

¹⁸ She considers whether humanitarian intervention would have been appropriate following sectarian violence in India's Gujarat state in 2002, in which the official government death toll was 790 Muslims and 254 Hindus. She suggests that it might have been justifiable, but that it likely would be preferable, given India's democratic political system and her own emphasis on 'citizen autonomy' to allow democratic processes 'to take their course, out of respect for those processes themselves and the citizens involved in them, in the hope that over time duly elected officials and duly appointed courts will bring the offenders to book and prevent further abuses' (2006: 259).

advocates can so easily reject the global constitutionalization of rights principles and creation of corresponding avenues for contesting rights rejections by states. This challenge is concerned again with autonomy, and specifically the conditions under which an actor within political liberalism can be said to exercise a meaningful choice. Autonomy in political liberalism is presented as a thin conception, applicable to individuals in their lives as free and equal democratic citizens. Enabling it requires ensuring that all are free to leave the community of adherents to a particular comprehensive doctrine, and that children are exposed to a variety of life options (Nussbaum 2011b: 36; see Rawls 1993: 221–22). Nussbaum argues that, in contrast with some thicker conceptions of individual autonomy which underpin comprehensive liberal doctrines, under the thinner *political* autonomy, ‘no announcement is made by the state that lives lived under one’s own direction are better than lives lived in submission to some form of religious or cultural or military authority’, (2011b: 36). The key difference for her is that, under political autonomy, individuals would be free to surrender their own autonomy in accordance with their comprehensive doctrine.

Yet, consider that they must also always be free to claim it back, and again that children must be exposed to a range of options ‘so that they can really live their own lives’. (Nussbaum 2011b: 36; see also Rawls 1993: 199). Both could require extensive state intervention, often in contravention of the views held within a community of adherents to a comprehensive doctrine. In relation, for example, to a fundamentalist, gender-differentiated doctrine, the state would be required to ensure that the children of adherents were exposed to a meaningful set of alternative doctrines. This likely also would entail some ongoing course of education, publicity and especially surveillance to ensure that women genuinely were exercising political autonomy in adhering to the doctrine and remaining in their community, rather than being held in place through coercion or psychological domination.¹⁹

Nussbaum has, in fact, treated the possible domination of women within domestic cultural traditions at some length (1999). We can note her elaboration of Mill’s (1988 [1869]) claims that women in mid-nineteenth-century England might seem to be unable to participate as full democratic citizens only because of the ways in which society had shaped or ‘deformed’ their personal preferences, including through

¹⁹ Similar issues have been treated in discussions of the US Supreme Court’s *Wisconsin v Yoder* case. At issue was whether young people in the Old Order Amish sect should be required to attend school through age 16, in part as a means of ensuring they were exposed to a range of world views in choosing the modes of their own lives (see Nussbaum 2001: 232–34).

unequal educational opportunities, distorted information about women's potential and other repressive social factors (Nussbaum 1999: 148–49). Each of these factors would stand in the way of realizing even a strictly political autonomy, and each could be found within the kind of gender-restrictive comprehensive doctrine at issue here. To address those factors sufficiently to ensure that alternate choices were genuinely available to women would require extensive intervention in the society, or in the community of adherents.

Nussbaum suggests, following Mill, that public persuasion is preferable to state coercion in bringing about the needed changes in such situations. Yet, given the centrality of political autonomy to her political liberalism, such persuasive speech likely would need to be reinforced by a wide-ranging programme of public education and sensitization – broadcasts, billboards, online resources, easily accessible public information. Such efforts are a staple of public awareness campaigns on domestic abuse, drink driving, and other social ills in many democratic states. Also required, however, would be the capacity for state-backed coercive intervention in hard cases, or as a result of successful legal challenges from within the community of adherents. Such intervention could be comprehensive indeed, involving inroads into the fabric of everyday life, to ensure that doctrinal attitudes concerning the secondary status of women as thinkers, dialogue participants, etc, did not stand in the way of their full achievement of political autonomy.

In short, it is difficult to see how the actual realization of political autonomy for women, members of excluded ethnic or caste groups, among others, could be achieved without extensive and intrusive intervention of the kind that Nussbaum wants to associate much more closely with the thick autonomy she rejects. Ultimately, there could be little difference between the two. The thicker version would exhort individuals to exercise their free choice, and presumably would require that all be visibly leading lives of autonomy. Nussbaum's version would require that all persons are visibly choosing to lead the lives they are leading. That itself would mean that they are required to exercise autonomy in all of their choices about which choices they, according to the comprehensive doctrines they choose to adopt, will choose to forego in their daily lives. The latter set of choices may be cast within political liberalism as an exercise of only 'political autonomy' but ensuring either conception of autonomy would mean putting choice at the foundation of public and non-public lives. If that is the case, then the line between especially Nussbaum's political liberalism and other doctrines may not be so bright, and the case against more explicitly comprehensive liberal or rights-based doctrines would appear to be weakened. Further, if such intrusion in the name of ensuring

non-oppression and meaningful choice would be appropriate in the domestic context, that would reinforce the case, *pace* Nussbaum, for enabling individuals in the global variant of political liberalism to challenge possibly unjust domestic political outcomes, on which more in the next section.

VI. Rights-based protective instrumentalism

An alternative approach to trans-state and global democracy would emphasize instrumental connections between forms of participation and the protection of core individual rights (Cabrera 2014; see Christiano 2011; see also Sen 1999: ch 6; Buchanan 2004: 142–47; Talbott 2005: ch 7; Caney 2005: ch 5; 2006; Føllesdal 2012; and see Dworkin 1996: 17–19).²⁰ Participatory entitlements, or the specific civil and political rights associated with consolidated liberal democracies, are viewed as important tools that individuals can use to publicize and protect against violations of more comprehensive rights. These include voting, rights to assembly and expression, along with some legal rights to challenge perceived unjust rights rejections. These types of mechanisms are cited in empirical studies as significant factors in explaining why personal integrity and other rights are more secure in democratic than in hierarchical states (see Davenport and Armstrong 2004; Christiano 2011: 149–51), and each is seen as crucial in an instrumental approach for achieving and sustaining core rights protections.

While again it is not possible to engage in some full specification of rights categories and principles of constitutional interpretation and rights adjudication, I will note the potential value of rights chains for adding specificity to such an account. The essential chain insight is that the protection of even the most vital interests corresponding to basic rights is highly likely to entail secondary and tertiary rights. The right to life, for example, strongly implies secondary rights to shelter, health care, food, etc. Each of those in turn implies tertiary rights to political and legal systems capable of reliably upholding such rights, or of enabling individuals to pursue rights protections (see Caney 2007; see also Fabre 2000: 123–24; Nickel 2007: 87–90). In short, even if we begin with the most basic rights, actually securing them is likely to lead to the development

²⁰ Dworkin offers an instrumental approach grounded in a more encompassing right for individuals to be treated as having equal status within political institutions. Democratic processes are seen as furthering the aim of treating all members of a political community with equal concern and respect, as are constitutionally authorized processes of judicial review, which may be needed to correct democratically enacted legislation which would damage equal status.

of a highly elaborated set of political institutions tasked with protecting a chain of related rights. These institutions are conceived as participatory democratic ones marked by some separation of powers and judicial oversight, in service of enabling individuals to challenge potentially unjust rights rejections.

In this approach, the rationale for extending democracy beyond the state also would rest primarily in rights protections. I have argued at some length elsewhere (Cabrera 2010, chs 2–3) that it is highly unlikely that a defensibly robust set of individual rights will be reliably protected for all persons in the global system as currently configured. Such a system of competitive sovereign states naturally gives rise to various biases toward the compatriot set, in particular an ‘own case bias’ familiar from the social contract tradition. Individuals are seen as having a tendency to be biased when judging the rightness of their own claims, thus a disinterested arbiter is needed in the form of the state (Locke (1980 [1690]: 12). In the global context, similar dynamic arise in a situation where political leaders are the ultimate judge in their own states’ cases about external obligations (see also Buchanan 2004: 293–99).²¹ These biases cause insiders to routinely discount their duties toward outsiders. These and other factors (Pogge 2008: ch 7; see Caney 2006a; 2006b) reinforce the development of a global institutional order which is tilted in favour of the more affluent, more powerful states. Thus, democratic institutional transformation is advocated. This would involve more deeply integrating states economically and ultimately politically with one another in regional and global institutions, and developing institutions capable of promoting stronger rights protections for individuals, including social and economic rights for those in less affluent states.

The approach would recommend – over time and as feasible – the creation of a multi-level system of democratically accountable institutions, similar to the one outlined by Held, though with more robust mechanisms for individual challenge and with a greater emphasis on comprehensive rights, rather than simply those directly related to democratic participation. A fully realized such system would feature democratic and legal regional bodies, broadly similar to those still evolving within the European Union, as well as similar bodies at the fully global level dealing with a narrower range of competencies. Under the principle of subsidiarity noted above, political decisions would be made at the lowest appropriate level. And, given the boundary problems noted, as well as some presumptions about

²¹ Buchanan draws on both equality-based intrinsic and more instrumental justifications for democratic rule in his argument for extending democracy beyond the state, though not necessarily to the fully global level.

strong rights to non-discriminatory treatment (Buchanan 2010), it would support freer movement for individuals across borders, though a full argument for that cannot be presented here (see Cole 2012).

Such a rights-based, instrumental approach to global democracy gives emphasis to practical concerns around rights protections for persistent democratic minorities within states, especially those facing oppression or significant gaps in rights fulfilment. Even when all are empowered to participate democratically, such minorities can see their interests routinely trumped, including those relating to important rights protections. Domestic legal institutions provide an important potential check, but those also may be captured by local traditions, or at times express entrenched interests or power balances, to the extent that rights claims are not given a full and fair hearing.²² A brief discussion of the Dalit human rights case from India will provide some evidentiary substance for this claim and help to highlight its potential significance.

VII. The National Campaign on Dalit Human Rights

This case is focused on members of a persistent domestic democratic minority who face ongoing and systematic exclusions from social goods. They have been provided some formal domestic protections but have found implementation lacking, leading to widespread abuses of individuals, who then see little hope of appropriate aid from judicial institutions or a national human rights council (see Narula 2008; Thorat and Newman 2009). They have thus sought, in a far-ranging, decade-plus national campaign, to gain support beyond the state. Given that there is no global court empowered to hear and act on such domestic rights claims, group members have turned to the nearest approximation: the UN human rights regime. They have worked to have caste discrimination globally recognized as a violation of human rights, specifically through changes to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

Caste remains a significant factor in the political and social contexts of India. It is based in a comprehensive doctrine, or the doctrinal tradition and customs of Hinduism. Caste-based discrimination can be especially acute

²² An important related claim then is that local democratic outcomes or rights interpretations are generally more legitimate the more open they are to challenge, including formal legal challenge in suprastate jurisdictions. See Mayerfeld (2009) for a nuanced account of ways in which democracy and individual rights can be seen as inherently connected and mutually reinforcing, and of the importance of securing judicial review, including above the state, in the current global system.

involving members of the group in question, Dalits, who constitute nearly 17 per cent of the national population and are widely dispersed among India's 29 states. They are formally protected against caste discrimination under the Indian Constitution of 1950,²³ as well as by the Prevention of Atrocities Act of 1989, which also covers members of recognized tribal groups. Yet, the enforcement of anti-discrimination laws and prosecution of wrongdoers has long been decried by Dalit groups as gravely inadequate (see Irudayam, Mangubhai and Lee 2006).²⁴ This is due in large part to the persistence of social mores which perpetuate patterns of majoritarian discrimination despite affirmative action and anti-discrimination measures, and arguably would do so even were full democratic enabling rights in place.²⁵

The late 1990s saw the emergence of the major suprapstate advocacy effort: the National Campaign on Dalit Human Rights (Divakar and Ajai 2004; Bob 2007). Its leadership was drawn from Dalit activist groups around the country. They initially worked closely with global NGO Human Rights Watch, which in 1999 issued a widely publicized report on caste discrimination and called for it to be viewed as a globally significant human rights violation (Narula 1999). In 2001, NCDHR gained global attention when it took some 200 Dalit activists to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, sponsored by the United Nations Economic Social and Cultural Organization (UNESCO) in Durban, South Africa. In interviews, numerous NCDHR leaders cited the Durban conference as a watershed for raising international awareness of caste discrimination in India.²⁶ By 2005, the then-UN Human Commission on Human Rights (from 2006 the UN Human Rights Council) had appointed two special rapporteurs on caste-based discrimination globally

²³ The constitutional drafting committee was chaired in fact by charismatic Dalit leader BR Ambedkar, who remains a heroic figure for Dalit activists and increasingly some other marginalized groups (see Jaffrelot 2005; Thorat and Kumar 2009).

²⁴ The authors offer extensive case documentation of caste-based violence and discrimination throughout India.

²⁵ This is not, of course, to claim that none of India's more than 200 million Dalit persons have registered significant achievements. India's tenth president, Kocheil Raman Narayanan, was a Dalit, as have been numerous other individual political and business leaders. Exclusions and lags in social protections for Dalits remain the norm, however, especially in more rural areas, and many commentators see the 'creamy layer' of relative elites from lower-caste backgrounds as benefitting most from affirmative action programmes (see Raman 1999).

²⁶ The author conducted in-depth, semi-structured interviews with more than 30 members of the National Campaign for Dalit Human rights, at its New Delhi headquarters and at 10 cities or villages in seven Indian states, from 2010 to 2014, as well as numerous other activists and Dalit-studies researchers; and members of the Bharatiya Janata Party (BJP). The BJP headed the ruling national coalition from 1998 to 2004 and returned to power with an outright majority in the lower house, the Lok Sabha, in 2014.

(Bob 2007: 183–84). NCDHR's efforts also were central in the European Parliament's decision to hold a public hearing on the plight of India's Dalits in 2006, and the Parliament's resolutions on the treatment of Dalits in 2007 and 2012.²⁷

Yet, all such efforts to see caste discrimination formally recognized in international law have been vigorously resisted by the Indian government (see Bob 2007: 175). Consider that, as early as 1996, the government rejected the interpretation by the UN Committee on the Elimination of Racial Discrimination that the discrimination Convention's 'descent-based' provision should be interpreted to include caste prejudice in India. The Committee expressed 'great concern that ... there was no inclination on the side of the State Party to reconsider its position' (1996: section 352). In interviews, numerous NCDHR activists noted that at the Durban conference a number of states' delegates initially were willing to openly support the call for caste to be recognized as falling under the discrimination treaty's provisions. Yet, after approaches by the Indian government at the conference, all withdrew their support.²⁸

While some activists suggested that it was time for the National Campaign to focus solely on domestic efforts, many more argued that it was necessary to continue to reach out to allies beyond the state. This was in large part because they see state institutions as dominated by higher-caste Hindus with little interest in effectively implementing anti-discrimination laws. In the terms of the present discussion, they see Dalits as a persistent democratic minority with small hope of realizing robust rights protections through majoritarian procedural means, or through formal domestic checks on majoritarian power. Paul Divakar, who as NCDHR Convener has represented the group at numerous international hearings and events, compared the global outreach to lodging a formal challenge beyond the local level domestically.

In a village there are indigenous, traditional forms of justice. Now ... if a person says I and the other person [of different castes] feel we are made for each other and we would like to get engaged, but there is resistance from wider community, then we say 'you should give a very reasonable just decree or judgment to protect us'. Now if I say this kind of thing to any normal person [in the village] they would laugh at me. So where do

²⁷ The 2012 resolution states alarm 'at the persistently large number of reported and unreported atrocities and widespread untouchability practices [and] ... urges the Indian authorities at federal, state, regional and local level to honour their pledges and to implement or, if necessary, amend the existing legislation ... in order to effectively protect Dalits and other vulnerable groups in society' (European Parliament 2012).

²⁸ This account was independently confirmed to the author by a UN source who had been involved in the caste discrimination dialogue at Durban.

you take it? You take it to a level which is a little distant from traditional forms of norms (author interview, February 2013).

In going to the global level, he said, the National Campaign has similarly sought to find a venue which is more distant from prevailing domestic norms of discrimination against Dalits.

It can be noted that such commentators as Lerche (2008) see potential dangers in such engagement at the transnational levels, in that domestic groups may be required to frame their challenges in prevailing codes or conceptions of rights which do not fully capture the nuances of the practices being challenged. Similar issues could also arise domestically, however, especially in multinational or robustly multicultural states, for example, when those within an indigenous community or one governed in part by religious law seek to lodge a challenge beyond that system. Respectful and nuanced attention to difference would be required in all such cases. As the Dalit human rights case makes clear, such global outreach represents one of the few means of challenge that some persistent domestic democratic minorities have in the present system. In the kind of cohesive, multi-level democratic system envisioned in the rights-protective instrumental framework, those objecting to local rights interpretations and unable to make their voices adequately heard would have additional avenues of challenge and publicity. In such a system also, there would be further reason to think that those domestic or subsidiary rights interpretations which are able to survive specific challenges have a better claim to being treated as legitimate.

VIII. Conclusion

The discussion here has highlighted some problematic consensus assumptions that lie at the foundations of leading 'global intrinsic' approaches to extending democracy beyond the state, as well as in some suprastate extensions of liberal nationalism and political liberalism. These consensus assumptions underpin in each case a broad rights subsidiarity that could have some pernicious effects domestically, in particular on persistent democratic minorities who also face deep social exclusions. A rights-based, instrumental approach to global democracy was shown to avoid such problems, while also providing a framework within which democratic participation and constitutionally backed, rights-based challenge mechanisms are appropriately seen as complementary and mutually reinforcing of rights protections.

The account has thus offered some *prima facie* reasons why it would be crucial to advocate, with the development of global democratic institutions, clear constitutional principles and corresponding mechanisms by which

individuals and excluded domestic groups could lodge challenges above the state to dominant domestic rights interpretations. In fact, the current dialogue on global democracy could be enriched considerably through the consideration of some past proposals for a global human rights court. Several of these were presented in the 1960s, notably by US Supreme Court Associate Justice Arthur J Goldberg (1965; see also Kutner 1954; Jackson 2006). In most such accounts, the rights enshrined in the non-binding Universal Declaration of Human Rights, or in binding UN treaties, would become effectively globally constitutionalized and actionable within state and global courts. Individuals also would have standing to file challenges.

While such a human rights court at the global level may seem a very distant institutional aim, a similar court has of course been a reality for some time at the suprastate regional level, in the European Court of Human Rights. The Court, which as noted has become more firmly enmeshed in European Union governance under the 2009 Lisbon Treaty, has provided an important mechanism of direct challenge for individuals to a range of perceived rights rejections by their states (see Mayerfeld 2011; Stone Sweet 2012). It provides a crucial suprastate laboratory for studying both the potentialities for, and likely challenges to, the kinds of global accountability mechanisms discussed here, as well as for exploring next-step questions around the weight that should be given to domestic standards in the actual specification and suprastate judicial interpretations of constitutionalized rights.

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