

0 Chapter 9 – The Paradoxes of Democracy and the Rule of Law

Chapter Chapter 9 – The Paradoxes of Democracy and the Rule of Law has been updated.

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- 3 **Word count:** 44,086
- 4 **Abstract:** [Abstract 200 words]
- 5 The promise of modernization after the Second World War was that economic growth, equality, the rule of law and democracy would proceed together. While there has been an advance in both formal democracy understood as elections for government, and in the rule of law, these have been undermined by various developments; but there have also been some opportunities for the development of different models of democracy, more participatory and deliberative. Neoliberalism allows the owners of economic resources to influence political decisions, which entailed a spread of corruption and reduction of citizens' rights. The very conception of the rule of law is challenged in face of unequal access to the judicial system and unaccountable use of expertise. Public life is rescaling at multiple territorial levels, posing questions about equality and democracy but also opening up new forms of engagement. Definitions of citizenship

rights are premised narrowly on the model of the unilingual state and are less well adapted to the needs of more multi-national territories. Democratic paradoxes are also visible in the development of some of the principal democratic actors, from parties to trade unions, from experts to social movements, which see their organisational structures and modes of functions transformed. The very right of dissent is challenged, as neoliberalism spreads insecurity, but at the same time different paths of political participation emerge.

6 **Summary** (2 pages)

7 The chapter addresses some paradoxes in the developments of democracy and the rule of law which arise from the circumstance that many of the promises of social progress developed after WWII have been undermined by internal tensions in democratic developments as well as by other social and economic trends.

8 Societal responses against neoliberal developments have however articulated proposals to promote different democratic visions, stressing participation over delegation and deliberation over majoritarian decision-making. While stating the challenges that neoliberal policies brought about for democratic institutions and actors, in this chapter we will also look at the responses (both proposals and practices) that have emerged in order to address those challenges. In doing this, we note that the very conception of democracy as liberal democracy (based on delegation and majority voting) is under stress as neoliberalism attacked those very intermediary institutions (parties, unions, voluntary associations) that had been at the basis of the development of the welfare state and democratic capitalism.

9 We observe specific challenges to the liberal model of democracy, but also some opportunities for the development of different models of democracy, more participatory and deliberative.

10 We start by noting a growth of inequality, which means that formal democracy is shaped by uneven power resources as concentration of wealth has special advantages in its capacity to influence public decision making with mutual convertibility of economic and political resources. The spiral of inequality and corporate political power is reflected in a growing legitimacy crisis in old and new democracies. Corruption is linked to this crisis, as neoliberalism, which had promised the separation between the state and the market, in reality has increased the spread of the phenomenon through privatization and de-regulation. This has not only reduced not only state capacity to control corrupt exchanges, it has also encouraged visions of

private success as preferable at the expense of public integrity. The ensuing inefficiency and lack of transparency foster institutional mistrust, with perverse effects.

- 11 Challenges are also related to the fact that democracy has been mainly defined in a national mode, with the demos identified as the nation. Economic rescaling produced by global capitalism has however a complex effects of de-territorialization and re-territorialization, which requires a (yet unachieved) rethinking of the basis for democracy but also of welfare and its foundation in both identities and institutions. In the North and (with different characteristics) in the South of the globe movement of capital but also movements of people pose challenges of national pluralism and its constitutional recognition, questioning key concepts such as the definition political community as well as sovereignty. Global migration poses the challenge of the relationship between human rights and citizenship, and of the practical implications of their varied understanding. Citizenship is more appropriately considered as related not to fixed institutions but rather as “acts of citizenships” requiring subjectivity and agency and more inclusive conceptions.
- 12 The main actors of democratic development have been affected by these challenges. Political parties are an important element in democracy but they have become an interest in their own right, and often unrepresentative of society. A crisis of representation has emerged from growing social detachment of political parties from social cleavages as well as of elected representatives from the citizens. This had most dramatic effects on the Left, when left-wing parties supported neoliberal reforms. Relying on expertise for the development of progressive policies is not a solution given the non-accountable power of science as well as the increasing challenges of privatization of knowledge-making, opacity of knowledge production and persistence of fundamental class imbalances in access to knowledge. Participatory channels of access to institutions have been opened to “ordinary citizens” but, within neoliberalism, they are often based on individualist conceptions and do not address fundamental issues of inequalities. While citizens often call for direct participation, existing experiments rarely empower the citizens.
- 13 While the judiciary has been seen as a surrogate for democratic participation for marginalized minority groups, its capacity for rights enforcement is limited by the expansion (in particular at international level) of a *lex mercatoria* as well as the use of courts in order to protect economic freedom from democratic dynamics. The rule of law has also been subverted by unequal access to the law and by the influence of money while the judiciary also has its own particular interests and corporate lawyers assume a brokerage function in globalized markets. On the other hand, in the control of

political dissent, the state, rather than being weakened from globalization, increases its reach and power. The 'war on terror' has been used to challenge the rule of law by proclaimed states of emergency as well as authoritarian drifts with attempts at imposing of a permanent 'state of exception'. Progressive social movements have addressed growing inequalities and democratic crises by developing alternative visions of democracy. Participatory and deliberative conceptions have been developed as well as prefigured in recent waves of protests. The consolidation of oppositional actors, however, faces challenges in fragmentation of the potential social bases, the need to build a new collective identity as well as to establish channels of access to power. This has resulted from, but also triggered, the reduction in citizens' entitlements and the weakening of the social contract upon which social progress depends.

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1. Introduction

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During the second half of the twentieth century, there was a widely-held belief that modernisation carried the promise of global progress across a set of complementary spheres. Continuous economic growth under the impetus of technology would eradicate poverty and raise living standards. Social inequality would be reduced, bringing equality of opportunity and even greater substantive equality. Civil rights would extend to embrace the entire population on an equal basis, while democracy would impose itself as the norm. These elements would reinforce each other as prosperity would enhance democracy and secure political stability. While different models of economic management competed during the course of the twentieth century, by the end the liberal capitalist version seemed to predominate. The remaining issues concerned the exact balance between the market and state, dividing pure market liberalism from social democracy.

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Our concern in this chapter is democracy and the rule of law. Democracy is at its most basic, rule by the people but we would argue that it is only meaningful where the right conditions are in place. This encompasses universal suffrage, free competitive elections and alternation in government; there should be no obstacles to participation in public life. The primary site of democracy was the nation-state, based on a putative unitary *demos*, either already existing or brought into being by the process of nation-building. Conceptions of democracy, however, were eventually extended to

other sites, including the workplace and the community, and even the international order. There was also a deepening of the idea of democracy, beyond representative democracy and passive participation through elections, towards new forms of participative democracy. Rising living standards and greater equality were seen as conducive to the extension and deepening of democracy.

- 17 The rule of law is based on the existence of an impartial legal system and the equality of all citizens before it. Early conceptions of the rule of law had often been quite conservative, focused on defending existing privileges and property rights, but in time the rule of law was seen as an essential underpinning of democracy. It secures civil equality, protects against arbitrary government and provides predictability and security against corruption and overbearing power. It was thus complementary to democracy.
- 18 The paradox in the title of our chapter arises from the circumstance that many of these promises have been met but they have been undermined by their own internal conflicts or by other social and economic trends. There have been successive waves of democratisation during the twentieth century, affecting most parts of the world. Legal orders have been strengthened and separated from politics in many states. Formally equal civil rights were extended without regard to class, ethnicity or gender. National welfare bargains within states did secure a strengthening of social benefits and the extension of education, health and social benefits to larger sections of the population. Although these took place to very different extents depending on the country and region, there was hope for general progress.
- 19 Yet, in early C21, we see less room for optimism. The formal apparatus of democracy and rule of law is intact across much of the world, but is undermined by number of processes. Indeed, in some respects, the very processes for progress contain their own antitheses. Civil equality is undermined by increasing social and economic inequality, which in practice limits the ability of all to participate on equal terms. It is not our task in this chapter to trace the reasons for the increase in economic inequality, rather to point to its effects.
- 20 Formal democracy is undermined by the ways in which economic power can be transformed into political power. This takes numerous forms, including the purchase of political machinery required in modern elections; the privileged power of large business in lobbying government, given their ability to relocate beyond the nation-state; and outright corruption. Political parties, which used to be a means for broadening political recruitment and transmitting voter preferences into government, have become detached from society

while at the same time monopolizing state power. The old parties have become self-perpetuating, sustaining a closed political elite of professional politicians. The mass media have become less plural and often beholden to private economic or ideological interests.

- 21 The nation-state, traditionally the main object of political competition, is less able to manage the process of social and economic change, so that democracy is detached from substantive policy capacity; hence governments of different political hues end up with similar policy outcomes. Yet, at the same time as the state loses its capacity to produce social and economic change, its repressive capacity is enhanced in the face of real or constructed threats of disorder and terrorism. As the political agenda shifts from social progress to security, democracy itself produces a restriction of civil liberties.
- 22 The rule of law similarly produces its own paradoxes. Law is formally open to all, but has become expensive, giving advantages to the rich and to corporations. There is still corruption in many legal systems. Formally equal civil rights may be protected, which is a major gain, but as long as this does not extend to social and economic rights, may be undermined. International trade agreements may entrench the rights of commercial actors against laws based on social considerations. The rule of law is also vulnerable to internal interests. Like political parties, the judiciary itself may become a class with its own vested interests, providing an obstacle to democratic change.
- 23 There is also a long-standing tension between democracy and the rule of law in themselves. Democracy has usually been about the rule of the majority; the rule of law is also about the protection of minorities. At times of stress and economic dislocation, such as much of the world experienced following the global economic crisis of 2008, there may be opportunities for right-wing populist movements targeting and scapegoating minorities.
- 24 Understandings of democracy and the rule of law are also subject to dominant ideas and interpretations. Liberalism as a doctrine emphasises individual freedom and a secure public domain for the expression of ideas. It is often associated with free economic markets, based on competition and free entry. Neo-liberalism is another matter. It originated between the wars as a doctrine emphasizing the primacy of markets and opposing state intervention. In this version, during the twentieth century it was the adversary of social democracy, which sought to regulate and tame markets and counterbalance competition with the welfare state.

25 When neo-liberalism came back into fashion in the late twentieth century, the emphasis had shifted to the needs of corporations. Starting in universities and think tanks, neoliberalism, as an ideology privileging free market over social protection gained hegemonic status in the face of states' inability to handle the challenge of economic change after the 1970s. Even the global financial crisis after 2008 only briefly challenged its hold on global policy makers. It has been embedded in public policies that have eroded the old conceptions of the relations between the state and the market, the society and the economy, dismantling a regime of citizenship rights made of civic, political and social rights. Massive moves towards privatisation, deregulation and liberalisation have reduced public resources to limit social inequalities. The very notion of democratic capitalism, implying that democracy favours the development of capitalism, was indeed challenged (Streeck 2015). Neo-liberalism thus undermines the historic principles of liberalism itself, a paradox that was well known to Adam Smith.

26 The paradoxes we are going to discuss in this chapter are embedded in the crisis and 'strange non-death' of neoliberalism (Crouch 2013), but also in some reactions to it. Rather than simply representing what Karl Polany (1957) called 'countermovements' for social protection, conceived of as spontaneous and backward-looking, societal responses against neoliberal developments have articulated proposals to promote different democratic visions, stressing participation over delegation and deliberation over majoritarian decision-making.

27 While stating the challenges that neoliberal policies brought about for democratic institutions and actors, in this chapter we will also look at the responses (both proposals and practices) that have emerged in order to address those challenges. In doing this, we will note that the very conception of democracy as liberal democracy (based on delegation and majority voting) is under stress as neoliberalism attacked those very intermediary institutions (parties, unions, voluntary associations) that had been at the basis of the development of the welfare state and democratic capitalism.

28 While electoral accountability is jeopardised by a growing investment of economic resources in the political sphere, other visions and practices of 'counter-democracy' develop, that is 'a specific, political modality of action, a particular form of political intervention, different from decision making, but still a fundamental aspect of the democratic process' (Rosanvallon 2006: 40). Necessary to democratic legitimacy, confidence requires defiance, in the sense of instruments of external control and actors ready to perform this control; in fact, democracy develops with the permanent contestation of power. Actors such as independent authorities and

judges, but also mass media, experts, and social movements, have traditionally exercised a function of control. The latter, in particular, are considered as most relevant for the development of an 'expressive democracy' that corresponds to 'the *prise de parole* of the society, the manifestation of a collective sentiment, the formulation of a judgment about the governors and their action, or again the production of claims' (ibid: 26).

29 Representative institutions are therefore accompanied by other institutions. As Pierre Rosanvallon (2006: 11) notes, 'the history of real democracies cannot be dissociated from a permanent tension and contestation.' Indeed, the democratic state needs not only legal legitimacy through respect for procedures, but also the trust of its citizens. In the evolution of real democracies this has meant that, alongside the institutions that guarantee electoral accountability (or responsibility), there is a circuit of surveillance (or vigilance) anchored outside state institutions. A public sphere developed from the encounter between the state's search for efficiency and the intervention of civil society seeking to express requests and rectify decisions (Eder 2010). Stressing elections often ends up obfuscating the need for critical citizens that make governors accountable. Thus, 'when the electoral institution is chosen as the institution characterising democratic regimes the much more important presence of a sphere that is both public and distinct from the regimes is obscured. Deprived of this, deprived that is of open public discourse, and despite being governed by persons regularly elected, such a regime could only misleadingly be called democratic' (Pizzorno 2010: xiii).

30 If the representative model of democracy is often considered as dominant, it is therefore challenged by other conceptions, variously discussed as participatory democracy (Pateman 1970, Polletta 2002), strong democracy (Barber 2003), discursive democracy (Dryzek 2000a), communicative democracy (Young 1996), welfare democracy (Fitzpatrick 2002) or associative democracy (among others, Perczynski 2000). In the intense debate in normative theory, two dimensions of democratic conceptions emerge as particularly relevant for our reflections on democratic paradoxes. The first dimension refers to the recognition of participation as an integral part of democracy; a second one looks at the construction of political identities as exogenous versus endogenous to the democratic process. While the representative theories have underlined delegation, this has been considered as insufficient in other theorisations. Participatory theories have affirmed the importance of creating multiple occasions for participation (Arnstein 1969, Pateman 1970). Not only delegation, but also majoritarian decision making has been criticised.

- 31 A minimalist view of democracy as the power of the majority can not only risk thwarting the rights of the minorities, but also reduce the quality of decision making. In normative debates, deliberative theories have in fact promoted spaces of communication, the exchange of reasons, the construction of shared definitions of the public good, as fundamental for the legitimation of public decisions (among others, Miller 1993: 75; Dryzek 2000: 79; Cohen 1989: 18-19; Elster 1998; Habermas 1981, 1996). By relating with each other – recognizing the others and being by them recognised – citizens would have the chance to understand the reasons of the others, assessing them against emerging standards of fairness. Communication not only allows for the development of better solutions, by allowing for carriers of different knowledge and expertise to interact, but it would also change the perception of one's own preferences, making participant less concerns with individual, material interests and more with collect goods. Participation and deliberation are in fact democratic qualities in tension with those of representation and majority decisions, and alongside these in a precarious equilibrium in the different conceptions and specific institutional practices of democracy.
- 32 There is also a need to question the nation-state as the primary site of democracy and the rule of law. Talk of 'globalisation' and the end of the nation-state around the end of the Cold War was overblown and the nation-state remains a formidable centre of power as well as object of political attachment. Yet the challenges of inequality and democracy arise at multiple levels, below, above and across states as well as within them. The nation has been a force for progress and solidarity (Miller 1995) but also for exclusion and aggression.
- 33 In what follows, we observe specific challenges to the liberal model of democracy, but also some opportunities for the development of different models of democracy, more participatory and deliberative.
- 34 We observe how neoliberalism allowed the owners economic resources to influence political decisions, and the effect this had in spreading of corruption and the reduction of citizens' rights. The very conception of the rule of law is challenged in face of unequal access the judicial system. Public life is rescaling at multiple territorial levels, posing questions about equality and democracy but also opening up new forms of engagement. The democratic paradoxes are also visible in the development of some of the principal democratic actors, from parties to social movements, which see their organisational structures and modes of functions transformed. The very right of dissent is challenged, as neoliberalism spreads insecurity, but at the same time different paths of political participation emerge.

2. Capitalism, inequality and democracy

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In the days of the Cold War it was usually taken for granted that capitalism and democracy were natural partners. The situation has now changed. Some serious writers on contemporary politics have even begun to doubt whether democracy and capitalism are mutually compatible (Kocka 2014, Merkel 2014, Streeck 2015). A major source of disquiet is the implications for democracy of rising inequality. This disquiet comprises the following elements:

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1. Unless significant regulatory measures are taken, there are no means within a capitalist economy to prevent the conversion of economic into political resources, and the dominant capitalist ideology, neoliberalism, is hostile to such regulation.
2. In an open political system, concentrations of wealth have particular advantages in exercising influence because they are spared the problems of collective action that limit the activities of other groups.
3. This influence is used to extract political favours in the interests of the wealthy, further increasing inequality and interfering with the market order, producing a spiral of growing inequality and economic distortion.

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We shall examine each of these contentions in turn.

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2.1 The mutual convertibility of economic and political resources

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In a perfectly competitive market economic resources should not be converted into power, and therefore can have no political implications; spending money on politics would be a business cost, and a firm engaging in such activity would have to raise prices and lose out to firms that did not so engage. All firms in a sector might avoid this problem by combining to lobby for their political interests, but coordination among a large number of firms runs into the collective action problem (see below), defection from the coordinated action bringing cost advantages to the defectors. However, the situation changes when many markets are only imperfectly competitive. Here economists divide into those who accept no other solution than trying to establish perfect competition and those (associated with the anti-antitrust movement, mainly in the USA) who argue that advantages flow from imperfect competition (Bork 1993, Posner 2001). These are not concerned with the political implications but to demonstrate that returns to scale are more or less infinite, and that therefore there are no reasons to seek to establish perfect markets. For them, unlike pure

neoclassical theorists and *Ordoliberalen*, a competitive order exists where some firms win the competition and thereafter dominate, not one where competition is permanent.

41 We can here draw a distinction between two types of neoliberalism, which will be important to the general argument: market neoliberals, whose main concern is that markets function; and corporate neoliberals, who defend the role of large, oligopolistic corporations. These latter rarely confront the political implications of the build-up of large profits that their approach implies, but if they do they argue that if governments abstained from interference in the economy, there would be nothing to lobby about and firms would have no incentive to be politically active (Bork 1993). However, as was demonstrated in the financial crisis, certain sectors can be both dominated by a small number of firms and so strategically important for a national (or the global) economy, that the collapse of a small number could provoke a massive shock. This is the 'too big to fail' argument. It is clearly the case for banking; it is probably also true for energy, defence, and for certain privatised public services. Firms in these sectors have a clear incentive to become politicised, as they have much to gain from government. The uneven distribution of political influence that this implies, even among businesses in different sectors, let alone in comparison with the rest of the population, embodies part of the asymmetry and inequality that makes business lobbying questionable on both market-economic and democratic grounds.

42 The barrier that neoclassical theory would erect between polity and economy is a semi-permeable membrane; restraints are imposed on the state's ability to intervene in the market, but not on corporations' intervention in the polity. Indeed, in the USA such activity has been explicitly accepted by the Supreme Court. In 2010 it rejected a ruling by the Federal Election Commission that there were limits to the sums of money that organisations could spend on election campaigns, on the grounds that the US Constitution should be seen as having granted the same rights to organisations as to individuals, though it maintained the existing limits on such donations to individual candidates (US Supreme Court 2010). Four years later, however, it also removed the ban on the second kind of donation (ibid 2014). It is primarily large corporations that are able to make donations of this kind.

43 **2.2 Wealth and the problem of collective action**

44 There are two aspects to liberal democracy: the formal processes of elections, where rules to ensure strict equality among all citizens are accepted as paramount; and the informal debating, lobbying, and other activities that link the world of government to society between

elections. Here there are no guarantees of equality. The theory to support the latter was developed, largely by US political theorists, in the 1950s and 1960s under the general banner of pluralism or polyarchy (Dahl 1971). This dealt with the risk of an undemocratic inequality of influence in the informal arena by positing that the need for relative equality would be met if there were large numbers of groups trying to influence government, using a diversity of non-overlapping types of resource, and usually being effective only within specific, limited areas of policy. In that way, no one interest would dominate. As in the free market, provided that there are many participants in the market/polity, all are price-takers and none can exercise significant influence by acting alone.

45 There remained the risk of a hyperactive polity, with governments vulnerable to lobbying at every moment. Pluralist theorists dealt with this by pointing out that in general people were not politically active; Robert Dahl (1961: 305) remarked that 'Politics is a sideshow in the great circus of life'. Such observations were placed on a stronger theoretical basis when Mancur Olson (1965) developed his theory of collective action. This demonstrated the difficulties of participation in collective action. First, if a movement were big enough to be likely to succeed, it would do so without the participation of any one individual, whose contribution would be infinitesimal to the movement though costly to that individual; therefore individuals had only a very low incentive to participate. Second, if the movement were aimed at a collective good rather than a membership good, individuals would benefit from its success even if they did not participate; again the incentive to take part was very low.

46 The pluralist account of western democracy was being developed during the historical period when inequality was lower than at any time in the recorded past (OECD 2011, Piketty 2013). Now that inequality is increasing again the account is becoming unrealistic. Olson envisaged a world in which people had no means of co-ordinating their actions except through voluntary individual action. This does not apply to persons and corporations possessing considerable wealth. They do not need members; if they need human resources they employ people. The very wealthy are therefore an exception to the collective action problem, provided that they have enough incentive to bother to take action. They have this where governments might be in a position either to favour or frustrate their private interests. The assumption of pluralist theory that in a market economy firms are just some among many interests then falls – a circumstance that was indeed perceived and warned against by two of the leading US pluralist theorists at the start of the current period of growing inequality (Dahl 1982, Lindblom 1977).

The ways in which growing inequality, corporate power and politics interact take many forms. The OECD's (2011: 122 ff) analysis of growing inequality identified several causes, among them sectoral change; the growing finance and related business services sector being a particular source of growing inequality. It also identified 'institutional' and 'policy' factors. The latter can be seen particularly clearly in taxation, changes in which have been responsible for producing some of the growing inequality (ibid). In the face of growing pre-tax income inequality a democratically responsive fiscal regime would be expected to improve the progressivity of taxation, while one caught up in mutually reinforcing inequalities of economic and political power would make regressive changes. The fiscal changes of the neoliberal period have been consistent with the latter hypothesis.

An institutional change that the OECD identified was the decline of coordinated bargaining. There is a close though not perfect relationship between the extent of coordinated collective bargaining and trade union power. There is also a correlation between trade union power and post-tax and -transfer inequality: the greater the degree of union power, the greater the extent of redistribution produced by the fiscal system (Crouch 2016: Ch. 6). Interestingly, union strength correlates far more strongly with post-tax than with pre-tax inequality, suggesting a political rather than an economic effect of union challenge. Almost everywhere coordinated bargaining, union strength and fiscal redistribution have been in decline, reducing the role of what had been a major form of countervailing power against capital in more pluralist times.

2.3.1 Business lobbying

A major example of the asymmetry of political power between large corporations and the rest of the population can be taken from current plans for a general trade treaty between the EU and the USA, the Transatlantic Trade and Investment Partnership (TTIP). This is a plan for a major relaxation of barriers to trade between member states of the European Union and the USA. Most tariff barriers have already been negotiated away in various global agreements. What remain are the so-called non-tariff barriers. These extend from rules clearly intended solely to keep international competitors out of domestic markets, to regulations seriously designed to protect health, labour rights and various concepts of public and collective goods. In the current discussions an elite of business and governmental persons has been trying to make deals in secret, potentially undermining a mass of social and environmental policies. In particular it plans to enable tribunals of private corporate lawyers

to judge corporations' complaints against governments' policies in a system known as Investor-State Dispute Settlement (ISDS). An array of civil society groups as well as green and other smaller parties has been trying to alert public opinion to what is happening, but with far weaker resources and without access to full information about what is being negotiated. The trend of negotiations that in this way give an overwhelming role to business lobbies would lead to an overall decline in regulation on such issues as labour rights, banking behaviour, and chemical additives in food, pharmaceuticals and cosmetics.

52 The struggle over different components of TTIP will continue for a long time. On both sides of the Atlantic parliamentarians have expressed displeasure at their own exclusion from such a fundamental set of negotiations. There have been extensive mass demonstrations, starting in Germany but growing in other countries too, against the plans, which is remarkable given the highly technical nature of the issue. Much of the furore, suspicion and demand for openness reflect the widespread general mistrust currently engulfing both politics and the political activities of big business. Large sections of the general public are unwilling to accept the good faith of those claiming to work on their behalf. This marks a gain in political maturity, but if mistrust spirals out of control it breeds cynicism, demobilises any attempts at collective action, and plays into the hands of populist extremists. This may well be the first stage of reaction against the political dominance of corporate power, but it is an unsatisfactory one.

53 **Conclusion**

54 The above discussion has concentrated on the challenge to the mutual compatibility of capitalism and democracy presented by growing inequality. But this is not the only reason why corporate interests are exercising a political influence that is seriously unbalancing a democratic pluralism. Since the collapse of Keynesian demand management, according to which governments undertook to sustain the level of employment, the dependence of the population on a high level of employment has become an important argument at the disposal of neoliberals. For market neoliberals this means the contention that wages and non-wage labour costs must be allowed to fall until all idle labour can find employment. This is, for example, a major part of the policy package imposed on Greece in the wake of the Eurocrisis. For corporate neoliberals it means arguing that if governments want to reduce unemployment, they must listen to what corporations say they want. This can mean labour-market measures less harsh than the market neoliberal recipe, but it also

involves granting privileged political access for the corporate leaders, who of course interpret a general interest in the light of their own private ones.

- 55 For market neoliberals, efficiency is achieved when markets clear. Aspects of life that, looked at more broadly than through the framework of economic theory, might be seen as important but which are not or by their nature cannot be represented within market exchanges are either insufficiently important to merit consideration, or are just unfortunate not to be able to be taken into account. Examples would be a perceived need to safeguard poor people's basic standard of living when they cannot find work that would provide such a standard, or most types of environmental damage. For the pure theory, attempts to take such issues into consideration through regulation necessarily reduce efficiency because this is *per definitionem* measured only through the market.
- 56 In the light of all the above, we are forced to ask whether capitalism and democracy are today as mutually dependent as they seemed to be during the Cold War. Is 'republican democracy' still 'capitalism's best possible shell', as Lenin claimed? Capitalists are believed to have a preference for democracy, because they tend not to like dictatorships, which use a lot of state power, can be arbitrary and change rules without due process. Modern democracy more or less guarantees the rule of law, and clear procedures for changing law and lobbying around proposed changes. On the other hand, democracy can produce a mass of regulations to protect non-market, non-corporate interests. Capitalists' preferred regime is post-democracy, where all the forms of democracy continue, including importantly the rule of law, but where the electorate has become passive, responding to parties' carefully managed election campaigns, but not engaging in disturbing activism, and not generating a civil society vibrant enough to produce awkward counter-lobbies that try to rival the quiet work of business interests in the corridors of government (Crouch 2004).
- 57 Post-democratic capitalism does not require a formal renunciation of democracy any more than corporate neoliberalism requires a renunciation of the market; indeed, democracy and the market continue to be used as the primary legitimation of the evolving political system of dominant corporate power, because this latter lacks any legitimation of its own. Elements for such a legitimation are there, but they are used in a supplementary way (Crouch 2015). For example, anti-trust theory provided a justification for protecting market-dominating corporations from market-making competition law. New public management theory legitimates the abolition of boundaries between public officials and corporate personnel, seen so important to an earlier age of liberal economy. Corporate social responsibility both gives business leaders a social legitimation going

beyond their role as profit-maximisers and suggests that public policy is not needed to tackle many market failures. In the absence of Keynesian demand management, the widespread desire for a high level of employment gives priority to the policy preferences of business interests.

- 58 We have not yet arrived at a situation where corporate dominance of our politics is complete, otherwise all consumer protection and labour laws would have already been abolished; governments would not be continuing to develop regulations to try to reduce smoking. But this is the direction of travel, strengthened by continuing growth in inequality and the mutual reinforcement of political and economic power. Democracy in some form probably continues to be the best possible shell for capitalism; but *vice versa* may no longer apply.
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59 **3. Corruption, neoliberalism and democracy**

- 60 In the last decades a chain of scandals fueled a growing popular awareness of the relevance of corruption as a hidden factor which may negatively affect political and economic decision-making, distorting public policy – in terms of growing ineffectiveness and inequality – not only in less developed and authoritarian regimes, but also in advanced, capitalist liberal-democracies. The perception of rampant corruption in the political, economic and financial arenas has been one of the leading factor of a growing dissatisfaction against the elites, as exemplified by the *Indignados* in Spain or the ‘occupy movement’ of New York in 2011, with its radical protest against the top one percent of wealthiest people in society that exercise an opaque political influence, driven by the disproportionate share of financial and material capital that they possess and is actually converted into hidden and corrupt relationships with public decision-makers. In a vicious circle, more or less developed liberal-democracies where bribery is perceived as a still significant or proliferating reality suffer a mounting de-legitimisation of elected representatives and political institutions, since widespread mistrust towards public actors is at the same time a consequence and a facilitating factor for the development of a texture of systemic corrupt exchanges. Besides the ‘voice’ of anti-establishment movements and the ‘exit’ strategy of escalating abstention or de-engagement in political activity, also the populist appeals of would-be political leaders have been encouraged by the opportunity to wave the issue of corruption to challenge the traditional elite, occasionally threatening the stability of democratic institutions.

61 Not surprisingly, rampant corruption in advanced democracies has been denounced by social movements and social scientists alike (della Porta 2013, 2014). A corresponding interest on the issue of corruption came out also within the social sciences but, in spite of a large scientific debate, no consensus emerged on a commonly accepted definition. The classical concept of corruption looks at deviations of a polity from the inherent virtues of a 'good' political order, often related to the degradation of citizens' moral attitudes and social values, designating a degenerative process operating at a macro-social and institutional level, through the perversion of certain constitutive features of a political system (Dobel 1978). The predominant approach takes instead corruption as a specific social practice, having distinctive features which can be defined at micro-level, within a particular relational context (Gambetta 2002). Corrupt practices are characterised by an actor's violation of standards of behavior characterised as an abuse of entrusted power, which can be associated to legal (i.e. public-office centered), informal (as stated by the public opinion's judgement) or public-interest criteria (Heidenheimer and Johnston 2002). As such, evidence of large-scale corruption practices in the public sector is at the same time a signal of the failure of the institutional and societal mechanisms of control over the integrity and effectiveness in public agents' delegation of power, and a challenge to all the basic principles of democratic government: corruption *within* democracy is necessarily also corruption of a democracy.

62 3.1 Beyond the economic paradigm on corruption

63 According to the paradigm predominant in the economic literature, corruption is the rational response to contextual opportunities, generated by certain types of distortion of the relationship between a principal (the state, in case of corruption in the public sphere) and agents, often induced by the involvement of a third-actor, the corruptor. The latter, through a hidden transaction, prompts the agent to violate the constraints imposed by (formal and informal) rules which should safeguard the principal's interests when he delegates decision-making power in a condition asymmetric information (Banfield 1978, della Porta and Vannucci 1999). By offering him money or other rewards, the corrupter obtains from the public agent favorable decisions, reserved information, protection, while property rights on rents created and allocated through the public agent's activity (or non-decisions) and influence are shared between the two. The policy implications of this theoretical framework underlines how certain institutional variables – monopoly power and high degree of discretion in decision-making, lack of accountability – create opportunities and incentives for

individuals to enter into corrupt exchanges, and should therefore be reshaped in order to negatively affect individuals' motivations to engage similar deals (Klitgaard 1988).

64 The neoliberal doctrine provides the basic theoretical toolkit underlying anticorruption measures and reforms sponsored in the last decades by inter-governmental and international organisations, particularly OECD, World Bank, United Nations, IMF, and European Union. The preliminary adoption of an anticorruption regulatory framework congruent with a limitation of state interference with markets has often been imposed as a prerequisite for the subsequent distribution of economic aids and investments. Following this approach, in fact, the resilience of corruption to political and economic development is explained mainly by the persistence of an overextended, bureaucratically constrained, hyper-regulating, unaccountable operations of an interventionist State. When decision-making processes are monopolised by public agents aiming at the creation and allocation of rents and other benefits, bribery is the predictable byproduct of the undue intrusion of the state into the activity of competitive markets, in terms of both public services (which should be substituted by a market for equivalent private commodities) and regulation (whose burden should be avoided thanks to economic agents' self-restraining and free contractual agreements). As a corollary, privatisation, liberalisation, cuts in public spending, and deregulation are the cornerstones of any recommended policy, since the operation of free markets is invoked as the ultimate solution for an effective and long-lasting reduction of corruption.

65 The contemporary characteristics of corruption and anti-corruption policies have then to be connected with the evolution – rampant years and crisis – of neoliberalism, which, akin to a second 'great transformation' (Polanyi 1957), has brought about a move towards free market and away from social protection. The structure of values and theoretical insights underlying neoliberalism – prevailing since 1980s' in most western democracies economic and social policy-making, after the cycle of collective mobilisation of the 1960s and 1970s – fits well with the dominant anticorruption policy paradigm. Neoliberalism, in fact, sustains an ideology of de-politicisation which applied to anticorruption is misleading on at least two accounts: first, it underestimates the relevance that state's activity still maintain, therefore delegitimizing it and reducing its accountability; moreover, it does not consider, or undervalues, the distortions and inefficiencies of market processes, as exemplified by the dramatic subprime and financial crisis started in 2008, which in turn create further opportunities for hidden and corrupt practices.

- 66 In its practical application the neoliberal paradigm has shown severe drawbacks. First, the retreat of the state underlying neoliberalist policies may be corruption-enhancing in itself, as exemplified by the evidence of bribery aimed at distorting or manipulating the allocation of rents through privatisation processes of public enterprises and assets (Rose-Ackerman 1999), as well as by the strategic interest of large corporations, merchant banks and other oligopolistic actors to obtain from decision-makers a more favorable and looser regulatory environment of their high-profit activities discharging social, environmental as well as financial costs onto the public. Similarly, the externalisation of public services or the recourse to contractual provisos allowing private corporations to play a crucial role even in the definition and satisfaction of public needs has increased (formally) output-led managerial discretion and weakened public control and accountability.
- 67 Moreover, any reduction of the state's role in the economy necessarily generates a large set of un-regulated, opaque, unaccountable interactions between public and private agents, lobbies, large corporations and other organised economic and financial interests, which may negatively interfere with the functioning of competitive markets. Growing uncertainty in international transactions due to globalisation processes – especially when enterprises face protectionist regulation, bureaucratic burdens, flawed processes (Meny 1996) – and increased complexity of the economic environment engenders and reinforce information asymmetries in organisations and contractual agreements, i.e. the most fertile humus for corrupt exchanges in the private sector. The informal management of activities and the common orientation to corporate profits of actors involved in white-collar crimes make them even more difficult to be exposed and sanctioned by control agencies than corruption of public servants, in spite of the enormous social and economic costs.
- 68 Notwithstanding the illusory perspective of an effective separation of well-functioning markets and the state, allegedly anticorruption policies have de-facto augmented the power of giant corporations, increasing their monopoly power and therefore favoring collusive interactions among white-collar actors and state agents (Crouch 2011). An 'amoral' justification of the pursuit of profits depends on the strengthening of a structure of values opposite to any conceivable notion of public spiritedness, when public integrity is less praised than private success, profits matter more than observing ethical standards, monetary rewards more than social achievements and recognition. When shared and transmitted through socialisation processes, amoral conceptions and practices of capitalism may bring to the application of a similar 'market fundamentalism' also in the relationship between private and public agents (Stiglitz 2012). The

ideology of amoral neoliberalism may then produce a twofold effect: first, it weakens normative and moral barriers against corruption, especially when accompanying the disappointment which follows public engagement cycles (Hirschman 1982); secondly, being involved in corrupt practices, i.e. applying a market logic within a 'bureaucratic' and 'state-centered' environment, may produce within circles of agents involved in illicit activities a self-justifying stance, therefore reversing into some sort of moral legitimisation the practice of corruption itself (della Porta and Vannucci 2005; 2012).

69 Social science literature, influenced by rational choice paradigms, has not paid sufficient attention to the interaction between changes in capitalism and democracy and the spread and modelling of new patterns of corrupt practices. On the one side, the failure of anticorruption policies inspired by the application of the neoliberal paradigm has been widely observed and criticised (Ivanov 2007). Moreover, all international rankings, like Transparency International's *Corruption perception index*, or World Bank's *Corruption control indicators*, consistently show the (apparently) paradoxical outcome: the world's maximum degree of transparency and integrity in the public sector can be observed in Scandinavian countries where public regulation and state intervention in the economy and the society are at their highest level. Additional explanations needs to be accompanied by alternative policy measures: *another anti-corruption is possible*.

70 **3.2 Corruption and the blurred boundaries between political and economic power**

71 Within the principal-agent theoretical framework, corruption occurs when agents betray the principal's trust in their ability and willingness to pursuit principal's instead of agents' interest. But this implies the existence of a principal able and willing to monitor and enforce the agents' eventual malfeasances. Since in democratic regimes and complex economic and social organisations the principal is and operates as a collective actor, a collective action problem clearly emerges, where the lack of incentives undermines any effective control: supervision is normally delegated to other agents, shifting the risks of conflict of interests at this 'second-order' relationship (della Porta and Vannucci 2014). Moreover, in the neoclassic portrait of perfectly competitive markets enterprises have no economic power, therefore resources derived from the economic process could not be transformed into political power through pressure or corruption. Only non-transparent and competitive public procedures having allocative effects would generate incentives for rent-seeking activities. Since information asymmetries, externalities, monopoly power and other 'market failure' conditions are pervasive both in the public and in the private sphere, the issue of corruption

should be reframed. When uncertainty surrounds interactions between actors operating in different kinds of organisational structures and decision-making processes, both in markets and in the state, the asymmetrical distribution of transaction costs and rents generates opportunities to convert them into personal or small-clique benefits through corrupt practices.

72 While the complementarity between capitalism and democracy was usually taken for granted, corruption is a symptom of subterranean frictions between the two (Crouch in this chapter). Any liberal-democratic regime settles through institutional and informal constraints a boundary between *internal* power – i.e., the power deriving from the occupation of certain roles of public authority – and economic power – i.e. the power deriving from the operation of the market process – aimed at reducing uncertainty about the actual ‘rules of the game’ (Pizzorno 1992). Regulation of lobbying activity, for instance, reflects the institutional attempt to use official and ‘transparent’ channels of influence from organised groups in order to submit the pressure of private interests over public decision-making to the scrutiny of the public, and therefore to the electoral process – which however can be influenced precisely by the additional resources reinvested into political support by ‘captured’ politicians. In a wider perspective we can therefore look at corruption as a practice – more or less ‘institutionalised’ in itself – that *covertly* (but not always and necessarily illegally) converts economic into political resources and vice versa, therefore blurring the “official” and informal frontier separating the public and the private sphere, i.e. markets’, societal and the state’s role. The very definition and enforcement of corruption may therefore become the object of a symbolic contention on the acceptable boundaries between state, markets and society; individual and collective interests and rights; proper extent and limits of market, bureaucratic and patrimonial allocation of resources; public and private roles (Johnston 1996).

73 The application of the price system to legal procedures and rights is not only contrary to democratic values, it also obstructs the efficient functioning of the market itself. When law enforcement, conflict resolution, the protection of rights and all those other public goods which are a necessary complement to the markets functioning become a ‘commodity’ negotiated in corrupt exchanges, the minimum level of predictability which allows economic actors to profitably engage in their business is removed and uncertainty rules. As Arrow (1972) noticed, the definition of property rights based on the price system depends precisely on the lack of universality of private property and the price system, which have to be complemented by legal institutions. The development of inclusive economic and political institutions, as opposed to rent-seeking extractive institutions, could be considered as the successful path towards

more effective and credible commitments of rulers and economic actors towards a limitation of undue privatisations and conversions (also through corrupt practices) of the public goods into privately appropriable rents (Acemoglu and Robinson 2012). The strengthening of the social and political role of the judicial branch (and the popularity of judges leading corruption inquiries) observed in most representative democracies can also be explained in this perspective (Vauchez in this chapter). In fact, the institutional function of a (non-corrupt and non-colluded) judiciary is to unveil and sanction also white-collar malfeasances, therefore containing the drawbacks of corrupt practices in politics, bureaucracy and markets.

74 When corruption happens in a liberal-democratic country, in fact, a market for the exercise of public authority substitutes official rules which under the rule of law should provide impartial and universalistic criteria in the public allocation of goods and services. In this perspective, privatisation can hardly be considered as a remedy against bribery, since behind any form of corruption lies precisely an hidden and unaccountable privatisation of resources entitled to the public by secret networks of public and private agents, which are preferentially and arbitrarily assigned to those who have more monetary, political or relational resources to offer in exchange. This invisible and unaccountable 'privatisation' process implicit in bribery explains the strong relationship between economic inequality and corruption across both developed and developing countries (Gupta, Davoodi, Alonso-Terme 1998). The *inequality trap* is the outcome of a positive-feedback mechanism fueled by the impact of perceptions of pervasive corruption on both mistrust in the quality of government's services and unequal allocation of resources, which in turn encourages both tax evasion and the search for selective inclusion in the cliques of privileged ones, through hidden influence and corruption, therefore further increasing unfairness (Uslaner 2013).

75 Also in most liberal-democracies corruption, in fact, cannot be considered only as a mere 'abuse of entrusted power for private gain' – according to a common definition, coherently with the principal-agent model. In the practice of systemic corruption a minority of high status, white-collar individuals (politicians, high-level bureaucrats, public managers, entrepreneurs, professionals, etc.) jointly appropriate and subdivide public resources and common goods – public budget, environmental assets, etc. Along time, successful attempts of corrupt agents to minimise through the strategic use of their official roles public scrutiny, visibility, and criminal risks of the corresponding activities may further undermine both vertical and horizontal accountability. The potential for corruption, in fact, generates economies of scale in a wider set of other illicit activities and white-collar crimes, since corrupt exchanges with regulators,

public supervisors and enforcers to avoid control and sanctions are intertwined with fiscal evasion, financial frauds, bankruptcies, irregular industrial waste dumping, etc..

76 Articulated informal mechanisms of governance of corrupt exchanges can emerge within wide networks of politicians, bureaucrats, entrepreneurs, professionals, where corrupt exchanges become a social practice with its self-reproducing processes of diffusion and dissimulation, through learning processes and adaptive expectations of actors involved (della Porta and Vannucci 2012). In a vicious circle, money – bribes and other illegal financing, but also formally regular contributions – and political power feed upon each other, deeply distorting the channels of political representation and therefore fostering public frustration and mistrust, sporadically channeled into indignation by the evidence of political scandals. The control over the exercise of authority and public power, because of widespread corruption, is progressively weakened by a large scale collective action problem, due to the lack of a ‘principled principal’ willing and capable to assure that formal and informal mechanisms of accountability properly operate, monitoring and punishing corruption (Ostrom 1998; Persson, Rothstein and Teorell 2010).

77 As a consequence of systemic corruption, besides the socially wasteful outcome of such rent-seeking activities, an increase in the opacity of decision-making, a further escalation of economic and political inequalities, an adverse selection in political, economic and professional careers can be observed, challenging democratic principles and practices.

78 **3.3 Corruption as an enduring challenge to democratic principles and practices**

79 According to the predominant policy paradigm corruption could be curbed by reducing monopoly rents and arbitrary power in their allocation, enhancing open competition in the private and public sectors, increasing meritocratic recruitment, transparency and accountability of public and private actors, introducing more effective controls and feedback mechanisms on the outcomes of public policies, strengthening moral barriers and societal control over the public sphere. The inability to adopt them or the ‘implementation gap’ showing poor anticorruption performance observed in most countries demonstrates the importance of specific political and institutional conditions for any effective anticorruption reform, measure and initiative to be approved and realistically implemented, where informal governance and cultural heritage clearly play a crucial role (Baez-Camargo and Ledeneva 2017). Heavily influenced by a rational choice paradigm, policy-makers and

researchers have paid a limited attention to the role of changes in capitalism and democracy on the spread and modelling of new patterns of corruption more resilient to policy efforts.

80 After the ephemeral triumph celebrated with the collapse of socialism in Eastern Europe, the democratic model has been shuddered in the last decades by a series of tensions: the decline of political participation and traditional parties; the growing lack of confidence among citizens in public institutions and in the functioning of the political system; the impotence of political leadership in front of recurrent economic crisis and public budgets deterioration; the apparent inability for policy makers to resist to the capturing influence of strongest economic and financial interests; the spiraling costs of political activity; the rise of populist or extremist parties and leaders openly questioning liberal-democratic values; the questioned sustainability of the welfare state. Evidence of corruption is at the same time one of the most acute symptomatic consequence of the manifold democracy's unresolved challenges, and an hidden factor that tend to exacerbate them, even strengthening the public opinion's awareness of the seriousness of these interrelated concerns.

81 The destructive consequences of corruption on a democratic system are felt throughout society. Far beyond the inflated cost of public works and services, inefficient contractor selection and the waste of resources due to rent-seeking, other long-term negative consequences affect the quality of democratic processes. The spread of corruption erodes the general support and trust of citizens in public institutions in general and in the political class in particular, therefore encouraging particularistic practices and corrupt deals (Johnston 1986). Finally, pervasive 'grand' corruption alters the relative allocation of public spending, penalizing sectors where rents are more difficult to be extracted, i.e. education, social security and welfare; vice versa, a relatively higher quote of public budget is allocated to infrastructural projects, defense and other areas where monopolistic or oligopolistic corporations control the markets (Mauro 1998). In a longer time-horizon, countries experiencing a lower public investment in education will suffer a diminished level of accountability, due to a weakened capability of citizens to effectively control their decision-makers, mobilise in collective actions, recognise and sanction malfeasance and corrupt practices (Arnone and Boldrini 2014).

82 In the alarming scenario sketched above, perverse effect of corruption can be harshened when the principal-agent model combines with neo-liberal paradigm and the dominant canon of anticorruption at international level dictates measures aimed at cutting public budget, deregulating, privatise public assets and

dismantling the public educational system as well as the welfare state, intensifying the repressive apparatus of anticorruption authorities (della Porta 2013). The fertile ground of an alternative, more effective anticorruption reform lies instead in a simultaneous set in motion of bottom-up initiatives, empowering societal actors, allowing them to become influential towards those political entrepreneurs having the authority to change the formal 'rules of the game', implementing anticorruption regulation. The mobilisation from below of civil society and local communities' participation in anti-corruption policies may represent a potential preliminary spark to set in motion any conceivable positive feedback interplay between actors' interests towards integrity and optimistic expectations that an exit from systemic corruption can be found.

83 The mutual recognition of the role of the citizens in the monitoring government activities and in generalised awareness about the costs of bribery (World Bank 2000) should, in turn, augment the perceived significance of transparency and anti-corruption commitment for bureaucrats and policy-makers, who would pay a price in terms of consent and career prospects. Moreover, anti-corruption 'trial-and-error', incremental and decentralised processes have the well-known quality of avoiding the potentially dangerous consequences of wider and ambitious reforms, while favoring a learning processes and the spread of 'best practices' among social movements activists, social entrepreneurs, associations, policy makers and bureaucrats – a positive-feedback mechanism in itself.

84 In recent years, social movements denouncing kleptocratic practices, corrupt politicians and entrepreneurs, have developed a radically different explanatory framework. Consequently, also the proposed policy toolkit to control corruption has broadened. The fight against corruption is a basic constituent of a wider effort of citizens to oppose the deterioration of the quality of democratic processes. This implies the revitalisation of a conception of politics intended not as a technique, but as a contribution to a realisation of the common good. Experiences and experiments that increase the citizens' opportunities to participate in public policies, in the formulation, decision-making and implementation phases, increase information available to the public, spreading a broad awareness and knowledge that in the 'technocratic' conception of politics are instead – for ideological beliefs – kept jealously hidden (della Porta, Font, and Sintomer 2014). The fight against corruption needs to be re-framed as a public good. It also requires an effective defense of citizens' rights, since without certainty of rights the arbitrary power of the patrons and political bosses – to whom particularistic demands are addressed – increases. Among the crucial factors that increase the possibility of success we may consider a facilitated access of individual and collective actors to an independent judiciary (class

action), in order to denounce discrimination and privileges, especially when such practices strengthens social awareness (Vauchez in this chapter).

85 In recent mobilisations from below the issue of corruption is defined as a problem of social justice, rather than a mere obstacle towards good government, which could be effectively curbed widening the forms of political participation through practices of participative democracy (della Porta in this chapter). Moreover, in the fight against corruption decentralised knowledge and awareness of citizens is considered to be more important than experts' understanding. Specifically, the awakening of public awareness spreads thanks to a collection of diffuse stigmatisation of political malfeasance (Spanish *indignados* ironically set the 'state of malestar' against the 'state of bienestar' i.e. the state of malfeasance against the welfare state). In the last years information about and censure of corruption spread thanks to the support of NGOs, movements, groups and activists, from Wikileaks to individual bloggers, to networks and e-platforms. This process encouraged the development of both vertical and horizontal accountability mechanisms, oriented not only to punishment and enforcement, but also to raise public awareness. Against systemic corruption, a plague affecting an increasing number of representative democracy, the fight against corruption as a factor of degeneration and injustice, cannot be a single-issue policy, nor delegated to experts, but rather linked to a wider rethinking of politics and participation (della Porta 2013).

86 4. The territorial dimension

87 4.1 The bounded nation-state

88 During much of the late nineteenth and twentieth centuries, the dominant strand in social and political theory presented modernisation as a process of territorial integration and functional differentiation (Durkheim 1964, Finer 1997, Giddens 1985). Some versions were based on functionalism and diffusion, with social factors as the driving force (Deutsch 1972). Others emphasised the agency of state-builders and other political, economic and social actors. Rokkan (1999) drew attention to boundary-building, which enclosed national spaces and turned social and economic demands, and their political articulation, inwards. With the rise of mass parties, political competition spread across the territory of the state (Lipset and Rokkan 1967; Caramani 2004). Economic and social systems

were gradually 'caged by the nation-state' (Mann 1993). Capitalism often developed within a national framework while eroding local production systems. Cultural homogenisation spread with the advance of literacy, mass education and military service.

- 89 Democracy, from the nineteenth century, was usually defined in a national mode. To the question of who was the *demos* in democracy and who were the people in the doctrine of popular self-determination, the answer was the nation. Civil and human rights were based on the idea of citizenship and this was again rooted in the unitary nation. The famous French Declaration referred to the 'droits de l'homme et du citoyen' and if the former can now be rendered into English as person, the reference to citizens is not so easily expanded.
- 90 Following the Second World War, national economic protectionism declined in Europe, but states adopted macro-economic policies to sustain aggregate demand and full employment in what has loosely been called Keynesianism. These were predicated on the national level, with some spatial development policies to integrate lagging regions. Post-colonial states in many cases pursued national protectionism, with the creation of national markets. They also engaged in nation-building based on the European template, to overcome internal cultural and political diversity. The welfare state was also based largely on the unitary nation-state, which provided the affective solidarity necessary to support redistribution. T.M. Marshall's (1992) influential work on social citizenship assumed that the citizens comprised a unitary national people. Centralisation of welfare states was also defended on grounds of allocative efficiency, since that scale could more easily mobilise resources and redistribute from wealthy to poor places as well as individuals. The welfare settlement was based on a positive-sum social compromise between capital and labour secured by the fact that both were confined to national boundaries and so could not 'exit' (Bartolini 2005).
- 91 The ironical outcome of this was a world of nation-states, which were rigidly demarcated from each other territorially but within which territorial distinctions would disappear. The coexistence of these two very different conceptions was conveniently camouflaged in the social sciences by the division of labour between international relations, which looked after the territorially-divided world of nation-states, and political science and sociology, which primarily looked at the nation-state from within. Right across the social sciences (although perhaps anthropology is an exception), there was a methodological nationalism that took the integrated state largely for granted, talking about national political systems, national societies, national economies and (thoroughly teleological) national histories.

92 So the European model of the state became the precedent for state-building elsewhere in the world, including Latin America and much of the post-colonial world. It owed something to social and political analysis but also had a strong normative element, with diversity, pluralism and dispersed authority being associated with pre-modern political tradition and unity and integration with modernisation, democracy, equality and welfare. This is an assumption built into much of liberal thought back to the French Revolution, through John Stuart Mill (1972) to US liberalism, which has often been preoccupied with memories of the Civil War and southern resistance to civil rights and social progress generally. New states, aware of their own precariousness, engaged in exercises in state and nation-building on European lines.

93 4.2 Economic rescaling

94 In the aftermath of the Cold War and the arguments about 'globalisation', there was talk of the 'end of territory' (Badie 1995) and the 'borderless world'. All of this looks rather overblown from the perspective of the present. In fact, if there was a change, it was not so much the end of territory as the end of the nation-state's monopoly over the definition and management of territory. Any social system has both a functional and a territorial reach and there is no ineluctable process whereby the form displaces the latter. Recent decades have seen evidence of de-territorialisation defined in some ways, but a reterritorialisation defined in other ways. This is the process of spatial rescaling by which functional systems, identities and institutions are migrating to new territorial levels, above, below and across the state system.

95 The best documented of these spheres is that of the economy. Economic processes are reconstituting at the global and transnational levels, with free trade, mobility of capital and the rise of the large corporation. Yet, even in a globalised world, territory appears to be as important as ever and, in some respects, more important. There is a global division of labour and some of the industries that might appear to be prime candidates for deterritorialisation, like financial services or software design, are remarkably concentrated spatially, often at the sub-state region or city level. There are several versions of this new regionalism in economics.

96 The New Economic Geography (Krugman 2011), builds on neo-classical assumptions but emphasises how proximity can reduce transaction costs and exploit economies of agglomeration. Other accounts draw on institutional economics and focus on institutions in government and civil society in promoting that balance of competition and cooperation in which capitalist markets thrive.

There is a move away from the traded dependencies of transaction costs models to untraded interdependencies in the form of tacit knowledge and face-to-face exchange, which are seen as important for innovation and for flexible specialisation. Institutional accounts fade into sociological accounts, focusing on the characteristics of local societies, and these in turn fade into cultural explanations, focusing on the characteristics of the population, including social capital (Putnam 1993). Territory thus becomes a factor of production, not always defined, as in the past, by proximity to raw materials or markets, but by social and cultural characteristics as well as labour supply.

- 97 Social and economic geography models these processes in two ways, linked to two different conceptions of territory. The relational approach presents local production locations as linked in global supply chains. Territories are subordinated to the logic of global capitalism and delinked from their closer environment. Even within cities, there is increasing social and economic inequality, between sectors that are more or less advantaged in the global division of labour, from manufacturing sweatshops to high finance.
- 98 The other conception focuses on regions as production systems, with their own internal coherence and interdependencies. These can be conceptualised as more than mere locations of productions but production systems, with their own internal logic and interdependencies among themselves (Crouch et al. 2001). This idea goes back to Alfred Marshall's (1920) idea of industrial districts, which has regularly reappeared in spatial economic analysis. It should be stressed that these are not too distinct empirical realities but two ways of conceptualizing territory; both may be used as lenses to illustrate aspects of a given case.
- 99 In a further move, these systems are sometimes portrayed as being in competition with each other. The argument is that, in modern forms of production, Ricardian comparative advantage has given way to absolute advantage (Scott, 1998). This is a contentious point. Many economists would insist that only firms compete and that talking of regional competition merely reifies arbitrary spatial entities. To put it in a less pejorative way, regional competition is a social construction, a way of conceptualizing social reality that emphasises some aspects rather than others.
- 100 The idea of inter-regional competition has, however, been taken up by regional elites, who find it an attractive electoral theme, unifying their populations. It is promoted by states and transnational agencies as a model for economic development to supersede the old diversionary regional policies. The emphasis now is on endogenous development and what regions can do for themselves. Of course,

logically it is impossible for all regions to become more competitive (as opposed to more productive) simultaneously, as it is a relative concept. The theme has nonetheless become a powerful one, inspired by the work of Michael Porter (2001) and underpinning neo-mercantilist visions of policy.

101 Competitive regionalism has an obvious potential to increase spatial inequalities. There is also a frequently-invoked danger of a 'race to the bottom', in which regions cut taxes and social expenditures in order to attract mobile investment capital.

102 4.3 Rescaling welfare

103 There has also been a rescaling of the politics of welfare and of welfare states. Some of this relates to changes in conceptualisations of welfare itself. There are new social risks related to precariousness as well as the cyclical unemployment in the old manufacturing economy. Need is defined according to more criteria than in the past, including gender, age and location. New distributive tensions have emerged, for example between generations. There has been a shift in policy away from passive assistance towards labour market activation, supported on both left and right but with the former putting more emphasis on incentives and the latter on coercion. Labour markets are usually local and regional and it is at that level that the connection between them and welfare policy is often made.

104 Austerity, plant closures and service retrenchment are often felt first at the local level. Spatial development strategies and the intrusion of global economic forces generate local conflicts over land use and displacement. Oppositional social movements often mobilise at a local level. This has made the city and metropolitan area key sites for distributional conflicts.

105 There is a danger that the combination of rescaling upwards and downwards may delink the spheres of economy and welfare, which in the old ideal-type nation-state were coterminous. This creates the possibility of 'partial exit' by actors from social compromises (Bartolini 2005). The literature on urban political economy has long identified business as the main candidate for exit and seen this as a constraint on redistribution within cities (Peterson 1985, Kantor 1995). As localities compete for investment, they may cut taxes and service provision in a 'race to the bottom'. The extent of this will depend on how far capital can be trapped into local and regional systems of production, and how footloose it is. Regions and cities are weakly-bounded systems with open borders.

- 106 Newly emerging regional and local spaces can, to varying extents, mould the pattern of interest representation so that class and sectoral interests are refracted at different territorial scales (Keating 2013; Keating and Wilson 2014). Large business operates in global markets but is conscious of the importance of territory for production. At the same time, it wants to avoid being captured by regional political systems or being forced into social partnership. So big business often favours a form of functional regionalism, based on development agencies and infrastructure provision, with a weak political element and a focus on development in a narrow sense. It uses territory rather than being itself territorial. Small business is more dependent on local markets and public goods and is sometimes quite protectionist. It is also closer to mass opinion and sensitive to political regionalism, and is therefore more favourable to the regional and local levels.
- 107 Trade unionists have been tied into national collective bargaining, social compromise (and corporatism at the limit) and support national welfare provision. Yet they have been drawn into local struggles over plant closures, which have often been defined as community issues. They seek to regain at the regional level influence and access that they have lost at the state level; and they look to regional labour market policy to expand both their influence and redefine the policy in a broader and more socially-focused way. Environmental interests link into local struggles around environmental challenges, which are first felt as they impact on particular territories, often linking into broader coalitions of territorial defence against pollution, especially that coming from outside. Yet their scope of action is necessary national or transnational.
- 108 So all groups are cross-pressured on the territorial dimension as social relations are refracted at new spatial scales. New social alliances can emerge, for example when business and unions are allied in productivist coalitions, with environmentalists on the other side. The adaptation of social and economic interests to competitive regionalism can result in the construction of a shared territorial interest, displacing or at least attenuating class conflicts within the territory. The balance of representation and interests at different scales will also influence the direction of policy, particularly the social inclusiveness of regional development strategies.
- 109 Public services are often provided at the regional and local scale. One view is to see service provision as a matter of allocative efficiency rather than political conflict. The New Public Management (which is no longer very new) (Pollitt and Bouckaert 2011) has influenced thinking on service delivery in favour of differentiation, choice, competition and contracting out. In practice, this does have

distributional consequences and winners and losers and, as management reform has spread it has generated further distributional conflicts at local and regional level. Indeed, this is the biggest divergence in public policies produced by devolution in Europe (Keating 2013). Taking all these factors together, the local and regional level has thus become an important arena for distributional conflicts, upsetting the conventional view that redistributive issues can and should all be settled at the level of the nation-state.

- 110 Decentralisation may not produce a race to the bottom but a race to the top if the territory concerned is more solidaristic than the state level. The test for progressive policy should logically be which level is more solidaristic rather than which corresponds to an existing state.

111 4.4 The politics of identity

- 112 Recent decades have seen an apparent reversal, in some places, of the trend to the creation of homogeneous national communities and the revival of old, or creation of new, territorial identities and demands for political autonomy. When this phenomenon was observed in the 1970s there was a tendency to write it off as evidence of retarded modernity or reversion to the past, a violation of the taken-for-granted national integration teleology. A less prejudicial view is to see political identities as continually in flux, with the nation-state providing merely one historically-specific fix. Some new nationalisms may be linked to exclusion, xenophobia, welfare chauvinism and opposition to immigration, and associated with the political far right. Others are socially liberal and politically social democratic. Many of them have fastened onto the new regionalism in economics to make an argument for the economic viability of smaller places in the context of global change and support transnational integration as a way of constructing a broader external support system for small polities. Critics have attacked this idea as a form of regional egotism or failure of state-wide solidarity but, unless they are committed to global redistribution, they are merely favouring one arbitrary territorial level (the state) over another. In many cases, sub-state territories have emerged as spaces for resistance to welfare retrenchment. Where there is an existing affective solidarity based on a competing national identity, this may provide the basis for defence of welfare (as in Scotland or Quebec).

113 4.5 Institutions

- 114 Rescaling has posed questions about representation and accountability as social and economic processes have escaped the purview of traditional governmental institutions. States have responded by seeking new institutions at new levels. These range

from forms of territorialised central management to devolution of responsibilities on the grounds that territorial management is best achieved by remaining at the strategic level, avoiding getting into detail and being sucked into local and regional political battles. At the same time, oppositional movements have confronted state priorities, the drawing of territorial boundaries and the political and economic construction of new territorial spaces. This has provoked a series of conflicts over institutions, which have sometimes been resolved by the establishment of new political institutions but at other times have produced institutional deadlock. The old nineteenth-century idea that there is an optimal level for each governmental competence has been revived in arguments about structural reform, which arise in domestic politics but also in the recommendation of global agencies for structural reform. Yet, the optimal level for any given function will always depend on what the objective is and cannot be deduced from purely abstract principles. Rescaling is a deeply political and contested process.

115 4.6 Understanding rescaling

116 The creation of unified nation-states was not the result of functional imperatives or a teleological drive but a deeply political process. The same is true of rescaling, which has been interpreted in different ways, often with a highly normative bias. One account, inspired by neo-liberal assumptions, has it that the emergence of new spaces is a result of functional imperatives. Ohamae (1995) argues that globalisation means the end of the nation-state, to be replaced by regions, which will have to compete in a rigorous market order; in fact this is a curious mixture of neo-liberalism and (in its reification of the region) neo-mercantilism. Alesina and Spoloare (2003) derive the size of 'nations' (by which they actually mean states) by reference to external trading conditions. The argument is that, in eras of protectionism, there is a tendency to large states, which can assure access to extensive home markets. In times of free trade, global markets are open, home markets are less important and small states are more viable and it is at these times that they emerge. Such small states are desired because, with a smaller population, they can achieve greater homogeneity of public policy preferences. Regions are, moreover, more ethnically homogeneous than large states, which they also credit with sustaining shared policy preferences. The argument is neither theoretically coherent nor empirically sustainable. In modern times, small states have usually emerged as a result of the fall of empires, which has nothing to do with free trade. Indeed, separatist movements after the First World War tended to be rather protectionist (Bohle and Greskovits 2013). There is no reason to believe that a state of one million people will be more homogeneous in its preferences than one of fifty million; that all depends on the degree of social stratification. Ethnicity is a deeply

contested and problematic concept, capable of being defined in relation to multiple criteria and there is no reason to believe that, however defined, co-ethnics will share the same substantive policy preferences. Many regional nationalist movements, as noted, have been at pains to deny that they are ethnically particularist. Regions and nations are not homogeneous entities but political spaces in which interests and ideas are argued and brokered.

- 117 Another version of the new regionalism sees the region or local level as one at which the old dilemmas between productive efficiency and distribution disappear. The argument is that social capital provides the magic ingredient that sustains both economic growth and social cohesion. This is the story of Putnam's (1993) virtuous regions. Amin (1999: 373) claims that many prosperous regions also show a range of virtuous economic, social and political behaviours, which are mutually reinforcing.
- 118 Another version again sees the region as a space of consensual governance, where that term refers to cooperation on agreed policy goals. Rescaling has been accompanied by an effort at depoliticisation of key policy tasks. So monetary policy has been entrusted to independent central banks. A new managerialism has focused on 'delivery', without always asking critical questions of what is to be delivered. In some instances depoliticisation is matched with a change of scale, as with monetary policy in the Euro zone, or regional development agencies located at the regional level. In the absence of representative and accountable mechanisms, these forms are often legitimated by the language of 'governance', given a positive normative spin and presented as somehow more inclusive. European and international agencies are particularly prone to this language. Yet, since there are distributive issues at stake here, politics will fade out and political and social movements will emerge to challenge dominant strategies and meanings. The sub-state level thus becomes politically contested, both as regards the meaning and delimitation of territory and the constitution of authority and power within territories.
- 119 Rescaling poses a challenge to a certain vision of the unitary or integrated nation-state as the inevitable outcome of modernisation (in successive stages) or a normatively desirable ideal. It poses challenges to inclusion and equality but this does not mean that the best response is to recreate that state. The nation-state had its bad sides, including exclusion, aggression and domination. In its democratic mode it achieved democracy often at the expense of pluralism. Inclusion and solidarity can no longer be entrusted to the centralised state alone, but must be built into systems of public policy making at all levels.

5. The constitutional challenge of national pluralism

121

As noted in the previous section, the central concept of political and constitutional modernity is the idea of the nation-state, which assumes the consolidation of modern states around the notion of a single cohering national identity. Theorised on the basis of the experience of nation-state formation in early modern Europe, this became the general organising principle of legal and political order both between and within territorial states in the modern era. In the post-World War II decolonised world, it provided both a heuristic model as well as a legitimating discourse for political consolidation through nation-building of the new states in Asia and Africa. Despite its past – and continuing – ideational dominance within the social sciences, however, the classical modernist discourse of nation-state building has been less successful in practice. Its teleological assumptions about stability through civic homogenisation and democratic order have been severely challenged if not defeated by the resilience of ethnic nationalisms, the resistance to national homogenisation, by authoritarian forms of political control, and by the combination of one or more of these factors, the persistence of protracted conflict and instability in many parts of the world.

122

One of the most significant ways in which the pretensions of the nation-state to be the natural mode of modern political organisation has been challenged is by the persistent autonomy claims made by sub-state or stateless nations within extant state polities. While more recently the value of societal pluralism in all its forms and manifestations is receiving unprecedented scholarly attention across the social sciences, the unitary nation-state, the most strikingly monistic of modernist macro-concepts, nonetheless remains largely undisturbed in the face of the sub-state national challenge. The condition of ‘national pluralism’, which denotes the existence of more than one group claiming a *national* identity within the historical and territorial space of a state, and the accompanying rights claims asserted by these groups as *nations*, raise fundamental questions for established conceptual categories of law and politics in relation to nationality and statehood.

123

The constitutional claims that flow from the assertion of national status by territorially based and historically defined groups (whose collective identities may be expressed in either ethno-cultural or civic-modernist terms) are both different from and more difficult to address through conventional concepts of democratic constitutionalism than are claims to recognition and representation made by ‘minority’ groups (Tierney 2006: 4-5; Keating 2001: 3-6;

Kymlicka 1995: Ch. 2). Comparative constitutional law and international law and practice, as well as democratic political theory and philosophy, have addressed the question of minority rights and multiculturalism with relatively little disruption to established categories of democracy and the nation-state (Kymlicka 2001). From the development of the normative content of democracy to structural innovations with constitutional forms, a rich variety of means and methods of securing the rights of minorities and multicultural citizenship are reflected in a voluminous literature as well as in a body of comparative practice developed during the post-war era, and in particular in the aftermath of the wave of democratisation that followed the end of the Cold War (Catt and Murphy 2002). It is, however, the condition of national pluralism that poses the more fundamental challenges for the democratic nation-state and its traditional constitutional structures and doctrines, demanding more radical responses from both constitutional theory and law in accommodating this socio-politically distinctive type of polity.

124

These issues have come to the forefront of political and constitutional reform agendas in a number of Western liberal democracies such as Belgium, Canada, Spain and the United Kingdom in recent decades. This has generated a substantial body of work in the fields of sociology, political science and philosophy, and in constitutional law and theory. This work has drawn attention to the theoretical challenges posed by politico-constitutional claims of plural sub-state nations and nationalisms, as well as to the constitutional arrangements that are, or ought to be, employed for their accommodation. Nevertheless, the condition of national pluralism itself is not a phenomenon that is unique to the Western world. In fact, ethnic, religious, linguistic and cultural diversity is arguably far more profound and politically salient on a day-to-day basis in states and societies outside the West, and especially in several countries in Asia and Africa, sub-state groups mobilising in distinctively nationalist terms do so along similar empirical foundations to those of their Western counterparts, and make similar normative claims.

125

While Western sub-state nationalists in Flanders, Quebec, Catalonia and Scotland may regard the constitutional responses of their host-states to be less than ideal, at least in these contexts the negotiation of competing claims have been conducted peacefully through established democratic procedures. However, the experience with constitutional accommodation of national pluralism in the non-Western contexts has generally been far less satisfactory, even though the need for exploring how the social sciences in general and constitutional law in particular can be employed in the better organisation of multinational polities is arguably more acute in these

countries, if only for the reason that unresolved anomalies between the constitutional form of states and their sociologically multinational polities have had a tendency to generate protracted conflict, and descend into sustained and intense violence (Ghai 2000; Berman, Eyoh and Kymlicka 2004; Baogang He, Galligan and Inoguchi 2007; Ghai and Woodman 2013).

126 **5.1 National pluralism: a global policy challenge?**

127 Identifying what is and what is not a multinational polity can be analytically very difficult, not least because sub-state groups themselves are often unclear about the type of constitutional claims they wish to assert. Sometimes the 'national' character of these claims are motivated primarily by strategic considerations in the face of unaccommodating host states. In others, such claims may be impossible to articulate due the hostile and repressive political atmosphere created by the host state. In yet others, groups may make 'nationalist' claims without necessarily demanding recognition as distinct nations. Most commonly and with only a handful of unusual exceptions across the world, however, nation-states do not recognise multiple nationality claims within their territorial boundaries at a constitutional level (even where some states may adopt sub-constitutional policies to address the challenges of national pluralism).

128 Even with these analytical difficulties, it is nevertheless possible to readily observe the empirical reality of national pluralism within a larger number of countries across the world than is often assumed, with one account even asserting that '90 per cent or more' of existing states cannot be considered mono-national nation-states (van den Berghe 2006). Based on the Minorities at Risk (MAR) data, Bertrand and Laliberté calculate that there are 126 ethnic groups in 23 countries in Asia, out of which 15 are classified as 'sub-state national groups'; 362 ethnic groups in 43 countries in Sub-Saharan Africa, out of which 4 are sub-state national groups; and 74 ethnic groups in 19 countries in North Africa and the Middle East, out of which 4 are sub-state national groups. This means that there are sub-state national groups in 39% of countries in Asia, 9% of countries in Sub-Saharan Africa, and 21% of countries in North Africa and the Middle East (Bertrand and Laliberté 2010). In very few of these multinational states do sub-state nations receive the constitutional recognition they demand, and where they do, political practice often serves to negate any constitutional commitments as do exist. This clearly demonstrates that the issue of national pluralism constitutes a constitutional and policy challenge that ought to engage social scientists at a more general level than the interests of area studies specialists who are often the only ones to study this phenomenon in any depth.

The contemporary international order of sovereign nation-states started taking shape after the First World War one of the outcomes of which was the dissolution of the Austro-Hungarian and Ottoman empires. These older forms of imperial political organisation had held together vast territories with diverse and sometimes hostile groups, which under the new principle of national self-determination were entitled – at least notionally – to their own states. The international order as we know it today took further shape with the dissolution of the Western European empires after the Second World War, which saw the creation of many new states in Asia and Africa. With the collapse of the Soviet empire, moreover, a number of new states were created. During these successive waves of state formation across the world, the dominant model to be followed was what has been described later as ‘classical modernist’ nation-state building (Smith 1998: Ch. 1). The classical modernist post-colonial nation-building model sees the sovereign nation-state as the essential condition of modernity, an aspirational model as well as a vehicle to it (Smith 1983). Based on the general principles of this heuristic blueprint, proponents of the model seek to ‘build,’ ‘forge,’ and ‘mould’ territorial, civic, nations corresponding to states through a wide array of techniques, including communications, mass education, political mobilisation, and constitution-making, in much the same way as an architect designs a building or an engineer a machine. It takes the distilled experience of nation and state formation in the post-industrial West as the exemplary path to the universal modernity to which they strive. In other words, societies escape feudalism and religious and ethnic primordialism in Asia and Africa by making good copies of the predecessor civic nations and territorial states in the West (Smith 1998).

If those are the broad sociological and historical theses of post-colonial modernism, there are also a number of key normative propositions associated with it. These may be listed as follows: nations are primarily territorial not ethnic entities. They are made up of political communities constituted by the principle of equal citizenship and civic participation. The nation defined in this way is the wellspring of sovereignty, which constitutes the sovereign state. The nation and the state cannot be separated; they only make sense as a conjoined concept (‘nation-state’). Nation-states command the loyalty of its members to the unity of the community, and this is desirable in that it gives coherence and substance to the ideals of democratic participation, civic community, and popular sovereignty. Individual as well as communal disloyalty to the nation-state – for example, in the form of attempted secession – can be dealt with by force, and this is in principle ethically defensible, for otherwise both internal and international order collapses. Finally, the intertwining of

nation, state, and sovereignty generally favours centralisation and unitary forms of constitutional organisation (although this is not inconsistent with orthodox, mono-national federalism). In most if not all post-colonial states, this model continues to exert a powerful influence on the constitutional imagination of political elites.

132 By fusing the very notion of democratic modernity with a particular state form, this discourse invested the nation-state with a normative superiority that permitted sub-state nationalisms to be dismissed as backward and revanchist. At the same time, however, in the post-colonial context, state practice did not live up to the civic ideal of the nation-state in a number of ways. In many countries, post-colonial nation-building became not so much a process of modernisation as allowing a convenient vehicle for ethnic majorities to consolidate their hold on state power at the expense of minorities. Such states became 'ethnocracies' rather than nation-states reflecting the republican ideals of the French and American revolutions or the liberal principles of the European Enlightenment more broadly (Yiftchael 2006: Ch. 2). Similarly, in many cases, the authoritarian apparatuses of the colonial state continued unreformed, providing the new elites with old instruments of oppressive power now legitimated by the discourse of modernism (Rae 2002).

133 In these ways, many sub-state nations found themselves trapped within nation-states (and a system of international order that presumed the legitimacy of state boundaries), which had little sympathy with their claims to recognition let alone accommodation. With few exceptions, this continues to be the overriding systemic context that sub-state nations in Asia and Africa have to contend with even today. Yet the widening and deepening of processes of democratisation in many of these states reopens the sub-state national question, and demands constitutional responses consistent with the normative commitments to democratisation.

134 **5.3 Democratisation and national pluralism**

135 While there are prominent instances of breakdown and state failure in the democratisation of multinational states, there is no doubt that democracy is today considered the aspirational political model in most societies of the world. Most states subscribe to – or at least claim to uphold – the basic procedural requirements of democracy in the form of periodic elections, and the democratisation challenge has moved on to deeper questions of substantive democracy (Whitehead 2002). It is in conceptualising the substantive content of democracy however that current thinking in the social sciences has been unable to adequately respond to the multinational conundrum. Due to the dominance of the unitary nation-state, many democratisation theorists and policy-makers who are otherwise attentive to the

demands of societal pluralism, assume that the *demos* within states is monistic, whereas the presence of multiple national groups within states demand approaches that recognise multiple *demos* (Cf. Stojanović 2010). From that analytical understanding a number of structural and normative implications for constitutional design flows if the democratic ideal is to be fully realised within multinational societies in a manner consistent with democracy's own normative dictates. Unless those questions are attended to, the nation-state's 'crisis of the hyphen' (Anderson ##reference) would only perpetuate injustice, instability, and conflict.

136

5.4 National pluralism's analytical and normative challenges to the nation-state

137

The first challenge that the empirical reality of national pluralism poses for the dominant unitary conception of the nation-state is that nation and state have to be (re)understood as separate analytical categories (Keating 2001). It follows from the fact of multiple nations within the territory of the state that unless nation and state are disaggregated, the continued assumption that the nation is something that is exclusively associated with the state renders sub-state nations unable to realise their own claims to recognition (Tierney 2006).

138

Similarly, it is routinely assumed that the unitary nation-state is the sole repository of sovereignty within its territory. In the multinational context, such a monistic conception of sovereignty makes little sense, because the multiple nations that constitute the state's constitutional order would assert their own sources of constituent power. It follows from this that the concept of sovereignty has to be understood in both plural and relational terms. It may not be the case that the unique European Union-style multilevel normative order and pluralised sovereignties are replicable in other parts of the world (Welikala 2015), but the division and sharing of internal sovereignty is a common practice in federations and this needs to be amplified in multinational contexts to take explicit account of sub-state nationalities. The relational concept of sovereignty eschews the notion that sovereignty belongs exclusively to either the state or the people in favour of the view that sovereignty is a product of an on-going relationship between the two (Loughlin 1992). This conception suits plurinational constitutionalism especially well, in determining the location and exercise of sovereignty as a constantly negotiated and dynamic political process between the sub-state nations and their host-states.

139 The nation, separated from the state, has both political and cultural dimensions. It is a form of collective identity defined in terms of a group's shared culture, history, and social institutions, and it is a normative concept in that the assertion of nationhood involves claims to territory and self-government. In both senses but especially the latter, the nation is a space of collective deliberation, decision-making, and self-determination. Individual autonomy only makes real sense within the social context in which choices are made (Kymlicka 1995) and in multinational contexts, the sub-state national society rather than the state-national society is the primary space within which individuals make their cultural and political choices. Democratic constitutionalism's commitments to individual and collective self-determination therefore must extend to sub-state nations and the individuals who comprise them, and must not be limited to conceiving this relationship as being limited to individuals and the traditional nation-state.

140 However there are two important provisos to traditional understandings of nationhood in the multinational context. The first is that individuals in the contemporary world can and do often entertain multiple 'national' identities, and this needs to be treated as a reality rather than as a threat. Thus plurinational constitutionalism must correspond to a reality in which individuals will have allegiances to both sub-state and state national identities, and in some cases to regional identities above the state. The second caveat is that the claims to constitutional accommodation of sub-state nations often do not and certainly need not take the form of separate states (Keating 2001: ix). States' fear of acknowledging sub-state national claims to even cultural autonomy stems from the assumption that any recognition of national status inevitably would lead to separatist claims to independent statehood. (This is again a function and consequence of the nation-state discourse.) However, while many sub-state nationalists do make separatist claims for reasons of both strategy and conviction, separatism is not often the primary goal of many within sub-state nations. Instead, they seek accommodation of their national status within the constitutional arrangements of their host-states, in such ways as to give them recognition, representation, and autonomy (Tierney 2006: 18-19, 92-98). This no doubt presents a set of difficult challenges for constitutionalism, but as the experience of both the Western plurinational states as well as a number of recent examples of transitional constitution-making in conflict-affected states have shown, they are hardly insurmountable as technical problems (Ghai and Woodman 2013).

141 These observations lead to a number of implications for constitutionalism in dealing with the challenge of national pluralism. The disaggregation of nation from state and the recognition of

multiple national spaces within the state demand a multilevel constitutional order with highly decentralised forms of legal authority and political power. It also demands a methodology of constitutional practice that is pluralist, empiricist, pragmatic, flexible, and asymmetrical, or to put it conversely, a constitutional culture that is not hierarchical, rigid, and monistic as most modern liberal constitutional democracies tend to be. Notwithstanding this fluid and context-specific nature of plurinational constitutionalism, however, it is possible to outline a set of core principles that are at its heart, and which can apply to any polity characterised by national pluralism. With the judicious application of these general principles to the specificities of local contexts, plurinational constitutional orders can be developed for multinational states that better serve the particular needs of political justice in these cases.

142

5.5 General principles of plurinational constitutionalism

143

What then are the broad and general principles that can be said to articulate the substantive core of a plurinational constitutional system? The major works of social science and constitutional theory in this area, as noted, has had the Western experience in mind. This does not make that work irrelevant for non-Western contexts, but care must be taken to address distinctive political and cultural challenges – such as ethnic forms of nationalism, authoritarianism, or non-liberal forms of democracy – that were not in contemplation in that work.

144

Accordingly, the first principle is the *principle of autonomy*. This principle involves the right of each sub-state nation within the plurinational state to determine its own path of political and cultural self-development. It ensures that the sub-state nations' 'national' rather than 'minority' status is reflected in appropriate autonomy arrangements within the constitutional structure of the plurinational state. In the Western context, Tierney observes that this principle accords with Neil MacCormick's notion of 'self-rule' according to which, "the members of a nation are as such in principle entitled to effective organs of political self-government within the world order of sovereign or post-sovereign states; but these need not provide for self-government in the form of a sovereign state." (Tierney 2006: 126) In non-Western contexts, where the spectre of secession is more politically sensitive, the principle of autonomy could be limited by an *a priori* commitment to the unity of the plurinational state; i.e., there would be no express constitutional right to secession and there would be a constitutional presumption against an implied right, which would be rebuttable only in extremely grave circumstances. However, the level of autonomy contemplated here is extensive, and would enable the sub-state nations to not merely govern themselves in most areas of day-to-day policy, but also ensure they have the full

constitutional capacity to protect and preserve their respective ethnic identities, including languages, religions and cultures, consistent with the democratic values of choice, tolerance and pluralism that are integral to the plurinational constitution. The principle of autonomy therefore translates as 'self-determination' for sub-state nations, albeit as of a tenet of political morality, rather than the rule in international law. The principle applies not only to a sub-state nation seeking specific legal recognition, but also to the plurinational state to respect the aspirations to recognition of such claims.

145 Secondly, the *principle of representation* derives from the understanding that the primary agenda of sub-state nations is not secession but full and fair representation in the constitutional and political processes of the host state. This involves power-sharing and representation in central government, particularly the legislature and the judiciary, and also critically, in procedures for constitutional change. The principle of representation ensures the active involvement of sub-state national governments in all aspects of the governance of the plurinational state, and not merely exceptional situations like constitutional amendment. Beyond the powers and institutions of the state, this principle demands conformity from state-wide political parties to devise their internal structures consistently with its dictates, so that political participation in central processes do not exclude citizens within sub-state nations. This principle reflects the interdependent and co-operative nature of the plurinational state, which not only recognises national pluralism in the self-rule dimension, but also the shared-rule dimension in the governance of the whole.

146 Thirdly, the *principle of recognition* has both a symbolic and practical character, and in both dimensions it has special significance for a plurinational constitutional culture. The recognition of the plurinational character of the state in symbolic commitments and institutions is not in fact merely 'symbolic' but crucially important in identifying the plural ethno-social foundations of the state and thereby the plural sources of its legitimacy. These symbols have a significant practical effect in that they 'set the tone for the way in which the constitution is in general interpreted and applied, and will determine whether a vision of a plurality of nations, interacting equal to equal, is in fact a constitutional reality' (Ibid).

147 Fourthly, the *principle of reciprocity* stresses the tenet of political morality by stating that in plurinational states in which sub-state nations enjoy the recognition, representation and autonomy ensured by the first three principles, the latter in turn owe certain obligations to the host state. Tierney identifies three such duties; viz., to reciprocally recognise the 'national status' of other entities within

the state, to work in 'good faith to consolidate the state as a common polity' (Ibid), and to respect the rights and interests of all citizens arising out of the common citizenship of the state as a whole. There is an important caveat attached to this principle: 'nationalist movements with an overtly 'separatist' programme may not accept these responsibilities, but in turn they must accept that the normative force of any claims they might make of the host state in terms of representation and recognition may, accordingly, be substantially weakened' (ibid.: 127).

148 Fifthly, the *principle of democracy* has two dimensions. Firstly, it relates to the situation of the individual within a sub-state nation, in which an overriding concern is to ensure that its individual members in the exercise of their democratic rights determine the collective political direction of the group, and not the converse. This underscores the fact that the sub-state nation in the plurinational scheme is not only an ethno-cultural entity but also a territorial unit of government. It must therefore respect the democratically expressed wishes of resident citizens and not only the interests of members of the ethnic nation. Moreover, the sub-state level must respect the principle that individuals in the plurinational state have the capacity and the constitutional opportunity to subscribe to multiple national identities, and that this involves respect for the loyalty that a member of the sub-state nation may owe to the state national society. Secondly, the principle of democracy echoes a much older rationale for dividing and decentralising political power and legal authority in terms of the democratic aim of preventing authoritarianism or control models of government. The radical decentralisation involved in plurinational reforms helps to address this broader consideration.

149 Sixthly, the *principle of asymmetrical pluralism* informs both institutional design and the ethos of the constitutional culture. The norm of pluralism in all its manifestations is the mainstay of a plurinational constitutional system, and this involves the constitutionalisation of asymmetries in a variety of ways. Pluralism and asymmetry will therefore not only describe but also normatively influence: textual choices in constitution-drafting, including preambular or other declaratory sections; the design of governmental institutions at every level of the state; constitutional implementation and constitutional adjudication; official language policies; the fiscal and financial framework; and how non-state democratic institutions such as the public service media, political parties, the public education system, and the legal complex are restructured.

150 Finally, the *principle of human rights protection* must constitute an unambiguous principle of the plurinational constitutional order. In historical contexts in which human rights may likely have been abused by both the state as well as sub-state ethnonationalist actors, especially as a result of violent conflict arising from national pluralism, the express incorporation of such a principle assumes pivotal importance in representing a fundamental commitment to acknowledging the abuses of the past, to redressing those wrongs, and to ensuring that they are not repeated in the future. The respect for universal human rights standards required by this principle also implies that neither the state nor sub-state authorities may defend non-compliance by recourse to ethnic, religious, or cultural particularities. This does not mean that the principles of autonomy, national pluralism and asymmetry are displaced if they are in potential conflict with human rights norms, thereby recentralising power (on the assumption that the state is better placed to protect them than sub-state governments). Rather, its presence compels a deliberative process through which those principles can be interpreted consistently with human rights standards, and therefore its purpose is to guard against any tendency for asymmetry to be interpreted as justifying ethnonationalist recidivism within territorial enclaves protected by plurinational autonomy.

151 The scheme articulated in these seven principles taken together outlines the general substantive parameters of a well-ordered plurinational constitution. They are prescriptive but not exhaustive, and hence constitutional designers would have to refine, expand, and add to them on the basis of the specificities of context.

152 **6. Rights and citizenship**

153 **6.1 Introduction**

154 There is a substantive multidisciplinary literature – from anthropology, law, sociology, politics, philosophy and public policy – that engages with and critically reflects on the relationship between human rights and citizenship and the practical implications of different ways of understanding this relationship. Yet scholarship and public policy debates on human rights and citizenship have broadly been situated in liberal democratic societies, where the predominant concerns have been the integration of migrants and managing national minorities, with the presumption of a trajectory towards legal citizenship in the given nation-state. More recently, the

changing conditions of global migration are said to be posing challenges for citizenship in liberal democratic societies. Whilst some have argued that we are witnessing the demise of 'national' citizenship, and that instead rights are available to non-citizens through 'postnational' means, others have highlighted that international human rights laws and norms cannot operate outside of national politics. Going further, it has argued that human rights discourses and legislation have actually led to greater inequalities through creating a number of substatus (Nash 2009), and that it is only through citizenship that 'we become human' and can claim rights (Douzinas 2000). In some regions of the world, for example, in the Arab region, there are significant non-citizen populations, where typically there is no route to legal citizenship. Whilst multiculturalism is evident as a discourse at the level of international organisations where respect for minority rights is a normative expectation also being applied to Arab states, it is conspicuous in its absence at the regional and national levels. Where there are forms of minority accommodation (e.g. Lebanon), this is decoupled from discourses on democratic inclusive citizenship.

155 This chapter aims to re-examine the relationship between human rights and citizenship in a comparative frame, starting with a consideration of theoretical understandings of human rights and citizenship and the tensions or paradoxes arising between these conceptions. It then explores the tensions/paradoxes between democratic assumptions underpinning international human rights discourses of multiculturalism and trajectories of inclusive citizenship, with regionalised and localised political discourses of minority rights and the nation-state.

156 **6.2 Between 'human rights' and citizenship**

157 A significant debate in the field relates to justifications for human rights, and how these justifications are linked to claims of universality. For example, Douzinas (2007: 9) has argued that the term 'human rights' is problematic and paradoxical in that it 'combines law and morality, description and prescription'. The word 'rights' indicates that it is a legal category, whilst the term, 'human' refers to a moral framing of the individual in relation to the law. As human rights can be claims that may not actually be recognised in law, this entails operating in the domain of aspiration as opposed to legal reality – what Douzinas describes as the 'confounding of the real and the ideal characteristic of human rights discourse' (2007: 10). There have also been attempts to define what is meant by 'universality' of human rights. For example, Donnelly acknowledges that some accounts of the universality of human rights are problematic – 'empirically, philosophically or politically' (2007: 281). As a way forward he attempts to delineate different forms of

universality where he defends 'functional' and 'legal' accounts of universality, whilst conceding the probable indefensibility of 'anthropological' and ontological' universality. He also talks of an 'overlapping consensus' universality and the notion of a 'relative universality' – distinguishing between the universality at the level of the concept and at the level of practice (Connelly 2008). In contrast, Goodhart (2008) argues that human rights are a resource for people in terms of 'aspiration' rather than 'moral truth' and as such the legitimacy of human rights does not come from 'proving' universality. He is troubled by Donnelly's concept of the 'relative universality' of human rights, arguing instead that the legitimacy of human rights comes from their global appeal. Clearly however, legitimacy does not stem from universality, rather than the reverse, as this reduces legitimacy to democratic popularity (Connelly 2008), confounding legal grounding with democratic grounding, (Ferrara 2003), and also potentially raising the accusation of 'imperial humanitarianism'[4] (Connelly 2007: 298).

158 In contrast to justice approaches to human rights, 'care' perspectives emphasise connection, concern for relationships and responsibilities, with an emphasis on obligation that does not arise from rights per se. Such perspectives potentially lend themselves to greater sociopolitical and local contextualisation, operationalising human rights in the context of the political interests of the state and its negotiations. This raises a structural problem with respect to the operationalising of human rights. Whilst human rights claims can challenge existing inequalities, they must appeal to those very structures to make their claims (Benhabib 2005, Douzinas 2007, Soysal 1994). Human rights also act to depoliticise exclusion and conflict by framing these issues in terms of individual claims with a corresponding legal remedy (Douzinas 2000).

159 Furthermore, whilst human rights discourses suggest that the cosmopolitanisation of international law benefits non-citizens, it has been argued that it is only through being fully recognised as a member of the political community, that we become 'human' and can claim our 'human rights'. Whilst legal migrants in Western liberal democracies are often entitled to many civil and social rights, as well as being protected by legislation at the transnational level and sub-nationally, the same cannot be said for refugees, asylum seekers and illegal (or 'irregular') migrants. In this regard, it could be argued that Soysal's conclusion that 'the logic of personhood supercedes the logic of national citizenship' (1994: 164) does not apply to refugees or those of irregular status. It is premature to claim that universal human rights have superceded national citizenship 'by disrupting the territorial closure of nations' (ibid.) when we witness, not only the tight control of state borders, but also the differential application of human rights with respect to those irregular migrants, refugees and

asylum seekers. Nash (2009) goes further arguing that the cosmopolitanisation of law does not lead to greater equality, and that rather than legally promoting universal human rights, legalisation of international human rights law has led to inequality as evidenced through a proliferation of sub-statuses. Critiquing Benhabib, she argues that such political theorising is at a level of abstraction that is not sociologically contextualised, and so does not engage with what happened in practice. Rather than simply a matter of legal entitlement, claiming rights depends on social structures through which power, material resources and meanings are created and circulated. She conceives of refugees as 'sub-citizens', arguing that this status is created through international law.

160 There is a substantive literature on group rights and one of the central debates or paradoxes relates to the very conception of group rights itself. Are rights inherently individual rights or can a group itself be attributed to hold rights, or is it as individuals or the group (Miller 2002)? In addition, are group rights defined as 'human rights' or are they the rights of citizenship? In addition, there is the question of what counts as a 'group', as opposed to people holding certain characteristics. Group rights typically refer to 'external protection' rights – that is rights that an individual of the group can claim for against the state (Kymlicka 1995). However, there are concerns about individuals' rights within the group, especially more vulnerable members. Justifications for group rights can be framed in terms of human rights principles or in terms of the principles of citizenship. Miller (2002) asserts that typically those arguing to defend group rights make the case that they are fundamental rights of citizenship appealing to equality; language rights for minority groups, or group rights for political representation would be such examples. Yet it could be deemed paradoxical that rights for certain groups are based on calls for equality. However, when looking at actual examples, it is evident that calls for group rights are often calls for achieving equality – for example in terms of rights to language, culture, education, and practice of religion. It may be considered more controversial when claims for group rights are made on the basis of difference per se in terms of consensus with those outside of the group, and in terms of determining what legitimately counts as a group claim (Miller 2002). This potentially has the problem of homogenizing the group, and conceiving of culture in a statist and culturally relative way.

161 Another paradox pertains to market citizenship, where citizens are presented with a discourse of having more choice and freedom, yet on the other hand, there is increasing social inequality, political apathy and lack of agency (Root 2007). In addition, in relation to immigration and citizenship, the market is a central force shaping who is deemed worthy of resident and ultimately a route to

citizenship. Shachar and Hirschl (2014) refer to 'Olympic citizenship' to refer to nation-states' strategies of selecting those deemed highly desirable – including, for example, the very wealthy, scientists and athletes. Skills-based programmes attest to this trend, as evident for example, in the UK's highly-skilled temporary migrant programme, introduced in 2008, which allows highly-skilled individuals to immigrate to the UK, initially for one year, without sponsorship from an employer, and, on securing employment, this stay can be extended with subsequent entitlement to apply for British citizenship after 5 years (Kiwan 2010). This invokes a moral conception of citizenship on economic grounds, and contrasts with securitisation discourses surrounding the concerns of integrating migrants who are typically unskilled or semi-skilled.

162 Rather than focusing on the relationship between human rights and citizenship per se, Isin's (2008, 2009) approach is somewhat different in that he suggests that we need to think in a new way about citizenship. He proposes the idea of 'acts of citizenship', where citizenship is not reduced to status or practice, but instead has its focus on subjectivity and agency. It has been proposed that refugees and other marginalised groups are participative actors constructing their own identities and acting to mediate their own fate (Nyers 2010) and that these actions constitute 'acts of citizenship' (Isin 2008, 2009). This has been written about in Western liberal democratic contexts, for example, in Canada and the United States, where there have been political movements by groups of irregular migrants, refugees and non-citizens making claims. It could also be argued that this conception of 'acts of citizenship' has resonance in other parts of the world, for example, in the Arab region, where disempowered groups have publically made claims in the context of the Arab uprisings (Kiwan 2014), and also for example, in Lebanon, there are examples of political and moral agency in Syrian refugees' 'acts of citizenship' in political, cultural and 'moral' domains (Kiwan 2016a, in press). The linking of 'performativity' and 'precarity' as theorised by Butler (2009) makes an argument of the different ways of 'laying claim to public space and to citizenship require both translation and performative modes of expression'. For Butler, precarity is a condition of being at increased risk of violence, and furthermore, gender norms relate to this notion. So precarity can refer to a range of vulnerable populations, including refugees, and women refugees in particular. She thinks of performativity not only in terms of 'speech acts', but in what she calls the 'reproduction of norms', which is necessarily iterative in nature. She links performativity to precarity in terms of thinking about how this vulnerable population lacking even the 'right to have rights' can claim its voice and making its claims.

Whilst citizenship has been an exclusionary concept, academic theorizing and policy approaches illustrate an engagement with developing more inclusive conceptions of citizenship, with a particular interest in citizenship and ethnic and religious diversity. The literature illustrates a range of constructions of citizenship, which can broadly be categorised into 'moral', 'legal', 'participatory' and 'identity-based' conceptions (Kiwani 2008). Whilst these are certainly not mutually exclusive traditions, they illustrate dominant ways of understanding citizenship in theory and practice. It should also be recognised that the intellectual history of citizenship is a highly gendered conception, where the public sphere is characterized as rational and masculine, in contrast to the private sphere as emotional and feminine (Shafir 1998). 'Legal' conceptions of citizenship draw from the tradition of modern liberal developments in seventeenth century Europe linked to the rise of the modern nation state (Held 1993) and the idea of a 'social contract' between 'free and equal' human beings premised on human (male) rationality. Participative conceptions also have a long intellectual history dating back to Ancient Greece, evident in contemporary communitarian approaches to citizenship and civic republican notions emphasizing civic bonds and active participation in the community (Kiwani 2016a). With regards to identity-based conceptions, it is of note that the twentieth century has been coined the 'ethnic' century, as many civil and international conflicts have been framed in these terms (Cornell and Hartmann 2007), and the twentieth first century looks to be continuing in this vein (Kiwani 2016b in press). One of the central debates in the citizenship literature relates to whether we are witnessing 'renationalisation', with negative consequences for immigrants and ethnic minorities (Kiwani 2013). In the context of securitisation discourses, it can be argued that immigration and refugee policies, integration policies, and education policies in Western liberal democracies are illustrating a 'restrictive turn' (Joppke 2010, Pacquet 2012, Wright 2008). In contrast, postnational accounts suggest the decline of national citizenship. Despite homogenising state discourses with regards to recognising or accommodating difference, individuals and groups contest, construct and negotiate their citizenship identities and practices in relation to official citizenship policies across a range of domains (e.g. immigration, refugee policy, education policy) and around the world, for example, Palestinians in Lebanon (Fincham 2013) and different regional identities in the Ukraine (Tereschenko 2013).

Contemporary discourses on multiculturalism and citizenship have been developed largely in the context of Western liberal democracies, exemplified by Will Kymlicka's seminal book *Multicultural Citizenship* published in 1995. Until recently, there has been relatively little scholarship on multiculturalism in other parts of the world, although

the question of minority recognition and accommodation with the nation-state is indeed an issue in many countries around the world (see Kivan's part in this chapter. In addition, since 2011, we are witnessing unprecedented change across the Arab region, characterised by some as a process of unfolding democratisation. This tends to be the dominant methodological approach to studying events in this region, where events are interpreted as a linear progression from authoritarian rule towards liberal democracy (Cavatorta 2012). In contrast, alternative accounts challenge such reductionism, where it is argued that what we are witnessing in the Arab region is a new political subjectivity emerging – a 'reflexive individualism' distinct from neoliberal conceptualisations divorced from community or party identifications (Hanafi 2012). Debates on multiculturalism around the world can be contextualised in relation to both global discourses of multiculturalism as well as local and regional discourses. For example, at the international level, there are international declarations on minority rights, including the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992), the UN Declaration on the Rights of Indigenous Peoples (2007) and UNESCO's Universal Declaration on Cultural Diversity (2001). The Arab region was not engaged in the global policy networks working on these rights, and similarly at a regional level, neither the Arab League nor the Organisation of the Islamic Conference has developed action plans for minority rights (Kymlicka and Pfostl 2014). However, this does not mean that minority accommodations do not exist in this region. It should be noted that the discourses underpinning these international declarations are informed by Western liberal-democratic approaches to multiculturalism whereby minority rights are seen in terms of an extension of universal human rights principles, typically with a route to citizenship (ibid). Different regions of the world, however, have their own historical intellectual and practical traditions with respect to minorities. For example, in the Arab region, Islamic conceptions of dhimmi and the practices of accommodation of minorities in the Ottoman Empire attest to a history of approaches of such accommodation which continues today; colonial legacies and politics of protecting minorities should also be contextualised politically. Whilst discourses of minority rights in the West are linked and embedded in understanding of democracy, local discourses of minority rights in the Arab world tend to be decoupled from discourses of democratisation [5]. There is also a clear distinction with respect to 'national' or 'religious' minorities on the one hand, and refugees and migrant workers on the other hand, who typically have no route to formal citizenship. Understanding how citizenship is being constructed in a range of contexts outside of the Western liberal-democratic frame is an important challenge for both academics and policymakers, as looking at a range of cases

challenges methodological and political assumptions with regards to the 'translatability' of language and concepts in the domain of rights and citizenship.

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7. Political parties and the challenge of democratic representation

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Social progress on a wide range of issues requires that citizens and civil society groups achieve effective representation through democratic channels. Although many types of societal organisations can play a role in democratic representation, political parties have long been seen as vital agents of representation that mediate the relations between states and societies. Parties have historically articulated and aggregated a plethora of societal interests; organised electoral competition; developed alternative public policy platforms; formed national governments; and staffed public agencies and administrative bureaucracies. As such, they are essential institutions for holding national governments accountable to societal interests and preferences.

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Nevertheless, the ability of parties to perform these roles has increasingly been questioned in many parts of the world, under both new and established democratic regimes. Although democratic institutions have spread to some 60-70 new countries since the mid-1970s in Southern and Central Europe, Latin America, Africa, and Asia, there exists a widespread belief that a 'crisis of representation' is undermining the quality and responsiveness of democratic rule (Mainwaring and Zoco 2007). Even in the long-standing democracies of Europe and North America, signs of representational deficiencies are readily apparent in declining voter turnout, reductions in party membership and identification, rising electoral volatility, and the growth of populist or anti-establishment parties and movements on the right and left flanks of traditional party systems (Mair 2013, della Porta 2015).

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Although democratic governance involves a mix of representative and participatory practices, some sort of representation is integral to modern large-scale democracies. An individual citizen – at least one lacking substantial private economic assets – cannot hope to influence democratic outcomes on a national scale on his or her own. It is only through acting in concert with others that citizens can hope to make a difference. Acting in concert can take a number of different

forms, including social movements, civil society organisations, and political parties, all of which play a role in articulating the competing interests, identities, and preferences that exist in any society. Parties, however, have a privileged and central role as representative agents in formal democratic institutions, as they are the primary actors who compete in the electoral arena, define and implement public policy alternatives, and organise national governments. As E.E. Schattschneider (1942) famously asserted, 'Political parties created democracy and modern democracy is unthinkable save in terms of the parties.' As such, parties are a natural starting point for understanding contemporary challenges of representation.

170 Theories of representation derived from the West European experience have long assumed that parties are anchored in, and give organisational and political expression to, societal conflicts (or 'cleavages') that structure policy preferences and electoral competition in a given democratic order (Lipset and Rokkan 1967; Bartolini and Mair 1990). Parties, in short, are traditionally seen as organisational intermediaries between societal interests and state institutions; parties were expected to simplify a plethora of societal interests by aggregating complementary (or at least reconcilable) preferences and 'bundling' issues into a reasonably coherent set of rival policy platforms to mold government decision-making.

171 With the spread of electoral competition to new countries and regions in the developing world, however, these classic representative functions are often in short supply, if not heavily distorted. Parties are sometimes coercive instruments of previous autocratic rulers (Riedl 2014; Hicken and Kuhonta 2015), or clientelist machines that allow political elites to control popular constituencies by manipulating economic dependency, patronage rewards, and political loyalties (Kitschelt and Wilkinson 2007; Stokes, Dunning, and Brusco 2013). Parties founded during recent periods of democratic transition are less likely to be rooted in deep social (especially class) cleavages than parties formed during earlier stages of economic and political development. Likewise, they are more likely to rely on the mass media or charismatic personalities to mobilise support, rather than strong grass-roots branches and encompassing ties to organised social blocs (Mainwaring and Zoco 2007). Meanwhile, the constraints of sovereign debt, global financial markets, and periodic financial crises can tie the hands of national rulers and narrow the range of viable policy options, making it difficult for parties to craft alternative platforms that appeal to voters with distinct policy preferences (Morgan 2011, Roberts 2014, Lupu 2016). Not surprisingly, party systems with such shallow social roots are prone to high levels of electoral volatility, and they are ineffective vehicles for translating societal interests and preferences into public policymaking arenas. That is especially true for working

and lower-class groups, which are highly dependent on political organisation to mobilise their strength in numbers as a counterweight to the more privileged forms of influence and access that are available for elite groups.

172 These representational deficiencies are hardly unique to new democracies in developing regions, however. Even in Europe, the historical birthplace of socially grounded, programmatically-defined mass party organisations, ‘parties are not what they once were,’ as Schmitter (2001) pithily noted. In part, this reflects changes in the social, economic, and cultural landscape that have altered the terrain on which parties compete for support. Social cleavages based on class and religion have loosened over time; a wide range of interest groups and activist organisations have emerged alongside and independent of parties to articulate societal preferences and identities; and mass broadcast and social media have partially displaced party organisations from their traditional roles as agents of political communication, socialisation, and electoral mobilisation. In this more heterogeneous and pluralistic socio-cultural landscape, citizens have become increasingly detached from party organisations, giving rise to a phenomenon that Dalton and Wattenberg (2000) call ‘parties without partisans’ (see also Mair 2013). This societal detachment is especially pronounced among the younger generation of voters whose life experiences are far removed from the socio-political cleavages, alignments, and organisational forms of the industrial era.

173 Meanwhile, as parties’ social roots withered, they became increasingly professionalised, embedded in state institutions, and dependent on state resources to sustain their political activities. Rather than representatives of societal interests, parties may come to be seen as collusive and self-interested political cartels that share in the spoils of public office (Katz and Mair 1995). Tendencies toward cartelisation threaten to create an insular and professionalised political class that is poorly attuned to societal needs and largely unaccountable as an agent of democratic decision-making.

174 Cartelisation also expands opportunities for politicians to exploit public office for purposes of corruption, self-enrichment, and influence peddling, practices that seriously distort the democratic process and erase the boundaries between public and private affairs. Such rent-seeking practices thrive when the rule of law is weak and institutional checks and balances are inoperative. They are also encouraged when the exorbitant costs of electoral campaigns induce politicians and parties to cultivate ties to wealthy private donors, tilting the democratic playing field and undermining the responsiveness of democratic institutions to popular constituencies (Gilens 2012, Winters 2011). Party competition can thus open

channels for private wealth to skew the democratic process, converting economic power into political leverage (see Crouch's part in this chapter). Taken together, varied forms of cartelisation, corruption, and rent-seeking drive a wedge between citizens and the political class, and they exert a corrosive effect on citizens' trust and confidence in political institutions (see Vannucci's part in this chapter). Ultimately, they make democratic institutions susceptible to anti-establishment forms of populist backlash.

- 175 The erosion of parties' societal linkages has been compounded by their diminished capacity to perform a key historical representative function—that of crafting alternative policy platforms or programs that respond to a broad range of societal interests. A gradual programmatic convergence of mainstream conservative and social democratic parties has long been noted in Europe, while new parties have emerged on both the left and right flanks of traditional party systems by articulating an orthogonal axis of competition related to issues of post-materialism, nationalism, globalisation, immigration, and cultural identities (namely, the new left and Green parties on one pole of this axis, and far-right nationalist parties on the other pole; see Kriesi 2008). These trendlines have only intensified over the past decade: the post-2008 global financial crisis narrowed the programmatic options of national governments and forced those with serious sovereign debt crises to adopt orthodox austerity measures dictated by transnational European institutions (Streeck 2013), while the surge in immigration helped to politicise the national-cultural dimension of competition.
- 176 Indeed, in Southern Europe, where the economic crisis was especially severe, political dislocations are strikingly reminiscent of those seen in Latin America following that region's debt crisis and market-based structural adjustment in the 1980s and 1990s. Party system upheaval in Latin America was especially pronounced where austerity measures and neoliberal market reforms were imposed by labor-based or left-leaning parties that were traditional proponents of state-led development and redistributive social policies (Morgan 2011, Roberts 2014, Lupu 2016). Such patterns of reform dealigned party systems programmatically, leaving them without a major competitor to articulate and institutionally channel societal opposition to neoliberal orthodoxy. This opposition, therefore, tended to be channeled outside and against traditional party systems, leading to widespread social protest and the eventual rise of a diverse array of populist outsiders or new 'movement parties' on the left flank of mainstream parties in the region's post-adjustment era (Yashar 2005, Silva 2009).

- 177 Not surprisingly, then, the adoption of orthodox austerity measures by mainstream leftist parties in the early stages of the Southern European crisis has been followed by cycles of social protest and the emergence of new populist or movement competitors that challenge the political establishment. Paradoxically, as Mair (2013) suggested, by following a course of action that was “responsible” in terms of securing international market integration, parties had become less responsive to – and representative of – their core domestic constituencies. Such tensions are accentuated when parties transfer policymaking authority to technocrats and/or transnational institutions that are largely insulated from popular democratic pressures.
- 178 Too often, citizens respond to such flawed or failed forms of partisan representation by withdrawing from active democratic participation, as can be seen in declining figures for partisan identification and voting turnout in a large number of countries. As Donatella della Porta points out in her section of this chapter, however, other societal responses are possible. Social movements, for example, often emerge in the political void created by deficits in institutionalised political representation. By articulating issue dimensions and societal interests or values that mainstream parties have neglected, social movements can transform the policymaking agenda, create new axes of electoral competition, and give voice to new or marginalised social groups. Typically, they do so in extra-institutional arenas by means of diverse forms of social protest or ‘contentious politics’ (McAdam, Tarrow and Tilly 2001).
- 179 Social movements, however, need not remain on the margins of democratic institutions, and their repertoires of contention are not limited to protest activities. Movement organisations and activists often work within established parties, or even found new ‘movement parties’ that articulate their agendas in electoral and parliamentary arenas (della Porta, Fernandez, Kouki and Mosca forthcoming). In the process, they may re-align or reconfigure national party systems and enhance the representation of diverse social groups. Such was the case with the Green parties spawned in the 1980s by European environmental, peace, and women’s rights activists. Examples from Latin America include the Workers Party in Brazil, which was founded by labor and community activists, and the Movement Towards Socialism (MAS) in Bolivia, which gave partisan expression to a plethora of indigenous, peasant, and community-based movements in the early 2000s (Madrid 2012). More recently, the *indignados* anti-austerity movement in Spain set the stage for a new movement party, *Podemos*, which has challenged the programmatic convergence of the country’s two mainstream parties. *Podemos* and other movement or leftist parties in a number of countries have repoliticised economic policymaking around issues of inequality,

social citizenship, and workers' rights, potentially expanding the range of policy debate in response to the post-2008 crisis of global capitalism.

- 180 Similarly, a plethora of civil society actors are performing interest articulation and representation functions that parties once monopolised. Many civic groups work with progressive parties and local or national governments to shape the public policymaking agenda and respond to social needs. Reforms to decentralise governing institutions have sometimes facilitated these forms of public-private partnership, opening new channels for grass-roots participation by community-based civic networks. In many cities community organisations are playing an important role in budgeting, program design, policy implementation, and the monitoring of public agencies (Baiocchi, Heller, and Silva 2011; Heller 2001). Such pluralistic forms of civic engagement clearly provide opportunities for societal input and representation that are a vital complement to the activities of party organisations. To be effective, however, these forms of civic engagement place a premium on the organisational strength and autonomy of societal actors, attributes that are too often found in short supply.
- 181 Other types of institutional reforms might also be designed to enhance parties' responsiveness to societal concerns. Serious efforts at campaign finance reform and the regulation of media-based political advertising might reduce the incentives and opportunities for corruption. In so doing, they could help to protect the democratic process from the influence of private wealth. Likewise, a strong independent judiciary and an independent electoral agency are vital to safeguard against abuses of power and maintain the integrity of the electoral process. Primary elections and internal democratic decision-making procedures can open up party organisations to more grass-roots participation and citizen input. It should be recognised, however, that institutional reforms often have unintended consequences or potential tradeoffs between conflicting goals. Primary elections, for example, may give citizens greater voice in the selection of party candidates for public office, but they can also inflate the costs of elections and encourage polarizing or populist tendencies in party systems. And while public financing of election campaigns may provide a measure of protection from the distortionary effects of private wealth, it can also make parties more dependent on state resources, reinforcing their cartel-like tendencies.
- 182 Ultimately, modern democracy has seen a proliferation of new societal actors in the public sphere, but it has yet to discover a substitute for party organisations in a number of essential representative functions. For better or worse, parties continue to

structure electoral alternatives, form governments, and determine macro-level policy initiatives. The latter, to be sure, are drawn from a narrowing range of alternatives that are constrained by global financial markets and transnational institutions, at least partially shielding national governments from popular democratic pressures. The ability of parties to craft meaningful programmatic alternatives at the national level would be well-served by coordinated international efforts to govern global markets; indeed, vigorous advocacy of such coordinated efforts could offer a new opportunity for parties to craft progressive platforms that are clearly differentiated from the mainstream technocratic convergence around market orthodoxy. In the meantime, both traditional and newly-emerging parties face the challenge of giving institutional expression to the broad range of societal actors and interests that are clearly dissatisfied with conventional forms of representation.

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8. Expertize and Democracy

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Science and expertise have been granted large roles as facilitators of democracy in the theory and practices of modern governments. The roots of such thinking extend back to the Scientific Revolution. The rise of experimental science, it is argued, gave citizens a new model for witnessing rulers' claims and holding them to higher standards of public justification (Ezrahi 1990). By the late nineteenth century, scientific knowledge, aggregated and communicated by experts, came to be seen as providing an indispensable baseline for accountable political action, ensuring that governments would not move outside the limits of reasonableness and that publics, too, would agree on the demonstrated need for new agenda items and policy decisions. Progressive politics at the turn of the twentieth century accepted and largely celebrated the growing delegation of policy responsibility to experts (Skowronek et al. 2016). Despite the shocks of two world wars and subsequent pessimism about technology's power to reduce human autonomy and freedom (Arendt 1958; Habermas 1970), faith in government based on facts and evidence has only grown. While arguments persist about the meaning and implications of scientific observations, few question the proposition that sound science serves the democratic demand for sound policy.

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Across wide swaths of public policy, developments over the past 100 years seem to have borne out the assumption that scientific knowledge increases civic participation, encourages interstate

collaboration for the public good, and enhances the quality of public reason. Nineteenth-century divisions based on race and gender, for example, gave way to advancing biological and sociological knowledge that established the equal capabilities of all human beings, and thus laid the foundation for equal political treatment of all.[6] More recently, environmental and health knowledge has spurred the formation of national, and to some extent global, “epistemic communities” (Haas 1990) on issues from biodiversity to pandemics and climate change—thereby promoting worldwide mobilization against potentially catastrophic harms.

186 Yet, faith in the democratizing influence of enlightened knowledge has long been offset by countervailing doubts: in particular, the threat that superior knowledge and expertise will create hierarchies of non-accountable power and exclude the *demos* from choosing its own purposes or questioning the reasons given for the *élite*’s political judgments (Dewey 1927). Moreover, if public facts are made in ways that shore up prior constellations of power, dominance, and injustice (Foucault 1977, 1980), then where and how can possibilities of democratic accountability and self-governance assert themselves?

187 Constructivist scholarship on science and technology over the past half-century has underscored these dimensions of concern and added new ones. Investigations of scientific practice, following the lead of Ludwik Fleck (1979 [1935]) and Thomas Kuhn (1962), replaced a naturalistic account of scientific truth, in which science unproblematically mirrors nature, with humanistic and social science perspectives that treat science as a mode of representation and interpretation. How such representations achieve and maintain authority then becomes highly relevant to analyses of democracy and law. A body of work emanating from the field of science and technology studies (STS) shows that knowledge about the world and norms for inhabiting the world are coproduced (Jasanoff 2004)—that is, our factual depictions of how the world is cannot be disentangled from our understandings of how we should live with the fruits of that knowledge. On this view, scientific claims are neither neutral nor universal but rather reflect the contingencies of their conditions of production. It follows that scientific facts are not so much starting points that enable concerted action as endpoints of social and political struggle (Latour 1987). And if facts are established through politics, then the hope that facts can supply a reliable, neutral ground, enabling all players to stand on a level playing field of shared knowledge, becomes more mirage than reality.

- 189 At stake in contemporary debates on the merits and guiding force of technical expertise is one of the founding premises of modernity: does more knowledge lead to greater benefits for society? That question in turn breaks down into subordinate puzzles about what and how publics know, or can be expected to know, and how powerful institutions acquire and process knowledge. Is the Enlightenment promise that civic maturity will grow along with the rise of scientific understanding still valid, or is a more complex restatement warranted? What is the evidence on either side, and how should democracy reconfigure itself to take note not only of what science delivers but also of the limitations of public scientific knowledge? Further, given that knowledge is a form of power, do means exist in contemporary democracies to ensure that this power is accountably wielded? Attempts to address those questions have revealed a number of paradoxes in the very idea of reason-driven progress.
- 190 Findings from a half-century of scholarship on the practices of science and technology help explain a number of challenges to democracy and the rule of law that have surfaced in late modernity. At the same time, the uptake of the revised, socialized version of science accepted by STS scholars, and the problems it poses for political theory and practical politics, is far from complete. Across the landscapes of politics and policy the older view of science as a source of supreme epistemic authority continues to hold sway. Many of today's most intransigent political conflicts about how best to ensure social progress can be traced to fundamental disagreements about the relationship between facts and values, the nature of objectivity, and the presumptions that should guide working relations between the institutions of science and technology and those of law and politics.
- 191 The need for science and technology in governance is not seriously in question. It has come to be accepted throughout the modern world that investments in science and technology are necessary if societies are to remain healthy and viable, whether (as in the case of developing countries) by escaping from entrenched poverty and its assaults on human dignity, or (as in the case of technologically advanced societies) by maintaining prosperity through growth in jobs and economic opportunities. Those investments increasingly include not only science responsive to scientists' curiosity about fundamental aspects of nature, such as the origins of the universe, but also science answering to governmental demands for useful knowledge with which to make policy. By the late twentieth century, the world's collective knowledge-producing capabilities included a large share of what came to be called Mode 2 science (Gibbons et al. 1994): applied, transdisciplinary, multisited, and reflexive or

conscious of its own value-ladenness. That rubric covers much social knowledge (Camic et al. 2012), such as knowledge relevant to health, safety, economic, and environmental concerns.

192 The economic benefits of pursuing technology-led development policies have been dramatically illustrated in some parts of the world, most notably perhaps in the rise of the so-called Asian tigers—Hong Kong, Singapore, South Korea, and Taiwan. The relationship of economic and technological development to democracy, however, remains far from obvious. The Tigers, along with neighboring countries such as Indonesia, Malaysia, Vietnam, and Thailand, exemplify similar developmental trajectories, wedded to increased industrialization to serve national interests, but they have embraced very different pathways to involving publics in governance. The emergence of China as a global economic superpower only reinforces the lack of fit between the welfare benefits of scientific and technological activity in a society and its commitment to conventional forms of democracy.

193 In Western democracies, as well, fractures have appeared between the upward curve of investments in knowledge creation and perceived gains for society. First, contradicting the presumption that increasing knowledge will resolve ambiguities and provide more reliable grounds for politics, more science seems instead to have opened up new frontiers of doubt and uncertainty. Science has indeed been democratized in the sense that actors of diverse political stripes can acquire their own experts and make claims supportive of their political positions; but more knowledge has not necessarily produced greater convergence among disparate groups within or across nations. Instead, in this period of reflexive modernization (Beck 1992), science provides ever more resources for people to question the very facts that science produces in such abundance. The results range from what Ulrich Beck (1999) termed “organized irresponsibility”—a condition characterized by lack of accountable rulership—to “science for hire,” with claims generated to serve parochial political interests rather than any detached search for truth. Privatization of knowledge-making services in a neoliberal era has generated novel pockets of non-accountable expertise: models and algorithms that govern vast tracts of economic and social policy are guarded against transparency or critique by the laws of intellectual property and secretive corporate practices. Additionally, in most technologically advanced societies, expert knowledge related to military strategy remains largely outside the purview of democratic supervision.^[7]

194 Second, in spite of the demonstrated contingency of policy-relevant expert knowledge, science in the abstract continues to provide a powerful deskilling discourse with which politicians can deflect

democratic criticism by accusing their critics of lack of scientific understanding. Numerous now canonical examples accruing toward the turn of the 21st century illustrated this dynamic: a controversy over the relationship between vaccination against childhood diseases and autism; widespread rejection of genetically modified crops and foods; skepticism toward the increasingly strong expert consensus around the urgency of anthropogenic climate change; and, especially in the United States, ongoing rejection of evolutionary theory in favor of beliefs grounded in the Bible. To these may be added Britain's surprising referendum vote in June 2016 to leave the European Union ("Brexit"), which some commentators immediately attributed to an ignorant rejection of economic expertise. In each case, the notion that publics are scientifically illiterate—and hence incapable of deciding rationally for themselves—was accepted by many in positions of high technical and political authority. For adherents of this "deficit model" of citizenship (Wynne 1994), it follows that a knowledge-deficient *demos* cannot be entrusted with the rights and obligations of democracy.

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Third, law, the institution that most closely parallels science in its claims to impartial authority and commitment to reason, has found its authority compromised by accusations of scientific illiteracy. Judges, like other members of the lay public, are frequently charged with lack of scientific understanding (Jasanoff 1995), especially in the United States, where political disputes often spill over into litigation. More insidiously, legal institutions are themselves complicit in accepting a bright-line distinction between facts and values, and the corollary assumption that fact-finding must precede normative judgment. This is most starkly apparent in the prevalent discourse of the "law lag," which holds that law is unable to keep up with the rapidity of scientific and technological advances and thus constantly arrives too late in its efforts to resolve the situations of moral ambiguity or indeterminacy opened up by those developments (Hurlbut forthcoming). Implicit in this discourse is the view that some norms of science are not open to second-guessing, most notably, the norm that more research is always a public good, as a promoter of unending social progress.

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These and related developments underscore the need to complicate earlier views of the linear relationship between knowledge and social advancement with greater awareness of the institutional infrastructures within which expert knowledge is generated and put to use. A growing literature points to the specificity of the contexts of knowledge generation, showing the varied and subtle ways in which tacit assumptions about the right ways to organize collective behavior impinge on and shape a society's approaches to producing shared knowledge and reasoning. Those underpinnings, because tacit, tend to be reproduced and reaffirmed by largely unreflective

institutional practices. Therefore, although robust democracies continually give rise to new expert institutions and new knowledge-based policy initiatives, some deeper commitments to forms of politics rarely get exposed to critical scrutiny. These virtually constitutional dimensions of political culture, which have come into relief through comparative studies of policy making, shape the conditions of possibility for modern politics, whether democratic or authoritarian.

197 **8.2 Cultures of Public Reason**

198 Some two centuries of industrial development have essentially disproved the commonplace view of technological determinism, that human progress is driven by possibilities unlocked through material inventions. The violence of war, and nuclear catastrophe in particular, are obvious reminders, but the inadequacy of the technoscientific progress narrative emerges from many other findings. Importantly, there appears to be nothing deterministic about how societies respond to scientific findings and technological innovation. To be sure, technologies with enormous implications for society sometimes disperse quickly and pervasively throughout the global marketplace—such as cars, cell phones, computers, and to some extent contraceptives. But on a great variety of technologies, from industries emitting greenhouse gases to agricultural biotechnology, both lay and official responses have failed to converge transnationally, even where there is strong scientific consensus about the nature of the risks and benefits. Put differently, it is not the spread of science, technology, and expertise that define how societies come to see actions as reasonable or progressive. Rather, it seems that preexisting ideas of how to assess expert judgments shape which claims society sees as meriting collective response.

199 Cross-national divergences in technically grounded decision making suggest that the public uptake of expert claims is a phenomenon to be understood in its own right in any comprehensive account of democracy and the rule of law. Some steps in this direction may be noted. “Civic epistemologies” (Jasanoff 2005), or ways of public knowing, refer to the institutionally stabilized ways in which nation states organize their modes of public reasoning. States differ in the practices by which they generate public knowledge, select and authorize experts, subject epistemic claims to public testing, and construct the very idea of objectivity in public discourse. These historically and often legally grounded practices affect the credibility of expert claims. It matters, for instance, whether public expertise is built, as in Germany, as a “view from everywhere,” with all interested parties gathered around the same table, or as a “view from nowhere,” as in the United States, constructed through adversarial clashes among interest groups so as to produce claims that appear to stand

above and outside of identifiable interests. The more inclusive practices of “view from everywhere” reasoning have led to markedly fewer public knowledge controversies than the “view from nowhere” approach. The latter approach, however, encourages a more skeptical style of citizenship, with lay publics more willing to question claims of higher epistemic authority. Closure then depends on the capacity of ruling institutions, such as courts or expert advisory bodies to draw acceptable boundaries between valid and invalid claims and reasons—which occurs in the United States with only mixed success (Jasanoff 1990, 1995).

200 No theory of political legitimacy questions (as yet) that sovereign states have a right to organize their public knowledge practices in accordance with their own cultural understandings of how to constitute relations between experts and citizens. If, however, divergent practices lead to different appraisals of the state of the world—whether the matter is climate change or plant genetic modification or threats to public health—then there could be a democratic justification for epistemic subsidiarity, that is, an acknowledgment that different assessments of the same facts may be allowed to coexist without needing to be standardized or brought into complete harmony. How and under what circumstances such subsidiarity may be tolerated remains an open question for political theory, especially in a global world. One may rightly deplore the arbitrary moves by which South African president Thabo Mbeki denied his nation’s HIV-AIDS patients access to potentially life-saving drugs, without accepting that letters signed by dozens of eminent scientists or Nobel Laureates should take precedence over national political judgments.[8] In any case, the demonstration that public facts were publicly deliberated can be taken as a minimal precondition for global organizations, such as the World Trade Organization, to acknowledge epistemic subsidiarity (Winickoff et al. 2005).

201 **8.3 Epistemic Democracy: A New Constitutional Form?**

202 The paradoxes and divergences identified above are likely to increase as technical expertise finds its way into new domains of decision making and is disseminated through the ever more widely accessible digital medium. Policy choices at the frontiers of biomedical research, for example, have become subject to bioethical supervision throughout the world, and a relatively young profession of bioethics has emerged to meet that demand, although neither criteria of membership nor deliberative procedures are standard across countries (Hurlbut forthcoming; Jasanoff 2005). Human rights has spawned its own forms of expertise, ranging from measures of violation and compliance (Sikkink 2011) to means of identifying victims for purposes of truth and reconciliation. Citizen science

initiatives have sprung up to gather and distribute information on matters the authorities preferred to leave uncounted or failed to acknowledge as politically significant (Corburn 2005). The march of privatization and outsourcing has profoundly affected the production of expertise, delegating greater authority for knowledge making to nonstate actors and thereby creating new puzzles for accountability and quality control (Lentsch and Weingart 2011). The proliferation of social media allows ease of access to information, enabling popular sovereignty in theory, but it also encourages the reinforcement of views within closed, pre-formed groups rather than deliberative exchange across belief systems.

203 Democratic societies are not insensitive to these challenges, and developments over a half century indicate growing awareness that public participation in the workings of government must include forms of epistemic engagement. However, histories and trajectories for delivering on this insight, as well as the capacity to forge closure in situations of deep epistemic conflict, differ across countries and scales of governance, in accordance with institutionalized civic epistemologies and practices of reasoning. A further complexity for democratic governance arises from the recognition that participatory processes not only invite engagement but, to some degree, construct the very publics they seek to engage (Chilvers and Kearnes 2015). Even in cultures committed to open access, pressures may thus form to exclude forms of participation that rulers see as unreasonable. In turn, the moves by which such exclusions are made are themselves culturally conditioned. In the United States, for example, the notion that publics can evaluate facts and reason for themselves has been undercut in recent years by scientific claims purporting to show that people make irrational choices unless “nudged” by “choice architectures” developed by benevolent public authorities (Thaler and Sunstein 2008). This marshaling of social science evidence to critique and constrain an argument from politics is consistent with a political culture in which the fact-value distinction is sharply maintained.

204 To sum up, some 350 years from the beginning of the Scientific Revolution, modern societies find themselves caught in novel binds about the role of knowledge in fostering democracy and the rule of law. The wide dissemination of knowledge and knowledge-making capabilities has not necessarily brought about the preconditions for making well deliberated, let alone wise or even rational, judgments. A tacit recognition has grown, reflected in changing rules of public engagement, that the relationship between politics and science needs to be retheorized and new practices need to be developed to keep citizens meaningfully involved in the dynamics of public reason. But fundamental challenges remain in the form of increased splintering and privatization of knowledge making, the loss of trust in

expert bodies, the opacity of transnational organizations, the persistence of power imbalances between rich and poor, and (not least) the unreflective uses of science to exclude positions that rulers find too uncomfortable to admit into the centers of decision making.

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9. Participatory democracy in the neoliberal era

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In speaking of democratic deficits and paradoxes in our current era, it is impossible not to address the issue of citizen participation. Indeed, partially as a result of disappointments with democratic institutions, we are living today through a veritable ‘participation revolution.’ The idea that citizens ought to be at the centre of governance has, since at least the late 1990s, become a central part of mainstream policy thinking. Although many – if not most – of the ideas about participation emerged with social movements and the political Left, enthusiasm for ‘citizen participation’ today spans the political spectrum (as well as the globe) and is today widely endorsed and promoted by mainstream public policy experts, pro-market actors, as well as social movements. From deliberative polls to plebiscites, to e-governance, to participatory budgets and all manner of citizen forums, it is hard to find a democratic government today that does not invoke citizen participation in some form. Today we are witnessing a new political moment in which citizen participation is no longer the assumed domain of outsiders but has become widely encouraged, if not directly mandated, by governments and multilateral agencies. As Matt Leighninger (2006) writes in his enthusiastically titled 2006 book, *How Expert Rule Is Giving Way to Shared Governance – And Why Politics Will Never Be the Same*, ‘In the 20th century, public life revolved around government; in the 21st century, it will center on citizens.’ Similarly very many others discuss the dawning of an era in which citizens have come to participate in all sorts of matters previously reserved for government bureaucrats and politicians. To talk of citizen participation today is to address something being invoked by *Podemos* in Spain, by the Bolivarian Revolution in Venezuela, as well as by the World Bank and the EU.

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Yet, despite the enthusiasm, citizen participation is today deeply paradoxical, and in this small section we briefly explore what we see as its premises and limits. Participation, generally speaking, is today understood as a compelling way to gather governmental input, build trust in government, and create communities of engaged citizens.

More sanguine promoters also hold the view that participation, properly instituted, can help solve all kinds of modern-day problems of governance and politics. Yet, citizen participation today is fundamentally compatible with neoliberal tenets; not only has it emerged at the time of neoliberal reforms and government rollbacks (and in some cases been deployed with the purpose of legitimating those reforms), moreover, it is based on the idea of the individual, self-responsible citizen who solves problems without recourse to politics, movements, or sectoral representation. And mechanisms of citizen participation very seldom address the fundamental questions of power and inequality at the heart of the neoliberal project. But this is not all, however. Participation does bring together communities of equals under a logic of inclusion, which tensions neoliberalism. And what participation can come to mean can be very different in places, depending on the power of movements, associations, and unions to shape the experience. These, of course, are the very actors that current understandings of participation do not recognise.

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9.1 The history and development of participation: the ‘perverse confluence,’ top-down influences & travel

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Although numbers are difficult to come by, most experts agree that the number of experiences of citizen participation have exploded in the last two decades across the global North and the global South. As Archon Fung suggests, part of the difficulty in estimating the extent of participation is that ‘the forms of participatory innovation are often local, sometimes temporary, and highly varied’ (Fung 2015: 514). But all indications suggest it is a very major trend. There is general agreement that we are living through what Caroline Lee, Michael McQuarrie, and Edward Walker have called a ‘participatory revolution.’ Today, they note, ‘across the political spectrum, increasing citizen voice is viewed as a necessary counterweight to elite power and bureaucratic rationality’ (2015: 7). Caroline Lee, who has studied the rise of the ‘Public Engagement Industry,’ dates its appearance to the late 1980s but notes a tremendous growth in the 2000s. Demand for services by the International Association for Public Participation, for example, tripled between 2005 and 2008 (Lee 2015). In addition, participatory instruments now quickly travel the world as processes of ‘fast policy transfer’ (Peck and Theodore 2010).

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Dagnino, Olvera, and Panfizzi, in the context of Latin America, have described a ‘perverse confluence’ between democratizing projects and multilateral agencies around the desirability of participation. This resulted from the meeting of genuine ‘democratizing projects that were constituted during the period of resistance to authoritarian regimes’ and ‘neoliberal projects’ at the end of the

1980s. 'In effect,' they write, 'they are based on the same references: the construction of citizenship, participation, and the very idea of civil society' (2006:16). All manner of New Left parties, movements and NGOs turned away from Leninist practices and took a 'local' and a 'social' turn, with a central focus on ideas of civil society and participation (Castañeda 1993: 200). Throughout Latin America in the 1990s, there were demands and claims from social movements and new progressive actors who sought to reform the state and deepen democracy through participation. This discourse ranged from the Zapatistas, to the Civil Society Assembly in Guatemala, to local administrations run by the Workers' Party in Brazil, to the Movement for Socialism in Bolivia, among many others. At the same time, agencies like The Inter-American Development Bank, USAID, the World Bank, and other bilateral and multilateral donors like DFID (UK), CIDA (Canada), UNDP, and major foundations like Ford, Kettering, Rockefeller, and MacArthur had all adopted the language of civil society and participation. For one indicator among many, at the global level, the World Bank has invested \$85 billion in development assistance for participation in the last decade (Mansuri and Rao 2013, cited in Fung 2015: 514).

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Citizen participation in the global North follows a similar time-line and similarly wide cast of characters. There was been a sea-change in thinking about governance and the role of the citizenry since the late 1990s. With the growing disappointment with New Public Management and ideas of the minimal state, there has been growing receptivity to various forms of citizen involvement in governance in both the global North and global South. In the early 2000s, in particular, there was growing concern about the quality of democracy and democratic participation in industrialised democracies. At the same time as alterglobalisation activists expressed their desire for a more genuine global democracy, and innovated through the practices of NGOs and new movements – sometimes directly inspired by Global South movements like the Zapatistas or Brazil's Landless Movement-mainstream scholars and government officials worried as well. While the tenor was slightly different in Europe and in North America, the worry about declining citizen engagement, growing apathy, mistrust in government, and atomisation was shared. As a result, there were a number of reforms and policy initiatives in several countries meant to encourage participation and bring citizens back into the work of government. Some have called this broad move a turn to 'Public Governance,' even if there is no consensus yet for the reforms and policies intended to increase citizen participation. But the trend is very clear. For North America a survey from 2009 found that almost all cities responded that they provided 'opportunities for civic engagement in community problem solving and decision making' and that nearly three-fourths of them had instruments in place for citizen decision making in

strategic planning that year[9]. In Western Europe the figures are similar, and several countries now mandate citizen participation as part of recent local government reforms[10]. Nabatchi and O’Leary (##) catalog and describe the tools of this new governance, which include deliberative democracy, e-democracy, public conversations, participatory budgeting, citizen juries, study circles, collaborative policy making, and alternative dispute resolutions that permit citizens and stakeholders to actively participate in the work of government.

212 **9.2 Compatibility with neoliberalism: marginal experiments, self-responsible citizens, and conflict-free deliberations, and without Sectoral Representation**

213 While they range in format, new forms of participation share some common features. They are open, and inclusive, and place ‘ordinary citizens’ at the center. That is, they are not mediated by what are nowadays described as representatives of ‘the old ways,’ like unions, social movements, or political parties. And participation is not supposed to be conflictive, as it promises a win-win for all: governments get better input, citizens are heard, new solutions are dreamed up, and a more encompassing and inclusive sense of the common good emerges out of deliberation for all involved. By and large, participatory experiments have brought new participants to the *demos*. Though there is significant variation, there are significant successes in attracting non-traditional and vulnerable participants to forums that in some instances have surpassed the capacity of social movements in creating inclusive spaces. There is evidence of democratic learning, and some evidence of increased civic capacity that has been spurred by these.

214 Nonetheless, there is reason to worry, and critical scholars have begun to point to the ways that participation is part and parcel of neoliberal reforms (Hickey and Mohan 2004), with some, like Pablo Leal, referring to ‘the buzzword of the neoliberal era?’ (Leal 2007). It is more than the fact that participatory democracy has spread as governments have retrenched, or that local governments have, in some cases, introduced participation to improve the fiscal management of dwindling resources.

215 The first worry is that these experiments often take place at the margins of the state apparatus, without significant government reform, and without transforming the functioning of state institutions. They invoke the language of empowerment without devolving significant decision-making to participants. Many experiments are introduced ‘from above’ and do not allow for participants to define the terms of participation itself. Many of these experiments – particularly consultative forums – do not wield

decision-making power, or if they do, they do not wield decision-making power over significant decisions, such as economic policies. These experiments are fundamentally not able to challenge inequalities that are one of the principal threats to democracy. Second, there is the worry that participation paves the way to a depoliticisation of the public sphere. Participation today emphasises important characteristics of the neoliberal citizen: self-regulation, responsibility for individual problems, and a nonconflictive partnership with the state (Li 2005). In this formulation people are 'conceived as individuals who are to be active in their own government, and shifting responsibilities for problems to individuals and communities' (Ferguson 1990). As the state pulled out of the realm of social policy, these participatory citizens are charged with shouldering the burden. And third, there is the move away from sectoral representation. It is not uncommon for promoters of participation today to frame their appeals in terms of going beyond unions, social movements, neighborhood associations, or interest groups, and placing emphasis on 'regular citizens.' There is no role for such organisations. This changes the structures of collective negotiation between the organisations and the public authorities with a direct system of decision-making. But this emphasis on direct voice can conflict with, and disempower, associations and movements formed around conflicts. Thus, the worry by Frances Cleaver and many others, that a central postulate of the thinking on participation today is that while there is a lot of emphasis on 'getting the techniques right,' 'considerations of power and politics on the whole should be avoided as divisive and obstructive' (Cleaver 1999: 598).

216 **9.3 Tensions with neoliberalism, and recapturing democracy from below: associational power, camps and other demands**

217 The idea of citizen participation in matters of common concern has very clear origins in social movements and progressive instincts. Yet, participation today is a different phenomenon. If participatory democracy's scope has expanded, its emancipatory dimension has all but disappeared. The question, rather than whether participation is neoliberal, is what its potential to tension the neoliberal project might be. More and more, democracy appears to spread while its meaning seems to be ever more modest. There are more ways than ever to participate democratically today, but the range of decisions within the reach of the *demos* seems narrower than ever. 'We are all democrats now,' writes Wendy Brown, but, as her essay also poignantly asks, 'what is left of democracy?'

218 There are some ways that citizen participation can come to be in tension with neoliberal projects. First, is that while it is difficult to track with any precision because participation is so ubiquitous, we

can say that participatory experiments have brought new participants to the *demos*. Though there is significant variation, of course, and in some instances there are significant successes in attracting non-traditional and vulnerable participants to forums. This is not a trivial accomplishment, especially in that these are formally spaces of equals, where all, in principle, are allowed equal voice. In some instances these have surpassed the capacity of social movements in creating inclusive spaces. There is also evidence of democratic learning, and some evidence of increased civic capacity that has been spurred by these spaces. In a world of increasing inequality and segregation, these can be very significant spaces.

219 And finally, there is recurring finding by the scholarship that what participation comes to mean is ultimately contingent on local configurations of actors. Whether we are speaking of the Andes, of Brazil, of Southern Europe, or India, one recurring and robust finding has been that social movements, political parties, and unions can push citizen participation to be more transformative, more empowering, more responsive to local context, and more tied to fundamental decisions that matter[11]. Participation, in fact, continues to be a platform of social movements and other actors who see in it the potential to deepen democratic institutions and foster social change (see della Porta's part in this chapter). Yet, these are the very actors that are excluded in current modes of citizen participation.

220 10. The judiciary as a challenger

221 10.1 The changing role of the courts

222 Ever since the 1960s, the social and political role of courts has dramatically changed, prompting a shift in the balance of powers within representative democracies. Although the intensity and the timing of this transformation has differed from one country to another, the judicial branch has been endowed with new functionalities (social change, policy reform, symbolic politics of identity recognition, market regulation, etc.) and has become a central and relatively autonomous arena for the mediation of political, economic and social interests. This ubiquitous rise of the judiciary has triggered optimistic scholarly and political discourses on the emancipatory and democratic potential of this new path. Many have viewed this judicial empowerment as fulfilling the promises of liberal democracies in terms of equality and rights, taking 'law' out of

the hands of bureaucrats and politicians and bringing it back to the 'people' and civil society. The ideal-type of judicial arenas (equal access to the court, fair and contradictory trial, professional and 'independent' judge) have become increasingly valued to settle the hard cases of democracies, against the 'pitfalls' of representative democracy and 'public choice', be it at national level (against party politics and bureaucratic interests) or at the international level (against political and diplomatic actors). Yet, the progressive potential of this rights- and courts-centered approach is now undermined by its very success. While the rise of the judiciary has opened up new avenues for social progress, it has at the same time, in a sort of 'boomerang effect', further contributed to weaken the traditional channels of representative democracy and party politics. In addition, the instrumental role given to courts in the rise of neo-liberal modes of governance threatens their capacity to live up to the new democratic and social promises that they have been endowed with over the past decades.

223 10.2 An alternative use of rights

224 For long, the 'rule of law' and the judiciary have been viewed by progressives as belonging to a broader block of socially and politically conservative elites that protected economic freedoms (property and freedom of contract) and impeded the unfolding of 'New (social and economic) deals'. In a variety of Western countries, however, the 1970-80s have brought an important change as new claims for equality, often framed in terms of minority rights, have been pursued through litigation strategies before courts. In the wake of politicisation of late 1960s, new conceptions of law (ex: '*uso alternativo del diritto*' in Italy, 'cause lawyering' in the United States) and of courts have emerged within the legal professions in Western Europe, America and in part also in Latin America. New social movements have contested the monopoly of unions and left-wing parties over the realm of progressive politics, in part through the progressive discovery of the emancipatory potential of rights' claims. The world of human rights' activism that has emerged around transnational NGOs (Amnesty, Human Rights Watch, Oxfam, FIDH, etc.), philanthropic foundations, and professional lawyers have come to consider 'courts and rights' as a key avenue to fulfill the political and social promises of equality encapsulated in liberal democratic founding declarations. Following the successes of civil rights' advocacy in 1960s America, advocacy groups have embraced forms of 'cause lawyering' turning law and courts into new levers for furthering their political undertaking (women's rights, indigenous rights, minority rights). Viewing courts as more responsive to their cause, they have used them as a correction mechanism for the flaws of majoritarian democracies, gaining access points in the policy

process through litigation. To a certain extent, the judicial avenue has therefore become a surrogate for democratic participation for minority groups structurally marginalised in the political field.

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In turn, rights and courts have been profoundly transformed. Historically framed in the liberal tradition as *political* and symbolic in nature, texts, and principles. These changes have also triggered a profound transformation of the judicial branch itself. Under the lead of regional or international organisations that have promoted higher 'standards' of independence and new forms of judicial cooperation national borders, courts have become more autonomous from political and bureaucratic control. In many contemporary democracies, their role has made a drift away from the stato-centric conceptions as a formal component of the bureaucratic apparatus. In addition, courts have become more accessible and 'responsive' institutions even though they are not just one land of opportunity equally open and accessible to citizens regardless of their social and professional status: access to justice has been facilitated both for individuals (legal aid) and for interest groups (class actions, or *amicus curiae* before international courts such as the WTO appellate body) opening more alleys to use judicial arenas as a venue to settle political and social conflicts. Last but not least, the weakening legitimacy of political parties and legislatures has prompted new delegations of powers to constitutional courts progressively extending the scope of judicial review into new domains (conditions of political campaigning, same-sex marriage, affirmative action's policies, etc.). Civil society movements, new fractions of the media as well as moral entrepreneurs from the political ranks have called for and welcome the increasing judicial review over political and State activities -from the spheres governed by the '*raison d'Etat*' (secret services) to the realms of political clientelism ('Clean Hands' operations in Italy, Spain and in Brazil). Combined with the ubiquitous rise of constitutional courts that develop judicial control of governmental legislation and administrative action, this process has elevated judicial institutions in a position of being a, if not *the most*, legitimate controller of 'political virtues' (Pizzorno, 1998).

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10.3 Judicialization and the elites

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Yet, this dramatic change in the role of courts has prompted a wider shift in the allocation of political authority within representative democracies. First of all, against all naïve narratives of judicial empowerment, one should point at the fact that these processes of judicialisation are themselves oft driven by political and social elites: at times, they may even be an essential lever through which threatened political and social elites attempt to preserve their hegemony and lock in their policy preferences and worldviews, as Ran Hirschl (##) has argued in the case of the rise of constitutional

courts in countries such as South Africa or Israël. Emblematically, the recent anti-corruption inquiries in Brazil and the related impeachment procedure against the democratically-elected president, Dilma Rousseff, have been led by conservative political elites. Second, because of the very individualizing of features of rights' claiming, judicial petitioning has also brought its own contribution to processes of depoliticisation. The development of a 'rights' talk' that has hampered the public debate has often led to an 'impoverishment of the political discourse' mostly centered on individualism and liberty at the expense of more collective causes and solidarity campaigns. Last: while it has helped concretise the claims for 'equality before the law', the rise of courts has further undermined the political relevance of the traditional arenas of representative democracy. Even though this process has been ubiquitous, it has proved particularly subversive in civil law countries – whether European or Latin American – where the judicial branch had historically been thought of as a functionally distinct but structurally integrated (and subordinated) unit under the common umbrella of the *volonté générale* embodied by parliamentary and State institutions. This has fueled the development of new forms of populism that have pointed at the judges' lack of social and political legitimacy. Revamping old criticisms of the '*gouvernement des juges*' and old concerns over the "counter-majoritarian difficulty", new waves of contestation of judicial review and constitutionalism have emerged in terms of the transferal of power away from the national parliaments and towards a 'juristocracy'. The recent British campaigns against the European Court of Human Rights (ECtHR) provides a striking example of this growing conflict over the role and place of courts, in particular international courts, in contemporary globalizing society.⁴

228 **10.4 Courts in neoliberal market making**

229 The promises raised by the rise of rights however face an ever bigger challenge given the instrumental role that courts have been endowed with in the context of the rise of neo-liberal economics. With the general retreat of State interventionism in the economic realm, courts have indeed become the new pivot institution of the development of 'competitive market', together with regulatory agencies most often shaped on a quasi-judicial model. Under the umbrella of the 'Regulatory State' championed by neo- and ordo-liberal doctrines of market regulation, courts are increasingly instrumental for the liberalisation of trade (e.g. the creation of WTO appellate body), the development of free competition and the prevention of 'market failures', at the expense of alternative understandings of the 'general interest' (e.g. social protection). Business elites and interest groups have used them to put economic freedoms at bay from the dynamics of democratic politics, securing a

constitutional statute for economic freedoms through judicial or quasi-judicial bodies (such as regulatory or competition agencies). The European Court Justice (ECJ), arguably the most effective international/regional court in the world, provides a clear example. In duet with the European Commission, the ECJ has defined itself as 'market builder', forcefully promoting a jurisprudence coined as 'market constitutionalism'. While economic freedoms have gained a very powerful stance in Luxembourg, their dominance has prompted a selective protection of human rights, favoring the rights that were instrumental to the building of a Single Market (non-discrimination, sex equality) while disregarding (or dismantling) others (e.g. labor rights) that remain weakly protected at the EU level.

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This connection between neoliberalism and courts has brought large companies and transnational interest groups in closer contact with courts. With the rise of multinational companies and the increasing international flows of trade, finance, and production, a growing market for legal services has emerged that transcended the traditional national boundaries of legal systems. Starting in the United States and the United Kingdom in the 1970s, a new organisational model began to spread internationally, that of global law firms with branches in Europe and, later, in the new BRICS markets, especially in Asia. These mega-law firms, such as Baker & McKenzie (with 77 branches in 47 countries) or Clifford Chance, now provide full and standardised services to their corporate clients ranging from transnational legal counselling to world-wide legislative and administrative lobbying. Positioned across the globe, they have the resources to pursue long-run interests in changing the state of the law through litigation and they are able to play across national and sector-specific legal domains, seizing fault lines, opportunities and loopholes. The recent cases of the Panama papers or LuxLeaks have further exemplified the brokering role corporate lawyers may play in globalised markets. Together with their clients, they engage in judicial forum shopping circumventing State regulations in domains like taxes or social rights. This in turn has put States' regulation under stronger pressures to engage in forms of regulatory competition. This autonomisation of the international field of *lex mercatoria* has led to an unprecedented development of commercial arbitration and similar forms of *private* justice. Most trade liberalisation treaties now include arbitral mechanisms – so-called Investment State Dispute Settlements (ISDS) – that circumvent States' judicial apparatus. In the framework of the current Transatlantic trade, it has taken strong civil society and NGOs' mobilisations to reorient the ongoing negotiations towards a public legal structure that would settle disputes between investors and States. On the whole, the increasing capture of this new judicial terrain of market regulation by big law

firms and large interest groups has contributed to strengthen the political capacity of their clients and further undermined States' capacity to promote an agenda of 'social progress'.

231 Emblematically, 'courts and rights' have progressively been integrated into a larger neo-liberal compact, thereby tuning down the initial promises in terms of equal civil rights. Over the past two decades, IOs such as the IMF or the World Bank have increasingly insisted on the economic importance of securing independent courts and an effective rule of law. They have promoted new benchmarks and indicators (e.g. the annual World Bank's *Doing Business* ranking) that evaluate the performance of national legal and judicial systems in terms of regulatory environment of business (easiness of firing, hiring, and creating companies). The shift away from the narrowly macroeconomic and financial concerns of the structural adjustments' plans of the 1980s and towards instead an emphasis on rights and the rule of law has also led to a rediscovery of the importance of judicial institutions. IOs as well as law-and-economics' scholars now consider the judicial protection of human rights, in particular of economic rights (property rights, freedom of contract), as an essential condition to attract foreign investments and a powerful lever to reduce governments' restriction to competition and cartelised industries and State monopolies. Working under the assumption that economic rights and human rights are mutually-beneficial, this new package of development policies has turned courts into a key lever in the transformation of emerging countries into competitive markets (fight against corruption of public sector, accountability of politicians, transparency of political institutions).

232 Similarly, in Western democracies, the increasing centrality of courts has often come along with wider changes in the modes of regulation from State-centred politics to more rights-based regulation. This judicialised mode of governance has been viewed as intrinsically more transparent and accessible than the circuit of representative democracy. The combination of regulatory agencies, private actors' enforcement of legal norms (e.g. mostly firms and interest groups) and a certain style of litigation that takes adversarial approaches to enforcement and dispute resolution (so-called 'adversarial legalism'), sometimes described as ideal-typical of the neo-liberal mode of governance, has indeed been a powerful challenger of the more cooperative and neo-corporatist style of government typical of Welfare State politics. With its limited administrative capacity and weak redistributive policies, the European Union is probably the paramount case of this mode of governance whereby supranational litigation, transnational mobilisation, and rule change are intertwined. The rise of this new governance scheme is now without flaws however as it makes the decision making process even more

opaque and arcane, therefore weakening political accountability while reinforcing the position of the various intermediaries, be they consultants, lobbyists or lawyers.

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11. The construction and governance of democratic political spaces in times of perceived crises

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This section will delve into the basic underlying precondition for democracies – the protection of the political spaces for democratic dialogue and dissent. Across the globe the perceived threats posed by refugees, fiscal crises, and terrorist acts has increasingly led to an understanding of security in statist, exclusionary and militaristic terms. Security is *the* vernacular of the 'political' today. The sovereign mediation of security and insecurity, the decision on 'friend' and 'enemy', is the crucial moment in which political spaces (and order) emerge. Hence, in response to challengers, be they from the domestic population or in ever increasing numbers asylum-seekers, the sovereign defines who is a 'friend' and should be included in political spaces and who is an 'enemy' and should be excluded from these spaces. The sovereign state, with the support or at least acquiescence of its population, constructs democratic spaces that are either inclusionary or exclusionary and at times both—inclusionary for some and exclusionary for others.

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A central paradox of democracy is between conflict and consensus.

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Democracy implies *dissent and division*, but on a basis of consent and cohesion. It requires that the citizens assert themselves, but also that they accept the government's authority. It demands that the citizens care about politics—even if not too much (Diamond 1990, p. 56).

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Subsequently, a healthy democratic state invites its inhabitants into its decision-making and implementation processes, even dissident inhabitants. So in order to retain their legitimacy liberal democracies are constitutionally committed to allow dissent, even from inhabitants located at its margins. The public spaces for assembly and freedom of speech are essential elements in democracies and these spaces of contention, according to liberal constitutions, must be protected. The conundrum lies in that while domestic dissent must be allowed, governments are determined to steer this dissent in ways that do not fundamentally threaten the political and economic

order. The spaces for the maneuverer of political challengers must be protected without jeopardising the rule of law. Demonstration rights must be made secure but political violence on the part of challengers, e.g. terrorist attacks on refugee centres, etc., must be rigorously policed. In other words, institutional actors meet the perceived threats of oppositional forces with actions designed to 'steer the conduct of civil society' (Loader 2000: 344) so as not to threaten or disrupt the dominant political and economic order. Repression or policing contention is a dispersed mechanism for the governance of the dominant political and economic order. Dissent is governed, by sheer coercive force or by less strong-arm and subtle means, in order to maintain the status quo (Peterson and Wahlström 2015).

238 Policing contention is typically thought of as exercised at the national scale, and in many cases this is correct in terms of the steering, that is, law-making and coordination of repressive capacities. However, since 11 September 2001 the US-defined 'war on terror' has dramatically extended the geo-political scope of the governance of dissent to the global scale and with this extension clouded the traditional distinction between domestic threat and foreign threats. Post-September 11 has witnessed an unparalleled international cooperation and intelligence sharing between police authorities and security services and private corporate intelligence agencies in this new situation for the governance of dissent.

239 In response to terrorist actions or the threat of terrorist actions numerous democracies across the globe enacted anti-terrorist acts, such as the Patriot Act in the US and the Prevention of Terrorism Act in India, which have radically expanded the repressive powers of the federal government thereby infringing on the civil rights of assembly and protest (Abdolian and Takooshian 2002; Cole 2003). Abdolian and Takooshian point out that 'historically, during times of crisis, it has been natural for democratic nations, including the United States, to temporarily abridge individual liberties in ways that would never be considered in more halcyon times' (2002: 1446). The rule of law, in Agamben's (2005) understanding, becomes lawless. For example, the USA Patriot Act of October 2001 dramatically reduced restrictions on law enforcement agencies' capability to search telephone and e-mail communications, medical, financial, and other records. The act expanded the definition of terrorism to include what the Act defined as domestic terrorism, thus enlarging the number of activities to which the Patriot Act's extended law enforcement powers could be applied. For example, animal rights organisations and ecological organisations could fall within its reach making it potentially a 'felony to, among other things, "deter" the business activities of industries engaged in the exploitation of animals and natural resources by protesting the actions of a corporation or influencing a unit of government to take a specific action' (Eddy 2005: 262). These

changes in the statutes have, according to Eddy, boosted the governance capacities in some states to protect economic interests and threaten to significantly raise the costs of involvement in nonviolent environmental protest.

240 Moreover, in the aftermath of terrorist acts as in Paris 13 November 2015 the French government declared a 'state of emergency' through which the government extended the decree and temporarily suspended democratic rights of assembly, banning the protests, marches and other outdoor activities planned by climate change activists across the globe as a counter-voice, or alternative 'civil society' to the official meeting of COP21 elite representatives. The French authorities in essence announced their disregard to provide security for peaceful demonstrators<, rather they prioritised the security of the world leaders assembled for the Climate Summit, shoppers and soccer fans.[\[12\]](#) The threat of terrorism, and its concomitant states of emergency, effectively disengages democratic rights of dissent within civil society.

241 Furthermore, policing theorists have warned that democratic societies have progressively shifted towards becoming 'surveillance societies' where 'surveillance displaces crime control for the efficient production of knowledge useful in the administration of suspect populations' (Ericson 1994: 139), thereby more and more and effectually extending in liberal democracies the legal scope of repression away from respect for the constitutionally protected rights of individuals to encompass collectives of individuals. For example, since 9/11 and further accelerated in face of the threat posed by ISIL (Islamic State of Iraq and the Levant), Security Services are increasingly targeting Muslim communities as suspect populations. By casting a wide net in their counterterrorism measures, Security Services have introduced a 'religious profiling', which in effect risks criminalizing Muslims *per se* (Peterson 2012). Counterterrorism policing in many Western European countries now gives priority to what are called preventive strategies in which cooperation with Muslim communities is sought by the Security Service. According to Peterson (2012), in Sweden the 'soft coercion' of the Security Service is an attempt to create new spaces of governance, where Muslim communities (and individuals) are ostensibly 'invited' to participate in the State's counterterrorism programme. These invited spaces reflect what Raco (2003: 78) describes as the State's 'increased concern with defining and shaping 'appropriate' individual and community conduct, regulation and control', which in effect extends the scope of repression from political dissidents to targeted communities and away from the constitutionally protected rights of individuals, which is a cornerstone in the rule of law in liberal democracies.

- 242 Political actors – both social movements and political parties – are found on the far-left, the left, the moderate right, and the far-right of the political spectrum, that is, not all political actors are benign nor democratically progressive. We have in addition *the basic democratic paradox of majoritarian rule* in liberal democracies in which majorities can suppress minorities and with the support of an electoral majority the processes of democracy can be turned back or even overturned; for example, the current cases of Hungary and Poland.
- 243 In the wake of the fiscal crisis in 2008 and the waves of refugees seeking entry into Europe far-right extremist movements and far-right parties are mobilizing the ‘losers’ in ever increasing numbers across Europe. Democracies, through an ordinary ‘free and fair’ election, can take a turn away from the rule of law. In Hungary in 2010 Viktor Orbán’s Fidesz Party won 53% of the vote and a seat bonus big enough to give it powers of constitutional amendment, moving toward what Orbán himself has called an ‘electoral revolution’. The speed and the scale of the changes have indeed been revolutionary. The new 2011 Constitution and its enabling acts have turned what are supposed to be politically neutral bodies such as the Constitutional Court, the Central Bank, and the offices of the Ombudsman and the Public Prosecutor into arms of the ruling party. In short, according to Rupnik (2012: 133), ‘Orbán and his lieutenants have downgraded or done away with the checks and balances that are widely considered essential for the rule of law’. If you add to this an act that creates a state agency meant to ensure ‘media objectivity’, thereby undermining the public space for critical opposition, you have the main ingredients of an authoritarian drift in the construction of political spaces and the governance of dissent.
- 244 The ruling Law and Justice Party (PiS) in Poland passed laws in 2015 that make it more difficult for the highest court, the Constitutional Tribunal, to overturn any of the government's decisions. The constitutional court itself refused to follow the new laws, which it said were unconstitutional – a textbook definition of a constitutional crisis – and a full-blown domestic democratic crisis has erupted. KOD, a new pro-democracy movement, put an estimated 200,000 people on the streets for a protest in May 2016. The EU’s Venice Commission, which focuses on constitutional rights and the rule of law, issued a report condemning the moves. On the border of the EU in Turkey we find a similar authoritarian drift in the governance of dissent. President [Recep Tayyip Erdogan](http://www.chicagotribune.com/topic/politics-government/government/recep-tayyip-erdogan-PEPLT00007719-topic.html) (<http://www.chicagotribune.com/topic/politics-government/government/recep-tayyip-erdogan-PEPLT00007719-topic.html>) has gradually been reversing two decades of democratic progress in Turkey and has in 2016 pushed through a tough anti-terrorism law that can be used to target even democratically minded opponents; also this move has been condemned by the EU.

- 245 While the developments in Hungary, Poland and Turkey are perhaps the most dramatic these movements and parties have found varying traction within civil societies and among electorates across Europe. In Sweden the neo-Nazi movement party, the Sweden Democrats, have been so successful in their 'make-over' that in the 2014 elections they garnered just under 13% of the vote to become Sweden's third largest party (Peterson 2016). Austria's far-right [Freedom Party \(http://countrystudies.us/austria/120.htm\)](http://countrystudies.us/austria/120.htm) was founded in 1956, also its leadership former Nazis. Though it has twice been part of coalition governments, the party has been relatively marginal in Austrian politics. But in 2016 it just came within a hair's breadth of winning control of Austria's presidency. The Freedom Party candidate lost to the Green Party's candidate – by a 0.6 percentage point margin – getting 49.7% of the vote. The response by many citizens across Europe to the so-called refugee crisis has been to cast their votes for authoritarian, nationalist parties. In Hungary, Poland and elsewhere on the European continent far-right, nationalist, xenophobic, and anti-EU parties are flourishing.
- 246 Events, whether these are terrorist attacks or the perceived threat of terrorism, fiscal crises, or a refugee crisis, demonstrate the fragility of democratic processes in so-called new democracies as well as in consolidated democracies. Democratic processes can be rolled back. The still on-going fiscal crisis is challenging democracy from both a technocratic and a populist direction. In Greece and Italy, democratically elected but insolvent governments have already ceded vast policy-making powers to unelected experts. According to Donatella della Porta (forthcoming) a shared element of the recent anti-austerity protests she studied in Latin America, Eastern Europe and South Africa was the discontent at what was perceived as a violation of acquired entitlements by a small and corrupt oligarchy of businessmen and politicians.
- 247 So, while the longstanding assumption had been that capitalism needs democracy, and vice-versa, anti-austerity protests have shown that late neoliberalism fuels illiberal tendencies, challenging previous strategies of incorporation and, in doing so, becoming less and less tolerant of dissent.
- 248 The authoritarian tendencies we are witnessing across the globe appear to marry well with the 'liberal state'. In the wake of the global fiscal crisis della Porta (2015) identifies a concomitant 'crisis of responsibility'. Committed to protecting neo-liberal markets liberal governments are unable to protect their citizenry. Facing the real challenges from an aggrieved and concerned citizenry, dissent is increasing governed in more repressive ways. Even in one of the world's oldest democracies, a new Trade Union Bill and strike law

'reforms' were passed in the UK 2015, which more or less emasculate unions' use of the strike weapon in labour disputes. Market interests are defended whilst collective labour action is seriously weakened.

249 In conclusion, democracy is under siege and from a number of fronts, not least from the state itself. The responses of governments across the globe to real and perceived crises, even of governments that with some justification claim to be 'liberal' and 'democratic', provide substance to Giorgio Agamben's (2005) portentous warning that we have entered a 'permanent state of exception; 'the state of exception has become a paradigm of government today' (Agamben and Raulff 2004: 609) and security has become *the* political vernacular. The existence of derogation-like clauses permits states to suspend the protection of certain basic human and civil rights thereby undermining meaningful political action. Declaring war on terror the Bush administration invoked a *global state of emergency* to wage infinite war on an indefinite enemy. The present 'permanent state of exception' should, Agamben indicates, be understood as 'a fiction sustained through military metaphor to justify recourse to extensive government powers' (p. 610), which can be introduced to cope with political dissent more generally – we see increasingly the conjunction of sovereign power and the police in the governance of dissent in contemporary democracies. As Ian Loader and Neil Walker point out:

250 '[a]s monopoly holders of the means of legitimate physical and symbolic violence, modern states possess a built in, *paradoxical tendency* to undermine the very liberties and security they are constituted to protect. Under conditions of fear ... states and their police forces are prone to deploying their power in precisely such uncivil, insecurity-instilling ways. If the state is to perform the ordering and solidarity-nourishing work that we argue is vital to the production of secure political communities then it must, consequently, be connected to forms of discursive contestation, democratic scrutiny and constitutional control' (2007:7, emphasis added).

251 In short, according to these scholars, the state itself must be civilized – 'made safe by and for democracy' (ibid.). States can only do so by engaging with all of its inhabitants, even the poor and dispossessed, in constitutionally protected spaces for democratic dialogue and dissent regarding the exercise of its power. A vigilant and engaged citizenry offers the sole protection against the potential excesses of democratic states. It is upon their shoulders that the responsibility for 'taming states' lays.

12. Social movement and the crisis of responsibility in late neoliberalism

Even if political science was late to recognise it, there is no doubt that social movement affected, affect and can be expected to affect the development of states in democratic as well as non-democratic regimes (della Porta 2014). In general, they do so by introducing new topics on the political agenda, but also by contributing to the emerging of new bodies in the public administration, as it happened on labour, gender, environment and so on (della Porta and Diani 2006: Ch. 8). While not all movement have been oriented to expand citizens' rights, many of them—suffice to think to the labour movement or the women's movement—have indeed contributed to achieve civil, political and social rights. What is more, progressive social movements have addressed the meta-issue of what politics and democracy are about. Social movements on the Left have therefore in general challenged a definition of progress as optimisation of economic conditions or economic growth, reflecting instead on issues of justice and democracy.

12.1 Social movements and citizens' rights

Historical work on the evolution of citizens' rights have stressed the role of mobilisation from below in achieving them. Civil, political and social rights developed indeed with the mobilisation of the labour movement, bringing about also relevant institutional changes. The initial phases of the construction of the state have been defined as characterised by widespread activism in the public sphere with the multiplication of autonomous and influential opinion movements (Pizzorno 1996: 972). In the period which, according to E.P. Thompson (1991), saw 'the making of the English working class', street marches for reform mobilised hundreds of thousands of citizens, while some of the radical magazines achieved circulations of tens of thousands of copies.

At the origins of democracy lies in fact 'the entrance of the masses into history': indeed, 'the 18th century represents a rupture on a grand scale in the history of western Europe. Before that moment, the masses were barred from exercising their public rights. From that moment, they became citizens and in this sense members of the political community' (Bendix 1964: 72). The struggle for universal suffrage has been thus also and principally a struggle for recognition (Costa 2010: 13).

- 257 A central claim for the worker movement, the right 'to combine' began with the right to associate, but differentiated itself from this (Bendix 1964). While the freedom to associate with others formed a part of the freedom of conscience, of speech, of industry, of religious belief and of the press, it had not, like these others, been promoted by the French revolution, which had rather aimed to abolish the bodies between the state and nation of the old order. It emerged instead as an invention of the workers' organisations that, exploiting the ambiguities of the revolutionary discourse, defined the demands for collective negotiations in terms of brotherhood. In the growing workers' movement, associations were thought of as workers corporations, cooperatives, but also as confraternities of proletarians, initially with a mutual aid function, but also instruments for opposing a vision of freedom as isolation, promoting reciprocal links and common intelligence (Sewell 1980: 216).
- 258 In the protest campaigns for the widening of citizenship rights, other models of democracy were also conceptualised and practiced: direct, horizontal, and self-managed democracy. In the public sphere, old and new intertwined: traditional forms of associationism (corporations etc.) combined with emerging forms. Under pressure from social movements of various types, the system of representation that had been constituted with continuity and discontinuity with respect to the old order soon began to build institutions and practices for the recognition of collective identities. Notwithstanding the individualising rhetoric, the democratic state in formation showed traits of organised or associative democracy, developing channels of access for interests organised in parties or associations.
- 259 Pushed by the workers' movement, the debate on democracy also spread to include not only an emphasis on participation, but also themes of social equality. In the first period of the development of capitalism, equality in civil and political rights sanctioned by the concept of citizenship was not normally considered in conflict with the social inequalities produced by the market, notwithstanding the fact that this weakened the enjoyment of civil and political rights (Marshall 1992: 27). In the twentieth century, the growth of economic wellbeing, the diffusion of education, and the active use of those same civil and political rights affected this balance: 'Social integration spread from the sphere of sentiments and patriotism to that of material satisfaction. The components of a civilised and cultivated life, at first the monopoly of the few, were progressively placed within reach of the many, who were encouraged to reach out their hand to those who still eluded their claims. The diminution of inequality reinforced the pressures for its abolition, at least with regard to the essential elements of social wellbeing. These aspirations were in part heeded incorporating social rights in the

status of citizenship and thus creating a universal right to a real income that is not proportional to the market value of the claimer' (ibid.: 28). Social rights began then to be discussed as indispensable conditions for a true enjoyment of political rights.

260 As the labour movement in the past, also more recent movements became arenas for debating and experimenting with different conceptions of democracy. The protest movements of the late 1960s were already interpreted as an indication of the widening gap between parties and citizens – and indeed of the parties' inability to represent new lines of conflict (Offe 1985). The anti-authoritarian frame, central for these movements, was in fact articulated in claims for 'democracy from below'. Democracies of councils and self-management were also discussed in the workers' movements of those years. Beyond the widening of forms of political participation, the student movement and those that followed it (the first being the women's movement, but also the environmental or peace movements) experimented internally with new democratic practices, considered as early indications for the realisation of non-authoritarian relations.

261 Also the social movements of the 1970s and the 1980s insisted on the legitimacy – if not the prevalence – of alternative forms of democracy, criticising liberal visions (Kitschelt 1993: 15). According to this interpretation, against a liberal democracy based on delegation to representatives, controlled only at elections, but legitimated to take decisions between one election and another, movements affirm that citizens, naturally interested in politics, must directly assume the task of intervening in political decisions. As carriers of a participatory conception of democracy, movements also criticise the monopoly of mediation through mass parties and organized interests, aiming to shift policy making towards more visible and controllable places. Democracy as self-management is much discussed among social movements in this period.

262 In part, these conceptions did penetrate the democratic state through reforms that widened participation, in schools, in factories and in local areas but also through the political recognition of movement organisations and the 'right to dissent'. Beginning from the 1960s, there has in addition been an increase in institutional and other forms of participation. Real existing democracies developed in fact by multiplying channels of participation, and widening the civil, political and social rights that made that participation possible. This evolution has been neither linear nor peaceful: rights to participation were affirmed through various waves of protest, with strong resistance and frequent u-turns. The broadening of participation rights was also reflected in a growth in non-conventional forms of

participation. Most importantly, the criticism of liberal democracy was expressed in the theorisation and experimentation of other models of democracy.

263 12.2 Social movements in the neoliberal juncture

264 As liberal democracy remained however dominant, an understanding of contemporary challenges requires an assessment of the mechanisms whose functioning was needed in order for liberal democracy to be legitimate. Three such mechanisms were necessary. First, liberal democracies needed functioning political parties as actors that could implement the principles of electoral accountability. Second, majoritarian conceptions of democratic decision-making needed a nation-state as defining the border of the *demos* in whose name (and interest) decisions were made (see Keating's part in this chapter). Third, and more subtly, even though liberal democracy did not call for social equality, it still relied upon the assumption that political equality was to reduce social inequality that risked otherwise to challenge the very principle of free access to political rights (see Crouch's part in this volume). The liberal form of democracy developed, that is, in contexts characterised by three characteristics: well-established welfare states, party democracies, and the full sovereignty of the nation state.

265 At the turn of the millennium, these conditions have been however challenged as neoliberal globalisation as well as other general evolutions in contemporary democracies have produced a shift of power from parties (and representative institutions) to the executive; from the nation state to international governmental organisations (IGOs); and from the state to the market, which also implies a shift from welfare state to warfare state. Even though these are neither complete nor natural or irreversible trends, they, however, for sure challenge the legitimacy of to the (neo)liberal vision of democracy, that is based upon an elitist conception of electoral participation for the mass of the citizens and free lobbying for stronger interests, along with low levels of state intervention (Crouch 2003: 5). Political sociologists and political scientists alike have pointed in fact at several indicators of a general malaise in democratic countries, both challenges within and without the nation state, as well as for both (traditional) conceptions of legitimation from the input as well as (more recent) conceptions of legitimation from the output side of the democratic process.

266 While the weakening of political parties, nation states and welfare states challenges some definition of democracy, they might have produced some opportunities (at least, discursive ones) for other conceptions of democracies, As Pierre Rosanvallon has suggested, 'In the historical evolution of democracy, near to the growth of

institutions of electoral accountability, there has been the consolidation of a circuit of oversight anchored outside of state institutions. This second conception of sovereignty found its incarnation in growing societal powers of sanction and prevention. In fact, the understanding of democratic experiences requires the consideration, at the same time, of the 'functions and dysfunctions' of electoral representative institutions, but also of the organisation of distrust' (Rosanvallon 2006: 8).

267 To which extent progressive social movements will be able to address this changed environment is an open question that social sciences is just starting to address. Social movements have in fact long been considered as children of affluent times – or at least of times of opening opportunities. Already research on the labour movement expected strikes to develop when unemployment was low, or at least when economic crisis was accompanied by an opening of political opportunities (as, e.g., in the New Deal in the US). The protests against first the austerity policies in the global South and then the Great Recession in the European periphery defy these expectations developing in moments of declining opportunities at both economic and political levels (Silva 2009; della Porta 2015, 2017). What is more, in many parts of the world, these movements have been able to radically change the party system, promoting the emergence of new actors, sometimes able to experiment with new policies (Roberts 2015; della Porta et al. 2017). If there are indications of potentials for change, in a progressive direction, the challenges for a progressive politics from below remain high, in terms of the mobilisation capacity of a fragmented social bases, of the development of a collective identity and solidarity, and of the construction of a sustained organisational structure.

268 **12.3 Class structures and the social base for protest: the challenge of fragmentation**

269 Social movement studies have seen recent changes in the social structure as not particularly conducive to mobilisation. In short, not only have processes such as deindustrialisation and migration weakened the structural preconditions that had facilitated the emergence of a class cleavage, particularly in the working-class model of collective action, but recent developments have also jeopardised citizens' rights through poverty, unemployment, and job insecurity.

270 Anti-austerity protests also challenged the new social movement paradigm. While some research had indicated that the social bases of (left-wing) protest shifted from the industrial working class for the labour movement to the new middle classes for new social movements, anti-austerity protests brought attention back to the

mobilisation of the losers of globalisation. Sometimes called 'multitude' or 'precariat', those who protested against austerity represented coalitions of various classes and social groups that perceived themselves as losers of neoliberal development and its crisis.

- 271 Precariousness is certainly a social and cultural condition for many movement activists (Standing 2011). Overwhelmingly present in protests is a generation (that in Portugal defines itself as 'without a future') that is characterised by high level of unemployment and under-employment – that is employment in positions which are ill-paid and un-protected. The most marginalised groups of young people took the lead in the Arab Spring, and those affected by the financial crises mobilised in different forms in Southern Europe. These young people are not those which have traditionally been described as losers: they are rather the well-educated and the mobile, which were once described as the 'winners' of globalisation – but are far for perceiving themselves as such.
- 272 Together with them, we found however other social groups that have lost most from the neoliberal attacks to social and civil rights: from public employees to retired individuals – those once considered as the most protected social groups and that have instead seen their rights continuously reduced, becoming, to larger or smaller extent, precarious themselves in terms of their life conditions, including in terms of losing fundamental rights such as those to health-care, housing, education (della Porta 2015). Similarly, blue-collar workers of the small but also large factories, shut down or at least in danger of being shut down, have participated in the wave of protest. With high levels of participation by young people and well-educated citizens, the anti-austerity protests brought into the street a sort of (inverted) '2/3' society of those most hit by austerity policies. Traditional workers participated, but so did retired people, unemployed and precarious workers (although these were more present in other types of protests). Therefore, the protests brought together coalitions of citizens with different socio-biographic backgrounds, but united by their feeling of having been unjustly treated.
- 273 The capacity of protest waves mobilize this broad but heterogeneous basis has been varied however, with very different capacity for coalition building as well as international networking (della Porta 2016).

274 **12.4 The construction of collective identities: the challenge of individualism**

- 275 Recent progressive movements have to face a particular challenge in terms of the building of a collective identity. If neoliberalism strengthened a liquid culture, destroying old bases for personal, collective and political identity through forced mobility and related insecurity, identification processes are however neither impossible nor automatic (Baumann 2000). Rather, as social movement studies would predict, they assume once again a central role, which is however much shaped by the changing culture of neoliberalism. While the labour movement had developed a strong identity – supported by a complex ideology – and new social movements had a focus on specific concerns, the identification processes of anti-austerity protestors seemed to challenge the individualisation of liquid society as well as its fear and exclusivism, calling instead for state intervention and inclusive citizenship.
- 276 If scholars reflecting on a liquid society had stressed the presence of multiple individual identities, changing subjective identification, and soft (or weak) collective identities – while others had hoped in the insubordination of the multitudes (Hardt and Negri 2000) – researchers observed much identity work oriented to a definition of the self, with the re-emergence of a social criticism of capitalism.
- 277 Defining themselves broadly – as citizens, persons, or the 99% – activists of the anti-austerity activists developed a moral discourse that called for the reinstatement of welfare protections, but they also challenged the injustice of the system (della Porta 2015). A strong morality framing grew to contrast the perceived amorality of neoliberalism and its ideology,. A cynical neoliberal view of personal responsibility for survival and the proclamation of selfish motives as beneficial have been stigmatised in the name of previous rights, with claims for their re-establishment. A call for solidarity and a return to the commons has been juxtaposed to an unjust and inefficient neoliberal ideology.
- 278 Referring often to the nation, as basis of reference of a community of solidarity, they however developed a cosmopolitan vision combining inclusive nationalism with recognition of the need to look for global solutions to global problems. An (inclusive) definition of the nation emerged, in contrast to the wholehearted cosmopolitanism of the global justice movement, as a reaction to declining national sovereignty.
- 279 Differently from the global justice movement, which had presented itself as an alliance of minorities in search of a broad constituency, the anti-austerity movements have constructed a broad definition of the self, as a large majority (contrasted with the network of minorities of the global justice movement) of the citizens (della Porta 2015). Backward looking, the anti-austerity protests called for the

restoration of lost rights, vehemently denouncing the corruption of democracy. However, they also looked forward, combining concerns for social rights with those for cultural inclusivity. As precariousness, as lost security about life development itself, spread from young unemployed and under-employed to large social groups of once protected, identification with the overwhelming majority in the society might provide some certainty.

280 What remains open is however the capacity of these movements to build new collective identities. The recognition of the great diversity within the movement does not seem in fact sufficient to build long term solidarities. The populist reasoning, as reconstruction of an idea of the people (Laclau 2005), is still at early stage.

281 **12.5 Movements and political legitimacy: The challenge of power**

282 Social movements active against austerity policies are embedded in a crisis of legitimacy that takes the particular form of a crisis of lack of responsibility towards citizens' demands (della Porta 2015, 2017). As the economic crisis is linked to a legitimacy crisis at the political level, more and more citizens feel themselves non-represented within institutions that are more and more considered as captured by big business. While privatisation, liberalisation, and deregulation reduced the capacity of the state to answer citizens' demands, particularly those countries with weaker economies lost large portions of their national sovereignty, as they were forced to accept loans from international financial organisations, with attached conditionalities in terms of implementation of heavy austerity measures. Collusion between economic and political power then emerged more and more strongly. The effects have been a dramatic acceleration of trends toward declining party membership, loyalty, and identification as well as of conventional forms of participation and (especially) institutional trust. Activists stigmatise the power of big corporations and (unaccountable) international organisations, with the related loss of national governments' sovereignty. What is more, they hold responsible those governments and the political class at large for what they consider an abduction of democracy.

283 However, rather than developing anti-democratic attitudes, protesters claim that representative democracy has been corrupted by the collusion of economic and political power, calling for participatory democracy and a general return to public concern with common goods. Given the extremely low trust in existing representative institutions, these movements have addressed requests to the state, but also experimented with alternative models of participatory and deliberative democracy. *Acampadas* became places to prefigure new forms of democracy. In comparison with the global justice movement, the declining confidence in representative

institutions is reflected in the weakening of the search for channels of access to public decision making through lobbying or collaboration. Even if there is still a desperate search for politics, its traditional forms are mistrusted and autonomous ones explored.

284 In this sense, these movements are not antipolitical but rather propose a different – deliberative and participatory – vision of democracy that they prefigure in their own organisational forms. Although appealing to the citizens beyond traditional parties and associations, they are far from widespread definitions of populism as an exclusivist and homogenizing discourse, instead stressing the need of arenas for encounters among persons with different social backgrounds and political ideas. Deliberation through high-quality discourse rather than charismatic power is called for as a way to find solutions to common problems. In the presence of an institutional system felt as more and more distant, a direct commitment is asked for. This development reflects the perceived challenge in the crisis of neoliberalism: first, the perception of a large and very critical potential basis of the movement in the heterogeneous social groups who have been hit by the crisis; and second, the deep disappointment not only with representative institutions and political parties, but also with unions and associations of various types, which are stigmatised as unwilling or unable to address the financial crisis.

285 Neither the hierarchical structure of the labour movement nor the networked model of the new social movements seems to fit with the emerging anti-austerity protests. As neoliberalism attacked the corporatist actors that had driven the social pacts of Fordist capitalism, the unions first but also many civil society associations once integrated in the provision of social protection, the idea of a direct democracy of the citizens started to be cherished by the emerging movements. Organisational structures have developed following strategic reflections over past successes and failures, but also the political and social balances of opportunities and constraints. Both the social characteristics of the reference base and its normative preferences are relevant in explaining the search for new organisational forms. Developing upon the global justice movement's experiences with participatory and deliberative forms of democracy, the anti-austerity protests moved from a 'democracy of the forums' to a 'democracy of the squares', with growing attention to openness, publicity, and equality. Deliberative and participatory conceptions and practices of democracy are combined with an emphasis on the direct participation of the citizens rather than through networks of associations.

286 Very successful in addressing the public and at times capable of sudden and dramatic political effects, these protests have been based upon new strategies with however still uncertain capacity for

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13. Social progress, economic factors and political conditions

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At the end of the 1980s and into the beginning of the 21st Century, all of the political conditions for a qualitative leap forward in social progress seemed to be in place. The triumphal declaration of 'the End of History' was regarded by many as credible. It implied that no longer did citizens (except for the diminishing proportion of them living in autocracies) have reason to expect any radical challenges to their established institutions. Liberal democracy, the rule of law and social equity had become solidly entrenched and mutually supportive. The Wall dividing East and West had fallen. The Soviet Union had collapsed and fragmented into new republics. The countries of East-Central Europe were well on the way to a successful transition to democracy, following the trajectory established earlier in Southern Europe, Latin America and a few countries in Asia. Centrist political parties with convergent and moderate programs dominated most elections. Parties opposing capitalism and/or democracy barely existed and, if so, were confined to the fringes of political life. The European Union had completed its 'Internal Market' and just made a 'Great Leap Forward' with the creation of a common currency. Regional organisations were spouting up all over the globe, lowering barriers to trade and investment. All of this seemed to promise further economic growth, less inflation, full employment, more and better well-being – undisturbed by political threats.

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The conjuncture of these events presaged a peaceful and prosperous evolution for the foreseeable future, especially in terms of social progress. National states were expected to be much less pre-occupied with external or internal security. The bounty from the presumed decline in military and police expenditures was supposed to be diverted to new or improved welfare and educational policies. Poverty would be eliminated; public health would improve; education levels would rise; pensions would become more bountiful; inequalities in personal and regional income would diminish; access to and fairness within the judicial system would be assured. Thanks to this convergence of 'all good things,' the legitimacy of public

institutions would be guaranteed and the grateful citizens would come to support and trust the politicians that would be associated with the production of such manifestly superior public goods.

290 It would not be an exaggeration to observe that virtually all of these expectations were frustrated. The 'Dog of Social Progress' did not bark in the 1980s and has remained silent into the 21st Century. This reversal of expectations has led to widespread disillusion and distrust with both the new and old liberal democracies and mistrust of the politicians that make them work. Traditional political parties lost members; voters no longer identified with them; fringe parties increased their presence in elections and in the public debate. The judicial process has achieved more attention than before, if only because of persistent stalemates in the political process, and issues involving access to courts and the fairness of their decisions increased. The institutions and performance of capitalism are under greater criticism than at any time since the 1930s. Instead of the expected progress in social conditions, citizens and denizens in countries across the globe have suffered from decreases in policy entitlements and in public spending on programs designed to combat poverty, ill health, poor education and income inequality – with the result that virtually all indicators of social distress have risen since the 1990s.

291 Why did this happen? What intervened during this period to so dramatically frustrate expectations? And why has it persisted into the following century?

292 No doubt economic factors played an important role. Growth rates declined and remained low in the developed countries; they increased but became more erratic in the developing ones. Where the aggregate demand of consumers declined, so did the incentives for investment and the margins of profitability. This, in turn, reduced public revenues and augmented resistance to redistributive policies – at the same time that the need for insuring against social risks and for compensating in response to market failures became more acute. One response of both private persons and state authorities was to borrow more funds in an effort to fill the widening gap – and that subsequently generated a massive crisis in currency markets, credit institutions, fiscal policies and public confidence. If all that were not enough, the very core of capitalist accumulation shifted from industry to services and within the service sector, to financial services. Much of the reduced growth was gained through speculation by firms that employed few people and rewarded them generously – at the expense of the general public. Inequalities in income and wealth climbed to levels not experienced since the end of the 19th Century – before the policy foundations for improved social progress were laid.

293 Changes in political conditions were quick to follow and even more disruptive of the trend toward social progress. Centrist and especially Leftist parties – historically the main supporters of increases in citizen entitlements – lost members and vote share. They have been increasingly replaced by populist fringe parties and candidacies that promise to address the decline in well-being, but have no concrete proposals for accomplishing this. At the same time, fewer and fewer citizens identify with any party and more and more of them bother to vote at all. Labor unions and employer associations became less representative of their respective class interests, and previously stable patterns of collective bargaining between them have dissolved into purely individual or plant level agreements. Those segments of the working class that are unemployed or precariously employed and, hence, no longer covered by collective agreements or eligible for public entitlements have become increasingly alienated from the political process altogether and more likely to respond to populist and national appeals.

294 As significant as they may be, these economic factors and political conditions might have been insufficient to explain the reversal in trend were it not for an even more important change in the nature of the unit responsible for deciding on the public policies that affect social progress. That unit is (or, better, was) the sovereign national state. It was presumed that it alone had the capacity to impose regulations, redistribute benefits, subsidise production, promote education and to do so by exercising its legitimate and exclusive authority over a distinct territory. Beginning in the 1980s, its capacity to do all of this in a sovereign manner has declined. A combination of transformations – conveniently summarised by the concept of globalisation – has emerged that limit the extent to which any state take these policies without reference to public and/or private actors outside its territory and beyond its jurisdiction. Whether these constraints are imposed by supra-national institutions at the global or regional level is less important than the extent to which they must be respected and the consequences that will follow if they are not. Putting the matter bluntly, social progress is no longer the exclusive product of national states.

295 In retrospect, it has become apparent that the increase in social progress that followed the Second World War was the product of an unusual coincidence of economic factors and political conditions. There was a shortage of labor for physical reconstruction, a manifest need for investment, and enormous opportunities to satisfy pent-up consumer demand (and to make assured profits). Moreover, governments had made extensive promises to disfavoured groups during the war in order to ensure their loyalty and their willingness to make sacrifices. National states had won the war and exercised uncontested authority over their respective territories (with the

exception of those who lost the war and were occupied by the victors). If this were not enough, there was also the persistent menace of the Soviet Union and national communist parties to justify making concessions to less favoured groups. This constellation of factors and conditions was anchored in a relative balance between competing classes and converging ideologies that persisted for some forty years or so. It has been labelled 'the post-war settlement' and it contributed very substantially to the expansion of welfare and educational policies during this period. While it was particularly characteristic of post-war Europe and North America, it set precedents and produced policy innovations that affected public decision-makers and private interest representative in other parts of the world.

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'Social progress depends upon social contract,' that is the lesson to be gleaned from the post-war history of the North and West and from the post-colonial history of the South and East. Needless to say, the socio-economic content of that contract and the political process that produces it has varied a great deal – as has its durability. Everywhere that it has existed, it has rested on two generic features: (1) the self-organisation of the conflicting class interests at stake; and (2) the relative balance of power between them – as well as on the competing presence of other cleavages that cut across the functional conflict between capital and labor and serve to divide or weaken their respective capacities to act collectively, as well as to complicate the process of ideological justification. In pre-capitalist economies and traditional societies, both the interests at stake and the balance of power between them will be significantly different. A viable and effective social contract will depend more upon cultural norms of responsibility and reciprocity, rather than calculations of material advantage. But once capitalism has penetrated the society and undermined traditional groups and norms, social progress will depend primarily upon arriving at a compromise between capital and labor. This will, no doubt, be made more difficult by the persistence of tribal, religious, linguistic, generational, gender and center-periphery conflicts in any specific case, but the core remains a mutually consensual agreement on how the economic surplus is to be distributed and the production of wealth is to be regulated – and by whom for the benefit of whom. Needless to say, such contracts are not always likely to be self-enforcing, hence, the need for the intervention of public authority to ensure that the contract will be observed. Without a state to monitor behaviour, redistribute benefits, regulate production, implement policies without discrimination and sanction non-compliance, all social contracts would be vulnerable to "opportunistic" defections in response to momentary advantage. In other words, regardless of the type of regime (although democracies are far more reliable in this regard than autocracies), their viability and longevity depends, not just on

the perceived fairness of their distributive impact, but also on the existence of an established and reliable legal system to adjudicate eventual conflicts and compensate victims. Without the rule of law in the background to enforce them, no social contract is likely to persist for long – and, hence, no social progress is likely to emerge or to be sustained.

- 297 In the advanced capitalist economies and established democratic polities of Western Europe and North America, considerable social progress was achieved during the forty or so years after the end of the Second World War. This was accomplished, however, as the result of two quite different processes of social contracting. The first favourable scenario has been called pluralist; the second corporatist.
- 298 In the former, characteristic of polities dominated by Conservative or Liberal political parties, the contract was ‘unsigned.’ It emerged spontaneously from the exchanges, largely among individuals and firms, in product and labor markets. By combining supply and demand in a competitive manner, they would create a “fair” and ‘consensual’ distribution of benefits – provided that these markets were neither monopolistic nor oligopolistic and provided that public authority was licensed to ensure that contracts were obeyed, that regulations were followed and that weak and marginalised citizens were compensated. Social justice (or progress) depended primarily upon the efforts of individuals to realise their potential according to their competitive advantage in contributing to growth in the general economy. Failure to do so was a matter of personal responsibility, not a failure of the system as a whole. In accordance with liberal principles, short-comings in this distributive process would (and should) be cared for by the voluntary actions of ‘charitable’ organisations in civil society, not by governments. The fact that labor was then relatively scarce and had a momentarily greater capacity for collective action that could plausibly affect the profitability of firms provided a relative balance in class forces that encouraged moderation and compromise. The ideological hegemony of liberalism in these polities ensured that the ‘freedom’ to compete for goods and services was regarded as preferable to the ‘tyranny’ of state intervention – and the Soviet Union was there to demonstrate what that would mean.
- 299 In the latter, characteristic of polities dominated by Social Democratic or Christian Democratic parties, the contract was ‘signed.’ It emerged as the result of explicit bargaining between organisations representing conflicting class interests and capable of ensuring the compliance of their respective members. Supply and demand were monitored and controlled by both public and semi-public institutions, as was the distribution (and, in some case, re-distribution) of eventual benefits by ensuring that wages more or less

tracked the evolution of productivity and that working conditions and skill levels would continuously improve. Critical for the success of such an allocation process was the high level of self-organisation of the contracting parties. Not only were a large proportion of the respective social classes incorporated (whether voluntarily or involuntarily) into the institutions that represented their interests, but these organisations were comprehensive and hierarchically ordered with regard to the classes and sectors they represented, monopolistic in that they faced no competition from other organisations, and officially recognised by the state and granted assured access to decision-making and a role in implementing the policies eventually taken. The ideological justification for such arrangements was weaker than that provided by the 'freedom' of liberalism. They were legitimated more by their success in increasing well-being than by their conformity to existing doctrine.

300 Signed or unsigned, the social contract no longer provides a reliable basis for social progress – and has not been doing so since, roughly, the early 1980s. The two elements that combined to produce it – the self-organisation of conflicting class interests and the relative balance of power between them – have changed beyond recognition. Associations representing capital, labor and the profession have lost members and the capacity to act collectively and credibly – as have the so-called “sister political parties” that supported them in the electoral and legislative process. Due to the globalisation of capitalism and the shift of its center of accumulation to finance from industry, the reciprocal capacity of labor and capital to influence each other’s behaviour and, thereby, compel them to resort to compromises in the distribution of their joint product has literally disappeared in the favour of the latter. In the absence of these two elements, it is difficult to imagine any significant increase in social progress for the foreseeable future, at least in those Northern and Western countries that had previously played a leading role in its advent. Hopefully, there may exist more favourable conditions for it in some of the countries of the South and East that are more protected from globalisation and whose capitalism is still more industrial.

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- 513 [3] Affiliations: Scuola Normale Superiore; University of Aberdeen; University of Oxford; University of Pisa; University of Edinburgh; American University of Beirut; Cornell University; New York University; University of Paris; Harvard University ; University of Gothenburg; European University Institute.
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- 515 [5] This is not to say that local activists do not appeal to global discourses of multiculturalism with related discourses of minority rights premised on notions of human rights principles and democracy.
- 516 [6] It is worth noting that petitioners' briefs for two of the most progressive decisions by the Supreme Court of the United States —*Muller v. Oregon*, 208 U.S. 412 (1908) (legitimizing limits on working hours to protect women's health) and *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) (holding that educational systems separated by race could not be equal)—both argued in part on the basis of social science evidence.
- 517 [7] For example, the civilian death toll from US drone strikes has been contested, and independent organizations making such estimates have little faith in numbers generated by the government. Charlie Savage and Scott Shane, "U.S. Reveals Death Toll From Airstrikes Outside War Zones," *New York Times*, July 1, 2016.
- 518 [8] Chris McGreal, "Mbeki urged to sack ally over HIV views," *Guardian*, September 7, 2006; see also Cecilia Dugger, "Study Cites Toll of AIDS Policy in South Africa," *New York Times*, November 25, 2008
- 519 [9] National League of Cities, Making local democracy work. Goodwin explores the data further to show "that a large majority (69 percent) had citizens serve on ad hoc task forces and a fairly high percentage of cities held neighborhood meetings (48 percent) and town meetings (39 percent)" (Goodwin 2014: 253).
- 520 [10] Recent research in Southern Europe highlights that most municipalities 'have developed considerable participatory activity' (Font, della Porta and Sintomer 2014: 42).

- 521 [\[11\]](#) This is a finding in Font, Della Porta, and Sintomer (2014); in Baiocchi, Heller, and Silva (2011); in Baiocchi and Ganuza (2016); in Van Cott (2009); and in many other works.
- 522 [\[12\]](#) The official ban was temporally lifted for the public demonstrations on the last day of the Summit 12 December 2015.