

Three forms of collective self-determination

Introduction

According to the public philosophy of the bourgeois revolutions, a constitution originates from “the people” or from “the nation”.

Regardless of what the difference between these seemingly mystical entities might come to, the belief implies, normatively understood, that a constitution is binding by virtue of political self-determination. It is through an act of self-constitution, indeed, that collective self-determination is given continuous presence and rational articulation in legal form. The authority of a constitution is perceived, hence, not as merely derivative of the universal principles of freedom and equality, which it is supposed to embody; rather, it is believed to derive *also* from lending shape to what would otherwise remain an amorphous—and potentially dangerous—blend of spontaneous acclaim for resolute action and precarious equilibria of forces. The formal quality of a constitution explains why its much derided “mystical” origin is necessary, even though not sufficient, to understand why it may legitimately claim authority. Moreover, owing to its path-dependence this authority is linked to one particular, and not to any other, people.

As both origin and one major aim of constitutionalization, political self-determination accounts for the *particularistic* dimension of modern constitutionalism. This particularism has been one of its defining features until to the very end of decolonisation in the second half of the twentieth century. This is not to say that its *universalistic* element, represented by the “rights of man”, has thereby been submerged, for it has always been understood that any people with mature reason would incorporate fundamental rights into their constitution.

Reasoning from within this tradition, one is easily at a loss when trying to identify an equivalent application of the idea of collective self-determination in a cosmopolitan context. There is no nation, not even a demos, to begin with. This predicament must not be taken lightly, for the idea of collective self-determination is not an accidental, but rather an essential component of constitutionalism. The constitution is not natural law. Its made by humans and reveals their power to make a new beginning. One may be able to say nice things about the constitution, for example, that it is composed of appealing principles or that it contains important standards for the assessment of public action, however, one would depart from the domain of constitutionalism if one could not link nice observations to a process of collective self-determination. Admittedly, many nice things, perhaps the nicest of all, can be said using the idioms of the common law (“accumulated wisdom”, “binding action through particulars” etc); it should be borne in mind, nonetheless, that ever since Burke this variety of constitutional thought has been surrounded by a remarkably reactionary ring.

In this paper, I would like to introduce two distinctions that might help us to overcome this predicament without thereby committing what I shall presently describe as the “usual mistakes”.

The distinctions concern, first, the difference between political and cosmopolitan self-determination and, second, the bifurcation of the latter into a “mixed” and a “pure” form.

The usual mistakes concern the assimilation of cosmopolitan self-determination to what it its not.

This paper cannot present a cosmopolitan constitutional theory. It can only speculate about basic concepts (*Grundbegriffe*) that might be helpful in order to establish continuity with a tradition that is deeply, perhaps inexorably, intertwined with the modern nation state.

The usual mistakes

One frequently encounters an assimilation of potentially cosmopolitan self-determination to either political democracy or administrative problem-solving. Both forms of assimilation are widespread among political scientists and spill over into legal studies.

First, some speculative explorations of cosmopolitan democracy tend to model cosmopolitan self-determination in the image of its political counterpart. A presumably federal cosmopolity would hence be nothing short of a particularly inhomogeneous pluralist democracy. The nature of a cosmopolitan relationship is thereby buried underneath a federalist imagery. Cosmopolitan self-determination turns out to be nothing but the anorexic sibling of full political self-determination.

Second, discussions of democracy beyond the nation state often assimilate the model of democracy to a highly bureaucratic perspective. The assimilation is brought about as follows. Given that a truly cosmopolitan democracy is supposed to be universally *inclusive*, voting rules cannot be essential, for their application would require *closed* constituencies. Since a truly cosmopolitan democracy needs to avoid closure what must be central to it is the quality of debate. The equal consideration of interests will be well served, of course, when the persons potentially affected by choices are given a *voice*. Participation becomes recast from respecting the *presence* of citizens in a common space by counting their *votes* to observing the *moral quality* of procedures. Not the presence of citizens, but the accurate generation and procession of information matters. The logic of political self-determination is reconfigured from an administrative point of view. Much excitement about “deliberative” processes unwittingly reflects such a shift.

In my opinion, these mistakes can only be avoided by throwing in to sharper relief the difference between political and cosmopolitan self-determination. This presupposes, evidently, to take both seriously as *different* forms of *collective* self-determination.

The basic concept

Any self-determination involves, on the part of the determining self, an active as well as a passive component (which is also essentially active for the reason of being action). The active component consists of identification. One is self-determining if one invests and encounters oneself in what one chooses to do. If one did not, one would rather suffer from some strange affliction. The passive component consists of allowing oneself to be determined by that with which one identifies. This involves, interestingly, always a *partial* loss of control.

For both activity and passivity, the self-reflexive element is essential. Both identification and passive affection have to be authorized by oneself. One must not have been tricked into identification or haphazardly yield to whatever drive one might happen to possess. In order to rule this out, identification and affection have to be governed by a principle that lends expression to who or what one is. Intriguingly, activity and passivity are involved here, too. The activity of authorization is mediated by passive awareness of, and receptivity towards, the identity that is at stake here.

On the basis of these preliminary observations, collective self-determination can be understood as involving the interplay of an active and a passive element and their synthesis on the basis of a principle.

Political self-determination

Political self-determination is situated in a space that is shared with others. The boundaries constituting this space are the condition for sharing a common concern for a place.

This place is occupied by real people. It is inevitable to engage with and to answer to them. Decisions cannot only be based upon aggregate data, models, projections and extrapolations. They are often preceded by effective encounters. Arriving at constructive solutions from such encounters requires judgment in the sense of an ability to assess the acceptability of certain solutions from the perspective of concrete others (Kant's *erweiterte Denkungsart* in the interpretation of Arendt and Vollrath). Getting along is an important aspect of political self-determination.

Owing to a shared responsibility for a common place, the temporal horizon of political self-determination spans across generations. Not only is leaving ("exit") generally understood to be a means of last resort, the participants in political processes act as though their lives were going to take place at this place for an indefinite period of time. The fate of this place matters to them even beyond their own physical existence.

The political world is experienced as the world where people are not unlikely to spend their whole lives. It is the place, therefore, where it is possible to negotiate and to agree upon the conditions under which people can develop, adopt and revise a plan of life. The conditions under which this is possible are the core focus of distributive justice. Debates over just distributions are *essential* to political self-determination.

If the world upon which political self-determination has an impact is the world where one can see whole and meaningful lives realized,

then this world is also perceived as an overarching *form of life*. Individual life is possible only if lived in reasonable balance and interconnection with other lives. One may *not* be able to arrive at a concept of what that life form is all about, but it is nonetheless presupposed in any consideration affecting its integrity and persistence over time.

Political self-determination involves a deep commitment to a bounded form of life. Since the political choices made by others with whom one shares this place are an integral part of it, one allows oneself to be determined by their choices. Greens grudgingly concede defeat to Christian democrats because the latter belong to their world. The principle mediating self-determination is *loyalty* to the community. Loyalty is a rational principle, for it is a condition for seeing one's life in the future, and not just now, located within a certain form of life that accounts for its significance and its success. Political beings care about where they live.

Cosmopolitan self-determination is by definition not tied to a certain place. It does not involve encounters with particular people. No actual exchanges are taking place. Cosmopolitans also do not share a concern about the future of one *particular* place.

Cosmopolitans inhabit one world, which is their *cosmopolis* (or cosmopolity). Yet, this *polis* exists only in the form of a variety of particular *poleis* (or polities). Hence, cosmopolitans can inhabit the cosmopolity by residing in *any* particular polity. Indeed, as long as there is one remaining, they do not care how many others may go under. Yet, since they do not, by definition, belong to a particular community they inhabit these as foreigners or as *hospites*—guests, as Kant would have put it.

Foreigners^② are not tied to any particular polity through the bonds of loyalty. They are always ready to move on. Indeed, from their perspective any community has to be as good as any other provided, however, that the community fulfils conditions of inhabitability for humans. Evidently, it is *human rights* that formulate these conditions.

Mixed cosmopolitan self-determination

As foreigners, that is, as people who do not participate in a people's common self-determination, cosmopolitans can be at home anywhere in the world so long as the local political process respects human rights. This implies, however, that cosmopolitan self-determination can be fully reconciled with political self-determination and serve as medium of its enactment. Political self-determination that abides by human rights standards is an apt vehicle for cosmopolitan self-determination. If the latter is linked to the former, one can speak of *mixed* cosmopolitan self-determination.

Abiding by human rights standards is, however, in and of itself not sufficient to constitute self-determination. Allowing oneself to be determined by the political choices of others may well be an acceptance of heteronomy, which one may have private reason to endure. Human rights alone merely circumscribe the conditions under which this type of heteronomy is reasonable.

In order to establish self-determination, it has to be shown how cosmopolitan subjects—or *we* in our capacity as cosmopolitan subjects—are able to *identify* with the will of a foreign polity and allow

^② I understand that cosmopolitan theory is more likely to use the concept of the “stranger”. But this would miss the mark of a constitutional theory. Fellow nationals are usually strangers to one another. Foreigners do not belong to the same political community. They may or may not be strangers to the resident nationals.

ourselves to be determined by it. Moreover, a principle needs to be found that explains why such behavior is rational.

The idea that provides the key is Burke's notorious notion of *virtual representation*. Indeed, repugnant as the use of the concept has been in the context of political self-determination it is all the more apt to illuminate the relation between foreigners and a political process. One is virtually represented as a foreigner, that is, as someone who does not participate internally, wherever the process does not rule out that one's interest *can* be represented. Foreigners do not participate. But they participate *through their absence*, as it were, when their interests are present relative to the support that exists locally. Their interests, seen from a person-neutral perspective, appear on the horizon of the polity in question depending on local traditions and the relative strength and composition of groups. These factors and others explain why some interests may be worse or better represented in one society than another. At any rate, foreigners are virtually represented as long as it is not impossible to articulate interests that they happen to have. They are adequately represented through the medium of a foreign body politic.

The concept of virtual representation also evokes the respect that foreigners have to pay to the political processes of other countries. Any other expectation, that is, to be more than merely virtually represented, would indeed be imperialistic. As a foreigner one needs to take into account, and respect, that various political communities are composed of different groups and reflect different traditions.

However, virtual representation fails, as Ely explained, if people are discriminated against. Hence, the conditions for cosmopolitan self-determination (identification with any foreign political process) are given only if there is no discrimination on the ground of nationality. When this condition is met, it makes sense for foreigners to allow

themselves to be determined by the result of foreign political self-determination, for they are then “at home” in the relevant polities, though, “as foreigners”. They can identify with any polity.

The principle mediating the rationality of this form of self-determination is the principle of cosmopolitan reciprocity. It says that one can claim respect for the choices of one’s own polity only if one respects the choices of others.

The transition to pure cosmopolitan self-determination

I do not mean to suggest that political and mixed cosmopolitan self-determination are mutually exclusive. On the contrary, I believe that the realization of both requires a special type of cosmopolitan constitution. But I have to leave this matter aside here.

Political self-determination presupposes seeing oneself as part of a form of life that one shares with others. Even if those others decide in a manner that one considers wrong, their choice is still experienced as part of one’s existence, for to exist in this form of life means to live among people who hold certain views. Indeed, the loyalty to a form of life can be expressed as loyalty to oneself as a component of that form. Respect for choices is what it takes to see oneself as part of a whole. It is what anchors political self-determination. One is *not* a component of a common situation where unanimity is the rule governing common action. Unanimity is the decision-making rule for individuals considered in isolation.

Mixed cosmopolitan self-determination perceives human life as taking place within political communities. It is a matter of cosmopolitan reciprocity that one can claim respect for the choices of one’s own polity if one respects the choices of others. The principle of cosmopolitan reciprocity recognizes the universal existential relevance of belonging to a place.

Mixed cosmopolitan self-determination involves distanced identification with any respectable polity. It allows for determination by a foreign will and is based on the principle of cosmopolitan reciprocity.

Indeed, mixed cosmopolitan self-determination recognizes the choices made by particular polities comprising the cosmopolity. One is collectively self-determining as a cosmopolitan subject if one sees oneself as inhabiting a world in which one is represented *as a foreigner*—a member of the cosmopolity—in the choices made by others.

Political self-determination involves the same attitude towards others. Members of the defeated minority accept the choices of the majority since loyalty ties them to their community.

Pure cosmopolitan self-determination

The turning point for the emergence of pure cosmopolitan self-determination is a reinterpretation of political choices. Instead of seeing them as acts of volition, they are regarded as practical manifestation of fallible knowledge. They are treated, then, not as acts by which an entity asserts its own *presence* in the social world, but as reflections of either provisional insights or beliefs over which it is reasonable to disagree. Acting is what we must do. One can act beyond reproach so long as what one does is based on sufficiently defensible knowledge. However, any course of action needs to be susceptible to correction on the basis of new insight. Thus understood, resolutions are nothing but unavoidable temporary resting points of inquiry.

It is through a choice that a subject constitutes itself into the cause of an end and thus creates its appearance in the social world: *sic volo*, *sic iubeo*. But the determination of action can also be seen as an invariable selection of certain options under conditions of notoriously imperfect knowledge. When choices become perceived as reflecting provisional beliefs that enter into some organism's interchange with its en-

vironment, they are treated as though they were essentially nobody's choices. They become faceless, in particular, when they are seen as instances of rational maximisation (of whatever) for random sets of preferences. They are not expressions of *somebody's* will but of *anybody's* reasons.

Mixed cosmopolitan self-determination reflects our self-understanding as both political and cosmopolitan subjects. People are believed to be loyal to their polities and to respect the loyalties of others as a matter of cosmopolitan reciprocity. *De facto* we conceive of ourselves as citizens and respect the same self-understanding of others.

When people no longer conceive of themselves as citizens but rather as the denizens of disembedded private projects the respect for choices disappears for the simple reason that the political entities engaged in choosing no longer matter. Choices are then treated as though they were tentative conclusions arrived at along some path of problem-solving. The perspective on the social world becomes thereby fundamentally altered.

Jurisdictionally unanchored demand for measures

When political entities become submerged, the world necessarily appears to be composed of networks of horizontal transactions the shape of which can be more effectively influenced by some at the expense of others. The world is composed of markets and voluntary associations. Both transcend, by definition, national bounds.

Individuals inhabiting the "flat" world of horizontal interactions recognize, of course, that living among others creates a demand for facilitating measures. What enters into their field of perception, in particular, are various aggregate adverse consequences of social cooperation. Consequences of this kind are called "risks". Individuals realize that being in society with others requires various forms of *risk-*

management, which can best be provided by bodies that are privy to relevant expertise. In addition, there is a high demand for *crisis-intervention* since capitalist economies are prone to crisis. Competence regarding risk-management and crisis-intervention is the twin source of the suprapolitical authority that is in high demand under cosmopolitan conditions. The root of normativity is distress. The felt need to have order sustained and societal accidents averted has no time for jurisdictional bounds. Any effective regulation or intervention is likely to be welcomed. Action takes precedence over norms governing conduct. Since norms, in a sense, establish jurisdiction over whatever alleges to be their applications the distinction between norms and their applications is in a state of collapse. Without jurisdictional bounds, authority is immediately active. Flexible rationality supersedes normativity.

Self-determination as herding

Pure cosmopolitan subjects are interested in having the pursuit of their private projects channelled by rational precautions. They can be collectively self-determining inasmuch as they yield to epistemic and practical authority when they sense that others do so as well. They identify with like smart individuals, even if the underlying reasons may simply say that it is better to have some coordinated conduct rather than none. They allow themselves to be determined by expertise, regulations and effective interventions, for they sense that this is a smart thing to do. The principle mediating their self-determination is rational deference.

The bodies relevant to this form of self-determination are of an administrative kind. Old-fashioned doctrines of delegation, which have been applied in the national as well as in the international realm, were attempts to rein in the jurisdictionally unbounded and expertise-driven claims to authority of administrative processes. Administrative prob-

lem-solving has always had a life and a dynamics of its own. Its authority lies outside the political realm. All that the shift of focus to sites of transnational authority has added was to make their overweening influence more visible.

When the transnational relevance of private standard setting bodies, of informal modes of policy co-ordination or of multilevel interaction among international and national administrators can no longer be rationalized in terms of delegation, one needs to face up to their independent source of authority. Jurisdictional anchors matter only at a remove, if they matter at all. In a sense, the demands for risk management and crisis intervention are jurisdictionally neutral. They are cognate to the normativity of distress underpinning global crisis management. Pedigree does not matter. The promised effectiveness of a response to a perceived exigency reveals whether measures ought to be followed or not. Management and intervention partake of the features that Schmitt attributed to sovereignty, even though in merely partial and non-comprehensive form.

Conclusion

This sketch of conceptual distinctions does not amount to even to the prolegomena of a cosmopolitan constitutional philosophy. I am confident, however, that it may provide a trajectory for a constitutionalism that puts national constitutions in cosmopolitan perspective. My remarks may also have revealed that I would caution against philosophies that do not attempt to explain what emerging structures of global governance mean when they are translated into the ordinary language of self-determination.

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	Identification with	Allow determination by	Principle
Political self-determination	Form of life	Democratic majority	Loyalty
Mixed cosmopolitan self-determination	Any inhabitable polity	Foreign will	Cosmopolitan reciprocity
Pure cosmopolitan self-determination	Like individuals	Well-grounded expertise	Rational deference