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Beyond the self-legislation model of democracy

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James Bohman's *Democracy across borders* aims to conceptualize transnational democracy. But it is more than that: Bohman begins to articulate a paradigm shift in how we conceive democracy in complex, pluralized, globalized contexts comprised of multiple, overlapping constituencies which often have broad extension in space and time. The paradigm shift is not Bohman's alone: it has been some time in the making—two decades at least—and has multiple sources in contemporary theories of power, inclusion and exclusion, pluralism, deliberation, as well as in theories of social and system complexity. The importance of Bohman's book is that it consolidates many of these elements into an important statement that breaks with those kinds of theory that conceptualize democracy as a way of organizing relatively simple, territorial, state-organized units of political organization. My comments highlight those elements of Bohman's argument that add up to a paradigm shift; they are critical only in the sense that there is a danger that this contribution could be overshadowed by the book's primary focus democracy across borders, important though this is. Most of my comments aim at extracting and reconstructing the paradigm shift within Bohman's text.

Let me begin by identifying the three most basic elements of the paradigm shift—elements that must be a part of any progressive democratic theory generally, not just theories of transnational democracy. These are:

- *Non-utopianism:* Theories must attend closely to the 'circumstances of politics' to have a progressive effect. Any democratic theory must work within these realities; a good democratic theory will identify the progressive opportunities in current realities, while avoiding stipulative approaches, which will always degrade into irrelevant utopianism.[1]

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- *Non-domination:* Democratic theory should be driven by commitments to fundamental norms of self-determination. Under contemporary circumstances of complexity, scale, pluralism, and multiple constituencies, the most direct route to this goal are rights that secure non-domination for individuals, in such a way that collective decisions are pushed away from domination and toward the democratic media of deliberation, bargaining, compromise, and voting.[2]
- *Reflexive institutions:* Democratic institutional design should be 'reflexive.' By this I mean that they should favor rules that enable the deliberative generation, revision, and renewal of collective procedures and decisions. Reflexive institutions are those that best induce and organize the creativity, intelligence, and energy of individuals.

I return to each point below. They are best appreciated, however, if we understand that they are more basic to democracy than what Bohman calls the monist ideal that equates 'democracy with self-legislation, as the act of a people giving itself laws,' usually through an elected legislature which 'expresses the popular will.'[3] Bohman suggests—quite rightly, I think—that the self-legislation paradigm of democracy is so ingrained in our ways of thinking that we often do not notice the extent to which it is now operating in a regressive way. The self-legislation model has been, and remains, deeply attractive from a normative perspective. Its cleanest and most uncompromising version can be found in Rousseau, but it runs deeply through almost all democratic theories. In Rousseau, of course, one becomes fully human by legislating for oneself together with others, so the law to which a collectivity subjects the self is exactly the law that the self would impose on itself after reflection together with others who are potentially affected. This model of democracy bridges the gulf between self and society, such that freedom and self-development follow self-determination together with others. What makes the ideal of democracy as self-legislation attractive is that it captures the notion that democracy is about self-rule under the circumstance that the fate of every individual is conjoined with others. Interdependence brings mutual vulnerability, with vulnerability bringing possibilities of exploitation and domination. So self-rule implies as an ideal an equal distribution of both protections and chances for influence in collective decisions. To the extent that the self-legislation model captures these basic features of common vulnerability and provides a response that advances human dignity and flourishing, there is little with which to argue. And, indeed, these intuitions have formed the basis of almost all strains of democratic theory—from Rousseauian-inspired participatory theory to neo-Kantian-derived deliberative theories. The intuition is basic to contract theory, as well as to various theories of representative democracy that build on the principal–agent relationship between citizens and representatives.

The problem with the self-legislation paradigm is not to be found in these generic intuitions, but rather in the move from the ideal of self-legislation to institutionalization. The paradigm remains robust within the context of relatively small societies faced with relatively simple tasks—which is, of course, why Rousseau argued for small, relatively simple polities. Under the circumstances of size, scale, complexity,

and pluralism, however, the norm of self-legislation is compromised, which is why those democrats who trace their lineage to Rousseau (or Aristotle, as far as that goes) view representative democracy as a necessary though undesirable accommodation of reality. Under this model, democratic institutions are built up by forming constituencies—usually but not necessarily territorial constituencies—which delegate powers to larger, higher, more complex units of collective decision-making, such as councils, parliaments, and other representative bodies, in such a way that self-determination is achieved through principal–agent a linkages.

A great strength of Bohman's book is that he recognizes that this institutionalization of the self-legislation model is broken. It is not simply a matter of a democratic ideal being compromised by reality. Rather, the model itself has so little purchase on contemporary circumstances of politics that it has now become a barrier to realizing basic democratic norms of self-determination. So rather than start with the debates within democratic theory, Bohman starts with the 'new circumstances of politics.'[4]

Two of these circumstances have been widely discussed as limits on the reach of democracy, and have been a staple of realist theories of democracy from Max Weber to Norberto Bobbio and Niklas Luhmann. These are the limits of the size and complexity of societies. Size, of course, limits the extent to which any citizen can have influence over a collective outcome. The challenges of size include not only the absolute number of individuals in a constituency, but also those of time and space: collective decisions often affect people across global reaches of space, as well as extensive reaches of time, so much so that our actions in the here and now can produce life and death consequences for strangers around the world and generations into the future. And the complexity of today's societies sets the bar for knowledge and understanding so high that no citizen—not even the most knowledgeable—can claim understanding of the forces that affect their lives. Complexity also introduces a scarcity of time: even without other limitations, no citizen has the time to attend to more than a few of the many forces affecting them.

In addition to these limitations, however, two other circumstances of politics are less easy to conceive merely as limitations on the self-legislation model, since they challenge its founding conception of constituency—the idea of a self-legislating people. This is the point at which Bohman's subtitle—*From dêmos to dêmoi*—takes up its position. One factor that impacts constituency is *differentiation*, which refers to the circumstance that collective decisions and actions are increasingly distinguished by issue, system and level of organization, and means of organization. Only a few sites of collective decision-making correspond to peoples organized into territorial political units. Most collective decisions occur elsewhere: governments, particularly national states, now mostly underwrite highly disaggregated sites of collective decision, organized through differentiated media—markets, state powers, and norms of civil society. Collectivities are organized at multiple levels, from friends and family through global regimes, and specialized into multiple institutions: stock markets and firms, hospitals and scientific institutions, churches and direct action networks, cable channels and the internet, and so on.

The second deeply challenging circumstance is *interdependence*. Owing to divisions of labor which flow across borders within and among differentiated spheres, the fates of individuals are not only intertwined with those within other political jurisdictions, but also affected by regimes and structures over which they have no effective control. The result is that each individual is subject to multiple forms of what Bohman calls 'affectedness.' Or, as he also puts it, interdependence leads to 'domination through non-voluntary inclusion.'[5] The challenge of this circumstance to the self-legislation model is fundamental. On the one hand, the structures of interdependency now often have little relationship to the effective units of political organization. On the other hand, owing to differentiation, the structures of interdependencies are complex, so it is hardly possible to imagine a political organization short of world government which could encompass the interdependencies. And even were this form of organization to be possible, size and scale would so thin out its relationship to self-legislation that its democratic credentials would be negligible.

So the case against the self-legislation model adds up to the following. First, the model is inapplicable: it fails to fit the social, political, and economic organization of the contemporary world. Second, and following from this point, regimes built on the self-legislation model are increasingly unable to address the possibilities of domination inherent in interdependency. Third, and more strikingly, as regimes modeled on self-legislation are scaled up, principal–agent control breaks down while powers are concentrated. So the self-legislation model leads naturally to regime structures that can become sites of domination. Fourth, when the language of self-legislation is read onto chains of interdependency within which principles have little effective control over their agents, then it can become an ideology: the institutional structures it justifies not only fail to include those affected in collective decisions, but actually aid and abet domination. Finally, when democracy is identified with the self-legislation model operating under these circumstances, democratic claims are easily attacked as utopian, and democratic ideals are dismissed as unrealistic. In short, the self-legislation model can do harm: as it loses relevance to these new realities, it often serves instead as an ideological justification for institutions that in fact generate domination rather than democracy. The model creates cynics. Bohman's critical achievement is, I think, to begin to detail these costs to democracy of standard democratic assumptions.

These same circumstances offer the opportunity to rethink democracy, and here is where the paradigm shift takes place. It seems to me that there are three important moves that, together, send democratic theory off in a direction that can turn the contemporary circumstances of politics to the advantage of democracy.

The first move is to return to the basic normative idea that what is important about democracy is that it maximizes self-determination of those affected by collectivities, and then to ask what this ideal can mean under contemporary circumstances.[6] It is clear what 'self-determination' cannot mean, namely, 'the people' controlling a collective center or site of collective decision-making, not least because this kind of agent does not exist apart from differentiated structures of organization or association. What it can mean is that individuals have some say over the influences

that affect their lives. But because these influences are multiple and plural, it makes little sense to conceive of 'democracy' as individual influence over each interdependency that affects them. But, fortunately, self-determination does not require influence over each form of affectedness. This point is implied in Bohman's argument, though he does not make it explicitly: affectedness *as such* does not require democracy, since, ideally, most forms of affectedness support self-determination. In the best of circumstances, self-determination is built out of 'normal' kinds of social connections and supports—trust, solidarity, and confidence in institutions, for example. From the perspective of the self-determination, what 'democracy' requires is that individuals are able to influence those interdependencies that are problematic—those that damage or undermine self-determination through domination, or which involve undecided or indeterminate or conflicted future decisions. Thus, to further develop the logic implied in Bohman's approach, if we think of individuals today as being implicated in multiple interdependencies, then we should also conceive them as holding multiple de facto 'memberships' in collective organizations and networks of interdependencies. At any given point in time, individuals should be able to activate those memberships that are problematic in ways that they can exert influence over the problematic effects—through argument, deliberation, protest, opposition, voting, bargaining, and so on. What this image of democracy suggests is that individuals should be able to divide and distribute their political labors in such a way that they can maximize self-determination. At any given point in time in a good society, most interdependencies will not need 'democracy' because they operate in ways that are already underwrite self-determination. What a democracy requires is that individuals have the capacities and standing that will enable them to choose their constituencies in such a way that they can form and reform 'peoples' as necessary. Though Bohman does not elaborate the consequences in precisely these terms, this vision of democracy as comprised of multiple and overlapping constituencies is the structural effect of what he calls 'the democratic minimum.'[7]

The second move follows directly from the first. If the basic meaning of democracy is self-determination, the way to achieve self-determination under conditions of multiple, non-centered interdependencies is by focusing on non-domination.[8] The interdependencies to which each individual is subject should support rather than undermine their self-development. The focus on non-domination brings democratic theory back to the basic question of how to distribute and contain power relations, such that individuals can thrive. But because the circumstances of politics lead to multiple interdependencies, the possibilities for domination are multiple and often shifting. The democratic response, in Bohman's language, should be to design institutions to support powers individuals can deploy to identify, resist, and alter interdependencies. Bohman identifies these powers as 'normative'—which is overly restrictive, I think, as the powers of obstruction, voting, and actions that make use of non-normative capabilities should also be part of the menu. But maybe this is what Bohman means by 'the normative powers of citizens.'[9]

In any case, the key idea here is clear enough: threats to self-determination are best identified by those who are subject to these threats, assuming they have the benefit of discursively induced self-reflection and some adequate powers of response. In Bohman's terms, the 'project' for democracy is to secure the minimum level of non-domination necessary for individuals to make demands, claims, and changes in particular, problematic interdependencies.[10] In more conventional terms, those rights and powers that enable political influence are prior to the broader distributions of powers that would secure 'justice'—which is, for purposes of political theory, best conceived as a consequence of inclusive political processes in which people can make and deliberate claims. So the project for a democracy is to secure the powers necessary for citizens to exert political influence. This would be the 'democratic minimum,' and its effect would be to enable individuals to choose to participate in those interdependencies they find problematic. The minimum powers necessary for the democratic minimum to work—are 'just those necessary conditions of non-domination necessary for democratization—that is, for citizens to be able to form and change the terms of their common life.'[11]

The third move has to do with institutionalization. The democratic minimum would result, of course, in complex divisions of political labor, multiple 'peoples' of many different kinds, organized in many different ways. We should expect a 'democratic minimum' to produce multiple polities with many kinds of actors—elected representatives, numerous publics, new institutions such as structured mini-publics, self-appointed representatives and advocates, and very many places open to participation and deliberation. This image of democracy is one of free-floating, overlapping, and plural memberships, within which individuals have the powers to selectively participate, as they choose, to delegate much political work to others, and to trust interdependencies that are supportive and unproblematic.

I emphasize this somewhat messy image in part because I think Bohman's choice of the European Union as illustrative of institutionalized, transnational democracy may leave an overly neat and organized image.[12] What we should notice is the new kind of political work accomplished by the European Union—less through its cumbersome decision-making processes than through the ways in which it extends the powers of citizenship, such that individuals can claim standing with respect to policy areas that are functionally defined and which cross the boundaries of the member countries. The effect is to generate multiple and overlapping peoples that do not correspond to national constituencies, as a consequences of institutions that extend rights and organize institutional take-up.

By calling attention to these features of the European Union, Bohman is able to caste some familiar devices for organizing democracies—rights and constitutions—in a new light. Bohman's innovative move here is to interpret these two devices from the standpoints of non-domination, the democratic minimum, and plural and overlapping peoples rather than from the standpoint of self-legislation.[13] Because the institutional picture is complex, I will limit my final remarks to the inherent reflexivity of these two devices—recalling the key point above that democratic institutions work when they are reflexive. Rights secure various conditions of personhood, the most important of

which are those of non-domination. The rights necessary for non-domination are, always, collective achievements, because rights are not actionable unless they are recognized by others, and those others are willing and able to enforce them. So rights imply institutions—particularly judicial institutions. But these institutions work reflexively, by virtue of their functions in creating space for individual powers, a necessary condition of potential political agency. And this agency in turn is essential to democracy as self-inclusion (my term, not Bohman's)—that is, enabling individuals to decide when and where they will organize, act, and constitute 'a people' for some purpose. The institution of rights, in other words, is generative of a particular kind of politics—that kind of politics built on the powers of individuals as citizens. These institutions are 'reflexive' in that they do not make collective decisions, but enforce status in ways that when collective decisions are made, affected individual have the powers to include themselves, should they decide to do so. They provide, as it were, the conditions of participation by limiting domination and securing status. As it turns out, securing working judicial institutions, though challenging, is less politically demanding than many other kinds of collective tasks. It is easier to gain consensus on rights—which devolve to individuals—than particular collective decisions, including those having to do with justice. The European Union experiment shows that it is possible to expand standing for individuals regardless of citizenship. And where these standings are secure, civil societies grow, public spheres organize and reorganize, and new peoples emerge.

The second device, constitutions, enable collective uptake of the input. Constitutions should be understood as secured agreements on second-order rules for collective decision-making. Constitutions, as Tocqueville noted a long time ago, are practices that people learn to master. Today we already have hundreds of thousands of cases of constitutions used for association and regime building. They function (a) to provide the conduits into points of decision-making for those whose status is secured in the form of rights and (b) to transform and regularize the medium of decision-making—in particular, transforming 'decision making' from coercion, arbitrary authority, untamed markets, and accident—the default media—into persuasion, voting, and other democratic media.

These are not precisely Bohman's terms, but I think they capture his intent in discussing the European Union: constitutions may have grown with nation-states, but their reflexive logic is not limited to nation-states. They are politics-transforming devices that build on the logic of non-domination. The case of the European Union shows that constitutions can be built across peoples, not in the form of building decisions to an apex (as in the self-legislation model of democracy), but in the form of regularizing conflict, deliberation, and decisions across the many different boundaries of thousands of decision-making units.

There are many little things one might criticize in Bohman's book: the concepts are not always sorted out as cleanly as one might like. The primary example of the European Union is highly contingent, and threatens to limit the reach of the theory. What I have sought to highlight here, however, is the shift in thinking about what

democracy is and what it does. By identifying and then breaking with the self-legislation model of democracy, Bohman provides an approach that returns democratic thinking to its core value of self-determination, and then shows how the new circumstances of politics—far from compromising democracy—provide opportunities that, perhaps, we could not see because our expectations framed them out of our vision.[14]

NOTES

1. James Bohman, *Democracy Across Borders: From Dêmos to Dêmoi* (Cambridge, MA: MIT Press, 2007), 23–5.
2. Ibid., 25–8.
3. Ibid., 21.
4. Ibid., 24.
5. Ibid., 25.
6. Ibid., 173.
7. Ibid., 45–7, 91–3.
8. Ibid., 25–7, 93–4.
9. Ibid., 52–3.
10. Ibid., 45–55.
11. Ibid., 45–6.
12. Ibid., chap. 4.
13. Bohman is indebted to Philip Petit's reformulation of concept of non-domination in *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1999).
14. See also Mark E. Warren, 'What Can Democratic Participation Mean Today?' *Political Theory* 30 (2002), 677–701.