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Egalitarian Rights Recognition:
A Political Theory of Human Rights

by

Matthew James Hann

Thesis for the degree of Doctor of Philosophy
Submitted to the School of Government and International Affairs
Durham University
2013

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Matthew James Hann,

Ustinov College, Durham, Summer 2013

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*'The central tension of human rights is that they became politically significant precisely at the moment when it was no longer possible to justify them.'*¹

*'The idea of human rights and freedoms must be an integral part of any meaningful world order. Yet, I think it must be anchored in a different place, and in a different way, than has been the case so far. If it is to be more than just a slogan mocked by half the world, it cannot be expressed in the language of a departing era, and it must not be mere froth floating on the subsiding waters of faith in a purely scientific relationship to the world.'*²

*'What is right has no natural existence at all,...men are perpetually disputing about rights and altering them, and whatever alteration they make at any time is at that time authoritative, owing its existence to artifice and legislation, and not in any way to nature.'*³

*'Nothing is harder, yet nothing is more necessary, than to speak of certain things whose existence is neither demonstrable nor probable. The very fact that serious and conscientious men treat them as existing things brings them a step closer to existence and the possibility of being born.'*⁴

¹ Serena Parekh, *Hannah Arendt and the Challenge of Modernity: A Phenomenology of Human Rights* (Abingdon, Routledge, 2009), p. 1

² Václav Havel, "Liberty Medal acceptance speech" (at Independence Hall, Philadelphia, Pennsylvania 4th July, 1994) [http://constitutioncenter.org/libertymedal/recipient_1994_speech.html] Accessed 22nd June, 2013.

³ Plato, *Laws*, 889e-890a; in Hannah Arendt's translation, from Hannah Arendt, *Responsibility and Judgment* (New York, Schocken, 2003), pp. 84-85

⁴ Hermann Hesse, *The Glass Bead Game* (Harmondsworth, Penguin, 1979), p. 14

Introduction

This thesis will set out the theory of ‘egalitarian rights recognition’, which is based on a novel combination of aspects of the work of Thomas Hill Green and Hannah Arendt. In doing so, it will make three key arguments. First, human rights must be grounded in social recognition, rather than in the innate qualities of the human. Second, rights recognition requires a serious commitment to equality; egalitarian rights recognition provides a critical lens through which the problems of rights recognised in situations of inequality can be more clearly seen. Third, human rights, if grounded by egalitarian social recognition, are important for human freedom and flourishing.

The idea that human rights are a central and vital part of both the practice and the theory of politics today is an idea that hardly needs substantiating. In both domestic and international politics, debates are frequently framed in terms of human rights, rather than any other considerations.¹ Michael Ignatieff argues that ‘human rights has [*sic*] become the major article of faith of a secular culture that fears it believes in nothing else’ and that the Universal Declaration of Human Rights has become the ‘sacred text’ of this secular religion.² Indeed, Kofi Annan has gone so far to describe the Declaration as ‘the yardstick by which we measure human progress’.³

Human rights are invoked in international relations to justify economic or even military interventions in the affairs of other sovereign states.⁴ Domestically, there has been intense debate about the extent to which the abrogation of human rights may be justified by the threat of terrorism.⁵ Human rights have been at the forefront of the Arab Spring revolutions.⁶ This is reflected in the academic literature. New journals have been dedicated to human rights, monographs on human rights appear at an ever

¹ A tendency criticised in Mary Ann Glendon, *Rights Talk: the Impoverishment of Political Discourse* (New York, Free Press, 1991); Sonu Bedi also argues we place too much emphasis on rights, to the detriment of other moral arguments: Sonu Bedi, *Rejecting Rights* (Cambridge, Cambridge University Press, 2009)

² Michael Ignatieff, *Human Rights as Politics and Ideology* (Princeton, Princeton University Press, 2003), p. 53

³ Kofi Annan, quoted in Ignatieff, *Human Rights as Politics and Ideology*, p. 53

⁴ R. J. Vincent, *Human Rights and International Relations* (Cambridge, Cambridge University Press, 1986), p. 85; Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford, Oxford University Press, 2002)

⁵ David Goodhart and Roger Smith, “Can the Human Rights Act Undermine National Security?” *Prospect* (September 2005), pp. 18-22; Richard Ashby Wilson (Ed.), *Human Rights in the ‘War on Terror’* (Cambridge, Cambridge University Press, 2005); Joan Fitzpatrick, “Speaking Law to Power: The War Against Terrorism and Human Rights”, *European Journal of International Law* 14:2 (2003), pp. 241-264

⁶ Amnesty International describe the Arab Spring as a ‘human rights revolution’. Amnesty International, “A Human Rights Revolution” [<http://vimeo.com/36600118>] Accessed 1st August, 2013. This despite subsequent post-revolution human rights abuses. On these, see, for example, Dino Kritsiotis, “The Arab Spring, Massive Violations of Human Rights and the Use of Force” *Amsterdam Law Forum*, Vol. 5, No. 1, pp. 80-94, 2013 [http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2246708] Accessed 1st August, 2013.

increasing rate, new centres and groups have opened up dedicated to the study of human rights. Human rights matter.

Yet at the same time, there is a simple, yet profound, problem. While many people agree that human rights are a ‘Good Thing’, it is far from clear precisely what gives us these rights. The great human rights declarations are little help here. The United States declaration holds ‘these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness’.⁷ The French Declaration of the Rights of Man and of the Citizen declares ‘the rights of man’ to be ‘natural, unalienable, and sacred’.⁸ Rights are natural, something which humans (or least men, in 1789) have simply *qua* humans. It is far from clear why the fact that we have rights should be self-evident. Furthermore, many people do not believe that there is a ‘Creator’ or any deity in a position to grant such rights.

Such explanations of human rights rely, implicitly at least, on an understanding of natural law that many no longer share. In the case of human rights, this understanding of natural law is a Christian one in origin at least. Though there is some debate as to the precise origins of Natural Rights,⁹ by the seventeenth century, Hobbes could argue that ‘the RIGHT OF NATURE, which Writers commonly call *Jus Naturale*, is the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing any thing, which in his own Judgement and Reason, hee shall conceive to be the aptest means thereunto.’¹⁰

To accept Hobbes’ view of natural rights (and the views of others in the tradition – although in many aspects they disagree – such as Grotius, Vittoria, Aquinas, Suarez and Locke) one must also accept their cosmological presuppositions: that there is a God, that He has endowed humans with reason, and so on. Michael Perry argues that ‘the conviction that every human being is sacred’ or that ‘every human being is ‘inviolable’, has ‘inherent dignity’, is ‘an end in himself’, or the like’ is inherently, and ‘ineliminably’, religious.¹¹ Although some have argued for a ‘secular’ understanding of human ‘sacredness’, these attempts ultimately fail to convince.¹²

⁷ United States of America, “Declaration of Independence”

[<http://www.ushistory.org/declaration/document/>] Accessed 10th July 2013.

⁸ Assemblée Nationale, “Déclaration des Droits de L’homme et du Citoyen de 1789” [<http://www.assemblee-nationale.fr/histoire/dudh/1789.asp>] Accessed 10th July 2013. [*les droits naturels, inaliénables et sacrés de l’homme*]

⁹ See Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150-1625* (Atlanta, Scholar’s Press, 1997) and Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge, Cambridge University Press, 1979) for differing accounts.

¹⁰ Thomas Hobbes (Ed. Richard Tuck), *Leviathan* (Cambridge, Cambridge University Press, 2004), p. 91

¹¹ Michael J. Perry, *The Idea of Human Rights* (Oxford, Oxford University Press, 1998), p. 13

¹² Such an attempt is made by Ronald Dworkin: Ronald Dworkin, *Life’s Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (Alfred A. Knopf, New York, 1993), p. 195; Ari Kohen convincingly argues that Dworkin’s efforts to establish a secular sacredness are not successful: Kohen, *In Defense of Human Rights*, pp. 64-84; see also Ari Kohen, “The Problem of Secular Sacredness: Ronald Dworkin, Michael Perry, and Human Rights Foundationalism”, *Journal of Human Rights* 5 (2006), pp. 235–256

The problem with this basis for human rights, then, is that quite simply many people dispute the existence of a god, and many more reject the notion of natural law.¹³ As Alan Dershowitz argues, ‘in a diverse world where many claim to know God’s will, and where there is consensus about neither its content nor the methodology for discerning it, God should not be invoked as the source of our political rights.’¹⁴ Rights cannot be truly universalisable – they cannot be *human* rights – unless they are firmly divorced from this natural law tradition: affecting such a divorce, by basing rights on intersubjective social recognition, is one of the key aims of this thesis.

Further, innate human rights, with their claim of universality, have run into trouble regarding just how universal human rights are, and the question of whether they are really just the imposition of a Western category of thought onto an unwilling world. This objection – that rights are imperialism – consists of two arguments. The first, follows Carl Schmitt, in arguing that ‘whoever invokes humanity wishes to cheat’, for the concept of ‘humanity’ is ‘an especially useful ideological instrument of imperialist expansion’.¹⁵ On this reading ‘human rights’ are used to justify Western imperialism.¹⁶ The second argument is that human rights only work in the West: they are a specifically Western way of thinking, which developed from a specifically Western heritage of natural law, and are therefore inapplicable to the rest of the world, which might well have different values.¹⁷ It is the contention of this thesis that egalitarian rights recognition, by acknowledging the contingency of rights, jettisoning natural law, and calling for all humans to have equal access to rights recognition debates and processes, can overcome these problems, for the core idea of human rights is one worth holding onto.

Rights Recognition: Human rights without natural law

There are good reasons to wish to keep human rights. There is broad agreement that human rights do good. States in which human rights are not respected are considered to have serious problems, and for good reason, as Aung San Suu Kyi points out:

‘Within a system which denies the existence of basic human rights, fear tends to be the order of the day. Fear of imprisonment, fear of torture, fear of death, fear of losing friends, family, property or means of livelihood, fear of poverty, fear of

¹³ See: Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton, Princeton University Press, 2001), p. 54

¹⁴ Alan Dershowitz, *Rights from Wrongs: A Secular Theory of the Origins of Rights* (New York, Basic Books, 2004), p. 26

¹⁵ Carl Schmitt, *Der Begriff des Politischen: Text von 1932 mit einem Vorwort und drei Corollarien* (Berlin, Dunckner und Humblot, 1996 [1932]), p. 55 [besonders brauchbares ideologisches Instrument imperialistischer Expansionen]; [Wer Menschheit sagt, will betrügen]

¹⁶ Slavoj Žižek, “Against Human Rights”, *New Left Review* 34 (2005), pp. 115-131, pp. 128-129

¹⁷ Adamantia Pollis and Peter Schwab, “Human Rights: a Western Construct with Limited Applicability”, in Christine M. Koggel (Ed.), *Moral Issues in Global Perspective, Volume I: Moral and Political Theory* (Peterborough, Ont., Broadview Press, 2006)

isolation, fear of failure. A most insidious form of fear is that which masquerades as common sense or even wisdom, condemning as foolish, reckless, insignificant or futile the small, daily acts of courage which help to preserve man's self-respect and inherent human dignity.¹⁸

Similarly, Joel Feinberg argues that 'a human population without rights ... would be 'morally impoverished'' as people would not be able to claim things by right, but rather would have to rely on the charity of others.¹⁹ Further, 'to respect a person is tantamount to respecting her rights...If a person is thought to have no rights, not even the basic moral rights, she is by the same token thought to be unworthy of respect.'²⁰ Without rights, we are left without protection and without respect, in a world of fear.

This thesis, then, is a response to the paradox of human rights: that they are crucially important, yet somehow unjustifiable. It is not good enough to 'agree to disagree' when it comes to the basis of human rights. To fully respect human rights, agreement is needed as to why we should respect such rights. The argument of this thesis is that we can hold on to human rights, but that human rights are not natural or innate. We must reject natural law, and rather accept the fact that rights are the product of intersubjective social recognition: the result of this is a *political* theory of human rights; rights are created through politics and human interaction, not by God or nature.

This thesis puts forward a novel theory of rights recognition, which will be termed 'egalitarian rights recognition'. This theory places a greater emphasis on both egalitarianism and dialogue than other theories of rights recognition, and thus avoids some of the problems associated with them. Emphasis on egalitarianism allows the theory of egalitarian rights recognition to function both as an account of how rights come into being, and also a form of ideal type against which actual practice can be critically assessed: flaws in the rights recognition process produce flawed, and thus less legitimate, rights. Further, the theory gives us an account of what sort of society or political community is necessary for rights recognition. Again, this provides a critical yardstick against which to measure rights recognising communities.

The theory of egalitarian rights recognition is constructed through combining the work of two thinkers who might seem, at first, strange bedfellows. Thomas Hill Green was one of the more significant British political philosophers of the nineteenth century, and his posthumously published *Lectures on the Principles of Political Obligation* are the central text for those who work on the 'rights recognition thesis'. Hannah Arendt, born in Germany and forced to flee by the anti-Semitism of the Third Reich to the United States, was one of the twentieth century's most important political theorists. Her work, entirely overlooked until now by those who work on recognition theories of rights, provides a compelling analysis of the breakdown of the 'rights of man', as well

¹⁸ Aung San Suu Kyi, "Freedom from Fear, Acceptance message for the 1990 Sakharov Prize for Freedom of Thought" [<http://sanooaung.wordpress.com/2009/01/03/freedom-from-fear-daw-aung-san-suu-kyi/>] Accessed 15th August, 2012.

¹⁹ Joel Feinberg, "The Social Importance of Moral Rights", *Philosophical Perspectives* 6, pp. 175-198, p. 180

²⁰ *Ibid.*, p. 180

as rich resources for constructing an updated theory of rights recognition, especially through her work on the importance of political community and on judgment.

Egalitarian rights recognition can be set out in the following ten propositions, which will provide a thread running throughout this thesis:

1. Rights, including human rights, require social recognition.
2. Recognition consists of two stages – recognition of persons, and recognition of rights.
3. The location, or arena, for rights recognition is society.
4. Recognition of rights requires meaningful equality, which can be expressed as ‘equality of access to rights recognition arenas and debates’.
5. Recognition of rights or persons may not be arbitrary, but must be based on moral argument, such as the notion of a common good or a *sensus communis*.
6. Recognition of rights requires the greatest possible facilitation of communication within a society.
7. ‘Society’ in the context of rights recognition is open to ideas from without, and has no necessary limits.
8. Rights are recognised claims, not established ways of acting.
9. Recognition of rights and persons is synchronic, not diachronic.
10. Recognition of rights is logically distinct from enforcement and maintenance of rights; although enforcement and maintenance of rights is desirable, recognition can exist without enforcement and maintenance

These points will be introduced in turn throughout the first five chapters of the thesis. Chapter one will introduce points one to three, through a discussion of T.H. Green and his combination of Hegelian notions of recognition with discourses around natural rights. Chapter two will reinforce these points, as well as the argument in favour of rights recognition in general, through an analysis of debates on natural rights and rights recognition between the era of Green and the 1948 Universal Declaration of Human Rights. Chapter three introduces the political theory of Hannah Arendt, particularly with regard to the rights of man, the 'right to have rights', recognition, and judgment. Arendt's work supports the idea that rights require social recognition and a political community, as well as the argument that rights recognition is a two-stage process. Chapter four will, through a further examination of Green and Arendt, introduce points four to seven. The second half of chapter four will build on other theories of rights recognition and differentiate egalitarian rights recognition from them, through the introduction of points eight to ten. Chapter five presents a potential objection to rights recognition, and introduces the notion of contingent grounds, on which egalitarian rights recognition, combining rights recognition with a moral component, rests. Chapter six then considers the question of whether egalitarian rights recognition can provide a theory of rights which works outside the context of a specific political community to create a theory of international, cosmopolitan rights recognition.

Chapter One

G.W.F. Hegel, T.H. Green, and the social recognition of rights

*'I do not suggest that [Green] has said the last word on any topic. But I am suggesting that, if we are interested in developing a social philosophy for ourselves, it is by carrying further the work he has already begun that we shall make most progress.'*¹

The key work done by this chapter is to set out the idea of socially recognised rights as they appear in the work of Thomas Hill Green (1836-1882), in whose work the 'rights recognition thesis' finds its origin.² This will be done by setting his work against the backdrop of the work of Georg Wilhelm Friedrich Hegel (1770-1831): Green's key contribution, as we shall see, is in taking Hegelian thought on recognition, and introducing it to discourses on natural rights. A key, and novel, contention of this chapter will be that there are two key types, or stages, of recognition in Green: 'recognition of persons' and 'recognition of rights'.

The idea that humans, *qua* humans, have innate human rights, or natural rights, is an old idea. Its development in the West from Christian notions of natural law can be traced back to the middle ages, though the precise date of its emergence is a matter of some dispute.³ However, the idea of natural rights has not always dominated political or philosophical discourse: the idea was challenged by Burke, Bentham and Marx, amongst others, and in the nineteenth century and in the years of the twentieth century before the outbreak of the First World War, both English and German philosophy included significant schools of idealist thought, who held that there were no such things as natural or innate rights, and that rights required social recognition.⁴

¹ A.J.M. Milne, *The Social Philosophy of English Idealism* (London, Allen Unwin, 1962), p. 164

² I take the phrase 'rights recognition thesis' from Gaus: Gerald F. Gaus, "The Rights Recognition Thesis: Defending and Extending Green" in Maria Dimova-Cookson and W. J. Mander (Eds.) *T. H. Green: Ethics, Metaphysics and Political Philosophy* (Oxford, Clarendon Press, 2006) pp. 209-235

³ See Tierney, *The Idea of Natural Rights* and Tuck, *Natural Rights Theories* for differing accounts. More unusually, some scholars trace human rights ideas back to Ancient Rome. See: Richard A. Bauman, *Human Rights in Ancient Rome* (London, Routledge, 2000)

⁴ Edmund Burke, *Reflections on the revolution in France* (New Haven, Yale University Press, 2003 [1790]); Jeremy Bentham, "Nonsense Upon Stilts, or Pandora's Box Opened, or The French Declaration of Rights Prefixed to the Constitution of 1791 Laid Open and Exposed – with a Comparative Sketch of What has been done on the Same Subject in the Constitution of 1795 and a Sample of Citizen Sieyès" in Jeremy Bentham (Ed. Philip Schofield, Catherine Pease-Watkin and Cyprian Blamires), *Rights, Representation and Reform: Nonsense upon Stilts and Other Writings on the French Revolution* (Oxford, Clarendon Press, 2002); Karl Marx, "On the Jewish Question", in Karl Marx and Frederick Engels,

Green, along with Hannah Arendt, is one of the two key thinkers in the project of this thesis, which is to develop a novel theory of egalitarian rights recognition. Chapter five will present the full theory of egalitarian rights recognition, which consists of ten key points. The chapters before chapter five will add to the theory, point by point, gradually drawing the full picture of the theory together. The starting point is the work of T.H. Green, which will be presented in this chapter. The key importance of T.H. Green to the theory of rights is that he brings Hegelian thought on recognition to bear on questions of rights. Where Hegel does not always talk explicitly about ‘rights’ in the way that we do today, but rather about ‘*Recht*’, which can be ‘right’, ‘rights’ or ‘law’, Green talks explicitly about rights in a way that is immediately understandable to readers of his work in the early 21st century. In this way, Green marks a highly significant confluence of streams of thought about recognition, on the one hand, and about (natural) rights, on the other.

Recent interpretations of T.H. Green have tended to emphasise his Kantian heritage at the expense of Hegel, who is viewed by some as a lesser influence on Green’s work. This is particularly evident in the analyses of Green by Colin Tyler, who sees a basis for Green’s conception of rights in a Kantian respect for persons, and who barely mentions Hegel in this regard.⁵ This chapter, whilst teasing out some of the interesting differences between Green and Hegel when it comes to rights, recognition and the role of state and society for both rights and recognition, will show that Green’s position, despite the differences present, is quite similar to the position of Hegel. Both see recognition as essential for rights; similar basic ideas lie behind their analysis of the role of the state in rights, too. For both, rights are essential for the realisation of freedom. Yet Green adopts the language of natural rights whilst holding on to the importance of recognition.

Comparing the thought of Hegel and Green on rights, recognition, and the role of the State in both, offers a method by which some of the details of their positions might be teased out more visibly and with greater clarity than a simple exposition of the

Collected Works, Volume Three (Lawrence and Wishart, London, 1975), p. 162; On the influence of idealism, see: Klaus Dockhorn, *Die Staatsphilosophie des englischen Idealismus, ihre Lehre und Wirkung* (Bochum-Langendreer, Heinrich Pöppinghaus, 1953); W. J. Mander, *British Idealism: A History* (Oxford, Oxford University Press, 2011); Peter Hoeres, *Krieg der Philosophen: Die deutsche und die britische Philosophie im Ersten Weltkrieg* (Paderborn, Schöningh, 2004)

⁵ See, for example, Colin Tyler’s entry on Green in the Stanford Encyclopaedia: Colin Tyler, “Thomas Hill Green”, in Edward N. Zalta (Ed.), *The Stanford Encyclopedia of Philosophy* (Summer 2011 Edition), [<http://plato.stanford.edu/archives/sum2011/entries/green>] Accessed 14th March 2013.

thought of either or both. In addition to this, such a comparison will shed light on the divergent contemporary literature on recognition and rights recognition. Some authors, such as Derrick Darby and Rex Martin,⁶ take their cue almost entirely from Green, particularly those who are primarily concerned with the rights recognition thesis. Others, for example Axel Honneth,⁷ draw on Hegel to the complete exclusion of Green. This division in the literature is puzzling, given the great similarities between Hegel and Green on rights and recognition that this chapter seeks to demonstrate.

This chapter will compare, in some detail, the idea of ‘recognition’ in Hegel and Green, before turning to ‘rights’ (although there is inevitably some overlap between recognition and rights in both cases), and finally the role of the state and of society in recognising rights. In doing so, it aims to set out theory of Green against the backdrop of Hegel’s theory of recognition. The chapter will both set out Green’s theory of rights recognition and demonstrate that he is closer to Hegel than many scholars of Green argue. His significance for the theory of egalitarian rights recognition lies in his bringing Hegelian recognition to bear on the theory of rights.

In this chapter, three key points that form part of the overall theory of egalitarian rights recognition will be laid out. First, rights require recognition. Second, rights recognition consists of two key stages: the recognition of persons and the recognition of rights. Third, rights recognition occurs in society (which is created through the recognition of persons); furthermore, rights *cannot exist* outside of society.

1. Recognition in Hegel and Green

Recognition is at the heart of Hegel’s philosophical system. This section will show that it is recognition that makes ethics possible for Hegel. Green takes on a great deal of Hegel’s thought on recognition – more than some commentators have allowed – but whereas Hegel’s account of recognition involves three levels, Green’s recognition can be split into two stages, the ‘recognition of persons’ and the ‘recognition of rights’. Recognition of persons is logically prior to rights, indeed it is akin to ‘the right to have

⁶ Derrick Darby, *Rights, Race, and Recognition* (Cambridge, Cambridge University Press, 2009); Rex Martin, *A System of Rights* (Oxford, Clarendon Press, 1997); See also: Patchen Markell, *Bound by Recognition* (Princeton, N.J. : Princeton University Press, 2003)

⁷ Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts* (Cambridge, Polity Press, 1995)

rights’, a concept to which we will return, in the context of Hannah Arendt’s thought, in chapter three. For both Green and Hegel, social recognition is crucial to personhood and the creation of (ethical) society.

1.1 Recognition in Hegel

In offering an exposition and analysis of Hegel’s account of recognition, this section will take its formal structure from Hegel’s division of recognition into three stages. This division is to be found in the *Encyclopaedia Philosophy of Spirit*, in paragraph 425, and – importantly, with reference to his influence on Green⁸ – in a slightly altered form in the *Philosophical Propädeutik*.⁹ Paragraph 425, and the paragraphs which follow it, offer perhaps the clearest logical account of recognition in Hegel’s work. Like much in Hegel, and reflecting the overall structure of his *Philosophy of Right*, this account of recognition consists of three parts, or levels, which are set out most clearly in the ‘addition’ [*Zusatz*] to paragraph 425. Each level leads logically to the next, but full, intersubjective recognition is only achieved at the third level. This section will explore each level in some depth, bringing in criticism and debate from the secondary literature at the appropriate level.

The first level is that of the ‘individual self-consciousness, which is simply identical with itself and at the same time – in contradiction to this – related to an external object.’¹⁰ This self-consciousness ‘has certainty of itself as existing whereas the external object has only seemingly certainty of its independent existence, but actuality has the existence of a nullity’. This then, is self-consciousness as appetitive [*begehrende*], which attains satisfaction by consuming the object and proving that the object is nullity.¹¹ This negation of a negation provides ‘unending affirmation’

⁸ Green may well have been familiar with this piece of Hegel’s work in particular. See footnote 56, below.

⁹ G.W.F. Hegel, *The Philosophical Propädeutik* (Oxford, Basil Blackwell, 1986), pp. 59-60; see also Hegel, Georg Wilhelm Friedrich, *Werke 4: Nürnberger und Heidelberger Schriften (1808-1817)* (Frankfurt am Main, Suhrkamp, 1983), p. 117

¹⁰ Georg Wilhelm Friedrich Hegel, *Werke 10: Enzyklopädie der philosophischen Wissenschaften im Grundrisse (1830) Dritter Teil Die Philosophie des Geistes mit dem mündlichen Zusätzen* (Frankfurt am Main, Suhrkamp, 1981) §425 Zusatz, p. 215 [*das unmittelbare, einfach mit sich identische und zugleich, im Widerspruch hiermit, auf ein äußerliches Objekt bezogene*]

¹¹ Robert Williams, *Hegel’s Ethics of Recognition* (London, University of California Press, 1997), p.71

[*unendliche Affirmation*] to the individual self-consciousness.¹² As a merely appetitive self-consciousness, it cannot separate ethical freedom from mere desire: an appetitive self-consciousness does not consume the external object as an act of free will, but, simply, can do no other but act following simple desire. To make ethical freedom – the exercise of free will – possible, it is clear that a further step is needed.¹³

Victoria Burke advances a further reason that the self-consciousness seeks recognition in Hegel: it is only this way that it can know itself. She argues that ‘the reason self-consciousness must be recognized in order to know itself as conscious is because consciousness is the agent of knowing, and as such it cannot know itself. As the agent of knowing, it cannot be the content of its knowledge qua its being the agent of its knowing.’ Therefore, ‘for consciousness as the agent of knowing to be known by itself qua agent of knowing, there must be another consciousness that knows it, however imperfectly, as such. Any knowledge that it has of itself as a consciousness, as an agent of knowing, must, consequently, come to it through the mediation [of] another.’¹⁴

Smith, following Kojève,¹⁵ holds that the recognition is, ‘for Hegel, the quintessentially human desire’. Although basic corporeal needs and desires – food, warmth, protection, and the like – are important, they are the needs of the immediate consciousness in its naturalness, and are not fully human. Rather, being fully human is acting on those ‘second order desires’ which set humans apart from other animals, and the desire for recognition is the quintessential ‘second order’ human desire.¹⁶

The first, basic, form of recognition, comes with the second level, which can be usefully split into two sub-levels. The first sub-level involves the simple introduction of another ego, whilst the second is the struggle for recognition between two self-consciousnesses which must be resolved in order to move to the third stage. Let us start, then, with the first sub-level, which involves the introduction of ‘the determination of another ego’ to the ‘objective ego’, through which ‘a relation of one self-

¹² Hegel, *Enzyklopädie*, § 425 Zusatz, p. 214

¹³ Williams, *Hegel's Ethics of Recognition*, p. 72

¹⁴ Victoria Burke, “Hegel’s Concept Of Mutual Recognition: The Limits Of Self-Determination”, *The Philosophical Forum*, 36:2 (2005), p. 215

¹⁵ Whose analysis would appear to correct on this point, if not on others (see pp. 12-13 of this thesis).

Alexandre Kojève, *Alexandre Kojève, Introduction to the Reading of Hegel: Lectures on the Phenomenology of Spirit* (New York, Basic Books, 1969), p. 6, in Steven B. Smith, *Hegel's Critique of Liberalism: Rights in Context* (London, University of Chicago Press, 1989), p. 116

¹⁶ Smith, *Hegel's Critique of Liberalism*, p. 116

consciousness to another self-consciousness comes into being'.¹⁷ In a recognised self-consciousness 'I see [the self-consciousness of the other] as I see myself, but I see also an immediately existing, independent other object, opposite to me'.¹⁸ Thus, between these two self-consciousnesses, 'the process of recognition' means that 'self-consciousness is no longer simply *individual* self-consciousness, but in it [through the process of recognition] there already begins a unification between the individual and the universal'.¹⁹ The individual self-consciousness is no longer isolated or atomistic, but through recognition of the other begins to be in relation to the universal, which is to say with all other self-consciousnesses. But this is to anticipate slightly the third level.

The second sub-level is marked by a struggle for recognition, which can be mortally dangerous to each of the self-consciousnesses. Hegel argues that 'I cannot know me [*mich*] as myself [*mich selbst*] in the other, in that the other is an immediate and other existence for me; I am therefore directed to the removal [*Aufhebung*] for him of this immediacy of his'.²⁰ Here, some terminological clarification is in order, particularly regarding the word 'immediate' and 'immediacy', which translate *unmittelbar* and *unmittelbarkeit* respectively. The vagaries of semantic shift in both German and English obscure what Hegel is getting at here for the modern reader. Today, the German *unmittelbar* and the English 'immediate' tend to be employed as synonyms for 'direct'. The word *unmittelbar*, however, literally denotes that something cannot be mediated, that cannot be communicated to a second party by a third party. Thus, Williams helpfully points out that for Hegel 'when something is immediate, it is not open, but exists by itself, closed off from influence. It is impervious to and exclusive of otherness'.²¹ In other words, the other is 'un-transmittable' or 'un-communicable' to me.

It is this state of affairs that must be overcome: if the other is so impervious and exclusive of my otherness (from its point of view) then I cannot know myself in the

¹⁷ Hegel, *Enzyklopädie* §425, p. 215 [*Auf der zweiten Stufe bekommt das objektive Ich die Bestimmung eines anderen Ich und entsteht somit das Verhältnis eines Selbstbewußtseins zu einem anderen Selbstbewußtsein*]

¹⁸ *Ibid.*, § 430 [*Ich schaue in ihm als Ich mich selbst an, aber auch darin ein unmittelbar daseiendes, als Ich absolut gegen mich selbstständiges anderes Objekt*]

¹⁹ *Ibid.*, § 425, p. 215 [*zwischen diesen beiden aber der Prozeß des Anerkennens. Hier ist das Selbstbewußtsein nicht mehr bloß einzelnes Selbstbewußtsein, sondern in ihm beginnt schon eine Vereinigung von Einzelheit und Allgemeinheit.*]

²⁰ *Ibid.*, § 431 [*ich kann mich im Anderen nicht als mich selbst wissen; insofern das Andere ein unmittelbares anderes Dasein für mich ist; ich bin daher auf die Aufhebung dieser seiner Unmittelbarkeit gerichtet*]

²¹ Williams, *Hegel's Ethics of Recognition*, p. 75

other. The same is true for the other self-consciousness. Yet this immediacy (or ‘un-transmittability’) is identified with naturalness by Hegel, and thus losing it is losing one’s natural corporeity. Losing this immediacy enables each self-consciousness to be ‘not merely natural but free’. To win freedom, then, a self-consciousness must be prepared to stake his own natural existence, his own life; neither may he tolerate the ‘natural existence of others’.²² Here, the life and death struggle for recognition arises, in which each self-consciousness tries to gain recognition from the other: this struggle for recognition has become famous, or infamous, as the ‘master-slave dialectic’.

At this point it is appropriate to include a brief excursus on the master-slave dialectic, before moving on to look at the third level of recognition. This master-slave dialectic is a much-discussed and controversial aspect of Hegel’s thought, which has attracted attention out of proportion to its role in his system. This attention is largely due to the work of Alexandre Kojève, for whom ‘recognition is synonymous with the unequal recognition of master and slave’.²³ However, as Richard Lynch’s analysis makes clear, Kojève’s reading and interpretation of Hegel were both as flawed as they were influential.

Kojève shaped the reception of Hegel in twentieth century philosophy, and his influence can be seen clearly in subsequent discussions of recognition, the other, and the master-slave dialectic, perhaps most notably in the work of Jean-Paul Sartre.²⁴ Lynch demonstrates that Kojève’s presentation of Hegel was flawed in two crucial ways. First, it was incomplete and omitted key sections. Second, by this omission of ‘key passages where Hegel underscores the *mutuality* of recognition’, Kojève’s analysis presents the dialectic of master and slave, and Hegel’s dialectic in general ‘as much more confrontational, one-dimensional, and uni-directional than in fact is the case.’²⁵ Recognition is mutual as it is the result of a common, human need to be recognised by the other; the benefit is shared.

Kojève’s methodological flaws are compounded by further flaws in his selection of which of Hegel’s texts to analyse. The part of Hegel’s work on which Kojève

²² Here there are strong parallels with Arendt’s reading of Ancient Greek attitudes: ‘Thus only that man was free who was prepared to risk his own life, and it was the man with the unfree and servile soul who clung too dearly to life – a vice for which the Greek language has a special word: *philopsychia*.’ Hannah Arendt, *The Promise of Politics* (New York, Schocken, 2005), p. 122. Further parallels between Hegel, Green, and Arendt will become evident in chapter three.

²³ Williams, *Hegel’s Ethics of Recognition*, p. 11

²⁴ See, for example, Jean-Paul Sartre, *Being and Nothingness* (London, Routledge, 2007), pp. 386 - 542

²⁵ Richard A. Lynch, “Mutual Recognition and the Dialectic of Master and Slave: Reading Hegel against Kojève”, *International Philosophical Quarterly* 41:1, Issue 161 (March 2001), p. 33

focused was the *Phenomenology of Spirit*: this is a highly questionable choice of focus. Hegel's account of recognition differs here from elsewhere in his work, especially as regards the master-slave dialectic, and there are distinct questions as to its place in Hegel's system. Thom Brooks argues that the *Phenomenology of Spirit* is 'not part of his larger system', but is, rather, merely an 'entrance exam' to the rest of the system.²⁶ as Terry Pinkard puts it, it is the 'ladder that one kicked away once one arrived at the proper heights' of Hegel's system.²⁷

Having discussed the master-slave dialectic, and rejected Kojève's version of it, it is important to point out that there is good reason to believe that the second stage is not necessarily marked by conflict. Williams, in stark contrast to Kojève, argues that neither conflict nor the master-slave dialectic are necessary stages in recognition in Hegel's system. For him, if this were they were necessary, then 'love, and all the virtues, as well as marriage and the state... would constitute oppressions'. Hegel is quite clear that these things depend on recognition;²⁸ if the master-slave dialectic and the struggle for recognition were vital for recognition in all cases, then virtues would be brought about only by oppressions: clearly this is not tenable. Despite Hegel's presentation of the master-slave dialectic in this part of the *Encyclopaedia*, which seems to suggest it plays an important part, Williams suggests that the dialectic is merely 'a contingent, deficient exemplification' of the possibilities of recognition: in the case of love, for example, this struggle for recognition need not occur.²⁹ This is true at the individual level at least: at the world-historical level of the spirit, argues Williams, the life and death struggle may always be necessary, but that need not concern us here.³⁰

It is clear that the master-slave dialectic of the second level of recognition cannot obtain indefinitely, for the master is not truly free, as he cannot see himself in the self-consciousness of the slave. Consequently, the slave too must be free, and recognised by the master, in order for the master to be truly free.³¹ As we have seen, the

²⁶ Thom Brooks, *Hegel's Political Philosophy: A Systematic Reading of the Philosophy of Right* (Edinburgh, Edinburgh University Press, 2010), p. 21

²⁷ Terry Pinkard, *Hegel: A Biography* (Cambridge, Cambridge University Press, 2000), p. 336, in Brooks, p. 22; see also Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* (London, Routledge and Kegan Paul, 1969), p. 150-151, §6.54

²⁸ See: Hegel, *Enzyklopädie*, §436; §436 Zusatz, pp. 226-227; Hegel, *Philosophical Propaedeutic*, p. 63; Hegel, *Nürnberg und Heidelberger Schriften*, p. 122

²⁹ Williams, *Hegel's Ethics of Recognition*, p. 74

³⁰ *Ibid.*, p. 87

³¹ Hegel, *Enzyklopädie*, § 436 Zusatz, pp. 226-227; Arendt, as we shall explore further in chapter three, holds a similar position: neither master nor slave can be free, but freedom requires equality: Arendt, *The Promise of Politics*, p. 117.

way out of this is that each must be prepared to sacrifice his ‘natural’, ‘immediate’ existence in order to achieve recognition. Here, I take Hegel to mean not that one should lay down one’s life to achieve recognition; there is nothing Christ-like to be read into it. Rather, I believe what Hegel has in mind would be something analogous to skydiving, bungee-jumping or other extreme sports: one has to accept that there is a very grave (if perhaps mitigated by modern health and safety legislation) risk of death, but that to gain the adrenalin rush, or the experience or fulfilment – or in Hegel’s case recognition – one must accept this risk. It is not done with the intention of dying, but rather with the knowledge that death is a possibility, a prospect which must be stared in the face for the greater gain.

Accepting this mortal danger and making the leap leads to the third stage. Already, the two self-consciousnesses are both ‘other’ to each other and identical in that otherness. In the third stage, the otherness [*Anderssein*] is sublated – which is to say it is confirmed, negated and transcended – which creates the ‘universal self-consciousness’ [*allgemeine Selbstbewußtsein*]. In this state, ‘subjects remain independent in their identity, and are identical in their independence’.³² The result of the struggle for recognition is universal, free self-consciousness, in which, by setting aside their unequal particular individuality (master and slave), both self-consciousnesses ‘have risen to the consciousness of their real universality...and hence to the perception of their specific identity with each other.’³³

Thus the human being ceases to be a mere individual in isolation, but remains an individual: a universal individual, ‘intersubjectively reciprocally recognized member of the ‘We’.’³⁴ Hegel argues that in recognition the self ‘exists by right in recognition, and this means it exists no longer immersed in its immediate existence’ – that is, the existence of the first level. Further, ‘the one who is recognized is recognized as immediately counting as such in his being’: in the words of Williams, ‘Recognition is the right to have rights’.³⁵ The full significance of this choice of phrase will become apparent further on in this work (chapter four), but already it suggests an interesting link between the work of Hannah Arendt and other traditions, such as the rights recognition thesis.

³² Williams, *Hegel’s Ethics of Recognition*, p. 73

³³ Hegel, *Enzyklopädie*, § 436 Zusatz, p. 226 [...*ihrer* reellen Allgemeinheit...*und damit zur Anschauung ihrer bestimmten Identität miteinander erhoben*]

³⁴ Williams, *Hegel’s Ethics of Recognition*, p. 101

³⁵ *Ibid.*, p. 101

The result of the third level of recognition is the ‘universal [*allgemeine*] self-consciousness’, in which subjectivity and objectivity are combined, which forms the substance of ethics, and makes everything ethical possible.³⁶ Thus, recognition is fundamentally important for Hegel; indeed it is ‘a matter of life and death’.³⁷ Robert Williams argues that it is of central importance in understanding Hegel’s thought on rights, freedom, and ethics.³⁸ Yet it has received relatively little attention, and what attention the struggle for recognition, and Hegel’s account of it in the *Encyclopaedia*, has received has tended to focus on the dialectic of master and slave. This is not the only way in which work on recognition in Hegel has tended to have been too narrow in focus. Williams argues that much of the research into recognition in Hegel has concentrated on his early writings, particularly the texts which stem from his Jena period, such as the lectures on the Philosophy of the Spirit of 1805-1806.³⁹ This clearly has an effect on the interpretation of Hegel; some commentators suggest that a grasp of his whole system is necessary to properly understand his political philosophy.⁴⁰ Williams suggests that Jürgen Habermas’ and Axel Honneth’s readings of Hegel on recognition tend to refer to this earlier period, rather than his later work – though it is worth noting that Honneth does refer to the concept of recognition in the ‘mature’ Hegel’s works, such as the *Encyclopaedia Philosophy of Spirit* and the *Philosophy of Right*.⁴¹

Concentration on Hegel’s Jena writings when it comes to recognition (alleged or real) should be no great surprise. It is, after all, here that Hegel is at his most explicit regarding the role of recognition, arguing that ‘Man is necessarily recognized and necessarily gives recognition. This necessity is his own, not that of our thinking in contrast to the content. As recognizing, man is himself the movement [of recognition], and this movement itself is what negates[/transcends] (*hebt auf*) his natural state: he is recognition; the natural aspect merely *is*, it is not the spiritual aspect.’⁴² Here, then, Hegel is very explicit about the importance of recognition.

³⁶ Hegel, *Enzyklopädie*, § 436, p. 227

³⁷ *Ibid.*, §432, p. 221

³⁸ Robert Williams, *Hegel’s Ethics of Recognition*, p. 6

³⁹ Leo Rauch, *Hegel and the Human Spirit: A Translation Of The Jena Lectures On The Philosophy Of Spirit (1805-6) With Commentary* (Detroit, Wayne State University Press, 1983)

⁴⁰ Brooks, *Hegel’s Political Philosophy*

⁴¹ Honneth, p. 108; Axel Honneth, *The Pathologies of Individual Freedom* (Princeton, Princeton University Press, 2010)

⁴² Rauch, *Hegel and the Human Spirit*, p. 111

In contrast, the ‘mature’ Philosophy of Right does not explicitly discuss recognition. Indeed, the term recognition [*Anerkennung*] appears only six times in the entire, lengthy, text.⁴³ This might lead one to the conclusion that recognition is not important for the mature Hegel, a conclusion that would make this analysis of rights and recognition in Hegel and Green something of a futile endeavour. However, Jürgen Lawrenz argues that ‘recognition is pervasive in [the Philosophy of Right]’ but that Hegel tries to conceal the extent to which it is important, hence the sparing use of the word *Anerkennung* and the use of synonyms, such as *respektieren* or ‘respect’. This, argues Lawrenz, was due to the fact that Hegel wished to distance himself from Fichte – *Anerkennung* being ‘a celebrated Fichtean coinage’ – whose philosophy on right was, at the least, seen as problematic.⁴⁴ Williams, too, sees recognition as a vital part of all of Hegel’s philosophy, certainly not limited to his early works.⁴⁵ There is no obstacle here, then, to taking seriously the idea of recognition in both Green and Hegel.

1.2 Recognition in Green

Green’s account of recognition is broadly similar to Hegel’s, though he does differ in some important aspects. Of these, one of the more significant is the fact that two distinct forms of recognition can be found within Green’s philosophy. Teasing out different sorts of recognition in Green has been done before: Maria Dimova-Cookson distinguishes between ‘practical social recognition’ and ‘metaphysical social recognition’, while Ann Cacoullos argues that the term ‘recognition’ is ‘not univocal’ and that Green uses it ‘in at least two senses and possibly a third’.⁴⁶ However, the distinction I would like to make is a novel one, and one which I believe has some explanatory power with regard to Green’s work. This distinction is between what I label the ‘recognition of persons’ on the one hand and the ‘recognition of rights’ on the other.

⁴³ As Lawrenz notes: Jürgen Lawrenz, “Hegel, Recognition and Rights: ‘Anerkennung’ as a Gridline of the Philosophy of Right”, *Cosmos and History: The Journal of Natural and Social Philosophy*, 3:2-3 (2007), p. 153

⁴⁴ Lawrenz, “Hegel, Recognition and Rights”, p. 154

⁴⁵ Williams, *Hegel’s Ethics of Recognition*

⁴⁶ Maria Dimova-Cookson: *T.H. Green’s Moral and Political Philosophy: A Phenomenological Perspective* (Basingstoke, Palgrave, 2001), pp. 133-140; Ann Cacoullos, *Thomas Hill Green: Philosopher Of Rights* (New York, Twayne Publishers, 1974), p. 88

Hegel's recognition was concerned with the recognition of persons, or self-consciousnesses, which gain freedom as both rights and duties through reciprocal, universal recognition. This account of recognition is similar to that found in Green, but Green seems to split it into two distinct parts. The first part is what I will term the 'recognition of persons', and although Green does not discuss it at great length, it would seem to encompass many of the aspects of recognition in Hegel. There also exists in Green, clearly linked to (and logically secondary to) the recognition of persons, a separate type of recognition, which I will term 'recognition of rights'. This second form of recognition will be discussed later; the present concern is with recognition in Hegel and Green as a form of metaphysics of the person, and it is the first form of recognition which is relevant to this.

This first form of recognition, the 'recognition of persons', may be found in Green's *Prolegomena to Ethics*. Here, he argues that without society, there can be no persons. Conversely, 'without persons, without self-objectifying agents, there could be no such society as we know.'⁴⁷ Society, then, is formed by the 'recognition by persons of each other, and their interest in each other, *as persons, i.e.* as beings who are ends to themselves, who are consciously determined to action by the conception of themselves, as that for the sake of which they act.'⁴⁸ Logically, then, if society is necessary for personhood, and if society is formed by recognition, it is recognition that forms, and is necessary for, personhood too. As Green argues, 'Some practical recognition of personality by another, of an 'I' by a 'Thou' and a 'Thou' by an 'I', is necessary to any practical consciousness of it, to any such consciousness of it as can express itself in act.'⁴⁹ We require the recognition of others to constitute us as persons.

Recognition of persons happens 'necessarily' when persons recognise in each other 'a common humanity, of which language is the expression'.⁵⁰ Thus recognition is built on communication, just as (as we shall see later in this chapter and in chapter four) rights recognition is also dialogical in nature, resting on claims, persuasion, and judgment. Language is thereby the key to moral action.⁵¹ Rights, which make moral action possible, are recognised through debate. Thus the quality needed for moral action is the ability to communicate through language; anyone who possesses this

⁴⁷ Thomas Hill Green, *Prolegomena to Ethics* (Oxford, Clarendon Press, 1899), §190, p. 225

⁴⁸ *Ibid.*, §190, p. 225

⁴⁹ *Ibid.*, §190, p. 226

⁵⁰ Green, *Lectures*, §135, p. 139

⁵¹ This point will be amplified in chapter three, through a discussion of Arendt's assertion that speech and action go together: language and speech make the action intelligible.

ability is necessarily recognised by others as being capable of moral action, and thus of possessing rights ‘in principle’:⁵² it is recognised that the persons are capable of taking part in a rights recognising debate, and through this recognition they gain admission to the political community. This recognition is the ‘recognition of persons’.

In broad terms Green’s recognition of persons is similar to Hegel’s position: society and personhood are constituted by intersubjective recognition. Yet there are differences in detail. Green’s account of the recognition of persons is less intricately sophisticated than Hegel’s, relying on a slightly simpler recognition of others as persons as ‘beings who are ends to themselves, who are consciously determined to action by the conception of themselves’,⁵³ rather than the rather complex Hegelian account of seeing oneself in, and being-with-oneself in, the other.

Echoes, however, of the Hegelian account of recognition may be found in Green’s account: whether this is deliberate or perhaps subconscious is hard to say – either way, the influence seems clear. Green argues that society is founded on the ‘mutual interest’ of persons who ‘being aware that another presents his own self-satisfaction to himself as an object, finds satisfaction for himself in procuring or witnessing the self-satisfaction of the other’. This he contrasts, in language quite close to Hegel’s, with ‘the tendency, inherent in the self-asserting and self-seeking subject to make every object he deals with, even an object of natural affection, a means to his own gratification.’⁵⁴ It seems to me that here, with the words ‘self-seeking subject’, Green is describing something very similar to Hegel’s appetitive self-consciousness, and that he is contrasting it with the previously mentioned two persons who exist in a state of recognition.

Recognition in Green is not characterised by a struggle; there is no master-slave dialectic to be found in his work. Rather, Green’s account relies on ‘mutual interest’. This may at first seem like quite a large difference. However, this would be to overstate things: Hegel’s account too does in the end boil down to mutual interest, in that only by recognising each other can both sides in the struggle for recognition attain freedom. In Green the argument from mutual interest runs slightly differently: society relies on the ‘treatment of one human being of another as an end, not merely a means’; society is necessary for personhood, and thus the realisation of the ‘human spirit’ and the

⁵² Green, *Lectures*, §135, p. 139

⁵³ Green, *Prolegomena*, §190, p. 225

⁵⁴ *Ibid.*, §190, p. 225

fulfilment of the ‘divine idea of man’, both of which ‘can only take place in and through society’. Society in turn relies on mutual recognition and thus persons are compelled to recognise each other.⁵⁵ Common to both philosophers’ work is a deep, human need for recognition. Society is a pre-requisite for rights, as rights can only be recognised in society (as we shall see). As society itself is formed by the recognition of persons, this first stage of recognition is logically prior – and necessary – for rights recognition. In the discussion of rights, we will see that the second stage of recognition for Green, ‘recognition of rights’, brings Hegelian thought on recognition to bear on rights theory.

1.3 The Universal Self-Consciousness and the Eternal Consciousness

There is one crucial aspect of the relationship between Green and Hegel’s metaphysical accounts of recognition which I believe has been overlooked; and when it has been commented upon, the comments have not been made with regard to the issue of rights and recognition. This aspect is the relation between the ultimate result of multiply intersubjective recognition in Hegel, which is the ‘Universal Self-Consciousness’ or ‘Reason’, and Green’s own ‘eternal consciousness’. There has recently been a good deal of discussion of the role of Green’s ‘eternal consciousness’, and the questions of what it is, what role it plays in his wider philosophical programme and whether his political philosophy can do without it have all been debated.⁵⁶ However, the link between this aspect of Green’s thought and Hegel has not been explored in any great detail.

Ben Wempe makes the case (and indeed later the case against) that Green was familiar with Hegel’s thought, in particular with his *Philosophical Propädeutik*, of which, allowing that the manuscript found in Green’s papers is in his own hand and not a forgery, he made a translation.⁵⁷ The *Propädeutik*, as noted earlier, contains a brief

⁵⁵ *Ibid.*, §190, p. 225

⁵⁶ See: W. J. Mander, “In Defence of the Eternal Consciousness”, in Maria Dimova-Cookson and W. J. Mander (Eds.), *T. H. Green: Ethics, Metaphysics, and Political Philosophy* (Oxford, Clarendon Press, 2006) pp. 187-207; Peter Nicholson, “Green’s ‘Eternal Consciousness’”, in Maria Dimova-Cookson and W. J. Mander (Eds.), *T. H. Green: Ethics, Metaphysics, and Political Philosophy* (Oxford, Clarendon Press, 2006, pp. 139-159; Robert Stern, “British Hegelianism: A Non-metaphysical View”, *Bulletin of the Hegel Society of Great Britain* 32 (1995), pp. 17-38; Colin Tyler, *Thomas Hill Green (1836-1882) and the Philosophical Foundations of Politics* (Lampeter, Edwin Mellen, 1997)

⁵⁷ The manuscript, thought to be in Green’s hand, was discovered by chance in 1982 ‘when Michael George and Andrew Vincent recognized it amongst some of Green’s papers on display in the library’ at a

exposition of the three levels of recognition in Hegel's thought, in paragraphs 22-39. The third stage of recognition here is the 'Universal Self-Consciousness', something that Hegel, in the encyclopaedia, glosses thus: 'What we have called in the previous paragraph universal self-consciousness, is, in its truth, the Notion of *Reason* – the *Notion* in so far as it exists not merely as the logical Idea, but as the Idea that has developed into self-consciousness'.⁵⁸ Similarly, in the *Propädeutik*, 'Reason is the highest union of consciousness and self-consciousness or of the knowing of an object and of the knowing of itself.'⁵⁹

Elsewhere in the *Propädeutik*, Hegel argues that 'the Moral Law within us is the Eternal Law of Reason which we must respect without reserve and by which we must feel indissolubly bound.' The ultimate result of recognition in Hegel, then, forms an 'Eternal Law of Reason'. However, Hegel argues, although he is clear that it is recognition which constitutes reason [*Vernunft*], 'we see...the immediate incommensurateness of our individuality with it and recognize it as higher than ourselves, as a Being independent from us, self-existent and absolute.' Furthermore, 'this absolute Being is present in our pure consciousness and reveals Himself to us therein. The knowing of Him is, as mediated through our pure consciousness, for us immediate and called Faith.'⁶⁰

The similarities to Green's 'eternal consciousness' are striking, particularly in respect of the way Hegel also brings in quite religious language to refer to this 'Being' which is none other than reason. Both Hegel and Green seem to have in mind the identity of reason with God made by the writer of the St. John's Gospel in the New Testament, where reason, logic, or 'the word' [*λογος*] and God [*θεος*] are clearly one and the same:⁶¹

conference at Balliol College, Oxford. Michael George and Andrew Vincent, "Preface", in G.W.F. Hegel, *The Philosophical Propaedeutic* (Oxford, Basil Blackwell, 1986); Ben Wempe, though initially convinced *his* discovery of the *Propädeutik*, in 1978 was highly significant for the understanding of Green's thought, was, by 1986, no longer convinced that the manuscript was in Green's hand: Ben Wempe, *Beyond Equality: A Study of T.H. Green's Theory of Positive Freedom* (Delft, Eburon, 1986).

⁵⁸ Hegel, *Enzyklopädie*, §437, p. 228 [*Was wie im vorigen Paragraphen das allgemeine Selbstbewußtsein genannt haben, das ist in seiner Wahrheit der Begriff der Vernunft, - der Begriff, insofern er nicht als bloß logische Idee, sondern als die zum Selbstbewußtsein entwickelte Idee existiert.*]

⁵⁹ Hegel, *Philosophical Propaedeutic*, p. 63; Hegel, *Nürnberger und Heidelberger Schriften*, p. 122

⁶⁰ Hegel, *Philosophical Propaedeutic*, p. 52; Hegel, *Nürnberger und Heidelberger Schriften*, p. 272

⁶¹ Green writes, in an unpublished lecture, 'In the Greek *λογος* the two notions of 'Wisdom' and the 'Word' are combined' T.H. Green, "Lectures on the Fourth Gospel", in Colin Tyler (Ed.), *Unpublished Manuscripts in British Idealism: Political Philosophy, Theology and Social Thought* (Exeter, Imprint Academic, 2008), pp. 135-190, p. 135

εν αρχη ην ο λογος και ο λογος ην προς τον θεον και θεος ην ο λογος
 In the beginning was reason and reason was with God, and God was reason.⁶²

Commenting directly on the first sentence of the Gospel of St. John, Green writes ‘the next clause ‘θεος ην ο λογος’ ... heightens the meaning of the previous words’ so that the meaning is ‘the Word, in this eternal relation to God, was itself God’.⁶³ Further on, Green writes of ‘God as the truth’ and as ‘the unity in which all the distinctions and oppositions of the manifold are reconciled’, and ‘the attainment of which on our part at once presupposes and issues in a moral life’. Further, ‘this ‘mind’ would be the λογος’.⁶⁴

Green makes the link between eternal consciousness and God explicit in the Prolegomena, when he writes that ‘there must be eternally such a subject which is all that the self-conscious subject, as developed in time, has the possibility of becoming...this consideration may suggest the true notion of the spiritual relation in which we stand to God that He is not merely a Being who has made us, in the sense that we exist as an object of the divine consciousness in the same way in which we must suppose the system of nature so to exist, but that He is a Being in whom we exist; with whom we are in principle one’.⁶⁵

It seems that Green saw himself as following Hegel in this regard, when he argued that ‘the vital truth which Hegel had to teach was that ‘there is one spiritual self-conscious being, of which all that is real is the activity of expression; that we are related to this spiritual being, not merely as parts of the world which is its expression, but as partakers in some inchoate measure of self-consciousness through which it at once constitutes and distinguishes itself from the world; that this participation is the source of morality and religion’.

What, then, are recognised in metaphysical recognition in Green and Hegel, albeit couched in differing terminology, are individual self-consciousnesses which have the potential to interact in such a way as to make reason itself – which is for Hegel and Green synonymous with God – possible. Interpreted in this way, by recognising each other as humans, we recognise ‘God’, the possibility of any moral, ethical or even reasonable thought. All these things, according to Green and Hegel, stem from the basic

⁶² Κατα Ιωαννην 1:1; John 1:1, *Authorised Version*

⁶³ T.H. Green, “Lectures on the Fourth Gospel”, p. 138

⁶⁴ *Ibid.*, p. 151

⁶⁵ Green, *Prolegomena to Ethics*, §187, p. 222-223

recognition of humanity. This has profound ethical implications, as Leslie Armour touches upon: humans ‘can know the eternal consciousness only as it appears through finite selves. Hence we must all join forces with others. The first aim, inevitably, is to increase the freedom of all the participants, for only if they are free can they pursue the good’.⁶⁶ Recognition, as we have seen from the master-slave dialectic in Hegel cannot be forced or coerced: it must be voluntarily given.

Geoffrey Thomas offers three objections to the idea that Hegel was a key influence on Green, and thus to the idea presented in this chapter, that Green’s central importance for rights recognition is introducing Hegelian ideas about recognition to discourse on natural rights.⁶⁷ The foregoing analysis of Hegel and Green on the ‘eternal consciousness’ provides us with the resources to counter Thomas’ objections, before moving on to considering Hegel and Green on rights and the roles of state and society in rights recognition. Thomas’ first objection is that Green ‘nowhere commits himself to anything like the explicit Hegelian account of levels of self-consciousness’. This is true; Green does not use a three level account like Hegel’s. However, as the previous section demonstrated, it seems likely that Green’s account does use Hegel’s idea of ‘appetitive self-consciousness’. Although Green did not incorporate wholesale the whole of Hegel’s theory here, it seems he was influenced by it. Thomas’ second objection is that Green’s ‘account of reason and self-consciousness, while it can accommodate the Hegelian theory, does not presuppose or otherwise require it’ and ‘that Hegel’s theory is a framework in which Green’s account might be placed, a framework of which Green was aware, does not show that Green accepted that framework broadly or in detail’. The fact that nowhere does Green seriously criticise Hegel’s theory, I would argue, suggests that he accepted a large part of it: Hegel does not come in for the sorts of criticism Green aims at Hume, Spinoza, or Hobbes. Third, Thomas claims that ‘the Hegelian framework has extensions which Green emphatically repudiates’: whilst Green supports the ‘ethical and axiological ultimacy of persons’, Hegel does not. The foregoing discussion of metaphysical recognition gives us grounds to dispute this claim. Metaphysically, and ethically, the person is ultimate. It is through recognition between persons that reason and ethics can come about in the first place: without interpersonal recognition, for Hegel, it would be impossible for ‘the family, the

⁶⁶ Leslie Armour, “Green’s Idealism and the Metaphysics of Ethics”, in Maria Dimova-Cookson and W.J. Mander (Eds.), *T.H. Green: Ethics, Metaphysics, and Political Philosophy* (Oxford, Clarendon Press, 2006), pp. 175-176

⁶⁷ Geoffrey Thomas, *The Moral Philosophy of T. H. Green* (Oxford, Clarendon Press, 1987), p. 193

fatherland, right, as well as all the virtues – love, friendship, bravery, honor and reputation’⁶⁸ to exist. The person, then, is ethically ultimate, but at the same time requires society in order to exist as a person at all: here Green and Hegel are in agreement. Thomas’ objections are insufficient ground for rejecting the key claim of this chapter, namely that the importance of Green lies in his bringing Hegelian recognition to bear in a theory of rights.

1.4 Summary

We have seen in this section that recognition is crucially important for both Hegel and Green. Although Green differs from Hegel in his account of how recognition happens – there is no intricate three-level process in Green – he shares much with Hegel’s account. The crucial importance of recognition is that, for Green as for Hegel, it is the foundation of society. Society is created by people recognising others as persons, that is to say as being capable of moral action. In this way, it is recognition that makes morality possible, for it is only within society that such moral action can occur. Thus the recognition of persons functions as the ‘right to have rights’: recognition is admission to the moral and political community, in which rights are possible.

2. Rights in Hegel and Green

Having discussed recognition in Hegel and Green, this chapter will move on to consider rights in Green and Hegel. We shall see that both hold rights to be essential for freedom. However, Green’s contribution is to theorise rights in a way much more akin to natural rights theories – as specific, valid claims to certain forms of treatment – whereas there is some uncertainty in Hegel’s use of ‘right’. Further, Green separates rights recognition from recognition of persons: rights must be recognised by society, which is comprised of persons who recognise each other as moral actors. These rights, recognised by society, are powers which allow persons to act morally.

⁶⁸ Hegel, *Philosophy of Subjective Spirit*, quoted in Williams, *Hegel’s Ethics of Recognition*, p. 93.

2.1 Rights in Hegel

Any discussion of ‘rights’ in Hegel is complicated to an extent by Hegel’s use of the term ‘right’, or *Recht*. As Michael Feola notes, ‘much discomfort with his argument can be traced to its tension with Anglo-American political vocabularies’.⁶⁹ The German word *Recht* is indeed ambiguous, and does not correspond simply to ‘right’ or ‘rights’, but, like the Latin *jus*, may also mean ‘law’, or even ‘justice’. Hegel provides some answers to the question of what *Recht* means in his work in the Introduction to the *Philosophy of Right*, where he states that ‘the basis of right is the realm of spirit in general and its precise location and point of departure is the will; the will is free, so that freedom constitutes its substance and destiny, and the system of right is the realm of actualized freedom, the world of spirit produced from within itself as a second nature.’⁷⁰ Here, it is clear that the word *Recht* is being used in quite a general sense. However, in other sections, such as §209, it seems that *Recht* is much more akin to the modern sense of ‘rights’.⁷¹ Similarly, in §66, Hegel is discussing whether rights in a quite modern sense can be alienable.⁷² Furthermore, it is quite clear that Hegel was aware of the natural rights tradition and the use of rights in this sense, as his discussion in §502 of the encyclopaedia demonstrates. Although Hegel uses the word *Naturrecht* here, which may mean either ‘natural right’ or ‘natural law’, depending on the context, his familiarity with the tradition suggests he is well aware of the use of ‘rights’ in the contemporary sense.

Hegel does not make the explicit argument, employed by Green (as we shall see in the next section), that rights are necessary for moral development, and should thus be recognised in order for all to reach their full potential as humans. For Hegel, such an argument is not necessary, as he does not make the distinction that Green makes between recognition of persons and recognition of rights. Rather, for Hegel, ‘rights are acquired through recognition as the right to rights: when I am recognized my

⁶⁹ Michael Feola, “Truth and illusion in the philosophy of right: Hegel and liberalism”, *Philosophy and Social Criticism* 36:5 (2010), pp. 567-585, p. 568

⁷⁰ G.W.F. Hegel, *Elements of the Philosophy of Right* (Cambridge, Cambridge University Press, 2008), §4, p. 35

⁷¹ Hegel, *Philosophy of Right*, §209, p. 241

⁷² Though even here Hegel discusses ‘goods...which constitute my own distinct personality’. To these goods, Hegel argues we have an ‘*imprescriptible*’ right. There seems to be a single right to multiple goods, rather than a straightforward multiplicity of rights. Hegel, *Philosophy of Right*, §66, p. 95

possessions become my property and my right to ownership is secured.’⁷³ One form of recognition leads logically, and necessarily, to the other. Recognition of a person in itself entails the recognition of rights; it imposes a duty on others to recognise the individual’s rights. That right (and rights) stems from recognition is made explicit by Hegel in his full exposition of the third stage of recognition in the *Encyclopaedia*, where he states that ‘This universal re-appearance of the self-consciousness, the concept [*Begriff*], which knows itself in its objectivity with its identical subjectivity and therefore universally, is the form of the consciousness of the *substance* of every essential intellectuality: the family, the fatherland, right, as well as all the virtues – love, friendship, bravery, honor and reputation.’⁷⁴ (Curiously enough, the word ‘right’ here is replaced with ‘the state’ in the *Encyclopaedia Philosophy of Spirit*:⁷⁵ this illustrates just how much the two notions are related in Hegel’s thought, an aspect which will be further explored later.) The important thing here, however, is that all those ‘intellectualities’ require intersubjective recognition – the ‘universal re-appearance of the self-consciousness’ and the identity of subjectivity with objectivity – in order to become actual, rather than just notional.

Williams argues that there are two facets to rights in Hegel, and that recognition is the second and key facet.⁷⁶ Here, like Hegel, Williams uses the right of possession as an example. The first facet is ‘the presencing of freedom in a thing’, which ‘means that it is mine and that others are excluded from the thing’.⁷⁷ This is itself does not constitute an actual right, however. To be actual, a right in Hegel must, according to Williams, be recognised by others. Here he draws on Hegel’s early, Jena writings, in which he argues that ‘taking possession is the empirical act of seizure, and this is to be justified through recognition’ as ‘it is not justified merely by virtue of its having occurred.’⁷⁸ This recognition, however, is of the person’s right to have rights, rather than of individual rights themselves, as it appears to be in Green’s account. In Hegel’s thought, the individual rights simply follow on from the recognition that a person may have rights; the recognition of his or her ‘right to have rights’.

⁷³ Williams, *Hegel’s Ethics of Recognition*, p. 207

⁷⁴ Hegel, *Philosophy of Subjective Spirit*, quoted in Williams, *Hegel’s Ethics of Recognition*, p. 93.

⁷⁵ Hegel, *Enzyklopädie*, §436 Zusatz, p. 227

⁷⁶ The first facet is ‘the presencing of freedom in the world, in things, in the body, and so on’. Williams, *Hegel’s Ethics of Recognition*, p. 139

⁷⁷ *Ibid.*, p.139

⁷⁸ Hegel *Philosophie des Geistes von 1805-1806*, quoted in Williams, *Hegel’s Ethics of Recognition*, pp. 141-142; See also Rauch, *Hegel and the Human Spirit*, p. 112

Green's recognition of a common good as one's own is similar to Hegel's account of rights and duties as identical in the ethical life [*Sittlichkeit*], though the terminology and precise details are clearly different. Whereas in Green, 'society' recognises rights in the individual as such rights will benefit both the individual and society,⁷⁹ in Hegel there is no dyad of 'society' and 'individual', but rather universal intersubjectively recognised rights, which through their universal intersubjectivity are also duties. As Williams puts it, 'I am secure in my recognition and possessions as an owner only if I recognize that others have the same right'.⁸⁰ This is why Hegel states that 'duty and right coincide in this identity of the universal and the particular will, and in the ethical realm, a human being has rights in so far as he has duties, and duties in so far as he has rights.'⁸¹ Now, although Green presents this notion of social recognition of rights contributory to the common good in what seems a dyadic way, it is possible to interpret this in a more fluid, intersubjective way. Interpreted on a personal ethical level, recognising the rights of another is a moral action.⁸² Dimova-Cookson argues these acts of 'positive freedom' enlarge the scope of 'negative freedom' for others.⁸³ 'Negative freedom' (the use of the word negative in this connection I take to be justified by Green's use of the same word in the quotation below) may be interpreted in Green as being to some extent synonymous with rights, based on Green's assertion that 'Rights are what may be called the negative realisation of this power [the power of the individual freely to make the common good his own]'.⁸⁴ So long, then, as society at large does not object, one actor may, through a moral act of positive freedom, increase the negative liberty, which is to say the rights, of another person. In a society of millions, this dyadic relationship can be reproduced almost infinitely, until it constitutes universal recognition, in a very similar way to Hegel's account. What Dimova-Cookson describes as acts of 'positive freedom' are, following Green's own definition,

⁷⁹ Green, *Lectures*, §44, p. 44

⁸⁰ Williams, *Hegel's Ethics of Recognition*, p. 207

⁸¹ Hegel, *Philosophy of Right*, § 155, p. 197

⁸² As Maria Dimova-Cookson argues: Maria Dimova-Cookson, "Justice as a Secondary Moral Ideal: The British Idealists and the Personal Ethics Perspective in Understanding Social Justice", *European Journal of Political Theory* 10:1 (2011), pp. 46-70, p. 58

⁸³ Maria Dimova-Cookson, "A New Scheme of Positive and Negative Freedom: Reconstructing T.H. Green on Freedom", *Political Theory* 31 (2003), pp. 508-532. It should be noted that this classification of freedom in Green is not uncontroversial: there is no space for a full discussion here, but Blau and Tyler have both criticised aspects of it. Adrian Blau, "Against Positive and Negative Freedom", *Political Theory* 32 (2004), pp. 547-553; Tyler, *The Metaphysics of Self-Realisation and Freedom: Part 1 of The Liberal Socialism of Thomas Hill Green* (Exeter, Imprint Academic, 2010), pp. 114-119

⁸⁴ Green, *Lectures*, quoted in Dimova-Cookson, "Positive and Negative Freedom", p. 524

very similar to the sort of dyadic recognitions of rights which Hegel builds his account upon.

The importance of these rights and duties is that they enable freedom. The importance of rights, for Hegel, is not just that they guarantee an area of negative liberty, but that the identity of rights and duties forms the true freedom in ethical life, where the idea of freedom becomes concrete actuality: ethical life is indeed '*the concept of freedom which has become the existing world.*'⁸⁵ Intersubjective rights, brought into being by recognition, and made identical to duties through universal intersubjective recognition, are necessary for the concept of freedom to be made real.

Honneth agrees that Hegel 'is convinced that only communicative relationships based on the pattern of friendship actually allow the individual subject to realize his freedom' but argues that Hegel 'nevertheless concedes that other, incomplete concepts of freedom are a necessary prerequisite for the emergence of such a practical freedom.'⁸⁶ For Hegel, then, there is a role for rights as commonly understood today: they are an essential first step to true freedom, but a first step that is to be transcended. This is strikingly similar to the role of formal or 'negative' freedom in Green, where formal freedom is a necessary precondition for true, or 'positive', freedom. It should be noted that Tyler criticises the use of the terms 'positive' and 'negative' with regard to freedom in Green, arguing that 'using Berlin's simplistic distinction tends to produce a distorted interpretation'.⁸⁷ However, both Kant and Hegel use the terms 'negative' and 'positive' with regard to freedom, and they provide useful, widely understood shorthand for different conceptualisations of freedom.

2.2 Rights in Green

The second form of recognition in Green, 'recognition of rights', can be found principally in his *Lectures on the Principles of Political Obligation*. This form of recognition is a step further, in that it moves from recognition of the other as a person, to recognition of the other as having rights, and the recognition of certain rights as allowable *powers* for a person to have, which will contribute to the common good.

⁸⁵ Hegel, *Philosophy of Right*, § 142. Hegel's italics.

⁸⁶ Axel Honneth, *The Pathologies of Individual Freedom: Hegel's Social Theory* (Oxford, Princeton University Press, 2010), p. 19

⁸⁷ Tyler, *The Metaphysics of Self-Realisation and Freedom*, pp. 116-117

Green argues that ‘No one ... can have a right except (1) as a member of a society, and (2) of a society in which some common good is recognised by the members of the society as their own ideal good’.⁸⁸ Green, then, like Hegel, rejects the notion of natural rights, and argues that ‘there is no such natural right to do as one likes irrespectively of society. It is on the relation to a society, to other men recognising a common good, that the individual’s rights depend, as much as the gravity of a body depends on relations to other bodies.’⁸⁹ Such recognised rights require a ‘society of men recognising each other as ἴσοι καὶ ὅμοιοι’, which is to say that the ‘recognition of persons’ is for Green logically prior to the recognition of rights.

Ann Cacoullous raises the point of what exactly ‘ἴσοι καὶ ὅμοιοι’ should be taken to mean, and comments that it ‘is unfortunate that Green never bothered to translate the Greek term he employs’.⁹⁰ Perhaps it is just as unfortunate that classical Greek is no longer taught as widely as in Green’s day, when such phrases were commonly left untranslated. However, there is a point to Cacoullous’ objection. The question is whether here Green is arguing that rights can only exist in groups of like people; the further question is in what way these people must be alike. A first answer may be taken from the discussion in section one of the ‘recognition of persons’ in Green: members of the society must be ἴσοι καὶ ὅμοιοι at least in the sense that they are human, and recognised as persons. This is what might be termed the ‘minimum equality’. However, it is possible, informed by Green’s political writings and activity, to speculate that, beyond this, greater equality might be desirable, especially when it comes to economic equality. If rights are powers which contribute to the common good, it is no great step to argue that economic equality of at least a basic sort is in line with Green’s theory: although (as we shall see later) all may contribute in some way to the common good, it is clearly easier for those in a better economic position to do so. The question of equality and similarity in Green will be discussed more fully in chapter four.

Green argues that ‘a power on the part of anyone is so recognised by others, as one which should be exercised, when these others regard it as in some way a means to that ideal good of themselves which they alike conceive: and the possessor of the power comes to regard it as a right through consciousness of its being thus recognised as

⁸⁸ Green, *Lectures*, §25, p. 44

⁸⁹ *Ibid.*, §99, pp. 109-110

⁹⁰ Cacoullous, *Thomas Hill Green*, p. 97

contributory to a good in which he too is interested.’⁹¹ A right, then, for Green, must contribute to ‘a common good’ in that it must benefit both the holder of the right, and the society which recognises that right. The right is a ‘common good’ in that it benefits everyone in society equally. A right that benefits some disproportionately more than others cannot be legitimately recognised. This insight is a powerful part of the theory of egalitarian rights recognition. Further, although Green holds that there ‘ought to be rights’, precisely which rights an individual should enjoy vary from society to society, according to varying conceptions of ‘ideal good’. An individual may exist in many common good recognising societies, and recognise different rights and obligations in each.⁹² These societies range from very small groups ‘with which one’s everyday life is bound up’⁹³ to large groups such as nations, and, as we shall see in chapters four and six, potentially the whole of humanity.

Green’s rejection of ‘natural rights’, by which he means ‘right[s] in a state of nature which is not a state of society’, may seem to contradict his argument that ‘there ought to be rights’. Geoffrey Thomas argues that Green’s statement that ‘there ought to be rights’ means that ‘for moral ontology what thus grounds a right is not dependent on recognition as its necessary condition’.⁹⁴ John Lewis and Peter Jones both appear to read Green as justifying natural rights on the basis of human needs.⁹⁵ This, though, I would argue, is to misread Green. Although Green holds rights to be desirable, and indeed necessary for freedom, he is quite clear that recognition is still necessary to create rights. The rest of this section will set out why, despite denying the existence of innate rights, Green holds rights to be desirable.

Here, Green draws on Aristotle’s teleological approach, and argues that rights ‘are ‘innate’ or ‘natural’ in the same sense in which according to Aristotle the state is natural; not in the sense that they actually exist when a man is born and that they have existed as long as the human race, but that they arise out of, and are necessary for the fulfilment of, a moral capacity without which a man would not be a man’.⁹⁶ Rights, then, fulfil a function in that they make moral development possible, and allow each

⁹¹ Green, *Lectures*, §25, p. 44

⁹² As Tyler points out: Colin Tyler, *Civil Society, Capitalism and the State: Part 2 of The Liberal Socialism of Thomas Hill Green* (Exeter, Imprint Academic, 2012), p. 75

⁹³ *Ibid.*, p. 75

⁹⁴ Thomas, *The Moral Philosophy of T.H. Green*, p. 355

⁹⁵ John Lewis, “On Human Rights”, in UNESCO, *Human Rights: Comments and Interpretations* (London, Allan Wingate, 1949); Peter Jones, “Moral Rights, Human Rights and Social Recognition”, *Political Studies* 61:2 (2013), pp. 267-281, p. 276

⁹⁶ Green, *Lectures*, §30, pp. 47-48,

person to achieve full humanity. Green further argues that ‘there ought to be rights, because the moral personality, – the capacity on the part of an individual for making a common good his own, – ought to be developed; and it is developed through rights; i.e. through the recognition by members of a society of powers in each other contributory to a common good, and the regulation of those powers by that recognition.’⁹⁷

Indeed, Green holds not only that there ought to be rights to facilitate such development, but that it is ‘*only* through the possession of rights’ that ‘the power of the individual freely to make a common good his own’ can ‘have reality given to it.’⁹⁸ And this is critically important, for the individual needs recognition of his rights in order to ‘have a life which I can call my own’.⁹⁹ Full humanity is contingent upon the recognition of rights. Green does not put the matter so strongly as Hegel, who holds recognition to be ‘a matter of life and death’,¹⁰⁰ but recognition is clearly required to live anything like a fully human life.

It would seem reasonable to base a justificatory argument for human rights on this logic, and Dimova-Cookson makes an argument that is along these lines. She argues that Green’s view of human nature includes the idea that the individual can always develop to reach his or her full potential. Rights, as we have seen, enable, and are necessary for, this to take place. Without rights, then, no such improvements can take place, and this undermines the nature of the person as a human being, as having by nature the ability to improve. Human need for development is, then, ‘a sufficient justification of rights’.¹⁰¹ Whilst this is an argument that rights are a good thing, it is not an argument for any specific rights or group of rights, which, according to Green, would still require recognition as being for the common good, which is to say rights require recognition in the process I have labelled here the ‘recognition of rights’. For Green, it is not enough to argue that rights are good and necessary for human flourishing and freedom – although this is an argument he clearly agrees with, as does Hegel – rather, an extra facet of Green’s position is that precisely which rights should be regarded as necessary also relies on intersubjective, social recognition, and there is no list of rights set in stone.

⁹⁷ *Ibid.*, §26, p. 45

⁹⁸ *Ibid.*, §25, p. 45. My emphasis.

⁹⁹ *Ibid.*, §114, p. 122

¹⁰⁰ Hegel, *Enzyklopädie*, §432, p. 221

¹⁰¹ Maria Dimova-Cookson, *T.H. Green’s Moral and Political Philosophy: A Phenomenological Perspective* (Basingstoke, Palgrave, 2001), p. 141

2.3 Summary

Discussion of rights in Hegel and Green shows Green's crucial contribution: introducing Hegel's thought on the importance of recognition to debates about rights and natural rights. In Hegel, rights come about with recognition in general; Green separates this into two stages: first persons are recognised, a process which creates society. Then, when society is created, rights recognition – which requires society – can occur.

Undoubtedly rights are important for the human in Hegel's work too. Implicit in Hegel is indeed the same argument as Green makes explicitly: to be truly free, indeed to be rational (and rationality is 'the *identity* of the *subjectivity* of the concept with its *objectivity* and universality'¹⁰²), one must have rights, acquired through recognition, which are identical with duties. However, Green makes the argument much more openly: humans *ought* to have rights in order to achieve their potential as humans – without rights we cannot be fully human. In this sense, Green is sympathetic to natural rights theorists in that they, like he, see rights as being vitally important. However, Green's essential contribution to the theory of rights is to reject the idea that humans have rights simply as humans, or because of their needs, and replace this notion with an account that holds that rights are created through intersubjective social recognition: humans may need rights, but the question of what rights are to be recognised can only be decided by society. As Boucher puts it, Green has 'appropriated the language' of natural rights, but changed utterly its meaning: rights remain important, but they are underpinned by social recognition, not natural law.¹⁰³

The foregoing discussion of Hegel and Green puts us in a position to set out the first two points of the ten-point account of egalitarian rights recognition that this thesis presents:

1. Rights, including human rights, require social recognition.

Humans do not have rights simply *qua* humans; rather, rights are created through mutual, intersubjective social recognition, as Green's work shows us.

¹⁰² Hegel, *Enzyklopädie*, § 438, p. 228 [...*die einfache Identität der Subjektivität des Begriffs und seiner Objektivität und Allgemeinheit.*]

¹⁰³ David Boucher, "British Idealism and the Human Rights Culture", *History of European Ideas* 27 (2001) pp. 61–78, p. 64

2. Recognition consists of two stages – recognition of persons, and recognition of rights.

The first stage of recognition is recognition of the other as a person, as someone capable of having rights in principle. The second stage is the intersubjective social recognition of specific rights.

These points will be elaborated further as the thesis progresses. The further eight points will be presented in subsequent chapters, before the full ten-point account is presented in chapter six.

3. State and society

The third and final aspect of recognition in Green and Hegel which will be explored here is the role of the state and of society in recognition. Recognition entails social recognition for both thinkers, but they differ in some respects, chiefly over the importance of the state. For Hegel, the state is vital for the ethical life and rights recognition. Green, on the other hand, allows that recognition can occur within societies that are not states. This section develops the third point of the ten-point account of egalitarian rights recognition:

3. ‘The location, or arena, for rights recognition is society – this may take several forms.’

3.1 State and society in Hegel

For Hegel, rights can only be fully realised in the state. Society alone is insufficient to properly establish intersubjectively constituted recognized rights. Green, on the other hand, as we shall see, allows that rights are possible in society, and do not necessarily require a state. Rights can be recognised by society, though they are enforced more effectively by a state. This distinction between recognition and enforcement will be maintained throughout this thesis and will become especially

important in chapters four, five, and six. Part of the reason for the difference in position between Hegel and Green regarding state and society lies in Hegel's conceptualisation of 'society', which differs from contemporary understandings.

Green's 'society' (sometimes 'community'¹⁰⁴) is not the same thing at all as Hegel's 'civil society' [*bürgerliche Gesellschaft*]. James Schmidt argues that 'Hegel's use of 'civil society', like his employment of a few other terms ... is peculiar in that it follows no established conventions of usage'. Furthermore, 'this peculiar use of terms cannot be interpreted simply as a response to the 'social question' of the nineteenth century', but, rather, 'must be read against the background of eighteenth-century concerns with the relationship between citizenship, commerce, and Christianity.'¹⁰⁵

Schmidt argues that earlier versions of Hegel's political philosophy relied on jumping straight from the level of the family to the level of the state, which was a significant deficiency, requiring the introduction of some tenuous argumentation and the use of mythical characters such as Theseus. Here, Hegel follows Machiavelli, who praises Moses, Cyrus and Theseus at the end of *The Prince*.¹⁰⁶ Similarly, Rousseau mentions Lycurgus, Solon, Numa and Servius.¹⁰⁷ Now, the link between each character in this array of classical and mythological figures may not immediately be clear. But the role each figure played was the same: first, each gathered scattered tribes and clans into cities and, second, each broke ties of clan, tribe, household and sect and replaced those ties with civic ties, which cut across the former divisions.¹⁰⁸ It was through the use of Theseus that the early Hegel linked the family with the state.¹⁰⁹

The introduction of the concept of 'civil society', holds Schmidt, is essentially another way of bridging this gap, without the importing of some historical figure. It performs this function by creating 'in the place of a sentimental and natural community', a 'community which is completely self-conscious' and 'totally unnatural', which rests 'on the interactions of isolated individuals' and leads, 'by its own logic', from the level of the family to the level of the state.¹¹⁰ Civil society is far from the ethical life of the state: 'universal and particular are in disintegration, and individuals

¹⁰⁴ For example in Green, *Lectures*, §134, p. 139; §135, p. 139-140

¹⁰⁵ James Schmidt, "A Paideia for the 'Bürger als Bourgeois': The Concept of 'Civil Society' in Hegel's Political Thought", *History of Political Thought* 2:3 (1981), p. 469

¹⁰⁶ Nicolò Machiavelli, *The Prince* (Harmondsworth, Penguin Books, 1974), p.134

¹⁰⁷ Jean-Jacques Rousseau, *The Social Contract* (Harmondsworth, Penguin Books, 1968), p. 73-74

¹⁰⁸ Schmidt, "A Paideia for the 'Bürger als Bourgeois'", p. 483

¹⁰⁹ Shlomo Avineri, *Hegel's Theory of the Modern State* (Cambridge, Cambridge University Press, 1974), p. 60

¹¹⁰ Schmidt, "A Paideia for the 'Bürger als Bourgeois'", *Ibid.*, p. 469

stand in exploitative relationships to each other and to the market. Everything becomes subservient to property and exchange value. There is no universal recognition except a purely formal and utilitarian sort; such formal recognition is capable of coexisting with the extremes of extravagance and poverty.’¹¹¹ For Hegel, it is something to be transcended, and stands in clear relationship to the dialectic of master and slave, which also features radical inequality and imperfect recognition, and which must also be transcended. Indeed, in the current English usage of the term ‘civil’, one might better label this society the ‘uncivil’ society.

For Green, in contrast (as the next section will explore more fully), society is a group in which people recognise each other as *ἴσοι καὶ ὅμοιοι*, as equals and similars. This may take almost any form, from family to a much larger form of society. In this it differs from Hegel’s ‘civil society’, which may not be a family, but which is the ‘totally unnatural’ midpoint between family and state. Further, if a society, for Green, must be made up of people who are *ἴσοι καὶ ὅμοιοι* (a concept we shall discuss more in the next section), then Hegel’s ‘civil society’ is not really a society at all in Green’s sense, due to the radical inequalities found within it. This is something of a normative strength in both Green’s and Hegel’s theory: radical inequality must be ended in order to properly bring about rights. Rights can exist, and do in a limited form, in civil society, but in order for all to enjoy full, human, rights, such radical inequality must be transcended, in Hegel as in Green. It is the next level, the state, which is vital in Hegel’s thought for rights: Hegel’s insight here strengthens the case for egalitarian rights recognition. If we are serious about rights recognition, we should be serious about equality.

The three levels of recognition discussed earlier are clearly analogous to the structure of the Philosophy of Right as a whole. The first level is concerned with the individual and with abstract life, the second level moves beyond the individual and explores morality, while the third level reaches the ethical life [*Sittlichkeit*] and is the universal. Universal rights are possible only at the third level; likewise the state is only possible in the third stage of the Philosophy of Right – the two clearly correspond, which underlines the close relationship in Hegel between the state and rights.

Similarly, within ‘ethical life’, the State is the third and highest level. True human rights are not possible within the family or within civil society. Here, one is recognised as wife or husband, as merchant or worker. The rights each has differ

¹¹¹ Williams, *Hegel’s Ethics of Recognition*, p. 268

according to station, and are thus radically limited and unequal. In the state, in contrast, one has rights as a citizen, and thus equal rights to all other citizens: this is the crucial aspect of the state for its citizens. As Williams notes, the state takes the ‘humanizing mutual recognition’ found in civil society and the family, and takes it a step further ‘by raising it to the universal level; that is, the state recognizes its members as citizens.’¹¹²

For Lawrenz, the state in Hegel’s thought is ‘the apotheosis of recognition in both its negative and positive connotations’. Indeed, the ‘state itself has a recognitive structure: for in the same respect as ‘rights’ cannot exist in themselves, neither can states have existence in abstracto’. The institutions of the state ‘extend the domain of private and civil recognition to the whole of society’, and furthermore, argues Lawrenz, ‘it is scarcely too much to say that their very existence in a state is predicated on the need to recognize the need for unilateral recognition.’¹¹³

Although Hegel, unlike Green as we shall see, does not appear to accept that one can have rights within societies outside of the state, similarities are apparent between Hegel’s state as a universalisation of pre-state, social recognition, and Green’s notion that rights are ‘carried into’ a state from previously existing social groups. The difference would seem to be on the question of how complete a non-state society may be. For Green, it is complete enough to grant rights (though he is unclear what these rights may be, but from his discussion of American ante-bellum slavery it would seem that this would include basic rights to freedom, speech, and some level of political participation) whereas for Hegel, non-state societies are inherently incomplete: it is ‘only through being a member of the state that the individual ... has objectivity, truth and ethical life’.¹¹⁴

Hegel emphasises this again in the *Philosophy of Right* when he argues that the state is ‘the actuality of concrete freedom’, which requires that personal individuality and its particular interests should reach their full development and gain recognition of their right for itself (within the system of the family and of civil society) but also that they should ‘pass over of their own accord into the interest of the universal.’ Here, again, is the third of the three levels of recognition outlined in the *Encyclopaedia*. Enabling this third level of universal individuality is precisely what gives states ‘enormous strength and depth’: they allow ‘the principle of subjectivity to attain

¹¹² *Ibid.*, p. 263; See also Lawrenz, “Hegel, Recognition and Rights”, p. 164

¹¹³ Lawrenz, “Hegel, Recognition and Rights”, p. 164

¹¹⁴ Hegel, *Philosophy of Right*, § 258

fulfilment in the self-sufficient extreme of personal particularity, while at the same times bringing it back to substantial unity and so preserving this unity in the principle of subjectivity itself.’¹¹⁵

Hegel does not explicitly discuss the idea of rights ‘against’ the state, or against the society, as Green does. However, it is clear implicitly that rights ‘against’ the state would be impossible. The state represents the highest form of human freedom and the highest duty of the individual is to be a member of a state: to rebel against it is to rebel against freedom itself. However, Hegel does hold that the state has a duty to recognise individuals, just as they have a duty to recognise it: ‘the ethical state has a right of recognition as well’.¹¹⁶

3.2 State and society in Green

As we have already seen, for Green, a society is vital for rights and recognition: he is explicit that rights are impossible, except in a society where all recognise each other as ‘ἴσοι καὶ ὅμοιοι’. This is because rights ‘attach to the individual, but only as a member of a society of free agents, as recognising himself and recognised by others to be such a member, as doing and done by accordingly.’¹¹⁷ There can be no rights, then, outside society.

Not only can there be no rights outside society, but, Green argues, there can be no rights against society either. For him, ‘a right, then, to act unsocially, – to act otherwise than as belonging to a society of which each member keeps the exercise of his powers within the limits necessary to the like exercise by all the other members, – is a contradiction’ as this would contradict the notion of ‘doing and [being] done by accordingly’ which is an essential part of the society which is required to recognised rights.¹¹⁸ Further, a ‘right against society as such, a right to act without reference to the needs or good of society, is an impossibility, since every right depends on some social relation, and a right against any group of associated men depends upon association on

¹¹⁵ *Ibid.*, § 260

¹¹⁶ Williams, *Hegel’s Ethics of Recognition*, p. 271; See also Georg Wilhelm Friedrich Hegel, *Lectures on Natural Right and Political Science: the First Philosophy of Right, Heidelberg, 1817-1818, with Additions from the Lectures of 1818-1819* (Berkeley, University of California Press, 1995), §121

¹¹⁷ Green, *Lectures*, §138, p. 143

¹¹⁸ Green, *Lectures*, §138, pp. 143-144

some footing of equality with them or with some other men'.¹¹⁹ To claim a right against a 'group of men' who constitute one's own society would be to claim a right against oneself, and thus it is impossible. A right against this group could only be claimed, according to Green, if one were part of another group: either way, society is necessary for rights. Here, then, is defence against any charges that rights might be atomistic.

This prompts the question of how exactly Green defines society, and of what constitutes a 'group of men' who may recognise each other's rights. In his discussion of rights against the state, it appears that Green is very flexible about the nature of society needed for rights to be recognised. He argues that a person 'may ... have rights as a member of a family or of human society in any other form, without being a member of a state at all, – rights which remain rights though any particular state or all states refuse to recognise them'.¹²⁰ In this respect, as we shall see, he seems most sharply to differ from Hegel. This flexibility allows Green's theory to accommodate the notion that slaves have, or at least should have, rights, as 'membership of any community is so far, in principle, membership of all communities as to constitute a right to be treated as a freeman by all other men'.¹²¹

A clue to Green's understanding of 'society' may be found in his unpublished (until recently) lecture notes on political philosophy. Here, he writes, in note form, '(Better to speak of 'Society' than of 'state'. To Greek πόλις exactly = 'society'. Not so now. We recognize social obligations which 'state' does not enforce, and *social* agency as *opposed to political*.'¹²² From these terse notes, it would seem that we could do worse than interpret Green's society as something akin, in his mind at least, to the πόλις found in the work of the Greeks, particularly Aristotle. However, whereas in the πόλις formal and informal institutions were coterminous, Green perceived that there is in the modern world a divide between state and society. It is this divide, as we shall see, that sometimes justifies rights against the state.

The state, however, does play an important role in rights recognition for Green. Geoffrey Thomas goes so far as to claim that 'the central concept of Green's political philosophy is that of the state', although putting so much emphasis on the role of the

¹¹⁹ Green, *Lectures*, §143, p. 148

¹²⁰ Green, *Lectures*, §141, p. 145

¹²¹ *Ibid.*, §141, p. 145

¹²² T.H. Green "Political Philosophy", in Colin Tyler (Ed.), *Unpublished Manuscripts in British Idealism: Political Philosophy, Theology and Social Thought* (Exeter, Imprint Academic, 2008), pp. 72-77, p. 74

state seems to go against Thomas' protestations that Green was not so close to Hegel.¹²³ Although only society, not the state, is necessary for recognition, Green holds the state to 'presuppose rights': there can be no state without rights.¹²⁴ However, Green holds that the state 'is a form which society takes in order to maintain [rights]'.¹²⁵ Once a person is a member of state, it is upon that state, as formalised society, that he relies for rights: 'for the member of a state to say that his rights are derived from his social relations, and to say that they are derived from his position as member of a state, are the same thing. The state is for him the complex of those social relations out of which rights arise'. In the state, these rights 'have come to be regulated and harmonised according to a general law, which is recognised by a certain multitude of persons, and which there is sufficient power to secure against violation from without and from within.' It is in this way that the state 'maintains' rights.¹²⁶ A state is a form that a rights recognising society can take; however, not all rights recognising societies do take this form. Many 'societies' in which rights are recognised remain informal. This distinction between formal and informal recognising spheres will remain an important one throughout the thesis, as will the idea that one can belong to many common good recognising societies of recognition at the same time.

Societies and communities which would recognise rights before the creation of a state 'do not continue to exist outside of it, nor yet are they superseded by it' but 'are carried into it'. Rights one would have had which arose 'out of other social relations than that of citizen to citizen', for example within a family, or within any other sort of non-state community, 'are yet to the citizen derived from the state'. In the state, 'the association of the family' and other previously non-state relations 'are included as in a fuller whole', 'under conditions and limitations which the membership of the fuller whole...renders necessary.'¹²⁷ Rights then, are maintained, but also changed by the state, so that the interests of all in the state are reconciled. This account resembles Hegel in the *Philosophical Propädeutik*, when he writes that 'the natural whole, which constitutes the family, expands into a whole of a People and State in which the individuals have for themselves an independent will'.¹²⁸ Like Hegel, Green holds that rights can be held in the family, or in communities, or societies, but that these rights are

¹²³ Thomas, *The Moral Philosophy of T.H. Green*, p. 334

¹²⁴ Green, *Lectures*, §139, p. 144

¹²⁵ *Ibid.*, §139, p. 144

¹²⁶ *Ibid.*, §141, p. 146

¹²⁷ *Ibid.*, §141, p. 146

¹²⁸ Hegel, *Philosophical Propädeutic*, p. 47; Hegel, *Nürnberger und Heidelberger Schriften*, p. 265

best secured when carried over into the state. However, the link between state and rights is not so strong as it is in Hegel. Whereas Hegel argues that it is ‘only through being a member of the state that the individual ... has objectivity, truth and ethical life’,¹²⁹ Green, as his perceptive, if terse, notes on the state, society and πόλις make clear, is aware that recognition societies – societies of people who recognise each other as ἴσοι καὶ ὅμοιοι – are not always coterminous with the state. Clearly, when rights are ‘carried over’ into the state, then the formal organs and institutions allow for them to be better enforced. However, not all rights recognising societies are states, and a state is not necessary for rights to be recognised. Here, again, the distinction between recognition and enforcement of rights is important.

We have seen already that Green holds that there cannot be rights against society. As Green holds that ‘the state is ... the complex of those social relations out of which rights arise’, it would be logical that one cannot have rights against the state either. Green concedes this point: ‘it would follow, if we regard the state as the sustainer and harmoniser of social relations, that the individual can have no rights against the state; that its law must be to him of absolute authority.’¹³⁰ However, ‘in fact, as actual states at best fulfil but partially their ideal function, we cannot apply this rule to practice.’¹³¹ Green brings to Hegel’s eulogistic approach to the state an awareness that, in the real world, states do not carry out their ideal role as ‘sustainer and harmonise of social relations’ completely successfully. This is especially true when inequalities within a state lead to a distortion of the rights recognition mechanism, and the recognition of rights which do not truly contribute to a common good, but to the good of some more than others. The importance of equality in recognition societies for the theory of egalitarian rights recognition will be underlined again in chapters five, six, and seven.

Green criticises Hegel for being unrealistic in his account of freedom in the state, arguing that ‘Hegel’s account of freedom as realised in the state does not seem to correspond to the facts of society as it is, or ever as, under the unalterable conditions of human nature, it ever could be’.¹³² In making the distinction between the state as the ideal vessel into which rights from the family and societies are carried to be better

¹²⁹ Hegel, *Philosophy of Right*, § 258

¹³⁰ Green, *Lectures*, §143, p. 148

¹³¹ *Ibid.*, §143, p. 148

¹³² T.H. Green, “On The Different Senses Of Freedom As Applied To Will And To The Moral Progress Of Man”, in Thomas Hill Green, *Lectures on the Principles of Political Obligation* (London, Longmans, 1955), p. 8

ensured and the state as a really-existing phenomenon, it could well be that Green is trying to protect himself from his own charge against Hegel. This acute awareness of the difference in practice between state and society is a strength of Green's thought, and a more supportable approach to the issue than Hegel's. The somewhat idealised account of a rights-recognising society as *ἴσοι καὶ ὅμοιοι* gives us a goal to work towards, and a yardstick to measure 'real-existing' states against.

Discussion of the role of society has helped us flesh out the third point of the ten-point account of egalitarian rights recognition:

3. The location, or arena, for rights recognition is society – this may take several forms.

Quite simply, as rights rely on recognition, they require a society of people for that recognition to occur. The second half of this point will be further elaborated in chapter five, but our discussion of Green so far as already pointed towards the idea that society is not coterminous with the state, and that we may all be members of multiple rights recognising societies, both formal and informal.

4. Concluding remarks

This chapter has sought to give an outline of T.H. Green's rights recognition theory, setting it in comparison with the recognition theory of G.W.F. Hegel. It has been shown that the key importance of Green lies in his introducing the Hegelian idea of recognition to debates about rights. Where Green found natural rights accounts in Rousseau, Locke and others unconvincing, he found that rights were still important – we 'ought' to have them – but that they could only be created through intersubjective social recognition.

Green's reputation has been restored a great deal during the last 50 years. Once written off as 'a minor figure in the history of philosophy', who 'left no legacy of convincing argument or insight'¹³³ his work is now viewed as a significant contribution

¹³³ Stuart Hampshire, "Oxford Virtue", *New Statesman* 7 August 1964, p. 184; see also Colin Tyler, *The Metaphysics of Self-realisation and Freedom*, p. 16

to political philosophy. This chapter has attempted, alongside the main project of this thesis, to add to the literature which suggests that Green is a major figure in political theory, whose work provides us with powerful resources which we can bring to bear on contemporary debates on human rights. Part of the restoration of Green's reputation has undoubtedly involved moving him out from under the shadow of Hegel. Whereas thirty years ago, an exploration of the work of Green could be included in a volume entitled 'The British Hegelians',¹³⁴ this title would be unlikely today. Clearly Green was not simply a disciple of Hegel; his philosophical influences were much more diverse and his theory of rights offers something novel and valuable: a blend of Hegelian recognition with natural rights discourse. Green drew from natural rights theorists the essential idea that rights are important: we need right to fully flourish as humans, as moral actors. In Hegel he found the resources to support rights without recourse to natural law: rights are founded on recognition.

This chapter has also introduced, through the work of Green, the first three points of the ten-point account of egalitarian rights recognition presented in this thesis. These first three points are:

1. Rights, including human rights, require social recognition.
2. Recognition consists of two stages – recognition of persons, and recognition of rights.
3. The location, or arena, for rights recognition is society – this may take several forms.

The theory of rights based on recognition presented here is in stark contrast to liberal theories of innate, human rights which seem to dominate 20th century discourse on rights. Although it may seem surprising, idealist philosophy, with its insistence on recognised rights, occupied a dominant position in philosophy in Britain and in Germany in the late nineteenth century, as Kirk Willis demonstrates.¹³⁵ The next two chapters will address developments in rights theory between the death of Green, in

¹³⁴ Peter Robbins, *The British Hegelians, 1875-1925* (New York, Garland, 1982)

¹³⁵ Kirk Willis, "The Introduction and Critical Reception of Hegelian Thought in Britain 1830-1900", *Victorian Studies*, 32:1 (1988), pp. 85-111

1882, and the proclamation of the Universal Declaration of Human Rights in 1948. There are good reasons to doubt the standard historiographies of human rights, which tend to overlook the rights recognition thesis, and which tend to focus on 1776, 1789, and 1948, forgetting the interim, in which theories of rights recognition had more popularity.

Chapter Two

Natural Rights and Rights Recognition between Green and Arendt

*'The attempt to defend a doctrine of natural rights before historians and political scientists would be treated very much like an attempt to defend the belief in witchcraft.'*¹

The previous chapter introduced the work of T.H. Green on rights recognition, in the context of his application of Hegelian thought to discourse on rights. The third chapter of this thesis will make the argument that Hannah Arendt is a significant contributor to work on rights recognition. In choosing Green and Arendt as key theoretical focus points, the chronology of this thesis is out of kilter with standard accounts and histories of rights, which often take the French and American revolutions as the first focus point, and the Universal Declaration of Human Rights (UDHR) of 1948 as the second focus point. The standard narrative, crudely put, is that human rights were discovered (or invented) in the 1770s and 1780s, forgotten or driven out by nationalistic thought and *realpolitik* during the nineteenth century, and finally re-discovered when the horrific events of the 1940s forced the world to reconsider its attitude to human life.² The norm of this narrative is innate human rights.³

This narrative, however, does not stand up to scrutiny.⁴ Rather, as part of arguing for the theory of egalitarian rights recognition, I want to suggest that it is the UDHR that stands out against a background of a general shift in the understanding of rights from one based on natural law and innate rights, to one based on recognition. Furthermore, the UDHR's assertion that humans have rights simply as human was

¹ Morris R. Cohen, "Jus Naturale Redivivum", *The Philosophical Review* 25:6 (1916), pp. 761-777, p. 761

² For this argument, see: Dershowitz, *Rights from Wrong*.

³ Histories which take broadly this approach include: Samuel Moyn, *The Last Utopia: Human Rights in History* (London, The Belknap Press of Harvard University Press, 2010) – though Moyn argues that human rights only really took off in the 1970s; Aryeh Neier, *The International Human Rights Movement: A History* (Oxford, Princeton University Press, 2012); Micheline R. Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (London, University of California Press, 2008); Kenneth Cmiel, "The Recent History of Human Rights" in Akira Iriye, Petra Goedde and William I. Hitchcock (Eds.), *The Human Rights Revolution: An International History* (Oxford, Oxford University Press, 2012), pp. 27-52; and Lynn Hunt, *Inventing Human Rights: A History* (New York, W. W. Norton and Company, 2008)

⁴ G. Daniel Cohen, challenges the role the holocaust played in bringing about human rights in "The Holocaust and the 'Human Rights Revolution': A Reassessment", in Akira Iriye, Petra Goedde and William I. Hitchcock (Eds.), *The Human Rights Revolution: An International History* (Oxford, Oxford University Press, 2012)

based not on a philosophical argument, but rather upon studiously avoiding philosophical arguments in order to reach political consensus. In an account of his work with UNESCO in drafting the UDHR, Jacques Maritain writes ‘during one of the meeting of the French National Commission of UNESCO at which the Rights of Man were being discussed, someone was astonished that certain proponents of violently opposed ideologies had agreed on the draft of a list of rights. Yes, they replied, we agree on these rights, *providing we are not asked why*. With the ‘why’, the dispute begins.’⁵ Over recent decades, there has been a human rights revolution; the idea of human rights is more important than ever before. We can, therefore, no longer avoid the question of ‘why’, unless we are prepared to base politics and even wars on little more than a shrug, or on what Robert Dyson describes as a ‘lullaby’.⁶

This chapter will present an account of thought on rights between 1882 (the death of T.H. Green) and 1948. It will aim to show that throughout this period, the majority of scholars rejected innate human rights in favour of rights based on recognition. Thus, the UDHR and a sudden switch to innate rights is something of a historical aberration, however well-intentioned. Faced with philosophical uncertainty, the drafters of the Declaration avoided the ‘why?’ question. Egalitarian rights recognition can supply an answer to this question, as well as a critique of the procedure by which the list of rights in the UDHR was drawn up. Once we see the UDHR as an event which went against the grain of rights theory, in holding rights to be innate, and grounded in human dignity, rather than based on recognition, the rights recognition thesis becomes more plausible and less of a minority interest. Placing the UDHR in context, and accepting that it was essentially a process of imperfect rights recognition writ large, also frees us from the Sisyphean task of trying to philosophically justify the UDHR after the political fact.⁷

In tracing the history of thought on human rights, natural rights, and ideas of rights recognition from the time of Green to the time of Arendt, this chapter will first consider the debate between Spencer and Ritchie in the late nineteenth and early years of the twentieth century, as well as A. Inglis Clark’s response to Ritchie. This debate turns largely on the word natural, and was, to a degree, foreseen by Green, who

⁵ Jacques Maritain, *Man and the State* (Chicago, University of Chicago Press, 1956), p. 77

⁶ Robert Dyson, *Natural Law and Political Realism in the History of Political Thought Volume 2: From the Seventeenth to the Twenty-first Century* (New York, Peter Lang, 2007), p. 228

⁷ Kai Nielsen, “Scepticism and Human Rights”, *The Monist* 52:4 1978, pp. 575-594, tries in vain to find a justification which he finds convincing for the human rights in the UDHR.

admitted that rights were ‘natural’ in the sense that we ought to have rights, but was clear, nonetheless, that only through social recognition can we determine which rights there ought to be in any given society.⁸

This chapter will then examine thought on rights in the interwar years, particularly the work of the early British Political Scientists, Jacques Maritain, and American political scientists. It will be shown that Leonard Trelawney Hobhouse and Ernest Barker both held that rights required social recognition; across the Atlantic, this view was shared by George Herbert Mead and Ralph Mason Blake. In the opposing camp, Jacques Maritain, H.D. Lewis, and Morris R. Cohen argue in favour of natural rights – yet Lewis and Cohen note explicitly that they realise themselves to be in the minority in holding this position.

The aim of this analysis will be to show that, firstly, rights did not go away or disappear between sometime in the 1790s and 1948, as some histories of human rights appear to indicate. Second, throughout the period, theories of rights recognition held sway over theories of natural rights. In this sense, the 1948 UDHR marks a rupture and an abrupt change in thinking: the narrative of rights theory should not be conceived as innate rights, sometimes interrupted, but, rather, innate rights theories are the sudden interruptions, borne out of hope and a misplaced trust in foundationalism. We would secure rights better not through declarations, but through being honest about how rights come about – through processes of social recognition – and ensuring that the right social conditions are in place for the best possible processes of rights recognition (more of which in chapter four).

1. Spencer, Ritchie and rights debate at the turn of the twentieth century

The work of Herbert Spencer (1820-1903) and of David George Ritchie (1853-1903) gives us a good indication of the debate on rights around the turn of the twentieth century. This section will briefly explore Spencer’s arguments against the rejection of natural rights, before turning to Ritchie’s response.

In the late nineteenth century the idea of natural rights was not an idea widely subscribed to. It had been attacked, as we have seen, by Idealism in the shape of Hegel

⁸ Green, *Lectures*, §30, pp. 47-48

and Green, as well as by Utilitarianism,⁹ and, earlier, by Conservatism in the shape of Edmund Burke.¹⁰ Yet the debate was not over, for one of the foremost figures of late nineteenth century thought, Herbert Spencer, made natural rights a fundamental – if not the fundamental – element of his system of thought. Although Spencer’s reputation has suffered, in his time he was considerably influential, and compared favourably by his contemporaries with J. S. Mill and Hobbes.¹¹

Spencer’s work on natural rights was greatly influenced by Lamarckian evolution¹² and by the scientific progress of the nineteenth century, as well as by his non-conformist background. Barker accuses Spencer of simply repeating ‘the old idea of natural rights...with the one difference that the code is translated into the future, and connected with evolution’.¹³ For Barker, ‘natural rights...are the solid core of Spencer’s thought.’¹⁴

Spencer’s work makes it clear that he considered himself to be in the minority in his arguing for natural rights. In “The Great Political Superstition” he notes the opposition towards notions of natural rights from ‘Professor Jevons, in his work, *The State in Relation to Labour*¹⁵ [who writes that] ‘The first step must be to rid our minds of the idea that there are any such things in social matters as abstract rights.’” Similarly, he quotes Matthew Arnold who argues that ‘An author has no natural right to a property in his production. But then neither has he a natural right to anything whatever which he may produce or acquire.’¹⁶ Both Jevons and Arnold were significant public intellectuals of the period. Furthermore, Spencer records that he ‘recently read in a weekly journal of high repute, that ‘to explain once more that there is no such thing as ‘natural right’ would be a waste of philosophy.’ In Spencer’s opinion, ‘the view

⁹ Jeremy Bentham, “Nonsense Upon Stilts”

¹⁰ Burke, *Reflections on the revolution in France*

¹¹ W. H. Greenleaf, *The British Political Tradition, Volume Two: The Ideological Heritage* (London, Methuen, 1983), pp. 48-49

¹² By combining natural rights with evolution, Spencer bucks the trend identified by Andrew Vincent, who argues that during the nineteenth century the theory of evolution ‘knocked away all the intellectual supports from natural right’. Andrew Vincent, *The Politics of Human Rights* (Oxford, Oxford University Press, 2010), p. 80

¹³ Ernest Barker, *Political Thought in England 1848-1914* (London, Oxford University Press, 1959 [1915]), p. 79

¹⁴ Barker, *Political Thought in England 1848-1914*, p. 102

¹⁵ W. Stanley Jevons, *The State in Relation to Labour* (London, MacMillan and Co., 1882), p. 6

¹⁶ Matthew Arnold, “Copyright”, in Matthew Arnold, *The Works of Matthew Arnold in Fifteen Volumes, Volume XI: Irish Essays and Others* (London, MacMillan and Co., 1904, pp. 234-269, p. 241. This essay appeared originally in the *Fortnightly Review* in March 1880, No. CLIX, pp. 319-334.

expressed in these extracts is commonly uttered by statesmen and lawyers in a way implying that only the unthinking masses hold any other.’¹⁷

Although he sees himself in the minority within British political thought, Spencer argues that there are many who share his opinion outside Britain, particularly on the continent, where a great deal of thought is based on the German notion of *Naturrecht*. This perceived divide between Anglo-American and Continental thought on rights is a theme which is recapitulated throughout the period.¹⁸

The Man Against the State, published in 1884, two years after the death of T. H. Green, attacks the idea that rights are based on recognition. Spencer argues that ‘those who, denying natural rights, commit themselves to the assertion that rights are artificially created by law, are not only flatly contradicted by facts, but their assertion is self-destructive: the endeavour to substantiate it, when challenged, involves them in manifold absurdities.’¹⁹ Spencer does not explain quite what these absurdities, which the ‘fashionable counter-theory’²⁰ of recognition involves, are at this juncture. However the ‘facts’ of which he speaks are the result of his sociological and anthropological study into a diverse group of peoples, including the ‘Bechuanas’, the ‘Koranna Hottentots’, the ‘Araucanians’, the ‘Kirghizes’, the ‘Dyaks’, the ‘Chippewayans’, the ‘Ahts’, the ‘Esquimaux’, and others. The result of this is Spencer’s discovery that ‘before permanent government exists...the rights of each individual are asserted and maintained by himself, or by his family’.²¹ This he takes to be evidence that natural rights are prior to the state, and indeed to society. This argument is less fatal to rights recognition than Spencer imagines. The fact that rights may exist before a fully-fledged state is nothing that really refutes the account of recognition given by Green; rights recognition occurs within the family and other informal groups, as we have seen.

In *Social Statics*, his earliest book, Spencer provides a justification of natural rights: ‘Let us repeat the steps by which we arrive at [his theory of natural rights]. God wills man’s happiness. Man’s happiness can only be produced by the exercise of his

¹⁷ Herbert Spencer, “The Great Superstition”, in Herbert Spencer (Ed. John Offer), *Political Writings* (Cambridge, Cambridge University Press, 1994), p. 149

¹⁸ *Ibid.*, p. 149-150; Charles Grove Haines discusses at length differences in the reception of Natural Law between the USA, Great Britain, France and Germany: Charles Grove Haines, *The Revival of Natural Law Concepts: A Study of the Establishment and of the Interpretation of Limits on Legislatures with special reference to the Development of certain phases of American Constitutional Law* (New York, Russell and Russell, 1965 [1929])

¹⁹ Spencer, “The Great Superstition”, p. 165

²⁰ *Ibid.*, p. 165

²¹ *Ibid.*, p. 155

faculties. But to exercise his faculties he must have liberty to do all that his faculties naturally impel him to do. Then God intends that he should have liberty. Therefore he has a right to that liberty.’²² Based on this, ‘justice’ comprehends only the preservation of man’s natural rights. Injustice implies a violation of those rights.’²³

This is a line of argument that is open to attack in a couple of obvious ways, not least the reliance on the will of God, something notoriously tricky to pin down. An objection might also be raised to the idea that ‘happiness’ is the ultimate aim of human existence, rather than any other conception of human flourishing.

For Spencer, then, every person has the natural and equal rights to do anything they like (so long as it does not interfere with the natural and equal rights of others to do the same).²⁴ There is potential for confusion here, which Ritchie is quick to seize upon. Ultimately, however, the key problem with Spencer’s argument for natural rights is that it relies on a number of assumptions, some of which are impossible to prove. Furthermore, the only ‘facts’ Spencer provides as evidence in support of his position do not necessarily support the idea of innate natural rights over the idea that rights require recognition.

Following Spencer’s interventions on behalf of the theory of natural rights in the late nineteenth century, it was left to the second generation of Idealists to restate the case against natural rights and in favour of rights based on recognition. The most notable contribution on this side of the debate was that of David George Ritchie, a significant figure within British Idealism and philosophy generally at the turn of the last century, and a founding member, as well as the third president, of the Aristotelian Society.

Despite their differences, Spencer and Ritchie agree on one point: Spencer saw himself in the minority in arguing in favour of natural rights, and Ritchie was more than happy to confirm Spencer’s minority status. In the Preface to his *Natural Rights*, Ritchie writes that ‘when [I] began...to write a paper on ‘Natural Rights’, which has grown by degrees into the present volume, I had a certain fear that in criticising that famous theory I might be occupied in slaying the already slain.’²⁵ Furthermore, Ritchie echoes Spencer’s diagnosis of a split in opinion between academia and the populace at

²² Herbert Spencer, *Social Statics*, (London, Chapman, 1851), p. 77

²³ Spencer, “The Man Against the State”, in *Political Writings*, p. 7

²⁴ Spencer, *Social Statics*, pp. 77-78

²⁵ David George Ritchie, *Natural Rights* (New York/London, Macmillan, 1924/1903), p. i-ii

large: ‘Though discredited by almost all our more careful writers on politics and ethics, it yet remains a commonplace of the newspaper and the platform, not only in the United States of America, where the theory may be said to form part of the national creed, but in this country, where it was assailed a century ago by both Burke and Bentham.’²⁶ Despite this, Ritchie sees the idea of natural rights, in the light of ‘recent experience as ‘still, in a sense, alive, or at least capable of mischief’.²⁷

Ritchie seems to have Spencer in mind as one of the key mischief-makers in this regard, and criticises him several times within *Natural Rights*, as well as at length in *The Principles of State Interference*, in which two of the book’s four chapters are devoted to criticism of Spencer.²⁸ For the purposes of this chapter it is worth noting just a selection of these criticisms.

Ritchie makes the point quite clearly that Spencer’s use of ‘primitive’ societies to show that rights exists prior to the state does not disprove the idea that rights require some form of social recognition: ‘It proves certainly that all rights cannot arise in an explicit contract or through a statute made by a definite legislature; but does it prove that rights are antecedent to society?’²⁹ Ritchie argues not. Indeed, Ritchie points out that ‘The customs of a primitive society are its laws, and, as the product of society, vary in different societies.’³⁰ These customs, then, are not a single set of natural rights which all people naturally claim, but are socially-made customs, which can be radically different from society to society. In this sense, the evidence points more easily against Spencer’s argument than for it.

A second major criticism of Spencer is that he misuses, intentionally or not, the concept of ‘natural’. Ritchie points out that ‘natural’ has innumerable different meanings, and that some are quite different from others. Spencer, argues Ritchie, tries to conflate the ‘natural’ found in the idea of ‘natural laws’ of biology, physics or other natural sciences, with the rather different sense of ‘natural’ in the ‘Law of Nature (jus naturale) of Roman jurists, mediaeval theologians and intuitional moralists’. In this sense, argues Ritchie, ‘Mr. Herbert Spencer is making use of a mere ambiguity of language when he speaks of the folly of our legislators in trying ‘to repeal by Act of

²⁶ A similar disparity of opinion is noted by Boucher, “British Idealism and the Human Rights Culture”, p. 63

²⁷ *Ibid.*, p. i-ii

²⁸ David George Ritchie, *The Principles of State Interference* (London, George Allen and Co., 1902), pp. 3-82

²⁹ Ritchie, *The Principles of State Interference*, p. 36

³⁰ *Ibid.*, p. 37

Parliament a law of Nature'³¹ as 'no Act of Parliament can affect what is really a law of nature; and Mr. Spencer need not be afraid of the folly of our legislators, if it only leads them to attempt the genuinely impossible.' The matter is not one of Parliament breaking the laws of nature, but, rather, 'Mr. Spencer has drawn his own practical maxims from his own conclusions about nature; and some Acts of Parliament run counter to these – that is all.'³²

This feeds into one of Ritchie's key criticisms of natural rights in general: there is a great deal of uncertainty about what 'natural' means, and about what things or practices may, should, or can be considered to be 'natural'. He spends a great deal of *Natural Rights* exploring the many uses of the term, and finds them to be too diverse to properly base rights on: 'the Law of Nature, if it really represented 'the consent of the human race', would serve to settle controversies; on the whole it has helped to promote them.'³³

A third criticism of Spencer made by Ritchie is his claim that Spencer's argument in favour of natural rights contradicts his embrace of Lamarckian evolutionary theory. On the one hand, Ritchie argues, he sees society as a form of super-organism, but on the other hand sees individuals as having rights superior and prior to those of society. Ritchie argues that if this logic is to be followed, then the 'social organism in Mr. Spencer's ideal State, where Government is no longer needed, ought to resemble an animal drunk or asleep, with the brain doing as little as possible.'³⁴ Thus, for Ritchie, Spencer is 'in sad isolation', defending natural rights 'against the logical consequences of the evolutionist philosophy with which he has familiarised his contemporaries', for 'The conception of society as essentially organic or super-organic, if it be once really accepted, is incompatible with the individualism of the 'natural rights' theory.'³⁵ These criticisms of Spencer are valid not just narrowly against his theory of natural rights, but hold also against a range of natural rights theorists.

In putting forward his own theory of rights, Ritchie recognises the problem that led people to posit natural rights as a solution. In comparing 'moral rights' with 'legal rights', Ritchie argues that, 'On the analogy of the definition of legal right, a moral right might be defined as 'a capacity residing in one man of controlling the acts of another

³¹ Spencer makes this argument in Herbert Spencer, *The Principles of Ethics, Volume One* (New York, D. Appleton and Company, 1898), p. 546

³² Ritchie, *Natural Rights*, p. 45

³³ *Ibid.*, p. 88

³⁴ Ritchie, *The Principles of State Interference*, p. 21

³⁵ Ritchie, *Natural Rights*, p. 15; p. 15n

with the assent and assistance, or at least without the opposition, of public opinion,' or as 'the claim of an individual upon others recognised by society, irrespective of its recognition by the State.' Therefore, the 'only sanction of a moral right as such is the approbation and disapprobation of private persons.'³⁶ The problem arises when 'different sections of the society to which a person belongs and for whose opinion he cares may hold different views as to various duties, and consequently as to various rights'. These differences cannot be resolved in the same way as legal rights, as 'in the matter of moral rights there is no law court to which appeal can be made to pronounce a binding decision.'³⁷

It is in order to escape this problem, argues Ritchie, that people have appealed to the Law of Nature and to natural rights. For, 'if we knew clearly the natural rights of the individual, we could deduce from them what are his moral rights, and what in a well-regulated community should be his legal rights: we should have a satisfactory system of practical ethics and a satisfactory theory of legislation.'³⁸ However, divining what precisely are natural rights has proven to be just as problematic. Ritchie identifies three criteria that have been used to define natural rights: authority, nature, and utility. However, these criteria result in a 'chaos of conflicting individual impulses, instincts, desires, and interests', in which 'we can find no stable criterion.'³⁹ Pinning down what is 'natural' is far from straightforward, and may well be impossible.

Ritchie therefore argues that 'we must go beyond [these criteria] to the essential nature of things' and argues that 'human society' is the 'part of the nature of things [that] is here relevant'. This leads him to claim that 'If there are certain mutual claims which cannot be ignored without detriment to the well-being and, in the last resort, to the very being of a community, these claims may in an intelligible sense be called fundamental or natural rights.'⁴⁰

Ritchie, then, bases rights very much on society. In this respect he goes a great deal further than Green, who, as we have seen, required social recognition, but saw the flourishing of individuals for a common good as the main reason as to why individuals should have rights. Ritchie, in contrast, downplays the aspects of individual flourishing and freedom, and focuses very much on the effects of individual rights for society as a

³⁶ *Ibid.*, pp. 78-79

³⁷ *Ibid.*, p. 79

³⁸ *Ibid.*, p. 80

³⁹ *Ibid.*, p. 87

⁴⁰ *Ibid.*, p. 87

whole. This is explained by Ritchie's social ontology: for him, 'the person with rights and duties is the product of a society' and is for this reason that 'the rights of the individual must therefore be judged from the point of view of a society as a whole, and not the society from the point of view of the individual.'⁴¹ This is a view diametrically opposite to that of Spencer, and, as we shall see later, to that of Jacques Maritain. For both of them, the person represents something eternal and unchanging, in comparison to the temporal and evanescent institutions of state and society, and is therefore prior when it comes to rights. Whereas Spencer and Maritain work from the needs of the person to the needs of society, Ritchie turns to Plato, and, like Plato, works from society to person: 'We must return to the method of Plato: in order to know what is really just, we must call up a vision of an ideal society.'⁴²

Thus Ritchie argues that 'the appeal to natural rights ... is only a safe form of appeal if it be interpreted, as just explained, as an appeal to what is socially useful'. Although this social utility is to take account 'not only of immediate convenience to the existing members of a particular society, but of the future welfare of the society in relation, so far as possible, to the whole of humanity',⁴³ Ritchie is clear that what is 'natural' or 'right' may vary both diachronically and from society to society. He argues that 'natural rights' vary from society to society, as do concepts of what is natural. While 'Slavery seems to us horrible' and it seems 'contrary to nature', Ritchie notes 'it used not to seem horrible or contrary to nature, even to many people who talked loudly about the inalienable right of liberty.' This being just one example, he argues that 'there are probably many things existing now, which will seem 'horrible' some day, but which now seem quite 'natural' to most persons.'⁴⁴ This points quite clearly to the impossibility of truly 'natural rights', which remain the same for all humans in all times and in all societies. Rather, the rights which may be considered justifiable, Ritchie argues, vary from case to case. This element of contingency will be explored more in chapter five.

The important criterion for rights, in all cases, and for any notions of natural law, is that they are compatible with Ritchie's idea of an ideal society: 'The only 'law of nature' to which we can listen must be such as will commend itself to our reason as a statement of the principles of a coherent and orderly society which will not throw away

⁴¹ *Ibid.*, p. 101

⁴² *Ibid.*, p. 101

⁴³ *Ibid.*, p. 103

⁴⁴ *Ibid.*, p. 104

the hard-won achievements of man in his struggle with nature and with barbarism, and which will at the same time be progressive, in the sense of being capable of correcting its own faults.’⁴⁵ In contrast, ‘any ‘natural rights’ which incompatible with such a society are only another name for anarchy.’⁴⁶ Anarchy, argues Ritchie, would be the result of fully implementing Spencerian ideas of natural rights, with their primacy of the individual over society.

Although Ritchie makes quite clear his view that rights depend on the ‘approbation and disapprobation’ of persons, and that they depend on society, he does not spell out a clear mechanism for how this is to be achieved, and what precisely social recognition will look like. It seems that customs may, for Ritchie, constitute human rights, so rights may be granted simply by custom. Laws too seem to constitute human rights, so rights are granted by government. The precise mechanism by which society may recognise rights which do not fall into these two camps is left unclear, however. Aspects of mechanism and the role of custom and claim in rights recognition will be discussed in chapter five.

An interesting response to Ritchie’s criticisms comes from the Australian A. Inglis Clark, perhaps better known for his role in the development of the Hare-Clark Single Transferable Vote voting system. Clark argues that Ritchie’s work ‘contains the materials of a perfect defence of the doctrine which it was written to confute.’⁴⁷ This argument, like so many others, is based on the ambiguity of the term ‘natural’, and if anything serves to underline Ritchie’s point that such a protean word is hardly to be trusted to the extent of building a system of rights upon it.

The key thrust of Clark’s argument is that ‘natural’, ‘ought’, and ‘necessary’ all have the same meaning when placed in front of the word ‘rights’. Clark rightly points out that ‘we cannot convert the word ought into an adjective and speak of ought rights’. ‘Moral rights’ would be a possibly equivalent, but Ritchie has already written that ‘Natural rights are not identical with moral rights, because in many cases people have claimed that they have a moral right to do things that were not recognized either by the law of the land, or by prevalent public opinion, or by the conscience of the average

⁴⁵ *Ibid.*, p. 106

⁴⁶ *Ibid.*, p. 106

⁴⁷ A. Inglis Clark, “Natural Rights”, *Annals of the American Academy of Political and Social Science*, Vol. 16 (Sep., 1900), pp. 36-50, p. 45

individual’.⁴⁸ Leaving aside the questionable nature of Ritchie’s claim here – this thesis rejects the idea that an unrecognised claim is a right, as rights require social recognition – we can accept Clark’s point.

Clark even goes so far as to accept Ritchie’s argument that ‘social utility’ is the ‘ought’ of ‘ought rights’: justifiable rights are those which promote social utility. However, Clark argues that the greatest ‘social utility’ of the state is to produce ‘persons’, that is ‘thinking,’ intelligent beings capable of moral action.’⁴⁹ ‘Natural rights’ argues Clark, are those necessary to enable the creation of such persons, and here he explicitly falls back on the argument of Green, who, as we have seen, argued that ‘There is a system of rights and obligations which should be maintained by law, whether it is or not, and which may be called ‘natural,’ not in the sense in which the term ‘natural’ would imply that such a system ever did exist, or could exist, independently of force organized by society over individuals, but natural because necessary to the end which it is the vocation of human society to realize.’⁵⁰ Here is the identity of ‘natural’ and ‘necessary’ which forms the backbone of Clark’s argument. Peter Jones interprets Green in a similar way, as we saw in chapter one.⁵¹ Clark argues that ‘if the word ‘necessary’ is admitted to be a legitimate description of the alleged rights, it will be difficult to justify the scorn and vehemence with which the use of the word ‘natural’ has been condemned when applied to them.’⁵²

The alternative to continuing to campaign for ‘natural rights’, argues Clark, is a scenario where ‘the weak and all minorities are without verifiable authority or justification for resisting oppression’ and ‘might is the ultimate foundation and criterion of right and the highest political ideal men can safely cherish is the rule of the benevolent despot’.⁵³ Clearly this is a scenario few would wish for. In avoiding it, Clark argues, ‘neither law nor politics can avoid the use of the vocabulary of ethics; and the political philosopher may fairly claim to use the expression ‘natural rights’ to designate that sphere of personal action which must be held inviolate from the coercive intrusion of any other individual or the State in order to permit every man to live the most truly human life which his nature and his capacities make possible for him in the

⁴⁸ Ritchie, *Natural Rights*, p. 80

⁴⁹ *Ibid.*, p. 46

⁵⁰ T. H. Green, quoted in A. Inglis Clark, “Natural Rights”, p. 46

⁵¹ Peter Jones, “Moral Rights, Human Rights and Social Recognition”, p. 276

⁵² A. Inglis Clark, “Natural Rights”, p. 48

⁵³ Clark, “Natural Rights”, p. 50

social environment in which he is found.’⁵⁴ Moreover, the ‘fact that the extent of this sphere of personal action has been, and may continue to be, the subject of an interminable controversy does not prove that such a sphere of personal action does not exist.’⁵⁵ There are, or should be, ‘natural rights’, even if it is unclear what they are, in other words. Yet what they should be depends on each society. Clark’s argument is one that resonates with Feinberg’s argument in favour of rights: a lack of rights results in ‘moral impoverishment’. However, this does not mean we have to accept the theory of natural, innate rights. Rights created by intersubjective social recognition also make leading a fully human, moral life possible. The necessity that there be rights does not mean that the rights that exist are natural.

Ultimately, what Clark is arguing for is not so far away from ideas of rights recognition today, or from T. H. Green. He is not making a case like Spencer’s or Maritain’s that there are some rights humans have by virtue of being human, but rather, like Green, he is arguing that humans should have some rights in order to flourish, but what these rights are ultimately depends on what is necessary for each society. Unlike Green, however, he does not explicitly mention recognition, and this is the chief weakness of his argument: he provides no mechanism for deciding precisely what is ‘necessary’ and, therefore, he would argue, ‘natural’. Clark’s argument is best read as a check on Ritchie, arguing that the baby of rights – or human rights – should not be thrown out with the bathwater of highly questionable notions of ‘natural’ and ‘natural law’. It sets up the perilous path between Scylla and Charybdis which work on rights in the rest of the century was to follow.

2. Rights recognition and natural rights, 1900-1948

Ritchie’s dismissal of natural rights set the tone for much of the subsequent period, especially in Anglo-Saxon political theory. This chapter will now examine work on rights from a number of thinkers of the period 1900-1948, in order to show that rights based on recognition remained a key part of thinking on rights throughout the period, right up until the second year of the Second World War. In doing so, this

⁵⁴ *Ibid.*, p. 48-49

⁵⁵ *Ibid.*, p. 49

section will also put forward the argument that significant work on rights did take place in the years between T. H. Green and the writing on the Universal Declaration of Human Rights. This period has hitherto been neglected, and, this chapter argues, is worthy of further research.

One of the most important figures in British political thought of the interwar period was Leonard Trelawney Hobhouse. Although, along with many thinkers of this period, his contributions to political thought were neglected for much of the later twentieth century, he is now being championed by a number of contemporary left-wing politicians, including Jon Cruddas.⁵⁶ There is no doubt that Hobhouse was influential in his own time: he was the first Professor of Sociology at the London School of Economics, and his influence extended internationally too: for Harry Barnes, writing for an American audience, Hobhouse was the ‘one scholar whose writing are of a sufficiently high order to mark him as the worthy successor of England's great philosopher and sociologist [Herbert Spencer]’.⁵⁷

On the face of it, it might be surprising to find Hobhouse next in a row of thinkers, after Hegel, Green, and Ritchie. Hobhouse’s *The Metaphysical Theory of the State* is an, at time vitriolic, attack on Idealism, in which he explicitly links the philosophy of Hegel to the bombing of London by German war-planes – ‘[Hegel’s] Gothas’.⁵⁸ In reality, Hobhouse was closer to the Idealists than he would care to admit, and the same work contains one exposition of Hobhouse’s own account of rights recognition.⁵⁹

Hobhouse’s account of rights recognition may also be found in *Liberalism* and in *Social Evolution and Political Theory*.⁶⁰ Like the majority of thinkers in the interwar period, Hobhouse explicitly rejects natural rights, ‘rights often attributed to the individual as though they were part of his skin, or one of his limbs’, and argues that they

⁵⁶ Jon Cruddas, “Keir Hardie Memorial Lecture”, [http://www.joncruddas.org.uk/index.php/articles/entry/keir_hardie_memorial_lecture/]; Jon Cruddas, *The Future of Social Democracy* (London, Compass, 2010) [http://www.lwbooks.co.uk/ebooks/cruddas_ebook.pdf]

⁵⁷ Harry E. Barnes “Some Typical Contributions of English Sociology to Political Theory” *The American Journal of Sociology*, Vol. 27, No. 4 (Jan., 1922), pp. 442-485, p. 442

⁵⁸ Leonard T. Hobhouse, *The Metaphysical Theory of the State: a Criticism* (London, Routledge/Thoemmes, 1996), p. 6. For more on the effects of the First World War on philosophy – in particular idealism – see Peter Hoeres, *Krieg der Philosophen*, pp. 330-384.

⁵⁹ On the closeness of Hobhouse to idealism, see Hanno Terao, *Towards a Welfare Society: a Critical Re-appraisal of L.T. Hobhouse's New Liberalism and Sociology* (PhD Thesis, Cardiff University, 2013)

⁶⁰ Leonard T. Hobhouse, *Liberalism* (London, Oxford University Press, 1964); Leonard T. Hobhouse, *Social Evolution and Political Theory* (New York, Columbia University Press, 1911)

are an expression of ‘one-sided individualism’.⁶¹ Instead, his account argues that rights must be justified or recognised. Quite how far the term ‘recognition’ can be employed when it comes to Hobhouse will be explored later.

At the most basic level, Hobhouse holds that a right is a ‘claim’⁶² or an ‘expectation’.⁶³ However, it has to be more than just a claim or an expectation, since ‘a mere claim is nothing’ as one ‘might claim anything and everything’.⁶⁴ To be a right, this claim must be justifiable, and recognised as justifiable. At this point, Hobhouse separates moral rights from legal rights. For legal rights, justification is straightforward: it ‘lies in an appeal to law.’ However, Hobhouse notes that ‘there are, or there may be, rights which the law does not recognize and which the moral consciousness holds out to be recognized. These are the moral or ethical rights of men.’⁶⁵ Justification for these rights is less straightforward: clearly, there is no written law to appeal to.

Hobhouse’s solution, like Hegel’s and Green’s, is that moral rights are justified by social recognition. Moral rights, he argues, are inherently social. Whereas an ‘abstract individualism might regard the individual as possessed of certain rights’ – the classically liberal natural rights position – in fact, Hobhouse argues, ‘rights are a function of the social group, since rights involve demands made upon others either for positive services or for negative forbearances.’⁶⁶ Hobhouse is, thus far, in agreement with Green. However, he differs in the mechanism of recognition required to justify rights. Hobhouse’s account relies on an impartial third person to whom rights claims appeal, rather than society: ‘analysis of the term ‘right’ goes to show that a right is nothing but an expectation which will appeal to an impartial person.’ Thus, ‘A may make a claim on B, and B may refuse the claim. The claim only becomes recognized as a right if some impartial third person (C) upholds A in making it’.⁶⁷

This triadic account raises some questions. Potentially problematic is the ‘impartial third person’: who are they, and on what basis should they decide to uphold or reject a right? It seems clear that Hobhouse is not suggesting that in the case of every debated right, a neutral third person should be asked to rule. Rather, as ‘some impartial

⁶¹ Leonard T. Hobhouse, *The Elements of Social Justice* (London, George Allen & Unwin, 1922), p. 31

⁶² Leonard T. Hobhouse, *Liberalism*, p. 61

⁶³ Leonard T. Hobhouse, *Social Evolution and Political Theory*, p. 197

⁶⁴ Hobhouse, *Liberalism*, p. 6

⁶⁵ Hobhouse, *Social Evolution and Political Theory*, p. 197

⁶⁶ Hobhouse, *The Metaphysical Theory of the State*, p. 30

⁶⁷ Hobhouse, *Social Evolution and Political Theory*, p. 197

third person', person C has a merely hypothetical existence. However, even we are to take person C as merely hypothetical, he or she is still to be part of the same community as A and B: '[a]s impartial, he [C] is looking at A and B just as two persons equally members of the community with himself.' This co-membership of the community has a pronounced effect on the judgment C makes in each case, as Hobhouse argues that '[i]f there exists a rule recognized by the community which covers the case, no question arises [as to whether A has a right against B]'. Thus, moral rights may differ from community to community in Hobhouse's system, as they may in Green's. Furthermore, it seems that, by specifying that person C must belong to the community in question, Hobhouse rules out the imposition of external moral norms or rules on a particular community.

Rights claims may be advanced for which the community in question has no rules in place. Discussing this possibility, Hobhouse takes a very Greenian line, and asks 'To what in such a case can he look except the common good?'. Hobhouse is clear that rights 'can only be justified if their fulfilment is held to be for the good of the society – temporary or permanent – for which they are prescribed'.⁶⁸ Hobhouse's introduction of a hypothetical third person as judge is a move rejected by this thesis: as we shall see in chapter four, we are better off if *all* in society can act as judges, and it is unclear what a hypothetical judge adds that offers more than letting all in society judge the matter based on reality rather than on hypotheticals. The common good is best arrived at by involving all those who the good might be common to in debate, rather than by invoking a hypothetical arbiter.

The influence of Green is plain to see again in Hobhouse's argument that 'the rights of man are those expectations which the common good justify him in entertaining'.⁶⁹ Further, Hobhouse introduces the slight element of confusion surrounding the term 'natural rights' which is present in Green's *Lectures on the Principles of Political Obligation*, when he argues that 'may even admit that there are natural rights of man if we conceive the common good as resting upon certain elementary conditions affecting the life of society, which hold good whether people recognize them or not.'⁷⁰ Here, it seems Hobhouse is using 'natural' in the same, Aristotelian, sense as Green did.

⁶⁸ Hobhouse, *The Metaphysical Theory of the State*, p. 30

⁶⁹ Hobhouse, *Social Evolution and Political Theory*, p. 197

⁷⁰ *Ibid.*, p. 197

The question arises, as it does for Green, what precisely Hobhouse means by the ‘common good’. In judging on the validity of a right, person C must make a ‘rational’ decision, and ‘he must found [it] on some good result which it serves or embodies, and as an impartial man he must take the good of every one affected into account.’⁷¹ The combination of consequentialism and the concern for the effects on all seem to place Hobhouse near to a sort of utilitarianism, far removed from theories of natural rights. Yet Hobhouse did not see these positions as being as far apart as they might be considered today, arguing that ‘the Benthamites arrived at practical results not notably divergent from those of the doctrine of natural liberty’ and that both played key, and complementary, roles in the formation of liberalism.⁷² This appeal to a ‘good result’ for the good of all does appear to be problematic when one is talking of rights, however. It would appear to suggest that person C, if he considers that it is the best course of action for all in society, or the great majority, may deny person A his rights against B, regardless of whether person A had acted badly (in any sense of the word) enough for a plausible argument to be made as to why he should be denied a right. Green’s conception of ‘common good’, on the other hand, means that recognised rights must benefit every person, rather than simply society in general.

A criticism that Hobhouse anticipates is that placing the common good at the heart of his account of rights recognition may make the individual subservient to society. Against this, he argues that ‘society consists wholly of persons’ and thus, ‘the common good to which each man’s rights are subordinate is a good in which each man has a share. This share consists in realizing his capacities of feeling, of loving, of mental and physical energy, and in realizing these he plays his part in the social life, or, in Green’s phrase, he finds his own good in the common good.’⁷³ Society, then, is essential for personality and human flourishing, and thus membership of society is a good in itself. The final, direct, reference to Green in this passage underlines the deep debt Hobhouse owes to Green’s account of rights recognition.

In Hobhouse’s discussion of Green’s thought in *The Elements of Social Justice*, the extent to which Hobhouse is committed to social recognition as a justification for rights is brought into question. Here, he writes ‘A true moral right is one which is demonstrably justifiable by relation to the common good, whether it is actually

⁷¹ Hobhouse, *Liberalism*, p. 60

⁷² Hobhouse, *Liberalism*, p. 36

⁷³ *Ibid.*, p. 61

recognized or not. On the other hand, the individual has no moral rights which conflict with the common good, as therein every rational aim is included and harmonized.⁷⁴ Here, Hobhouse has abandoned recognition, save for in a hypothetical, rational sense: a right is ‘a claim upon others...which is maintained by some impartial standard.’⁷⁵ Rather than being recognized by society, rights are ‘determined by the good of society’, as ‘the community may misjudge the common good’.⁷⁶

If we are to accept Hobhouse’s account here as representative of his thought, then we must accept that he is far from fully committed to social recognition, and may even see it as dangerous. What Hobhouse is more in favour of is what might be termed ‘hypothetical recognition’: the impartial judge need not exist; the key criterion is a right’s contribution to the common good. However, this is problematic. The questions which were raised earlier, of who is to judge and on what basis are they to make their judgment, remain open, in fact more open than before. Furthermore, the justification in terms of the common good, rather than social recognition, would seem to leave room in Hobhouse’s theory for the imposition of moral rights and norms by persons outside the community or society in question.

Hobhouse’s contribution to thought on rights is important in three ways. First, there is the simple fact that Hobhouse discusses rights, and recognition, in depth. The fact that Hobhouse discusses rights in several places, at some length, must be underlined: the political theorists of the interwar period did not ignore rights, or simply revert to eighteenth century notions of natural or self-evident rights. Second, Hobhouse, as argued above, was influential in the period. His thought shaped that of many other people, not least at the LSE, and so merits quite some discussion in an account of work on rights in the period. Third, while loudly rejecting much of the metaphysics that came with Idealism, especially in its Hegelian form, Hobhouse follows Green when it comes to rights in many respects, unsurprisingly perhaps, given his description of Green as the philosopher ‘in whom we get most of the cream of Idealism and least of its sour milk’.⁷⁷

Hobhouse was not alone among the ‘new liberals’ in considering and rejecting the classical liberal notions of natural rights. Ernest Barker, another high profile figure of the period, who was Principal of King’s College London from 1920 to 1927, before

⁷⁴ Hobhouse, *The Elements of Social Justice*, p. 40

⁷⁵ *Ibid.*, p. 39

⁷⁶ *Ibid.*, p. 40n

⁷⁷ *Ibid.*, p. 43

becoming the first person to hold the newly-created Chair of Political Science at Cambridge University in 1928, also rejected classical liberal theories of natural rights. For him, ‘functions of government’ and ‘rights of persons’ were in the same relationship as the obverse and reverse of a coin.⁷⁸ Rights and government, he argues, rely on each other in a symbiotic relationship, where on the one hand ‘the functions of government are a condition of the rights of persons, because they are necessary to the enjoyment of those rights and because they exist in order to secure them’ and on the other ‘the rights of persons are a condition of the functions of government, because they are the source and the cause of the existence and action of government.’⁷⁹ There can be no natural rights, because of the necessity of the state, or at least society with some form of government, for rights to exist.

Barker argues that, in a sense, ‘the origin of my rights is something in me, and my rights flow from the inherent fact of my own moral personality’ and that ‘[i]f we stop at this point, we shall say that rights are ‘natural’ or ‘human’, meaning by the adjectives which we use that they come from the nature of man, in his own intrinsic being.’ However, we cannot stop at this point, because ‘I should not possess the sum total of rights which is my legal personality unless it were vested in me by the State, which assigns it to me as the part which I play, and the persona which I sustain, in its ‘drama’ or scheme of legal action.’ Although the individual personality plays a role in rights, it is the state which is the ‘immediate source of rights’ and, therefore, ‘rights, in any full sense of the word...are never rights unless they proceed immediately from that source.’⁸⁰ Here, Barker is being perhaps more Hegelian than Greenian in his commitment to the importance of the state, but the important point remains that he considered the theory of natural rights to be untenable.

Emphasis on the importance of social recognition, and on the inherently social nature of rights, was not restricted to British interwar thought. In America, the country which had declared rights to be ‘self-evident’, there was also a degree of acceptance that natural rights as Hobbes and Locke knew them were by no means self-evident, and that rights require social recognition. Amongst those arguing for this position was the American philosopher, sociologist and psychologist, George Herbert Mead. If it may be

⁷⁸ Ernest Barker, *Principles of Social and Political Theory* (Oxford, Clarendon Press, 1951), p. 226

⁷⁹ *Ibid.*, p. 226

⁸⁰ *Ibid.*, p. 138

admitted that Hobhouse was a major figure in the period, then it is clear that Mead was an even more influential figure; his works have continued to influence research in several disciplines for around a century.

Mead argues that recognition is inherent in rights, and that a right ‘can only exist in a society’.⁸¹ Such recognition is founded on ‘common interest’, which bears a resemblance as a term to Green’s ‘common good’, although it is unclear whether Mead was aware of Green’s work in this area – he certainly does not cite him. For Mead, ‘it is the common interest on the part of society or those who constitute society in that which is the right of the individual which gives that right its recognition, and gives the ground for the enforcement of the right’.⁸²

Once more, the term ‘natural’ is introduced in a slightly confusing way. Mead argues that what has just been outlined provides ‘a basis for a doctrine of rights which can be natural rights without the assumption of the existence of the individual and his right prior to society’. He contrasts ‘natural’ here with ‘arbitrary’, and argues that all ‘so-called natural rights’ involve reciprocal recognition, rather than arbitrary benefit. Thus, in all ‘so-called natural rights... we recognize that the individual in asserting his own right is also asserting that of all other members of the community, and that the community can only exist in so far as it recognizes and enforces these common ends, in which both the individual and the community are expressed.’⁸³

Central to all this is ‘common interest’ or ‘common good’: ‘the community recognizes the individual's end as a right because it is also the good of all, and will enforce that right in the interest of all.’ Mead takes the example of property rights. It is in the interest of a property holder to have his right over that property recognised by society. Inherent in this recognition is his recognition of the right of others over their property. In this way, social recognition works for the good of all.

In Mead, then, we find a proponent of a form of rights recognition very similar to that found in Green, where a right is only a right through social recognition, and if it contributes to the common good. He ‘does not allow the existence of the natural rights clear and dear to the classical British libertarians and to thinkers like Hobbes and

⁸¹ George H. Mead, “Natural Rights and the Theory of the Political Institution”, *The Journal of Philosophy, Psychology and Scientific Methods*, Vol. 12, No. 6 (Mar. 18, 1915), pp. 141-155, p. 149; See also, George H. Mead, *Movements of Thought in the Nineteenth Century*, (ed. Merritt H. Moore) (Chicago: University of Chicago Press, 1936)

⁸² Mead, “Natural Rights”, p. 149

⁸³ *Ibid.*, p. 149

Locke',⁸⁴ but rather, like many in the period this chapter examines, holds recognition to be central to rights.

Ralph Mason Blake is certainly a less well-known figure than Mead today, though he was Professor of Philosophy at Brown University in the United States for twenty years from 1930-1950.⁸⁵ Blake devotes an entire paper in 1925 to a discussion of natural rights and their relationship to natural laws, and precisely what the term 'natural' should be taken to mean. A common theme running from Spencer's – perhaps disingenuous – use of the term throughout the period is some ambiguity surrounding the word 'natural'. This, like much of the literature on rights of the period, is anticipated by Green when he contrasts 'natural' in an Aristotelian sense to 'natural' in the sense it was used by classical liberals in the phrase 'natural rights'.

Blake provides an interesting insight into the prevailing views on rights in the period when he writes that

At various times in the history of moral and political philosophy the concept of natural rights has played an important and prominent role in the thoughts of men. It has frequently, indeed, been the central and dominating idea of a whole system. At other periods, however – *and it is through one of these that we seem at present to be passing* – it has fallen out of favor. In many quarters it seems just now to be regarded as an *outworn and exploded superstition of the past*, and any appeal to the idea is looked upon as evidence of an antiquated and unenlightened approach to the problems of the day.⁸⁶

It seems clear, then, that in Blake's opinion, any proponent of natural rights in the 1920s would be distinctly in the minority.

However, Blake does not give up the idea that natural rights might be resurrected – and history would subsequently prove him right on this matter – and asks 'whether an idea of such vitality, appealed to at times, indeed, by the most diverse schools of thought as giving warrant to their views, and constantly reappearing in men's minds just when it seemed once more finally to have been got rid of, does not really

⁸⁴ Joseph Betz, "George Herbert Mead on Human Rights", *Transactions of the Charles S. Peirce Society*, Vol. 10, No. 4 (Fall, 1974), pp. 199-223, p. 199

⁸⁵ "Blake, Ralph M.", in *Martha Mitchell's Encyclopedia Brunoniana* [http://www.brown.edu/Administration/News_Bureau/Databases/Encyclopedia/search.php?serial=B0260] Accessed 14th March 2012

⁸⁶ Ralph Mason Blake, "On Natural Rights", *International Journal of Ethics*, 36:1 (1925), pp. 86-96, p. 86. My emphasis.

embody some important notion which it would be useful to preserve and dangerous to lose sight of.’⁸⁷

To this end, he examines claims that natural rights may be based on natural law but finds only a thoroughgoing confusion of what exactly is meant by the term ‘natural’. From this ‘chaos’, argues Blake, it ‘seems impossible to bring any real order... and the attempt to find any standard of ‘what ought to be’ from a contemplation of ‘nature’ ... really is futile.’ Therefore, Blake finds it impossible ‘to derive any principles with regard to what ought to be, any principles of ‘natural morality’ or ‘laws of nature,’ from a contemplation, no matter how earnest, disinterested and thoroughgoing, of the facts of nature, as these are reported to us by the ordinary descriptive sciences of nature.’⁸⁸

Instead, Blake puts forward an argument for founding natural rights on promoting human happiness, so that ‘the truly natural rights must be those claims, liberties, and privileges the possession of which by the person or persons in question will continue, so long at least as human nature and the laws of the physical universe remain substantially what they now are, to constitute permanent and general conditions of human happiness.’⁸⁹ What precisely is meant by ‘human happiness’ is left rather ambiguous.

Finally, in the last paragraph of the paper, Blake gives us his definition of a right, and we arrive back at a version of rights recognition: ‘A right is a claim which ought to be allowed to an individual in view of the general welfare.’⁹⁰ Further in answer to the question ‘Allowed by whom?’, Blake writes, ‘We can only answer, “By society,”’ for ‘[s]ociety is implied at every turn.’⁹¹ Once again, a theorist in the interwar years provides an account of rights recognition that Green would have recognised as similar to his own.

All of the scholars examined in this section subscribe to the idea that recognition is essential for human rights, and that natural rights are untenable. Several have similar systems of rights recognition to Green, and his influence seems to underlie much of what was written. Perhaps it is unsurprising that rights recognition was one aspect of Idealism that was retained following the take-over of the vast majority of Anglo-Saxon philosophy by logical positivism; the logical positivists more than shared Idealists’

⁸⁷ *Ibid.*, p. 86

⁸⁸ *Ibid.*, p. 91

⁸⁹ *Ibid.*, p. 94

⁹⁰ *Ibid.*, p. 96

⁹¹ *Ibid.*, p. 96

scepticism towards doctrines of natural rights. However, a minority of theorists continued to argue for natural rights, and natural law gained some traction, particularly in the USA, as Haines describes.⁹²

2.1 Arguments in favour of natural rights

One of the most prominent proponents of natural rights during the first half of the 20th Century was the French Catholic philosopher Jacques Maritain. Although his output was eclectic, including volumes on prayer, on the Christian liturgy, and on art,⁹³ in the late 1920s, under the influence of his friendship with the personalists Nikolai Alexandrovich Berdyaev and Emmanuel Mounier,⁹⁴ Maritain first turned his attention to the issue of human freedom, human rights, and the relationship of both to natural law. Over the subsequent decades, he wrote a number of works on this theme.⁹⁵ A large part of the significance of Maritain's political thought, according to one commentator, lay in the fact that 'he was the one primarily responsible for reformulating the Thomistic theories of natural law and the idea state in ways that made them applicable to modern political conditions and that gave life to the political application of neo-Thomism.'⁹⁶ In other words, Maritain used a neo-Thomist conception of natural law to provide a justificatory argument for human rights.

Maritain's significance in a discussion around human rights is not merely theoretical, however. Maritain was part of the 'Committee on the Theoretical Bases of Human Rights',⁹⁷ which played a key role in drafting the 1948 Universal Declaration of

⁹² Haines, *The Revival of Natural Law Concepts*

⁹³ Amongst which are: Jacques Maritain, *Prayer and Intelligence* (New York, P. J. Kennedy, 1928); *Creative Intuition in Art and Poetry* (New York, Pantheon Books, 1953); *Liturgy and contemplation* (London, G. Chapman, 1960); *Art and faith*. (New York, Philosophical Library, 1948).

⁹⁴ Johan de Tavernier, "The Historical Roots of Personalism: From Renouvier's *Le Personnalisme*, Mounier's *Manifeste au service du personnalisme* and Maritain's *Humanisme intégral* to Janssens' *Personne et Société*", *Ethical Perspectives* 16:3 (2009) pp. 361-392, p. 378; John Hellman, "Maritain and Mounier: A Secret Quarrel Over the Future of the Church", *The Review of Politics*, 42:2 (1980), pp 152-166

⁹⁵ Jacques Maritain, *Les droits de l'homme et la loi naturelle* (New York, Éditions de la Maison française, 1942); Jacques Maritain, *Man and the State* (Chicago, University of Chicago Press, 1956 [1951]); Jacques Maritain, *Du regime temporel et de la liberté* (Paris, De Drouwer, 1933); Jacques Maritain (trans. Richard O'Sullivan), *Freedom in the Modern World* (London, Sheed & Ward, 1935)

⁹⁶ Paul E. Sigmund, "Maritain on Politics", in Deal W. Hudson and Matthew J. Mancini (Eds.), *Understanding Maritain: Philosopher and Friend* (Macon, Mercer University Press, 1987), pp. 153-170, p. 153

⁹⁷ Ari Kohen, *In Defense of Human Rights: A Non-Religious Grounding in a Pluralistic World* (London, Routledge, 2008), p. 137; see also Mary Ann Glendon, *A World Made New*, p.51;

Human Rights. In this way, there is a clear link between the interwar theory and the post-war practice of human rights.

Although Maritain is quite clearly – indeed explicitly – a proponent of natural rights, he does not fit neatly into the canon of Western liberal political thought on natural rights. He attacks Rousseau and Kant in particular, and by extension would have had little sympathy for either Locke’s or Hobbes’ position on natural rights. For Maritain, Rousseau and Kant and their ‘autonomy of the person’, whereby ‘one is free only if he obeys himself alone’ and where ‘man is constituted by right of nature in such a state of freedom’, represent ‘false political emancipation’ and ‘the false city of human rights’.⁹⁸ According to Maritain this doctrine leads to several undesirable consequences, including ‘a practical atheism in society’, the...disappearance of the idea of the common good’, and the ‘disappearance of the idea of the responsible leader’.⁹⁹ We may not share all of Maritain’s concerns here, but his concern at the disappearance of the common good, and the ‘divinization’ of the individual seems to interestingly echo Marx’s critique of liberal rights as alienating. Furthermore, it points to one argument in favour of those thinkers previously explored in this chapter, who see society, and a common good of one sort or another, as crucial for human rights. With recognition, the individual cannot be ‘divinized’ as Maritain puts it, as he or she is not invested by nature with rights, god-like, but rather depends on others for the recognition of any rights he or she enjoys.

Maritain, however, does not see the answer to his concerns in rights recognition. Rather, he argues for a different sort of natural rights, founded explicitly on neo-Thomistic natural law. In his *Freedom in the Modern World*, Maritain describes this in rather religious language. Here, the ‘true city of human rights’, is founded on a principle that is not ‘anthropocentric’ – which leads to the ‘divinization’ of humans – but, instead, on a principle that ‘is in conformity with the nature of things and therefore ‘theocentric’.¹⁰⁰ Maritain argues that this conception ‘understands that human society...implies a religious principle, and supposes that God is accessible to our reason and that He is the last end of our existence’. Further, this conception is ‘founded upon the authentic notion of the common good’, which ‘is other than the collection of private

⁹⁸ Jacques Maritain, *The Social and Political Philosophy of Jacques Maritain: Selected Readings* (London, Geoffrey Bles, 1956), p. 37

⁹⁹ *Ibid.*, pp. 37-38

¹⁰⁰ *Ibid.*, p. 38

goods'.¹⁰¹ In this way, Maritain's 'common good' differs quite significantly from the understanding of common good in egalitarian rights recognition.

The importance Maritain attaches to the 'common good' here does not mean that he holds a doctrine similar to Hobhouse or Green, in which rights are only rights if they are recognised as contributory to a common good. Rather, Maritain holds that 'some things are due to man by the very fact that he is a man', and this includes rights: 'the human person has rights by the very fact that he is a person, a whole who is master of himself and of his acts'. However, this does not stem from the nature of the human in isolation, but rather from the human's relation to the universe, conceived in terms of natural law. Maritain argues that 'the true philosophy of the human person's rights is therefore based on the idea of natural law'. It is because 'we are involved in the universal order, in the laws and regulations of the cosmos and of the immense family of created natures' and 'we have at the same time the privilege of being spirits' that 'we possess rights before other men and before the whole assembly of creatures'.¹⁰²

As such spiritual beings, Maritain argues, humans transcend time, and therefore temporal constructions such as the state. Therefore, from Maritain's perspective, a Hegelian argument, which holds that the state is essential for freedom, rights, and law, is nonsensical. Humans do not get their rights from the state, according to Maritain, but, rather,

'the fundamental rights such as the right to existence and life, the right to personal freedom or to conduct one's life as master of oneself and of one's acts, responsible for them before God and the law of the community, the right to pursue perfection of moral and rational human life, the right to pursue eternal good, without which pursuit there is no true pursuit of happiness, the right to bodily integrity, the right to the private ownership of material goods as a safeguard for the liberties of the person, the right to marry according to one's choice and to establish a family, itself assured the liberties proper to it, the right of association, of respect for the human dignity in each man whether or not he represents an economic value for society – all these rights are rooted in the vocation of the person, a spiritual and free agent, to the order of absolute values and to a destiny superior to time.'¹⁰³

¹⁰¹ *Ibid.*, p. 39

¹⁰² *Ibid.*, pp. 57-58

¹⁰³ *Ibid.*, p. 61

The source of rights, then, is not the state, or society, which pass away, but rather natural law, which remains the same eternally. The phrase ‘such as’ is striking here: the theorist of natural rights can enumerate some of the rights that are natural, but the list is never exhaustive. This seems to suggest that even theorists of natural rights think the list of rights may change, which of course prompts the question of how far rights can be held to be ‘natural’ or innate if the contents of rights, and rights, can change over time.

Maritain is certainly unusual in the context of twentieth century work on human rights in his explicit use of religion and natural law as a justificatory framework for rights. It is beyond the scope and competence of this chapter to interrogate or analyse Maritain’s work from a theological standpoint, but the one obvious problem with his conception of human rights is one which Maritain himself experienced, and referred to, and which prefigures a weakness in Michael Ignatieff’s work on rights, some decade later.¹⁰⁴

This problem is one Maritain admits himself, in the anecdote we saw at the beginning of this chapter: the drafters could agree on rights, ‘*providing we are not asked why*’, for ‘with the ‘why’, the dispute begins.’¹⁰⁵ Nowhere is this anecdote more apt than when applied to the work of Maritain himself. The list of rights which he puts forward in *Man and the State* would be largely unobjectionable to many people. But many of these same people would, of course, utterly reject, or find to be absurd, the neo-Thomist, Catholic, natural law underpinnings which inform Maritain’s position. We cannot leave aside the ‘why’ question, and hope that we have stumbled upon the correct solution. Maritain acknowledges this too, when he writes that ‘what is essential is to have a true justification of moral values and moral norms. With regard to Human Rights, what matters most to a philosopher is the question of their rational foundations.’¹⁰⁶ For Maritain, these foundations are natural law. If one is to disbelieve Maritain’s claims about natural law – and it is very much a matter of faith – then the rational foundations of his position crumble, and the whole edifice of his theory of human rights comes crashing down.

¹⁰⁴ Ignatieff, *Human Rights as Politics and Idolatry* also suggests we should ignore the ‘why’ question.

¹⁰⁵ Jacques Maritain, *Man and the State*, p. 77; The same anecdote is related by Maritain in Jacques Maritain, “Introduction”, in UNESCO (Ed.), *Human Rights: Comments and Interpretations* (London, Allan Wingate, 1949), p. 9

¹⁰⁶ Maritain, *Man and the State*, p. 80

Another noted theologian-philosopher who turned his attention to the question of rights, and natural rights, in the interwar period was H. D. Lewis. Like Maritain, his contribution comes towards the end of the period, and is concentrated chiefly in a long, two-part essay in *Mind*, published in 1937 and 1938.¹⁰⁷ Although Lewis' later career was focused much more on theology than political philosophy, he does not invoke religion in his argument to anything like the extent that Maritain does. There is no question of one's having to subscribe to neo-Thomistic Catholicism to support Lewis' argument.

The article tells us a few things implicitly, and in passing, about the state of thought on rights at the time. The fact that the editors of *Mind* chose to give over such a large amount of their journal to rights shows that in their opinion the matter was relevant, and there was a debate to be had. One reason for this is suggested by Lewis' comment that the idea that rights depend on recognition 'finds...general acceptance'.¹⁰⁸ His article argues that this is mistaken, and thus marks itself out as unusual – and print-worthy – for the period. This, then, supports the contention of this chapter that rights did not 'go away' during the interwar period, and that the importance of recognition was also recognised far beyond the time of Green.

Lewis argues against theories of recognition on several grounds, focussing his attack on the work of Green, Lord and Ritchie, and takes his cue partly from W. D. Ross's attack on Green's account of recognition in his volume *The Right and the Good*,¹⁰⁹ particularly in his use of the questionable argument that to 'recognise' rights is absurd, as 'to be recognised they must already exist'.¹¹⁰ In rights recognition it is a claim which is recognised – if it is not recognised then it remains simply a claim, not a right. Further, recognition here does not mean simply 'an awareness that something perceived has been perceived before'; rather, recognition, in rights recognition, means 'the acceptance of a claim as being valid'.

More profoundly, Lewis argues that the key mistake made by Green and other Idealists was to use legal rights as a template for moral rights. Whereas legal rights are recognised by the action of the state, it is clear that for moral rights this cannot always

¹⁰⁷ H. D. Lewis, "Some Observations on Natural Rights and the General Will (I)", *Mind* 46:184 (Oct. 1937), pp. 437-453; H. D. Lewis, "Some Observations on Natural Rights and the General Will (II)", *Mind* 46:185 (Jan. 1938), pp. 18-44

¹⁰⁸ Lewis, "Natural Rights and the General Will", p. 440

¹⁰⁹ David Ross and Philip Stratton-Lake, *The Right and the Good* (Oxford, Oxford University Press, 2002)

¹¹⁰ Lewis, "Natural Rights and the General Will", p. 442

be the case, and Lewis argues that moral rights must obtain their recognition from the general will. Lewis' objection to this is that, quite simply, 'there is no 'General Will' or interest', and therefore there is no way in which moral rights may be recognised.¹¹¹ It may well be that Lewis also had Hobhouse in mind, given his comment that 'the advocates of the theory of the 'general will' usually resort to the notion of rational desire or rational recognition':¹¹² Hobhouse's theory, as we have seen, is indeed one of hypothetical or rational recognition, rather than actually-occurring social recognition.

Lewis' argument misunderstands the position of Green on recognition, principally by misunderstanding recognition. As discussed in more detail in the previous chapter, Green's account of recognition does not depend on the sort of formal recognition by a state-like body, informed by the general will, which Lewis seems to think it does. It might be the case that Lewis has the work of Bernard Bosanquet, a disciple of Green and the key figure in the next generation of British Idealists; Bosanquet, unlike Green, did hold that recognition of rights by the state was necessary for those rights to exist.¹¹³ Neither does Green subscribe to a 'rational' or hypothetical recognition theory in the way that Hobhouse does. Finally, Lewis seems to think that Idealists like Green hold that 'we may claim as our right the treatment that is involved in the fulfilment of [our rational end]'.¹¹⁴ Whilst Green holds that human flourishing, and the fulfilment of rational ends, is an argument in favour of having rights, it is not a sufficient argument: as was pointed out in the previous chapter, although there 'ought' to be rights, according to Green, the question of which rights precisely depends on social recognition by the society in question.

A second argument, more wide-ranging, made by Lewis is that 'the attempt to provide a justification for rights' is 'essentially individualistic'.¹¹⁵ Lewis objects to this on Utilitarian grounds; he argues that rather than concerning ourselves with individual rights, 'it is always our duty to produce the greatest good possible in the circumstances,

¹¹¹ *Ibid.*, p. 444-445

¹¹² *Ibid.*, p. 447

¹¹³ Bernard Bosanquet, "The Function of the State in Promoting the Unity of Mankind", *Proceedings of the Aristotelian Society*, 17 (1916-1917), pp. 28-57, p. 29; Bernard Bosanquet (Ed. Gerald F. Gaus and William Sweet), *The Philosophical Theory of the State and Related Essays* (South Bend, Indiana, St. Augustine's Press, 1999), p. 180; see also William Sweet, *Idealism and Rights: The Social Ontology of Human Rights in the Political Thought of Bernard Bosanquet* (Lanham, Maryland, The University Press of America, 1997), p. 188; p. 75.

¹¹⁴ Lewis, "Some Observations on Natural Rights and the General Will (II).", p. 34

¹¹⁵ *Ibid.*, p. 42

and that rights are [or should be] determined accordingly'.¹¹⁶ Green's conception of the common good seems to avoid this problem (as does Arendt's 'judgment', as we shall see in chapters three and four): rights, though they pertain to the individual, can only be recognised by society if they contribute to common good – if they benefit all in a society.¹¹⁷ Admittedly this is different from Utilitarianism, but it is hardly individualistic, considering as it does the good of all.

Lewis argues that Locke and other natural rights theorists were also individualistic. The 'blind assertion' of all rights, regardless of society is inherently individualistic, according to Lewis.¹¹⁸ In contrast, Lewis argues that some rights are subordinate to others, and that it is this hierarchy of rights that led Idealists into the 'mistake' of seeking to justify arguments by reference to something other than rights. For Lewis, 'no justification is required in the sense of justifying rights by reference to, or deriving them from, something other than rights' which 'gives us a sense in which rights are absolute'.¹¹⁹ However, Lewis introduces a distinction which he does not fully explore: intrinsic rights are absolute and may only be asserted, whereas instrumental rights may be justified by virtue of their use.¹²⁰

In the end, then, if we cannot deploy justificatory arguments for rights, we may only assert them.¹²¹ This position is simply unsatisfactory. Pure assertion does not make something so: I may assert my right to ownership of the moon, but I would not expect anyone to take this assertion seriously without some argument as to *why* it is that I should own the moon. A powerful justificatory argument is necessary.

The doctrine of natural rights found some attention from the other side of the Atlantic, too, in the shape of an article defending natural rights by Morris R. Cohen. Although not a household name today, Cohen was a key figure in American legal and political thought, particularly surrounding liberalism. He was central to the development of City College in New York, where the library is named after him. In his obituary, the New York Times described Cohen as someone who had become 'an

¹¹⁶ *Ibid.*, p. 43

¹¹⁷ Avital Simhony argues that, rather than being an individualist, Green takes community seriously: Avital Simhony, "T.H. Green's Community of Rights: an Essay on the Complexity of Liberalism", *Journal of Political Ideologies* 8:3 (2003), pp. 269-287; Avital Simhony, "Idealist Organicism: Beyond Holism and Individualism", *History of Political Thought* 12:3 (1991), pp. 515-535

¹¹⁸ Lewis, "Natural Rights and the General Will (II)", p. 42

¹¹⁹ *Ibid.*, pp. 42-43

¹²⁰ *Ibid.*, p. 43

¹²¹ Lewis, "Natural Rights and the General Will (I)", p. 440

almost legendary figure in American philosophy, education and the liberal tradition' even before his death.¹²² Again, then, rights are something that occupied the time of important figures in academia, rather than a peripheral concern.

Cohen's article gives a clear impression of the state of the rights debate at the time of its writing, in 1916. On the first page, Cohen writes 'Whether all doctrines of natural rights of man died with the French Revolution or were killed by the historical learning of the nineteenth century, everyone who enjoys the consciousness of being enlightened knows that they are, and by right ought to be, dead. The attempt to defend a doctrine of natural rights before historians and political scientists would be treated very much like an attempt to defend the belief in witchcraft.'¹²³ Like Spencer, he claims that, in contrast to the Anglo-Saxon world, 'on the Continent the doctrine of natural law has been revived by advanced jurists of diverse schools, in France, Germany, Belgium, and Italy, and stands forth unabashed and in militant attire.'¹²⁴

The aim of Cohen's article is to 'reassert' natural rights in a way that is 'scientifically possible'. To this end, he spends the majority of the article criticising 'the four usual arguments against the theory of natural law', which he labels 'the historical, the psychologic, the legal, and the metaphysical'.¹²⁵ In his view, none of these arguments successfully defeats the notion of natural law. Having dealt with these arguments, Cohen turns his attention to constructing a theory of natural law that will fulfil 'the requirements of a scientific theory'.¹²⁶ He rejects the 'traditional' view of natural law which holds that it is founded on 'axioms whose self-evidence is revealed to us by the light of natural reason', as advances in science, such as the discovery of non-Euclidean geometry, show that such 'self-evident' axioms, like the 'self-evident' axioms of Euclidean geometry, are by no means unchanging.¹²⁷

Rather, 'the only way to defend [natural rights] against those who would deny them is to show that like other scientific principles ... they yield a body or system of propositions which is preferable to that which can possibly be established on the basis of their denial'.¹²⁸ Though he does not use the term, Cohen argues that elements of

¹²² "Editorial", *New York Times*, January 31, 1947 quoted in Milton R. Konvitz, "The Impact of Morris R. Cohen, A Cultured East European Immigrant", in Jacob Rader Marcus, *The Jew in the American World: A Source Book* (Detroit, Wayne State University Press, 1996), p. 317-320, p. 317

¹²³ Cohen, "Jus Naturale Redivivum", p. 761

¹²⁴ *Ibid.*, p. 761

¹²⁵ *Ibid.*, p. 762

¹²⁶ *Ibid.*, p. 774

¹²⁷ *Ibid.*, p. 774

¹²⁸ *Ibid.*, p. 774

natural law have been falsified, and thus the theory, as it has been put forward, does not fulfil the requirements of a scientific theory, as it cannot explain a number of exceptions to the rule it apparently suggests. The solution to this, argues Cohen, lies in abandoning the ‘monistic or monarchical craving that our science of justice shall be founded on a single supreme principle’,¹²⁹ and instead accepting that natural law, and natural rights, are the result of a number of conflicting principles. In this way, according to Cohen, natural rights may be founded on a theory that is scientifically acceptable. Frustratingly, Cohen does not actually outline such a theory.

Despite the attempts of Maritain, Lewis, and Cohen, theories of human rights as natural rights failed to convince. Theological arguments are too contingent on specific systems of belief, as Ignatieff points out; other theories of natural rights simply have to make assumptions that are, in the end, insupportable. In the late 1940s, the framers of the Universal Declaration of Human Rights were forced to skirt around the ‘why’ question, leaving the rights declared more of an aspiration than a statement of any coherent factual content.

The results of UNESCO’s consultation before the UDHR in 1948 show that opinion had not swung anything like fully behind a declaration of innate human rights. While there is support for the endeavour from the American Arnold J. Lien, head of the Politics Department at Washington University in St. Louis at the time, who argues that human rights ‘are universal rights or enabling qualities of human beings as human beings or as individuals of the human race, attaching to the human being wherever he appears, without regard to time, place, colour, sex, parentages or environment’ and that such rights ‘are really the keystone of the dignity of man,’¹³⁰ others are less convinced.

Mahatma Gandhi and E.H. Carr both argue that an emphasis on rights is mistaken, and the emphasis should rather be on duties.¹³¹ John Lewis, a Unitarian minister who had become a Marxist Philosopher and editor of the Marxist journal *The Modern Quarterly*, makes the argument that ‘the conception of absolute, inherent and imprescriptible rights based on man’s origins and nature...is...a myth’. Rather, he argues, ‘a more satisfactory approach would consider rights as based upon human needs and possibilities and the recognition by members of a society of the conditions

¹²⁹ *Ibid.*, p. 776

¹³⁰ Arnold J. Lien, “A Fragment of Thought Concerning the Nature and Fulfilment of Human Rights”, in UNESCO, *Human Rights*, pp. 24-30, p. 24

¹³¹ Gandhi, “Letter to the Director-General of UNESCO”, in UNESCO, *Human Rights*, p. 18; E. H. Carr, “The Rights of Man”, in UNESCO, *Human Rights*, pp. 19-23, p. 21

necessary in order that they may fulfil their common ends.’¹³² In making this argument, Lewis refers specifically to T. H. Green’s view of ‘natural rights’, as those rights which correspond to human needs, and which change along with changes in society. As such ‘rights cannot be considered as permanent and absolute’, but must change to meet changing human and social needs.¹³³ Benedetto Croce argues that ‘Declarations of rights are all based upon a theory which criticism on many sides has succeeded in destroying: namely, the theory of natural right...which has become philosophically and historically quite untenable’.¹³⁴

While philosophical opinion was far from being united in favour of innate human rights, the political realities had shifted. The idea of a declaration of rights had attracted a great deal of popular attention. In Britain, the celebrated science-fiction author H.G. Wells had published a declaration of the ‘Rights of Man’ which prompted discussion in the national and international press, and which was translated into several languages and even dropped as propaganda over Germany.¹³⁵ The UN’s drafting committee pressed on with the UDHR, ‘without agreement on the reasons’.¹³⁶

Kai Nielsen, writing twenty years after the UDHR, though he is sympathetic to the idea of human rights, can simply find no evidence that that ‘could show that ... a Nietzschean conception of morality [that denies the existence of innate human rights] ... is wrong (mistaken, untrue) and that the kind of normative ethic defended by Brown, Vlastos and Frankena¹³⁷ [in favour of innate human rights] is right (correct, true).’¹³⁸ Natural rights theories failed, throughout the early twentieth century, to provide persuasive arguments either for natural rights or against rights recognition, as we have seen. Tackling the ‘why’ question posed by the UDHR requires a return to rights

¹³² John Lewis, “On Human Rights”, in UNESCO, *Human Rights*, pp. 54-71, p. 54

¹³³ *Ibid.*, p. 55

¹³⁴ Benedetto Croce, “The Rights of Man and the Present Historical Situation”, in UNESCO, *Human Rights*, pp. 93-95, p. 93

¹³⁵ H. G. Wells, *The Rights of Man: or What are We Fighting For?* (Harmondsworth, Penguin, 1940); Jan Herman Burgers, “The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century”, *Human Rights Quarterly* 14 (1992), pp. 447-477; Paul Gordon, *The Evolution of International Human Rights: Visions Seen* (Philadelphia, University of Pennsylvania Press, 1998), p. 152; On translations, see David C. Smith (Ed.), *The Correspondence of H. G. Wells, Volume 4 1935-1946* (London, Pickering and Chatto, 1998), p. 445.

¹³⁶ Glendon, *A World Made New*, p. 78

¹³⁷ Stuart M. Brown, “Inalienable Rights”, *Philosophical Review* 64 (1955), pp. 192-211; Gregory Vlastos ‘Justice and Equality’ in Richard Brandt (Ed.), *Social Justice* (Englewood Cliffs, NJ, Prentice-Hall, 1962), pp. 31-72; W. K. Frankena, “The Concept of Social Justice”, in Richard Brandt, *Social Justice* (Englewood Cliffs, NJ, Prentice-Hall, 1962), pp. 1-29; see also Richard Wasserstrom “Rights, Human Rights and Racial Discrimination”, *The Journal of Philosophy* 61:20, pp. 628-41

¹³⁸ Kai Nielsen, “Scepticism and Human Rights”, *The Monist* 52:4 1978, pp. 575-594, p. 581

recognition to provide a more honest, and plausible, account of how rights come into being. Adopting a theory of egalitarian rights recognition adds resources for a critique of *how* rights are recognised.

This chapter has been a contribution towards addressing the lack of attention to thought on rights between 1789 and 1948 in contemporary literature on human rights. By showing that rights recognition held sway for over half a century, this chapter also suggests that we have reason to take theories of rights recognition seriously. All through the period examined, both opponents and supporters of rights recognition acknowledged that it was the prevailing justificatory argument for human rights. Although rights recognition has been a minority interest since 1948, this is an exception in the light of the history of rights thought in the last 150 years. Furthermore, attempts to argue against rights recognition and in favour of natural rights in the period from 1789 to 1948 were not convincing. In the end, the Declaration of 1948 represented an abandonment of any attempt to justify a theory of innate human rights in favour of simply asserting them. Although Ignatieff and Maritain may encourage us to ignore the ‘why’ question to enable political agreement, in the light of the huge political importance of human rights in recent decades, simply ignoring the ‘why’ question is no longer good enough. Ignoring the question of whether or not the emperor is clothed does not change the fact that he is naked.

Chapter Three

Hannah Arendt: the Rights of Man, the political community, judgment, and recognition

*'No paradox of contemporary politics is filled with a more poignant irony than the discrepancy between the efforts of well-meaning idealists who stubbornly insist on regarding as 'inalienable' those human rights, which are enjoyed only by citizens of the most prosperous and civilised countries, and the situation of the rightless themselves.'*¹

Set against the optimism of the Universal Declaration of Human Rights in 1948, against the hope that a new, universally accepted, codification of human rights would render the horrors of the holocaust and the Second World War unrepeatable, the pessimism of Hannah Arendt struck an oddly discordant note. Where human rights were for many – Eleanor Roosevelt,² H. G. Wells,³ the United Nations⁴ – the solution to the unprecedented mass murder of the previous two decades, for Hannah Arendt, the doctrine of human rights was responsible for much of what had happened. This attitude sets Arendt apart from the vast majority of post-war literature on human rights, yet what she had to say was, and remains, more interesting and more nuanced than a simple dismissal of human rights.

This chapter will argue that Arendt's political theory,⁵ though often overlooked by theorists of rights recognition, makes a major contribution to our understanding about how rights are created by intersubjective recognition. Like Green, she argued that we can only have rights if we are members of political community or society:⁶ this right

¹ Hannah Arendt, *The Origins of Totalitarianism* (New York, Harcourt Books, 1994), p. 279

² See: Glendon, *A World Made New*

³ Wells, *The Rights of Man*

⁴ United Nations, "Universal Declaration of Human Rights" [<http://www.un.org/en/documents/udhr/>] Accessed 2nd June, 2013.

⁵ Arendt rejected the term 'political philosophy' in connection with her work. Hannah Arendt, *Essays in Understanding 1930-1954: Formation, Exile, and Totalitarianism* (New York, Schocken Books, 1994), pp. 1-2; See also her remarks about the affinity of philosophy and tyranny, as against politics and freedom, in her *Denktagebuch: Hannah Arendt, Denktagebuch 1950-1973, Erste Band* (Munich, Piper, 2003), p. 43

⁶ Arendt's term 'political community' and Green's term 'society' will be used interchangeably throughout this thesis. Although they have somewhat different connotations today, both Arendt and Green had the Ancient Greek *polis* in mind as the model for the 'political community' and 'society' respectively. It should be noted that Green's 'society' was political, in contradistinction to the way in which Arendt used the term 'society' to denote something non-political and indeed deleterious to politics. On Arendt's

of membership she termed ‘the right to have rights’. Her work on judgment explains why political membership is so important in creating rights, and, though she was seemingly unaware of Green, compliments and furthers his account of recognition. As we shall see in this chapter and the next, she placed great value on equality in forming political communities: this overlooked emphasis, like Green’s ‘ἴσοι καὶ ὅμοιοι’, is a vitally important insight which the theory of egalitarian rights recognition seeks to re-emphasise. Finally, Arendt’s work provides compelling – and chilling – evidence of what happens when the recognition process is reversed and the rights of persons are slowly stripped away until they are left bare and completely unprotected. The plight of the stateless – and therefore rightless – shows that invoking natural rights, held by humans *qua* humans, offers no defence against abuse at all.

But Arendt does not abandon human rights. ‘The concept of human rights’, argues Arendt, ‘can become meaningful again if it is redefined in the light of present experiences and circumstances’.⁷ This attempt at retrieval through redefinition is at the heart of both Arendt’s work on rights and this thesis. Rather than simply writing rights off, Arendt attempts to reformulate human rights, with a new basis in her concept of ‘natality’, and invoking the concept of ‘the right to have rights’. This curious phrase, as we have seen, is used by Williams in his discussion of recognition in Hegel,⁸ an alignment of phrase which points towards a new way of reading Arendt on rights, namely, that central, though implicit, to her work on rights is the concept of recognition. In one sense, this is clear: her insistence on the relationship between political community and rights implies that different societies recognise different rights for different people. However, I will argue that recognition is also key to understanding her concept of ‘the right to have rights’. In this respect, Arendt follows in the footsteps of T. H. Green and Hegel, for whom recognition was also crucially important. Arendt’s adds to their work not just in terms of theory, but also through her empirical analysis of the worst events of the 1930s and 1940s: her work shows what happens when recognition is withdrawn, and humans are left stateless, deprived of political community, and thus rightless.

account of the social and of the political, see Hanna Fenichel Pitkin, *The Attack of the Blob: Hannah Arendt’s Concept of the Social* (Chicago, University of Chicago Press, 1998); See also Arendt, *The Human Condition* (Chicago, University of Chicago Press, 1974), pp. 38-49 on ‘the rise of the social’.

⁷ Hannah Arendt, “The Rights of Man: What are they?” *Modern Review* 3:1, 1949, pp. 24-36, p. 34

⁸ Williams, *Hegel’s Ethics of Recognition*, p. 101

This chapter, then, will explore three key strands of Arendt's thought on rights: her critique of the natural rights ('rights of man') tradition, the nature of the relationship between state and rights, and the centrality of recognition to her theory of rights. It will be found that Arendt provides a unique, empirical contribution to the literature criticising natural rights: her experience as a stateless person provides a compelling addition to previous theoretical arguments against natural rights. Further, it will be argued that her conception of the 'right to have rights' is important, and supportable, and that it is in many ways analogous to the 'recognition of persons' found in T. H. Green and discussed in chapter one. Finally, it will be demonstrated that recognition is critically important to Arendt: rights require recognition, and so does the 'right to have rights'; furthermore recognition is critical for Arendt's conception of the political community as an arena of disclosing speech and action.

This chapter will help build up the ten-point account of egalitarian rights recognition which this thesis presents. Arendt's work supports that of Green's in arguing the following:

1. Rights, including human rights, require social recognition.
2. Recognition consists of two stages – recognition of persons, and recognition of rights.
3. The location, or arena, for rights recognition is society.

Arendt's work will also help this thesis in fleshing out the following points, partially in this chapter, but predominantly in the following chapter, which will analyse what sort of political community or society best facilitates rights recognition:

4. Recognition of rights requires meaningful equality, which can be expressed as 'equality of access to rights recognition arenas and debates.
5. Recognition of rights or persons may not be arbitrary, but must be based on moral argument, such as the notion of a common good or a *sensus communis*.

6. Recognition of rights requires the greatest possible facilitation of communication within a society.
7. 'Society' in the context of rights recognition is open to ideas from without, and has no necessary limits.

1. Hannah Arendt, 'the Rights of Man' and statelessness

Hannah Arendt was a fierce critic of the 'rights of man', of innate human rights. This section traces her lines of argument, which add to our reasons for abandoning innate human rights and finding a more convincing account of how rights come to exist.

A first line of criticism of natural rights in Arendt follows Burke to some extent, in that the problem concerns the 'abstract' human beings who are said to have such rights, rather than Englishmen, Frenchmen, or Germans, who have rights by virtue of being citizens of England, France or Germany. For Arendt, the 'declaration of inalienable human rights' involved a 'paradox' from the beginning, in that 'it reckoned with an 'abstract' human being who seemed to exist nowhere, for even savages lived in some kind of a social order.'⁹ There simply aren't such 'abstract' humans, who live beyond the pale of any sort of civilisation; even the stylites of late antiquity, who were said to live isolated from human contact on the top of poles, came from somewhere; they were at some point members of some community.

Connected with this is Arendt's observation that rights of members of a community came to be identified with the rights of peoples as wholes: 'If a tribal or other 'backward' community did not enjoy human rights, it was obviously because as a whole it had not yet reached that stage of civilization, the state of popular and national sovereignty, but was oppressed by foreign or native despots.'¹⁰ Thus, before human rights were to be enjoyed, it was argued, national self-determination was first necessary. With such national self-determination, communities could break free of oppression and reach the stage of civilisation held to be necessary for the realisation of human rights; the rights of the individual thus were dependent, and logically secondary to the rights of the community in which the individual lived. This uneasy alliance between individual

⁹ Hannah Arendt, *The Origins of Totalitarianism*, p. 292

¹⁰ *Ibid.*, p. 291

rights and the rights of nations was a key flaw in ideas of natural rights, as will become clearer further on in this chapter; already it is clear that if individual rights depend on the rights of one's nation, then they are far from certain. The experience of Poles (thrice partitioned), Kashubians (first Germanified, then Polified), and Kurds (split between Iraq, Turkey and Iran) are enough to make this amply clear; the plight of the Jewish diaspora and later of Palestinian refugees underline this point.

For Arendt, the uncertainty of the 'Rights of Man' was symptomatic of an age in which things which were thought to be 'permanent and vital' were suddenly revealed to be neither. Arendt calls our attention to 'the few rules and standards according to which men used to tell right from wrong, and which were invoked to judge or justify others and themselves, and whose validity were supposed to be self-evident to every sane person either as a part of divine or natural law.' Yet, in the twentieth century, 'without much notice, all this collapsed almost overnight, and then it was as though morality suddenly stood revealed in the original meaning of the word, as a set of *mores*, customs and manners, which could be exchanged for another set with hardly more trouble than it would take to change the table manners of an individual or a people'.¹¹ The idea that every person has rights simply by virtue of the fact that they are human was exposed as an empty idea by totalitarianism and the *Shoah*, which involved 'the total collapse of all established moral standards in public and private life'.¹² Rather, the complete collapse of the moral order showed that all morality and ethics is contingent (as we shall explore further in chapter five), and that the 'Rights of Man' were part of a paradigm of moral understanding that had had its day. As Plato (in Arendt's translation) puts it: 'what is right has no natural existence at all, ... men are perpetually disputing about rights and altering them, and whatever alteration they make at any time is at that time authoritative, owing its existence to artifice and legislation, and not in any way to nature.'¹³

The events of the 1930s and 1940s, argues Arendt, show that 'the conception of human rights, based upon the assumed existence of a human being as such, broke down at the very moment when those who professed to believe it were for the first time confronted with people who had indeed lost all other qualities and specific relationships – except that they were still human.' When refugees and the stateless – '*les apatrides*' –

¹¹ Arendt, *Responsibility and Judgment*, p. 50

¹² *Ibid.*, p. 52

¹³ Plato, *Laws* 889e-890a, quoted in Arendt, *Responsibility and Judgment*, pp. 84-85

were deprived of the rights of citizens, the ‘rights of man’ should have applied to them. Yet they did not.¹⁴ The loss of citizenship implies the loss of ‘political status’; there is no country in which one is accepted as a political actor. As such one enjoys no political rights. One might be allowed to work,¹⁵ or even to join a political party,¹⁶ but this is a favour granted, not a right respected. There is nothing to prevent the work, or the opportunity for political engagement, from being withdrawn. In this circumstance, one should, ‘according to the implications of the inborn and inalienable rights of man, come under exactly the situation for which the declarations of such general rights provided.’¹⁷ Yet, as Arendt notes, ‘actually the opposite is the case’, for ‘it seems that a man who is nothing but a man has lost the very qualities which make it possible for other people to treat him as a fellow-man.’¹⁸ Quite simply – and in contrast to arguments put forward by Ronald Dworkin more recently¹⁹ – ‘the world found nothing sacred in the abstract nakedness of being human’.²⁰ The qualities needed to be accorded treatment in line with the expectations of human rights, then, are something not found in the abstract human organism, in the socially-unclothed naked body, but, rather, they require social clothing; they require the naked body to acquire the mask – literally, the *persona* – of social recognition as not just a human, *homo sapiens*, but as a *person*. This, as we shall explore more fully further on in this chapter, comes with recognition.

In addition to arguing that historical events proved that there was a vacuum at the heart of the doctrine of the ‘rights of man’, Arendt also argued that subsequent, post-war attempts to resurrect the doctrine in the shape of ‘human rights’ would do more harm than good. For Arendt, widespread disagreement during the ‘many recent attempts to frame a new bill of human rights’ about what rights precisely may or may not be counted among the ‘rights of man’ added to the confusion, and further undermined the ‘rights of man’. As chapter two suggested, revealing that no-one agreed about why we should be held to have human rights did nothing to strengthen the case for them. Although, she argues, ‘everyone seems to agree that the plight of [the

¹⁴ Arendt, *The Origins of Totalitarianism*, p. 299; p. 278

¹⁵ Often subject to restraints: as Arendt herself experienced, work was often ‘not available to those without the proper papers and without work the papers could not be secured’. Elisabeth Young-Bruehl, *Hannah Arendt: For the Love of the World* (New Haven, Yale University Press, 1982), p. 118

¹⁶ The Labour party in the UK, for example, allows residents, as well as citizens, of the UK to become members. Labour Party, “Labour Party Rule Book” [<http://labourlist.org/wp-content/uploads/2013/04/Rule-Book-2013.pdf>] Accessed 25th July, 2013.

¹⁷ Arendt, *The Origins of Totalitarianism*, p. 300

¹⁸ *Ibid.*, p. 300

¹⁹ Ronald Dworkin, *Life’s Dominion*, p. 195

²⁰ Arendt, *The Origins of Totalitarianism*, p. 299

stateless] consists precisely in their loss of the Rights of Man, no one seems to know which rights they lost when they lost these human rights.’²¹ The fact that the list of rights enumerated by the UDHR was the result of horse-trading between the interested parties further underlines the uncertainty of natural rights theories in terms which rights are innate to the human being.²²

A second flaw with declarations of rights, argued Arendt was that ‘in the welter of rights of the most heterogeneous nature and origin, we are only too likely to overlook and neglect the one right without which no other can materialize – the right to belong to a political community.’²³ This ‘human right’, like all others, ‘can exist only through mutual agreement and guarantee’;²⁴ it requires recognition, and it bestows recognition. It must be recognised by society and societies, and it gives recognition to humans, thereby granting them a *persona* and membership of a political community.

Arendt also found fault with the traditional arguments that lay behind the doctrines of natural rights, especially with the religious or quasi-religious foundations on which it is based. As we have seen already, Arendt argues that the world found there to be nothing inherently sacred in the abstract, naked human being. Any idea that there *is* something sacred about the abstract human in this way seems to invoke religious or other controversial metaphysical claims about humans. These, though, argues Arendt, are less than convincing. In Arendt’s view, the idea that the human ‘is created in the image of God (in the American formula), or that he is the representative of mankind, or that he harbors within himself the sacred demands of natural law (in the French formula)’ are ‘the concepts of man upon which human rights are based’. But in the face of ‘objective political conditions’, Arendt argues that it is hard to see how such justifications could have helped in any way.²⁵ Indeed, the fact that there are different arguments presented to justify the same sets of rights underscores just how contestable each argument is. One needs only to be an atheist or to deny that natural law places sacred demands on oneself – or contest what those demands might be – to feel completely un-swayed by such arguments. Furthermore, the historical record shows

²¹ *Ibid.*, p. 293

²² For an account of the intense debates during the drafting process, see Glendon, *A World Made New*, pp. 79-121

²³ Hannah Arendt, “The Rights of Man”, p. 37; See also: “Es Gibt Ein Einziges Menschenrecht”, *Die Wandlung*, Vol. 4., 1949, pp. 754-770

²⁴ Arendt, “The Rights of Man”, p. 37

²⁵ Arendt, *The Origins of Totalitarianism*, pp. 299-300

that these arguments were not strong or compelling enough to prevent the widespread disregard for human rights of any sort that prevailed in the 1930s and 1940s.

An argument against Arendt's criticisms of the 'rights of man' might be made with reference to the care with which the Nazis attempted to dehumanise their victims, especially Jews, over a long period of time. First with propaganda, including the notorious film *Der ewige Jude*, which depicts Jews as 'a plague' on mankind,²⁶ and then in legislation, Jews were systematically dehumanised. This thorough process of dehumanisation might be seen to suggest that the Nazis were aware that abuses of human rights against Jews would be seen as unacceptable while Jews were considered human; by stripping them of their humanity, the Nazis deprived Jews of recourse to human rights. This is a similar process to that which occurred in ante-bellum America, and which is described by Derrick Darby. In order to abuse and enslave black slaves, white Americans had simply to make the argument that slaves were in some way either 'not human' or at least 'not fully human'.²⁷ This way, the practice of slavery could be squared with the commitment to natural rights found in the American Declaration of Independence and Constitution.

This argument does not, however, do much to strengthen the cause of the doctrine natural rights – it is found wanting either way. Derrick Darby, as we have seen, takes the ante-bellum American practice as the basis for his criticisms of natural rights and argument in favour of rights based on recognition. How effective this argument is against Arendt is certainly questionable at the least. While the Nazis did dehumanise the Jews, this was not done consistently – sometimes the Jews were portrayed as sub-human, sometimes as an inferior race but still human. Further, legislation that was passed distinguished between Aryan and non-Aryan, so while it was dehumanising in its effect, its distinction was more subtle. Arendt notes this legislation and argues that it marks a change from humans being born with rights, which they might then later lose, to humans being born rightless – and stateless – and receiving rights and statehood only when it can be proved that their 'racial characteristics' are suitably Aryan.²⁸ Darby and Arendt use different terminology to make essentially similar arguments. Where Darby talks of ante-bellum America denying that black slaves were human he does not necessarily mean that it was denied that black slaves

²⁶ Fritz Hippler/Josef Goebbels (Dir.), *Der Ewige Jude* (Deutsche Film Gesellschaft, 1940) [<http://www.youtube.com/watch?v=WN79ti93NBY>] Accessed 25th July, 2013.

²⁷ Darby, *Rights, Race and Recognition*, pp. 114-116

²⁸ Arendt, *The Origins of Totalitarianism*, p. 288

were *homo sapiens* (some did deny this, but not all). Rather, what he means, as indicated by his label ‘the black inferiority thesis’ is that it was held that black slaves were unable to act as *persons* in the same way as whites. Thus, Darby’s ‘human’ means much the same as Arendt’s ‘person’. Rather than showing that the Nazis viewed natural rights with respect and thus took pains to demonstrate that Jews were somehow not human – this was much the attitude of those Americans who ‘held these truths to be self-evident’ yet also thought that rights did not attach to black people – the Nazi’s systematic stripping away of rights shows that they understood all too well that rights are based on social recognition. Nazi propaganda and legislation was made to ensure popular support for a distorted grotesque of a system of rights in which Jews had no rights.

Arendt’s analysis of the Nazi regime provides unique empirical support to philosophers such as T. H. Green, who argue that rights require recognition. Arendt notes that the Nazis, ‘who were such legal pedants’ took great care in depriving ‘those whom they intended to exterminate of their citizenship’.²⁹ What is happening in this process is almost the complete, literal, reversal of recognition. Both formal and informal recognition of rights was blocked: informal recognition was halted through anti-miscegenation laws, restrictions on the trading of Jewish businesses, and finally restricting Jews to ghettos, cut off from the rest of the world. Formal recognition was stripped away through new laws restricting civil and political rights, freedoms of employment and movement. More and more rights are lost as fewer and fewer claims are recognised, until finally the claim to belong to the political community is refused, the right to membership, the ‘right to have rights’, is lost, and the former citizen is expelled from the political community into the camps. In the camp, the human is outcast, and outside the law of the community: the human ceases to be a person and is reduced to ‘bare life’.³⁰ Whereas Hegel and Green explore the processes of recognition, whereby humans move from the natural unrecognised state to intersubjective recognition and rights, what Arendt shows here is the stripping away of rights and recognition from the person, leaving the naked, abstract human behind. This is one of

²⁹ Hannah Arendt, Unpublished notes for a lecture at Berkeley, [<http://hannaharendt.net/documents/statelessnessV.html>] Accessed 25th July, 2013.

³⁰ Giorgio Agamben takes his cue from Hannah Arendt and discusses the phenomenon of bare life further: Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford, Stanford University Press, 1998)

her more powerful contributions the understanding of human rights, to which we shall return in section five of this chapter.

In summary, then, it has been shown that Arendt's work contains a number of lines of criticism of the doctrine of natural rights. Theoretically, she argues, their foundations are not as sure as thinkers of the eighteenth century might have thought: humans are not abstract entities who all have rights by virtue of their humanity; the reality is more complicated, as the fate of the stateless demonstrates. The idea of natural human sanctity (put forward, as we've seen, by Dworkin amongst others) is a questionable one – Arendt demonstrates that if there is any such sanctity, it was not noticed or respected by anyone in the first half of the twentieth century. The idea that men are created in the image of God, or are possessed of rights according to the law of nature, was not enough to guarantee anyone any rights. In practice, doctrines of natural rights provided no safeguards for the stateless human in the face of atrocity. Rights could be lost when recognition was withheld. Given all this, Arendt remained sceptical of post-war attempts to codify human rights into Declarations. Such declarations, she argued could do more harm than good, if they led to the overlooking of the one essential right, the right to membership of a political community.³¹ In combining these elements, informed by the real and tragic events of the twentieth century, Arendt's work can provide a powerful addition to the already numerous criticisms of natural rights, and fits in compellingly with Green, Hegel, and Ritchie on natural rights.

2. Human Rights and the Political Community

Arendt made her criticisms of natural rights alongside an analysis of statelessness and the plight of the stateless, 'the most symptomatic group in contemporary politics'.³² For Arendt, statelessness was a new 'mass phenomenon', which eclipsed the familiar inter-war problem of minority people in its importance and intractability. Where the minority peoples had at least some rights, belonging as they did *de jure* to some political community, albeit with the need for extra protection in terms of language rights or other culturally specific rights, the stateless belonged

³¹ Hannah Arendt, "The Rights of Man", p. 37

³² Arendt, *The Origins of Totalitarianism*, p. 276

nowhere, and to no political community; they had no rights.³³ This section will draw out Arendt's analysis of statelessness, and argue that it complements her criticisms of the doctrine of natural rights: the plight of the stateless shows that humans do not have rights *qua* human, but, rather, that rights depend on membership of a political community, and thus upon recognition. In chapter six, we shall see that egalitarian rights recognition offers resources to address the phenomena of statelessness.

Arendt traces the rise of stateless people from the first *Heimatlose* (literally, homeland-less) of the 1919 settlement to the refugees, expelled people, and those simply deprived of citizenship under the Third Reich and during the Second World War and the holocaust. It is the plight of the stateless, argues Arendt, that shows the doctrine of natural rights to be defective. Put another way: there is a vital link between state, citizenship, – sometimes, and dangerously, nationality – and rights.

Stateless people included 'millions of Russians, hundreds of thousands of Armenians, thousands of Hungarians, hundreds of thousands of Germans, and more than half a million Spaniards'.³⁴ These groups had been forced from their native countries by war or revolution, and were subsequently 'denationalized' by the new governments of those countries, leaving them stateless. These cases, argues Arendt, suggest 'a state structure which, if it was not yet fully totalitarian, at least would not tolerate any opposition and would rather lose its citizens than harbour people with different views'.³⁵ Yet subsequently, such citizenship-depriving measures were not restricted to totalitarian or near-totalitarian states. Arendt notes that 'now we have reached the point where even free democracies, as, for instance, the United States, were seriously considering depriving native Americans who are Communists of their citizenship. The sinister aspect of these measures is that they are being considered in all innocence.'³⁶

The problem with statelessness, and what makes such measures so sinister, is the close relationship between citizenship – having a state and political community – and rights. Arendt notes that 'No paradox of contemporary politics is filled with a more poignant irony than the discrepancy between the efforts of well-meaning idealists who stubbornly insist on regarding as 'inalienable' those human rights, which are enjoyed only by citizens of the most prosperous and civilised countries, and the situation of the

³³ *Ibid.*, p. 276-277

³⁴ *Ibid.*, p. 278

³⁵ *Ibid.*, p. 278

³⁶ *Ibid.*, pp. 279-280

rightless themselves.’³⁷ Human rights, whatever rights they may be – and Arendt undoubtedly had in mind the debates surrounding the formulation of the Universal Declaration of Human Rights – are enjoyed only by those who have membership of a state. The moment one steps outside the protection of citizenship, it seems, recourse to rights disappears. This was the experience of the stateless whom Arendt discusses: they were rightless too.

The loss of citizenship, of belonging to a state, entails a movement from being a person to being a human being. A person has legal status and rights; a place within the state: a person is recognised as belonging. A human being has none of these things, but must fall back on those natural rights which, it was argued, pertain to the abstract human being. As Arendt points out, however, ‘a human being in general – without a profession, without a citizenship, without an opinion, without a deed by which to identify himself – *and* different in general, representing nothing but his own absolutely unique individuality which, deprived of expression within and action upon a common world, loses all significance.’³⁸ Deprived of such markers of significance, as noted earlier, the world finds nothing sacred or intrinsically valuable in the rightless, stateless, person, and natural rights provide no protection from the abuses they were designed to prevent.

By becoming stateless, a person/human being also finds herself out of the bounds of law. Arendt argues that many natural rights which were enumerated over the years were designed to provide people with protection within communities, and as such are by the nature ineffective where no community exists. ‘The calamity of the rightless is not that they are deprived of life, liberty, and the pursuit of happiness, or of equality before the law and freedom of opinion – formulas which were designed to solve problems *within* given communities – but that they no longer belong to any community whatsoever.’³⁹ This is a radical change from traditional forms of inequality or oppression, indeed the problem for the stateless is ‘not that they are oppressed but that nobody wants even to oppress them’. Likewise, their ‘plight is not that are not equal before the law, but that no law exists for them.’⁴⁰

For Arendt, proof that the position of the stateless was worse than that of people discriminated against within a legal system was found by asking what would happen to

³⁷ *Ibid.*, p. 279

³⁸ *Ibid.*, p. 302

³⁹ *Ibid.*, p. 295

⁴⁰ *Ibid.*, p. 295

the stateless were they to commit a crime. The legal system, argues Arendt, does not provide for those who are outside it – for those who are stateless. Without membership of a state, the stateless have no recourse to those rights and protections which the legal system of a state upholds. What the legal system does provide for, however, is criminals. Criminals must be arrested, and thereafter treated in certain ways, regardless of questions of citizenship. Legal systems arrest people, even stateless people, to protect the rights of citizens, which may be endangered by criminals regardless of questions of nationality. After arrest, a criminal is treated in a certain way, not as a citizen or a non-citizen, but as a criminal. In a person's categorisation as 'criminal', the person transcends the divide between citizen and non-citizen. Thereby the stateless person gains some advantage: as a criminal she has rights for the first time. For Arendt, this is the criterion by which to decide whether someone has been forced outside the pale of the law: 'If a small burglary is likely to improve his legal position, at least temporarily, one may be sure that he has been deprived of human rights.'⁴¹ By committing a crime, the stateless person has forced the state to treat her in a way which accords her some status, which recognises her as a sort of person – as a criminal – and thus as belonging in some, undesirable admittedly, way to the community.

Central to rights, then, is belonging to a community, and, ideally, to a state. By using the events of the first half of the twentieth century, Arendt makes a powerful and compelling argument that there is a deep, inescapable link between the state and rights. Only membership of a state provides a person with rights, and protection against the sorts of abuses and atrocities that litter the 1930s and 1940s. Furthermore, loss of certain human rights is not decisive; what matters is the loss of the 'one human right', the right to belong. As Arendt notes, 'man, it turns out, can lose all so-called Rights of Man without losing his essential quality as man, his human dignity. Only the loss of a polity itself expels him from humanity.'⁴²

Thus Arendt provides compelling support for point three of the ten-point theory of egalitarian rights recognition:

3. The location, or arena, for rights recognition is society.

⁴¹ *Ibid.*, p. 286

⁴² *Ibid.*, p. 297

Arendt's discussion of the stateless shows just how crucial it is to have a society or political community, within which rights are recognised. Indeed, Serena Parekh argues that 'Arendt's biggest contribution to the philosophy of human rights is in showing that belonging to a community is a precondition for human rights'.⁴³ For Parekh, membership is a pre-condition for two reasons: the first is that membership means state and governmental protection of a right; the second is that 'belonging to a political community means that you have a place in the world where you can speak and act meaningfully'.⁴⁴ Parekh is correct that Arendt does us a huge service in showing just how important membership is. However, this thesis will differ slightly on why from Parekh: the key importance of membership for human rights is that it is only within political communities that rights recognition can occur. Green is clear that recognition can only occur in a society of 'ἴσοι καὶ ὅμοιοι'. Likewise, as we shall see in subsequent sections of this chapter, Arendt argues that it is only in a political community that judgment (by which, we shall argue, claims of human rights are accepted or refused) can occur properly.

Arendt quotes Proust with approval on the question of membership and political community: 'The question is not, as for Hamlet, to be or not to be, but to belong or not to belong'.⁴⁵ It is on belonging that everything, including rights, depends.⁴⁶ This leaves the question: 'Who may belong?'. It is the answer to this question which determines who is to enjoy rights, and who is to be excluded. As such it is a question of central importance to the whole idea of rights. The answers given to it in the 1930s led to mass murder on an unprecedented scale. This chapter will now turn its attention to how this question was answered, and how it may otherwise be answered, in such a way as to avoid the mass statelessness and the commission of atrocities which occupied Hannah Arendt's attention.

⁴³ Parekh, *Hannah Arendt and the Challenge of Modernity*, p. 148

⁴⁴ *Ibid.*, p. 84

⁴⁵ *Ibid.*, p. 84

⁴⁶ The question of belonging had occupied Arendt since the 1930s when she had written on Rahel Varnhagen, and the tension between parvenu and pariah. See: Hannah Arendt, *Rahel Varnhagen: The Life of a Jewess* (Baltimore, The Johns Hopkins University Press, 2000); Seyla Benhabib, *The Pariah and her Shadow: Hannah Arendt's Biography of Rahel Varnhagen*, *Political Theory*, 23:1 (1995), pp. 5-24

3. *ἴσοι καὶ ὅμοιοι* – equality and sameness – or ‘who may belong?’

As we saw in chapter one, the question of membership of a society was of crucial importance for T. H. Green too. To recapitulate briefly, according to Green, ‘No one ... can have a right except (1) as a member of a society, and (2) of a society in which some common good is recognised by the members of the society as their own ideal good’. Furthermore, rights require a specific form of society, a ‘society of men recognising each other as *ἴσοι καὶ ὅμοιοι*’ – in other words, as we have seen, they must be equal and similar.⁴⁷

Unpicking the two terms can shed light on statelessness and citizenship. If ‘equality’ and ‘sameness’ are prerequisites for rights, they are clearly important terms. They give us a clear indication as to what sort of society may enjoy rights, and, more disquietingly, as to who may be excluded from the rights society and from citizenship.

‘Equality’, it hardly needs noting, is open to a wide variety of interpretations. Yet, it is the less problematic of the two terms. Almost everyone can agree that some form of equality is vital for society and for rights: at the least, equality before the law; equality in rights. In this way, some form of justice is produced. Here, equality is something artificial. As Arendt notes, ‘equality, in contrast to all that is involved in mere existence, is not given us, but is the result of human organization insofar as it is guided by the principle of justice. We are not born equal; we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights.’⁴⁸ We shall explore Arendt’s requirement of equality further in chapter four as part of our investigation into what sort of society best promotes rights recognition.

‘Sameness’, however, is much more problematic. At a minimum level, it may imply that all within a society must be human. This thesis interprets sameness in this way: by recognising each other as *ὅμοιοι*, people recognise that they are capable of communication and moral action, as we saw in chapter one in our discussions of Green. Likewise, for Arendt, as we shall explore further later on in this chapter, persons recognise each other (by watching and listening) as similar in that they speak and act. In the last few hundred years, however, ‘sameness’ has been rather more narrowly construed, and bound up with ideas such as race or nation: it has been argued that a

⁴⁷ Green, *Lectures*, §25, p. 44

⁴⁸ Arendt, *The Origins of Totalitarianism*, p. 301

society can exist only if limited to one nationality; the nation state has become the normal location of sovereignty.

A link may be established between equality and the state on the one hand and between this new, narrow sameness and the nation on the other. This gets to the heart of the question of ‘who may belong?’ raised at the end of the previous section. Arendt is clear in her distinction between nation and state. For her, ‘a people becomes a nation when ‘it takes conscience of itself according to its history’; as such it is attached to the soil which is the product of past labor and where history has left its traces. It represents the ‘milieu’ into which man is born, a closed society to which one belongs by right of birth.’ She contrasts this with the state, which is ‘an open society, ruling over a territory where its power protects and makes the law. As a legal institution, the state knows only citizens no matter of what nationality; its legal order is open to all who happen to live on its territory’.⁴⁹ A nation, then, is closed, whereas a state is open. In a nation, there is very great sameness, narrowly construed, as all are moulded by the traces of history and products of past labour in similar ways. In a state, there is not this degree of sameness,⁵⁰ but there is equality: people are citizens and the legal order is applied to them equally regardless of nationality. Thus, whereas ‘as a power institution, the state may claim more territory and become aggressive’, the nation cannot do so, as the nation ‘has put an end to migrations’: were the nation to seize more territory, those within it would not become part of the nation. Were the state to do so, those seized may become citizens; their nationality would not restrict this.⁵¹

Where a state may give rights to all within its borders, it would appear that a nation is unable to do so: as a nation, it may give rights only to those of its nationality. To do otherwise would be to render the distinction of nationality meaningless, something it cannot do without losing its *raison d’être*. A great problem emerges when nation, state, equality, and sameness are superimposed, and mixed. In her *Denktagebuch*, Arendt notes, with regard to Plato’s *Statesman* that there is an important difference between *μέρος* and *γένος*: between ‘a division’ and ‘a race’ of people. Further, it is a ‘deadly sin’ to ‘pass off a *μέρος* (a division of people) for a *γένος* (a

⁴⁹ Hannah Arendt, “The Nation”, in Hannah Arendt, *Essays in Understanding 1930-1954: Formation, Exile, and Totalitarianism* (New York, Schocken Books, 1994), pp. 206-212, p. 208

⁵⁰ There is still sameness to the extent that all citizens of the state are moral actors: it is recognition of one’s being a moral actor that grants one membership of the political community. This is the ‘right to have rights’ or Green’s ‘recognition of persons’.

⁵¹ *Ibid.*, p. 208

race).⁵² It was this problem which led to the plight of the stateless in the first half of the twentieth century. To belong is vital for rights, but in answering the question ‘who may belong’, the politics of the early twentieth century cut vast swathes of people off from the prospect of rights.

Arendt seems to point towards this conflation of state and nation, equality and sameness, when she describes the way in which modern political communities have tended to become ever more homogeneous. ‘The reason why highly developed political communities, such as the ancient city-states or modern day nation-states, so often insist on ethnic homogeneity’, she argues, ‘is that they hope to eliminate as far as possible those natural and always present differences and differentiations which by themselves arouse dumb hatred, mistrust, and discrimination because they indicate all too clearly those spheres where men cannot act and change at will, *i.e.*, the limitations of the human artifice.’⁵³ For those who are outside of this homogeneous community, the results are stark, as Arendt notes: ‘If a Negro in a white community is considered a Negro and nothing else, he loses along with his right to equality that freedom of action which is specifically human; all his deeds are now explained as ‘necessary’ consequences of some ‘Negro’ qualities; he has become some specimen of an animal species, called man.’⁵⁴ It is precisely this which happens to the stateless: they are merely humans, members of the same species, but as non-members of the nation in question they are not persons; they are not recognised as having rights, or as belonging to the political community which, tragically, is coterminous with the nation.

The conflation, then, of ‘equal’ with ‘similar’ and ‘state’ with ‘nation’ led to a situation where millions could be deprived of the right of membership based on their nationality, or perceived nationality. Non-belonging of a nation led to statelessness, and nowhere so clearly or explicitly as in National Socialist Germany with its legal distinctions between ‘Aryan’ and ‘alien’ humans. While Arendt aligns the failure of human rights with the decline of the nation state, the seeds for the atrocities of the first half of the twentieth century were sown in the coming into existence of the nation state itself.

There is a deep relationship, as Arendt correctly shows, between belonging – citizenship – and rights. To have rights, a person must be part of a political community

⁵² Arendt, *Denktagebuch*, p. 19, [Die Unterscheidung von μέρος und (εἶδος). Die Politik hat es nicht mit γένη, sondern mit μέρη zu tun. Die Todsünde ist, das μέρος für ein γένος auszugeben]

⁵³ Arendt, *The Origins of Totalitarianism*, p. 301

⁵⁴ *Ibid.*, pp. 301-302

– the plight of the stateless which Arendt describes shows this quite clearly. As with Green and Hegel, so too for Arendt is the State – the political community – central for the guaranteeing of rights through recognition. This relationship can have catastrophic results, if the question of belonging is brought into questions of nationality or race. Arendt shows quite clearly the risks of treating the phrase *ἴσοι και ὅμοιοι* as meaning simply ‘equals’. However, the conflation of state and nation, of *ἴσοι* and a narrowly defined *ὅμοιοι*, need not happen. Both Arendt and Green open the sphere of the *ὅμοιοι* to potentially the whole world, a stance which this thesis pursues to its cosmopolitan conclusion, as we shall see in chapter six. Once equality and sameness are unpicked from their conflation with state and nation, a new relationship between non-exclusive belonging and rights may be forged. The answer to the question ‘who belongs?’ need not be restricted to any familial, tribal, national or racial group. The answer might potentially be the whole world. Whatever the group, the key is to belong. Therefore the most important right, as Arendt argues, is the right to membership of a political community – the ‘right to have rights’. It is to this right that this chapter will now turn its attention.

4. Membership: The Right to Have Rights

This section will explore the fundamental right that Arendt clings to: the ‘right to have rights’, or the right to membership of a political community. It will be shown that this phrase, though it may seem cryptic, vague or even logically incoherent, has a real and vital meaning, and that criticisms of it may be answered. Arendt’s statements on the ‘right to have rights’ will be analysed, before this section turns its attention to criticisms of the notion.

Further, this right is analogous with ‘recognition of persons’ in Green. Both involve what Green termed the recognition of rights ‘in principle’: by recognising persons or recognising the right to have rights, we recognise that someone is human and capable of moral actions, and thus a member of the rights recognising sphere in which we encounter them. This section, then, uses Arendt to support the second point of the ten-point account of egalitarian rights recognition presented in this thesis:

2. Recognition consists of two stages – recognition of persons, and recognition of rights.

First, the question of why Arendt does not simply reject rights completely will be addressed. It would, perhaps, have been simpler for Arendt to follow in the footsteps of Burke and others and reject human rights completely. Yet Arendt's position is more complex than that – she does not do anything so simple as to reject all human rights, as Jeffrey Isaac rightly points out.⁵⁵ Faced with the crises, hypocrisy and cynicism which Arendt associates with human rights discourse in the first half of the twentieth century, the fact that she does not reject human rights *in toto* is initially puzzling. That she does not, however, lies at the heart of why her work on human rights is important and distinctive.

There are several reasons for Arendt's stance; Isaac enumerates three main considerations. The first, he argues, is a practical reason. Democracies use the rhetoric of human rights against totalitarian regimes:⁵⁶ so much is clear from the widespread promulgation of H.G. Wells' pamphlet calling for a declaration of human rights during the Second World War, the proclamation of the Universal Declaration of Human Rights in 1948, and from the rhetoric of politicians in the years since then. If human rights can do some good, even if they are little more than slogans, then there is a case to retain them, rather than writing them off completely. As Isaac puts it, 'Arendt...is far from naïve when it comes to 'doing things with words''.⁵⁷ The rhetoric of human rights can be a force for good; thus it falls to us to make sure that the theory supporting them is as convincing as possible so that they are not just mere rhetoric – this is in a sense the aim of this thesis.

Isaac terms his second reason a '*moral* reason'. He argues that, although Arendt dismisses the idea of natural rights, she nevertheless believes in 'an elemental dignity grounded in the very facts of natality and mortality, birth and death, human power and human vulnerability'.⁵⁸ Human rights are needed, as is politics, he argues, to 'acknowledge and support the moral claims of individual human beings to enjoy this

⁵⁵ Jeffrey Isaac, "Hannah Arendt on Human Rights and the Limits of Exposure, or Why Noam Chomsky is Wrong about the Meaning of Kosovo", *Social Research* 69:2, pp. 505-537, pp. 511-513

⁵⁶ Isaac, "Hannah Arendt on Human Rights", pp. 513-514

⁵⁷ *Ibid.*, p. 514

⁵⁸ *Ibid.*, p. 515

dignity'.⁵⁹ This line of reasoning runs the danger of running into contradiction: as we have seen, Arendt noted with sadness that 'the world found nothing sacred in the abstract nakedness of being human'.⁶⁰ Humans in the abstract were found to have no dignity; their dignity was a result of *persona*, as shall be further discussed later. The argument may be put slightly differently from Isaac's presentation, however, and thus put may be more compelling. Arendt is clear that what is uniquely human is the capacity for artifice, in the literal sense of the word: *homo faber* is distinctively human; *animal laborans* is not.⁶¹ This artifice extends to the political community and the *vita activa*. The political community is artificially constituted, by human speech and action (as we shall further explore later). Rights, then, are needed to ensure that all may participate in this political community; to ensure that all may lead full, uniquely human, lives. The most important right in this context is the 'right to have rights': access to this community is the most important thing. To be outside is to lead an incomplete, not fully human, life. The dignity is not innate in the organism *homo sapiens*, but the potential for dignity is there. A parallel to T. H. Green may be found here, in the way in which rights are claimed to be necessary to enable fully human flourishing; yet, as with Green, recognition is a vital and necessary part of this process, as we shall see later. Both Green and Arendt appear to owe a debt in this respect to Aristotle and his argument that man is by nature – by which is meant, when humans fully flourish, or achieve their *telos* – a political (and this is distinct from 'social') animal. The idea that rights allow us to flourish as persons is an idea accepted by this thesis, and similar ideas can be found in the work of Joel Feinberg, for example: rights allow us to lead the best possible lives, therefore we should be as clear as possible about exactly what they are and how they come into being.⁶²

The third reason Isaac suggests is quite similar to the first, but viewed from something approaching the opposite angle. Though he terms it the '*epistemological* reason', it has more to do with the duties and 'public responsibilities' of the intellectual. Here, Isaac picks up on Arendt's discussion of the reaction of public intellectuals to totalitarianism, and to the 'bourgeois double standards' of the society that preceded it, in particular, of Weimar Germany. By criticising the double standards and hypocrisies of bourgeois society, intellectuals, Arendt argues, were not 'running their heads against

⁵⁹ *Ibid.*, p. 515

⁶⁰ Arendt, *The Origins of Totalitarianism*, p. 299

⁶¹ Arendt, *The Human Condition*, p. 136.

⁶² Joel Feinberg, "The Social Importance of Moral Rights", p. 180

walls but against open doors'.⁶³ In a sense, their exposure of the shortcomings of bourgeois society made it more possible for totalitarianism to come about, in the name of creating something more 'authentic'; the relation of the futurists to fascist movements is an illustrative case here.⁶⁴ Isaac argues that by abandoning double standards, intellectuals abandoned standards altogether; 'revolted by the impoverishment of social relationships, they abandoned all sense of genuine solidarity with fellow citizens or human beings'.⁶⁵ Extrapolating this, the argument is that by exposing the aporias, inconsistencies and contradictions in human rights, one provides support for those who reject human rights because they wish to impose totalitarian rule. In short, as Isaac puts it, 'hypocrisy is not the ultimate vice': we may support human rights that we know to be philosophically doubtful, or even untenable, because the alternative is still less appealing.⁶⁶ This, then, is the opposite of *fiat iustitia, ruat caelum* type arguments, and bears a strong resemblance to Michael Ignatieff's position: even if there is no agreement on the basis of human rights, or agreement as to whether they have a basis, then it is still better to have them than not to have them.⁶⁷ However, as we shall see, Arendt does not have to rely on columns of philosophical Swiss cheese to hold up her theory; she is able to provide another, plausible, basis for human rights. Likewise this project is sceptical about 'standard' accounts of innate human rights, yet wishes to avoid throwing out human rights entirely. Instead, it seeks to support them with a more convincing theory than that of natural rights. We don't need to make the concession that Isaac suggests; there is no evidence that Arendt supported human rights which she thought were untenable.

Having explored why Arendt might wish to preserve human rights in some form, this section will now turn its attention to the basis of her reformulation of human rights: the one human right, the 'right to have rights'. This section will set out what the 'right to have rights' is, examine whether it entails other specific rights, consider whether commitment to this right means Arendt does have a theory of natural rights, and explore how the 'right to have rights' might be guaranteed. Following this, some objections to the 'right to have rights' from the secondary literature will be examined. Finally, this

⁶³ Arendt, *The Origins of Totalitarianism*, p. 335

⁶⁴ See: Anne Bowler, "Politics as Art: Italian Futurism and Fascism", *Theory and Society* 20:6 (1991), pp. 763-794; Günter Berghaus, *Futurism and Politics: Between Anarchist Rebellion and Fascist Reaction, 1909-1944* (New York, Berghahn, 1995)

⁶⁵ Isaac, "Hannah Arendt on Human Rights", p. 517

⁶⁶ *Ibid.*, p. 519

⁶⁷ Michael Ignatieff, *Human Rights as Politics and Idolatry*, pp. 54-55

section will suggest a new way of reading the ‘right to have rights’, informed by Arendt’s work on judgment and the literature on rights recognition.

For Arendt, there is one universal right, which should be enjoyed by all, and which is not dependent on race, nation or any other criteria, save for the criterion of being human. This right is ‘the right to have rights’. The central importance of this right for Arendt’s thought is underlined by the title of the German version of her 1949 essay which appeared in English as “The Rights of Man: What are they?”. The German version was entitled “*Es gibt ein einziges Menschenrecht*” – ‘There is only one single human right’.⁶⁸ Arendt argues that while other rights ‘change according to historical and other circumstances, there does exist one right which does not spring ‘from within the nation’ and which needs more than national guarantees.’⁶⁹ This right is the ‘right to have rights’.

Arendt argues that the importance of this right has historically been missed, principally because ‘we became aware of the existence of a right to have rights (and that means to live in a framework where one is judged by one’s actions and opinions) and a right to belong to some kind of organized community, only when millions of people emerged who had lost and could not regain these rights because of the new global political situation.’⁷⁰ There had always been a potential problem, and the right to have rights was always important, but it took events on the scale of those of the first half of the twentieth century to show just how acutely important the right to have rights is.

Yet the question remains as to what the phrase ‘the right to have rights’ means, and how cogent a concept it is. As Frank Michelman puts it, ‘It’s a nice expression. When you think about it, though, what possible sense can it make?’⁷¹ Charles Barbour notes that ‘it has not been especially well-received’.⁷² This section will explore what the phrase means for Arendt, and investigate some critical reception of the concept. A key contention will be that Arendt’s ‘right to have rights’ may be taken as a form of recognition, and that recognition of persons is as crucial for Arendt as it is for Green. It

⁶⁸ As Menke notes: Christoph Menke, “The ‘Aporias of Human Rights’ and the ‘One Human Right’: Regarding the Coherence of Hannah Arendt’s Argument” *Social Research* 74:3 (2007), pp. 739-762

⁶⁹ Arendt, “The Rights of Man”, p. 34

⁷⁰ Arendt, *The Origins of Totalitarianism*, p. 296

⁷¹ Frank Michelman, “Parsing ‘A Right to Have Rights’”, *Constellations* 3:2 (1996) p. 200

⁷² Charles Barbour, “Between Politics and Law: Hannah Arendt and the Subject of Rights”, in Marco Goldoni and Christopher McCorkindale (Eds.), *Hannah Arendt and the Law* (Oxford, Hart, 2012), pp. 307-319, p. 307

is on the basis of recognition, rather than contentious ideas of natural law, that human rights may be rebuilt.

The right to have rights is the right to belong to a community. Only within the confines of a community can the familiar list of human rights – life, liberty, property, the pursuit of happiness, and so forth – be realised. In this respect Arendt follows Burke and his contention that all rights are the rights of Englishmen, Frenchmen and so forth, rather than of humans *qua* humans. Arendt, though, couches this idea in different language; as we have seen, relating rights to notions of nationality would be highly dangerous and problematic. According to Arendt, we ‘know even better than Burke that all rights materialize only within a given political community’, and that rights ‘depend on our fellow-men and on a tacit guarantee that the members of a community give to each other.’⁷³ The ability to agree and guarantee rights requires first access to a political community: this access is the right to have rights. Here Arendt offers further support to the third point of the ten-point theory of egalitarian rights recognition which argues that ‘the location, or arena, for rights recognition is society.’

It may be asked whether the right to have rights is the right to any particular rights, or just rights in general. Arendt is not explicit on this point, although Birmingham argues that the right to have rights, as it is the right to participate in a political space, entails necessarily the rights to freedom of expression and association.⁷⁴ As we shall see, Arendt’s notion of the political community turns on speech, discussion and action. Thus Birmingham is correct to suggest that these rights are necessary for Arendt. To have the best possible political community, it may be argued that several other rights are also necessary; however, to have a political community requires only the right to have rights. Although imperfect, it would exist when people recognise each other as fellow members. Although further rights would improve the quality of the public sphere, they are logically distinct from the right to have rights. This right is prior to individual rights, even if some rights are necessary to give it as full a meaning as possible. In this sense, it is analogous to the ‘recognition of persons’ in T.H. Green, a link which we shall return to later.

This right to have rights is crucial for Arendt, and, as we have seen, is logically prior to other rights. Indeed, ‘man as man has only one right that transcends his various

⁷³ Arendt, “The Rights of Man”, p. 34

⁷⁴ Peg Birmingham, *Hannah Arendt and Human Rights: the Predicament of Common Responsibility* (Bloomington, Indiana University Press, 2006), p. 59

rights as a citizen: the right never to be excluded from the rights granted by his community'.⁷⁵ This is Arendt's 'one human right'. It may seem, then, that Arendt is suggesting that there are natural rights, or at least that there is one natural right.⁷⁶ This would be a powerful objection to her criticism of natural rights: it would be inconsistent, surely, to reject natural rights in general only to replace them with a specific natural right. However, Arendt avoids this contradiction, by arguing that even this right – despite the fact that it transcends other rights – 'can exist only through mutual agreement and guarantee'.⁷⁷ That is to say: it is not just the specific rights within any given political community that depend on mutual agreement and recognition, but the right to have rights itself requires recognition and agreement. Thus in Arendt, as in Green, there are two levels of recognition, which respond to what we have termed 'recognition of rights' and 'recognition of persons' in discussing Green; this is point two of the ten-point account of egalitarian rights recognition. This too, however, seems to throw up some problems. How may agreement be reached on this right if the right comes before political community? How is the right to be guaranteed, if the only people for whom it would be useful – the stateless – are outside political communities? In short, if a political community is necessary to enable rights recognition through judgment (as we shall discuss shortly), how can a right to have rights be recognised outside of a political community?

Arendt's answer to this is that the right to have rights is 'the only [right] that can and can only be guaranteed by the comity of nations'.⁷⁸ Instead of worrying about lists of rights, argues Arendt, the United Nations should work on ensuring and safeguarding the right to have rights, which, 'in the welter of rights of the most heterogeneous nature and origin, we are only too likely to overlook and neglect'.⁷⁹ Practically, this would involve all states agreeing to take in, and grant citizenship to, anyone deprived of citizenship by their previous state. This is nothing altogether novel: it is quite simply the right of asylum. A more theoretical response makes use of the analogy of the right to have rights with Green's recognition of persons, and takes seriously the idea that rights are recognised both formally and informally (as discussed in chapter one; this

⁷⁵ Arendt, "The Rights of Man", p. 36

⁷⁶ Though in a quite different way to the way in which Hart suggests there is only one natural right. For Hart, the one natural right was 'the equal right of all men to be free'. H. L. A. Hart, "Are There Any Natural Rights?", *The Philosophical Review* 64:2, pp. 175-191, p. 175

⁷⁷ Arendt, "The Rights of Man", p. 37

⁷⁸ *Ibid.*, p. 37

⁷⁹ *Ibid.*, p. 37

formal-informal distinction will be further discussed in chapters four and six). The recognition of persons and right to have rights simply involves the recognition by one person that the other person is a person – that they too are capable of moral action (Green) and speech and action (Arendt) and that they are therefore *ὄμοιοι*. This first level of recognition is different from the second: it does not require a political community, but merely two people. The moment of mutual recognition, where the two persons recognised that they may have rights ‘in principle’ creates the political community at the most basic level.

A further problem with ‘the right to have rights’ is a one of logic. As Michelman notes, ‘a difficulty in this construction fairly leaps off the page’. He points out that a ‘right to have rights is itself ipso nomine a right’ and therefore it ‘seems that a person cannot at one and the same time both have this right and also be in a situation to which rights as such do not or cannot attach.’⁸⁰ On this view, the very phrase ‘the right to have rights’ is incoherent.

Seyla Benhabib explains the ‘right to have rights’ by arguing that that the word ‘right’ has different meanings in each half of the phrase. Whereas the second ‘rights’ implies the familiar conception of a ‘right’, as a recognised claim, which implies duty on the part of others, Benhabib argues that the first ‘right’ is something different, namely a ‘moral imperative: ‘Treat all human beings as persons belonging to some human group an entitled to the protection of the same’’. For Benhabib, ‘what is invoked here is a *moral claim to membership* and a *certain form of treatment compatible with the claim to membership*.’⁸¹ This does not seem an entirely satisfactory distinction to make. Rights resultant from the right to have rights may also be (recognised) moral claims. Similarly, all rights may be interpreted as a moral imperative: the right not to be tortured may be read as ‘treat all human beings as persons who should not, or even may not, be tortured’. However, Benhabib is correct in the fact that there is something quite distinct about the right to have rights, in comparison with all other rights: this distinctiveness is its primacy – without this right, there would be no others – but also that it is the person who is being recognised. The claim is that one is a person and should therefore be admitted to the political community, rather than relating to any rights specifically (other than perhaps, implicitly, that one be accorded the rights

⁸⁰ Michelman, “Parsing ‘A Right to Have Rights’”, p. 200

⁸¹ Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge, Cambridge University Press, 2004), p. 56. Benhabib’s emphasis.

that others in the same political community have; but this rights content is contingent and depends on the community in question).

Michelman too argues that conceptually there must be two kinds of rights in Arendt. For him, the only way to escape from ‘the self-referential bind’ of ‘the right to have rights’ is to accept that ‘the right to inclusion must belong to a different conceptual class from that containing the “further” rights that inclusion enables a person to have. This distinction, he argues, cannot be ‘between moral and empirical rights’, as ‘Arendt’s account of rights collapses this distinction’. Rather, there are those rights which ‘are politically grounded (that is, in the kind of productive action that inclusion enables)’ and those rights ‘that are not’.⁸²

The difficulty with this, argues Michelman, is that it prompts the question: ‘if the Arendtian right to inclusion is not politically grounded, then what is its ground?’ There is a clear danger that in saying that its ground is ‘the human condition’, Arendt would be dangerously close to the ‘ideas of natural, abstract human rights’ that she is so critical of.⁸³ As we have seen (above) it is grounded in the recognition of persons: this recognition creates the political community, and therein is the potential for new beginnings that underlies Arendt’s concept of natality, which this chapter will turn to in detail later; the question of grounds will be re-visited in chapter five.

Christoph Menke is somewhat critical of Arendt’s concept of ‘the right to have rights’, and is not entirely convinced that it offers a way out what he describes as ‘the aporias of human rights’.⁸⁴ Menke locates ‘the right to have rights’ in the sphere of international law, and interprets this ‘solution to the aporias of human rights’ as one which ‘consists in conceptually treating the one human right to have rights structurally like the (membership) rights within a political community’. This reading, argues Menke, means that ‘the human right to have rights belongs to the ‘sphere of a law that is above the nations’ – that is, to a new international law that no longer only regulates ‘the intercourse of sovereign nations’.⁸⁵ The ‘right to have rights’ would be brought into being by ‘legally binding – through ‘mutual agreement and guarantee’ [Arendt’s phrase, which we have already noted above] - international law that constitutes mankind as a ‘political entity’.⁸⁶

⁸² Michelman, “Parsing ‘A Right to Have Rights’”, p. 206

⁸³ *Ibid.*, p. 206

⁸⁴ Christoph Menke, “Aporias of Human Rights”, p. 746

⁸⁵ Menke, “Aporias of Human Rights”, p. 750

⁸⁶ *Ibid.*, p. 750

For Menke, this solution is not good enough, and is even in contradiction with what Arendt had to say about the problems of the rights of man. First, the tracing back of the ‘one human right’ to the ‘historical fact of a political entity of mankind’ is problematic: it is by no means clear whether such an entity ever has existed, exists, or could exist. Second, if it was by agreement of such an entity that the one human right was guaranteed, this would contradict Arendt’s insight that ‘only in a completely organized humanity could the loss of home and political status become identical with being expelled from humanity altogether’.⁸⁷ The new international law of the ‘right to have rights’, argues Menke, ‘runs up against the very same problem that had led into the aporias’, for ‘if there is to be an inalienable right of each human being to membership, and thus to rights, it cannot merely be defined as resulting from the largely unspecified act of legislation of a politically constituted humanity; it is a right to be introduced and enforced by this act of legislation.’⁸⁸

However, Menke does find an escape from the aporias of human rights in Arendt’s ideas of human dignity, for which she draws largely on Aristotle. Menke argues that according to Arendt, ‘human dignity is...no natural property, which human beings are endowed with individually, and which subsequently would have social consequences, but it consists in nothing other than their politico-linguistic existence: their speaking, judging, and acting...with and vis-à-vis others’.⁸⁹ Here Menke is getting at the distinction drawn already in this chapter between the human and the person; between the abstract *homo sapiens*, which was found to have no intrinsic sanctity, and the recognised person, a political actor and speaker, invested with rights, and the member of a political community. However, this idea of dignity is not necessarily enough for Menke. It is sufficient to ground the right to have rights only if two conditions are met. First, only if ‘it introduces an entirely different anthropology than that of modern natural law’. This is an ‘anthropology of a politico-linguistic form of life as opposed to an anthropology of quasi-natural human ‘needs’ or ‘interests’’. Second, only if ‘the concept of human dignity introduces an entirely different fundamental concept of rights: a concept that grounds subjective rights in the experience of what is the right thing for human beings.’⁹⁰

⁸⁷ Arendt “The Rights of Man”, quoted in Menke, “Aporias of Human Rights”, p. 751

⁸⁸ Menke, “Aporias of Human Rights”, pp. 751-752

⁸⁹ *Ibid.*, p. 753

⁹⁰ *Ibid.*, p. 756

The right thing for human beings, as we shall see later, according to Arendt, is that they be free to act and communicate within a political sphere: this is the distinctively human activity bound up with the idea of natality. It is on this basis too that a new anthropology may be built. Understood as a form of recognition, the right to have rights acts as a gateway to the politico-linguistic existence Menke discusses. As discussed above, it is the preliminary recognition of one person by another. What is being recognised is that the human is a person: that they are capable of communication and moral action. This recognition is transformative: before recognition a human is *capable* of moral action and communication, but it is recognition of this that constitutes the human as a person, that confers personhood. In this first stage of recognition, a person is recognised as having rights ‘in principle’. At the same moment, she is made part of whatever political community the recognising person is in in the context of recognition. The community could be just the two people, or a political community coterminous with a state.

This recognition is the ‘right to have rights’ in the sense that it is only in a political community that one can have rights. Arendt shows this negatively through the experience of those deprived of membership of a political community, who also lose their rights. However, there is also a positive case to be made, and through Arendt’s work on judgment it can be shown why a political community is necessary for rights. Membership of the political community is important because the political community is ‘different from all other forms of human communal life’. The difference is that only the political community involves freedom: ‘being free and living in the *polis* were, in a certain sense, one and the same’.⁹¹ This freedom, for Arendt, ‘is understood negatively as not being ruled or ruling, and positively as a space which can be created only by men and in which each man moves among his peers’. Anyone who is ruled is not free; neither is anyone ruling. Without equal status there is no freedom.⁹² We shall develop this thought on equality more extensively in the next chapter. The key point here is that the political community involves freedom and commonality.

Only under these conditions can ‘all things be recognized in their many-sidedness’. This ‘ability to see the same thing first from two opposing sides and then from all sides’ stems from the impartiality of Homer and was lost almost completely,

⁹¹ Hannah Arendt, *The Promise of Politics*, p. 116

⁹² *Ibid.*, p. 117

argues Arendt, until Kant's discussion of the faculty of judgment.⁹³ In Kant, *phronesis* 'the greatest possible overview of all the possible standpoints and viewpoints from which an issue can be seen and judged' re-appears as 'enlarged mentality (*eine erweiterte Denkungsart*)', defined as the ability 'to think from the position of every other person'.⁹⁴ The faculty of judgment is not just a matter of aesthetic taste, but is, rather, political – indeed 'judgment may be one of the fundamental abilities of man as a political being insofar as it enables him to orient himself in the public realm'.⁹⁵ For the Greeks, *phronesis* was the principal virtue of the statesman in contradistinction to the wisdom of the philosopher.⁹⁶ Judgments and political opinions are both persuasive: 'the judging person – as Kant says quite beautifully – can only 'woo the consent of everyone else' in the hope of coming to an agreement with him eventually'. Such persuasion, Arendt notes, 'corresponds closely to what the Greeks called *πειθειν*, the convincing and persuading speech which they regarded as the typically political form of people talking with one another.' This mode of speech defined the political from the non-political methods of violence and 'from another non-violent form of coercion, the coercion by truth.'⁹⁷ So judgment involves the judging person trying to see things from all sides, and trying to persuade everyone else in the political community of the correctness of her judgment. This can occur only within the political community, with its equality and freedom.

The 'right to have rights', then, is the right of membership to a political community within which judgment can occur. This judgment includes the content of the rights within that community. Deciding which rights should apply in a community is an example of facing a novel problem – there are no pre-existing rules from which to derive rights, now that 'the demonic politics of the twentieth century...[has] exposed the latent crisis' in Western morality.⁹⁸ Once we realise, with Arendt, that morality and ethics are something contingent, then we must commit to the idea that every political society must start anew, and cannot necessarily rely on the morality or ethics of other societies as being reliable. Yet the human is uniquely equipped for such circumstances,

⁹³ *Ibid.*, p. 167

⁹⁴ Kant, *Critique of Judgement*, quoted in Arendt, *The Promise of Politics*, p. 168. See also: Immanuel Kant, *The Critique of Judgement* (Oxford, Clarendon Press, 1980), p. 153, §40

⁹⁵ Hannah Arendt, *Between Past and Future: Six Exercises in Political Thought* (London, Faber and Faber, 1961), p. 219; p. 221

⁹⁶ *Ibid.*, p. 221

⁹⁷ *Ibid.*, p. 222

⁹⁸ Ronald Beiner, "Interpretive Essay: Hannah Arendt on Judging", in Hannah Arendt, *Lectures on Kant's Political Philosophy* (Brighton, The Harvester Press, 1982), pp. 89-156, p. 95

in that the essence of the human, for Arendt (as we shall see), is beginning. Thus, ‘even though we have lost yardsticks by which to measure, and rules under which to subsume the particular, a being whose essence is beginning may have enough of origin within himself to understand without preconceived categories and to judge without the set of customary rules which is morality’.⁹⁹ Through judgment and persuasion, then, each society sets about setting its own rules: recognising rights and duties. This judgment can only occur in a political society, and this is why the ‘right to have rights’ is so crucial. It is in this way, through judgment in the political community, that ‘men are perpetually disputing about rights and altering them, and whatever alteration they make at any time is at that time authoritative’.¹⁰⁰

5. Recognition

The third and final strand of Arendt’s thought on rights that this chapter will explore is the idea that the concept of recognition is crucial, though implicit, to Arendt’s thought.¹⁰¹ This contention is one that has been hinted at throughout the chapter so far; the language of ‘recognition’ has deliberately not been avoided, and parallels with T. H. Green, perhaps the most famous proponent of rights recognition, have been drawn. The idea that recognition is so important for Arendt’s thought is relatively novel: Benhabib and Phillip Hansen¹⁰² both mention recognition in connection with Arendt, but neither explore the concept in detail. Benhabib gets close to the heart of the issue when she argues that ‘one’s status as a rights-bearing person is contingent upon the recognition of one’s membership’.¹⁰³ This is important, but recognition in Arendt is worth exploring further and in greater detail.

This section will first argue that Arendt’s account of the rightless, the stateless and totalitarianism shows us recognition in reverse: when rights and recognition are stripped away. Second, it will be argued that speech and action, which play a major role

⁹⁹ Arendt, “Understanding and Politics”, p. 391

¹⁰⁰ Plato, *Laws* 889e-890a; trans. Arendt. In Arendt, *Responsibility and Judgment*, pp. 84-85

¹⁰¹ It is worth noting that Arendt attended Kojève’s *Lectures* on the philosophy of Hegel, which must have included recognition. See: Elisabeth Young-Bruehl, *Hannah Arendt: For the Love of the World*, pp. 116-117

¹⁰² Phillip Hansen, *Hannah Arendt: Politics, History and Citizenship*, p. 219

¹⁰³ Seyla Benhabib, *The Reluctant Modernism of Hannah Arendt* (Rowman & Littlefield, 2003), pp. 57-58

in Arendt's politics, require recognition. Finally, Arendt's use of the concept of *persona* will be shown to imply recognition.

We have already seen, in section one of this chapter, that Arendt's analysis of the failures of natural rights provides an empirical example of what happens when recognition is stripped away. Rather than analysing, as do Hegel and Green, how recognition leads from natural, abstract humans to persons with rights, Arendt analyses the way in which this process was reversed by Nazi totalitarianism. This is concerned, at the end of the process of 'de-recognition' with the stripping of what has been termed the 'recognition of persons' in Green's thought. However, this process contains, and begins with, the 'de-recognition' of the 'recognition of rights'. Before Jews were stripped of citizenship and forced into camps, other rights were withdrawn. In April 1933 the Nazis required non-Jews to boycott Jewish business; in the same month, the *Berufsbeamtengesetz* or 'Professional Civil Service Law' was passed, which barred Jews from holding positions in the civil service.¹⁰⁴ These are just typical of several other laws which stripped more and more rights from Jews: recognition of one's claim to be able to trade or have a career in the civil service was withdrawn if one was Jewish. Although Arendt does not use the language of recognition in this respect, what she is describing is the reverse of the processes Green and Hegel describe.

An objection to viewing Arendt's description of this chilling process as a contribution to work on rights recognition goes right to the heart of the idea that rights need to be recognised. It has two parts. First, it might be argued that the fact that rights are ignored need not mean natural rights do not exist: it might just be that Jews and refugees had rights all along which *should* have been treated with respect, but were not. Second, it might be asked, what use are rights which depend on recognition if recognition can be withdrawn by a political community? To the first part of the objection the answer may be made that in this respect Arendt's analysis does not disprove the notion of natural rights *per se*, but it does seem to show that if they do exist they make very little difference to what happens; they offer no defence. The question of whether they have any philosophical basis requires a different sort of investigation. Further as Beiner points out, the events of the 1930s and 1940s were not the cause of

¹⁰⁴ The full (German) text of the law is available here: [<http://www.documentarchiv.de/ns/beamtenenges.html>] Accessed 1st August, 2013. On the boycotting of Jewish businesses and the eventual ban on all Jewish commercial activity in the *Reich*, see: Saul Friedländer, *Nazi Germany and the Jews, Volume I: The Years of Persecution, 1933–1939* (London, Weidenfeld and Nicolson, 1997), p. 257-263

the collapse of the idea of natural rights; rather, such events ‘*brought to light* the ruins of our categories of thought’.¹⁰⁵ An answer to the second part is more difficult, and must depend on a discussion of what a political community must look like, which will form a large part of the next chapter. However, in short, the answer is that in key ways Nazi Germany had ceased to be a political community; thus it was unable to protect, recognise, or guarantee the rights of anyone. It lacked the key qualities of a political community: there was no freedom, neither was their equality of commonality of peers. Rather, ‘equality of others and of their particular opinions [was] abrogated...under tyranny, in which everything and everyone is sacrificed to the standpoint of the tyrant, no one is free and no one is capable of insight’.¹⁰⁶ In other words, judgment became impossible, and with judgment rights and the existence of a political community. The qualities necessary for a political community will be explored further in the next chapter.

Recognition is crucial too for speech and action, which play a centrally important role in Arendt’s work. The basic condition of both action and speech, holds Arendt, is ‘human plurality’, which ‘has the twofold character of equality and distinction’, for if ‘men were not equal, they could neither understand each other and those who came before them nor plan for the future and foresee the needs of those who will come after them’; likewise, if ‘men were not distinct, each human being distinguished from any other who is, was, or will ever be, they would need neither speech nor action to make themselves understood.’¹⁰⁷

It is through speech and action that ‘men distinguish themselves instead of being merely distinct; they are the modes in which human beings appear to each other, not indeed as physical objects, but *qua* men’. Humans can live without many other aspects of life, but ‘life without speech and without action, on the other hand – and this is the only way of life that in earnest has renounced all appearance and all vanity in the biblical sense of the word – is literally dead to the world; it has ceased to be a human life because it is no longer lived among men.’¹⁰⁸ Arendt, like Green, sees communication through speech and language as a quality of being human: it is through

¹⁰⁵ Arendt, “Understanding and Politics”, quoted in Beiner, “Interpretive Essay”, p. 95; Beiner’s emphasis.

¹⁰⁶ Arendt, *The Promise of Politics*, p. 169

¹⁰⁷ Arendt, *The Human Condition*, p. 175

¹⁰⁸ *Ibid.*, p. 176

speech and action that we show ourselves to be human, and indeed persons.¹⁰⁹ Clearly, then, speech and action are an integral part of what it means to live a fully human life. Furthermore, speech and action are not ‘forced upon us by necessity, like labor’ or ‘prompted by utility, like work’. Rather, argues Arendt, the ‘impulse’ towards speech and action ‘springs from the beginning which came into the world when we were both and to which we respond by beginning something new on our own initiative.’¹¹⁰ In other words, speech and action are voluntary, entirely new and novel, and reliant on initiative, on thinking.

The relationship of action and speech may be questioned: to what extent does action really require the accompaniment of speech? Arendt is quite clear that action does require speech, arguing that, ‘without the accompaniment of speech, at any rate, action would not only lose its revelatory character, but, and by the same token, it would lose its subject, as it were; not acting men but performing robots would achieve what, humanly speaking, would remain incomprehensible.’ If action were speechless, then it would no longer be action, ‘because there would no longer be an actor, and the actor, the doer of deeds, is possible only if he is at the same time the speaker of words.’ An actor’s action ‘is humanly disclosed by the word, and though his deed can be perceived in its brute physical appearance without verbal accompaniment, it becomes relevant only through the spoken word in which he identifies himself as the actor, announcing what he does, has done, and intends to do.’¹¹¹ In one sense this is obvious: we would have a hard time understanding a performance of *Hamlet*, for example, if we were deprived of the dialogue. This is a point made equally well by the silent ballet scene in the film *Amadeus*: deprived of the language of music, the action of dance makes no sense, and cannot be interpreted. Speech and action, as Arendt insists, must go together.

The importance of speech and action for recognition and rights is two-fold. First, speech requires a listener; it is the vocal transmission of ideas from one person to another. A person speaking by herself, or in a language only she understands, would be nonsensical. This listening implies recognition. Second, the forum in which speech and action occur is political; this further implies recognition (it is through the recognition of the ‘right to have rights’ that we enter the political community).

¹⁰⁹ Compare: Green, *Lectures on the Principles of Political Obligation*, §135, p. 139

¹¹⁰ Arendt, *The Human Condition*, p. 177

¹¹¹ *Ibid.*, pp. 178-179

One sense of recognition is the sense in which a meeting recognises the speaker.¹¹² This form of recognition is one which does not require something previously existing to be ‘re-cognised’, processed again mentally. Rather, recognition in this sense is something creative. Before being recognised, the speaker may have had no status at all in the eyes of the meeting; indeed, if the person speaking is someone who does not regularly attend a certain committee or group, then this almost certainly the case. In the act of recognition, a status for the speaker is created. Arendt’s insistence on the importance of speech for the human condition implies recognition in this way: speakers must be listened to, if they are to speak, and not simply project ‘mere talk’. Arendt points towards this in her analysis of the way speech breaks down when ‘human togetherness’ is lost, particularly in the case of war. In these instances, for example war ‘where men go into action and use means of violence in order to achieve certain objectives for their own side and against the enemy...speech becomes indeed ‘mere talk’...whether it serves to deceive the enemy or to dazzle everybody with propaganda’. Unlike speech, which involves disclosure, here ‘words reveal nothing’.¹¹³ Speech must be understood, and must reveal, in order to be speech; speech therefore requires listening and recognition.

In her account of the life of Hermann Broch, the twentieth-century Austrian modernist writer, Arendt divides his life into three areas: literature, knowledge, and action. These she couples with ‘three fundamentally different activities of men: artistic, scientific, and political work’.¹¹⁴ The key here is that action is *political*. Action and speech, deeds and words, belong to the political sphere. As Birmingham points out, ‘for Arendt, significant speech and action...can occur only in a political space. Thus, the right to have rights...is the rights to belong to a political space.’¹¹⁵ A right, for Arendt (as for Green), is a capacity to *act*.¹¹⁶ Arendt is explicit on this point in *The Human Condition*, where she draws on Aristotle, who held ‘the sharing of words and deeds’ to be what makes it ‘worthwhile for men to live together’.¹¹⁷ As we have seen, these

¹¹² G. F. Gaus, “The Rights Recognition Thesis: Defending and Extending Green”, in Maria Dimova-Cookson and W. J. Mander (Eds.), *T.H. Green: Ethics, Metaphysics, and Political Philosophy* (Oxford, Clarendon Press, 2006), pp. 209-235, p. 211; David Boucher, “The Recognition Theory of Rights, Customary International Law and Human Rights”, *Political Studies* 59:3 (2011), pp. 753-771, p. 758

¹¹³ *Ibid.*, p. 180

¹¹⁴ Hannah Arendt, *Men in Dark Times* (San Diego, Harcourt, Brace and Company, 1983), p. 112

¹¹⁵ Birmingham, *Hannah Arendt and Human Rights*, p. 59

¹¹⁶ Barbour, “Between Politics and Law”, p. 314

¹¹⁷ Arendt, *The Human Condition*, pp. 196-197; Aristotle, *Nicomachean Ethics*, (Cambridge, Cambridge University Press, 2000), p. 74, 1126b

deeds and words require recognition within the *polis*; within the political community. Furthermore, drawing on conclusions reached earlier in this chapter, we may see that recognition is central for entry to the *polis*. Here, the right to have rights means the right to be recognised – to have one’s speech listened to – on the one hand. On the other hand, the right to have rights is recognition itself. This right is guaranteed by the agreement of others and is their recognition of one’s being a person, having something to say, and being able to communicate.

The final pointer towards the importance of recognition for Hannah Arendt may be found in her discussion of the concept of *persona*.¹¹⁸ *Persona* is the Latin form, via the Etruscan *ΦΕΡΣΥ*, of the Ancient Greek *πρόσωπον*.¹¹⁹ A compound of *πρός* (towards), and *ὄψ* (eye), this word referred to the masks worn by Ancient Greek actors, and then, by extension, to the characters represented by those masks, and taken on by those actors. As Arendt notes, the familiar later *dramatis personae* corresponds to the Greek *τὰ τοῦ δράματος πρόσωπα*.¹²⁰ It is from this notion that the modern word *persona*, for example in its usage in Jungian psychology, takes its cue. For Jung, the *persona* is ‘a kind of mask, designed on the one hand to make a definite impression upon others, and on the other to conceal the true nature of the individual’.¹²¹ At the same time, we are familiar with a second usage of *persona*, which is similar, and often complementary, but which builds on the Latin legal tradition of *persona*, where to have a *persona* is to have a certain nexus of rights, responsibilities, and entitlements: in short, to take on a legal character.

Recognition is fundamental to *persona*. The reason for masks to be worn is to enable recognition – to let the audience know who the character is, and for the audience to act accordingly. By the mediaeval and renaissance period, there were no longer actual masks, but the stock characters remained, and dressed accordingly so that they were recognised as such by the audience.¹²² The actor becomes the character when we as an audience recognise him by his mask, or his *persona*. We recognise him as having

¹¹⁸ Hannah Arendt, *On Revolution* (New York, Viking Press, 1963), pp. 102-104

¹¹⁹ On the etymology of *persona*, see: James Noel Adams, *Bilingualism and the Latin Language* (Cambridge, Cambridge University Press, 2003), p. 164; Carlo De Simone, *Die griechischen Entlehnungen im Etruskischen: II. Untersuchung* (Wiesbaden, Otto Harrassowitz, 1970), pp. 293-298

¹²⁰ Arendt, *On Revolution*, p. 102

¹²¹ C. G. Jung, *Two Essays on Analytical Psychology* (London, Routledge, 1953) p. 190

¹²² Though masks made a resurgence in the Comedia dell’arte of the 17th Century, which featured stock characters such as Arlecchino (Harlequin), Pulcinella, Scaramuccia (Scaramouche), and Tartaglia. On this, see Allardyce Nicoll, *The World of Harlequin: A Critical Study of the Commedia dell’Arte* (Cambridge, Cambridge University Press, 1963), particularly chapter three, “The Four Masks”, pp. 40-94

certain relations, and certain responsibilities, as well as certain background stories and information, by his mask.

The same is true by extension for *persona* in the legal sense. A human being becomes a person, someone with the right to have rights, when we recognise them as such; when we recognise the persona made up of a nexus of rights and responsibilities which colour our actions towards them just as though they were a mask. ‘Without his *persona*, there would be an individual without rights and duties, perhaps a ‘natural man’...but certainly a politically irrelevant being.’¹²³ Arendt notes that a person, with a *persona*, was sharply distinct for the Romans from the *homo*, ‘someone who was nothing but a member of the human species’; the word *homo* was even used ‘contemptuously to designate people not protected by any law’.¹²⁴ The transition from human being to person – someone with a *persona* – is dependent on recognition. Individuals, subjects, human beings ‘can become philosophical abstractions’ whereas, ‘by contrast, the notion of the ‘person’ entails the idea of reciprocity and hence the condition of plurality whereby distinct biological beings are nevertheless bound together such that the recognition of each is made possible by the recognition of others.’¹²⁵

Arendt highlights another aspect of *persona* and masks, which she bases on some potentially fanciful etymological speculation,¹²⁶ but an aspect that is important nonetheless. This aspect is that it is through *personae* that characters, actors, speak. Thus a *persona* becomes vital for one to take part in the action and speech which, as we have seen, is a vital part of being human for Arendt.¹²⁷

Another aspect of *persona* which Arendt does not mention, and which feeds into the mask analogy, is *persona* as not just a mask projecting an image which is recognised, but as a protective mask, which saves the person behind it from harm. It is legal and political character – the right to have rights, and recognised *persona* – that prevent abuses against the person. Arendt’s analysis of the events of the first half of the twentieth century and the plight of the stateless shows that *persona* is a mask which is recognised, but also a mask vital for protection. Recognition of the *persona* prevents

¹²³ Arendt, *On Revolution*, p. 103

¹²⁴ Arendt, “Prologue”, in *Responsibility and Judgment*, p. 12

¹²⁵ Phillip Hansen, *Hannah Arendt: Politics, History and Citizenship* (Oxford, Polity Press, 1993), p. 219

¹²⁶ It is by no means clear that the Latin *persona* is related to *per sonare* (‘to sound through’), though it is a nice idea. The presence of the long ‘o’ in the Latin *persona* in contrast to the short ‘o’ in *sonare* suggests this link is not as likely as the etymology of *persona* via the Etruscan. See footnote 119.

¹²⁷ Arendt, *On Revolution*, p. 102

harm to its possessor; without *persona*, abstract man is left vulnerable, unprotected, and ultimately helpless in the face of totalitarian oppression.

This conclusion is stark. As Birmingham notes, ‘humanity itself must guarantee the right to have rights, or the right of every individual to belong to humanity’;¹²⁸ Arendt herself writes that ‘it is by no means certain whether [this] is possible.’¹²⁹ The traditional sources of human dignity are all vanished in the problems of modernity¹³⁰ and the end of the idea of enlightenment. As Birmingham bleakly describes it: ‘The gates of heaven are shut, the hands of God are closed. The rationality of nature, the self-evidence of reason, and the progress of history have given way to the death camps and holes of oblivion’.¹³¹ The question remains: what is left? What will provide or secure the right to have rights? Why should humans recognise each other as persons?

5.1 Natality: or ‘why recognise?’

The title given to a well-known interview which Hannah Arendt gave to German television provides a hint as to the way out of the problem of what is to guarantee the right to have rights, according to Arendt. The title asks: ‘What remains?’, and responds: ‘The language remains’.¹³² Even in the face of the death camps, the destruction of the Second World War, and continuing totalitarianism in the USSR, there is reason for hope, and it lies in language and communication, and in Arendt’s conception of ‘natality’. Language and speech are crucial for Arendt, and for her concept of ‘natality’. It is natality which is ‘the miracle that saves the world, the realm of human affairs, from its normal, ‘natural’ ruin’. By natality, Arendt means ‘the birth of new men and the new beginning, the action they are capable of by virtue of being born’. Only natality ‘can bestow upon human affairs faith and hope’ which found its ‘most glorious and most succinct expression’ in the words of the Gospel’s glad tidings: ‘A child has been born unto us’.¹³³

¹²⁸ Birmingham, *Hannah Arendt and Human Rights*, p. 6

¹²⁹ Arendt, *The Origins of Totalitarianism*, p. 298

¹³⁰ Serena Parekh, *Hannah Arendt and the Challenge of Modernity: A Phenomenology of Human Rights* (Abingdon, Routledge, 2008), pp. 58-66

¹³¹ Birmingham, *Hannah Arendt and Human Rights*, p. 6

¹³² Hannah Arendt, “What Remains? The Language Remains: A Conversation with Günter Gaus”, in *Hannah Arendt, Essays in Understanding*, pp. 1-23; see also *Zur Person*

[<https://www.youtube.com/watch?v=dsoImQfVsO4>] Accessed 25th July, 2013.

¹³³ Arendt, *The Human Condition*, p. 247

The importance of language lies in the multi-faceted nature of natality in Arendt's thought. As Birmingham notes, two key facets permeate natality: 'the principle of publicness and the principle of givenness.'¹³⁴ Further, there are two 'births':¹³⁵ the natural birth, marked by givenness, and the politico-linguistic birth, marked by publicness.¹³⁶

It is in the beginning, in natality, argues Arendt, that the principle of action lies.¹³⁷ This beginning is not the same as the beginning of all things, of the world, but the beginning of somebody, of a human. Here, Arendt follows Augustine's distinction between *initium*, the beginning of a human, and *principium*, the beginning of the world.¹³⁸ This link between action and beginning is the idea that 'to act...means to take an initiative, to begin'. Indeed, the original meaning of the Latin *agere*, from which we get the word 'agent' was 'to set something into motion', as Arendt notes. Arendt also draws on the Greek *archein* and *arche*, meaning 'to lead' and 'to begin'. The distinctiveness of humans, argues Arendt, is precisely their capacity for beginning, and therewith for action. Only humans are capable of *agere*, of setting something into motion. In the words of Augustine, whom she quotes, '*Initium ergo esset, creatus est homo, ante quem nullus fuit*': 'that there be a beginning, man was created before whom there was nobody'.¹³⁹ It is this same passage of Augustine that Arendt quotes at the end of *The Origins of Totalitarianism* – if there is hope for the future in the shadow of the death camps, it lies in the uniquely human capacity to begin and to act. This capacity for beginning is reason for hope in two ways, corresponding to the two births. First, new humans will always be born, and that in itself is reason to hope. Second, political birth is always possible: through recognition one can take on a *persona* and be admitted to a political community. Extending this, new political communities can themselves always be possible, as Pericles argued.

¹³⁴ Birmingham, *Hannah Arendt and Human Rights* p. 9

¹³⁵ Although Patricia Bowen-Moore suggests that there is also 'tertiary natality' in Arendt, by which she means 'the nascent experience of the theoretical life (p. 68), or 'birth into the timelessness of thought' (p. 71). Patricia Bowen-Moore, *Hannah Arendt's Philosophy of Natality* (New York, St. Martin's Press, 1989), pp. 69-100

¹³⁶ *Ibid.*, p. 23; p. 57; Arendt, *The Human Condition*, p. 176

¹³⁷ See Birmingham, *Hannah Arendt and Human Rights*, p. 57

¹³⁸ Arendt, *The Human Condition*, p. 177

¹³⁹ *Ibid.*, p. 177; This phrase appears as '*Initium ergo esset, creatus est homo, ante quem nemo fuit*' (my emphasis) in Arendt, *Between Past and Future*, p. 167. In each case, Arendt cites the phrase as being from Augustine, *De civitate Dei* xii. 20 – it is actually from chapter 21 of book xii, where the word is *nullus*. See Augustine, *De Civitate Dei* [<http://www.thelatinlibrary.com/augustine/civ12.shtml>] Accessed 20th July, 2013.

One answer to the question of motivation behind recognition lies in Augustine's conception of love,¹⁴⁰ which influenced Arendt throughout her work: 'This mere existence, that is, all that which is mysteriously given us by birth and which includes the shape of our bodies and the talents of our minds, can be adequately dealt with only by the unpredictable hazards of friendship and sympathy, or by the great and incalculable grace of love, which says with Augustine, '*Volo ut sis* (I want you to be)', without being able to give any particular reason for such supreme and unsurpassable affirmation.'¹⁴¹ This wish for another to be implies the second aspect of natality, the political birth. Mere existence is given – mysteriously – by the physical birth; recognition, the wish for another to be, to come into existence, implies the beginning, the *arche*, of the person, born again not as an abstract human, but as a person with *persona*, capable of speech and action. Here, the two facets of natality, givenness and publicness, and the two births, come together. There is no reason for the original, human birth – one does not choose to be born; who is born and what and who they become is the product of chance and is unknowable and improbable, indeed Arendt calls it 'miraculous'.¹⁴² The second facet, publicness, is tied to the second, political, birth, inspired by the wish for another 'to be' a person, a political entity.

This may be an act of love, as Augustine has it, but it may also be the necessary consequence of the importance which Arendt places on communication and action. To be fully human is to speak and to act, but to do so one needs a listener and an audience (or etymologically better, 'onlookers'). To be able to speak and act to the fullest, one must recognise others, thus giving them too the opportunity to speak and to act, and thereby to enter the political community of the fully human, of persons. Indeed, in her discussion of the political community, Arendt insists that the political community must consist of peers, of equals, to make freedom possible: 'Without those who are my equals, there is not freedom, which is why the man who rules over others...is indeed a happier and more enviable man than those over whom he rules, but he is not one whit

¹⁴⁰ To what extent this is Augustine's conception of love, rather than Arendt's, is brought into question by Margaret Miles, who suggests that Augustine himself never used the phrase *volo ut sis*. It appears that Arendt took the phrase from a letter written to her by Martin Heidegger, in which Heidegger attributed the phrase to Augustine. Heidegger also used the phrase in 'a letter to one of his wife's more attractive friends', after his affair with Arendt had come to an end. Margaret Miles, "*Volo ut sis*: Arendt and Augustine, *Dialog: A Journal of Theology* 41:3 (2002), pp. 221-224; See also: Elzbieta Ettinger, *Hannah Arendt, Martin Heidegger* (New Haven, Yale University Press, 1995)

¹⁴¹ Arendt, *The Origins of Totalitarianism*, p. 301

¹⁴² Arendt, *The Promise of Politics*, p. 113

freer. He too moves in a sphere in which there is no freedom whatever.’¹⁴³ Further, cut off from the political community through inequality, the despot cannot be fully human, in that he cannot speak or act, for this requires peers: ‘in order to speak, he would need others who are his equals’.¹⁴⁴ Just as in Hegel’s master-slave dialectic, Arendt’s tyrant must give up his tyranny and join the political community in order to attain freedom for both himself and those under his domination. To refuse to do so is to turn one’s back on the possibility of being fully human.

Birmingham argues that the second, political, natality is implied in the first, ‘because the first act, the act of beginning itself – the event of natality – contains both the beginning and its principle within itself.’¹⁴⁵ *Arche* conveys ‘the sense of principle, beginning, and common ground’; ‘the principle of action...lies in its beginning’.¹⁴⁶ These might seem like large claims, or even leaps, based on somewhat obscure etymological explanations of Ancient Greek, but applying Arendt consistently on this point leads to these conclusions. We have seen earlier that action requires speech and is thus explicitly public; action and speech are political, occurring within the *polis*, or political community. Further, action and beginning are inextricably linked: *agere* is ‘to set in motion’. Thus in the beginning, the *initium*, of every human is implied the action and speech which require admission to the public sphere: the right to have rights. It is on this basis that Arendt can claim that this is indeed a universal right. Yet it is a right which still requires recognition. Admission to the political space depends on communication, as we have seen. But, as Pericles argued, wherever two or three persons communicate together, there may be a *polis*. Like the human capacity for beginning, the human capacity for creating – beginning – political communities should also be cause for hope.

The key to Arendt’s hope for a reformulation of human rights, based on the right to have rights, recognition and natality, is found in her quotation of Augustine: ‘*Initium ergo esset, creatus est homo, ante quem nullus fuit*’: ‘that there be a beginning, man was

¹⁴³ *Ibid.*, pp. 117-118; There are certain parallels to more recent developments in ‘republican freedom’ as ‘non-domination’, as James Bohman notes. James Bohman, “Citizens and Persons: Legal Status and Human Rights”, in Marco Goldoni and Christopher McCorkindale (Eds.), *Hannah Arendt and the Law* (Oxford, Hart, 2012), pp. 321-334, pp. 324-325; see also: Quentin Skinner, “A Third Concept of Liberty”, *Proceedings of the British Academy* 117 (2002), pp. 237-268; Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford, Oxford University Press, 1998)

¹⁴⁴ *Ibid.*, p. 118

¹⁴⁵ Birmingham, *Hannah Arendt and Human Rights*, p. 57

¹⁴⁶ *Ibid.*, p. 57

created before whom there was nobody'.¹⁴⁷ In the capacity to begin, there is a way out from the 'Dark Times' of the twentieth century; new humans are born and begin life, and, through recognition, new persons begin political life. Hope stems from the human capacity to begin: 'every human being, simply by being born into a world that was there before him and will be there after him, is himself a new beginning' – it is in this 'ability to make a beginning' that the miracle of freedom lies.¹⁴⁸ The potential of continual new beginnings is the basis for freedom and human rights, rights founded on the judgment of members of a free political society. Only by founding rights on judgment, on intersubjective debate through *πειθειν* and *phronesis*, can we preserve freedom: any attempt to set out a list of rights which are divinely revealed or inherent in nature is an attempt to remove our freedom to judge for ourselves.

This section has sought to underline the importance of recognition in Arendt's thought, and explore its relationship with natality. It has been shown that recognition permeates Arendt's thought on communication, speech and action. Speech cannot have meaning or validity in isolation; speakers require the recognition of their listeners. The *polis* relies on recognition to function, and that recognition consists of two stages. First, through recognition humans become persons, take on a *persona* and become members of the *polis*. Second, the rights of the individual members of the *polis*, once it has been constituted, really on the recognition of other members of the political community. Arendt's discussion of *persona* too points strongly towards recognition: the mask is what is recognised, and it is the legal *persona* that entails rights. Furthermore, to extend Arendt's metaphor, one's *persona*, through its recognition, provides a protective mask. Political natality is bound up with recognition; to be 'born' politically is to be recognised as a member of the political community, and to act and to speak in that community, as we have noted, involves recognition. Further, the potential of humans to begin – both in the sense of natural birth and in the sense of the possibility of the creation of the new political communities – is a powerful cause for hope: a *polis* may be anywhere, and there is always the potential for a new *polis*, a new political community within which one has rights, to come into being, wherever humans recognise each other and communicate. Through all this, it is clear both that, although barely mentioned, recognition is fundamentally important for Arendt's thought, and also that Arendt makes a powerful contribution to the literature on rights recognition.

¹⁴⁷ *Ibid.*, p. 177; (Augustine, *De civitate Dei* xii. 21; see footnote 140)

¹⁴⁸ Arendt, *The Promise of Politics*, p. 113

6. Concluding Remarks

This chapter has explored three main strands within Arendt's thought on human rights. First, her critique of 'the Rights of Man' was outlined; then, this chapter turned its attention to Arendt's argument that there is a deep link between the state and rights. Finally, this chapter made the argument that permeating Arendt's work on rights is the idea of recognition, which compliments her concept of natality. Throughout, the key contentions have been that, first, Arendt makes a unique, and significant, contribution to the literature critical of natural rights and, second, that recognition, though implicit, permeates her work in this area. For Arendt as much as for Green, natural rights are found to be unsustainable and in their place must be substituted rights based on recognition, which are by their nature closely tied to the notion of a political community.

The work of Arendt that has been examined in this chapter supports the first three points of the ten-point account of egalitarian rights recognition:

1. Rights, including human rights, require social recognition.

Arendt is clear that natural rights are unsustainable in the light of the horrors of the twentieth century, which show up just how changeable ethics and morality are. Rights can only be recognised within political communities, where their contents are judged and debated among peers.

2. Recognition consists of two stages – recognition of persons, and recognition of rights.

This chapter has made the argument that Arendt's 'right to have rights' is analogous to Green's 'recognition of persons'. In both cases, it is the person who is being recognised as a moral actor and as someone capable of communication through the faculty of language. This recognition is recognition that the person can, in principle have rights, and is thus admitted to the political community, where the content of those rights is debated.

3. The location, or arena, for rights recognition is society.

This chapter has argued that rights recognition occurs through the exercise of the faculty of judgment, which can only happen in a political community or society, for only here are people able to exercise their *sensus communis* and see a matter from all sides; only in political communities can debate through persuasion (*πείθειν*) occur, rather than enforcing rights by force or revelation. Only rights arrived at through political persuasion in the political community are compatible with freedom, through recognising their contingent nature as part of their genesis.

The events of the twentieth century exposed the hollowness of doctrines of natural rights, and one of Arendt's key contributions is to show this and point out the paradox of the rights of man to a world which thought it had found solutions to many of its problems in the form of the Universal Declaration of Human Rights. Further, in linking rights to the political community, Arendt makes another key contribution to our understanding of how rights work. Through arguing for the 'right to have rights' Arendt shows us just how important membership of a political community is: without it, no other rights are possible. Finally, Arendt's work on 'natality' gives us hope: although rights are contingent, the continuing birth and emergence of new life, as well as the human capacity for beginning and setting in motion, are encouragement that political communities will continue to emerge and to recognise new members, enabling processes of judgment to occur and rights to be recognised.

Chapter Four

Societies of rights: what does a political community look like?

*'Rights have no being except in a society of men recognising each other as ἴσοι καὶ ὅμοιοι'*¹

The foregoing chapters have shown that the idea that rights require social recognition is an idea which has enjoyed substantial support. Hegel, Green, and Arendt provide powerful arguments as to why society is crucial for rights; where Hegel and Green dealt with the theoretical, Arendt complemented their analysis with her account of the worst events of the twentieth century, as well as her insight into the importance of *persona*, the political community, and judging. Without membership of a society, and without citizenship, a human can have no meaningful rights.

The question this analysis points towards concerns the nature of this 'society', to use Green's terminology, or 'political community', in Arendt's words. What kinds of communities or societies permit their members to have rights? What features are necessary for the recognition of rights? What manner of political community is best for the recognition and maintenance of rights?

This chapter will advance several parts of the theory of egalitarian rights recognition relating to the qualities of society necessary and normatively desirable for rights recognition. In the first half of this chapter, the case will be made for the following four points:

4. Recognition of rights requires meaningful equality, which can be expressed as 'equality of access to rights recognition arenas and debates'.
5. Recognition of rights or persons may not be arbitrary, but must be based on moral argument, such as the notion of a common good or a *sensus communis*.
6. Recognition of rights requires the greatest possible facilitation of communication within a society.

¹ Green, *Lectures*, §139, p. 144

7. 'Society' in the context of rights recognition is open to ideas from without, and has no necessary limits.

The second half of this chapter will contrast the theory of egalitarian rights recognition with the theory of rights recognition set out by Rex Martin; in doing so, the novel features of the theory will be cast into clearer relief. In particular, the following propositions will be advanced:

8. Rights are recognised claims, not established ways of acting.
9. Recognition of rights and persons is synchronic, not diachronic.
10. Recognition of rights is logically distinct from enforcement and maintenance of rights; although enforcement and maintenance of rights is desirable, recognition can exist without enforcement and maintenance.

1. Society

1.1 Equality

The first point this chapter will advance is that:

4. Recognition of rights requires meaningful equality, which can be expressed as 'equality of access to rights recognition arenas and debates'.

This requirement of equality can be found in the work of both Green and Arendt; without equality of access to rights recognising debates, the rights that are recognised are clearly skewed or biased, and the good recognised is not common to all (Green), further, judgment can only occur in political communities marked out by equality. Thus, the political community or society must be one with meaningful equality in order for rights recognition to occur properly and legitimately.

Green, as we have seen in chapter one, argued that ‘No one ... can have a right except (1) as a member of a society, and (2) of a society in which some common good is recognised by the members of the society as their own ideal good’.² Furthermore, ‘rights have no being except in a society of men recognising each other as *ἴσοι καὶ ὅμοιοι*’, which may be translated as ‘equals and similars’.³ Scholars of Green have paid much attention to the first two of Green’s stipulations – membership of a society and the common good – but his third stipulation, that societies be ‘equal and similar’ has often been overlooked, even by scholars keen to present Green’s egalitarian credentials.⁴ We will address the question of similarity in section 1.4 of this chapter, but for now we will focus on Green’s stipulation that equality is necessary for rights recognition.

Rendering the Greek into English is relatively straightforward, given that ‘iso-’ and ‘homo-’ are common prefixes in English. ‘ἴσοι’ corresponds to the ‘iso’ in ‘isobars’, ‘isometric’, and ‘isosceles’; while ‘ὅμοιοι’ corresponds to the ‘homo’ in ‘homogenous’, ‘homonym’, and ‘homophonic’. ‘Equal and the same’, therefore, would not be an unsatisfactory translation of ‘ἴσοι καὶ ὅμοιοι’. The phrase is not tautology: although some editions of Green’s work – and some commentators – gloss the whole phrase as meaning ‘equals’,⁵ this is not an adequate understanding of its meaning. *ἴσος* and *ὅμος*, the stems of the phrase, have categorically different meanings. *ἴσος* refers to equality, particularly in a numerical sense, and tends to denote an equality of quantity. *ὅμος* refers to sameness, commonality or homogeneity, and denotes rather an identity in quality, rather than quantity. We shall discuss *ὅμος* further on in this chapter.

Green’s use of the phrase *ἴσοι καὶ ὅμοιοι*, un-translated, points to its origins in Greek philosophy, most likely in Aristotle, who uses the phrase, or variants of it, three times in the *Politics*. The phrase appears in connection with the status of states, who are ‘equal in power and alike in character’ (*οἱ δὲ ἔχοντες ἀμύνειν οὐ δυνήσονται τοὺς ἐπιόντας, οὐθ’ οὕτως ὀλίγην ὥστε μὴ δύνασθαι πόλεμον ὑπενεγκεῖν μηδὲ τῶν ἴσων καὶ τῶν ὁμοίων*), in connection with the middle classes, who are ‘equal and alike’ (*βούλεται*

² Green, *Lectures*, §25, p. 44

³ Green, *Lectures*, §139, p. 144. See also §141, p. 145: ‘a right against any group of associated men depends on association, as *ἴσος καὶ ὁμοιος*’; and §148, p. 154: ‘[rights] depend for their existence, indeed, on society a society of men who recognise each other as *ἴσοι καὶ ὅμοιοι*’.

⁴ For example, Colin Tyler, *Civil Society, Capitalism and the State*, pp. 143-146. Though Maria Dimova-Cookson does pick up on the importance of equality for Green’s rights recognition: Dimova-Cookson, ‘Justice as a Secondary Moral Ideal’, pp. 62-64

⁵ T. H. Green, *Lectures on the Principles of Political Obligation* (Kitchener, Batoche Books, 1999) [<http://socserv2.mcmaster.ca/~econ/ugcm/3ll3/green/obligation.pdf>]; Colin Tyler, *Civil Society, Capitalism and the State*, p. 143

δέ γε ἡ πόλις ἐξ ἴσων εἶναι καὶ ὁμοίων ὅτι μάλιστα), and in connection with the appointment of magistrates from ‘equal or similar classes’ of citizens (οἷον ἐν δημοκρατία καὶ ὀλιγαρχία καὶ ἀριστοκρατία καὶ μοναρχία πότερον αἱ αὐταὶ μὲν εἰσιν ἀρχαὶ κύριαι, οὐκ ἐξ ἴσων δ’ οὐδ’ ἐξ ὁμοίω).⁶

It is the second of these occurrences of the phrase in the *Politics* which seems most relevant. Here, Aristotle is discussing which classes of people best make up a city. His argument is that a city radically divided between rich and poor has significant problems. In a passage which brings to mind Hegel’s account of the master and slave dialectic, Aristotle writes ‘Thus arises a city, not of freemen, but of masters and slaves, the one despising, the other envying; and nothing can be more fatal to friendship and good fellowship in states that this...a city ought to be composed, as far as possible, of equals and similars’.⁷ Arendt draws on similar aspects of Aristotle, as we shall see, in terms of the limits on freedom brought about by inequality: for her, a society of unequals is not a free society.

For the process of rights recognition, inequality presents potentially very large problems. To illustrate these problems, let us imagine rights recognition in two societies with two types of inequality. In the first case, a minority of citizens in a society have the vast majority of votes in a broadly (otherwise) democratic system; in the second, a minority of citizens have the vast majority of resources. To recognise rights, Green argues, a society must be able to recognise rights claims as contributory to a common good: rights must benefit all equally. In the first case, the conceptualisation of a common good by a formal rights-recognising forum (parliament, for example) would be deeply distorted. With one group over-represented, it is likely any ‘common good’ would not be truly common, but actually rather particular; rights would probably benefit the over-represented group the most – either through self-interest or through sheer ignorance of the problems faced by the rest of a society.

In the second case, with resources in the hands of a minority, the rest of society is forced to consider pressing material concerns – how they are to feed themselves and make basic ends meet – before it is able to deliberate rights claims. Thus the opinions of the majority in society are not heard because they have no way of articulating them. Further, with great resources, the rich minority can manipulate decision making arenas

⁶ Aristotle. (ed. W. D. Ross), *Aristotle's Politica*, (Oxford, Clarendon Press, 1957) [<http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3atext%3a1999.01.0057>] Sections 1267a, 1295b, and 1299b, respectively.

⁷ Aristotle, *Politics* (Cambridge, Cambridge University Press, 1996), p. 107

through lobbying or applying other financial pressures. Finally, the rich minority can use its economic power to dissuade the poor majority from expressing certain political opinions, through denying access to resources.

These two brief examples show how inequalities can skew or bias the rights recognising mechanisms in Green's thought. When the recognition process is skewed in such a way, it is impossible for the rights recognised to reflect the common good and benefit everyone in society. The question remains as to what sort of equality Green holds to be necessary. In recent years, egalitarian thought has devoted much time and energy to the 'equality of what?' question, though more recently relational egalitarians have called this debate into question.⁸ Clearly, the important quality of equality for Green is that it allows a person to participate in rights recognising arenas and debates. Shorthand for Green's position here might therefore be 'equality of access to rights recognising arenas and debates'. In order to flesh out exactly what this might involve, this section will now examine Green's commitment to equality in both theory and practice; although he does not define equality in the context of rights recognition, we can reconstruct his position from other aspects of his writings and political engagement.

Undoubtedly, Green was committed at the very least to a formal, legal equality. Green discusses with evident approval the process by which the law 'of civilised nations', the 'law of opinion', 'social sentiments and expectations' and the 'formulae [of] philosophers' have come to agree with Ulpian,⁹ who declared that '*omnes homines aequales sunt*' – 'all men are equal'.¹⁰ This is formal equality which should extend to all races: he expresses disappointment that, despite holding that 'all men are born free and equal', some Americans still tried to justify the enslavement of African Americans.¹¹

Green's commitment to equality went beyond the idea that all *men* are equal. Olive Anderson argues that Green's work includes a serious commitment to equality not

⁸ On the 'equality of what?' debate see: Amartya Sen, "Equality of What?" in S. McMurrin (Ed.), *Tanner Lectures on Human Values* (Cambridge, Cambridge University Press, 1980); Ronald Dworkin, "What is Equality? Part 1: Equality of Welfare", *Philosophy and Public Affairs* 10:3 (1981), pp. 185-246; Dworkin, "What is Equality? Part 2: Equality of Resources", *Philosophy and Public Affairs* 10:4 (1981), pp. 283-345; G. A. Cohen, "On the Currency of Egalitarian Justice", *Ethics* 99:4 (1989), pp. 906-944. Relational egalitarian points of view include: Elizabeth S. Anderson, "What is the Point of Equality?", *Ethics* 109:2 (1999), pp. 287-337; Simon Scheffler, "What is Egalitarianism?", *Philosophy and Public Affairs* 31:1 (2003), pp. 5-39

⁹ Gnaeus Domitius Annianus Ulpianus (c. CE170 – 228), anglicized as Ulpian. A Roman jurist.

¹⁰ Green, *Prolegomena*, §209, p. 249

¹¹ *Ibid.*, §209, p. 250

just for men, but between the sexes.¹² Green's efforts in this area included arguing for greater equality within marriage, including in terms of recourse to divorce; greater access for secondary and higher education for girls and young women; and the rejection of patriarchy within the family. As Anderson puts it, 'his neighbours were neighbours without distinction of sex ... his common good was common to both sexes ... Equality was his goal as much as liberty, and that included equality between women and men.'¹³

Green was also vocal on the need for equality in terms of the extension of the franchise, and parliamentary reform in general. Speaking in 1867, Green rejected the then state of the House of Commons, which involved 'a government by oligarchy of wealth, fenced round and protected by a system of law, which makes many poor to make a few rich, and which, as a matter of history, has done its best to keep the mass of the people abject and ignorant, in order to secure the supremacy of a class.'¹⁴ Democracy, for Green, was something that should benefit all equally, and not work simply to the advantage of a privileged few.

Education was another area in which Green keenly advocated equality, on two fronts. The first concerns gender. He spoke in favour of secondary school education for girls¹⁵ and also called for greater access to higher education for women. As Anderson notes, Green was instrumental in the founding of two Halls at Oxford for the education of women, Somerville and Lady Margaret Hall.¹⁶ The second front on which Green fought for equality within higher education was class. He argued that 'popular [secondary] education is not enough', but, rather, 'we must open the higher education' and 'make the part open for the poorest to the best leaning which this University can impart'.¹⁷ If only elementary education was available to all, then only 'the most ordinary freedom' would be possible.¹⁸ The less the extent to which the poor were kept 'abject and ignorant', the less one class would have 'supremacy'.¹⁹

Green was also in favour of a high degree of economic equality. In the *Prolegomena*, he argues that whereas the ancient Greek, when faced with a multitude of

¹² Olive Anderson, "The Feminism of T.H. Green: A Late-Victorian Success Story?", *History of Political Thought* Vol. XII. No. 4. (Winter 1991), pp. 671-693

¹³ *Ibid.*, p. 685

¹⁴ T. H. Green, "Speech on The Reform Bill, 25th March 1867", in T. H. Green, *Collected Works Volume 5: Additional Writings* (Ed. Peter Nicholson) (Bristol, Thoemmes Press, 1997), pp. 228-232, pp. 228-229

¹⁵ T. H. Green, "Education for Girls, 18th June 1878", T. H. Green, *Collected Works Volume 5: Additional Writings* (Ed. Peter Nicholson) (Bristol, Thoemmes Press, 1997), pp. 322-328

¹⁶ Anderson, "The Feminism of T.H. Green", p. 682

¹⁷ Green, "Speech on The Reform Bill", p. 231

¹⁸ T. H. Green, "Parliamentary Reform", p. 232

¹⁹ T. H. Green, "Speech on The Reform Bill", p. 229

disenfranchised people, would see ‘a supply of possibly serviceable labour’ who could be used as ‘instruments in their service’, the ‘Christian citizen’ must sacrifice this opportunity and instead ‘provide [such] positive help...as is needed to make their freedom real’.²⁰ Green’s concern for the working classes is highlighted by Nettleship, who relates that Green once declared ‘Let the flag of England be dragged through the dirt rather than sixpence be added to the taxes which weigh on the poor’ and that ‘no man had a truer love for social equality’.²¹

Green, however, did not advocate anything so radical as the collectivisation of property, as he held that property is necessary for moral action, which is impossible where property is held in common.²² However, he does provide a radical condition attached to the unlimited right to private property and wealth. While ‘the right to freedom in unlimited acquisition of wealth, by means of labour and by means of saving and successful application of the results of labour’ is acceptable to Green, this right ‘does not imply the right of anyone to do as he likes with those gifts of nature, without which there would be nothing to spend labour upon.’²³ The only justification for the appropriation of finite natural resources, argues Green, is ‘that it contributes on the whole to social well-being’ or ‘that the earth as appropriated by individuals under certain conditions becomes more serviceable to society as a whole...than if it were held in common.’²⁴ In other words, private exploitation of natural resources can only be justified if it is of a greater benefit to society as a whole than if society as a whole held it in common. If it is not, then there is no right to such private ownership and appropriation. Such inequalities as there are have to benefit all in order to justify the inequality.

Certain passages do seem to be at odds with Green’s general commitment to equality, and seem to suggest that there is some ambiguity in his theory. In one passage, Green addresses a key concern regarding equality, property, and the freedom of markets. The situation might arise, he suggests, whereby ‘an inequality of fortunes, of the kind which naturally arises from the admission of these two forms of freedom [freedom of bequest and freedom of trade], necessarily results in the existence of a proletariat [sic], practically excluded from such ownership as is needed to moralise a

²⁰ Green, *Prolegomena*, §270, p. 329

²¹ T.H. Green, quoted in R. L. Nettleship, *Memoir of Thomas Hill Green* (London, Longmans, Green and Co., 1906), p. 18

²² Green, *Lectures*, §218-219, pp. 217-219

²³ *Ibid.*, §229, p. 226

²⁴ *Ibid.*, §229, p. 227

man'.²⁵ Clearly if this were the case, he admits, his commitment to such economic freedoms would be at odds with his commitment that all should have such property as is necessary for moral action. One response – indeed a common socialist response – would be to restrict such economic freedoms to ensure that a class was not completely stripped of property. However, Green does not take such a radical approach, arguing that it is not necessary. 'We must bear in mind', he writes, 'that the increased wealth of one man does not naturally mean the diminished wealth of another.' The economic world is not a zero-sum game, but rather: 'the wealth of the world is constantly increasing' and there is 'no natural limit' to the increase of wealth 'except such as arises from the fact that the supply of the food necessary to sustain labour becomes more difficult as more comes to be required owing to the increase in the number of labourers, and from the possible ultimate exhaustion of the raw materials of labour in the world.'²⁶ In this passage, then, Green's commitment to equality is less certain. It allows for some to get very rich, provided that this is not to the detriment of others.

The essential consideration regarding material equality for Green is that all are able to possess the minimum property required in order to be moral actors within the state: what we have called 'equality of access to rights recognition debates'.²⁷ However, Green calls for more than just the equality of legal rights and possession of a minimum amount of property. Green goes further, and calls for everyone to have a share in government, so that they may be 'intelligent patriots'. Everyone

'must have a share, direct or indirect, by himself acting as a member or by voting for the members of supreme or provincial assemblies, in making and maintaining the laws which he obeys. Only thus will he learn to regard the work of the state as a whole, and to transfer to the whole the interest which otherwise his particular experience would lead him to feel only in that part of its work that goes to the maintenance of his own and his neighbour's rights.'²⁸

Thus members of a society should be equals – *ἴσοι* – in that they all have a share in government, and take active part in the administration of a state. This is in

²⁵ *Ibid.*, §222, p. 221

²⁶ *Ibid.*, §226, p. 224

²⁷ *Ibid.*, § 219-221, pp. 218-220

²⁸ Green, *Lectures*, §122, pp. 130

contradistinction to an unequal society marked by a distinction between the governing and the governed.

Green's personal commitment to advancing the cause of equality shows that his stipulation that equality is necessary for rights recognition does not just mean a basic, formal equality. Rather, his political action gives us reason to believe that he thought a much richer conceptualisation of equality was necessary.

As in Green, so too in Arendt is equality essential for rights recognition. Arendt's take on equality is one that is at odds with much political thought in the last 400 years, and which looks back to the Greek *polis* as its model. This leads to some potential tensions, but tensions which are, ultimately, capable of resolution.

For Arendt, equality is not something natural: 'men are unequal according to their natural origin, their different organization, and fate in history'.²⁹ This is in stark contrast to 'modern' ideas that humans are in some important way equal simply by virtue of their humanity. Rather, for Arendt, equality is only possible in the political community – and herein lies the reason that membership of a political community is so important for rights recognition. To enable freedom, through the recognition of rights, equality is necessary to enable judgment. Thus, 'the equality attending the public realm is necessarily an equality of unequals who stand in need of being 'equalized' in certain respects and for specific purposes'. In this way, 'Political equality, therefore is the very opposite of our equality before death, which as the common fate of all men arises out of the human condition, or of equality before God, at least in its Christian interpretation, where we are confronted with an equality of sinfulness inherent in human nature'.³⁰ We are not born equal, but unequal. Joining a political community makes us equal with the others in that community, so that judgment and rights recognition are possible.³¹

Equality, then, is a key characteristic of the political community for Arendt, in contrast to other forms of collective life. Membership of a political community is distinct, for Arendt, to membership of a household or of what she labels 'society': 'The *polis* was distinguished from the household in that it knew only 'equals', whereas the household (*oikia*) was the center of strictest inequality'.³² Modern 'society' follows on from the household in demanding that 'its members act as though they were members of

²⁹ Arendt, *The Origins of Totalitarianism*, p. 234

³⁰ Arendt, *The Human Condition*, p. 215

³¹ See also: Arendt, *On Revolution*, p. 23

³² Arendt, *The Human Condition*, p. 32

one enormous family which has only one opinion and one interest'.³³ This contrasts with the political community, where, alongside equality, difference, not conformity is the key characteristic: 'the public realm itself, the *polis*, was permeated by a fiercely agonal spirit, where everybody had constantly to distinguish himself from all others, to show through unique deeds or achievements that he was the best of all (*aien aristeuein*).'³⁴

'Modern' equality, on the other hand, argues Arendt, involves conformity. She argues that 'society' excludes the possibility of action, just as the household did in Ancient Greece. 'Society' 'equalizes under all circumstances, and the victory of equality in the modern world is only the political and legal recognition of the fact that society has conquered the public realm'.³⁵ Under these conditions, economics replace ethics, and 'those who [do] not keep [to] the [statistical and economic] rules [are] considered to be asocial or abnormal'.³⁶ Freedom is impossible under such conditions, stemming from such an interpretation of equality. Rather, 'human plurality, the basic condition of both action and speech, has the twofold character of equality and distinction'.³⁷ Distinction, and difference between people, is just as important as equality.

Hauke Brunkhorst argues that there is an inherent contradiction in Arendt's thought on equality and freedom, stemming from the two very different sources from which she draws her key inspiration. On the one hand, her ideas on freedom drawn from the Greek *polis*, he argues, are 'elitist in its content and presuppositions', whereas on the other hand, her ideas on freedom as 'spontaneous new beginning', drawn from St. Augustine, have 'an egalitarian core'.³⁸ The Greek *polis* is elitist because the leisure that makes participation in politics and judgment possible³⁹ depends on 'the existence of 'unequals' who, as a matter of fact, were always the majority of the population in a city-state'.⁴⁰ Equality in political participation for Hellenic males meant the subjugation of woman and slaves, who were forced into lives of labour to make politics economically

³³ *Ibid.*, p. 39

³⁴ *Ibid.*, p. 41

³⁵ *Ibid.*, p. 41

³⁶ *Ibid.* p. 42

³⁷ *Ibid.*, p. 175

³⁸ Hauke Brunkhorst, "Equality and elitism in Arendt", in Dana Villa (Ed.), *The Cambridge Companion to Hannah Arendt* (Cambridge, Cambridge University Press, 2000), pp. pp. 178-198, p. 178

³⁹ Arendt, *The Promise of Politics*, p. 117; see also Butler, "Arendt and Aristotle on Equality, Leisure, and Solidarity"

⁴⁰ Arendt, *The Human Condition*, p. 32

possible: ‘the point of the exploitation of slaves in classical Greece was to liberate their masters entirely from labor so that they then might enjoy the freedom of the political arena’.⁴¹ Equality, then, for the Ancients, admits Arendt, was not connected with justice, as it is today.⁴²

With the technological advances of the last 2500 years, a way out of this paradox is possible.⁴³ No society today depends economically on slavery – at least in the sense of slavery in Ancient Greece. Although capitalist relations remain exploitative, there is no necessity that they do so. Mechanisation and automation mean that it is possible to conceive of societies where all people, not just white men of a certain age and status, have the leisure to be able to participate in politics and in rights recognition arenas. In this sense, we can agree with Butler, who argues that ‘the central place accorded to political participation in the Aristotelian and Arendtian picture of the good life leads their positions toward something much more egalitarian than anything either of them would have countenanced’.⁴⁴ Technological advance allows the possibility that the two freedoms (and equalities) in Arendt can link up: admitting every person to the political community through recognising their right to have rights means that all attain equal status (alongside distinction rather than conformity) and are able to take part in judgment.

Both Arendt and Green, then, give us good reason to take equality seriously: rights recognition, through judgment, simply doesn’t work properly without equality. This equality of access to rights recognising arenas is potentially quite a far reaching equality, extending some way beyond purely formal equality, and demanding a high degree of economic equality.

As we shall explore subsequently in this chapter, and as mentioned briefly in chapter one, rights recognising societies can take many forms, and one can be a member of several at the same time. These can range from formal, state-level arenas of recognition to extremely local, informal, small scale rights recognising arenas. Given

⁴¹ Arendt, *The Promise of Politics*, p. 117

⁴² Arendt, *The Human Condition*, pp. 32-33

⁴³ Shiraz Dossa seems to misunderstand Arendt on this point, arguing that Arendt ‘would have us understand the ‘old and terrible truth, that only violence and rule over others could make some men free’’; placing the quotation of Arendt makes it clear she actually thinks that ‘the rise of technology...has refuted’ this truth. Shiraz Dossa, *The Public Realm and the Public Self: The Political Theory of Hannah Arendt* (Waterloo, Wilfrid Laurier University Press, 1989), p. 67; Hannah Arendt, *On Revolution*, p. 110

⁴⁴ Samuel A. Butler, “Arendt and Aristotle on Equality, Leisure, and Solidarity”, *Journal of Social Philosophy* 41: 4 (2010), pp. 470–490, p. 471

the wide variety of rights recognising societies, it is clearly impossible for perfect equality in all. However, this means we must accept that in unequal societies the rights recognised are not fully legitimate. Full legitimacy of rights comes only when the stipulation for equal access to rights recognising debates is met. In this way, the theory of *egalitarian* rights recognition provides a powerful critique against false consciousness, exploitation, and other systematic inequalities within otherwise rights-recognising societies. For rights to contribute to a truly *common* good, equality is essentially important.

In applying this critique to a rights recognising society, egalitarian rights recognition puts forward two measures, relating to input and outcome of the rights recognition process. In terms of input, egalitarian rights recognition requires that all persons within a society have equal access to rights recognising debates. This means not just the ability to vote, for example, but that all people are able to play as active a role in discussions as each other: this has implications for the amount of leisure time people can enjoy for example.⁴⁵ It also requires universal access to education and to measures including welfare payments and equal access to healthcare, for example, which facilitate peoples' continuing access to the rights recognising process. Such measures as healthcare and welfare payments are possible usually only at the state level: states, politically organised societies, as Green argues, are the best – though not the only – arena for rights recognition (we shall discuss the morphology of rights recognising arenas more fully later in this chapter).

The second measure relates to the outcome of rights recognising mechanisms. The test is whether the rights recognised actually do contribute to a common good, that is, contribute to the good of all within the society equally. If they contribute more to the good of some than to others, then their legitimacy, according to the theory of egalitarian rights recognition, is reduced. Applying these tests to systems of rights provides the resources for powerful critique of those systems.

⁴⁵ As Samuel Butler points out: Butler, "Arendt and Aristotle on Equality, Leisure, and Solidarity", pp. 470–490

1.2 Common good and *sensus communis*

The second key claim advanced in this chapter is that:

5. Recognition of rights or persons may not be arbitrary, but must be based on moral argument, such as the notion of a common good or a *sensus communis*.

Green, as we saw in chapter one, is clear that to be recognised, a right must contribute to a common good: it must benefit all in society. Indeed, Green defines rights as ‘powers ... contributory to a common good’.⁴⁶ By common good, Green does not mean some abstract higher ideal that people work towards, nor does he mean something that will benefit some (a majority even) within society but not others. Rather, by holding that rights must contribute to a common good, Green means that a right, recognised by society, must benefit *every person* within that society. In this way, the right is held in common. The building in of this stipulation is a powerful check on abuses that might otherwise occur in a system of rights recognition.

Societies within which common goods can be recognised range in size, scope and formality. A society can correspond to a nation state, but it can also be a local community, subculture, or work environment. Most people exist in a multiplicity of common-good recognising societies, and correspondingly have a complex network of interrelated obligations, rights and duties, some of which are enforceable by formal means – law – and some of which are not.⁴⁷ Recognition can occur either through formal mechanisms, for example the passing of legislation by parliaments, or informally, through changes in social opinion.

In Arendt’s work, the *sensus communis* plays a similar role to the common good in Green’s work. When judgment takes place, one judges ‘always as a member of a community, guided by one’s community sense, one’s *sensus communis*.’ This is certainly not far removed from Green’s notion that the recognition of rights depends on a notion of the common good or common interest; the *sensus communis* must appeal to

⁴⁶ Green, *Lectures*, §26, p. 45

⁴⁷ Tyler, *Civil Society, Capitalism and the State*, p. 75

all.⁴⁸ The *sensus communis* does not mean that the political community is restricted to something very narrow. Rather, just as Green's common good recognising sphere may theoretically extend to all Christendom, the *sensus communis* for Arendt is expandable to the world, for 'in the last analysis, one is a member of a world community by the sheer fact of being human; this is one's 'cosmopolitan existence'. When one judges and when one acts in political matters, one is supposed to take one's bearings from the idea, [though] not the actuality, of being a world citizen and, therefore, also a *Weltbetrachter*, a world spectator.'⁴⁹

The *sensus communis* is vitally important as it is through viewing a matter from all sides, and from the point of view of all in a community that judgment can take place. The notion of the *sensus communis*, with the idea of seeing things from as many angles and sides as possible, also reinforces Arendt's insistence on plurality and upon distinction as the obverse side of equality. We need a *sensus communis* because there is no single correct or 'right' view: matters decided by judgment are decided through persuasion; they cannot be settled as matters of fact. It is this openness that makes freedom – and rights – possible. 'There must always be a plurality of individuals or peoples and a plurality of standpoints to make reality even possible and to guarantee its continuation', for 'the world comes into being only if there are perspectives; it exists as the order of worldly things only if it is viewed, now this way, now that, at any given time.'⁵⁰ In a pre-echo of Francis Fukuyama, Arendt argues that 'if...there were to be some cataclysm that left the earth with only one nation, and matters in that nation were to come to a point where everyone saw and understood everything from the same perspective, living in total unanimity with one another, the world would have come to an end in a historical-political sense.'⁵¹

A certain vicariousness, which itself requires the maintenance of human plurality, was essential for Arendt. Jerome Kohn recalls that:

'What [Kant] called an 'enlarged mentality' is the capacity, in her words, 'to make present in your own person' others than yourself. There is a lot of talk today about empathy, but that notion was utterly alien to Arendt. She did not

⁴⁸ Arendt, *Lectures on Kant's Political Philosophy*, p. 75

⁴⁹ *Ibid.*, pp. 75-76

⁵⁰ Arendt, *The Promise of Politics*, p. 175

⁵¹ Francis Fukuyama, *The End of History and the Last Man* (London, Penguin, 1992); Arendt, *The Promise of Politics*, p. 176

believe that we could or should feel or think what another person feels or thinks, but that we can and must, if we are to experience events at which we were not present, imagine what those who were present, through the medium of their words, felt and thought. Only then can we think for ourselves in circumstances and from points of view that are not our own. Only then can we begin to comprehend the meaning of a common world, and insofar as the common world of 1968 was already becoming less limited by national boundaries, the need for an increasingly ‘enlarged mentality’ was reflected in the diversity of Arendt’s curriculum.⁵²

Further, using one’s *sensus communis* in forming judgments is a far better alternative than using other criteria, such as utilitarianism, which Arendt singles out for criticism. Considerations of utility and instrumentality in the end, she argues, are the hallmark of the *homo faber* – man as mere fabricator, who cannot understand ‘meaning’, but for whom everything ‘must be of some use...must lend itself as an instrument to achieve something else’.⁵³ For the *homo faber*, with his instrumental, utilitarian way of thinking, meaning itself ‘can appear only as an end, as an ‘end in itself’ which actually is either a tautology applying to all ends or a contradiction in terms.’⁵⁴ The only way out of this position, argues Arendt, is to take the Kantian position that humans are the ultimate ends, and never means. This too is ultimately unacceptable for Arendt, as all nature is degraded, including the very products *homo faber* creates; there is no way out from ‘the sheer vulgarity of all consistent utilitarianism’⁵⁵ and thus utilitarian bases for judgment must be avoided. Rather than calculating the results of a judgment, judgment must be reached by thinking from as many points of view as possible.

To sum up, the work of this section has been to show that recognition of a common good, or the application of a *sensus communis*, is essential to egalitarian rights recognition. It is through underlining the importance of common good that we can have rights based on recognition with their becoming purely arbitrary; a requirement that rights benefit all is an important moral aspect of egalitarian rights recognition. Further, as Arendt points out, we need to judge from as many angles as possible because there is

⁵² Elisabeth Young-Bruehl and Jerome Kohn, “Truth, Lies, and Politics: A Conversation”, *Social Research* Vol. 74:4, (2007), pp. 1045-1070, p.1048

⁵³ Arendt, *The Human Condition*, pp. 154-155

⁵⁴ *Ibid.*, p. 154

⁵⁵ *Ibid.*, p. 157

no single correct view: rights recognition is a matter of political persuasion and debate, not of any sort of scientific ‘right’ or ‘wrong’ answers.

1.3 Communication

The third point put forward in this section is that:

6. Recognition of rights requires the greatest possible facilitation of communication within a society.

Without communication, the debate necessary to the recognition of rights cannot take place. For both Green and Arendt, this debate is crucial. In the case of Green, persons must be able to advance rights claims, which are then discussed: if society concludes they should be recognised as rights, then they become rights. This process is fleshed out somewhat by complimenting it with Arendt’s work on judgment, which suggests that persuasion (*πειθελν*) is essential. Without communication, such political discussion cannot occur; neither can judgment, and thus rights cannot be recognised.

Between successful communication and no communication lies the case of impaired communication. This can be tied to other problems for rights recognition, such as economic inequalities, or inequality of access to debates. Two scenarios can illustrate the potential problems for rights recognition in cases of impaired communication. In the first, the media and press in a society are both concentrated largely in the ownership of one person (a former cruise ship crooner, perhaps). In this case, communication can be controlled deliberately so that the viewpoint of the owner of the media is promoted and views contrary to hers are suppressed. Communication may also be subject to non-deliberate filtering in this scenario, where employees avoid pushing viewpoints which they believe may not be popular with their employer. In addition to this, a media company can suppress key facts or knowledge that may affect the decisions made in the rights recognising arena. In this scenario – in all three ways – the outcome is a distortion of rights recognition: when the views of some are suppressed and others exaggerated, the good recognised is no longer common to all.

A second scenario is one in which some people lack the ability to communicate as well as others in society. Let us assume that most people in a given society have mobile telephones, freedom of movement and the means to travel, the means to assemble in the sort of places Jürgen Habermas sees informal ('episodic' and 'occasional') public spheres as forming (in 'taverns' and at 'rock concerts', amongst other places⁵⁶), access to broadband internet, and so on. However, one group of people lack some of this: perhaps they do not have the means to afford tickets to rock-concerts, or to travel far; it could be that broadband internet and mobile phone signal is not available in their area of the country. In both of these cases, the ability of these people to have their say in processes of rights recognition is reduced, and thus the rights resulting from the recognition process do not consider their good as much as the good of others in considering a common good promoted by rights. It is quite plausible that this has been the case in dealings with indigenous populations, for example, who, because they have had limited communication, have tended to have been overlooked.

More subtle than a lack of access to a reliable phone line, Arendt points out the dangers of atomism within a society, which can lead to a break of communication. It is vital that there is an 'inter-est' between people; that there is a political *community*. In Arendt's discussion of totalitarianism – a social system marked by the absence of rights – one of the key factors in the coming into being of totalitarian systems is the rise of the 'mass man'; it was the masses which allowed Hitler, Stalin, and others to seize power through popular support.⁵⁷ Yet the 'masses' were not created 'from growing equality of condition, from the spread of general education and its inevitable lowering of standards and popularization of content' as many had expected and predicted, but, rather, 'highly cultured people were particularly attracted to mass movement and...generally, highly differentiated individualism and sophistication did not prevent, indeed sometimes encouraged, the self-abandonment into the mass for which mass movements provided'.⁵⁸ According to Arendt, the masses 'grew out of a highly atomized society' in which previously the 'loneliness of the individual had been held in check only through membership in class'. The chief characteristic of the 'mass man', then, 'is not

⁵⁶ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, Massachusetts, MIT Press, 1996), p. 374

⁵⁷ Arendt, *The Origins of Totalitarianism*, pp. 311-318

⁵⁸ *Ibid.*, p. 316

brutality and backwardness, but... isolation and lack of normal social relationships'.⁵⁹ A political community with only very loose interpersonal bonds – a political 'community' where radical individualism and atomisation is endemic – presents a large obstacle to rights recognition (even though those rights pertain to the individual). This sort of political community constantly runs the risk of facilitating the coming into being of totalitarianism. The irony in this is that part of the West's response during the Cold War to the threat of totalitarian rule was to argue for precisely the sort of radical individualism, often in the guise of human rights or negative liberty,⁶⁰ which Arendt saw as leading directly to that sort of totalitarianism it sought to avoid.

Her commitment to communication against atomism, couple with a preference for the 'open society' of the state, as against the 'closed society' of the nation, reflects Arendt's commitment to a strong and open public realm as a key part of a political community.⁶¹ Indeed, it is this speech action in the public realm that is distinctly political, and which marks politics off as an activity from economics or other social intercourse. The freedom to speak and act is the definition of the political for Arendt: 'Freedom, moreover, is not only one among the many problems and phenomena of the political realm properly speaking, such as justice, or power, or equality; freedom, which only seldom – in times of crisis or revolution – becomes the direct aim of political action, is actually the reason that men live together in political organization at all. Without it, political life as such would be meaningless. The *raison d'être* of politics is freedom, and its field of experience is action.'⁶²

Any political community, then, if it is properly to be labelled as such, must have an open public realm in which political action and speech can occur; otherwise those in the society are not fully persons. As noted in the previous chapter, it is the 'second birth' into this political society that divides the naked human being from the person; if this society is not open enough to allow for speech and action then a life within it 'it

⁵⁹ For a cinematic portrayal of the totalitarian 'mass man' as a product of isolation and lack of normal social relationships, see the character of Tim Stoltefuss in Dennis Gansel's exploration of a totalitarian experiment in a German school, *Die Welle*. Before the creation of the totalitarian style 'mass movement', he is the archetypal loner, cut off from society; following the creation of the movement, it is he who goes furthest and who becomes the most radically committed to it. Dennis Gansel (Dir.), *Die Welle* (Rat Pack Filmproduktion/Christian Becker, 2008)

⁶⁰ Examples of this argument include: Friedrich von Hayek, *The Road to Serfdom* (London, Routledge, 1962); Isaiah Berlin, *Two Concepts of Liberty: an Inaugural Lecture delivered before the University of Oxford on 31 October 1958* (Oxford, Clarendon Press, 1958); Margaret Thatcher, 'Free Society', Speech to the Conservative Party Conference (1975) [<http://www.margaretthatcher.org/document/102777>]

⁶¹ Arendt, *Essays in Understanding*, p. 208

⁶² Arendt, *Between Past and Future*, p. 146

literally dead to the world' and 'cease[s] to be a human life because it is no longer lived among men'.⁶³ As well as a minimal requirement, we may assume that the more easily and effectively people are able to communicate with each other, and the more well-informed they are, the better the quality of their debate will be. As we saw with Green (above) this may place restrictions on a society in terms of culture, language, and geography, though modern technology, as we shall explore further, may provide one answer to this.

1.4 The shape and limits of society

The fourth claim this section will advance is that:

7. Society' in the context of rights recognition is open to ideas from without, and has no necessary limits.

Green is clear that a person can have rights 'as a member of a family or of human society in any other form, without being a member of a state at all'.⁶⁴ It is in this way, he argues, that a slave can be said to have rights: these rights are 'independent of, and in conflict with, the laws of the state in which he lives, but they are not independent of social relations'. Rather, they:

'arise out of the fact that there is a consciousness of objects common to the slave with those among whom he lives, – whether other slaves or the family of his owner, – and that this consciousness constitutes at once a claim on the part of each of those who share it to exercise a free activity conditionally upon his allowing a like activity in the others, and a recognition of this claim by the others through which it is realised. The slave thus derives from his social relations a real right which the law of the state refuses to admit.'⁶⁵

What makes the right real is the 'social relations', not the positive law of the state.

⁶³ Arendt, *The Human Condition*, pp. 176-177

⁶⁴ Green, *Lectures*, §141, p. 145

⁶⁵ *Ibid.*, p. 145

The morphology of a society, then, is quite flexible with regards to its suitability for rights recognition. What Green describes here is little more than a group of people who allow each other to do certain activities in return for reciprocal permission. It may not even be a fixed group of people – new family members are born; slaves are bought or sold; people are born and die. The size of the group does not seem greatly to matter, so long as claims to certain actions can be recognised. Neither does the society described seem necessarily to be territorially fixed: it could operate equally well in a state of mobility, perhaps even nomadically.

However, Green's expectation seems to be that normally rights are related to the state. Indeed, the state 'is a form which society takes in order to maintain [rights]'.⁶⁶ Although a person can have rights as a member of 'human society in any other form, without being a member of a state at all', the fact that the state has the power to maintain rights provides a clear reason for society to take the form of a state. When this happens, Green holds that 'The other forms of community which precede and are independent of the formulation of the state, do not continue to exist outside it, nor yet are they superseded by it. They are carried on into it.'⁶⁷ Green's use of the phrase 'carried on into it' is instructive here, and points to Green's drawing on Hegel in this regard. *Aufheben*, the word commonly translated as 'to sublimate' may be broken down into two parts: *auf*, which may be rendered, depending on context, 'on', and *heben*, which can carry the meaning of 'carry'. The relationship of individual to pre-state society is, then, sublated – it is both preserved and changed – in the new form of the state. This reference to Hegel would seem to confirm the idea that although Green holds rights to be possible in political communities other than the state – even in extremely ad-hoc communities – nevertheless the state remains the ideal political community, into which rights may be carried; nowhere does Green suggest that the process might occur in reverse.

As we have seen, Green requires that a society of people must be '*ἴσοι καὶ ὅμοιοι*' in order for rights to be recognised. We have discussed equality (above), but what about similarity? Given that Green holds that similarity is a necessary prerequisite in a group of people for rights recognition to occur, the key question is: how much similarity is needed? Correspondingly, how much variation is possible within a group, and how wide a group may be commensurate with rights recognition? These questions

⁶⁶ *Ibid.*, p. 144

⁶⁷ *Ibid.*, p. 146

are answered to some extent in the *Prolegomena to Ethics*. The second half of Chapter III concerns ‘The Extension of the Area of Common Good’, and here Green considers how wide a group of people might have some good in common. Green uses the phrase *ἴσοι καὶ ὅμοιοι* here,⁶⁸ and it is worth pointing out that one meaning of *ὅμος*, the stem of *ὅμοιοι*, is ‘common’. ‘Sameness’, then, has a lot to do with the ability of people to conceive of having something in common with each other.

Green argues that the sphere of the *ὅμοιοι* – that is, the sphere of people who can conceive some commonality – has expanded throughout history: ‘the earliest ascertainable history exhibits to us communities, relatively very confined, within any one of which a common good, and in consequence a common duty, is recognised as between the members of the community, while beyond the particular community the range of mutual obligation is not understood to extend.’⁶⁹ Originally, then, ‘sameness’ extended only so far as members of a small community; persons outside the community were somehow ‘different’.

Since then, argues Green, the sphere of commonality has expanded, as it has come ‘to be understood that no race or religion or status is a bar to self-determined co-operation’. The breaking down of such barriers has had the result that ‘persons come to be recognised as having claims who would once not have been recognised as having any claim, and the claim of the *ἴσοι καὶ ὅμοιοι* comes to be admitted where only the claim of indulged inferiors would have been allowed before’.⁷⁰ Here Green brings in the idea of equality – *ἴσοι* – too, unsurprisingly, given his use of Philistines and Israelites, two groups which viewed each other as not only different but inferior as well, as an example. The key point, though, is that the sphere of those regarded as *ὅμοιοι* has expanded. The concept of similarity has remained the same, but its area is enlarged. As Green puts it: ‘It is not the sense of duty to a neighbour, but the practical answer to the question Who is my neighbour? that has varied.’⁷¹

However, the process does not stop there, according to Green. For Green, the idea of a common good is an idea implied ‘in the most primitive human society’ and an idea the tendency of which ‘in the minds of all capable of it must be to include, as participators of the good, all who have dealing with each other and who can

⁶⁸ In Green, *Prolegomena*, § 207, p. 247, for example.

⁶⁹ Green, *Prolegomena*, §206, p. 245

⁷⁰ *Ibid.*, §207, p. 247

⁷¹ *Ibid.*, §207, p. 247

communicate as ‘I’ and ‘Thou’.⁷² In other words, *ὄμιοι* can be any people who are able to communicate with each other. This point is amplified in Green’s *Lectures on the Principles of Political Obligation*, where he describes the process by which states take in smaller groups: ‘A common humanity, of which language is the expression, necessarily leads to the recognition of some good as common to these families with those which form the state. This is in principle the recognition of rights on their part’.⁷³ In other words, the ‘right to have rights’, to use Arendt’s phrase – the right of membership – is extendable to all those who are perceived as belonging to a common humanity, a belonging which is demonstrated by the ability to communicate using language. Rights recognition is possible wherever communication can occur.⁷⁴

The implications of this for rights recognition beyond the state are significant. When Green argues that a society must be equal and similar for recognition to occur, this similarity does not, it would appear, have to include considerations of race, religion, ethnicity or nationality. As we have seen, quite the opposite is the case: Green argues that, historically, the barriers these categories denote have been broken down. Further, Green’s example in the *Lectures on the Principles of Political Obligation* shows that recognition can extend beyond ‘the society’ (perhaps defined narrowly as a nation-state), so long as some common good can be conceived. We can hold people outside our nation or community to have rights.

The sphere of commonality, then, is potentially unlimited, so long as communication is possible. Green does not shy away from following this point to its logical conclusion: ‘With growing means of intercourse and the progress of reflection the theory of a universal human fellowship is [the] natural outcome.’⁷⁵ Clearly, universal human fellowship has not yet been arrived at, though for Green, it is not the theory itself but ‘rather the retardation of the acceptance of the theory that the historian has to explain’.⁷⁶

Green offers some suggestions as to what may be impeding the universal fellowship of man. The impediments ‘are the same in kind as those which interfere with the maintenance of unity in the family, the tribe, or the urban commonwealth’. Of

⁷² *Ibid.*, §209, p. 250

⁷³ Green, *Lectures*, §135, pp.139-140

⁷⁴ This is perhaps extendable to non-human animals too, if it can be shown that they are able to communicate in a ‘language’. See: Sue Donaldson and Will Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (Oxford, Oxford University Press, 2011)

⁷⁵ Green, *Prolegomena*, §209, p. 250

⁷⁶ *Ibid.*, §209, p. 250

these, the ‘prime impediment...is selfishness’, which may be described as ‘a preference of private pleasure to common good.’⁷⁷ However, the wider the fellowship in question, the more impediments come into play: ‘ignorance, with the fear that springs from ignorance; misapprehension of the physical conditions of well-being, and consequent suspicion that the gain of one community must be the loss of another; geographical separations and demarcations, with the misunderstandings that arise from them’.⁷⁸ These impediments must be overcome in order to realise the potential community of ‘all men’: everyone, if they can communicate, can possibly conceive of one another as *ὅμοιοι*. However, in practice this conception is prevented by obstacles, albeit obstacles that Green holds can potentially be overcome.

For theories of rights recognition, the key point is that there is ‘no necessary limit’ to the group of people who may be considered *ὅμοιοι*: the barriers and impediments Green describes may be overcome or removed. This conceptualisation may have something useful to contribute to debates between cosmopolitans and ethical particularists, in that it suggests a position between the two. What is important is still one’s duty to one’s neighbour, which broadly suits the ethical particularist position. However, one’s neighbour may be any fellow man, which suits cosmopolitanism.

If we accept Green’s argument that there is no necessary limit to those we can recognise as *ὅμοιοι*, the question remains as to whether this limitless sphere of commonality is normatively desirable. There may be reasons why we might think it better to choose other criteria to determine who is *ὅμοιοι*: we may decide that it is important to maintain precisely those barriers which Green suggests have been, and are being, gradually removed. Green makes an argument against any such position however, and holds that there is a normative reason to conceive *ὅμοιοι* as all people, rather than any narrower group. The conception of a common good, argues Green, has ‘come to be conceived with increasing clearness, not as anything which one man or set of men can gain or enjoy to the exclusion of others, but as a spiritual activity in which *all* may partake, if it is to amount to a *full realisation* of the faculties of the human soul.’⁷⁹ The implication is clear: the wider the range of people amongst whom a good can be common, the fuller the faculties of the human soul can be developed and

⁷⁷ *Ibid.*, §216, p. 258

⁷⁸ *Ibid.*, §216, p. 258

⁷⁹ *Ibid.*, §286, p. 349. My emphasis.

realised; restriction of the conception of *ᾠμοιοι* to a smaller group of people places a restriction on human development and perfection, and thus must be avoided.

For Arendt, the political community is not necessarily geographically fixed. In her discussion of the Greek *polis*, she notes that it is ‘not the city-state in its physical location’ but rather ‘the organization of the people as it arises out of acting and speaking together’ and therefore ‘its true space lies between people living together for this purpose’.⁸⁰ The political community is, literally, that which is ‘*inter est*...which lies between people’.⁸¹ As those people shift from one part of the world, so does the political community: as Pericles puts it, ‘Wherever you go, you will be a *polis*’.⁸² For Arendt, ‘action and speech create a space between the participants which can find its proper location almost any time and anywhere’.⁸³ Arendt’s conception of the state is similarly mobile. In contradistinction to the nation, ‘which is attached to the soil which is the product of past labor and where history has left its traces’, the state ‘rul[es] over a territory where its power protects and makes the law’ and, as ‘a power institution, the state may claim more territory and become aggressive’.⁸⁴ The territory over which a state exercises power may shift, through factors including aggression and warfare in general, or through mergers or secessions: Tanzania (merger of Zanzibar and Tanganyika, 1964), India (partition, 1947), the UK (Irish independence, 1922), Germany (reunification, 1990), and a long list of other states have changed territory in this way.

Arendt’s attention to the cosmopolitan aspects of Kant’s work on judging leads us into the final consideration from her work of what may be the proper political community. This is the idea of world federation, or perhaps, in today’s terminology, ‘multi-level governance’. After the massive dislocations of the early twentieth century, and the totalitarianism of the 1930s and 1940s, Arendt noticed a tendency to return to the 19th Century nation-state and argued strongly against this, that ‘restoration...promises nothing’ but a return to the very conditions that led to

⁸⁰ *Ibid.*, p. 198

⁸¹ *Ibid.*, p. 182

⁸² Pericles, quoted in Arendt, *The Human Condition*, p. 198

⁸³ Arendt, *The Human Condition*, p. 198

⁸⁴ Arendt, *Essays in Understanding*, p. 208

totalitarianism, meaning that ‘the process of the past thirty years might commence again, this time at a greatly accelerated tempo’.⁸⁵

Rather, Arendt calls for an ‘international politics’, which she distinguishes from ‘global politics’, which she holds to be associated with imperialism. Global politics in this sense involves the destruction of ‘societies and communities whose atomization is one of the prerequisites of imperialistic domination.’⁸⁶ International politics, on the other hand, involves a federative structure. Arendt notes that while the distinction she makes between state and nation ‘would take the wind out of the sails of nationalism by putting man as a national in his right place in public life’, this is not enough. Rather, ‘the larger political needs of our civilization, with its ‘growing unity’ on one side, and its growing national consciousness of peoples, on the other’ can be met only ‘with the idea of federation.’ In a worldwide federated structure, ‘nationality would become a personal status rather than a territorial one’ and ‘the state, on the other side, ‘without losing its legal personality would appear more and more as an organ charged with competencies to be exerted on a limited territory’.⁸⁷ Here she is quoting with approval from *La Nation* by J. T. Delos, as the essay is a book review. The context and provenance might be cause for caution against placing undue emphasis on this passage, but it is a theme she returns to. In the preface to the first edition of *The Origins of Totalitarianism*, Arendt calls for a ‘new political principle’ ... ‘a new law on earth, whose validity this time must comprehend the whole of humanity while its power must remain strictly limited, rooted in and controlled by new territorial entities.’⁸⁸ This ‘new law’ may be read as both the notion of limited, territorial states within a multi-level governance structure, and the ‘right to have rights’. Elsewhere, Arendt argues against globalisation in favour of a ‘world-wide federated political structure’.⁸⁹

In her arguments on this point, Arendt is influenced by early moves towards European federation, which preceded the foundation of the European Coal and Steel Community (forerunner to the EEC, the EC, and today’s EU) by some years. Her aims in many ways echo those of the founders of the ECSC: the aim was to make war impossible, to avoid repeating the worst events of the mid twentieth century. The key method for this was discussed in the 1940s, and involved limiting sovereignty, and

⁸⁵ *Ibid.*, p. 120

⁸⁶ *Ibid.*, p. 208

⁸⁷ *Ibid.*, p. 210-211

⁸⁸ Arendt, *The Origins of Totalitarianism*, p. ix

⁸⁹ Arendt, *Men in Dark Times*, p. 84

divorcing sovereignty from nation. Thus Arendt looks approvingly on the Dutch Underground movement, who contended that ‘the problem of equality of rights should not be a matter of restoring sovereign rights to the defeated state but of granting it a limited influence within the European Council or Federation’.⁹⁰ Likewise, Arendt notes that the ‘cardinal principle of French resistance was *liberer et federer*’, both in terms of replacing the centralist French state with a federal system, and calling for ‘a federative structure of Europe...based on similarly federated structures in the constituent states.’⁹¹ Arendt is clear that this course of federalism, ‘taken by the European resistance’, is ‘the only alternative’ to a pointless and destructive return to the nation-state system and the potential for history to repeat itself.⁹²

This section has sought to demonstrate that the morphology of the rights recognising sphere is a very flexible one. Green and Arendt show that such spheres vary greatly in size, shape and formality; they need not be tied to the nation-state, or any state or formal apparatus at all. A rights recognising society could in theory encompass the whole world, and Arendt points towards this working in a federal structure, with each person belonging to several spheres at the same time.

The foregoing analysis has argued for four key features of the theory of egalitarian rights recognition, which take their cue from Green and Arendt. The first is the requirement of equality. Rights recognition can only occur, through considerations of common good, *sensus communis*, and judgment, in societies which have equality of access to rights recognition debates. The second point concerns common good and the *sensus communis*: rights recognition can only occur in societies in which it is possible to form a notion of a common good. Further, in this way rights recognition is not arbitrary positivism, but has a key moral component. The third point put forward here is that rights recognition can only occur in which a high quality of communication is facilitated. If some parts of society are unable to communicate with others, or if the voices of some are suppressed whilst others’ are amplified, then the rights recognition process is skewed and flawed. Fourth, the work of both Green and Arendt shows that rights recognising societies can take many shapes, and that there are no necessary limits to the size of a rights recognising society (a point we shall return to in chapter seven).

⁹⁰ Arendt, *Essays in Understanding*, p. 116

⁹¹ *Ibid.*, p. 114

⁹² *Ibid.*, p. 120

The next section will look in detail at how precisely rights are recognised within society.

2. Rights as synchronically recognised (though not necessarily enforced) claims

The work of this section will be to elaborate the following three claims:

8. Rights are recognised claims, not established ways of acting.
9. Recognition of rights and persons is synchronic, not diachronic.
10. Recognition of rights is logically distinct from enforcement and maintenance of rights; although enforcement and maintenance of rights is desirable, recognition can exist without enforcement and maintenance.

An underlying assumption of this chapter so far has been that rights are claims that are recognised: saying that X has a right is to say that X makes a claim, A, that is recognised by a society or political community, Z. A claim that is not thus recognised is not a right, but remains a claim. For present considerations, the question of whether claim A requires that political community Z, or another party, Y, do anything in respect of that claim, does not require an answer.

Within the rights recognition literature, the idea that rights are claims in this sense is not an idea that is universally subscribed to. Rex Martin, whose book *A System of Rights* is one of the most prominent arguments in favour of the idea that rights require recognition,⁹³ argues that rights are best viewed not as claims, but as established practices: ‘contrary to the view that a right is a claim, a valid claim, or an entitlement, I advance the notion that a right is an established way of acting’.⁹⁴ This idea requires serious consideration, as the sort of political society needed to secure established ways of acting may take on a quite different form from that needed to enable claims to be made and socially recognised. This chapter will suggest that there are some problems

⁹³ Rex Martin, *A System of Rights*, p. 27

⁹⁴ Martin, *A System of Rights*, p. 1; See also p. 58; p. 60

with holding rights to be established practices, before turning its attentions to meeting Martin's criticisms of rights as claims, with the overall aim of shedding more light on precisely what sort of political community would be necessary to enable rights as claims to overcome Martin's criticisms, and thus what sort of political community would enable rights recognition.

There is no doubt that Martin's work represents a serious and important contribution to the literature which suggests that rights are not innate, and, rather, that they require social recognition to properly be called rights. At a time when literature on rights was dominated by conceptions of rights such as those of Rawls, Nozick and Dworkin, which held there to be a thin set of natural, human rights which humans have by virtue of being human, Martin's claim that rights are not innate, and that they require some form of social recognition, was an important and controversial one. A further distinction between Martin and the foregoing literature is that he goes beyond insistence on a list of 'thin' rights, and sets out an entire system in which he believes rights will best be upheld. There is much common ground between the arguments Martin puts forward and many of the arguments presented in this thesis. However, I wish to challenge Martin on a few points, particularly concerning the question of whether rights are claims. These differences in detail, however, should be in no ways construed as a criticism of the entirety of his approach, with which I have a great deal of sympathy.

Through examining Rex Martin's work on rights, I hope to flesh out some distinctions – between tradition and recognition; actions and claims – that should help to make clearer what sort of political community would best allow for rights recognition. Martin's theory of rights is also worth examining in its own right as an alternative theory of rights recognition to the one which I am proposing, albeit separated largely by questions of detail. Finally, Martin's assertion that rights are established ways of acting rather than recognised claims is an assertion I wish to challenge, and an objection to the theory I am putting forward that I feel I need to meet.

2.1 A walk in the woods: tradition, action and claims

In setting out his conceptualisation of rights as established ways of acting, Martin asks us to 'imagine the following scene': some people live 'in an out of the way place, a forest perhaps', where there is a pond in which people are accustomed to fishing. Access to the pond may be gained via 'several well-worn paths', each of which

lead to different parts of the forest. However, ‘one day a fence is put across one of the paths and the people are told that the path is closed.’ Resultantly – and here talk of rights enters the picture – ‘one of them responds that this [the closure] cannot be’, as the people ‘are going to the pond to fish and it is their right to do so and they have taken this path and it is their right to do so’ and therefore ‘the fence maker should remove the fence or, at the very least, the people should be able to climb over it and continue to the pond’.⁹⁵ Now there are two rights invoked here: a right to access the pond via the path, and the right to fish. The latter is relatively insignificant for Martin’s example, save for disabusing the reader of the notion that the people might be fishing illegally. The key right in focus here is the right to travel along the length of the path. The key conclusion Martin draws from this illustration is that ‘rights are – or involve – accredited ways of acting’, as ‘before it is challenged, the way of acting is relatively unself-conscious – unreflective and routine’, yet ‘when a way of acting has been challenged or infringed, the practice in question may well be referred to by its proponent, explicitly, as a right’.⁹⁶ Further, to be a right, argues Martin, the practice – using the path – must be ‘accredited...by an appropriate social ratification’; it was ‘an accepted [practice], not merely by those who engaged in it but also by others whose judgment seemed relevant’.⁹⁷

Whilst at first glance this may seem perfectly reasonable as an account of rights, I would like to suggest that there are a few problems with Martin’s account. The first of these is the rootedness of rights in his example. What justifies things is the fact that they have been done, and that – until now – no-one has objected. Perhaps the most well-known, and vehement, line of argument against this view of things can be drawn from the work of Brian Barry, who points out that ‘if somebody says ‘We’ve been doing this for a long time’, the right response may be ‘Well, in that case it’s high time you stopped doing it.’’⁹⁸ The fact that something has been done in the past, he argues, ‘is not in itself a good reason for going on doing it regardless of whether or not it was a good idea then, is a good idea now, or will ever be a good idea in the future’.⁹⁹ Perhaps this line of criticism is, in itself, not sufficient to disprove Martin’s view of rights: it is not simply tradition, but socially recognised tradition, that he is referring to. However,

⁹⁵ *Ibid.*, pp. 24-25

⁹⁶ *Ibid.*, p. 26

⁹⁷ *Ibid.*, p. 26

⁹⁸ Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge, Polity, 2001), p. 254

⁹⁹ *Ibid.*, p. 264

it is unclear to what extent the fact that something has been traditional can be divorced from the fact of its social recognition. If a practice forms part of a society into which one is born and within which one grows up, then it would take some unusual realisation or revelation for one to reject the tradition; convincing others within a society to withdraw their recognition too would be, likely, even more difficult. Kwame Appiah suggests that for changes in normal tradition behaviour to be realised, more is required than simply rational arguments.¹⁰⁰ Traditions – established practices – frame the very society that is required by Martin’s conceptualisation of rights to recognise those rights.

A similar, but logically distinct, point of criticism concerns novelty. In Martin’s example, access to the path is a right because it is an established way of acting, accredited by society – people, it seems, have used that path for a long time, perhaps as long as people can remember. Yet, what if the path were new? When the path first existed, when the first person walked along it, did he or she have a right to do so? By Martin’s reasoning the answer is no: it was not then, at that point in time, an established way of acting. The first person to walk along the path had no right to do so. Then did the second, or third? How many people must walk down a path, before their walking along it is considered to be an established way of acting? The answer to this seems quite unclear.

A rejoinder to this criticism might be that I have wilfully misunderstood how paths come to exist. In a forest, historically, there are no ‘paths’; what makes paths is the fact that several people over a long time have walked in certain way, from certain place to certain place, and in doing so have created a path, it may be argued. Geographically, at least, this is true. But the criticism still stands if we are to take Martin’s second right in his example: the right of people who have traversed the path to fish. Did the first person to bait a line and catch a fish have the right to do so? Again, it is unclear *when* an action becomes an established social practice, or *what criteria* its establishment may be judged by.

The idea that rights are established ways of acting leaves Martin’s theory unable to account for new rights. Universal inoculation against polio, to take one example, was not an established social practice a century ago, or even more recently, being only first used in 1952. Yet now it is broadly considered a right in many societies that one receives such inoculation as a child. To take another example, free education is

¹⁰⁰ Kwame Anthony Appiah, *The Honor Code: How Moral Revolutions Happen* (New York, W. W. Norton and Co., 2010)

considered a right – primary and secondary schools are not a privilege, but are open to all, without charge. Yet when the first classes of children began their free education in Britain in the 1890s, following the 1891 Free Education Act, what they were doing was not an established social practice. It was, however, a right that they could claim against the state, which was required to fund their school fees. This points to, at the very least, a tension between the notions of rights as established practices and new rights. It also points towards the idea that at the heart of rights is a claim. It was not an established way of acting for schools to offer free education to pupils; it was not an established way of acting for children to attend schools and not to pay. However, there was a claim, or, rather, two claims, that met with social recognition. The first claim was that children should be educated for free. Social agreement with this claim led to the possibility of the second claim, the claim on the part of each child (or made for the child by parents) that he or she should receive free education. In each case, the important point is that rights are the result of dialogue: claims are advanced, discussed, and either accepted or rejected. This is different from sheer acts, accompanied by no claim content; as we saw in our discussion of Arendt, such acts need speech in order to make them intelligible. Rights recognition is a *dialogical* process.

Having cast a degree of doubt on the idea that rights are established ways of acting I will now try to defend the idea that rights involve claims against Martin's criticism of this approach. However, in doing so, I will make a different argument from the one held by Martin to be typical of the 'rights as claims' approach, that of Joel Feinberg. Unlike Feinberg, I will argue that rights do involve claims, but that these claims must be socially recognised. In this way, the idea of rights put forward here will reside somewhere in the space between Martin's and Feinberg's.

Before proceeding, however, it would be useful to make a few terminological distinctions, particularly concerning the terms 'claims', 'actions', 'recognition', and 'tradition'. Recognition and tradition are susceptible of being conflated or confused; contrary to this I argue that they are two separate processes (or facts). Similarly, when talking of rights claims, what is often being referred to is an action, rather than a claim.

Tradition is a process which is diachronic in nature, and a fact which refers to this diachronic process having happened. This is made clear by the etymology of the word. The Latin *traditio* was something 'handed down', stemming from *trans dare*, to give something over. Tradition, then, is something handed from one person to the next; this must of necessity be a diachronic process, an action repeated by successive people

over time. In contrast, recognition is an instant process. When a meeting recognises a speaker, the speaker's status changes from unrecognised to recognised in that instant; it can change back again just as instantaneously. Thus, when Martin is talking about socially recognised established practices, I would suggest he is talking about two different qualities: social recognition is not the same as tradition. To take an example, it may be a tradition for a sports club in a university to require its new members to drink a large quantity of alcohol before swimming across a river as part of an initiation ceremony; conceivably this practice has been handed down for decades or longer. However, the process is not socially recognised – indeed, the university in question has banned such practices, many students disapprove, and the sports team – knowing themselves that what they are doing is not approved of, goes against the university's regulations, and is quite possibly illegal – goes to great lengths to keep the tradition from the notice of the wider public, who do not recognise the tradition as having validity. Rather, in a moment of instant judgment (as opposed to diachronic tradition), they withhold their recognition (or approval) of the practice, as they think it is unwise and probably dangerous.

Similarly, 'claims' can usefully be distinguished from 'actions'. Often, the two are held to go together: to walk along the path Martin describes might well be seen as a claim that one should be allowed to walk along the path. However, it is possible – and useful – to separate the two both conceptually and temporally.

Green holds that rights are recognised claims¹⁰¹ rather than actions. Yet the claim and the action are in close relationship: the recognised claim is a claim that some person should or should not perform certain actions. A right to freedom of movement calls for others not to act in such a way as to impede the person with the recognised claim that constitutes that right. A right to receive welfare payments calls for others (often the state) to perform the act of transferring money that that recognised claim calls for. This is significant when we consider Martin's argument that rights are 'established ways of acting'. Here, in apparent opposition to Green, he equates rights not with claims, but with actions. Although both Green and Martin talk of social recognition, it is clear that this is conceptualised in subtly, but significantly, different ways.

An action may relate to a claim in several ways: the claim may be implicit in the action (a); the claim may be absent from the action (b); the claim may be made and

¹⁰¹ Green, *Lectures*, §21, p. 41

recognised preceding the action (c); the claim may be advanced but not recognised preceding the action, which is then committed without validity (d); the claim may come after the action and be recognised (e); the claim may come after the action but receive no recognition, thus invalidating the action (f). In all of these cases, the claim and the action may be made by two different parties. Let us explore these distinctions a little further.

(a) An action may entail an unspoken claim within it; however the claim is still something separate. Walking down a path, or fishing, may contain the implicit claim that ‘I am allowed (or should be allowed) to perform this action’: when challenged as to what he is doing, the walker or fisherman may explain that he claims the right to walk or to fish. However (b), it is by no means clear that the performance of an action always entails this claim. When a poacher is challenged as to what he is doing, he is likely to flee the scene as quickly as possible: he knows that although he is performing an action, he has no right to be doing so.

(c) There are circumstances in which a claim is advanced and recognised prior to any action being taken. Here, the right exists irrespective of whether it is exercised: the recognised claim – not the established way of acting – is enough. Take, for example, the debate surrounding the ‘right to die’. Various campaigners are advancing the claim that, with the consent of the terminally ill person, a second person should be allowed to administer drugs that would end the terminally ill person’s life. If this claim receives legal and social recognition before those seeking the right to end their lives act to do so, then we can see that the claim precedes the action. However (d), it is also possible to conceive of a situation where, despite the arguments put forward by campaigners, legal and social recognition is withheld. The claim is advanced, but not recognised. Despite this, a terminally ill person asks a second person to administer drugs to end their life, and drugs are administered, killing the terminally ill person. In this circumstance the action is separate from the claim, and is committed with the knowledge that the claim has already been advanced and rejected.

(e) A claim may come after an action. Let us consider an example related to Martin’s path. In this example, someone builds a house, unaware that legally a public right of way runs straight through where he has built his living room.¹⁰² This action was

¹⁰² This sort of thing does occur, for example: “Villager in fight to keep ramblers out of his living room”, *The Scotsman*, 11th August 2010 [<http://www.scotsman.com/news/villager-in-fight-to-keep-ramblers-out-of-his-living-room-1-820666>]

made without any claim as to the validity of the claim of the public to their right of way – the action, building the house, was made in complete ignorance that a right of way might be a problem. Therefore, there was no claim implicit in the action. Two claims, however, follow from the action. The first is the claim of walkers that they should be allowed access to the right of way, and that therefore the house has been built illegally (f). The second is the counter claim of the house builder and owner, now aware that there is a claim regarding a right of way, that there is no right of way and that his house was built legally. In this case, two outcomes are possible: either the claim on the half of the walkers is recognised (f), or that on the half of the house builder (e). In both these cases, one claim will be made after the action that will be recognised, validating the action, and one claim will not be recognised, invalidating that action.

In this section, then, I have sought to show that claims are distinct from actions, and that recognition is correspondingly distinct from tradition. Claims require recognition to become rights. Actions, if repeated often enough over time, may become traditions. Actions are not rights, but they can be the exercise of rights, which are recognised claims to perform that action. Therefore, Martin’s description of rights as ‘established ways of acting’ is one which I must reject.

2.2 Defending rights as claims

For Feinberg, ‘to have a right is to have a claim *to* something and *against* someone, the recognition of which is called for by legal rules or, in the case of moral rights, by the principles of an enlightened conscience’.¹⁰³ For Martin, this formulation is at odds with his own account, ‘on the crucial point at issue, whether social recognition and maintenance are essential to rights properly understood’.¹⁰⁴ However, it is unclear why the fact that rights as claims should exclude the possibility that social recognition is key to whether those claims are accepted as valid. For ‘legal rules’ or ‘the principles of an enlightened conscience’ – positivistic and transcendental notions, respectively – could be substituted the principle that it is the judgment of society which recognises the claims advanced by persons. Upon this recognition, those claims

¹⁰³ Quoted in Martin, *A System of Rights*, p. 54

¹⁰⁴ *Ibid.*, p. 54

become rights; this is very much the argument that T. H. Green puts forward. With this modification of the Feinberg position in mind, this chapter will now tackle the three criticisms of ‘rights as claims’ that Martin puts forward, with a view to ascertaining what sort of political community will facilitate the overcoming of the potential problems he identifies.

The first problem with ‘rights as claims’ that Martin identifies is the idea that moral reasons for a claim to be respected may be unknown to those against whom a claim is directed, and that therefore, those people have no moral duty to respect the claim.¹⁰⁵ Martin argues that ‘a person’s being normatively directed – being held to be under some sort of duty of obligation – necessarily involves that person’s being aware of that direction, aware of it as normative and aware of it as applicable to them’.¹⁰⁶ In some societies – Martin invites us to consider the morals of an Aztec priest, accustomed to human sacrifice – some moral imperatives may be unknown, for example the notion that killing other humans is wrong. The problem here is that though the notion that people have the right not to be sacrificed might be a ‘valid moral claim...that is, there might be a sound argument from objective moral principle(s)’, ‘where that valid moral claim effectively failed to connect with such direction as was available in a society, then it would not be a right...in that society’.¹⁰⁷ This problem with rights as claims is sidestepped neatly by adapting Feinberg’s position to include social recognition. If what constitutes validity for a moral claim is social recognition, then there can be no circumstance in which the necessary knowledge of the moral claim is not available to a member of that society.

The second problem Martin identifies concerns the promotion and maintenance of rights as claims. Martin argues that a right might be claimed, indeed proclaimed, almost universally, yet not enforced. He invites us to consider a scenario in which the right of liberty to travel becomes a norm accepted the world over:

‘Citizens the world over might declare for it. Pronunciamentos are issued, editorials written, sermons preached. Panels of thinkers mull it over and see the moral force of such declarations. The liberty to travel is espoused in essays and from platforms. A book entitled *The Liberty to Travel* wins acclaim and then awards...its author appears on television and her ideas are widely disseminated,

¹⁰⁵ *Ibid.*, pp. 77-82

¹⁰⁶ *Ibid.*, p. 78

¹⁰⁷ *Ibid.*, p. 81

unusually so for philosophical ones. The idea of a liberty to travel enters the reflective consciousness of humankind as something morally endorsed and well grounded. The claim is valid: the liberty in question has an impeccable moral title, is widely practicable, the relevant duties are in place, etc.’¹⁰⁸

It would seem that the right is a right: arguments have been advanced, claims made, and it has been socially recognised. However, Martin argues, there is a problem: ‘it would seem then that there is a human right to travel. But the guard at the border or the ticket agent at the airport counter says no.’¹⁰⁹ Here, then, the problem is that a right which is a valid claim – which I take here to mean a claim which is socially recognised – has not translated into legislation and policy. This raises two important questions: first, it throws into sharp relief the question of what we mean by ‘social’ recognition – is recognition by a majority of people enough, or must social recognition include legal-formal state recognition? Second, what mechanism for recognition should be in place so that if a right is socially recognised, this recognition is translated into actual practice, in terms of legislation and policy?

Derrick Darby, in his work on rights recognition, argues that rights are most effective when recognised by formal-legal institutions, however ‘informal social practices can suffice’.¹¹⁰ For Darby, ‘there are reasons for grounding moral rights possession in more formal social practices’ which are mainly to do with the notion that ‘this is a very strong form of protection for rightholders’.¹¹¹ This builds closely on Green, who, as we have seen holds that rights can exist outside the state in various forms of society, but for whom the state provides the fullest expression of rights. Social recognition, then, can mean the recognition of a society, or of a group within society, but is at its best and most effective when this social recognition includes formal, legal recognition. This is not in itself an answer to Martin’s objection, however the point may be raised that in his example what Martin depicts is somehow incomplete social recognition. This leads us to consideration of the second question: what mechanism would ensure that recognition of rights is as complete as possible, including not just informal social agreement, but legal-institutional guarantees too?

¹⁰⁸ *Ibid.*, p. 82

¹⁰⁹ *Ibid.*, p. 82

¹¹⁰ Darby, *Rights, Race and Recognition*, p. 85

¹¹¹ *Ibid.*, pp. 85-86

An institutional approach that allows for both informal-social and legal-institutional recognition of rights as claims can be derived from Jürgen Habermas' work, in particular his account of 'twin-track' deliberative democracy, in which the process of opinion and will formation is divided into two arenas: the formal legal legislative bodies such as parliaments and law courts on the one hand, and the informal bodies and groupings that together constitute what he labels the public sphere on the other.¹¹² If this account of deliberative democracy is applied to the matter of rights recognition, there are three principle ways in which a right can be recognised. It can be recognised by the formal legal bodies alone, by the informal public sphere(s) alone, or by both. Such an account allows for the creation and adoption of new human rights whilst at the same time providing a safeguard against the abuse – or simple deletion – of human rights at the whim of a government that critics of positivistic accounts of rights fear. The collapse of positivism 'into Hitlerism'¹¹³ that some fear can be avoided: rights retain their validity even if the government tries to abolish them, provided that their currency still holds in the civil society that makes up the public sphere.

New rights are often discussed in the public sphere – moral arguments are advanced and rejected or accepted, in line with Darby's two-part conception of rights recognition – before being accepted socially; then pressure is exerted on the formal legal institutions to also recognise such rights. Upon recognition by the formal legal institutions, rights enjoy a double recognition.

If a right that has become socially established and recognised by the formal legal institutions is abused or ignored by a section of society, then the state can, and has a duty to, act. If, on the other hand, the state abuses rights that have been accepted by society, then the public sphere will become exercised and will act either to ignore or circumvent such actions of the state (in the form of underground or resistance organisations and the like) will apply pressure to the formal legal institutions until such actions are reversed (through organised civil disobedience, political process and other techniques).

In this way, Martin's second objection can be met. The fact that the border guard says 'no' shows that there is a problem in the political society: a viable political

¹¹² Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, Massachusetts, MIT Press, 1996), p. 374. See also: Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Cambridge, Polity Press, 2008)

¹¹³ C. H. Perelman, "Can the Rights of Man be Founded?", in Alan Rosenbaum (Ed.), *The Philosophy of Human Rights: International Perspectives* (London, Aldwych Press, 1981), p. 47

society for rights recognition must be one where the authorities must respond to the opinion of society. It is for this reason that Green holds that we sometimes have rights against the state – if it isn't reflecting the needs and wishes of society properly.¹¹⁴ Martin's second objection only applies in a society which is fundamentally unsuitable for rights recognition.

Martin's third objection to the notion of rights as claims concerns the role of governments in recognising human rights. Martin argues that human rights, like legal rights, 'require governmental practices of recognition and maintenance', though he admits that 'many people are not prepared to accept this'.¹¹⁵ Martin's reason for arguing this stems from his conviction that rights require social recognition; they are not just 'established ways of acting', but are also socially 'accredited'. When it comes to human rights, argues Martin, 'insofar as human rights claims are addressed to governments in particular, we have to regard practices of government recognition and promotion as being the appropriate form that such recognition and maintenance must take'.¹¹⁶ Without this government recognition, for Martin the right is not fully a right but is, rather, a claim – even if it may be in some way morally justifiable.

In this way, he argues, human rights as claims run up against a problem: if human rights require government action in order for them to be properly described as rights, then how do they differ from legal rights? Are human rights and legal rights not one and the same thing, both requiring government practice and legislation? One potential defence he offers for this is that human rights involve moral claims, which require 'social convention or arrangement' rather than legislation.¹¹⁷ Yet, he argues, this defence is not tenable, because of the answer he offers to the question 'what [sort of recognition] is *appropriate* for a human right?'¹¹⁸

The answer to this question is drawn from Martin's argument that 'the great human rights manifestos were intended to impose restraints upon government' and that 'individuals were involved as beneficiaries of these restraints but, for the most part, were not the parties to whom the manifestos were addressed'.¹¹⁹ If it is the government to whom the claims of human rights are addressed, argues Martin, then it must be the

¹¹⁴ Green, *Lectures*, §143, p. 148

¹¹⁵ Martin, *A System of Rights*, p. 87

¹¹⁶ *Ibid.*, p. 87

¹¹⁷ *Ibid.*, p. 86

¹¹⁸ *Ibid.*, p. 86

¹¹⁹ *Ibid.* p. 87; See also Rex Martin, "Human Rights and the Social Recognition Thesis", *Journal of Social Philosophy* 44:1 (2013), pp. 1–21, p. 8

government that recognises these claims, and this is done through the mechanism of legislation, rather than informal means.

Now there are some problems with this objection, and it is by no means an insurmountable obstacle to conceiving rights as (socially recognised) claims. First, Martin's claim that human rights are typically held against governments is open to some question. If we examine the Universal Declaration of Human Rights, for example, whilst we find that some rights do, clearly, concern governments – the 'right to recognition before the law', rights concerning trials, the right to an education, for example – other rights are not necessarily focussed on government action. The rights to 'life, liberty and security of person', the right to move freely, the right to marry only if one consents, the right not to be compelled to belong to an association, to pick out a few, do not explicitly or necessarily involve the state. They are claims against a wide variety of possible actors. There is no reason why the form of recognition appropriate to many of these rights should not be social recognition rather than governmental-legal recognition (leaving aside for the moment Darby's point that the state provides a surer guarantee that rights will be maintained than society sometimes does).

An element of possible confusion creeps in to Martin's objection regarding the use of the word 'recognise'. If, as Martin argues, the state is the object of many rights claims, then it is clear that if these rights *are* rights, as opposed to unjustified, unrecognised claims, then the state must *respect* these rights. However, this *respect* is different from *recognition*. To illustrate this point, let us consider an example. Let us imagine that person X has a right, A, which is recognised both informally by society and legally by the state – there is no doubt that A is a right, not merely a claim. This right, A, requires another person, Y, to commit an act, B. Now, legally, and to meet the expectations of society, person Y must commit that act, B: person Y must *respect* the right, A, of person X. However, this is logically distinct from person Y's *recognition* of X's right: it may be that person Y disagrees with the notion that the right, A, is a valid claim. To take a controversial real-world example, let us imagine that the right, A, is the right of a celebrity not to have certain details about their life made public. Society is broadly in favour of some law regarding privacy (let us assume this social consensus for the sake of argument), and the state, through a legal judgment, enshrines the right to keep some detail secret in law. Person Y may be a tabloid journalist who does not recognise a right to privacy, but regardless of his personal recognition, he must respect that he must commit act B – the act of not publishing a story – because society and the

state have held X's right to be valid. To transpose this back to Martin's objection, just because the state is the object of a right does not mean it is the state which must recognise that right. Rather, the state, through legislation, legal judgments and policy, carries out the measures that *respecting* that right entails. For example, if we accept there is a right to a fair trial, then by passing laws which aim to make trials fair, the state is *respecting* that right. This is not to say that state action cannot recognise rights to: the fact that a state passes a law requiring certain minimum health and safety requirements to be met in the workplace is formal-legal recognition of a worker's right against his or her employer to work in a safe environment. Indeed, state action can entail recognition and respect of a right in the same act, thus blurring the distinction, but a distinction is there.

Finally, against Martin's objection it may be argued that state recognition of a right is not always necessary. Rights are not always held against the state; the state may respect a right without recognising it (the UK has grudgingly respected the decisions of the European Court of Human Rights, for example, whilst at the same time making arguments which suggest the government does not recognise certain rights as they are interpreted by the Court). The best solution to rights recognition, as we have already seen, seems to be that based on a twin-track informal and formal approach, where the strengths of formality support the weaknesses of informality, and vice-versa. This approach is more flexible to new rights than Martin's legally recognised, established way of acting approach, whilst maintaining the idea that state recognition of a right is the most effective way of ensuring the right is promoted and maintained. The approach also allows us to argue that the state is wrong – for example in not granting black Americans rights in the ante-bellum USA, or in criminalising homosexuality, to take another example. In these circumstances, social recognition of rights can take place more quickly than legal recognition.

In summary, then, none of Martin's objections to the idea of rights as claims is sufficient to defeat the idea that rights are recognised claims, provided the right forms of recognition are in place. To address Martin's concerns, the political community must be one in which the state follows the wishes of society – one in which the border guard says 'yes'. The political community must allow society to debate and discuss which claims should be recognised.

3. Concluding Remarks

The work of this chapter has been to address the question of what sort of society is best for rights recognition as well as to flesh out further details about how rights recognition functions.

The first half of this chapter advanced the following four propositions:

4. Recognition of rights requires meaningful equality, which can be expressed as ‘equality of access to rights recognition arenas and debates’.

As Arendt illustrates, judgment can only function in equal communities: among peers. An analysis of Green showed that the equality required is quite far-reaching, extending to significant economic equality, so that all are able to participate in rights recognition – this requires leisure, as Arendt makes clear. Further, only equal societies allow a common good to be arrived at.

5. Recognition of rights or persons may not be arbitrary, but must be based on moral argument, such as the notion of a common good or a *sensus communis*.

The key moral component of egalitarian rights recognition – as with Green’s account of rights recognition – is that rights contribute to a common good: that they benefit all within society. Arendt’s use of *sensus communis* fulfils a similar function: one must judge from as many points of view as possible so that the judgment is to the benefit of all.

6. Recognition of rights requires the greatest possible facilitation of communication within a society.

Rights recognition requires effective communication, first so that information is available to those taking part in rights recognition debates, and secondly, so that all can participate in these debates.

7. ‘Society’ in the context of rights recognition is open to ideas from without, and has no necessary limits.

Societies can take many shapes, and there is no upper limit to the size of a society. The informal rights recognising sphere, as we shall return to in chapter six, is

essentially porous. A rights recognising sphere might potentially extend to the whole world.

The second half of this chapter addressed more closely the question of what rights are, and how rights recognition occurs. Through a comparison with the important work of Rex Martin, this section brought out three key points which differentiate egalitarian rights recognition from other social recognition theories of rights:

8. Rights are recognised claims, not established ways of acting.

The process of rights recognition is dialogical: claims are either recognised, and become rights, or rejected. A right is not an action, but it is rather the recognised claim that a certain action or set of actions is valid.

9. Recognition of rights and persons is synchronic, not diachronic.

Because rights are not established ways of acting, but rather claims, there is no requirement that rights attach only to set patterns of behaviour or traditions. Rather, a right claim is either recognised or not instantly: it is a binary system. This allows societies to establish new rights as well as to adapt to changes in values or in information.

10. Recognition of rights is logically distinct from enforcement and maintenance of rights; although enforcement and maintenance of rights is desirable, recognition can exist without enforcement and maintenance.

The mechanism by which claims are recognised and become rights is a different mechanism from that by which rights are maintained and duties enforced. Rights can be recognised in a society even if they are not maintained effectively. However, as Darby and Habermas illustrate, and as Green argued, it is desirable for a society to put in place measures which maintain the rights it has recognised: just as cricket is better played with an umpire than without, a society is better off with some means of ensuring the rights it recognises are maintained in practice. However, the lack of formal rights maintaining institutions does not mean that there are no rights.

We are now in a position to define a right as:

- i. a claim recognised by society,

- ii. in a process to which all members of society have equal access and ability to take part,
- iii. and in which communication has been good enough to allow all to debate effectively, expressing their views and hearing the views of others,
- iv. which contributes to a common good.

Chapter Five

Building Rights on Contingent Foundations: filling the void and minding the gap

This chapter consists of three moves. First, a possible serious objection to the theory of egalitarian rights recognition will be considered. Second, in defending the theory against this objection, this chapter will discuss ‘post-foundational’ political thought in Jean-Luc Nancy, Ernesto Laclau, Claude Lefort, and Alain Badiou. It will be argued that through basing the moral content of rights recognition on *contingent* foundations, egalitarian rights recognition can avoid the arbitrariness of a completely value-free approach without falling back on an implicit theory of natural law. The third part of this chapter will link together and summarise discussions of Green, Arendt, and post-foundational political thought through a re-statement of the ten-points of the theory of egalitarian rights recognition. In this way, we shall be in a position to tackle the key question of the final chapter of this thesis, the question of whether egalitarian rights recognition works not just within individual polities, but on a global scale too.

1. A potential objection to the egalitarian rights recognition

Egalitarian rights recognition is more convincing than natural rights-based human rights theories because it provides a more plausible account of how rights come to exist: through human interaction rather than some fixed natural law or divine gift. However, a question remains: what is it about such human interaction that gives it the normative force required to create rights that are worth respecting? What ultimate ground can be appealed to in justification of rights? We have dismissed natural rights theories because they must appeal to a cosmogony or theology that is always contestable. If we advance the proposition that democratic recognition of rights gives rights normative force, on what ground can we advance this? It is quite plausible that we have dismissed one version of natural law only to replace it with another, indirect natural law account of why we have, or should have, rights. Rather than arguing that we have rights because they are natural or God-given, we are arguing that we have

rights because we have a natural or god-like ability to create rights through democratic recognition. If this is not just plausible, but true, then it would appear that rights recognition falls victim to exactly the same arguments that proponents of the rights recognition thesis use to attack natural rights.

Furthermore, the fifth point of the theory of egalitarian rights recognition holds that:

5. Recognition of rights or persons may not be arbitrary, but must be based on moral argument, such as the notion of a common good or a *sensus communis*.

The question may be raised: how can we have moral argument without a fixed code of morality to which we can refer? Again, it might be held that we need a fixed code of morality against which to judge, and that this involves fixed, unchanging natural law. If these objections can be sustainable, then rights recognition must either drop morality altogether in favour of pure positivism, or some sort of Thrasymachean realism, where the rights decided are simply those suggested by the strongest (or perhaps the most persuasive), without regard to any moral concerns.

2. Post-foundational political theory

However, an answer to these objections may be drawn from what Oliver Marchart has termed ‘post-foundational’ political theory.¹ Post-foundational political theory, as its name suggests, rejects the foundationalism of ‘those theories which assume that society and/or politics are ‘grounded on principles that are (1) undeniable and immune to revision and (2) located outside society and politics’². Natural rights theory is a classic foundationalist theory: rights are undeniable, immune (supposedly) to

¹ Oliver Marchart, *Post-Foundational Political Thought: Political Difference in Nancy, Lefort, Badiou and Laclau* (Edinburgh, Edinburgh University Press, 2008); Other works on the ‘Post-Foundational’ include Euan MacDonald, *International Law and Ethics After the Critical Challenge: Framing the Legal within the Post-Foundational* (Leiden, Martinus Nijhoff, 2011), who, curiously, does not mention Marchart, Nancy, Lefort, Badiou or Laclau.

² Dan Herzog, *Without Foundations: Justification in Political Theory* (Ithaca, Cornell University Press, 1985), p. 20, in Marchart, *Post-Foundational Political Thought*, pp. 11-12

revision, and are grounded either on nature or theology, in both cases outside of society and politics.

Post-foundational political theory must not be confused with ‘anti-foundationalism’. Whilst anti-foundationalism assumes the absence of any ground, post-foundationalism merely assumes ‘the absence of an ultimate ground’. This is because ‘it is only on the basis of such absence [of an ultimate ground] that grounds, in the plural, are possible.’³ The possibility of contingent grounds, and the absence of an ultimate ground, as we shall see further on in this section, makes freedom possible; meaningful freedom relies on this contingency.

For Marchart, this post-foundational position is not something new that has been invented in modern times, but rather ‘one must insist that radical contingency, i.e., necessary contingency, has always been there in the form of a ‘moment’ realized by certain specific discourses.’⁴ Where once an ultimate ground could be appealed to, for post-foundational thought the absence of an ultimate ground allows for contingent grounds. Rather than doing away with foundations altogether, the point is to interrogate what moves authorise or give legitimacy to contingent foundations.⁵ In this way, post-foundationalism does not turn into ‘anti-foundationalist nihilism, existentialism or pluralism, all of which would assume the absence of any ground and would result in complete meaninglessness, absolute freedom or total autonomy.’ To avoid this nihilism and meaninglessness, some grounding is still necessary, albeit also necessarily contingent: post-foundationalism is not ‘into a sort of post-modern pluralism for which all meta-narratives have equally melted into air’.⁶

Although post-foundationalists hold that contingency has always been a necessary feature of grounds, only recently, ‘within a particular historical conjuncture has [it] become possible to question the foundationalist horizon and to develop a post-foundational counter-concept of contingency and groundlessness.’⁷ The ‘enabling constellation’ of the theory is ‘radically historical, ‘empirical’, and part of the ontic

³ Marchart, *Post-Foundational Political Thought*, p. 14

⁴ *Ibid.*, p. 31

⁵ Judith Butler, “Contingent Foundations: Feminism and the Questions of ‘Postmodernism’”, in Judith Butler and Joan W. Scott (Eds.), *Feminists Theorize the Political* (London, Routledge, 1992), pp. 3-21

⁶ Marchart, *Post-Foundational Political Theory*, p. 14

⁷ *Ibid.*, p. 31

realm'.⁸ Post-foundationalism, then, is a response to the collapse of everything in morality that had seemed 'permanent and vital' noted by Arendt.⁹

This realisation of the absence of ground may be cause for some alarm. Marchart sees post-foundational theorists as 'standing among the ruins of what was once considered society's unshakeable foundations.'¹⁰ Yet as Kate Shires reminds us, ruins 'open up possibilities for new experiences' by 'creating disturbances within our order' and conforming 'to neither presence nor absence'.¹¹ It did not take a theorist to point out to inhabitants of the British Isles after the Roman retreat that Roman ruins made perfect building blocks for the making of something new. Although, as Marchart notes, 'some conservative thinkers may be alarmed' and 'others from the normative camp, 'Habermasians' mainly, may claim that without some sort of foundation within the realm of the normative we will deliver ourselves to ethical and political nihilism..., there are no necessarily pessimistic or nihilistic conclusions to be drawn from the dissolution of the foundationalist horizon – for one of the names of the absence of ground is freedom.'¹²

This freedom as absence of ground might be cause for concern; the abyss is daunting. As Arendt noted, it can seem almost as though we are '*doomed* to be free', and there is a temptation to 'escape [freedom's] awesome responsibility by electing some form of fatalism'.¹³ Yet, in examining the work of four post-foundational political theorists, this chapter will argue that the void that is freedom is the very thing that makes democracy and rights recognition possible. This section will explore aspects of post-foundation political thought as presented in the works of Nancy, Lefort, Laclau, and Badiou. Each will thinker will be used simply as signifier for a particular idea: Nancy for the void-as-freedom, Lefort for the empty heart of democracy, Laclau for the danger of pure particularism, and Badiou for the event establishing a contingent ground. It will become clear that democracy, rights recognition, and contingency are inexorably linked. Through contingent foundations, rights recognition can be based on arguments that appeal to morality, without recourse to any implicit theory of natural law. The

⁸ *Ibid.*, p. 31

⁹ Arendt, *Responsibility and Judgment*, p. 50

¹⁰ Marchart, *Post-Foundational Political Theory*, p. 155

¹¹ Kate Shires, *The Absence of Absence: a (geographical hi)story of the landscape of Blackpool* (Saarbrücken, VDM Verlag, 2010) pp. 54-55

¹² Marchart, *Post-Foundational Political Theory*, pp. 155-156

¹³ Hannah Arendt, *The Life of the Mind: Willing* (New York, Harvest, 1978), p. 217

foundations, like the rights which appeal to them, are the product of human, political interaction.

2.1 Nancy: the void as freedom

Jean-Luc Nancy has written on a wide variety of topics, among them, as Hutchens notes, ‘Romanticism and techno music, phenomenology and communitarianism, Hegelian logic and contemporary cinema’.¹⁴ Yet the degree of commentary on his work, though ‘respectable’, remains ‘modest’.¹⁵ The present section will restrict itself to Nancy’s work on freedom, foundation, and the void.

Nancy’s work carries on to a large extent from the point at which Heidegger fell silent about the question of freedom. In contra-distinction to Heidegger, for Nancy, it is freedom, not Being, that has ontological primacy. As Ignaas Devisch notes, ‘at a certain moment...Heidegger let the theme of freedom go...and, from that moment, he made freedom, previously allocated ontological primacy, subordinate to that of the truth and authentic freedom of being’.¹⁶ It is this moment that Nancy steps into, re-asserting the ontological primacy of freedom, and continuing to ask what freedom means.

There are two strands we will seek to pull out from the rich tapestry of Nancy’s work here. The first is freedom as foundation/void. The second is freedom as the gap between people that facilitates politics (which anticipates, to an extent, much of what Lefort and Laclau have to say, as we shall see later).

In discussing freedom and the void, Nancy takes his cue from Heidegger, who writes that ‘Freedom is the foundation of foundation...The breaking-forth of the abyss in founding transcendence is the primordial movement which freedom makes with us.’¹⁷ For a foundation can have no foundation: ‘foundation does not, as such, come after

¹⁴ B. C. Hutchens, *Jean-Luc Nancy and the Future of Philosophy* (Chesham, Acumen Publishing, 2005), p. 4

¹⁵ *Ibid.*, p. 4

¹⁶ Ignaas Devisch, “De ‘Affaire’ van de Vrijheid: Jean-Luc Nancy over het Vrijheidsbegrip bij Kant en Heidegger”, *Tijdschrift voor Filosofie* 71 (2009), pp. 723-750, p. 732 [*Op een bepaald ogenblik ... laat Heidegger immers het thema van de vrijheid los en ...[o]p dat ogenblik ... maakt hij het eerder toegekende ontologische primaat van de vrijheid ondergeschikt aan dat van de waarheid en van een authentiekere vrijheid van het zijn*]; Michael Inwood also picks up on this point: ‘In the 1920s freedom plays a central role in forming the world. In the mid-1930s it loses this role, since it is being itself (or rather ‘beyng’), not man or Dasein, that initiates a world’ Michael Inwood, *A Heidegger Dictionary* (Oxford, Blackwell, 1999), p. 76

¹⁷ Martin Heidegger, *The Essence of Reasons* (Evanston, Northwestern University Press, 1969) quoted in Jean-Luc Nancy, *The Experience of Freedom* (Stanford, Stanford University Press, 1993), p. 83

anything else. Foundation has, by definition, no foundation.¹⁸ This very absence of foundation is freedom – as void. Freedom is not foundation, or *Grund* ('ground') but rather the void *Abgrund* ('abyss', or 'void').¹⁹ That is to say, foundation is founded in the abyss. As Nancy puts it, 'The foundation of foundation ... founds, in Heideggerian terms, in the mode of 'the abyss': *Abgrund*, which is the *Grund* of every other *Grund*, and which is of course its own *Gründlichkeit* as *Abgründlichkeit*.'²⁰ Foundation has itself no foundation, but rather every foundation is founded in the abyss, or void.

Before the foundation, there is 'nothing but the indeterminable *chorā* (not an undetermined place, but the possibility of places, or rather pure matter-for-places) *where* the foundation takes place.'²¹ The act of founding is 'not a foundation in the architectonic sense of the excavation and preparation of a ground that will support a building', but rather 'the attempt to reach the limit, to keep to the limit'. In this sense, 'the model of all foundation [is] the founding of the ancient city – the marking of the outline of the city limits'.²² Founding, then, sets something akin to a horizon on the pre-existing void.

This horizon opens up a 'world'. Here, 'world' does not mean 'universe or cosmos' but rather 'the proper place of existence as such, the place in which one is 'given to the world''. A world 'is neither space nor time; it is the way we exist together.'²³ Here, Nancy's 'world' is a very similar concept to that used by Arendt, who views the world in terms of relations between humans: 'Wherever people come together, the world thrusts itself between them, and it is in this in-between space that all human affairs are conducted.'²⁴ The world is the 'inter-est', without which human and political relations are impossible. This world, as foundation founded in the void, is contingent, for 'in the last analysis, the human world is always the product of man's *amor mundi*, a human artifice whose potential immortality is always subject to the mortality of those who build it and the natality of those who come to live in it.'²⁵ In founding, 'the announcement of a 'we''²⁶, we mark out the contingent world.

¹⁸ Nancy, *The Experience of Freedom*, p. 163

¹⁹ *Ibid.*, p. 35

²⁰ *Ibid.*, p. 83

²¹ *Ibid.*, p. 84

²² *Ibid.*, p. 84

²³ Jean-Luc Nancy, *The Birth to Presence* (Stanford, Stanford University Press, 1993), p. 163

²⁴ Arendt, *The Promise of Politics*, p. 106

²⁵ *Ibid.*, p. 203

²⁶ Nancy, *The Birth to Presence*, p. 164

Each foundation, then, can only be contingent, and subject to change or removal. Yet this contingency opens up possibility of freedom. As Devisch and Schrijvers note, ‘this is Nancy’s hope: freedom throws us into a world where, precisely because nothing (substantial) is given, anything can happen.’²⁷ As our brief discussion of ‘world’ has hinted, beyond the initial void, there is a second empty space, essential for freedom: the space Arendt terms ‘inter-est’. This is the space between people which allows politics to happen (or perhaps to ‘take place’ – literally). ‘The political’, argues Nancy, ‘does not primarily consist in the composition and dynamic of powers...but in the opening of a space’. This space ‘is opened by freedom – initial, inaugural, arising – and freedom there presents itself in action. Freedom does not come to produce anything, but only comes to produce itself there (it is not poiesis, but praxis), in the sense that an actor, in order to be the actor he is, produces himself on stage.’²⁸ Freedom, then, is beginning, and opening – a ‘lightning burst’.²⁹ Freedom is ‘the experience of having nothing given, nothing founded ... the inaugural experience of experience itself, [which] experiences the nothing as the real [and] as the stroke of luck it offers.’³⁰ Devisch and Schrijvers liken this experience of freedom to birth: ‘Birth can be likened to the empirical-transcendental experience of freedom Nancy is describing, since indeed my own birth must have been an ‘experience’ for me, but one that I never could have undergone consciously and thus ‘experience’ as a subject.’³¹

Nancy, then, through his building on Heidegger’s work on freedom and the void, shows us the importance of the void, and the absence of ultimate ground: only through this absence can true freedom be possible. In this void, we are free to open up the world within which we can live, and within which political action can occur.

2.2 Lefort: the empty heart of democracy

Claude Lefort was a prominent French left-wing intellectual, influenced strongly by his tutor Maurice Merleau-Ponty, whose posthumous works he later edited. He was

²⁷ Ignaas Devisch and Joeri Schrijvers, “Freeing yourself towards Your Own Being-Free: Jean-Luc Nancy on the Metaphysics of Freedom”, *South African Journal of Philosophy/Suid-Afrikaanse Tydskrif vir Wysbegeerte* 30:3 (2011), pp. 267-281, p. 277

²⁸ Nancy, *The Experience of Freedom*, p. 78

²⁹ *Ibid.*, p. 82

³⁰ *Ibid.*, p. 86

³¹ Devisch and Schrijvers, “Freeing yourself towards Your Own Being-Free”, p. 277

active in left wing politics and taught at the Sorbonne. Of all the post-foundationalist thinkers, he devotes the largest amount of text to specifically investigating human rights. The two papers devoted exclusively to human rights are “Politics and Human Rights” and “Human Rights and the Welfare State”.³²

In terms of the structure of this chapter, Lefort moves us from the void that is freedom in Nancy to the emptiness at the heart of democracy, which is essential for its preservation, and the establishment of which, as the result of the removal of the king (and his ‘two bodies’) during the period of revolutions, marked the start of the democratic era.

Lefort identifies a strong link between freedom, democracy and human rights. He argues that rights ‘[do] not let us note, depend for [their] coherence on a reference to human nature, or on the idea that every individual is born with inalienable rights. [Their] coherence is ensured by the principle of political freedom.’³³ In other words, rights are political, and established by people in political communities. Further, ‘the formulation of the rights of man at the end of the eighteenth century was inspired by a demand for freedom which destroys the representation of power as standing above society and as possessing an absolute legitimacy, either because it derives from God or because it represents a supreme wisdom or justice which can be embodied by the monarch or the monarchical institution.’ This posits human rights as an act of rebellion against natural law, and against the universalism embodied by God or monarch, with their ‘absolute legitimacy’. In this way, the ‘rights of man mark a disentangling of right and power’, for ‘right and power are no longer condensed around the same pole’. Rather, ‘if it is to be legitimate, power must henceforth conform to right, but it does not control the principle of right.’³⁴ The state now gains its legitimacy from the extent to which it conforms to principles of right – the state becomes the object of rights claims, and not the recogniser of those claims, to use terminology introduced in the previous chapter.

Rights, shorn of an appeal to fixed authority, are inherently democratic, and rely on public opinion: ‘the democratic apprehension of right implies the affirmation of speech – be it individual or collective – which, whilst it is not guaranteed by existing

³² Claude Lefort, “Human Rights and the Welfare State”, in Claude Lefort, *Democracy and Political Theory* (Cambridge, 1988, Polity Press), pp. 21-44; Claude Lefort, “Politics and Human Rights”, in Claude Lefort, *The Political Forms of Modern Society: Bureaucracy, Democracy, Totalitarianism* (Cambridge, MIT Press, 1986), pp. 239-272

³³ Claude Lefort, “Human Rights and the Welfare State”, p. 31

³⁴ *Ibid.*, p. 31

laws or by a monarch's promise, can assert its authority in the expectation of public confirmation because it appeals to the conscience of the public.' Lefort underlines the 'novelty' of this phenomenon. Claims underpinning rights are addressed to all in society, not to a fixed point of power.³⁵ Although 'speech of this type is intimately bound up with a demand addressed to the state, it is also distinct from that demand.' In other words, it is citizenship rather than subjecthood or dependency that is important. Claims, though they concern the state, are addressed primarily to one's peers. This agrees with the distinction made between 'recognisers' and 'subjects' of rights made in the previous chapter. The 'conscience of the public' replaces the 'absolute wisdom' of the monarch: rights are recognised claims debated in the arena of society. In this way, Lefort is in agreement with the literature on rights recognition.

Lefort also offers a new interpretation of the declarations of rights on the late eighteenth century. He rejects the notion of 'human nature', and argues that 'the naturalist conception of right masked an extraordinary event: a declaration which was in fact a self-declaration, that is, a declaration by which human beings, speaking through their representatives, revealed themselves to be both the subject and the object of the utterance in which they named the human elements in one another, 'spoke to' one another, appeared before one another, and therefore erected themselves into their own judges, their own witnesses.'³⁶ Here is the radical link between democracy and rights recognition. Rights are made by (potentially) all; claims are advanced by any member of the vast potential legislature that is of humanity, while all sit in judgment of all claims advanced. As Lefort notes, 'no one can take the place of the supreme judge: 'no one' means no individual, not even an individual invested with a supreme authority, and no group, not even the majority.'³⁷ This doing away with the judge 'relates justice to the existence of a public space – a space which is so constituted that everyone is encouraged to speak and to listen without being subject to the authority of another, that everyone is urged to will the power he has been given.' Lefort's prescriptions match closely with the conclusions drawn from the work of Arendt and Green in the previous chapter. Furthermore, the public space 'which is always indeterminate, has the virtue of belonging to no one, of being large enough to accommodate those who recognize one another within it and who give it a meaning, and of allowing the questioning of right to

³⁵ *Ibid.*, p. 37

³⁶ *Ibid.*, pp. 37-38

³⁷ *Ibid.*, p. 41

spread.’³⁸ The arena of debate is ownerless, and thus free; its size will be constituted by the number of citizens – potentially (as Green indicates) the number of humans – and it will thus always be large enough. The single judge of the natural law model, the person suitably equipped to interpret the existing law, is replaced by all people as judges. Judgment is thus arrived at by all members of a political society, through discussion in the public sphere. It is in precisely this way, as we have seen, that Arendt and Green allow for rights recognition to take place.

2.3 Laclau: the particular and the universal

Ernesto Laclau, like Lefort and Nancy, emphasises the empty space that must lie at the heart of democratic politics. However, his work warns against the dangers of pure particularism and the complete absence of ground or foundation. Rather, there must be some ground, however contingent it may be. In drawing on Laclau’s work in this way, this chapter aims to avoid the idea that, in rejecting natural rights, rights recognition must resort to pure arbitrary positivism, devoid completely of any moral content.

Although Ernesto Laclau has written widely on Marxism, and has contributed widely to what been labelled ‘post-Marxist’ thought, the passages most significant to this project are found in his *Emancipations*, a collection of essays written between 1989 and 1995. What makes *Emancipations* so relevant for this project is its focus on the tension of particularisms against the ‘globality’ of projects such as the ‘free world’ or ‘communist society’. For Laclau, many of the changes of the early 1990s represented particularist struggles against globalist projects.³⁹ A variety of ethnic, national, racial or sexual groups had started, many for the first time, to rebel against the Universalist, globalising projects – liberalism and communism – that had dominated politics for decades. This brings into play the debate between universalism and particularism in general, and thus the idea of universal grounds.

The coming into play of competing ‘identities’ in the 1990s and the collapse of universalising projects such as the USSR could lead one to conclude, argues Laclau, that ‘the chasm between the universal and the particular is unbridgeable – which is the

³⁸ *Ibid.*, p. 41

³⁹ Ernesto Laclau, *Emancipations* (London, Verso, 1996), p. vii

same as saying that universal is no more than particular that at some moment has become dominant, that there is no way of reaching a reconciled society.’ The ‘proliferation of particularisms’ of the 1990s seems to support this, he argues.⁴⁰

Despite such tendencies, Laclau argues that ‘an appeal to pure particularism is no solution’ to contemporary problems.⁴¹ For if one defends the rights of some societies in the name of particularism, one must also defend societies that are ‘reactionary groups involved in anti-social practices’. In short, anything goes – and must be allowed to go – in a state of pure particularism. This could be built into a defence of things that society as a whole finds repugnant and morally objectionable: such pure particularism might defend, in varying extreme circumstances, infanticide, marital rape, female genital mutilation, or slavery (to pick four examples of practices that have, at one time or another, actually been defended, but which are now widely considered to be indefensible). Pure particularism, then, involves significant problems.

Furthermore, ‘in the case of pure particularism there is no universal body – but, as the ensemble of non-antagonistic particularities purely and simply reconstructs the notion of social totality, the classical notion of the universal is not put into question in the least...the universal is the symbol of a missing fullness and the particular exists only in the contradictory movement of asserting at the same time a differential identity and cancelling it through its subsumption in the non-differential medium.’⁴² The ensemble of non-antagonistic particularities is exactly the same as a universal. To assert an identity, the particular, say an oppressed group, needs to assert this identity in terms of difference from the oppressor – but this necessarily involves asserting the identity of the oppressor too.⁴³ This is the contradictory movement whereby the particular asserts its identity and the identity of the universal at the same time.

For Laclau, two alternatives to the advancement of particularisms present themselves. The first is to ‘affirm, purely and simply, the rights of the various cultural and ethnic groups to assert their differences and their separate development’.⁴⁴ This alternative is written off by Laclau, as it would lead to ‘total segregation’ and ‘self-apartheid’. By simply asserting different cultural identity, and ignoring what is outside that identity or culture, a minority group would effectively impose apartheid on itself.

⁴⁰ *Ibid.*, p. 26

⁴¹ *Ibid.*, p. 26

⁴² *Ibid.*, p. 28

⁴³ *Ibid.*, p. 29

⁴⁴ *Ibid.*, p. 32

The second possible approach is to realise that although ‘the universalistic values of the West are the preserve of its traditional dominant groups’, this ‘historical link’ is a ‘contingent and unacceptable fact which can be modified through political and social struggles’.⁴⁵ Through such struggles, ‘universalism as a horizon is expanded at the same time as its necessary attachment to any particular content is broken’ – this is reminiscent of T. H. Green’s expansion of the area within which the common good can be conceived.⁴⁶ To reject this second alternative, that is, to reject ‘universalism *in toto* as the particular content of the ethnia of the West...can only lead to a political blind alley’ as the alternative is pure particularism, with all its problems.⁴⁷

Yet, the breaking of the link between universal and its content leads to a potential problem. The universal needs a particular to supply this content, but is incommensurable with any specific particularity as it is ‘an always receding horizon resulting from the expansion of an indefinite chain of equivalent demands’.⁴⁸

The answer to this brings us, finally, back to the notion of contingent grounds, and furthermore to the link between contingency and democracy. Laclau states that ‘The universal is incommensurable with the particular, but cannot, however, exist without the latter’ and that this is a paradox. Yet it need not be solved: Laclau argues that ‘that this paradox cannot be solved, but that its non-solution is the very precondition of democracy.’ For ‘the solution of the paradox would imply that a particular body had been found, which would be the true body of the universal. But in that case, the universal would have found its necessary location, and democracy would be impossible. If democracy is possible, it is because the universal has no necessary body and no necessary content; different groups, instead, compete between themselves to temporarily give to their particularisms a function of universal representation.’⁴⁹ In other words, a contingent ground is formed every so often when a group manages to achieve the dominance necessary to proclaim their ground as universal – for a time. This process of contestation is at the heart of democracy, and the process of rights recognition, where rights are formed through social and political debate and discourse. Creating rights through intersubjective recognition requires that the universal has no necessary content. If it did, rights recognition would not be truly free, but would simply

⁴⁵ *Ibid.*, p. 33

⁴⁶ *Ibid.*, p. 34

⁴⁷ *Ibid.*, p. 34

⁴⁸ *Ibid.*, p. 34

⁴⁹ *Ibid.*, p. 35

be a case of ‘discovering’ the rights that are there, as though they were Platonic forms. This would remove the fundamentally democratic and egalitarian element that characterises Green’s social recognition and Arendt’s political community and judgment. If the universal was there to be discovered, and permanent for all time, once discovered all debate would be over; there would be no meaningful political freedom.

The crucial role of democracy and contingent universals is underlined again by Laclau towards the end of another paper, “Identity and Hegemony: The Role of Universality in the Constitution of Political Logics”, in another *Phronesis* offering, this time edited with Judith Butler and Slavoj Žižek, *Contingency, Hegemony, Universality: Contemporary Dialogues on the Left*. Here, he argues that the ethical moment of a community is linked to the presence of empty symbols, and that therefore a community requires the constant production of these symbols in order for an ethical life to be possible.⁵⁰ Further, for a community to be democratic, the ‘moment of articulation between the particularity of the normative order and the universality of the ethical moment’ must be kept ‘open and ultimately undecided’.⁵¹ For ‘the only democratic society is one which permanently shows the contingency of its own foundations’ which is to say ‘keeps open the gap between the ethical moment and the normative order.’⁵² Democracies must, so to speak, mind the gap. Here, he goes further than Lefort: ‘Lefort’s argument, according to which in democracy the place of power is empty, should, I think, be supplemented by the following statement: democracy requires the constant and active production of that emptiness.’⁵³ If the ‘gap’ at the heart of democracy is closed, then the nature of political discourse changes radically. Such closure would involve the positing of an ultimate ground, rather than leaving space open in the knowledge that grounds are contingent. Were an ultimate ground posited, ‘political argument would consist in discovering the action of a reality external to the argument itself’ – broadly speaking, politics would be a seeking after Platonic forms, as mentioned. By ‘minding the gap’ and bearing in mind that ‘there is no ultimate ground, political argument increases in importance because, through the conviction that it can contribute, it itself constructs, to a certain extent, the social reality. Society can then be understood as a vast argumentative texture through which people construct their own

⁵⁰ Laclau, “Identity and Hegemony: The Role of Universality in the Constitution of Political Logics”, in Judith Butler, Ernesto Laclau, and Slavoj Žižek, *Contingency, Hegemony, Universality: Contemporary Dialogues on the Left* (London, Verso, 2000), p. 85

⁵¹ *Ibid.*, p. 85

⁵² *Ibid.*, p. 86

⁵³ Ernesto Laclau, “Democracy and the Question of Power”, *Constellations* 8:1 (2001), pp. 3–14, p. 12

reality.’⁵⁴ Rights recognition is part of an effort to ‘mind the gap’ – by arguing against those who posit unchanging, foundational natural rights, rights recognition takes seriously the importance of political argument, and gives us an additional incentive to ensure that the conditions that allow for political argument are preserved and maintained.

It is precisely in this way, through allowing people to construct their own reality, that rights recognition offers a clear advantage over natural rights theories. It takes freedom seriously, rather than holding rights to be fixed by nature and unchanging. In the case where rights are fixed, democracy collapses: there is no political persuasion or debate if the answers are final and can be ‘known’. Further, even if we accept that there are no fixed answers, and no fixed foundation, the claim alone that one has access to the knowledge of them (whether made in good faith, as some universalists, or disingenuously, as some totalitarians) is enough to shut down democracy and destroy meaningful political freedom. Egalitarian rights recognition, through being more honest about how rights come about (through human interaction rather than divine revelation or a close reading of nature) helps us to ‘mind the gap’ and safeguard democracy and freedom.

2.4 Alain Badiou: ‘ethics’ and the event

Alain Badiou is a Moroccan-born French philosopher, professor at the European Graduate School, and formerly chair of Philosophy at the *École Normale Supérieure* in Paris. Committed politically to the hard left, philosophically Badiou’s primary influences are Hegel and Lacan, although he studied for a time with Louis Althusser.

Badiou is the final philosopher this section will consider. In his ‘Eight Theses on the Universal’, he offers us an account of contingent universals that may serve us as something approaching a conclusion to this section, building on Nancy’s void as freedom, Lefort’s emptiness at the heart of democracy, and Laclau’s warnings about the danger of pure particularism. Badiou’s account of the ‘Event’ (*L’événement*) provides an account of how the abyss comes to be filled with a Universal in a ‘sudden emergence’.

⁵⁴ Ernesto Laclau, “Politics and the Limits of Modernity” *Social Text* 21 (1989), pp. 63-82, pp. 78-79

Before we explore Badiou's work on the universal, the void, and the event, however, this section will explore the portion of his work which bears directly on the idea and practice of human rights. Badiou adds to the arguments against innate human rights, informed by a general ethics, and suggests instead, that specific situations demand specific ethics: this specificity is both spatial (different roles and relationships require specific ethics) and temporal (in the wake of specific events, there are specific ethics at work). This supports the theory of egalitarian rights recognition put forward in this thesis, which holds that specific rights recognising spheres have specific sets of rights that are recognised. A person may belong to several at the same time, and should act regarding that sphere in a way corresponding to the rights recognised within it: some actions which are ethical in one sphere or towards certain people may not be in another sphere or towards a different set of people. Further, it supports the historical aspect of egalitarian rights recognition, which argues, as we have seen in chapter four, that the sets of rights recognised in a society can change over time. What was un-ethical, for example same-sex marriage, can become ethical; the once ethical, for example racism and sexism, can become un-ethical. These changes are often tied to what Badiou calls the 'event' (*L'événement*).

2.4.1 The 'ethical ideology', general ethics and specific ethics of truth

Badiou addresses the subject of rights primarily in his book *Ethics*, which carries the subtitle *An Essay on the Understanding of Evil*. In this book he launches a scathing attack on the prevailing 'ethical ideology', which is, to a large extent, the doctrine of innate human rights. He notes that 'we are supposed to assume the existence of a universally recognizable human subject possessing 'rights' that are in some sense natural: the right to live, to avoid abusive treatment, to enjoy 'fundamental' liberties. These rights are held to be self-evident, and the result of a wide consensus. 'Ethics' is a matter of busying ourselves with these rights, of making sure that they are respected.'⁵⁵

Badiou links this return to universal, self-evident rights with 'the collapse of revolutionary Marxism, and of all the forms of progressive engagement that it inspired'. Faced with a lack of alternatives, rather than creating new ways of thinking, both public opinion and philosophy, he argues, have reverted to a previous mode of being: 'rather than seek out the terms of a new politics of collective liberation, they have, in sum,

⁵⁵ Alain Badiou, *Ethics: An Essay on the Understanding of Evil* (London, Verso, 2001), p. 4

adopted as their own the principles of the established ‘Western’ order’. However, ‘in doing so, they have inspired a violently reactionary movement against all that the thought and proposed in the 1960s.’⁵⁶ The return to innate human rights, then, is a reactionary move, in which philosophers have ‘rediscovered the virtues of that ideology constantly defended by their former opponents: humanitarian individualism and the liberal defence of rights against the constraints imposed by organized political engagement.’⁵⁷

Badiou argues we must reject this ethical ideology – and with it, a commitment to innate human rights – as it ‘equates man with a simple mortal animal, it is the symptom of a disturbing conservatism, and – because of its abstract, statistical generality – it prevents us from thinking the singularity of situations.’⁵⁸ Further, he rejects out of hand the views of those ‘who believe that there is a kind of ‘natural law’, founded in the last analysis on the self-evidence of what is harmful to Man’.⁵⁹

There can be no ethics in general for Badiou because there is ‘no abstract Subject, who would adopt it as his shield.’ Rather, there is ‘only a particular kind of animal, convoked by certain circumstances to *become* a subject’.⁶⁰ Rather than being general, ethics must correspond to the set of circumstances that convoke an animal to be a subject; these circumstances are the event, and the fidelity to the truth of the event borne by the animal after then event, as subject. A subject, for Badiou, is a ‘bearer [*le support*] of a fidelity’ which is fidelity to the truth process of an event. Thus the subject ‘is absolutely nonexistant in the situation ‘before’ the event’.⁶¹ Events bring about a specific truth, and thus subjects. Thus, Badiou argues, ‘after the musical event known by the name of ‘Schoenberg’ musicians faithful to this event, such as Berg and Webern, could not ‘continue with *fin-de-siècle* neo-Romanticism as if nothing had happened.’ Similarly, ‘after Einstein’s texts of 1905, if I am faithful to their radical novelty, I cannot continue to practise physics within its classical framework’.⁶² In contrast to these specific ethics following specific events, Badiou argues that a return to human rights and a universal human subject, is, essentially, a ‘return to Kant’⁶³ in which

⁵⁶ *Ibid.*, pp. 4-5

⁵⁷ *Ibid.*, p. 4

⁵⁸ *Ibid.*, p. 16

⁵⁹ *Ibid.*, p. 58

⁶⁰ *Ibid.*, p. 40

⁶¹ *Ibid.*, p. 43

⁶² *Ibid.*, p. 42

⁶³ *Ibid.*, p. 8

the central idea is ‘the presumption of a universal human Subject, capable of reducing ethical issues to matters of human rights and humanitarian actions.’⁶⁴ Further, ‘ethics subordinates the identification of this subject to the universal recognition of the evil that is done to him. ‘Ethics’ – which is to say universal, foundationalist ethics – thus defines man...*as a victim*.’⁶⁵ This identification of man as victim is unacceptable, argues Badiou, for three reasons.

The first reason is that the status of victim renders man nothing more than his ‘animal substructure’; as victim, there is nothing special about humans in comparison with any other animal, according to this point of view. Yet Badiou argues that there is evidence that it is humans’ resistance to suffering and torture, and to the spectre of death, that marks them out. Such resistance ‘*does not coincide with the identity of victim*’. Rather, humans here strive to be immortal: ‘this is what the worst situations that can be inflicted upon man show him to be.’⁶⁶ This bears out Arendt’s observation that human activity in the public realm is a striving for some form of immortality.⁶⁷

The second reason is that if ethics depends on the recognition of Evil, any attempt to unite people around something ‘Good’ must, according to the proponents of the ‘ideology of ethics’, result not in good but in Evil. This accusation, notes Badiou, is oft-repeated. It has become a cliché of the prevailing ethics of public opinion that every revolutionary project is stigmatized as ‘utopian’ and is expected to turn into totalitarian nightmare. This, argues Badiou, is ‘sophistry at its most devastating’, for, if no such Good is possible, ‘how are we to envisage any transformation of the way things are?’ To forbid humans from imagining the Good, devoting their powers to it, or working towards it; to forbid the imagining of a break with what is, argues Badiou, is to ‘forbid humanity as such.’⁶⁸ Again, natural rights, in the guise of ‘ethics’, is an obstacle to freedom, and stands in the way of freedom and thus the possibility for people to reach their full potential as humans – this can only be realised, as Green and Arendt show, through moral action in the political community.

Third, ethics in general prevents us from thinking of ‘the singularity of situations as such’. Rather than an ethics in general, what is needed, argues Badiou, is an ethics of each situation specifically, for this ‘thinking the singularity of situations as such’ is ‘the

⁶⁴ *Ibid.*, p. 10

⁶⁵ *Ibid.*, p. 10

⁶⁶ *Ibid.*, p. 12

⁶⁷ Arendt, *The Human Condition*, pp. 18-21; pp. 55-56

⁶⁸ Badiou, *Ethics*, p. 14

obligatory starting point of all properly human action'.⁶⁹ By way of illustration, Badiou asks us to consider a doctor, and the doctor's decision as to whether a certain patient should be treated. The ethics of the specific situation require the doctor to disregard other considerations and judge the case according solely to the ethics of doctor-patient relations: he has performed the Hippocratic Oath, thus he is bound by specific ethics to treat any patient. General ethics might tempt the doctor to deny treatment, if, for example, the potential patient 'is without legal residency papers, or not a contributor to Social Security'.⁷⁰ By taking a conceptualisation of the human in general as a starting point, as is the case for general ethics, we lose sight of the needs of the specific human in specific sets of circumstances.

In place of the ideology of general ethics, founded on the notion of a 'radical evil', Badiou proposes 'the ethic of truths' which combats several types of evils. Badiou defines the ethic of a truth as 'the principle that enables the continuation of a truth-process – or, to be more precise and complex, *that which lends consistency to the presence of some-one in the composition of the subject induced by the process of this truth.*'⁷¹ As we shall see, the ethic of truths consists in following the truths set in place by an event, and the 'evental statement' that comes out of the event.

2.4.2 The contingent universal and the evental statement

Badiou argues that 'at the heart of every situation, as the foundation of its being, there is a 'situated' void, around which is organized the plenitude (or the stable multitudes) of the situation in question.'⁷² The age of Enlightenment sought to fill this void: Kant in philosophy; Haydn and Mozart in music. Badiou takes composition as his example. Whereas 'at the heart of the baroque style at its virtuoso saturation lay the absence [*vide*] of a genuine musical architectonics', Haydn 'occurs as a kind of musical 'naming' of this absence', just as Kant and the doctrine of the rights of man fill an absence in philosophy.⁷³ The void means foundations are contingent: they are there, but fundamentally subject to change, and change which is axiomatically proclaimed through politics, rather than being subject to proof.

⁶⁹ *Ibid.*, p. 14-15

⁷⁰ *Ibid.*, p. 15

⁷¹ *Ibid.*, p. 44; Badiou's emphasis.

⁷² *Ibid.*, p. 69

⁷³ *Ibid.*, p. 68

Badiou spells this out further, and explicitly, in his ‘Eight Theses on the Universal’. His second thesis echoes Laclau’s point that pure particularism is not possible. Indeed, for Badiou, it is often a disingenuous part of the ‘ethics’ he rails against. He argues that the thesis, ‘commonly claimed nowadays’, ‘that the only genuinely universal prescription consists in respecting particularities’ is ‘inconsistent’. For Badiou, ‘any attempt to put it into practice invariably runs up against particularities which the advocates of formal universality find intolerable’ because these particularities are seen by the upholders of universality as ‘bad ones’ – ‘a cultural or religious particularity is bad if it does not include within itself respect for other particularities’. Thus, the proponent of the idea that ‘the only genuinely universal prescription consists in respecting particularities’ must decide precisely which particularities should be upheld and which shouldn’t: a hierarchy must be created. This, of course, is in contradiction of the idea that *all* particularities should be respected. On the other hand, one may stipulate that all particularities contain within them the universal idea that all particularities should be upheld. If this is the case, though, ‘the universality of respect for particularities’ becomes merely ‘the universality of universality’.⁷⁴ Recognising pure particularity simply does not make sense.

A universal is not ‘a regularization of the particular or of differences’. Rather, it is ‘of the order of a sudden emergence’. This brings Badiou to his third thesis, which is: ‘Every universal originates in an event, and the event is intransitive to the particularity of the situation.’⁷⁵ One of the most important events, which created a universalism that lasted for almost two thousand years in the West, was the crucifixion and resurrection of Christ, as interpreted by Saint Paul. Here, ‘Christ’s resurrection is neither an argument nor an accomplishment. There is no proof of the event; nor is the event a proof.’⁷⁶ As such, the event can only be ‘axiomatically declared’.⁷⁷ So it is with every event and every creation of a universal through an event. Every universal emerges as ‘a decision about an undecidable’ for which there can be no proof, but merely axiomatic declaration.⁷⁸ This is to say that a political event – Badiou suggests ‘the French Revolution, or the Paris commune, or October 1917, or the struggles for national

⁷⁴ Alain Badiou, “Eight Theses on the Universal”, [<http://www.lacan.com/badeight.htm>] Accessed 6th July, 2013. Thesis 2

⁷⁵ *Ibid.*, Thesis 3.

⁷⁶ Alain Badiou, *Saint Paul: The Foundation of Universalism* (Stanford, Stanford University Press, 2003) p. 49

⁷⁷ Marchart, *Post-Foundation Political Thought*, p. 125

⁷⁸ Badiou, “Eight Theses”, Thesis 4.

liberation, or May 1968' as examples – brings about a new universal, which expresses itself in terms of deciding about questions that are uncertain, indeed 'undecidable'. Thus, before an event, the question 'do migrant workers belong here?' is undecidable (Badiou gives two contradictory answers: 'Yes, probably, since they live and work here. No, since they don't have the necessary papers'). The event 'implies that \mathcal{E} , which is undecidable within the situation, has been decided' – here \mathcal{E} stands for the 'evental statement'. Just as with *πειθελειν*, the persuading speech, in Arendt, the truth is not fixed, but, until the matter is settled (for the time being; it remains contingent) by the event, both answers are possible: the matter can be viewed from all sides.

The detached, evental statement is all that remains as 'trace of the disappearance of the event that founds it'. The universal 'initiates its procedure in the univocal act through which the valence of what was devoid of valence comes to be decided' – this is to say that the universal begins with the deciding of the undecidable; the formulation of the evental statement. All this happens 'according to the chance of an aleatory supplement'. There is chance at play, for the universal, although 'for all time' is contingent. It can only last until the next event decides the undecidable in a new way. This is the contestation at the heart of the political, and it is what makes democratic politics possible.

Thus Badiou points towards how the void as freedom, which have traced through Nancy, Lefort, and Laclau, is filled through the event with a contingent universal. In this way, the problems of pure particularism, and sheer nihilism, are avoided, whilst at the same time so too is the threat of the end of freedom which would be heralded by a fixed foundation.

Post-foundational theory, then, offers an answer to objection presented at the beginning of this chapter. There is a ground that rights recognition can appeal to, or, rather, there are several, contingent grounds, which come and go through contestation in the realm of the political. Natural rights theories, in contrast, are committed utterly to foundationalism. As we have seen, this removes the possibility of meaningful freedom. Rights recognition, on the other hand, is completely aware of its contingency. Contingency, and the ability to change and adapt to changing human needs is one of the strengths of rights recognition. Taking contingency seriously, and a commitment to 'mind the gap' is also an advantage of a recognition-based approach: rather than taking rights for granted, we must work hard to ensure the conditions in which rights

recognition can best occur are preserved. Egalitarian rights recognition, then, is a call both for honesty about how rights are created, and for vigilance, in protecting rights and rights-generative political and social conditions.

Through recourse to grounding on contingent grounds, rights recognition passes through the Scylla and Charybdis presented by pure positivism, on the one hand, and back-door natural law foundationalism, on the other. The rights recognised are not arbitrary, as they would be in pure positivism, but must relate to moral arguments grounded on something common to society. Neither do the rights recognised have to rely for their normative force on some notion of natural law: it is a contingent law humans make for themselves, which can only be strengthened by knowledge of its contingency, and the respect for human agency which this must entail. Purely by the act of making laws and recognising rights humans create for themselves a need and requirement for a level of respect for each person.

3. Egalitarian rights recognition restated

The foregoing chapters have examined several theories of rights recognition. The most significant of these are those of T. H. Green and Hannah Arendt. Combining Arendt and Green enriches the theory of rights recognition through greater consideration of judgment as well as the importance of political community, speech and action. As we have seen (in chapters three and four), considering Arendt's work leads us to conceptualise rights recognition in a much more dialogical way than some theories: speech, as well as action, is important. Further, egalitarian rights recognition takes Green and Arendt on equality much more seriously than some other theories of recognition. Finally, considering aspects of post-foundational thought has pointed towards a way in which egalitarian rights recognition can build in a significant moral element – and avoid value-free, arbitrary rights – without sneaking in an implicit theory of natural law.

Egalitarian rights recognition can be set out in the following ten points, which have formed a thread through the previous four chapters:

1. Rights, including human rights, require social recognition.

2. Recognition consists of two stages – recognition of persons, and recognition of rights.
3. The location, or arena, for rights recognition is society.
4. Recognition of rights requires meaningful equality, which can be expressed as ‘equality of access to rights recognition arenas and debates’.
5. Recognition of rights or persons may not be arbitrary, but must be based on moral argument, such as the notion of a common good or a *sensus communis*.
6. Recognition of rights requires the greatest possible facilitation of communication within a society.
7. ‘Society’ in the context of rights recognition is open to ideas from without, and has no necessary limits.
8. Rights are recognised claims, not established ways of acting.
9. Recognition of rights and persons is synchronic, not diachronic.
10. Recognition of rights is logically distinct from enforcement and maintenance of rights; although enforcement and maintenance of rights is desirable, recognition can exist without enforcement and maintenance

Before proceeding to the final chapter, and the question of whether egalitarian rights recognition can be applied internationally, this section will briefly summarise the main points of the theory.

1. Rights, including human rights, require social recognition.

The most fundamental claim of egalitarian rights recognition is that all rights, including human rights, are created by social recognition. There are no ‘natural’ or

‘innate’ rights, that humans have simply *qua* humans, independent of social and political interaction. Rather, rights are claims that have been recognised by society. In this way, rights are not self-evident, God-given, or natural, but are human-made, and socially constructed, through processes of social recognition.

2. Recognition consists of two stages – recognition of persons, and recognition of rights.

The idea that recognition consists of two distinct stages, which we have labelled the ‘recognition of persons’ and the ‘recognition of rights’, is one that is drawn from the work of T.H. Green, as discussed previously in chapter one. This idea also incorporates Arendt’s notion of ‘the right to have rights’ and gives this potentially paradoxical statement meaning. Recognition of persons is logically prior to the recognition of rights, as Arendt’s phrase suggests. Recognition of a person grants a human entry to the political community, or society. It is within this political community that claims are debated and recognised as rights.

It is not the political community as a whole which recognises persons. Rather, this action is done simply in the act of communication. Communication – speech, in Arendt’s sense; the conversing of an ‘I’ to a ‘Thou’ in Green’s terminology – carries in that action an implicit claim, that ‘I’ am a person, and that ‘Thou’ art also a person. A communicative response recognises that claim as valid. It is this fluidity of inter-actor recognition of persons that allows the society in which rights are recognised to exist in many forms, in the way in which Pericles’ *polis* was infinitely flexible and shifting. Recognition of a person does not entail necessarily recognition of rights, but rather recognition of rights *in principle* – the recognition that, as a moral actor, a person is capable of having rights.

3. The location, or arena for the recognition of rights is society; society may take many forms.

The basic premise of the first half is clear enough, and follows from Green and Arendt. Rights are created through recognition, rather than by virtue of nature or act of God. Therefore rights require people to recognise claims, and these people constitute society. As Hegel and Green make clear, this society can be quite basic – a few people, or a family unit. However, for both Hegel and Green, the most desirable form of society so far as the recognition of rights is concerned is the society which has

organised itself into a state. Arendt's analysis of the plight of the stateless adds to this point. As we saw in chapter four, a state provides the best mechanism for upholding rights, through formal legislation and state action.

However, informal social recognition matters too. In this sense, a political community which has established itself as a state consists of two overlapping arenas in which rights are recognised: the formal and the informal. In each arena, the mechanism for recognising rights is essentially deliberative and democratic. Just as in Ancient Greece anyone could advance an argument from the *bema* (speaker's platform) in the *Pnyx* which would be voted upon by the *ekklesia*, so can anyone advance a claim on their own behalf or on the behalf of others in the arena of rights recognition. Similarly the claim is decided by the continual plebiscite of those present – meaning of the members of society. This is, of course, a somewhat idealised account – communication in modern societies is not quite so simple or open – but the basic premise remains. Some claims are listened to; others dismissed. In all cases it is the audience of the arena that is the judge – as Lefort and Arendt show us, each member of the political community is a judge – even if their judgment is impaired by distortion of communication, misrepresentation, or even the repression of speech (though to be legitimate, rights must be recognised in an environment which permits the highest possible standard of communication, as point six makes clear).

4. Recognition of rights requires meaningful equality, which can be expressed as 'equality of access to rights recognition arenas and debates'.

For the theory of egalitarian rights recognition, equality – as the name suggests – is essential in enabling rights recognition to take place. Green is quite clear that rights can only be recognised in a society of equals, as we have seen in chapter four. For Arendt, it is only in a society of one's equals that judgment can occur. Without equality, matters cannot be viewed from all sides, in the way that judgment requires.

Further, as both Green and Arendt make clear, inequality involves a distortion of rights recognition. Where there is inequality, the common good which is recognised is unlikely to be truly common – it will, in all likelihood, be skewed to the advantage of those already most well-off. Thus, distorted rights recognition runs the risk of reinforcing already existing social injustices. This is why insisting on equality as part of rights recognition is so important: by taking equality seriously, egalitarian rights

recognition can provide a powerful commentary on, and critique of, rights recognised through flawed recognition processes.

This equality demanded by egalitarian rights recognition is ‘equality of access to rights recognition arenas and debates’. This is a challenging criterion for many political communities to meet. It calls for an end to any discrimination on the basis of gender, race, or sexuality as a very basic minimum. True equality of access to rights recognition arenas and debates also requires, as Arendt shows, that everyone has sufficient leisure to take part in political debate, and that, therefore, they can afford this leisure. This may require significant programmes of welfare support in terms of unemployment benefit, education programmes, maternity and paternity support, pensions, minimum wages, and so on. So far as egalitarian rights recognition is concerned, the precise mechanism by which this equality is brought about does not matter, but it is vital – in order that rights benefit all in society, and in order that human rights can be described as *human* rights, for every human – that there is meaningful equality which enables all to take part in rights recognition processes.

5. Recognition of rights or persons may not be arbitrary, but must be based on moral argument, such as the notion of a common good or a *sensus communis*.

Most of the key proponents of rights recognition agree that the question as to which rights should be recognised and which not must be answered by reference to some form of moral argument. Such decisions, they argue, should not be arbitrary. Derrick Darby leaves open what form of moral argument is acceptable; Green holds that the criterion for recognition of rights is that they contribute to the common good; Arendt, in her work on judging, holds that such judgments should be made with reference to the Kantian notion of the *sensus communis*. It is clear that judgments of rights recognition must be made with reference to the situation of all in the community, rather than from individual self-interest.

The prioritising of the interest of all over self-interest is not so unrealistically Utopian as it sounds, for two reasons. First, as a member of a community, an individual shares a large degree of interest with that community. Recognising rights – or withholding rights – that would damage the community as a whole would probably harm the individual too. Therefore, the individual, even if through self-interest, thinks often in terms of the good of all – of the all of which he or she is a part. Second, in a

society with proper communication and access to relevant information it should be obvious to the many when the few are motivated by self-interest. In the essentially democratic discourse of rights recognition the self-motivated few can simply be overruled. To enable this to happen, equality is vital, as noted in the previous point.

Further, rights recognition is essentially democratic in nature. It requires that all in society make a judgment; as we saw in the previous chapter it requires a society in which the formal state apparatus reflects accurately and effectively the views of society as a whole, and in which communication between formal and informal arenas is effective and meaningful.

6. Recognition of rights requires the greatest possible facilitation of communication within a society.

To function properly, rights recognition needs the greatest possible facilitation of communication within a society. Society, as we have seen, is the venue, the arena, for rights recognition. Everyone in society acts as the judge of sometimes competing claims. To make the most well-informed decisions about these claims, each judge – each person in society – must have the most information possible. This requires communication, so that information is freely available, and so that misunderstandings and misinformation do not occur.

To flesh this out a little, let us consider smoking, the rights of smokers, and the rights of non-smokers. Until recently, society held that smokers had a right to smoke tobacco where they pleased, including in their place of work. This was based on two key understandings: the first was that smoking, though considered irritating or bad-mannered by some, was not harmful; the second, which replaced the first, was that cigarette smoking was potentially harmful, but only to the smoker. Both understandings led to the conclusion that the smoker had the right to smoke, even at the expense of annoying some people, because the annoyance was trivial, any potential harm was harm only to the smoker, and others were not harmed by cigarette smoke. However, even while society accepted the smoker had this right, information was held, but suppressed, that undermined the understandings upon which the right was built. First, evidence was obtained that showed smoking to be harmful. Later, evidence was obtained that showed cigarette smoke harmed others. It was only when this information entered the public domain, after a delay of decades, that society reconsidered, and held that smokers have no right to smoke where their smoke could cause harm to others. Had this information

emerged earlier, and been available for the public debate about the claims of smokers to certain rights, and the claims of non-smokers to other rights, it is quite possible that a good many benefits would have been obtained for society. Some premature deaths would have been prevented a great deal of expenditure on healthcare would have been saved.

In addition to this, communication is necessary to allow rights recognising debates to take place – people must be able to discuss, and in a large society this requires the facilitation of effective communication.

7. ‘Society’ in the context of rights recognition is open to ideas from without, and has no necessary limits.

The ‘society’ within which rights are recognised is created solely by the recognition of persons by other persons. As such, society is an essentially porous entity, with no fixed limits to membership. Therefore a society is not necessarily coterminous with a national group, with a race, religion or ethnicity. The only meaningful boundary is that of communication, but so long as persons are able to communicate with each other they may be part of the same society.

Further, the right to have rights – or the recognition of persons – is non-exclusive. One can at the same time be a member of several different societies, recognised by each and participating in the process of rights recognition in each. An obvious example of this would be dual citizenship, the possession of which entitles one to make interventions through the formal democratic procedures in the rights recognising processes of two separate polities. As well as such obvious lateral dual memberships, one may also be a member of societies within other societies: an example of this would be the participation both in a minority society, for example the Quebecois community and the national society of Canada.

This porous, unfixed notion of society means that societies of rights recognition are fundamentally open to ideas from outside the society, through the simple mechanism of incorporating anyone into the society who wishes to advance an argument for a right. By listening, the right to have rights is accorded, and even an advocate of rights originally from outside the society becomes part of the society.

The logical conclusions of the open, porous society, as Green noted, are that the bounds of such society are limitless. Green held that such a society of equals could come to encompass the whole world. Through advances in technology, transport,

education, and communication, it is no longer entirely Utopian to envisage the expansion of the rights recognising society to the whole of humanity.

8. Rights are recognised claims, not established ways of acting.

Contrary to much of the literature around rights recognition, which, as we saw in chapter four, sees recognised rights as established ways of acting, the theory advanced here holds that rights are recognised claims; these claims are distinct from actions. Although an action may implicitly entail a claim, it is the recognised claim which is the right, not the action. In the case of walking on a public right of way, for example, the action of walking on that path entails the implicit claim that one is, or should be, allowed to do so. This claim may be advanced whether one is engaged in walking or not, and may be recognised by society regardless of whether an action has been committed. A right is the potential or power to legally act, not action itself.

9. Recognition of rights and persons is synchronic, not diachronic.

Similarly, the recognition of rights is synchronic, not diachronic. Rights need not be recognised as part of some tradition. They are not ways of acting which are ‘established’ by tradition. Rather, they are claims which are recognised by society in a synchronic, instantaneous act. Thus, they are susceptible to change. One day, a society can recognise the right of plantation owners to own black Americans as slaves. Another day, society can recognise the rights of black Americans to freedom from slavery. One day a society can recognise the right of an insulted aristocrat to demand satisfaction for the insult in a duel. Another day, society does not recognise the right of two men to shoot pistols at each other from twenty paces, no matter who has been insulted, or how severely.⁷⁹

The tradition in these cases does not appear: slavery had happened and so had duelling; history cannot be erased. What happened was that society no longer found any moral justification for the continuation of the tradition. For most people, actions did not change: few people owned slaves in proportion to the general population; even fewer took part in duels. Rather, opinion shifted. And, although it shifted gradually, the shift was, in effect, binary. Either society approves or it does not. Issues may be contentious, but eventually society decides one way or the other, even though this may

⁷⁹ Both examples taken from Kwame Anthony Appiah, *The Honor Code*.

be unclear for a few years without the benefit of hindsight. We can say, for example, that society in the first half of the twentieth century in Britain felt that published work should not contain profanity and that homosexuality was in some way morally objectionable. By the start of the 21st Century, it is clear that society holds neither of these attitudes, though precisely where the switch occurred is difficult to say. Although the Lady Chatterley trial and the Wolfenden Report are convenient markers in terms of formal recognition of rights, looser social recognition is harder to track, sometimes anticipating and sometimes following formal legislation. This difficulty in tracking changes, however, should not detract from the key point, which is that as radical changes in rights are clearly possible, we have good reason for holding recognition to be synchronic, not diachronic.

10. Recognition of rights is logically distinct from enforcement and maintenance of rights; although enforcement and maintenance of rights is desirable, recognition can exist without enforcement and maintenance.

The last point of distinction from other rights recognition theories is that recognition and maintenance of rights are two different processes. This is important, as it allows rights recognition to occur in informal arenas, where there is no enforcement of the rights as such. We can have rights in small, informal rights recognising arenas, held against only a few people, which do not require governmental enforcement, or formal legislation.

Although many rights can be held informally, it is clear that rights are most effective when they are enforced and maintained: both Green and Arendt make it clear that the state is the best environment for this. However, the state is not *necessary* for rights recognition, as thinkers such as Bernard Bosanquet would argue.⁸⁰ Maintenance and enforcement of rights is a separate process, which can only come about after the process of rights recognition has established that a claim ought to be a right.

Having re-stated the theory of egalitarian rights recognition, we are now in a position to proceed to chapter six, which will investigate whether egalitarian rights

⁸⁰ Bosanquet, "The Function of the State in Promoting the Unity of Mankind", p. 29; Bosanquet, *The Philosophical Theory of the State*, p. 180; Sweet, *Idealism and Rights*, p. 75.

recognition can work not just within set communities, but internationally, as the underpinning for a cosmopolitan theory of human rights.

Chapter Six

Rights recognition and cosmopolitanism: global egalitarian rights recognition

1. Introduction

The main contention of this chapter is that egalitarian rights recognition provides a theoretical basis for rights not simply within states or political communities, but on an international scale too. This is essential in constructing a political theory of *human* rights: if rights recognition is to provide a justificatory argument for *human* rights, rather than rights in a localised area or network, then it must admit of application to all humans, on a global scale.

Chapters four and five demonstrated that rights recognition is not inextricably linked to the state. The state is the best environment for recognising rights, and for the maintenance of rights, but other constellations are possible, so long as they fit the criteria set down in chapters four and five. As we have seen, for both Green and Hegel, rights are ‘carried over’, or ‘*aufgehoben*’, into the state, but can exist without a state. For Arendt, a *polis* can be anywhere, a quite fluid structure. This flexibility offers some hope in a world where the Westphalian system of sovereign states is under some tension.¹

In a globalised (or at least globalising) world, a theory that takes isolated nation states as its area of application has clear shortcomings. Today, states are not so isolated. Both increased migration and the creation of supranational bodies mean that states are interconnected and interdependent. Thus, a system of rights cannot work in one state in isolation, or even in an idealised, abstract ‘state’. Rather, it must take into account the links between states and the links between persons and peoples in several states.

This prompts various questions: what does a system of rights recognition have to say about refugees, the stateless, or immigrants? How can rights recognition deal with failed states? How does rights recognition sit in relation to (partially) supranational

¹ On the decline of the Westphalian system, see: Andrew Linklater, “Citizenship and Sovereignty in the Post-Westphalian State”, *European Journal of International Relations* March 2:1 (1996), pp. 77-103; Richard Falk, “The Decline of Citizenship in an Era of Globalization” *Citizenship Studies* 4:1 (2000), pp. 5-17, pp. 10-14

bodies such as the European Union? It is clear that any overly Westphalian methodological assumptions that lurk in the background of a theory of rights recognition must be exposed and challenged if the theory is to be supportable in a world of globalisation and mass migration.

The questions posed to egalitarian rights recognition by the internationalisation of politics can be split into two main strands. The first strand concerns the question of whether rights recognition can cope with the complexity of today's international system, and whether it can be applied to more than an idealised abstract singular state and deal with supranational or other entities. The second strand concerns the question of whether rights recognition has anything to add to our understanding of international politics; and whether it can provide better solutions to specific problems of international politics than other theories, such as that of natural rights.

In addressing these questions, this chapter will aim to show that rights recognition can be applied to international politics, and not simply to idealised notions of individual states. Further, rights recognition has the potential to enhance our understanding of, and inform our responses to, specific problems of international politics. Rather than drop rights recognition because it can happen only in specific, delimited political communities, we should take it seriously as an international theory.

Key to an international theory of rights recognition are two potential tensions in the ten point theory, which, to recap, is the following:

1. Rights, including human rights, require social recognition.
2. Recognition consists of two stages – recognition of persons, and recognition of rights.
3. The location, or arena, for rights recognition is society.
4. Recognition of rights requires meaningful equality, which can be expressed as 'equality of access to rights recognition arenas and debates.
5. Recognition of rights or persons may not be arbitrary, but must be based on moral argument, such as the notion of a common good or a *sensus communis*.

6. Recognition of rights requires the greatest possible facilitation of communication within a society.
7. 'Society' in the context of rights recognition is open to ideas from without, and has no necessary limits.
8. Rights are recognised claims, not established ways of acting.
9. Recognition of rights and persons is synchronic, not diachronic.
10. Recognition of rights is logically distinct from enforcement and maintenance of rights; although enforcement and maintenance of rights is desirable, recognition can exist without enforcement and maintenance.

The first potential tension is between points 5 and 7: how wide can a community be without sacrificing the moral agreement – either common good or *sensus communis* that is necessary for rights recognition? A second tension potentially exists between points 6 and 7. How wide can a rights recognition society or political community come to be without making communication impossible, or at least too problematic to allow proper mechanisms of debate and rights recognition to function? These questions will be addressed with a view to demonstrating that the model can overcome such potential tensions.

The first half of this chapter will assess three major theories of international and cosmopolitan human rights. Part 2.1 will discuss what might be labelled 'mainstream' cosmopolitanism, a body of literature that, although it draws on Kant, has come to the fore largely since the end of the Cold War. Part 2.2 will address a Hegelian approach to the question of international rights, embodied particularly in the work of Mervyn Frost and in his 'constitutive theory' of human rights. Part 2.3 will assess the prospects of a cosmopolitanism built on discourse ethics, an idea arising in part from Jürgen Habermas' account of communicative action, but also drawing on aspects of the thought of Hannah Arendt, and developed by Seyla Benhabib.

The second half of this chapter, section three, will take forwards the theory of egalitarian rights recognition developed thus far, and make the case that it goes further to address the needs and complexities of contemporary international politics than any of the other theoretical approaches presented in this chapter. The potential tensions highlighted above will be addressed, and it will be shown that they do not present any insurmountable barrier to the theory of egalitarian rights recognition. Further, the advantages of adopting egalitarian rights recognition over other approaches will be set out.

2. Current accounts of international and cosmopolitan human rights

Cosmopolitanism has a history virtually as long as Western political thought as a whole: adopted by the Stoics, the idea goes back at least as far as the Cynic Diogenes of Sinope, who declared himself to be a citizen of the world, or *kosmopolitēs*, the Greek phrase from which the word ‘cosmopolitan’ is derived.² According to this line of thought, the *polis* becomes coterminous with the whole universe, the *kosmos*. Rules and laws, *nomoi*, that would previously apply only within the *polis*, apply, for Diogenes and the Stoics, to the whole of the *kosmos*. The Cynic philosophy provided ‘tools of resistance against the injustices of the city’, through ‘principles of dignity and equality deduced by reason or given by God’ which held equally for the whole *kosmos*.³

The next major development in cosmopolitan thought comes with Immanuel Kant – a thinker who had an extensive influence on both Green and Arendt. In Kant’s 1795 essay, ‘*Zum Ewigen Frieden*’ (‘Perpetual Peace’), he sets forth three ‘definitive articles’.⁴ These are, first, that ‘the civil constitution in every State shall be republican’; second, that ‘international law [or ‘the law of peoples’] shall be founded on a *federalism* of free States; and third, that ‘*cosmopolitan rights* shall be restricted to the requirements [sometimes, ‘conditions’⁵] of universal *hospitality*’.⁶ *Hospitalität* is a word very seldom

² As related by Diogenes Laertius, *Lives of Eminent Philosophers*, Book VI. Chapter 2, Section 63 [http://data.perseus.org/citations/urn:cts:greekLit:tlg0004.tlg001.perseus-eng1:6.2]

³ Costas Douzinas, *Human Rights and Empire: the Political Philosophy of Cosmopolitanism* (Abingdon, Routledge-Cavendish, 2007), p. 159

⁴ Immanuel Kant, *Zum Ewigen Frieden: Ein Philosophischer Entwurf aus dem Jahre 1795* (Berlin, Verlag der Nation, 1985), pp. 19

⁵ ‘Condition’ alone is not a satisfactory translation of *Bedingung* – ‘necessary condition’ or ‘requirement’ are closer to the German meaning.

used in German,⁷ and Kant feels the need to gloss this Latin borrowing with a neologism, *Wirtbarkeit*, from *Wirt*, which means ‘innkeeper’, ‘landlord’ or ‘host’. Kant’s use of unusual language, as Benhabib notes,⁸ points towards the fact that he is talking about hospitality in an unusual way: it is not a case of *Gastfreundschaft*, another word for hospitality, denoting literally friendliness towards guests. Rather, hospitality in Kant’s usage denotes that he is talking ‘not of philanthropy, but of right’.⁹ Such a right, ‘of an alien...not to be treated as an enemy’¹⁰ after entering the territory of another person, and to be allowed entry if refusal will result in his destruction [*Untergang*], is a right ‘to which all people are entitled...in virtue of the right of common possession of the surface of the earth, on which, as it is the surface of a sphere, they cannot scatter infinitely, but must instead in the end tolerate [living] next to each other, as originally no one has more right than another [person] to be in a place on the earth.’¹¹ In describing this right to hospitality, Kant introduces a new category of rights – in addition to *Staatsrecht* (rights and laws within the state) and *Völkerrecht* (international law, the law of nations or of peoples) – that of *Weltbürgerrecht*: *cosmopolitan* rights, to which all are entitled, simply by virtue of their common possession of the earth. This three-level account of rights is Kant’s key conceptual innovation regarding cosmopolitanism.¹² However, the third level, cosmopolitan rights, is restricted solely to what is required by hospitality; as such it is rather more modest than some more recent cosmopolitan projects. It is Kant’s work, as we shall see, that provides the starting point for much contemporary work on cosmopolitanism.

⁶ 1: ‘Die bürgerliche Verfassung in jedem Staate soll republikanisch seyn.’ 2: ‘Das Völkerrecht soll auf einen Föderalismus freier Staaten gegründet seyn.’ 3: ‘Das Weltbürgerrecht soll auf Bedingungen der allgemeinen Hospitabilität eingeschränkt seyn.’ My translation; Kant’s emphasis retained. Immanuel Kant, *Zum Ewigen Frieden*, p. 19

⁷ [<http://www.duden.de/rechtschreibung/Hospitalitaet>] Accessed 1st July, 2013.

⁸ Seyla Benhabib, *Dignity in Adversity: Human Rights in Troubled Times* (Cambridge, Polity, 2011), p. 6

⁹ Kant, *Zum Ewigen Frieden*, p. 40. ‘nicht von Philanthropie, sondern vom Recht die Rede’

¹⁰ *Ibid.*, p. 40. ‘das Recht eines Fremdlings, seiner Ankunft auf dem Boden eines andern wegen, von diesem nicht feindselig behandelt zu werden.’

¹¹ *Ibid.*, pp. 40-41 ‘ein Besuchrecht, welches allen Menschen zusteht, sich zur Gesellschaft anzubieten, vermöge des Rechts des gemeinschaftlichen Besitzes der Oberfläche der Erde, auf der, als Kugelfläche, sie sich nicht ins Unendliche zerstreuen können, sondern endlich sich doch neben einander dulden zu müssen, ursprünglich aber niemand an einem Orte der Erde zu seyn, mehr Recht hat, als der Andere.’ Kant’s emphasis.

¹² As Benhabib notes: Seyla Benhabib, *Another Cosmopolitanism* (Oxford, Oxford University Press, 2006), p. 21

2.1 ‘Mainstream’ Cosmopolitanism

Following the end of the Cold War, there has been a resurgence of interest in cosmopolitanism, alongside a literature seeking to understand ‘globalisation’ more generally. Much previous post-war thinking about justice and rights assumed that such debates took place not at an international level, but within hypothetical states or societies: both John Rawls’ *A Theory of Justice* and Robert Nozick’s *Anarchy, the State, and Utopia* take the hypothetical state as the location within which debates about justice and rights occur.¹³ Rawls’ attempt to expand his theory of justice to an international level in his *The Law of Peoples* was the jumping off point for a renewed interest in cosmopolitanism, and provides the background for much of the subsequent debate.¹⁴ This section will briefly outline some of the key accounts of cosmopolitanism that have been put forward, paying particular attention to the philosophical justifications offered. It will be argued that, in many cases, the philosophical underpinnings are insufficient to justify the cosmopolitan account of human rights that is offered. More promise is offered by the theories of Seyla Benhabib and of Mervyn Frost, which show the possibility of accounts of international politics based on recognition.

Several variations occur within the current cosmopolitanism literature. David Held distinguishes between two broad groupings of approach: on the one hand are ‘those for whom membership of humanity at large means that special relationships (including particular moral responsibilities) to family, kin, nation, or religious grouping can never be justified because the people involved have some intrinsic quality which suffices alone to compel special moral attention, or because they are allegedly worth more than other people, or because such affiliations provide sufficient reason for pursuing particular commitments or actions.’¹⁵ Opposed to this view, Held describes another broad position, which ‘recognizes that while each person stands in ‘an ethically significant relation’ to all other people, this is only one important ‘source of reasons and

¹³ John Rawls, *A Theory of Justice* (Oxford, Oxford University Press, 1971); Robert Nozick, *Anarchy, State, and Utopia* (Oxford, Blackwell, 2003)

¹⁴ John Rawls, *The Law of Peoples: with “The idea of Public Reason Revisited”* (Cambridge, Mass., Harvard University Press, 1999)

¹⁵ David Held, “Principles of Cosmopolitan Order”, in Gillian Brock and Harry Brighouse (Eds.), *The Political Philosophy of Cosmopolitanism* (Cambridge, Cambridge University Press, 2005), pp. 10-27, p. 17

responsibilities among others’’.¹⁶ According to this position, ‘cosmopolitanism principles are ... quite compatible with the recognition of different ‘spheres’ or ‘layers’ of moral reasoning’’.¹⁷ Held terms these two positions ‘thick’ and ‘thin’, respectively.¹⁸

Another distinction may be drawn between what Brock and Brighouse term ‘moral’ and ‘institutional’ cosmopolitanism.¹⁹ Institutional cosmopolitanism holds that significant institutional changes are required to facilitate the cosmopolitan vision; such a view is exemplified in the literature by Luis Cabrera, who argues for the creation of a world state.²⁰ Against this view, ‘moral’ cosmopolitanism holds that we need not go quite so far, and that radical institutional transformations are not necessary. Rather, cosmopolitan justice can be achieved largely within the current international state system.²¹

Benhabib offers her own three-part taxonomy of cosmopolitanism. Cosmopolitanism can be ‘an attitude of enlightened morality that does not place ‘love of country’ ahead of ‘love of mankind’; this view is associated with Martha Nussbaum. Second, it can denote ‘hybridity, fluidity, and recognizing the fractured and internally riven character of human selves and citizens, whose complex aspirations cannot be circumscribed by national fantasies and primordial communities’; this view she associates with Jeremy Waldron. Third, cosmopolitanism can be ‘a normative philosophy for carrying the universalistic norms of discourse ethics beyond the confines of the nation-state’; this view is ascribed to Jürgen Habermas, David Held, and James Bohman.²²

This section will briefly explore the philosophical foundations of various conceptualisations of ‘mainstream’ cosmopolitanism. It will argue that, in common with much human rights discourse in general, it relies on an often implicit assumption that humans have rights simply *qua* humans – that there is an ontological basis for

¹⁶ Held, “Principles of Cosmopolitan Order”, p. 17, quoting Samuel Scheffler, “Conceptions of Cosmopolitanism”, *Utilitas* 11 (1999), pp. 255-276, p. 260.

¹⁷ Held, “Principles of Cosmopolitan Order”, p. 17, quoting Michael Walzer, *Spheres of Justice: a Defence of Pluralism and Equality* (Oxford, Robertson, 1983).

¹⁸ David Miller and Simon Caney use the terms ‘strong’ and ‘weak’ for this distinction. See: Simon Caney, “International Distributive Justice”, *Political Studies* 49:5 (2001), pp. 974-997; David Miller, “The Limits of Cosmopolitan Justice,” in David R. Mapel and Terry Nardin (Eds.) *International Society: Diverse Ethical Perspectives* (Princeton, Princeton University Press, 1998), pp. 164-182

¹⁹ Gillian Brock and Harry Brighouse, “Introduction”, in Gillian Brock and Harry Brighouse (Eds.), *The Political Philosophy of Cosmopolitanism* (Cambridge, Cambridge University Press, 2005), pp. 1-9, p. 9

²⁰ Luis Cabrera, *Political Theory of Global Justice: A Cosmopolitan Case for the World State* (London, Routledge, 2004)

²¹ Rawls *The Law of Peoples* is an example of this approach.

²² Benhabib, *Another Cosmopolitanism*, pp. 17-18

human rights. As noted previously, this reliance on human rights as natural rights is unsustainable, as it is both empirically inaccurate and philosophically problematic. Rather, as this chapter attempts to demonstrate, we can tackle the problems of global justice with a recognition-based approach.

As previously noted, the spur for much recent work on cosmopolitanism was the transfer of the dominant conception of the social contract, John Rawls' *A Theory of Justice*, to the international level, in his *The Law of Peoples*. This transition was found to be disappointing by many in its tolerance of non-democratic nation-states and its acceptance of the existing state system. This disappointment led many to put forward more cosmopolitan accounts based on Rawls' earlier work. Martha Nussbaum gives us good reason for finding Rawls' later theorising of the foundations of international human rights wanting. She points out that it involves assuming that the original social contract is made between people who are roughly equal, that the contract is for mutual advantage, and that the nation state is the basic political unit. The problem with these assumptions is that Rawls' account involves a two-stage process of contract making. The first stage creates nation states (perhaps already a controversial enough move). The second stage involves the creation of a social contract between states. As Nussbaum points out, the 'second stage bargain' is made between parties who are not equal, but rather radically unequal, and in an international system where eight countries, the G8, dominate the rest. Further, Rawls' assumption that nation-states are akin to hermetically sealed units is at odds with the empirical reality of moving populations and porous borders (which we shall discuss further on in this chapter); neither can it accommodate supranational entities such as the European Union.²³

Rawls' account has been further criticised for being 'surprisingly conservative'.²⁴ Rather than arguing that his principles of justice from *A Theory of Justice* should be applied universally, Rawls argued for a respectful relationship between states. Liberal democratic states, according to Rawls' position, must deal with 'illiberal decent hierarchical regimes as equals, and not to endeavour to impose their values; and also that national boundaries place limits on redistributive obligations.'²⁵

²³ Martha Nussbaum, "Beyond the social contract: capabilities and global justice", pp. 198-200, in Brighouse and Brock, *The Political Philosophy of Cosmopolitanism* (Cambridge, Cambridge University Press, 2006)

²⁴ Brock and Brighouse, "Introduction", p. 2

²⁵ *Ibid.*, p. 2; see also Rawls, *The Law of Peoples*, pp. 59-70

Further, Rawls restricted the list of human rights that apply universally to a very short list, leaving the rest to be determined locally.²⁶

There are significant problems with Rawls' approach, then. It is a very weak form of cosmopolitanism – if indeed it can be called cosmopolitanism at all, which does not guarantee – or attempt to guarantee – human rights internationally. More significantly for this project, its philosophical foundations are shaky. Rawls' use of a social contract among nations has several problems, in addition to the many controversies that go with any use of a social contract argument.

Charles Beitz and Thomas Pogge²⁷, however, both attempt to use a Rawlsian social contract approach to cosmopolitanism, and Nussbaum holds their approach to be more appealing, as they 'think of the Original Position as applied directly to the world as a whole', which is 'a big improvement over the two-stage bargain' offered by the later Rawls: no longer do we have to subscribe to the implausible conceptualisation of nation-states as hermetically sealed units and as moral actors.²⁸ Yet their use of a contract approach still brings with it all the problems that a social contract approach entails. Nussbaum argues that both Beitz and Pogge are vague about the precise details of the global social contract and about the role of the nation state.²⁹ Further, any social contract approach has to assume that humans have rights *qua* humans, outside of society – in short, it must rely on a natural rights account of human rights. The problems with this assumption, as noted elsewhere, are manifold.

David Held bases his cosmopolitanism on two 'metaprinciples': the 'metaprinciple of autonomy' or 'MPA' and the 'metaprinciple of impartialist reasoning' or 'MPIR'.³⁰ For Held, the 'MPA' is not a philosophical principle, but a political one, which is to say 'it represents an articulation of an understanding latent in public political life and, in particular, if against the background of the struggle for a democratic culture in the West and elsewhere, it builds on the distinctive conception of the person as a citizen who is, in principle, 'free and equal' in a manner 'comprehensible' to everyone.'

²⁶ Rawls, *The Law of Peoples*, p. 79

²⁷ Charles R. Beitz, *Political Theory and International Relations* (Princeton, Princeton University Press, 1979); Thomas W. Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Oxford, Polity, 2002)

²⁸ Nussbaum, "Beyond the social contract", p. 207

²⁹ *Ibid.*, pp. 208-209

³⁰ David Held, *Cosmopolitanism: Ideals and Realities* (Cambridge, Polity, 2010), p. 82; pp. 85-86

It is, thus, ‘a notion embedded in the public political culture of democratic societies and emerging democracies’.³¹

The ‘MPIR’, on the other hand, is, according to Held, a philosophical principle, namely ‘a moral frame of reference for specifying rules and principles that can be universally shared’, which, ‘concomitantly ... rejects as unjust all those practices, rules and institutions anchored in principles not all could adopt’.³² The ‘MPIR’ as a moral frame can be measured using a number of tests, including:

‘an assessment of whether all perspectives have been taken into consideration; whether participants in decision-making are in a position to impose their will on others in such a way that would prove unacceptable to the latter, or to the originator of the action (or inaction), if the roles were reversed; and, finally, whether all parties would be equally willing to accept the outcomes proposed as fair and reasonable irrespective of the social positions they might occupy now or in the future’.³³

In adopting these principles as the justificatory basis for his account of cosmopolitanism, Held argues that he is making use of ‘the principles of democratic public life’ but without one ‘crucial assumption’: ‘that these principles can only be enacted effectively within a single, circumscribed, territorially based community’.³⁴

Held argues that conceptions of the MPIR lie at the heart of Rawls’ account of the Original Position, Habermas’ ‘ideal speech situation’, and Barry’s formulation of ‘impartialist reasoning’.³⁵ We might be tempted to add Jesus of Nazareth’s ‘whatsoever ye would that men should do to you, do ye even so to them’³⁶ or even Harper Lee’s invocation, through the character of Atticus Finch, that we should never judge before we ‘consider things from [the other person’s] point of view’.³⁷ The MPIR, then, is in danger of being so vague as to lose any specific utility. Furthermore, there is an epistemological problem: how are we to know that the views of all have been taken into

³¹ *Ibid.*, p. 82

³² *Ibid.*, p. 86

³³ *Ibid.*, p. 86

³⁴ *Ibid.*, pp. 83-84

³⁵ David Held, “Principles of Cosmopolitan Order”, in Gillian Brock and Harry Brighouse (Eds.), *The Political Philosophy of Cosmopolitanism* (Cambridge, Cambridge University Press, 2005), pp. 10-27, p. 21

³⁶ Matthew 7:12, *Authorised Version*

³⁷ Harper Lee, *To Kill a Mockingbird* (London, Arrow Books, 2010), p. 33

consideration? Indeed, how are we to know what those views are, or might have been, without asking those people to articulate them at the time? As a post-hoc check on the legitimacy of rights and laws, it offers a useful reminder to consider the views of others, but it does not go so far as a theory based on recognition does. A theory of egalitarian recognition does not question whether all perspectives have been taken into consideration: rather, the very formulation of rights and laws, through recognition, is dependent on the views of all being heard. This process is recognition. More than other theories of recognition, egalitarian rights recognition calls for *all* in society (whether local or global) to play an equal role in the rights recognition process. Only in this way can the rights recognised be properly legitimate.

2.2 A Hegelian Approach to International Human Rights

A second approach to constructing a theory of international human rights draws strongly on the work of Hegel; this approach is best exemplified in the work of Mervyn Frost, particularly his 1996 book *Ethics in International Relations* and his 2002 work *Constituting Human Rights*.³⁸ In *Ethics in International Relations*, Frost applies Hegel's theory of recognition to some of the 'hard problems' of international relations in an effort to construct a more compelling background theory for international relations than various others he rejects which, including utilitarian, English school, and 'rights-based' justifications of what Frost calls the 'settled norms' of international relations. Frost expands his work on his constitutive theory of human rights in the later *Constituting Human Rights*. Frost argues, following Hegel, that recognition is crucial for rights, and rejects natural rights-based approaches.

The crucially international dimension of Frost's work comes from the effect of recognition within one state on the status not just of people within that state, but on recognition of their status by members of other democracies. Frost argues that 'the ethical gain achieved when we become citizens of democratic states is not only a gain enjoyed which we enjoy vis-à-vis those who are our co-citizens within a given state, but is also a gain enjoyed which we as citizens in one state enjoy vis-à-vis citizens in other

³⁸ Mervyn Frost, *Ethics in International Relations: A Constitutive Theory* (Cambridge, Cambridge University Press, 1997); Mervyn Frost, *Constituting Human Rights: Global Civil Society and the Society of Democratic States* (Abingdon, Routledge, 2002)

states'.³⁹ This is because the 'ethical advance' of citizenship requires 'that civilians [read: members of civil society] come to recognize one another as people who are citizens within some state in a community of states'.⁴⁰

The key aspect of this is the membership of a state. Frost's constitutive theory holds, closely following Hegel, that the individual is only fully constituted within a state: 'sovereign states and the system of sovereign states are necessary to the flourishing of individuality'.⁴¹ The recognition of people in one state by people in another is the recognition as 'being[s] whose status as ... free individual[s] is (and can only be) realized within the context of some democratic state'.⁴²

Frost sticks closely to the Hegelian triad of recognition explored in chapter one. Recognition occurs first within the family, in the form of love, secondly within civil society in various (yet incomplete) forms, and finally, in its most ethically advanced stage, in *Sittlichkeit*, in the state. In his later work, Frost concentrates mostly on the divide between the rights of 'civilians' – that is to say, members of civil society – and the rights of 'citizens' – members of states. Rights within the family, Frost argues, are not so important: 'the notion of individual human rights is not central to the practice of family life in that it is quite possible to understand the workings of this practice without having any conception of individual human rights whatsoever'; further Frost argues that the 'rights' of children are better understood as the 'duties' of parents.⁴³

The 'primary feature' of civil society for Frost is that 'it is a practice of first-generation rights holders'. In civil society, people are not 'slaves, serfs or subjects but individual rights holders'.⁴⁴ Civil society, argues Frost, is the first (and lower level) of two 'authoritative practices which are global in their reach', the second being 'the society of democratic and democratizing states'.⁴⁵ The global reach of civil society is something of a break with Hegel, for whom the geography of civil society was much the same as that of the state. Both practices are crucial for Frost's 'constitutive theory', for 'were we to be denied participation in them, we would consider ourselves to have been fundamentally ethically damaged'.⁴⁶ Global civil society 'comprises all those many

³⁹ Frost, *Constituting Human Rights*, p. 115

⁴⁰ *Ibid.*, p. 116

⁴¹ Frost, *Ethics in International Relations*, p. 155

⁴² Frost, *Constituting Human Rights*, p. 116

⁴³ *Ibid.*, p. 55

⁴⁴ *Ibid.*, p. 62

⁴⁵ *Ibid.*, p. 67

⁴⁶ *Ibid.*, p. 67

men and women worldwide who, like me, consider themselves to be bearers of first generation rights and who recognize others as having such rights'.⁴⁷ This distinction between 'generations' of rights – made by many in relation to lists of human rights⁴⁸ – is crucial to the difference in Frost's work between the state and civil society. Only in states are 'second generation' rights possible, he argues.

'First generation' rights are 'often called 'negative liberties'' notes Frost, and these typically include 'the rights not to be killed, assaulted, tortured, the rights to freedom of speech, freedom of movement, freedom of conscience, to private property, and so on'.⁴⁹ These are the rights, he argues, of civil society. 'Second generation rights' or 'positive' rights⁵⁰ include 'a right to health care, housing, education, an old age pension, an annual holiday, and so on' and are only possible in states.⁵¹ In this sense, there are two stages to recognition in Frost, which correspond to two types or sets of rights.

Civil society is pre-political for Frost. Politics enters the stage on the third level, that of the state. It is only in states that people are fully constituted as citizens – as holders of not just civil society 'first generation' rights, but also of the rights of citizens, in particular the right to participate in the governing of the democracy within which they are in. Frost argues that three properties make the state so important for the 'ethical advance' from civil society. First, the legal system of the state provides 'a system of sovereign rule' which regulates and coordinates the 'rules encompassed in the myriad other associations, organizations and institutions within which citizens live their lives'. Second, it is in the state that citizens can decide which 'second generation rights' they wish to give each other: Frost argues that 'positive rights only make sense when they are located in a system of positive law which specifies a legally constituted government against which such positive rights may be claimed' – second generation rights, he argues, need a state. Third, Frost argues that it is the state which determines 'what rights citizens are to have with regard to the protection of cultural, ethnic and national forms of life'; these decisions are unavailable to civil society.⁵²

⁴⁷ *Ibid.*, p. 68

⁴⁸ Karel Vašák was the first to talk of 'three generations' of human rights. Karel Vašák, "Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of law to the Universal Declaration of Human Rights", *UNESCO Courier* 30:11 (1977), pp. 28-32

⁴⁹ Frost, *Constituting Human Rights*, p. 6

⁵⁰ *Ibid.*, p. 118

⁵¹ *Ibid.*, p. 6

⁵² *Ibid.*, pp. 105-106

Frost gives a long list of the ethical shortcomings of civil society. This list is important as it provides the reason that he holds states – and a society of democratic states – to be so important in international politics. The shortcomings of society are similar to those noted in Hegel in chapter one. These include the following. In civil society, there is alienation, competition, and individualistic self-help, in contrast to the state’s common interest, worth as citizens, and community. Civil society is marked by great inequalities, and it cannot be controlled by its members; the state is more equal, and controlled by the citizens. In the state, virtues such as altruism or heroism make sense; they do not in civil society. Civil society lacks the ‘institutional machinery’ to enforce rights.⁵³

To summarise, then, individuals’ identities, including rights, are constituted by civil society and states. For Frost, as for Hegel, the highest ethical realisation comes in states. Civil society is incomplete; this is because states allow individuals to flourish in a large set of ways that global civil society does not. Put another way, global civil society entails the recognition of ‘first generation’, ‘negative’ rights only, whereas states add to this the recognition of ‘second generation’, ‘positive’ rights.

Having given a brief account of the leading recognition-based approach to international politics, this section will outline some potential weaknesses and challenges to an account of international human rights based on a Hegelian theory. It will be shown that while Frost’s theory has many advantages, and is indeed more compelling than any of the alternative theories he discusses in *Ethics in International Relations*, especially in the way it takes the role of society and state in constituting identity seriously, it does have some disadvantages, which the theory of recognition proposed in this thesis has the potential to address. The first of these is a focus on states as the primary actors, and a somewhat monolithic conception of states. The second is the split between ‘first generation’ and ‘second generation’ rights which corresponds to the third potential weakness – the distinction between civil society and states. The fourth problem is the assumption of a community of (independent) democratic states.

A key aspect of Frost’s constitutive theory is that individual human identity flourishes to the fullest extent in states. Further, the international system is one of ‘a

⁵³ Frost, *Constituting Human Rights*, pp. 109-113

society of democratic states'.⁵⁴ Frost argues that when 'we recognize one another as citizens in democratic states, we are indicating to one another that we are rejecting a whole slew of international modes of conduct', including territorial expansion into other states, secret diplomacy, ad hoc forms of international relations and non-intervention.⁵⁵ Objections may be raised to this account from a realist or neo-realist point of view: the international system is one of anarchy, rather than a society, neo-realists might argue; the international system is actually a struggle for power and security, driven by fear and human frailty, other realists might suggest. These objections are potentially interesting, but the (neo-)realist position is not one that the theory of rights recognition sets out so far naturally aligns with.

Rather, it may be suggested that the international system is rather more complicated than a system of democratic or democratizing states. Multi-level governance presents a very large challenge to Frost's account. Over the last few decades there has been a tendency for power to spin away from the nation state, centripetally, in two key directions.⁵⁶ On the one hand, governance has become supranational. Entities like the EU are not states, but they do have considerable state-like function. On the other hand, some governance has devolved. Scotland, Wales and Northern Ireland in the UK; the Basque country and Catalunya in Spain; and Greenland in Denmark have all gained greater power over their own affairs, yet none are states.

The key qualities of states in Frost's theory can be seen in several non-state bodies. The EU, for example, contains a system of laws which 'regulate, harmonize [and] co-ordinate other sets of rules' within the EU; further, various economic and welfare policy, which governs 'second-generation' rights is decided at the EU level by either the Commission, the European Council or the European Parliament; finally the EU provides laws about protecting various nationalities and minorities, in terms of language, culture and other aspects. The EU acts in the three ways Frost holds to be typical of a state (and which make states so important for his theory and for constituting identity).

⁵⁴ *Ibid.*, p. 115

⁵⁵ *Ibid.*, p. 117

⁵⁶ As Marks and McAdam note: Gary Marks and Doug McAdam, "Social Movements and the Changing Opportunity Structure in the European Union", *West European Politics* 19:2 (1996), pp. 249-278; See also Liesbet Hooghe and Gary Marks, *Multi-level Governance and European Integration* (Oxford, Rowman and Littlefield, 2001)

To go in the opposite direction, let us take Scotland as an example. Frost points out that those campaigning for independence for Scotland are scrupulously careful to do so within the constraints of the British state. However, Scotland already acts in many of the ways Frost holds states to act. Scotland has its own legal system, and its own welfare policies, which are sharply distinct from UK policies. Further, Scotland has established policies on the preservation of the Gaelic language and even of Lowland Scots as a separate language.⁵⁷ Scotland, like the EU, seems to be a state-like entity.

The theory of rights recognition put forward in this thesis does not require so rigidly that rights recognising societies be states. Rather, there can be a multiplicity of rights recognising societies, many of which may overlap. This seems to better map onto the empirical reality, in which a person may have rights as a Scot, as a UK Citizen, and as an EU Citizen, which are recognised (created) in several different arenas. Here, there is a clear advantage to taking our cue from Green as opposed to Hegel: society is not necessary incomplete and unethical, as Hegel and Frost hold it to be; rather, societies can be the equivalent of the *polis* and of Arendt's political community.⁵⁸

Frost's theory, like Hegel's, places a great deal of weight on the state, and assumes that rights of citizens are recognised in one arena, which is coterminous with the state. In the contemporary world of mass migration and polyethnic and multicultural societies, states are more porous and less monolithic than this.

Frost holds that a key property of the state is that it has fixed borders: 'the identities and the total numbers of citizens within the state [are] known with some certainty'.⁵⁹ The theory presented in this thesis, in contrast, sees no necessity for borders or for distinguishing between insiders and outsiders. It is much more inclined towards cosmopolitanism and inclusion than Frost's theory. The sorts of rights Frost argues necessitate the existence of a state can be recognised in many non-state configurations, from devolved government, to supranational entities, and also, admittedly less ideally, in large groups of officially stateless peoples.

To object to Frost's theory in the terms above – that some bodies which are not states do the work he says only states can do – may be to concede some ground to Frost.

⁵⁷ Riaghaltas Na H-Alba/The Scottish Government, "Plana Gàidhlig/Gaelic Language Plan" (Edinburgh, The Scottish Government, 2010)[<http://www.scotland.gov.uk/Resource/Doc/317687/0101165.pdf>] Accessed 20th July 2013; The Scottish Government, "Report of the Ministerial Working Group on the Scots Language" (Edinburgh, The Scottish Government, 2010) [<http://www.scotland.gov.uk/Resource/Doc/332491/0108193.pdf>] Accessed 20th July 2013.

⁵⁸ Green, "Political Philosophy", p. 74; See chapter one, section 3.1, and chapter three, Introduction.

⁵⁹ Frost, *Constituting Human Rights*, p. 109

We might object rather more radically. This objection is to return to a distinction, discussed previously, between the *recognition* and *enforcement* of rights. Frost is undoubtedly right that states provide locations in which rights can be more effectively enforced: a justice system, a police force and a military force to ensure against outside aggression all help – or can help – enforce, or guarantee rights. When rights are abused, in an ideal state, abuse is halted by the police and justice restored by the judiciary. Without state apparatus, such enforcement or guaranteeing of rights is more fragile: it is analogous to a football game without a referee. It might very well be that all the players ensure, collectively, that rules are followed, but there is no single authority with the power to ensure this.

However, this does not mean that there are *no* rules. Even without a referee, all the players share certain understandings of what is permitted, and what is against the rules. All are aware that to control the ball with one's hand, for example, is not permitted, and even that such an action should be punished with the awarding of a direct free kick to the opposing team. Similarly, in a rights recognition arena that does not have a state apparatus – in a community of stateless people, or in a community of ante-bellum slaves, for example – people's rights can be recognised: it can be agreed by the community that all have certain rights and that infringing these rights is not permitted, even if such rights clearly lack enforcement by a formal authority and rather rely on the goodwill of all for enforcement. Crucially, recognition does not require enforcement: enforcement is desirable, but its lack does not mean that there are no rights. Thus, Frost is correct to argue that states provide a highly desirable environment for rights, but it does not follow that certain rights cannot exist outside of the state.

'The distinction between basic civil society rights and citizenship rights', argues Frost, 'is starkly brought out within the European Union'.⁶⁰ The two sets of rights, argues Frost, are compatible, but '[i]n the EU citizens enjoy their democratic rights within discrete states, but their civil society rights are respected Europe-wide'.⁶¹ It is hard to see how this distinction is justified, particularly since the 2000 passing of the Charter of Fundamental Rights of the European Union by the EU, and its subsequent inclusion in the 2009 Lisbon Treaty. Among these rights are several of the 'second generation', concerning equality, welfare, working conditions, social housing, rights to democratic participation, discrimination, and linguistic diversity. These are the sorts of

⁶⁰ *Ibid.*, p. 115

⁶¹ *Ibid.*, p. 115

rights Frost holds can only exist in states, yet here they clearly exist across several states in Europe in the form of the EU.

The Universal Declaration of Human Rights also contains several ‘second generation’ rights, which are held to apply to all humans. It is clear that those who are in states are in a better position to have these rights respected. However, as noted above, there is a difference between the recognition of rights and the enforcement of rights. The lack of enforcement does not imply a lack of recognition. Some rights clearly do need a state-like entity in order to acquire meaning. The right to democratic participation is meaningless without a democracy to participate in, for example. It is unclear, though, why only a system of states can deliver such rights. In Europe a system of states, supranational bodies, and sub-state rights recognising arenas make possible both first and second generation rights. Greenland and Scotland are not states, but in both rights to welfare, education and the like are recognised.

Frost’s constitutive theory inherits from Hegel a large commitment to the state, and to a Westphalian system where the predominant international actors are states. There are reasons to question this reliance on states alone as units of analysis, and, instead, to favour a more flexible approach to rights recognition. Globalisation, as well as shifts upwards, towards transnational governance, and downwards, towards devolution, in addition to the growing importance of non-state actors, places the Westphalian model under a great deal of tension. States provide their citizens with effective ways of enforcing rights, but it is clear that other methods are available in the 21st century, particularly supranational rights recognising bodies.⁶² The political community need not be coterminous with the state – the stateless lack a body to maintain their rights, but this does not mean they have no rights.

2.3 Cosmopolitanism built on discourse ethics

Seyla Benhabib attempts to build what she describes as ‘another cosmopolitanism’, built not on a social contract, natural law, or an account of capabilities, but rather on a universal discourse ethics, which owes much to Habermas’

⁶² As Kelly Staples illustrates: Kelly Staples, *Rethorising Statelessness: A Background Theory of Membership in World Politics* (Edinburgh: Edinburgh University Press, 2012), pp. 168-175

work on communication and communicative action.⁶³ In emphasising the importance of communication and action, Benhabib is also drawing heavily on Hannah Arendt, as does egalitarian rights recognition.

Benhabib aligns her cosmopolitan with the third group of thinkers within cosmopolitanism as a whole (see above), ‘whose lineages are those of Critical Theory’ and for whom ‘cosmopolitanism is a normative philosophy for carrying the universalistic norms of discourse ethics beyond the confines of the nation-state’; this group includes Jürgen Habermas, David Held, and James Bohman.⁶⁴

Before outlining Benhabib’s cosmopolitanism, a conceptualisation which offers the potential to develop a cosmopolitanism based on rights recognition, it is useful to note the problem which Benhabib is trying to address, and the question her cosmopolitanism attempts to answer. In discussing the trial of Adolf Eichmann, Hannah Arendt and Karl Jaspers found a contradiction between the cosmopolitan legacy of Kant, to whom both their philosophies are greatly indebted, and a commitment to civic republicanism.⁶⁵ Further, neither Arendt nor Jaspers accept legal positivism or natural law.⁶⁶ These twin paradoxes, between world-citizenship and republican citizenship, and between positivism and natural law, are the Scylla and Charybdis between which Benhabib is attempting to sail.

Benhabib’s cosmopolitan answer to these questions is built on a combination of discourse ethics and what she terms ‘democratic iterations’. In setting out her account of cosmopolitanism, Benhabib also considers the philosophical foundations of cosmopolitanism, particularly the question of how cosmopolitanism might be founded in what Benhabib terms ‘a postmetaphysical universe’.⁶⁷

Regarding the philosophical foundations of cosmopolitan rights, Benhabib notes three ‘philosophical puzzles’.⁶⁸ The first concerns the relationship between Kant and previous, natural law, theories of rights. Benhabib notes that ‘Kant relied on the work of other natural law thinkers before him, such as Pufendorf, Grotius, and Vattel’. The question, for Benhabib, is what ‘the ontological foundations of cosmopolitan right’ after

⁶³ Seyla Benhabib, *Another Cosmopolitanism*

⁶⁴ James Bohman and Matthias Lutz-Bachman (Eds.), *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal* (Cambridge, MA, MIT Press, 1997)

⁶⁵ Benhabib, *Another Cosmopolitanism*, p. 15

⁶⁶ *Ibid.*, p. 20

⁶⁷ *Ibid.*, p. 72

⁶⁸ *Ibid.*, p. 26

Kant are, or if there are indeed any.⁶⁹ The second is the question of where cosmopolitan right gets its authority: what allows it to trump positive law, if there is no sovereign power higher than positive law to enforce it? Third, does cosmopolitan right require world government, and if it does, can world government be reconciled with the values of private and public autonomy and of republican self-governance?

To the first question, Benhabib responds that, in a ‘postmetaphysical universe’, the ‘norms and principles’ of cosmopolitan right ‘are morally constructive’. Thus, they ‘create a universe of meaning, values, and social relations that had not existed before by changing the normative constituents and evaluative principles of the world of ‘objective spirit’, to use Hegelian language. They found a new order – a *novo ordo saeculorum*. They are thus subject to all the paradoxes of revolutionary beginnings.’⁷⁰ To the second question, Benhabib argues the authority for cosmopolitan norms comes from ‘the power of democratic forces within global civil society’.⁷¹ A global human rights regime is enforced by the approbation or disapprobation of states by other states, as well as the threat of force and armed intervention.⁷² The answer to the third question comes through Benhabib’s theory of ‘democratic iterations’, which this section will examine shortly.

Let us first turn to Benhabib’s discourse theoretical justification of human rights, which marks her out from much of the rest of the literature on cosmopolitanism. This justification is part of a move ‘away from minimalist concerns towards a more robust understanding of human rights in terms of the ‘right to have rights’.’ Here, Benhabib means not the familiar Arendtian identification of the ‘right to have rights’ with the right to membership of a political community, but rather, ‘the right to have rights’ in this context means ‘the claim of each human person to be recognized as a moral being worthy of equal concern and equally entitled to be protected as a legal personality by his or her own polity, as well as the world community.’⁷³

Benhabib argues that discourse ethics tends naturally towards the cosmopolitan. As ‘the discourse theory of ethics articulates a universalist moral standpoint, it cannot limit the scope of the *moral conversation* only to those who reside within nationally recognized boundaries; it views the moral conversation as potentially including all of

⁶⁹ *Ibid.*, p. 26

⁷⁰ *Ibid.*, p. 72

⁷¹ *Ibid.*, p. 71

⁷² *Ibid.*, p. 72

⁷³ Benhabib, *Dignity in Adversity*, p. 62

humanity'.⁷⁴ As we shall see in the next section, this is a similar point of view to Green. Benhabib's discourse theory engages in what she labels a 'presuppositional analysis'. Benhabib notes that she will 'presuppose some conception of human agency, of human needs, of human reason, as well as making some assumptions about the characteristic of our socio-political world'.⁷⁵ The key thing that must be presupposed in arguments about human rights, argues Benhabib, is 'communicative freedom'. Without this, any attempt at the justification of rights becomes 'meaningless', as 'any legal and political justification of human rights...*juridical universalism*, presupposes recourse to *justificatory universalism*, which in turn cannot proceed without...communicative freedom, which rests on *moral universalism*. Moral universalism here means 'equal respect for the other as a being capable of communicative freedom'.⁷⁶

Benhabib argues that her discourse theoretical conception of human rights can avoid 'falling either into the traps of naturalistic fallacy or possessive individualism'.⁷⁷ Here, she deploys an argument very similar to Green's argument regarding the link between communication and rights 'in principle', which the next section will outline. Her argument runs as follows:

'In order to be able to justify to you why you and I ought to act in certain ways, I must respect your capacity to agree or disagree with me on the basis of reasons the validity of which you accept or reject. But to respect your capacity to accept or reject reasons the validity of which you may accept or reject means for me to respect your capacity for communicative freedom.'

This capacity entails a 'fundamental *right to have rights*', argues Benhabib.⁷⁸ To allow for the exercise of communicative freedom, upon which all other rights depend, this 'right to have rights' must be respected. Thus, each human – for Benhabib assumes that all humans 'are potential or actual speakers of a natural or symbolic language' and 'are capable of communicative freedom, that is, of saying 'yes' or 'no' to an utterance whose validity claims they comprehend'⁷⁹ – has 'a moral claim to be recognized by others as 'a

⁷⁴ Benhabib, *Another Cosmopolitanism*, p. 18

⁷⁵ Benhabib, *Dignity in Adversity*, p. 65

⁷⁶ *Ibid.*, pp. 64-65

⁷⁷ *Ibid.*, p. 67

⁷⁸ *Ibid.*, p. 68. Benhabib's emphasis.

⁷⁹ *Ibid.*, pp. 67-68

rights-bearing person'.⁸⁰ Through this discourse theory, Benhabib argues that we can justify human rights without becoming mired in metaphysics; further, her account is different from 'agent-relative accounts', as she does not have to answer the question as to why someone else should act in order to enable her agency. Rather, in her discourse model, 'my recognition of *your* right to have rights is the very precondition for you to be able to contest or accept *my* claim to rights in the first place. *My* agent-specific needs can serve as a justification for *you* only if I presuppose that *your* agent-specific needs can likewise serve as a justification for *me*.'⁸¹ What Benhabib is describing bears a striking resemblance to the process of intersubjective recognition in Hegel and Green discussed in chapter one. Her justification of human rights also involves a two-stage process of recognition akin to that found in Green, and points towards the potential for fruitfully combining the work of Arendt, on whom Benhabib draws heavily, with Green (to whom she does not refer).

Through this extension, via discourse ethics, of moral conversation to all people, cosmopolitanism brings about a change in sovereignty, which Benhabib ascribes to Kant's introduction of the cosmopolitan right to hospitality. Thus Kant and cosmopolitanism form a bridge which leads from the previous 'Westphalian' sovereignty to the contemporary 'liberal international sovereignty'. Whereas sovereignty previously meant 'ultimate and arbitrary authority over a circumscribed territory', the shift from Westphalian to liberal international sovereignty means that today 'the formal equality of states increasingly is dependent on their subscribing to common values and principles, such as the observance of human rights, the rule of law, and respect for democratic self-determination'.⁸² That is to say, states' sovereignty is only justified if they subscribe to cosmopolitan norms: the *kosmos* is to provide a check on the potential abuses of the *polis*. Sovereignty becomes contingent.

In this way, state sovereignty is preserved in Benhabib's system; the mechanism for this is what she labels 'democratic iterations'. Rather than calling for a world state as proponents of what Held labels 'thick' cosmopolitanism do, Benhabib favours a heavily revised version of a system of states, divorced from the majority of concerns about territoriality.

⁸⁰ *Ibid.*, pp. 68-69

⁸¹ *Ibid.*, p. 70

⁸² Benhabib, *Another Cosmopolitanism*, p. 23

Thus, ‘Democratic iterations are processes of linguistic, legal, cultural, and political repetitions-in-transformation – invocations that are also revocations’.⁸³ Through these ‘iterative acts’, a group of people organised in a democracy, who consider themselves bound ‘by certain guiding norms and principles’, can reappropriate and reinterpret these norms. In doing these ‘iterative acts’, a democratic people shows that it is ‘not only *subject* to the laws but also their *author*’. However, all this need not be done purely within the confines of the nation-state. Rather: ‘*Popular sovereignty no longer refers to the physical presence of a people gathered in a delimited territory, but rather to the interlocking in global, local and national public spheres of the many processes of democratic iteration in which peoples learn from one another.*’⁸⁴

Benhabib argues that although the nation-state has, ‘until recently, has been a very successful host to the project of popular sovereignty’, its institutions have been weakened by ‘economic, military, immunological, and climate-related forces, as well as the explosion of news means of electronic communication and worldwide migrations’ to such an extent that without a re-pooling of sovereignty in bodies such as the EU, popular sovereignty ‘cannot be actualized’.⁸⁵ In this way, the ‘boundaries of the political’ have decisively shifted, beyond ‘the republic housed in the nation-state’.⁸⁶ Ensuring popular sovereignty requires new ‘institutions of global governance’ which can better cope with factors which cut across the traditional boundaries of nation states.⁸⁷ Although the EU clearly has its flaws, Benhabib argues that this institution is still ‘the most impressive example of this reconfiguration of the markers of sovereignty in the spirit of republican federalism’.⁸⁸

Through the mechanism of democratic iterations, Benhabib allows for some variation in the precise rights humans have: there is, she notes, ‘a legitimate range of variation even in the interpretation and implementation of such a basic right as that of ‘equality before the law’. This variation may well be some cause for alarm; given such variation is allowable, it may well be asked to what extent such a theory of rights is really cosmopolitan. Further, might the meaning of rights be altered so much as to make them either unrecognisable or worthless? Benhabib’s answer to these concerns is to argue that ‘legitimacy of this range of variation and interpretation is crucially

⁸³ *Ibid.*, p. 112

⁸⁴ *Ibid.*, p. 112. Benhabib’s emphasis.

⁸⁵ *Ibid.*, p. 115

⁸⁶ *Ibid.*, p. 114

⁸⁷ *Ibid.*, p. 115

⁸⁸ *Ibid.*, p. 116

dependent upon the principle of self-government'. For, '*without the right to self-government, which is exercised through proper legal and political channels, we cannot justify the range of variation in the content of basic human rights as being legitimate.*'⁸⁹

It is this requirement for self-government, argues Benhabib, that is distinct about an approach to cosmopolitanism based on communicative freedom: 'Freedom of expression and association are not merely citizens' political rights, the content of which can vary from polity to polity; they are necessary conditions for the recognition of individuals as beings who live in a political order of whose legitimacy they have been convinced with good reasons.'⁹⁰

Democratic iterations, then, provide a way of reconciling the *kosmos* with the *polis*. Benhabib argues that because rights may vary in each democratic area, fears on the part of 'democratic sovereigntists' that 'cosmopolitan human rights norms must override democratic legislation' turn out to be 'philosophically unfounded'.⁹¹ Rather, the very interpretation and implementation of human rights norms are *radically dependent* upon the democratic will-formation of the *demos*.

Benhabib's project, as Kimberly Hutchings notes, is an attempt to make the case for 'a middle way between strong cosmopolitanisms that would argue for the abolition of borders or for a world state, and the *status quo* Westphalian model of national self-determination, in which a defined 'people' governs itself within territorially fixed political boundaries.'⁹² Benhabib is sceptical of the idea of a world state and argues that 'an unbounded global polity cannot be a democratic one.'⁹³ This is because democracies require boundaries; 'the scope of democratic legitimacy cannot extend beyond the *demos* which has circumscribed itself as a people upon a given territory.' This circumscription, or 'closure' is required, argues Benhabib, 'because democratic representation must be accountable to a specific people'.⁹⁴ In an argument that is strangely reminiscent of arguments against the possibility of a truly supranational European Union – a project which Benhabib seems to support – Benhabib argues that there cannot be a world state because there is no worldwide *demos*.

⁸⁹ *Ibid.*, p. 128, Benhabib's emphasis.

⁹⁰ *Ibid.*, p. 128

⁹¹ *Ibid.*, p. 130

⁹² Kimberly Hutchings, "Good Fathers and Rebellious Daughters: Reading Women in Benhabib's International Political Theory", *Journal of International Political Theory* 5:2 (2009), pp. 113-124, p. 122

⁹³ Benhabib, *Dignity in Adversity*, p. 141; *The Rights of Others*, p. 219

⁹⁴ Benhabib, *The Rights of Others*, p. 219

The project advanced in this thesis takes a stance in the ground between Benhabib's cosmopolitanism and a completely 'strong' cosmopolitanism, such as that advanced by Cabrera.⁹⁵ That is to say, there is no strict requirement for a world state in order to achieve cosmopolitan justice on the basis of rights recognition, but on the other hand, there is a certain natural movement within rights recognition towards the eventual creation of some sort of world state or at least world federalism: this is the movement towards ever-wide spheres of commonality described by Green.

There is much to welcome in Benhabib's approach to cosmopolitanism and human rights, in particular her attempt to avoid natural rights through basing her account in discourse ethics and an interpretation of Hannah Arendt's 'right to have rights'. Although broadly sympathetic with her project, this thesis relies on a fuller, two stage, account of rights recognition, and incorporates the insights of T.H. Green into the process, alongside Arendt's perceptive analysis of the shortcomings of the 'rights of man'. Further, this thesis takes a different line on the matter of borders and of *demos*, as well as developing a greater emphasis on the need for equality to enable recognition to function properly. These divergences with Benhabib's theory of cosmopolitan human rights based on discourse ethics, which is the closest of the cosmopolitanisms examined here to this thesis, will become clearer in the remaining half of the chapter. In this second half, the theory of global egalitarian rights recognition will be set out in more detail, alongside the advantages of the theory in comparison with competing theories of human rights and cosmopolitanism.

3. Global egalitarian rights recognition as a foundation for cosmopolitan human rights

The previous half of this chapter has examined three leading theories of cosmopolitan human rights. In the second half, this chapter will set out how the theory of egalitarian rights recognition can be applied to the international level to generate a theory of global egalitarian human rights. Section 3.1 will suggest some key divergences from the theory of Seyla Benhabib, with regard to borders. Later on, the importance of equality for recognition will be emphasised: intersubjective recognition of rights cannot be fully effective without this equality. Section 3.2 will show that

⁹⁵ Cabrera, *Political Theory of Global Justice*

global egalitarian rights recognition can accommodate a world state, although it need not be fully committed to the establishment of one. Section 3.3 will test the theory of egalitarian rights recognition against some of the complexities and problems of contemporary international politics. Finally, section 3.4 will explore the several advantages of the theory of egalitarian rights recognition, including its function as a barrier against imperialism and the way in which it takes equality seriously.

3.1 Fluidity of borders: formal and informal

Benhabib allows that democracies have control over their borders: ‘all democracies presuppose a principle of membership, according to which some are entitled to a political voice while others are excluded. The decision as to who is entitled to have political voice and who is not can only be reached, however, if some who are already members decide who is to be excluded and who is not. This means that there can be no non-circular manner of determining democratic membership.’ Thus we are left with a paradox, whereby the ‘boundaries of the *demos* remain...a matter of historical contingency and political domination.’⁹⁶

I would like to suggest that, in terms of rights recognition, borders are somewhat more fluid than Benhabib suggests, and that this is because she does not distinguish sufficiently between the formal and the informal in terms of borders and political membership. It is certainly true to suggest, as she does, that many people who are affected by the decisions a democracy makes – Iraqis affected by the USA for example⁹⁷ – are denied formal membership of that democracy; there is no senator for Iraq in the US Congress; Iraqis do not have a vote in the US presidential elections, and so on. However, both Benhabib’s work and the thesis presented here make use of Habermas’ twin track deliberative democracy.⁹⁸ According to this framework, it is not just formal representation that counts, but also informal discussion in a multiplicity of public spheres.

The seventh point in the theory of egalitarian rights recognition argues that ‘Society’ in the context of rights recognition is open to ideas from without, and has no

⁹⁶ Benhabib, *Dignity in Adversity*, p. 143

⁹⁷ *Ibid.*, p. 145

⁹⁸ Seyla Benhabib, *The Claims of Culture* (Princeton, Princeton University Press, 2007), pp. 105-146

necessary limits.’ Further, although the recognition of persons is quite a minimal idea, which confers only the right to membership of a political community (rather than a particular community), once this initial intersubjective recognition occurs, and the possibility of communication is confirmed, further rights are bound to be recognised in the course of a conversation, albeit informal rights at first. As soon as such recognition starts to occur between even small groups of people, a new common-good identifying sphere of recognition comes into being. In this way, rights recognition is more dynamic and fluid even than Benhabib’s account of ‘democratic iterations’, in which she consciously tries to accommodate contemporary phenomena such as mass migration.

Green makes use of the example of slaves in ante-bellum America to suggest that informal spheres of rights recognition can generate norms in the same way as more formal arena, such as states. Clearly, norms, in the form of laws, are most securely preserved, maintained and enforced by states, or other such formal institutions such as the European Union, as well as by binding international agreements. However, they can be generated in informal spheres of rights recognition. Indeed, the ‘twin-track’ arrangement Habermas proposes gives a great weight of importance to the informal opinion and will-forming mechanisms. It is not just formal law that leads to societal shifts in opinion; rather, on many issues, a change in the informal consensus leads to a change in the formal law, as we saw in chapter four.

It is not just in spontaneously arising spheres of rights recognition that informal borders can become porous. Many people who are *not* allowed to participate in the formal rights recognising mechanisms of a state-level political community *are* at least allowed to visit that political community’s territory (if it is territorially situated) and to interact with members of that political community. Through conversation, it is quite likely that a non-member of a political community can have an effect on the opinions of members of that community. Examples of this sort of process include missionaries, pilgrims, visiting scientists and academics, ambassadors, celebrities and so on – it is not a novel process. However, in the last hundred years, and particularly in the last 20 years, the potential for access to informal rights recognising arenas from anywhere in the world has increased massively. First, the twentieth century brought innovations including wireless communication and the telephone, as well as television, enabling communication over long distances much more easily – and cheaply – than before. Second, the late twentieth century brought travel by jet aircraft, making it possible to travel anywhere in the world within a day, and thus making access to debates anywhere

in the world easier. Finally, the creation of the Internet and the World Wide Web has made the communication of information, ideas and arguments across the world much simpler and faster than ever before. It is now possible to have a truly global discussion of any contentious issue at the click of a button. Facilities such as YouTube mean that media created for a particular political community is now consumed regularly by people from many other political communities. In this way, debates in the sort of informal fora that correspond to an updated version of those described by Habermas⁹⁹ – fora that now include message boards, chat rooms, apps, and social media platforms – become completely porous: anyone recognised as a person (perhaps in contradistinction to a ‘spambot’ or a ‘troll’) may contribute to debates, and has certain rights. Indeed, the 2010 UK General Election was dubbed the ‘Mumsnet election’ by some media, so important had this online informal forum become – and Mumsnet does not require that its members be UK citizens.¹⁰⁰

Informal borders, then, are much more porous than formal borders – yet, through informal rights recognition arenas a great deal of political change, in terms of what rights are to be recognised, can be brought about. Furthermore, through inclusion in informal spheres of recognition, people who lie, legally or physically, outside the formal political community can influence directly the formal institutions too. For example, although international students in a university in the UK have no vote in parliamentary elections, they are entitled to representation through bodies such as students’ unions, which lobby or are consulted by the formal rights recognising spheres. Further, although they have no political rights in terms of the state, international students have the right to vote in elections for leaders of students unions or even to be elected as leaders of such institutions; here the informal crosses over, to an extent, into the formal. But the upshot is the same: although formal borders can be quite impermeable, informal borders allow a greater diffusion of people and ideas.

Viewed in this way, the world’s borders are more fluid than Benhabib’s account suggests. Her analysis of formal, institutional borders is perceptive and the paradoxes

⁹⁹ Habermas, *Between Facts and Norms*, p. 374

¹⁰⁰ “Politicians woo ‘Mumsnet’ generation” BBC London News. 18th February 2010

[http://news.bbc.co.uk/local/london/hi/people_and_places/newsid_8522000/8522841.stm]; “Mumsnet set to wield real clout in the election campaign” *The Scotsman*. 9th March 2010.

[<http://thescotsman.scotsman.com/features/Mumsnet-has-expanded-into-an.6130764.jp>]; “Parties set sights on mums in the Mumsnet election” *The Times*. 3rd April 2010.

[<http://www.timesonline.co.uk/tol/news/politics/article7086096.ece>];

presented are troubling. However, by paying attention to the fluidity and porousness of informal borders we can arrive at an account of cosmopolitanism based on rights recognition that properly accounts for the movement of norms and rights-claim arguments through something akin to osmosis. Even democratically fixed borders can be permeable membranes in this regard.

3.2 Creating a demos – the possibilities of a world state

Two possible tensions in the theory of rights recognition presented here were mentioned at the beginning of this chapter. The first tension is whether expansion and fluidity of the political community can allow for a common good or a *sensus communis* to be maintained. The second tension concerns the possibility of maintaining the sort of quality of communication needed for recognising rights in a political community that could become global. These possible tensions correspond, in part, to Benhabib's concern that a world state cannot be democratic as it would, by definition, lack a *demos*, which she holds to be a delimited group of people, closed off from other groups of peoples.

In the previous section the idea that informal borders were somewhat more porous than formal borders was discussed. Porous informal borders have the potential to have a serious impact on the chances of creating *demos* that extend beyond the boundaries of current democracies. Most current debates about *demos* have the EU as their locus. One of the key perceived problems the EU faces, particularly in its supranational elements, is the 'democratic deficit', which, it has been suggested, is caused by the fact that the EU has no *demos*.¹⁰¹ A relatively standard (and often used) definition of *demos* is offered by Weiler, Haltern and Mayer: 'The subjective manifestations of peoplehood, of the demos, are to be found in a sense of social cohesion, shared destiny and collective self-identity which, in turn, result in and deserve

¹⁰¹ Those arguing that a European transnational demos is an unlikely prospect include: J.H.H. Weiler, "Bread and Circus: The State of the European Union", *Columbia Journal of European Law* 4:2 (1998), pp. 223–248, p. 246; F.W. Scharpf, *Governing in Europe. Effective and Democratic* (New York, Oxford University Press, 1999), p. 9; Dieter Grimm, "Does Europe Need a Constitution?", *European Law Journal* 1:3 (1995), pp. 282-302; Peter Graf Kielmannsegg, "Lässt sich die europäische Gemeinschaft demokratisch verfassen?", *Europäische Rundschau*, 22:2 (1994), pp. 23-33

loyalty’.¹⁰² Historically, such *demoi* have manifested themselves in terms of perceived shared nationalities, languages, cultures and religions. However, there is no necessary reason why the ties of the *demos* have to be based on these categories. In chapter four, we saw that for Arendt and Green, the state can be disaggregated from the nation. It is the political community, rather than any sort of perceived primordial communities, that counts. Social cohesion, shared destiny and collective self-identity are properties that can come into being: a *demos* need not refer always to the past, but it can instead take its cues from the present and from expectations of the future.

Green points towards this possibility, when he argues that everyone in society ‘must have a share, direct or indirect, by himself acting as a member or by voting for the members of supreme or provincial assemblies, in making and maintaining the laws which he obeys’, for ‘only thus will he learn to regard the work of the state as a whole, and to transfer to the whole the interest which otherwise his particular experience would lead him to feel only in that part of its work that goes to the maintenance of his own and his neighbour’s rights.’¹⁰³ In other words, the sense of cohesion and shared destiny that a *demos* requires can be brought about by democratic participation and a sense that one’s interests align in large part to those of the state. In calling for all in society to be ‘intelligent patriots’ through commitment to democratic participation, Green is anticipating aspects of the theory of constitutional patriotism by some hundred years.¹⁰⁴ Taking our cue from Green and from constitutional patriotism, it is possible to conceive of a *demos* coming into being without significant tradition, a shared language or common history: the real life examples of the USA and of Switzerland also suggest this is possible.

The first of the two potential tensions in internationalising egalitarian rights recognition is the concern that the sphere of the common good or of the *sensus communis* can only extend so far: like a bubble, it can be enlarged, but at some point the

¹⁰² J.H.H. Weiler, Ulrich Haltern, and Franz Mayer, “European Democracy and its Critique”, *West European Politics*, 18:3 (1995), pp. 4-39, p. 10. Their definition is adopted by, amongst others: David Ward, *The European Union Democratic Deficit and the Public Sphere: An Evaluation of EU Media Policy* (Amsterdam, IOS Press, 2002); David E. Kiwuwa, *Ethnic Politics and Democratic Transition in Rwanda* (Abingdon, Routledge, 2012), p. 26; Mette Jolly, (2005), “A Demos for the European Union?”, *Politics* 25 (2005), pp. 12–18, p. 12; Ian Johnstone, “Legal Deliberation and Argumentation in International Decision Making”, in Hilary Charlesworth and Jean-Marc Coicaud *Fault Lines of International Legitimacy* (Cambridge, Cambridge University Press, 2010), pp. 175-203, p. 178

¹⁰³ Green, *Lectures*, §122, pp. 130

¹⁰⁴ On constitutional patriotism, see: Jan-Werner Müller, *Constitutional Patriotism* (Princeton, Princeton University Press, 2007); Jan-Werner Müller, *Verfassungspatriotismus* (Berlin, Suhrkamp, 2010); Dolf Sternberger, *Verfassungspatriotismus* (Frankfurt am Main, Insel, 1990)

bubble will burst. According to this idea, the larger the political community becomes, the thinner the contents of a common good or *sensus communis* must get, until there are no contents left at all.

Reading Arendt on the *sensus communis* works quite swiftly to dispel these doubts. Rather than having a negative effect, the expansion of the *sensus communis* to include all humanity is normatively welcome: ‘One judges always as a member of a community, guided by one’s community sense, one’s *sensus communis*. But in the last analysis, one is a member of a world community by the sheer fact of being human; this is one’s ‘cosmopolitan existence’. When one judges and when one acts in political matters, one is supposed to take one’s bearings from the idea, not the actuality, of being a world citizen and, therefore, also a *Weltbetrachter*, a world spectator.’¹⁰⁵ Although Arendt writes ‘not the actuality’, this does not seem to preclude the possibility that one could be a world citizen in actuality too; here reality would simply have caught up with aspiration.

Leaving difficulties of communication aside – we will examine these shortly – there seem to be no compelling reasons why a common good may not be extendable to a worldwide scale. Green considered that the sphere within which a common good may be identified was extendable to the whole of humanity.¹⁰⁶ Conceptually, it is crucial to note that the common good is not some single goal that the whole of a society sign up to and work towards, which benefits some more than others, or some not at all. Rather, when Green uses the term ‘common good’, he signifies a good, or goods, which are common to all. In terms of rights, it is possible to imagine rights which benefit all humans equally – a right to life, for example – and there is no reason why such a good cannot be common among all people; furthermore, only when such a wide commonality is conceived can a right be truly *human*. Thus, there is a normative imperative, which Green notes, for expanding the sphere of commonality to include all humanity.¹⁰⁷ It appears that there are no insurmountable barriers to extending common good and *sensus communis* to the whole of humanity: any barriers that do arise appear to be to do with communication, which leads us on to our next point.

The second tension deals with the issue of communication: how can a common good recognising sphere function over the whole earth? Followers of Green within the

¹⁰⁵ Arendt, *Lectures on Kant*, pp. 75-76

¹⁰⁶ Green, *Prolegomena*, §286, p. 349

¹⁰⁷ *Ibid.*, §209, p. 250

British Idealist tradition were sceptical that rights recognition could transcend the borders of the nation state. Bernard Bosanquet argued that ‘the whole *raison d’être* of our theory is to show why, and in what sense there must be states wherever there are groups of human beings, and to explain for what reasons men are distinguished into separate adjacent political bodies instead of forming a single system over the whole earth’s surface.’¹⁰⁸ For Bosanquet, the quality of community and shared experience necessary to create the conditions for rights recognition was to be found only in the state: ‘at present the difficulty is to find such common constituents throughout any area exceeding what has usually been called the territories of a nation.’¹⁰⁹ This argument is a common one against the possibility of supranational government, though I believe it is not a valid one. The idea that there can be a community only of the size of a nation-state falls down when one considers the size of the typical nation-state in terms of population over time. Given the variations in population, area, climate and homogeneity of inhabitants, the argument that rights recognition can only occur in a nation-state is akin to pointing out that a puddle is exactly the right size for the amount of water in it. If the largest size that such a community could exist in was fewer than 10 million people in the UK in 1801, what enabled the community to cope with a population of around 30 million in 1901 and around 50 million in 2001?

The question of communication is a serious challenge, however. While a system of rights recognition might work very well in a small sphere, or something the size of a Greek city-state, the amount of communication it requires (see chapter four) does represent a potential obstacle.

The first response to this challenge concerns the massive innovation in communications technology discussed above. While in the UK of 1801 it might take days for a message to be relayed from one end of the political community to the other, such messages are now instant.¹¹⁰ Furthermore, with social media such as twitter, the formal rights recognising sphere – parliament – can be linked to the informal sphere – here, the virtual discussion for a provided by twitter – instantly. It is now relatively

¹⁰⁸ Bosanquet, “The Function of the State in Promoting the Unity of Mankind”, p. 33

¹⁰⁹ Bernard Bosanquet, “The Wisdom of Naaman’s Servants”, in Bernard Bosanquet (Ed. Sweet), *Social and International Ideals (Collected Works, Vol. 15)* (Bristol, Thoemmes Press, 1999), pp. 302-320, p. 312

¹¹⁰ The introduction of the mail coach in 1784 allowed a letter to be sent from Bristol to London in 16 hours, considerably faster than the previously standard 38. However, the political community of Britain at the time stretched over a considerably larger area served by considerably poorer roads than the London to Bristol route. “Mail Coaches” [<http://postalheritage.org.uk/page/Mail-Coaches>]; Stanley Harris, *The Coaching Age* (London, Richard Bentley and Son, 1885), p. 2

common for MPs to ‘live tweet’ parliamentary debates, and in so-doing receive instant response from members of the political community anywhere in the world. Programmes which monitor social media data can also give relatively accurate portrayals of ‘real time’ swings of ‘mood’ globally, in relation to specific debates. Although the assumption that this data accurately reflects the view of all in society is still a large assumption to make, it is undoubtedly becoming easier than ever before to give an accurate snapshot, or a sense of diachronic trends, on most political issues.

A second response takes on a concern implicit within the challenge of communication, which is the extent to which global communication is possible in a ‘post Babel’ world. The fact that people speak so many different languages that it is impossible for everyone to understand everyone else is a potential concern. However, there are two strong responses to this concern of mutual intelligibility, the first sociolinguistic and the second technological.

In terms of sociolinguistics, there is a large, and rapidly growing, proportion of the world who speak English as a *lingua franca*. At first, this may seem complacent – the assumption of English tourists abroad that everyone understands English so long as one shouts loudly enough is part of a negative perception of Britons held by many. Indeed, it might even be argued that there are neo-imperialist overtones to the notion that everyone should ‘just learn English’.¹¹¹ However, research on English as a *lingua franca* suggests that the notion of an empire imposing ‘the Queen’s English’ on an unwilling world is out of date. The vast majority of English speakers are not native speakers of English. This has had the effect that ‘English is ... no longer ‘owned’ by its native speakers, and there is a strong tendency towards more rapid ‘de-owning’’.¹¹² English as a *lingua franca* is more and more a language owned in common by much of the world, enabling easier communication than perhaps ever before between people all over the world. Neither does this development necessarily threaten to cause other languages to become extinct, a concern Bosanquet had about such a move.¹¹³ Rather, Juliana House argues that empirical research backs up Joshua Fishman’s claim, made in

¹¹¹ Though, as Ali Mazrui notes, British imperial policy was in fact to prohibit colonised peoples from speaking English, in marked contrast to the French policy of enforcing the use of French. The end result of these differing policies seems to have been entirely the opposite, with English rather than French becoming the *lingua franca*. See: Ali A. Mazrui, *The Political Sociology of the English Language: An African Perspective* (The Hague, Mouton, 1975) p89-90

¹¹² Juliana House, “English as a Lingua Franca: A Threat to Multilingualism”, *Journal of Sociolinguistics* 7:4 (2003), pp. 556-578, p. 557

¹¹³ Bosanquet, “The Function of the State in Promoting the Unity of Mankind”, p. 53

the 1970s, that English as a *lingua franca* would act as an additional language – ‘a ‘co-language’ functioning not against, but in conjunction with, local languages’.¹¹⁴ In other words, it is possible to have a global language which facilitates communication, without giving up the diversity of literatures, traditions, sounds and idioms which many prize so highly.

The technical solution to the problem of mutual intelligibility comes through rapid advances in translation software, which, though a few years ago was a byword for amusingly badly translated texts in which any meaning was rendered into nonsense by basic translation algorithms, now offer automated translations between a greater number of languages more accurately than ever before. Even if the nuances of, say, the fourteen grammatical cases of Finnish are lost as the text is converted into Serbo-Croat, the overall meaning can be conveyed more effectively than many previous solutions, which often involved translating via another language if no suitably bi-lingual interpreter could be found.

To conclude, this section has found that potential problems of communication are far from insuperable, largely through advances in technology; the potential size of a political community has continued to expand throughout history. Further, there is no reason why a common good recognising sphere should be restricted to the nation-state. It is possible to conceive of a political community that encompasses the whole world.

3.3 The challenges of contemporary international politics

This section is concerned with the question of whether a system of rights recognition can cope with the complexities of modern international politics, particularly such issues as statelessness, mass migration and refugees, failed states, and the centrifugal movement of power away from the nation state towards supranational and local governance. An objection frequently made to theories of rights recognition is that they break down in cases where there is no ‘society’ as the term is commonly understood (as being broadly coterminous with the people within a nation state); further, it is sometimes suggested, their need for society means they cannot be flexible enough

¹¹⁴ House, “English as a Lingua Franca”, p. 574; Joshua Fishman, “The Sociology of Language: An Interdisciplinary Social Science Approach to Language in Society” in Joshua Fishman (Ed.), *Advances in the Sociology of Language (Volume I)* (The Hague, Mouton, 1971), pp. 217-404, p. 329

to deal with the contemporary dynamic and fluid world, but rather require something somewhat more Westphalian and static. This section will first discuss statelessness, migration and refugees, before turning to failed states and finally the centrifugal dispersal of power. None of these issues need be an insurmountable barrier to adopting the theory of egalitarian rights recognition, and in no area would natural rights provide a more politically useful or philosophically convincing alternative.

An argument against recognition theories that might be advanced concerns the role of the state and the phenomenon of statelessness. Chapters three and four both suggested that rights recognition is done best by states; a system of maintained and guaranteed rights has clear advantages. However, as we have seen, there is an important distinction to be made between recognition of rights and enforcement of rights. States – and some supranational organisations, as we shall see – are adept at enforcing rights.¹¹⁵ However, the conclusion that one cannot have rights without a state, that statelessness is equal to ‘rightlessness’ does not necessarily follow: indeed to conclude this is to give up hope for millions of people. What is vital is some form of political community; as we have seen, this can be informal, such as the communities of slaves in ante-bellum America were for Green. Further, for Arendt, the ‘right to have rights’ – the one vitally important right – is the right ‘to belong to some kind of organized community’.¹¹⁶ If we read this in light of her discussion of the *polis* in *The Human Condition*, where she quotes Pericles’ words ‘Wherever you go, you will be a *polis*’, and argues that the *polis*, or ‘political realm’, is ‘not the city-state in its physical location’ but rather ‘the organization of the people as it arises out of acting and speaking together...which can find its proper location almost any time and anywhere’,¹¹⁷ we can conceive the ‘organized community’ necessary for rights as not necessarily coterminous with the state. Thus, exclusion from the state does not necessarily entail exclusion from the human race and the deprivation of rights, so long as one is member of some sort of organized political community.

Kelly Staples also makes the case that statelessness need not entail a complete loss of rights. Drawing on the experiences of two stateless groups, the Banyamulenge, a group of Kinyarwanda speakers in the Democratic Republic of Congo, and the Rohingya, or ‘Arakanese Muslims’, who are resident in Burma, Bangladesh, Malaysia

¹¹⁵ In the sense of upholding laws; as Andrew Vincent notes, states are sometime also adept at violating rights: Vincent, *The Politics of Human Rights*, p. 166; p. 196.

¹¹⁶ Arendt, *The Origins of Totalitarianism*, p. 297

¹¹⁷ Arendt, *The Human Condition*, p. 198

and Thailand, Staples argues that the exclusion of stateless groups ‘has been mitigated by improved recognition’.¹¹⁸ The formal recognition of stateless people by third party states which would provide them with greater security and stability still has some way to go, however limited levels of formal recognition are possible, such as through the issuing of documentation such as ‘Temporary Registration Certificates’ as a minimal form of recognition or through the recognition of stateless groups by NGOs or by groups such as the Association of South East Asian Nations (ASEAN).¹¹⁹ Through the intervention of NGOs and third party states, stateless people can not only have ties of rights recognition within their – often unstable and fragmentary – own political community

There are good normative reasons for preferring a recognition account of rights to a natural rights account in connection with statelessness. Hannah Arendt’s account of the futility of claiming natural rights in the face of statelessness suggests that, empirically, ideals of natural rights do little to improve the lot of the stateless. However, normatively, a theorist of natural rights can afford to be relaxed about statelessness, so long as the lack of a political community does not interfere with a certain list of natural human rights. Indeed, some libertarian thought, emphasising rights to property and liberty, moves in this direction. For rights recognition theorists, on the other hand, statelessness matters. Although a theory of rights recognition can accommodate statelessness as a phenomenon – it does not deny that the stateless have rights – it is nonetheless clear that rights are most valuable when they are both recognised *and* enforced, and that states are important for enforcement. From a rights recognition standpoint it is highly normatively desirable that action is taken on statelessness so that the rights of all can more effectively be protected.

Along with the issue of statelessness, the problems of mass migration, immigration and refugees are serious issues which any theory of international human rights must deal with. Here, the charge against rights recognition is that it is too parochial. Whereas natural human rights involve a commitment to the rights of all humans (unless you invoke ontology and suggest some humans are less human than other¹²⁰), some suggest that rights recognition involves a commitment only to the

¹¹⁸ Staples, *Rethorising Statelessness*, p. 170

¹¹⁹ *Ibid.*, p. 150; p. 152

¹²⁰ Something Darby reminds us natural rights theorists were capable of: Darby, *Rights, Race, and Recognition*, pp. 112-121. Originally, theories of natural rights were held to apply only to men and not to women: Carole Pateman, *The Sexual Contract* (Stanford, Stanford University Press, 1988), pp. 5-6, p. 41

recognition of the rights of people in one's own community; the prevailing attitude to those outside the community is indifference. It might further be suggested that social recognition of rights assumes fixed communities, with a fixed set of rights prevailing for each community, meaning that the theory cannot adequately cope with mass migration or immigration.

As we have seen in previous sections of this chapter, egalitarian rights recognition does not require such fixed communities. Rather, following Green, it suggests that the reality is that the vast majority of people are members simultaneously of a multiplicity of rights recognising spheres, all of which recognise goods common to all members, and none of which are fixed. Rather, as the discussion of porous informal borders showed, each rights recognising community is open to new membership. Furthermore, those outside a political community can still be recognised to an extent by members of a political community. Green, as we have seen, argues that such people can be recognised as having rights 'in principle'.¹²¹ This may seem like a cynical shrug, which does not admit any form of enforcement. However, rights 'in principle' can actually be a large commitment: if we assume that people outside our immediate community are 'in principle' rights holders, then there is no good reason to suspect that we should treat them, or view them, any worse than people within our political community, whose rights we recognise in actuality.

Furthermore, the discussion of Arendt's work on judgment, above, suggests that there is a good normative incentive for political communities to be open to new members and to new ideas – to be fluid. Simply put, the more ideas that are taken into account, the better one can conceive oneself as a *Weltbetrachter*, the better the quality of judgment that will result.

3.4 The advantages of a recognition-based approach

Having shown that an account of rights recognition can cope with some of the most pressing, and difficult, issues of contemporary international politics, this section will now outline two significant advantages that egalitarian rights recognition has over other ways of conceptualising rights on an international scale. First, it will argue that

¹²¹ Green, *Lectures*, §135, p. 145,

rights recognition allows human rights to resist a slide into imperialism and thus allow for the internationalisation of human rights without their imposition on unwilling states and peoples; second, it will be argued that rights recognition involves a serious commitment to equality, which makes it normatively appealing from the point of view of debates on global justice and cosmopolitanism.

3.4.1 Against imperialism

Accounts of human rights have often been accused of ‘rights imperialism’: the discourse of ‘human rights’, it is said, is a peculiarly Western one which has been imposed on the rest of the world either actively against its wishes, or at the least without pause for any form of consultation.¹²²

As we saw in the introduction to this thesis, the human rights of the post-1948 world have a genealogy which reaches back to conceptions of natural law which grew out of the Judaeo-Christian tradition. For a long while, rights were held to be ‘God-given’ or ‘endowed by our Creator’; such was the view of Jacques Maritain, who was on the framing committee of the Universal Declaration of Human Rights, and many clearly still hold this view to be true¹²³. However, there are good reasons to reject such shaky foundations. Alan Dershowitz makes the point clearly: ‘In a diverse world where many claim to know God’s will, and where there is consensus about neither its content nor the methodology for discerning it, God should not be invoked as the source of our political rights’.¹²⁴ If human rights are rooted in such specific foundations, then they appear to be a specifically Western invention, justified by appeals to specifically Western notions of god and creation.

¹²² Makau Mutua, “Savages, Victims, and Saviors: The Metaphor of Human Rights”, *Harvard International Law Journal* 42:1 (2001), pp. 201-245; David Kennedy, “The International Human Rights Movement: Part of the Problem?”, *Harvard Human Rights Journal* 15 (2002), pp. 101-126; Gil Gott, “Imperial Humanitarianism: History of an Arrested Dialectic”, in Berta Esperanza Hernández-Truyol (Ed.) *Moral Imperialism: A Critical Anthology* (New York, NYU Press, 2002); Susan Koshy, “From Cold War to Trade War: Neocolonialism and Human Rights”, *Social Text* 58 (1999), pp. 1-32; Pheng Cheah, “Posit(ion)ing Human Rights in the Current Global Conjuncture”, *Public Culture* 9 (1997), pp. 233-266

¹²³ President Obama’s 2013 inauguration speech, for example, restates the idea that rights were endowed by ‘our Creator’, and that ‘freedom is a gift from God’. [<http://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama>]

¹²⁴ Alan Dershowitz, *Rights from Wrongs: A Secular Theory of the Origins of Rights* (New York, Basic Books, 2004), p. 26. See also: Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton, Princeton University Press, 2001), p. 54; Kai Nielsen, “Scepticism and Human Rights”, *The Monist* 52:4 1978, pp. 575-594, p. 578; Michael J. Perry, *The Idea of Human Rights* (Oxford, Oxford University Press, 1998), p. 13

Yet even when God and theology are not specifically invoked, these notions are often implicit. Ronald Dworkin attempts to found human rights on his idea of ‘secular sacredness’, arguing that like great art, there is something intrinsically valuable about humans, ‘the highest product of natural creation’, which means they have rights.¹²⁵ But, as Perry argues, such value and sacredness is rather subjective; worth is in the eye of the beholder.¹²⁶ As Hannah Arendt amply demonstrates in her discussion of the paradox of the rights of man, ‘the world found nothing sacred in the abstract nakedness of being human’.¹²⁷ Stripped of the rights conferred by membership of a political community, the stateless victims of totalitarianism found that the rights of man – supposed to apply to their very situation – were of no use to them.

As we have seen, the dangers of human rights based on a (secular) ontology are also demonstrated by Derrick Darby through a discussion of ante-bellum slavery in the USA. Although all humans were held to have rights in slave-owning America, the simple solution for those who were committed to both natural rights and owning slaves was that blacks were either not human or not fully human, and that therefore did not have human rights. As Costas Douzinas argues, ontological justifications for rights and humanitarianism can be fundamentally exclusionary.¹²⁸

Cosmopolitanism and the slide into imperialism

For Costas Douzinas, global human rights are part of the project of cosmopolitanism, a project which began with emancipatory intent but inevitably slipped into imperialism from the very beginning. Originally, he argues, the Cynic philosophy of cosmopolitanism provided ‘tools of resistance against the injustices of the city’, through ‘principles of dignity and equality deduced by reason or given by God’ which held equally for the whole *kosmos*.¹²⁹ In this way, cosmopolitanism could provide a powerful check on the abuses of power and on injustice within a particular *polis*, by holding those abuses to be in violation of the universal law, which was valid for the whole *kosmos*. It is in just this way – preventing or at least redressing abuses of the

¹²⁵ Ronald Dworkin, *Life's Dominion*, p. 195; p. 83

¹²⁶ Perry, *The Idea of Human Rights*, p. 27

¹²⁷ Hannah Arendt, *The Origins of Totalitarianism*, p. 299

¹²⁸ Douzinas, *Human Rights and Empire*, pp. 78-89; see also Costas Douzinas, “The Many Faces of Humanitarianism”

[<http://mrzine.monthlyreview.org/2009/douzinas290509.html>] Accessed 20th July, 2013.

¹²⁹ Douzinas, *Human Rights and Empire*, p. 152

individual by the state, or by other individuals or corporations – that modern human rights are supposed to function.

Moving from the ancient world to the modern, Kant's development of cosmopolitan thought has led to similar changes in the understanding of sovereignty. Kant's insistence that there is a cosmopolitan right to hospitality which every state must uphold is an important check on sovereignty: Benhabib, as we have seen, argues that Kant's thought thus marks a break between Westphalian sovereignty and 'liberal international sovereignty', under which 'the formal equality of states increasingly is dependent on their subscribing to common values and principles, such as the observance of human rights, the rule of law, and respect for democratic self-determination.'¹³⁰ Again, the *universal* claim of human rights is a check against *particular* injustice.

However, in a new answer to that famous question 'what did the Romans ever do for us?', Douzinas argues that it is the Romans who turned cosmopolitanism on its head and metamorphosed it from a resource for liberation to an apology for empire. Roman cosmopolitanism 'elevate[d] the law of the polis to the status of the law of the cosmos', thus 'extending its writ to the globe and giving it metaphysical *gravitas*.'¹³¹ Thus almost from the very beginning, cosmopolitanism slid towards a justification for empire. This 'continuous slide of cosmopolitan ideas towards empire', argues Douzinas, 'is one of the dominant motifs of modernity.'¹³² Tied to this imperial cosmopolitanism, human rights, especially in their codified 1948 form, become not the liberating force of a cosmopolitan vision of rights for all, but rather an imperial projection of the particular onto the universal.¹³³ The human rights we have, following this argument, are not truly universal, but rather the projection of a particular, Western, ethics.

Rights recognition can provide a way out of this slide into imperialism. First, egalitarian rights recognition rejects the sort of universalism that identifies certain rights as 'self-evident' and proceeds outwards from that point. As chapter five demonstrated, rights recognition is essentially democratic and aware of its contingency. No rights are self-evident, unchanging, or the result of divine will or revelation. Rather, rights are claims on the part of some persons, recognised by other persons. In this process of

¹³⁰ Benhabib, *Another Cosmopolitanism*, p. 23

¹³¹ Douzinas, *Human Rights and Empire*, p. 159

¹³² *Ibid.*, p. 159

¹³³ Similarly, Žižek argues that human rights are 'false ideological universality, which masks and legitimizes a concrete politics of Western imperialism, military interventions and neo-colonialism': Slavoj Žižek, "Against Human Rights", pp. 128-129

claim and recognition there is the beginnings of a resistance to imperialism, in that the rights that operate within a society, if they are to be legitimate, are the rights which that society – meaning all members of that society, equally – has chosen to recognise, rather than any system of values imposed from without.

A further significant check on imperialism to be found in egalitarian rights recognition concerns taking equality seriously. Martha Nussbaum, as we have seen, criticises attempts by Rawls, Beitz and Pogge to extend contractarian arguments to the international level as such accounts, she argues, generally assume that those making the contract are equal, whereas in fact they are patently not: inequalities around the world are vast.¹³⁴ Applying rights recognition to the international level gives us a good indication of where international human rights has gone wrong. Egalitarian rights recognition, as we have seen, requires people who are equal – ἴσοι as well as ὅμοιοι. As this does not exist on the international level, the rights that have been recognised become skewed in favour of the strongest interests. These resulting rights are imperfect, as well intentioned as they may be.

In this way, rights recognition provides both a critique of the current state of human rights – because they are founded in inequality they cannot reflect a truly common good – and a suggestion of the action that is required: only through meaningful international equality can a global system of human rights that resists the slide into imperialism be created. Applying the tests of equality, and ensuring global ‘equality of access to rights recognition debates’, provides a critical lens through which imperialist agendas and global inequalities can be seen more clearly.

Taking rights recognition seriously can be a powerful corrective to the current state of affairs. By acknowledging that rights recognition requires a serious commitment to equality, we can recognise both that existing systems are flawed and also that substantial reform is needed to give the marginalised a voice in the recognition process. While the marginalised remain silent in the rights recognition process, human rights and cosmopolitanism cannot resist the slide into imperialism. Rather, in a world where eight countries dominate the rest, the justice and rights of the particular become those of the universal: put crudely, America becomes the world.

¹³⁴ Nussbaum, “Beyond the social contract”, p. 198

3.4.2 Taking equality seriously

This section returns to the important relationship between rights recognition and equality which has been a thread running through this thesis and which was discussed at length in chapter four. If part of a cosmopolitan project is an attempt to bring about greater global equality, to eradicate the huge material differences between the global rich and the global poor, then there is good reason to prefer a recognition based account of rights, as it involves a serious commitment to equality, as a prerequisite for effective, legitimate, rights recognition.¹³⁵

A recognition theory of right takes – or should take – equality seriously, taking its cue from Green, who was clear that recognition requires a society marked by equality.¹³⁶ Without equality in the mechanism of rights recognition, the rights that are recognised will not adequately reflect the common good – or goods that are common to all.

In chapter four, we saw that inequality has a profoundly negatively effect on rights recognition. Two hypothetical societies were presented: in one a minority of citizens in a society had the vast majority of votes in a broadly (otherwise) democratic system; in the second, a minority of citizens had the vast majority of resources. In both cases, the rights recognising mechanism was distorted in that the good recognised was not a good which was truly common to all in society.

This section will make two interrelated arguments. The first is that, if equality is held to be an important value, then we have a political reason to prefer egalitarian rights recognition to natural rights-based accounts of human rights. The second is that if we hold the rights recognition thesis to be more plausible than the natural rights-based account, we should be very serious about promoting equality in society: if we are convinced by rights recognition, we should adopt *egalitarian* rights recognition. From either approach it will be seen that a combination of rights recognition and equality has more promise than combinations of either natural rights and equality or rights recognition and inequality, or, still worse, natural rights and inequality. In other words, egalitarians should be rights recognitionists, and supporters of rights recognition should be egalitarians. Rights recognition and equality support each other in a quasi-symbiotic

¹³⁵ On global equality as a goal of cosmopolitanism, see: Charles R. Beitz, “Cosmopolitanism and Global Justice”, *The Journal of Ethics* 9:1 (2005), pp. 11-27; Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Cambridge, Polity, 2008)

¹³⁶ Green, *Lectures*, §139, p. 144; §141, p. 145; §148, p. 154; see also chapters one and four.

manner: equality makes rights recognition more effective (indeed, as Green argues, it is a necessary pre-condition for legitimate rights recognition) while a rights recognition approach makes us value equality more highly.

The first argument is a political argument in favour of a recognition-based approach to rights. Derrick Darby distinguished between political and philosophical arguments in favour of rights recognition.¹³⁷ He argues that the philosophical debate is impossible to prove either way: although we may have reason to look on natural rights with suspicion, we cannot *prove* that there is in fact no supreme deity or natural law.¹³⁸ Therefore, Darby switches tack, and instead makes a political argument for rights recognition. He argues that rights recognition approaches deal more adequately with the issue of ante-bellum slavery in the USA and with more contemporary problems of racism and what he calls the ‘black inferiority’ thesis.¹³⁹ This section will make a similar argument: rights recognition is better for equality than natural rights theories, and this is a political reason to embrace a recognition-based approach to rights.

As we have seen, for Green, equality is a pre-requisite of rights recognition. Societies must be comprised of people who are equal in a meaningful way in order for the mechanism of rights recognition to work properly. Inequality interferes with recognition so as to render the recognised rights flawed at best. Thus, if we value equality, there are clear reasons to prefer a theory of rights which takes equality so seriously. Let us now compare this with a natural rights approach.

It would be unfair to say that all theorists of innate or natural human rights fail to value equality. Ronald Dworkin, for example, wrote extensively both on the ontology of rights and egalitarian justice.¹⁴⁰ However, there are ways in which natural rights can be used to justify a great deal of inequality – the clearest example of this trend is the libertarianism of people such as Robert Nozick, and the emphasis placed on natural rights by some neo-liberals. For Nozick, an individual’s natural right to property and freedom is interfered with by redistributive taxation to the point of making work ‘forced labor’.¹⁴¹ egalitarianism goes against natural rights, and the right to

¹³⁷ Darby, *Rights, Race, and Recognition*, p. 177

¹³⁸ Though his position does run the risk of conceding too much ground. See: Matt Hann, “Rights, Race, and Recognition”, *Contemporary Political Theory* 10:1, p. 129

¹³⁹ Darby, *Rights Race, and Recognition*, pp. 126-132

¹⁴⁰ See: Dworkin, *Life’s Dominion*; Ronald Dworkin, *Taking Rights Seriously* (Harvard, Harvard University Press, 1978) on rights and Dworkin, “What is Equality?” on equality.

¹⁴¹ Nozick, *Anarchy, State, and Utopia*, p. 169

property calls for the potential for great inequality, based on merit or sheer brute luck. Margaret Thatcher's 'right to be unequal' sums up this position eloquently.¹⁴²

Space does not permit anything resembling a full discussion of these positions within proponents of natural or innate rights. However, even a very brief exposition makes clear that it is possible to be in favour of natural rights and neglect the importance of equality. If we have innate rights, no matter what our socio-economic status, then there is no need to take equality seriously beyond the notion that we all have the same innate rights as humans. This is a very minimal commitment to equality. Rights recognition, on the other hand, involves a very serious commitment to equality: a reason for egalitarians to prefer rights recognition.

The second argument in this section proceeds from the assumption that we hold the rights recognition thesis to be more supportable or plausible than a theory of natural rights. If this is the case, then we should be very serious about promoting equality in society. In other words, rights recognition presents a powerful political argument in favour of equality: equality is a good not just in itself, but also because it is essential for the mechanism of rights recognition. The more meaningful the equality within a society is, the better rights recognition will work.

Several arguments have been made in favour of equality: they generally fall into arguments which hold that there is a quality which all humans have in common which entitles everyone to equal treatment¹⁴³ or arguments which hold that equality brings about other goods.¹⁴⁴ Here, I argue that rights recognition provides a novel argument to this second strand: equality is valuable because without it we cannot have human rights, or at least, the system of rights would be imperfect.

Green's account of rights recognition requires rights to be recognised by society as contributing to the common good – as benefitting all within a society. There are two hurdles in terms of equality that must be overcome for rights recognition to work properly. The first is that there cannot be such inequality that some within a society lack the means to participate in any way as moral actors. Green holds that some private property is essential to facilitate this (and thus rejects collectivism)¹⁴⁵: there should at least be a basic, equal baseline below which no-one falls. Further, as noted earlier,

¹⁴² Margaret Thatcher, "Free Society"

¹⁴³ Bernard Williams, "On the Idea of Equality", in Louis P. Pojman and Robert Westmoreland, *Equality: Selected Readings* (Oxford, Oxford University Press, 1997), pp. 91-103

¹⁴⁴ Richard Wilkinson and Kate Pickett, *The Spirit Level: Why More Equal Societies Almost Always Do Better* (London, Allen Lane, 2009)

¹⁴⁵ Green, *Lectures*, § 219-221, pp. 218-220

Green argues that all ‘must have a share... in making and maintaining the laws which he obeys’, for only in this way will people ‘transfer to the whole the interest which otherwise [their] particular experience[s] would lead [them] to feel only in that part of its work that goes to the maintenance of [their] own and [their] neighbour’s rights.’¹⁴⁶ All people in a society need a share in the running of that society in order to conceive of the common good within that society. The more equal this share is, the easier it is to conceive such a common good, and thereby to decide (as a society) which rights ought to be recognised for the good of all. Any inequalities distort the ‘common’ good so that it becomes more particular, and benefits some more than others. Arendt holds that equality is a pre-requisite for judgment: we can only judge in political communities which are characterised by equality: rights recognition can only occur properly in an equal society. A rights recognition approach, therefore, involves taking equality very seriously: if we are in favour of a recognition-based theory of rights, then we ought to support *egalitarian* rights recognition.

This section has made two arguments. First, if equality is held to be an important value, then we have a political reason to prefer the rights recognition thesis to natural rights-based accounts of human rights. Second, if we hold the rights recognition thesis to be more plausible than the natural rights-based account, we should be very serious about promoting equality in society. Rights recognition involves a serious commitment to equality. In terms of human rights constructed on a basis of recognition, this means taking the demands of global equality and cosmopolitanism seriously, so that internationally recognised rights contribute to a global common good rather than the good of a few. Cosmopolitans who wish to bring about greater global equality would do well to embrace a theory of rights recognition.

4. Summary: a system of international, cosmopolitan rights recognition.

This chapter has made the case that egalitarian rights recognition works not just within particular societies, but internationally. Rights recognition therefore provides a powerful alternative to other conceptualisations of cosmopolitanism, which are often based on theories of natural rights, explicitly or implicitly. The potential tensions in

¹⁴⁶ *Ibid.*, §122, pp. 130

applying the model presented in the previous chapter to the international level have been shown not to be insurmountable obstacles. An international theory of human rights can be based on rights recognition.

The theory of international rights recognition presented here is one that accommodates problems of international politics such as statelessness, failed states, and mass migration. It is also flexible enough to cope with overlapping and multiple spheres of rights recognition. It is a theory which takes seriously the porousness of informal spheres of recognition, and the way in which these porous, fluid spheres undermine traditional Westphalian conceptions of rights existing purely within individual states.

Through the potential openness of spheres to anyone who is recognised as being able to communicate – as having rights ‘in principle’, the theory presented here is able to underpin global *human* rights. It is also open to the possibility that as methods of communication and travel become easier and quicker, there is a real possibility that supranational bodies such as the EU, or even world government, will assume the rights enforcing role previously owned by nation-states. Despite Benhabib’s concerns, it has been shown that democratic government does not necessarily require the splitting off of the world’s populations into individual *demos*. Indeed, as the world becomes more interlinked, the prospects of this state of affairs continuing diminish.

Further, a theory of rights recognition offers advantages over competing theories of human rights. First, it provides a response to the accusation that human rights and cosmopolitanism leads inevitably to empire, and to the idea that human rights are Western inventions imposed on the rest of the world. Rights recognition is a way out of subscribing to specifically Western or Judaeo-Christian assumptions about god and creation, whilst still maintaining the benefits of having a rigorous system of rights. Further, through a commitment to global equality, basing rights on recognition offers a buffer against the slide into imperialism identified by Douzinas.

A second key advantage over natural rights based theories and some accounts of the rights recognition thesis is the commitment to equality in the theory of rights presented here. Because rights depend on meaningful equality, we have more reason than ever to take equality seriously. In doing so, this theory suggests that there may be major problems with some prevailing rights, as they have been recognised in systems of great inequality, which has major implications for the rights recognising mechanisms.

These arguments add to the case that rights recognition provides a philosophically more convincing and politically preferable account of human rights. In addition to this, rights recognition can move beyond the individual nation-state: a global, cosmopolitan account of human rights, which argues for equal rights for all, can be based on a system of rights recognition.

Conclusion

This thesis has set out a novel ten-point account of egalitarian rights recognition, which differs from existing accounts of rights recognition in several aspects, as we have seen. In chapter one, the idea of rights recognition was introduced through setting the theory of T.H. Green against the backdrop of G.W.F. Hegel. It is Green who first combines discourse on rights with recognition. Green demonstrates that rights require social recognition, and must contribute to the common good to avoid being arbitrary. Further, there are two stages of recognition in Green, the ‘recognition of persons’ and the ‘recognition of rights’. Chapter two explored a number of overlooked texts on rights, to demonstrate that recognition-based accounts of rights held sway for several decades, until the UDHR, against the prevailing philosophical tide, brought back into vogue a theory of innate human rights. Chapter three introduced Hannah Arendt’s work on rights, which has not previously been explored in the context of rights recognition. This chapter argued that recognition is crucially important for Arendt, and that Arendt, through her work on the ‘rights of man’, the ‘right to have rights’, and judgment, contributes greatly to our understanding of rights recognition. Chapter four took Green and Arendt further, to investigate, first, what sort of society is necessary to allow for rights recognition, and, second, how exactly a right is recognised. It was argued that societies must be equal, must allow for communication and the identification of common good, but may take almost any shape and size if these criteria are met. Further, rights are recognised claims, rather than actions; and recognition is instantaneous rather than the product of tradition. Chapter five addressed a potential criticism of rights recognition – that it does, in the end, rely on natural law – by introducing post-foundational political thought. This brings to rights recognition an awareness of contingency which should spur us on to take greater care of the conditions that allow for rights recognition, freedom, and democracy. Chapter five then summarised the theory thus far, in preparation for chapter six. Chapter six sought to demonstrate that egalitarian rights recognition can be applied to the international level, rather than just within specific political communities. In doing so, it showed that egalitarian rights recognition provides a convincing base for cosmopolitanism, and offers resources for those concerned with global justice and imperialism.

Through these chapters, the following ten-point account of egalitarian rights recognition was developed:

1. Rights, including human rights, require social recognition.
2. Recognition consists of two stages – recognition of persons, and recognition of rights.
3. The location, or arena, for rights recognition is society.
4. Recognition of rights requires meaningful equality, which can be expressed as ‘equality of access to rights recognition arenas and debates.
5. Recognition of rights or persons may not be arbitrary, but must be based on moral argument, such as the notion of a common good or a *sensus communis*.
6. Recognition of rights requires the greatest possible facilitation of communication within a society.
7. ‘Society’ in the context of rights recognition is open to ideas from without, and has no necessary limits.
8. Rights are recognised claims, not established ways of acting.
9. Recognition of rights and persons is synchronic, not diachronic.
10. Recognition of rights is logically distinct from enforcement and maintenance of rights; although enforcement and maintenance of rights is desirable, recognition can exist without enforcement and maintenance.

In setting out the theory of egalitarian rights recognition, this thesis has sought to make three key arguments. First, human rights must be grounded in social recognition, rather than in the innate qualities of the human. Second, rights recognition

requires a serious commitment to equality. Third, human rights, if grounded by egalitarian social recognition, are important for human freedom and flourishing.

The initial problem this thesis aimed to address was the question of how we can justify the notion that we have human rights without resorting to natural law or ontological accounts, with all the problems they involve. Linked to this was the question of universalisability, and indeed of Western imperialism: how can we formulate a theory of rights which is acceptable to all, and which does not rely on specifically Western traditions? How can we ensure that human rights are not invoked simply to deceive, or to disguise ulterior motives? The answer to these questions, this thesis argues, lies in egalitarian rights recognition.

By adopting a recognition-based approach to rights, we can be more honest about how rights come into being: they are formed through debate within societies, through the advancing of claims and the recognition or rejection of those claims. Rights, and the societies which recognise them, remain contingent; neither rights, nor societies, as history amply illustrates, are set in stone, to remain for all time. Earth's proud empires – and their systems of ethics and morality – pass away. By paying attention to contingency, alongside an honest approach to the genesis of rights, we can ensure that the conditions which allow for the rights we hold important to be recognised are maintained; this is an advantage over the complacency that might creep in, were we to assume that our system of rights will hold good for ever.

A recognition-based approach to rights makes no claims to know the will of God, nor to divine the laws of nature. It recognises that the heart of democracy must be empty, and that there is no single judge. Rather, rights are recognised – claims are judged – by all in society, or at in the best situation by all in society.

In calling for all in society to take part in rights recognition, egalitarian rights recognition offers powerful resources for a critique of existing rights recognising societies. The crucial test of equality offers a yardstick against which to judge actual societies, from the local level to the global. The key moral component of rights recognition is that rights must benefit all – they must contribute to a common good. This requires equality of access to rights recognising debates, something that is clearly lacking both globally, and in very many states within the world. Adopting a theory of rights recognition should be a spur to taking equality seriously: without it, systems of rights cannot function properly.

Human rights have had a paradoxical existence: as Parekh points out, they were born at precisely the time in which they became impossible, a product of modernity made implausible by modernity itself.¹ Yet, as Hesse reminds us, sometimes, ‘nothing is more necessary than to speak of things whose existence is neither demonstrable nor probable’.² In this speaking, discussing, and dialogue, in claim, debate and recognition, rights are brought a step closer to being reborn, as ideas which are contingent and indeed fragile, but ideas which remain, despite all their perplexities, vital to fully human life.

¹ Parekh, *Hannah Arendt and the Challenge of Modernity: A Phenomenology of Human Rights*, p. 1

² Hermann Hesse, *The Glass Bead Game*, p. 14

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