

# THE RIGHTS OF FOREIGNERS: DIGNITY, CITIZENSHIP AND THE RIGHT TO HAVE RIGHTS\*

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*This article examines the rights of foreign nationals in view of Hannah Arendt's thesis that human rights amount to little when severed from the rights of members of a concrete political community. It considers three different theoretical attempts to come to terms with Arendt's challenge and to make sense of her reference to a 'right to have rights'. Drawing upon these theoretical perspectives, the article analyses the judicial reliance on the constitutional value of human dignity to mediate the tension between the rights of foreigners and the sovereign power of a political community to engage in exclusionary practices. In particular, it explores critically the possibilities and limits of the courts' dignity-based jurisprudence with reference to the central but unstable distinction between the dignity of man and the dignity of the citizen.*

## I ARENDT'S CHALLENGE

In chapter nine of *The Origins of Totalitarianism* Hannah Arendt famously noted, against the background of mass migration and statelessness in Europe, that for refugees and stateless persons, the loss of a political community willing and able to guarantee their rights had resulted in a state of utter rightlessness. What was at stake was not simply the loss of particular rights such as life, liberty or equality but, more fundamentally, the loss of membership in any community. It was at this moment that 'we became aware of the existence of a right to have rights'.<sup>1</sup> For Arendt, this right was inextricably bound up with membership in an organised political community. Individuals, who no longer belonged to any such community and only could rely on their abstract and general humanity, soon discovered that '[t]he world found nothing sacred in the abstract nakedness of being human'.<sup>2</sup> Deprived of 'a place in the world which makes opinions significant and actions effective',<sup>3</sup> they were relegated to a sphere of mere existence that was outside the law,

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<sup>1</sup> Hannah Arendt *The Origins of Totalitarianism* (1968) 296. See also Frank I Michelman 'Parsing "a right to have rights"' (1996) 3 *Constellations* 200 and Alison Kesby *The Right to Have Rights: Citizenship, Humanity, and International Law* (2012) for thoughtful analyses of the meaning(s) of the right to have rights.

<sup>2</sup> Arendt op cit note 1 at 299.

<sup>3</sup> Ibid at 296.

politics and humanity. According to Arendt, this involves a paradox: the loss of human rights occurs at the very moment when

‘a person becomes a human being in general — without a profession, without a citizenship, without an opinion, without a deed by which to identify and specify 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’.<sup>4</sup>

It is at this instant that the inalienable rights proclaimed in international rights declarations should become applicable. Yet, this is precisely the point when the impotency of these rights is revealed. Human rights, when uncoupled from citizens’ rights, have as their subject human beings who have been excluded from a common world, who can only fall back on their bare humanity. However, for Arendt, ‘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’.<sup>5</sup> The appeal to human rights as something inalienable and universal means nothing if it is divested from rights of political membership and from equality — on her understanding, equality can never be ‘natural’, but can only arise from human organisation.

As I will argue later, Arendt’s identification of the right to have rights with citizenship is not without problems. However, there is something disturbing about the extent to which recent experiences in South Africa resonate with her analysis. The constant uncertainty and fear which characterise the lives of many migrants in South Africa, arising from their vulnerability to administrative bungling in the department of home affairs, xenophobic attacks, crime, poverty, prolonged detention and the threat of deportation, appear to give credence to Arendt’s claim that human rights amount to little when detached from rights of political participation and membership. Assertions that asylum seekers, stateless persons and undocumented migrants find themselves in a state of exception, in which officials have a near-absolute discretion and can ignore the law with impunity,<sup>6</sup> appear plausible in view of the divide between the progressive nature of South Africa’s Constitution, 1996 and immigration and refugee legislation, on the one hand and, on the other hand, the Department of Home Affairs’ often blatant disregard for binding rules and precedents relating to the legal position of these categories of non-citizens.<sup>7</sup>

In the next three parts of this article, I approach this issue from the vantage point of the debate between three theoretical responses to the challenge

<sup>4</sup> Ibid at 302 (emphasis in the original).

<sup>5</sup> Ibid at 300.

<sup>6</sup> See e.g. Thomas Blom Hansen & Finn Stepputat (eds) *Sovereign Bodies: Citizens, Migrants, and States in the Postcolonial World* (2005) for analyses of the position of migrants in terms of Agamben’s notions of sovereignty, states of exceptions and bare life.

<sup>7</sup> See Roni Amit ‘Winning isn’t everything: Courts, context, and the barriers to effecting change through public interest litigation’ (2011) 27 *SAJHR* 8 for an analysis of the disconnect between a progressive legal framework and bureaucratic incompetence and recalcitrance.

posed by Arendt. The first theory finds the intellectual resources for the extension of citizenship in cosmopolitan notions of right, and is interested in the ways in which universal rights and principles are invoked and reinterpreted in the course of challenges to the boundaries of the nation state. Despite the appeal to cosmopolitan law, this understanding of the rights of foreign nationals is framed in terms of discourse theory, rather than a thick moral universalism. The second theory focuses on the irreducibly political nature of the processes through which political communities define and reinvent themselves. Here, the nation state's capacity to respond to challenges to its self-understanding is conceived in terms of a phenomenology of legal and political boundaries. The third theory, in turn, is critical of Arendt's identification of the right to have rights with membership in a political community and grounds the former in political struggles that are animated by the very divide between the rights of man and the rights of the citizen.

In the final two parts I draw on these theoretical perspectives to analyse a few prominent judgments dealing with the rights of non-citizens. I am particularly interested in the courts' reliance on human dignity to traverse the tension between human and citizens' rights and between national sovereignty and the rights of non-citizens. Can the value and ideal of human dignity help to secure the right to have rights, or is it powerless to do so in the face of the divide between the abstract rights of man and the concrete rights of citizens?

## II BETWEEN COSMOPOLITAN RIGHTS AND DEMOCRATIC SELF-RULE

Recent years have seen a proliferation of theoretical perspectives on law and politics which, inspired by Kant's essay on 'perpetual peace',<sup>8</sup> imagine new ways of institutionalising cosmopolitan law and membership in a community of world citizens.<sup>9</sup> Seyla Benhabib's work on citizenship and the rights of foreign nationals is one such attempt to reinterpret Kant's vision of the relationship between cosmopolitan norms, which establish a universal obligation to grant refuge to persons in need, and the prerogative of a republican polity to determine the conditions under which foreigners are to be admitted.<sup>10</sup> Unlike Kant, whose elaboration of the rights of foreigners did not extend to a right of membership in the political community — for him, the acquisition of permanent residence was a privilege, not a right, which rested on the beneficence of a sovereign polity — Benhabib seeks to ground debates

<sup>8</sup> Immanuel Kant 'Toward perpetual peace' in Mary J Gregor (ed) *Immanuel Kant: Practical Philosophy* (1996) 311.

<sup>9</sup> See for example Jürgen Habermas *The Inclusion of the Other: Studies in Political Theory* (1998) and Garrett Wallace Brown & David Held (eds) *The Cosmopolitan Reader* (2010).

<sup>10</sup> Seyla Benhabib *The Rights of Others: Aliens, Residents and Citizens* (2004); Seyla Benhabib *Another Cosmopolitanism* (2006); Seyla Benhabib *Dignity in Adversity: Human Rights in Troubled Times* (2011).

about inclusion and exclusion in universal moral principles. These principles are to be derived from discourse theory. However, Benhabib is quick to admit that the issue of membership confronts the discourse theorist with a dilemma:

‘[A] shared feature of all norms of membership, including but not only norms of citizenship, is that those who are affected by the consequences of these norms and, in the first place, by criteria of exclusion, *per definitionem*, cannot be party to their articulation. Membership norms affect those who are not members precisely by distinguishing insiders from outsiders, citizens from non-citizens. The dilemma is this: either a discourse theory is simply irrelevant to membership practices in that it cannot articulate any justifiable criteria of exclusion, or it simply accepts existing practices of exclusion as morally neutral historical contingencies that require no further validation. But this would suggest that a discourse theory of democracy is itself chimerical insofar as democracy would seem to require a morally justifiable closure which discourse ethics cannot deliver.’<sup>11</sup>

How, then, can the idea of an open moral conversation guide deliberations over ‘morally permissible practices of inclusion and exclusion’,<sup>12</sup> given the fact that those who contest these practices typically do so from a position outside of the political community and were excluded from the deliberations that established the boundaries they seek to challenge? How can discourse ethics, which posits the idea of an open deliberative process where all participants have an equal opportunity to place matters on the agenda and to participate, come to terms with this ‘fundamental asymmetry between the positions inside and outside a polity’?<sup>13</sup> Can discourse ethics provide a justification of democratic closure?

In attempting to answer these questions, Benhabib takes her cue from Habermas’s analysis of the co-originality of universal human rights and popular sovereignty, as the twin foundations of the democratic constitutional state. In Habermas’s view, these two concepts are irreducible. Any attempt to collapse them onto each other rests upon a conflation of the moral and ethical (or moral and political) and must either efface democratic self-government in the name of universal principles, or deprive us of a vantage point from which we can criticise the exclusionary citizenship practices of particular legal communities.<sup>14</sup> Accordingly, Benhabib describes her project as ‘one of mediations, not reductions’.<sup>15</sup> She is interested in mediating between the moral universality of human rights, and the particularity of contingent legal and political norms and ethical self-understandings. The concept of ‘democratic iterations’ is central to her efforts to mediate between these principles.

<sup>11</sup> Benhabib *The Rights of Others* *ibid* at 15 (emphasis in the original omitted).

<sup>12</sup> *Ibid* at 14 (emphasis in the original omitted).

<sup>13</sup> Hans Lindahl ‘In between: Immigration, distributive justice, and political dialogue’ (2009) 4 *Contemporary Political Theory* 415 at 415.

<sup>14</sup> Jürgen Habermas *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1996) 94–104.

<sup>15</sup> Benhabib *The Rights of Others* *op cit* note 10 at 16.

Benhabib describes democratic iterations as ‘complex processes of public argument, deliberation, and learning through which universalist right claims are contested and contextualized, invoked and revoked’ within particular contexts.<sup>16</sup> The disjunction between constitutional commitments grounded in universal moral norms and practices of democratic closure, opens up spaces for ‘reflexive acts of democratic iteration by the people who critically examines and alters its own practices of exclusion’.<sup>17</sup> While these processes cannot resolve the dilemma described above, they can render the boundary between the polity’s inside and outside more fluid, and help disrupt the supposed unity and identity of the people, in the name of emerging notions of post-national solidarity.

Far from endangering democratic self-government, on this view, cosmopolitan norms can enhance law’s democratic character. It is through their re-appropriation of universal human-rights norms, within the context of local struggles, that a democratic people become the authors of the laws to which they are subject. Drawing on Robert Cover’s thesis on the multiple normative meanings generated by legal texts, Benhabib is interested in the jurisgenerative effects of human-rights norms.<sup>18</sup> This refers to the processes, by means of which the meanings of universal human-rights norms are transformed through the dynamic interaction between official legal texts and informal processes of democratic engagement. These processes

‘can structure an extra-legal normative universe by developing new vocabularies for public claim-making; by encouraging new forms of subjectivity to engage with the public sphere, and by interjecting existing relations of power with anticipations of justice to come’.<sup>19</sup>

It is through processes of democratic iteration, grounded in the jurisgenerative effects of cosmopolitan legal norms, that popular sovereignty can break free from its rigid identification with the sovereignty of the nation state. Benhabib argues that in an era of increasing global interdependence and dwindling state sovereignty, the nation state can no longer successfully host popular sovereignty. Popular sovereignty needs to be reconfigured to embrace democratic agency within and outside the state’s borders. On this view, 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

<sup>16</sup> Ibid at 19.

<sup>17</sup> Ibid at 21.

<sup>18</sup> Benhabib *Dignity in Adversity* op cit note 10 at 152 refers both to Cover’s celebrated essay on jurisgenesis and to the work of Frank I Michelman. See Robert M Cover ‘The Supreme Court 1982 term — Foreword: Nomos and narrative’ (1983) 97 *Harvard LR* 4; Frank I Michelman ‘The Supreme Court 1985 term — Foreword: Traces of self-government’ (1986) 100 *Harvard LR* 4; Frank I Michelman ‘Law’s republic’ (1988) 97 *Yale LJ* 1493.

<sup>19</sup> Benhabib *Dignity in Adversity* op cit note 10 at 125.

iteration in which peoples learn from one another'.<sup>20</sup> The co-ordination of democratic iterations across state borders (examples include networks of environmental and women's movements) enables new forms of subjectivity to enter the public sphere and can help to establish democratic control over areas that have effectively been removed from the state's jurisdiction.

Whilst Benhabib's reliance on discourse theory to ground her attempted mediation of cosmopolitan norms and the sovereignty of a bounded political community strikes a chord with South Africa's recent experience in making and interpreting a democratic Constitution,<sup>21</sup> critical questions remain over the capacity of her theory to ground democratic inclusion and exclusion in universal moral principles. How can discourse theory come to terms with the historical contingency of the territorial and civic boundaries of particular polities? Can democratic processes of contestation and claim-making not be expected to perpetuate — and in some cases deepen — existing forms of exclusion, given the fact that membership and democratic voice necessarily reflect the contingent result of past struggles and forms of domination? How can those wishing to contest the boundaries that exclude them from membership in the polity be ensured a fair hearing? How can those prevented from entering the state's territory or regularising their residence be ensured a voice at all? Does Benhabib's theory point towards a way out of the utter rightlessness of millions of asylum-seekers and stateless and displaced persons described so chillingly by Arendt? Can it be said to place the right to have rights on a secure footing?

Benhabib concedes the difficulties inherent in any attempt to provide a principled basis for distinguishing morally acceptable forms of democratic closure from ones that are objectionable. She acknowledges that there is inevitably something circular and arbitrary about the ways in which democratic membership is determined and that 'there has never been a perfect overlap' between membership, voice and residence.<sup>22</sup> She nevertheless believes that Arendt's right to have rights can be placed on a more secure footing by reconceptualising it in discourse-theoretical terms. Whereas for Arendt the right to have rights denoted a political right closely related to membership in a political community, Benhabib understands it to designate the right to be recognised as a person worthy of moral respect and equal protection.<sup>23</sup> Equal respect for the other, as an autonomous human being

<sup>20</sup> Benhabib *Dignity in Adversity* op cit note 10 at 112.

<sup>21</sup> See Heinz Klug *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (2000) (analysing South Africa's recent constitutional history in terms of a dialectical interaction between a global text of constitutionalism and local democratic struggles); Henk Botha 'Learning to live with plurality and dissent: The Grundgesetz in South Africa' (2010) 58 *Jahrbuch des öffentlichen Rechts* 73 (arguing that the migration into South African law of certain constitutional ideas and concepts, derived from foreign law, has been instrumental in balancing conflicting constitutional commitments and keeping different constitutional visions alive).

<sup>22</sup> Benhabib *Dignity in Adversity* op cit note 10 at 144.

<sup>23</sup> *Ibid* at 60 and 62.

capable of communicative freedom, entails the other's right to demand justification for actions limiting her freedom. This places justification at the heart of the right to have rights.<sup>24</sup> Foreign nationals may not have a right of political membership in their country of residency, but they do have a right to reasons for limitations of their freedom, including those arising from their exclusion from the political community.

Naturally, this raises the question how the objections of those excluded from citizenship — or worse, from entry into or legal residence within a state's territory — can nevertheless be made to register in processes of democratic iteration. For the most part, Benhabib relies on the idea that the interests of those who are deprived of a voice in national democratic processes can be represented by others.<sup>25</sup> An example is where minorities within a state mobilise on behalf of those with whom they share a common origin — the Turkish minority in Germany can, for example, mobilise on behalf of Turks who are excluded.<sup>26</sup> Another possibility is that the interests of non-citizens can be represented by their country of nationality. Benhabib refers to a case in the United States involving Arizona's immigration enforcement laws, in which the governments of Mexico and other Latin American countries became parties to the litigation. She sees this as an encouraging example of the involvement of transnational actors in processes of democratic iteration, through which the

‘hiatus between the discursive community of all those whose interests are affected . . . and the circle of formally recognized democratic citizens, while it can never be eliminated, can nonetheless be reduced through processes of ever-wider circles of public representation and participation’.<sup>27</sup>

There are obvious difficulties with this model of interest representation. First, it is unlikely to provide meaningful protection to those who are stateless or who fled their countries of origin because they had been persecuted by those in power. Secondly, it is unclear whether, and to what extent, it allows

<sup>24</sup> According to Benhabib (*ibid* at 64), each individual has the right ‘to accept as legitimate only those rules of action of whose validity she has been convinced with reasons’.

<sup>25</sup> In Benhabib *The Rights of Others* *op cit* note 10 at 13–14, Benhabib touches briefly on the problems posed to discourse theory by persons, like very young children and the mentally ill, who are not capable of the kind of speech and action that tend to be taken for granted by advocates of deliberative democracy. She suggests that their interests ‘can be effectively represented in discursive contexts through systems of moral advocacy’ (*ibid* at 14). It is clear that she has something similar in mind, within the context of debates dealing with democratic membership. The discussion of the representation of the interests of those who are not full participants in moral discourses immediately precedes her introduction of the difficulties inherent in discourses about membership. Moreover, once she has introduced the issue of political membership, she invokes the language of representation when she writes: ‘I have a moral obligation to justify my actions with reasons to this individual or to the representatives of this being.’ (*Ibid*, emphasis in the original omitted.)

<sup>26</sup> Benhabib *Dignity in Adversity* *op cit* note 10 at 164.

<sup>27</sup> *Ibid* at 145.

the concrete needs, interests and viewpoints of non-citizens — as opposed to the most generalised concerns emanating from their bare humanity — to enter the democratic agenda. It could also be asked whether Benhabib's model of interest representation underestimates the extent to which non-citizens' lack of political power intersects with a complex array of other factors, including nationalist ideology, xenophobic attitudes, racism, restrictions on the rights of non-citizens to study and work, poverty, economic divisions within and between states, and the tendency of states to reassert their sovereignty in the sphere of migration through strategies of criminalisation and militarisation.

In view of this severe vulnerability, coupled with the potent mix of economic, structural and cultural-ideological barriers to the effective protection of non-citizens' rights,<sup>28</sup> one must ask whether Benhabib's discourse-theoretical model can escape Arendt's spectre of the utter rightlessness of those standing outside the circle of political membership. As I have pointed out above, Benhabib attempts to cut through the tie between political membership and the right to have rights, by invoking the idea of a moral conversation through which decisions must be justified to everyone affected by them. This conversation is open-ended, in contradistinction to the (provisional) closure that characterises decisions about political membership. This is an important distinction, as it seeks to prevent 'humanity' from being collapsed onto a closed circle of citizens. By appealing to the rights of non-citizens, it grounds the possibility of reflexive acts through which a political community can reconsider its own boundaries and practices of exclusion. Yet, in relying on this distinction, it must be asked whether Benhabib does not place foreign nationals too squarely within the camp of a 'humanity' whose interests can be represented by others, but, for the time being, are more or less incapable of political agency. Is she not too quick to accept Arendt's identification of political action with membership in a political community? Does she not fall back too readily on the distinction between the abstract dignity of man, with its connotations of a passive status, and the dignity of the citizen, as an active participant in the public sphere? Does she not underestimate the capacity of non-citizens to politicise current practices of exclusion and inclusion? Finally, is this not the result, despite her emphasis on the importance of (global) civil society, of a conception of democracy which still centres, for the most part, on statist modes of representation?<sup>29</sup>

<sup>28</sup> See Nancy Fraser *Scales of Justice: Reimagining Political Space in a Globalizing World* (2009) for an attempt to think through the problem of mapping our responses to a variety of injustices — arising from misrecognition, maldistribution and misrepresentation — on the global, national and local scales.

<sup>29</sup> See Bonnie Honig 'Another cosmopolitanism? Law and politics in the new Europe' in Benhabib *Another Cosmopolitanism* op cit note 10 at 102 for a critique of the statism in Benhabib's thought.

The converse is also true. Benhabib's model not only underestimates the political agency of non-citizens, but also tends to overestimate the impact of formal processes of law-making. For instance, Bonnie Honig points out that Benhabib's optimism about the European Union ('EU') arises in part from her emphasis on formal law. It is precisely because she focuses on the legal processes through which sovereignty has been realigned, borders have been rendered porous and rights have been extended to nationals of other EU states that she is able to present the formation of the EU as an instantiation of cosmopolitan law. This focus allows her to gloss over other features of the new Europe — eg extraterritorial migration control,<sup>30</sup> the fortification of internal borders,<sup>31</sup> the criminalisation of darker-skinned migrants<sup>32</sup> and the increasingly draconian police-state apparatuses — and to treat these as temporary obstacles on the road to a more rational future, based on universal human rights.<sup>33</sup>

The disconnect between formal law-making processes and the lived reality of non-citizens is also apparent in the South African context, where a progressive legislative framework and numerous court judgments upholding the rights of non-citizens exist side by side with a xenophobic public and a state administration which tends to disregard binding legal rules and precedents in the area of immigration and refugee law. This has increased the vulnerability of asylum seekers and other foreign nationals to arrest, detention and deportation, and effectively means that the same legal battles have to be fought over and over again.<sup>34</sup> The universalist premises of the Constitution, which recognises the dignity of all human beings and requires the

<sup>30</sup> This happens when foreign nationals, including asylum seekers, are prevented from presenting themselves at the country's borders. See Kesby op cit note 1 at 32–6. Examples from case law include the case where British immigration officers were permitted, through a bilateral agreement with the Czech Republic, to refuse passengers leave to travel to the United Kingdom from Prague Airport, or where migrants travelling by boat were intercepted outside of the territorial waters of their country of destination and returned to where they had come from. These practices were dealt a significant blow by the recent judgment of the European Court of Human Rights in *Hirsi Jamaa & others v Italy* App No 27765/09 (2012). In this case, the court held that the Italian authorities acted in contravention of the European Convention on Human Rights when they returned foreign nationals, who had been intercepted on the high seas in what was claimed was a rescue operation, to Libya, without consideration of their individual circumstances. The judgment is clear that extraterritorial strategies of border control are not to be allowed to circumvent the guarantees of the Convention.

<sup>31</sup> For example by labelling parts of the population as 'illegal' and by policing the divide between citizens and non-citizens through identity checks, differentiated access to social security, and other mechanisms. See Kesby op cit note 1 at 101–4.

<sup>32</sup> See Etienne Balibar *We, the People of Europe? Reflections on Transnational Citizenship* (2004) 43–5, 120–4 for an analysis of the ways in which the institution of European citizenship has coincided with the development of a 'European apartheid'.

<sup>33</sup> Honig op cit note 29 at 108–9.

<sup>34</sup> See Amit op cit note 7.

justification of all exercises of public power,<sup>35</sup> are thus undercut by a potent mix of factors — cultural, structural and political — which tends to exclude certain categories of non-citizens from the moral community affirmed by the Constitution and, in effect, places them outside the protective sphere of the law. These non-citizens are balanced precariously on the periphery of the legal order and lacking political representation, are removed from the ordinary mechanisms of democratic accountability. As a result, laws and decisions vindicating their rights are treated with far less reverence than is to be expected in a legal order premised on constitutional supremacy and the rule of law.

The gap between the law on the books and the lived reality of asylum-seekers, stateless persons and other vulnerable categories of non-citizens raises questions over the optimism of Benhabib's account which sees, in developments such as the adoption of international instruments for the protection of refugees and the creation of the International Criminal Court, major advances in the march towards the realisation of Kant's vision of cosmopolitan law and Arendt's articulation of a right to have rights.<sup>36</sup> The importance of these developments aside, it must nevertheless be asked whether this account is not one-sided. As Honig points out, Benhabib places us in a 'temporal register' in which remaining limits to an unfolding universal hospitality are 'always already about to be overcome'.<sup>37</sup> Presenting the history of the rights of foreigners in evolutionary terms, she is able to treat hostility to migrants as an expression of the particularity and historical contingency of a given polity which, through a series of democratic iterations, can and should be brought in closer conformity with the conditions of universal hospitality. She is thus able to present hostility towards the foreign other as something which always arises from the particularity of a given identity, culture or polity. This, warns Honig, is problematic — it overlooks the mutual implication of hospitality and hostility, captured in Derrida's term 'hostipitality' — and imposes a vision of universalism 'that seeks to subsume the new or the foreign under categories whose fundamental character and validity are unchanged or unaffected by this encounter between newcomer and established rules or norms'.<sup>38</sup>

<sup>35</sup> See *Pharmaceutical Manufacturers Association of SA in re the Ex Parte Application of the President of the RSA* 2000 (2) SA 674 (CC) para 85.

<sup>36</sup> See Benhabib *The Rights of Others* op cit note 10 at 67–9.

<sup>37</sup> Honig op cit note 29 at 114.

<sup>38</sup> *Ibid* at 110–11. In her latest book, Benhabib seems more guarded in her optimism about the capacity of democratic iterations to overcome local resistances to cosmopolitan norms. Following Robert Cover, she recognises that the interplay between formal law-making and informal processes of democratic will-formation can also become jurispathic, in that 'sources of meaning-generation may dry up and the law may stifle rather than stimulate contentious dialogue and the circulation of meaning' (Benhabib *Dignity in Adversity* op cit note 10 at 152). However, she steps short of embracing Cover's point that legal institutions are necessarily jurispathic and instead emphasises the creative role of formal institutions in the generation of legal meaning. Unlike Cover, who sees a 'radical dichotomy between the social organiza-

While Benhabib's discourse-theoretical model contains important insights into the contestability of legal and political boundaries, her focus on formal law-making processes and statist modes of representation results in an underemphasis of the political agency of those standing outside the circle of citizens and the profoundly political nature of acts that transgress the boundaries between a legal order's inside and outside. Moreover, the temporal register of her work precludes a realistic assessment of the limits of human rights-based democratic iterations.

### III THE INERADICABILITY OF BOUNDARIES

Hans Lindahl's work on legal boundaries and political space provides important insights into the contestability of the demarcation of a political community's inside and outside. Lindahl agrees with Benhabib that political boundaries are constitutive of democratic self-rule. He also shares her interest in the paradox of democratic legitimacy and in asking how non-members, who were excluded from membership by the constitutive acts through which a polity established its boundaries, can nevertheless challenge those boundaries. Nevertheless, Lindahl is critical of Benhabib's reliance on dialogical universalism to mediate between universal moral principles and the particularity of political boundaries. He notes that her attempt to ground Arendt's right to have rights in moral discourses of justification ignores the incongruity between her two different usages of the term 'rights'. Seeking to derive the legal rights that emanate from a person's membership in a particular political community from the moral right of every person to be recognised as belonging to some human group, she fails to recognise that what is at stake here are two fundamentally different forms of reciprocity, namely the 'reciprocity among individual human beings' and the 'reciprocity between political equals'.<sup>39</sup> Lindahl insists that these two forms of reciprocity are discontinuous: the moral rights of every member of the human family do not and cannot give rise to a right to be admitted to membership in a particular political community. Unless we collapse the distinction between morality and politics — something, neither Benhabib nor Lindahl is prepared to do — a moral dialogue between members and non-members must remain strongly asymmetrical, as members can invoke their right to determine, among themselves, the terms of inclusion in the polity.

tion of law as power and the organization of law as meaning' (Cover op cit note 18 at 18) and who is therefore alive to the interpretive violence through which legal meaning is destroyed and difference is assimilated to sameness, Benhabib views as jurispathic only those democratic iterations which inhibit further dialogue through their refusal to engage sufficiently with cosmopolitan norms. For her, jurispathy is not constitutive of legal decision-making, but simply marks its failings in particular cases. Her theory is consequently far less alive to the reductive nature of legal decision-making and views obstructions to political dialogue as temporary impediments to be overcome through future democratic iterations.

<sup>39</sup> Lindahl op cit note 13 at 421.

Lindahl challenges the view that it is only through recourse to the universality of human rights that we can hope to transcend the particularity of civic and territorial boundaries. He insists that spatial and civic boundaries are not simply manifestations of political particularity, but also of generality. Their particularity is revealed through their exclusionary effect — boundaries, while including some in the polity, exclude others. At the same time, however, legal boundaries, by closing a polity off from what it excludes, also include the polity and its outside within a more encompassing whole. Lindahl uses the example of the EU. On the one hand, its founding documents articulate the common interests of the EU, which are closely tied to the idea of a common market and express a preference for an internal market over an external one and for EU citizens over non-EU citizens. On the other hand, these documents refer beyond the territorial enclosure of the European polity to the unity of a global market. Lindahl argues that it is only with reference to this larger legal space that Europe's boundaries, and its normative claim on outsiders to recognise and abide by them, make sense. It is because these boundaries point beyond the enclosed 'we' of a particular political community to the extended 'we' of a more encompassing common interest and/or distribution of membership and to a place where non-members are able to contest them, through actions that evoke alternative understandings of that common interest and alternative ways of carving up political space. Such challenges

'evoke an outside in the strong sense of places that have no place in the unity of places made available by the current institutionalization of the common interest, European and global, and yet which, on the EU's own terms, ought in some way to be a part of that unity of places'.<sup>40</sup>

Yet, at the same time, in including itself within a larger distribution of 'ought-places', the polity excludes certain alternative visions of the division of global space and of the extended 'we' to which its boundaries point. The dialogue arising from the political contestation of boundaries is therefore 'irreducibly asymmetrical'. Lindahl notes that this is true in a double sense. First, assessments of the legality or illegality of boundary crossings by non-members are always already framed by a particular set of expectations about the meaning of such crossings. The claims of immigrants are invariably filtered through the expectations of those who have little reason to question official understandings of that larger common interest. However, a second asymmetry may nevertheless enable (some) immigrants' claims to register with the polity. This asymmetry comprises the imperfect fit between actual boundary crossings and the legal order's anticipations of their meaning. In the words of Lindahl,

<sup>40</sup> Ibid at 427.

‘boundary crossings can enter from an outside . . . that has no place within the distribution of places made available by a polity, . . . and invoke a “we” that bursts the extended “we” anticipated by the receiving polity’.<sup>41</sup>

For Lindahl then, it is the irreducibly political nature of legal boundaries that enables members and non-members to contest the ways in which legal norms carve up political space. He uses the term ‘a-legality’ to denote boundary crossings that call current distributions of ought-places into question. Examples of a-legal boundary crossings include the occupation of the Brent Spar oil storage and tanker loading buoy by Green Peace activists<sup>42</sup> and boundary crossings into Europe by ‘economic immigrants’ fleeing conditions of desperate poverty in their own countries.<sup>43</sup> These crossings reveal the contingent nature of legal boundaries. On the one hand, they highlight the correlation between the unity of legal space and the unity of a collective self — when a legal official declares a boundary crossing illegal, she invokes the unity of a ‘we’, in whose name trespassing will not be tolerated. On the other hand, a-legal boundary crossings put both the unity of legal space and the unity of a collective self into question. By challenging the current distribution of ought-places — ie by showing that a legal order excludes certain forms of behaviour which, on its own terms, it ought to accommodate — these crossings reveal the fragmentation of the collective self to which the legal boundaries in question are attributed.<sup>44</sup> They reveal that the unity of the collective self is always a ‘represented unity’<sup>45</sup> that is retroactively attributed to a ‘we’. Clearly, this collective identity is fundamentally unstable and open to contestation. Accordingly, the legal boundaries proclaimed in its name are also questionable.

Lindahl’s work thus enables us to make sense of the contestability of legal boundaries — including those civic and territorial boundaries that separate citizens from non-citizens and a polity’s inside from its outside — without having to appeal to universal moral principles. For Lindahl, such contestation is political to the core — it evokes alternative visions of legal space, which interrupt the supposed unity of the collective subject in whose name spatial and civic boundaries are invoked, and challenges authorities to defend boundaries with reference to a more encompassing vision that points beyond the particular polity. However, he insists that a legal order’s responsiveness to its outside is necessarily finite and is critical of the assumption underlying

<sup>41</sup> Ibid at 431.

<sup>42</sup> Hans Lindahl ‘A-legality: Postnationalism and the question of legal boundaries’ (2010) 73 *MLR* 30 at 38 claims that these acts ‘contest the distribution of legal places that define Shell as a spatial unity’ and ‘evoke a way of emplacing Shell’s activities in a global distribution of places that is — literally — outside the interests furthered by the way in which Shell’s activities distribute and use places’.

<sup>43</sup> Lindahl op cit note 13 at 427 argues that these crossings ‘can be understood as challenging how the EU’s economic and commercial policy seeks to realize the (global) “common interest” referred to in Article 131 of the EC Treaty’.

<sup>44</sup> Lindahl op cit note 42 at 41–2.

<sup>45</sup> Ibid at 45.

the work of Habermas and Benhabib that legal orders, even though they are necessarily bounded, can nevertheless ‘become ever more inclusive by progressively integrating what they had previously excluded’.<sup>46</sup> Rejecting the imagery of ‘ever expanding concentric circles’, in which exclusions of the other are increasingly overcome in the name of universal hospitality, Lindahl prefers a different metaphor of ‘variable intertwinements’.<sup>47</sup> This metaphor does not suggest that different legal orders share a common core which marks a universal standard for the progressive integration of those at the margins of society. Instead, it highlights the multifarious ways in which legal orders separate and join us together. Given that boundaries are constitutive of legal orders and include by excluding and exclude by including, some possibilities necessarily will appear alien or strange. This outside or remainder is ineradicable and never simply ‘about to be overcome’ in the name of an encompassing unity. On the contrary, the unity of a legal order presupposes closure and can never fully accommodate political plurality.

Lindahl’s theory of legal boundaries thus accounts both for the contestability of practices of inclusion and exclusion, and for the limits of a legal order’s capacity to respond to such challenges. Its emphasis on the asymmetry between actual boundary crossings and the legal order’s anticipation of their meaning, underscores the political agency of non-citizens, yet recognises that not all the possibilities evoked by a-legal boundary crossings will register within the legal order. The responsiveness of a legal order to its outside — in the double sense of non-members of the political community and alternative articulations of the distribution of places with a more encompassing common interest — inevitably is limited.

It could be objected that Lindahl’s theory of legal boundaries underestimates the capacity of universal human rights to galvanise resistance to the exclusion of the other. After all, international human-rights norms are incorporated into positive law — whether at the national, supra-national or infra-national levels — through a variety of mechanisms, including their constitutionalisation. In South Africa, court judgments vindicating the rights of non-citizens rely heavily on the language of universal human rights and, in particular, the inherent dignity and worth of every human being. Is it not precisely the gap between the universality of human rights and the constant fear and uncertainty characterising the lives of many foreigners that animates struggles for the recognition of foreigners’ rights? Does the incorporation of human rights into positive law not help to ensure the responsiveness of legal orders to the claims of non-citizens? Does Lindahl not overstate the incongruity between positive law and human rights, and thus overlooks the latter’s emancipatory potential?

It is true that Lindahl says surprisingly little about the role of fundamental rights guarantees in the contestation of civic and spatial boundaries. Nevertheless, this does not mean that he is opposed to the constitutionalisation of

<sup>46</sup> *Ibid* at 48.

<sup>47</sup> *Ibid* at 49.

human rights or is agnostic about the capacity of rights discourse to challenge exclusion or injustice. Ultimately, his rejection of universal human rights as a basis for deliberation over questions of political membership derives from his fear that attempts to ground a bounded legal order — whether at the national, regional or global level — in universal human rights, risks relegating the legal order's outside (ie that which appears alien or strange) to what is considered to be beyond the pale of a common humanity. The conflation of moral and political reciprocity inherent in such attempts would effectively brand those possibilities that a polity does not recognise as its own, as inhuman.<sup>48</sup> Bearing this in mind, it seems unlikely that Lindahl would object to reliance by activists, litigants and judges on the constitutional right and value of human dignity to challenge current configurations of legal space and/or distributions of civil, political and/or socio-economic rights. However, this is subject to an important proviso. He would have to insist that human dignity, when invoked as a fundamental right or constitutional value, undergoes a significant transformation. Dignity, by virtue of its inscription within a bounded legal order, becomes qualified by civic and territorial boundaries.<sup>49</sup> Any guarantee of human dignity contained in a national constitution of necessity must be qualified by distinctions between citizens and non-citizens, by spatial boundaries which confine a constitution's application to a bounded territory<sup>50</sup> and by the need to balance fundamental rights against each other and against the public interest. Dignity, as a marker of the absolute worth inherent in every human being, becomes imbued with a series of distinctions: between universal human rights and citizens' rights, between violations occurring within and outside a state's jurisdiction, and between an inviolable core of human dignity and peripheral areas that are often outweighed by countervailing interests.<sup>51</sup>

I would venture even to suggest that we can use Lindahl's work to re-interpret the constitutional guarantee of human dignity and to rethink its possibilities and limits in challenging spatial and civic boundaries. To the

<sup>48</sup> Ibid at 52–3.

<sup>49</sup> As Lindahl (ibid at 52) states in his critique of Habermas's proposals for a global legal order premised on human rights: 'On the one hand, because their referent is the humanity of individual human beings, human rights betoken an order that is valid at all times, in all places, and for all individuals, an all-inclusive legal order. On the other hand, the moment human rights are posited as fundamental legal rights, they are inevitably linked to a bounded common interest. To posit and articulate human rights in a legal order is to determine the concept of humanity for legal purposes, to limit that which is germane from a politico-legal perspective as constituting our "common humanity". And this entails a preferential differentiation concerning relevant and irrelevant interests, with a view to fixing what defines us, the members of a global polity, as human beings.'

<sup>50</sup> See Hasso Hofmann 'Die versprochene Menschenwürde' 1993 *Archiv des öffentlichen Rechts* 353. See also *Kaunda v The President of the Republic of South Africa* 2005 (4) SA 235 (CC) paras 36–7.

<sup>51</sup> See Henk Botha 'Human dignity in comparative perspective' (2009) 20 *Stellenbosch LR* 171 for an analysis of the ensuing tensions and contradictions.

extent that dignity is incorporated into a positive legal order as a constitutional right, norm and value, it is qualified by the kinds of spatial and civic boundaries referred to above. At the same time, however, dignity points beyond the self-closure of a bounded political community and evokes a commitment to a world in which every human being is guaranteed the minimum conditions of personhood. This enables a-legal boundary crossings — eg by social activists, disaffected communities or economic ‘refugees’ — to challenge the legal status quo in the name of alternative distributions of ought-places, which the legal order, in terms of its commitment to universal human dignity, ought to but does not accommodate. These boundary crossings do not and cannot overcome the asymmetry between the polity’s inside and outside through an appeal to the reciprocity that marks moral discourses of justification. But they can interrupt the unity of legal space — and thus, also of the collective self — by highlighting the hiatus between the commitment to a global distribution of ought-places that respects every person’s inherent dignity and representations of the people’s unity which fall short of that ideal. So conceived, dignity can never be fully accommodated within the confines of a positive legal order. Dignity always has a remainder, which pushes against current configurations of legal space and distributions of civil, political and socio-economic rights.

#### IV POLITICAL SUBJECTIVITY AND HUMAN RIGHTS

In an article entitled ‘Who is the subject of the rights of man?’, Jacques Rancière recalls Arendt’s view that the ‘rights of man’ must refer either to the rights of citizens or to the rights of those who have no other property left beside their humanity. On the former view, the term refers to the rights of those (citizens) who already have rights while, on the latter view, it signifies the rights of those who have no rights. Accordingly, the term is either tautological or devoid of meaning.<sup>52</sup> Rancière notes that Arendt’s suspicion of the rights of man, as a mere abstraction which is powerless to resist the rightlessness of those standing outside a concrete political community, derives from the absolute opposition in her thought between a public-political realm of freedom and a private realm of necessity.<sup>53</sup> By reason of her determination to protect politics from the corrupting influence of private needs and her identification of political subjectivity with permanent membership in a national community, Arendt is blind to political struggles that are waged outside the frames of citizenship and the nation state. Refugees,

<sup>52</sup> Jacques Rancière ‘Who is the subject of the rights of man?’ (2004) 103 *South Atlantic Quarterly* 297 at 302.

<sup>53</sup> See Emilios Christodoulidis ‘De-politicising poverty: Arendt in South Africa’ (2011) 22 *Stellenbosch LR* 501 for a critique of the opposition of the social and political in Arendt’s thought. For a more sympathetic reading of Arendt, see Vanya Gastrow *The Demise of Revolutionary Politics and the Rise of Terror? Assessing Hannah Arendt’s Hypothesis of the ‘Social Question’ in Post-Apartheid South Africa* (unpublished MPhil thesis, University of Cape Town, 2011).

stateless persons and others, who have forfeited their membership in an organised human community (read the nation state) are reduced to a life of bare necessity and find themselves in a state of exception, outside the law.<sup>54</sup>

Rancière argues, against Arendt, that the question of political subjectivity cannot be settled, in advance, by insisting on an absolute separation between the public and private spheres. In his view, politics cannot be confined to a sphere of citizenship that is fenced off from private life. Politics is not predicated on a pre-existing border which secures equality and freedom for citizens, while preventing the contamination of the public sphere by economic need and privation. Politics is precisely the activity that brings the border into question. Rancière cites the example of Olympe de Gouges, a French revolutionary woman, who famously declared that if women could be sentenced to death as enemies of the revolution, they also had the right to equal political participation. For him, this illustrates that political predicates like freedom and equality do not belong to definite subjects. De Gouges' statement politicised the boundary that confined women to domestic life — a sphere of 'bare life' which could not be allowed to corrupt the purity of the public sphere. It demonstrated that '[i]f they could lose their "bare life" out of a public judgment based on political reasons, this meant that even their bare life — their life doomed to death — was political'.<sup>55</sup>

The rights of man therefore cannot be restricted to a predefined category of citizens; nor are they merely abstract ideals, which are unable to challenge the inequality, exclusion and subordination arising from current distributions of wealth, power and political membership. Rather, they are open predicates, whose established meaning and scope of application are always subject to contestation. For Rancière, the gap between the rights that belong to every human being and the large-scale negation of those rights — i.e. the gap between universal human rights and the rights of citizenship — does not establish the emptiness of the rights of man, but opens up a political space in which those who effectively have no rights can enact the rights which they, at one and the same time, have and do not have. Put differently, the gap between man and citizen provides 'the opening of an interval for political subjectivization',<sup>56</sup> in which those who are excluded from membership can stage scenes of dissensus that challenge established understandings of the relationship between citizen and subject and between the public-political and intimate-private spheres.

So, in Rancière's view, the subject of the rights of man is not a definite category of rights bearers, such as citizens, but inheres in the very process of subjectivisation, which occurs when exclusion and subordination are challenged in the name of every person's inscription as a free and equal human

<sup>54</sup> Rancière *op cit* note 52 at 301. Here, he sees a continuity between Arendt's position and Agamben's thesis on 'the radical suspension of politics in the exception of bare life'.

<sup>55</sup> *Ibid* at 303.

<sup>56</sup> *Ibid* at 304.

being. He insists that this does not consist simply in checking whether, in reality, the rights are achieved or denied, or in bridging the gap between the universality of human rights and their imperfect realisation, in accordance with some inescapable inner logic. Freedom and equality, as political predicates, are not determinate, but ‘open up a dispute about what they exactly entail and whom they concern in which cases’.<sup>57</sup> Accordingly, political processes of subjectivisation do not serve to perfect the identity of the political community and its members, but disrupt that identity by revealing that the political subject always is a surplus subject. According to Rancière, politics precisely is about that part that has no part — the part that undermines attempts to reduce the political community to the sum of the parts of the population.

Rancière’s grounding of the right to have rights, in processes of political contestation through which human rights are enacted, should not be conflated with more mainstream understandings that stress the complementarity of democracy and human rights, and see in democratic struggles for human rights and the ensuing dialogues between courts, legislatures, the state administration, civil society and transnational political actors, a steady progression towards an inclusive, rational society. Rancière argues that politics is not about reaching a broad societal consensus; nor does it consist in a conversation about what the members of a society have in common. Rather, politics exists by virtue of struggles which confront the status quo with that which has no part, which neither can be heard nor seen in terms of current configurations of membership and power:

‘Political activity is whatever shifts a body from the place assigned to it or changes a place’s destination. It makes visible what had no business being seen, and makes heard a discourse where once there was only a place for noise; it makes understood as discourse what was once only heard as noise.’<sup>58</sup>

Politics consists in the confrontation of two worlds: one in which there is not and cannot be a relationship between those declaring a dispute and those who do not recognise them as ‘speaking beings who count’,<sup>59</sup> and one in which the very process of declaring a dispute gives birth to new political subjects who invoke a common political stage on which the wrong complained of can be articulated and understood. On this view, politics must not be equated with the organisation of state powers, the procedures whereby the consent of the electorate is secured or the legitimation of the distribution of bodies and places. Instead, politics exists wherever struggles for equality seek to disrupt the given distribution of power, places and bodies — what Rancière calls the ‘police’ — by asserting subjectivities and raising disputes that have no place within current configurations of power. Politics takes place where the logic of egalitarianism runs up against the logic of the police.

<sup>57</sup> Ibid at 303.

<sup>58</sup> Jacques Rancière *Disagreement: Politics and Philosophy* (1999) 30.

<sup>59</sup> Ibid at 27.

For Rancière, therefore, democracy is neither an ethos nor a way of life; nor can it be identified with mechanisms designed to map out and maintain a broad societal consensus. Democracy is that which undermines the identities affirmed by configurations of membership and power, and challenges the consensus or ethos, which lends the current distribution of places an air of inevitability. Democracy presupposes a space of appearance, in which new subjectivities can be asserted to expose the contingency of any given order of distribution. Still, Rancière is concerned that the contemporary ‘consensus democracy’, in which the people is transformed into a ‘statistical reduction’, is closing down this space of appearance.<sup>60</sup> The image of a people that can be cut up into its constituent parts and grasped in its entirety through the ‘science’ of public opinion, does not admit of a space in which those who have no part can declare a dispute and disrupt the identity of the political community. In Rancière’s view, the neoliberal emphasis on the rule of law and the constitutional protection of rights is perfectly consistent with a world in which politics’ dissensual stage gives way to the harmony of a community that is deemed to have no surplus and be identical to itself. Rather than helping to secure a space in which dissent can be staged, constitutional adjudication tends to depoliticise conflict, by transforming it into matters for expert knowledge and by making the ‘spirit’ of the constitution, which signifies the identity of the people with itself, the ultimate guide to the resolution of disputes. Constitutional adjudication thus transforms political disputes, which involve the confrontation of heterogeneous worlds, into an elaboration of a broad societal consensus, under the banner of the constitutional spirit or ethos.<sup>61</sup>

Rancière’s sharp delineation of politics from police could be criticised for its rather one-sided appraisal of constitutional adjudication that overlooks the latter’s potential, as a strategic and symbolic resource, in the contestation of legal and political boundaries. Nonetheless, there is an important upside to the disassociation of politics from a given set of rules and procedures for the exercise and legitimation of state power: it allows him to ground the right to have rights in processes of political subjectivisation which transcend nationality or citizenship. Rancière thus manages to keep open a space in which those whose claims are unintelligible in terms of current configurations of membership and power, can nevertheless rely on their rights as free and equal human beings to stage their dissent and confront the status quo with that which does not, yet somehow ought to have a part in the order of distribution.<sup>62</sup>

<sup>60</sup> Ibid at 105.

<sup>61</sup> Ibid at 109–10.

<sup>62</sup> See Kesby op cit note 1 at 118–41 and Andrew Schaap ‘Enacting the right to have rights: Jacques Rancière’s critique of Hannah Arendt’ (2011) 10 *European Journal of Political Theory* 22 for further elaborations of the significance of Rancière’s conception of politics and the right to have rights.

## V ADJUDICATING THE RIGHTS OF NON-CITIZENS

Human dignity has been central to judicial efforts to mediate the tension between South Africa's national sovereignty and its constitutional and international obligations to respect and protect the rights of everyone inside its territory, including non-citizens. While recognising the power of the state to differentiate between citizens and non-citizens and to decide whom to admit to its territory and on what terms,<sup>63</sup> the courts have, nevertheless, relied on human dignity to carve out a space in which those at the margins of the legal order are protected from degradation. Dignity has thus been central to efforts to negotiate the divide between the right of a self-governing citizenry to determine civic and political boundaries, and the right to challenge those boundaries in the name of a common humanity which inheres in every person, irrespective of nationality or citizenship.

The courts' reliance on human dignity in this area raises several questions. Can dignity mark out a space in which non-citizens are treated with equal concern and respect? How is it to do so, in a world characterised by the disjunction between mass migration, globalisation and increasing interdependence, on the one hand, and the powerful hold of myths of national sovereignty on the legal and political imagination, on the other?<sup>64</sup> How can reliance on dignity aid migrants, whose universal and inalienable rights are declared boldly in the Constitution and international treaties, yet whose political powerlessness renders them vulnerable to prolonged detention, deportation, xenophobic attacks and administrative fiat?

In this part, I examine a few key judgments dealing with the rights of non-citizens. Relying in part on the theoretical perspectives considered in parts II to IV above, I ask whether a dignity-based constitutional jurisprudence can point a way out of Arendt's conundrum. Is it not bound simply to reproduce the divide between the rights of man and the rights of the citizen, and thereby to confirm the powerlessness of those who, deprived of membership in a concrete political community, have only their bare humanity to

<sup>63</sup> In *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 (SCA) para 29, the Supreme Court of Appeal quoted from a judgment of the United States Supreme Court in which it was stated: 'It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential in self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.' The same dictum was referred to approvingly by the Constitutional Court in *Chairperson of the National Assembly, Ex Parte: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC) para 21n31 within the context of a challenge to s 22 of the amended constitutional text, which restricts the right to freedom of trade, occupation or profession to citizens. See also *Union for Refugee Women v Director: Private Security Industry Regulatory Authority* 2007 (4) SA 395 (CC) para 46.

<sup>64</sup> See Peter Vale 'Sovereignty, identity and the prospects for Southern Africa's people' in David Chidester, Phillip Dexter & Wilmot James *What Holds Us Together: Social Cohesion in South Africa* (2003) 23 on the continued hold of ideas of national and territorial sovereignty on the post-apartheid political imagination.

fall back on? Alternatively, can it serve to politicise this distinction, or help open up spaces of democratic engagement, through which a polity can become more responsive to challenges to its civic and political boundaries?

(a) *Dignity has no nationality*

In a number of judgments, the courts have invoked the constitutional right and value of human dignity to protect non-citizens against laws and practices which perpetuate and deepen their degradation, disempowerment and exclusion. In *Lawyers for Human Rights v Minister of Home Affairs*,<sup>65</sup> the Constitutional Court expressly rejected the state's contention that foreign nationals who were present in the national territory, but who had not been granted permission to enter, were not 'in our country' for purposes of s 7(1) of the Constitution and were, accordingly, not entitled to the right to freedom and security of the person and the rights of detained persons. To deny them these rights, would negate the constitutional values of human dignity, equality and freedom<sup>66</sup> and demean the 'very fabric of our society and the values embodied in our Constitution'.<sup>67</sup> The court held that s 34(8) of the Immigration Act 13 of 2002 was unconstitutional, to the extent that it did not place any restrictions on the length of time that illegal foreigners could be detained on a ship, at a port of entry. To remedy this defect, it read words into the section to afford detainees on a ship, like those detained at a state facility, the right not to be detained for longer than 30 days, provided that a court order could be obtained to extend their detention for a period not exceeding 90 days. At the same time, the court found that other restrictions on the rights of detainees on a ship, such as their exclusion from the s 34(2) right to be released after 48 hours, constituted a justifiable limitation.<sup>68</sup>

In *Minister of Home Affairs v Watchenuka*,<sup>69</sup> the Supreme Court of Appeal invalidated a general prohibition on asylum seekers to work or study. Although the respondents could not rely directly on s 22 of the Constitution, which reserves the right to freedom of occupation to South African citizens, the court, nevertheless, held that their right to human dignity was violated in cases where they had no other sources of income or support. In the view of the court, human dignity 'has no nationality. It is inherent in all people — citizens and non-citizens alike — simply because they are human'.<sup>70</sup> While dignity does not vest an absolute right to individual self-fulfilment in asylum seekers, it presupposes the ability to live 'without positive humiliation and degradation'.<sup>71</sup> The court reasoned that a general prohibition had the effect

<sup>65</sup> 2004 (4) SA 125 (CC).

<sup>66</sup> *Ibid* para 26.

<sup>67</sup> *Ibid* para 20.

<sup>68</sup> *Ibid* para 46.

<sup>69</sup> *Supra* note 63.

<sup>70</sup> *Ibid* para 25.

<sup>71</sup> *Ibid* para 32.

of degrading those who are destitute by forcing them to beg or steal. Despite the ringing endorsement of the dignity of everyone, including those at the lower rungs of the immigration ladder, who cannot claim to have made South Africa their home and whose immigration status is yet to be determined, the relief granted was quite narrow. The judgment does not confer on asylum seekers a general right to work and study, but leaves it to the Standing Committee for Refugee Affairs to determine whether applicants qualify on a case by case basis or to issue appropriate guidelines to the relevant officials.

In *Koyabe v Minister for Home Affairs*,<sup>72</sup> the Constitutional Court rejected the contention that the state, when declaring a person an illegal foreigner, is not obliged to furnish reasons for its decision. Given the harsh effects of such a declaration and in view of the *batho pele* principle, read with the constitutional values of dignity and ubuntu, the court found that it would be 'excessively over formalistic and contrary to the spirit of the Constitution' to hold that the applicants were not entitled to reasons.<sup>73</sup>

These judgments affirm the right of non-citizens not to be reduced to mere objects of state power (*Lawyers for Human Rights*), to be free from humiliation and degradation (*Watchenuka*), and to the justification of exercises of public power (*Koyabe*). Importantly, they sever human dignity from nationality and avoid collapsing humanity onto the political community of equals instituted by the Constitution. At the same time, however, these judgments carefully traverse the tension between universal human rights and state sovereignty, where the rights they rely on are narrowly circumscribed by the state's power to detain and deport illegal foreigners. Important as these judicial pronouncements are, one could well ask whether they can allay Arendt's concern over the impotence of the 'rights of man' in coming to terms with the powerlessness of those who, by virtue of their exclusion from membership in a political community, are deprived of a place in the world from which they can overcome their subordination.

*(b) Towards a more encompassing citizenship*

A second group of cases views the relationship between dignity and citizenship from a different perspective. While these cases sound many of the same themes as the cases referred to above (most notably, the vulnerability of non-citizens and the need to protect them from humiliation and degradation), they also introduce a second element by drawing on certain similarities between the position of the applicants and that of citizens. In these cases, dignity does not define the minimum conditions of personhood that must be guaranteed to all individuals, irrespective of nationality or immigration status. Instead, it is used to question distinctions between citizens and certain categories of non-citizens, and thus to extend some of the rights and benefits formerly restricted to citizens to categories like permanent residents.

<sup>72</sup> 2010 (4) SA 327 (CC).

<sup>73</sup> *Ibid* para 62.

The Constitutional Court judgment in *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development*<sup>74</sup> nicely illustrates the possibilities and pitfalls of this approach. In this case, the court held that the exclusion of permanent residents from benefits under the Social Assistance Act 59 of 1992 violated the constitutional rights of non-discrimination and access to social security. Reading these rights through the lens of human dignity, Mokgoro J emphasised the devastating impact of the differentiation in question. Permanent residents in need of social security programmes were stigmatised as inferior, reduced to the role of supplicants and relegated to the margins of society.<sup>75</sup> Although this may appear, at first glance, like another instance of the disarticulation of dignity from citizenship, closer scrutiny reveals that in fact, it is the opposite. Here, dignity is re-articulated with an extended notion of citizenship. The judgment emphasises the similarities between permanent residents and citizens. Like citizens, permanent residents have made South Africa their home, owe a duty of allegiance to the state and pay taxes.<sup>76</sup> In a celebrated passage, their well-being is tied to the well-being of society as a whole:

‘Sharing responsibility for the problems and consequences of poverty equally as a community represents the extent to which wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole.’<sup>77</sup>

Thus, on the basis of equal recognition, permanent residents are cast as members of a community, who are tied to the citizenry through bonds of solidarity and trust, and are entitled to full moral and social citizenship. Their position is distinguished expressly from that of temporary residents and illegal aliens, whose position remains unaffected by the court’s order.<sup>78</sup> The applicants’ entitlement to social security benefits therefore does not arise simply from their humanity or material need, but is conditioned on their immigration status. This is odd, given the heavy reliance placed by the majority on the text of s 27(1) of the Constitution, which confers the right to social security on ‘everyone’.<sup>79</sup> Why then, are temporary residents categorically excluded? Would it not make more sense, in view of s 27’s universal language, to include temporary residents in the category of those entitled to the right, but if needs be, to justify their exclusion from specific programmes with refer-

<sup>74</sup> 2004 (6) SA 505 (CC) para 76.

<sup>75</sup> *Ibid* paras 74, 76, 77, 80 and 81.

<sup>76</sup> *Ibid* paras 58, 59 and 74.

<sup>77</sup> *Ibid* para 74. See also *Lawyers for Human Rights* supra note 65 at para 20: ‘The very fabric of our society and the values embodied in our Constitution could be demeaned if the freedom and dignity of illegal foreigners are violated in the process of preserving our national integrity.’

<sup>78</sup> *Ibid* paras 59, 89 and 98.

<sup>79</sup> *Ibid* paras 42, 46, 47, 54, 79 and 85. In response to the argument that most developed countries set citizenship as a requirement for access to social security, Mokgoro J argues that ‘those countries do not have constitutions that entitle “everyone” to have access to social security’ (para 54).

ence to the availability of resources<sup>80</sup> or in terms of the general limitation clause in s 36(1) of the Constitution? Why does ‘everyone’, in this context, refer only to citizens and those in a similar position to citizens?

In the end, it seems the majority judgment hinges less on the lack of a textual qualification of the beneficiaries of s 27(1) than on a particular vision of citizens’ dignity and the community of equals created by the Constitution. On this reading, the Constitution embraces a more encompassing vision, in which moral and social citizenship extends to everyone who has been admitted to, and has assumed the obligations and responsibilities attached to permanent residence in South Africa. This is an attractive vision, particularly when compared to the more restrictive understanding of citizenship informing Ngcobo J’s dissenting judgment.<sup>81</sup> Nevertheless, the way the majority confines its reasoning to permanent residents is problematic. As Lucy Williams points out, the majority judgment simply assumes, without citing any evidence in support of the claim, that temporary residents do not have meaningful ties of allegiance and commitment to their country of residence.<sup>82</sup> She argues that this runs counter to the court’s previous judgment in *Larbi-Odam v Member of the Executive Council for Education (North-West Province)*,<sup>83</sup> in which it embraced a more ‘nuanced understanding of the

<sup>80</sup> Section 27(2): ‘The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.’

<sup>81</sup> Ngcobo J accepted that ‘everyone’, in the context of s 27(1), indeed means ‘everyone’ (para 111). Testing the restriction of the category of beneficiaries against the general limitation clause in s 36(1), he argued that the limitation of the right was neither permanent nor absolute (paras 115–19); that, given limited resources, the state was entitled to give preference to its own citizens; and that the limitation served the important objective of encouraging self-sufficiency among immigrants and discouraging immigration motivated by the wish to access welfare benefits (paras 120–1 and 132). In view of these considerations, he held that it was reasonable to restrict social grants to South African citizens, but that the restriction of child grants and care-dependency grants to those whose primary care giver or parent is a South African citizen was unconstitutional. Although his judgment subjects the exclusion of all categories of non-citizens from social assistance to a proportionality inquiry, the sharpness of his distinction between citizens and non-citizens and his acceptance of the legitimacy of state policies which put citizens first, ultimately leaves less room than the majority judgment for the contestation of the boundaries between the polity’s inside and outside.

<sup>82</sup> Lucy Williams ‘Issues and challenges in addressing poverty and legal rights: A comparative United States/ South African analysis’ (2005) 21 *SAJHR* 436 at 468–9.

<sup>83</sup> 1998 (1) SA 745 (CC). In this case, the Constitutional Court held that a regulation providing that only South African citizens could be appointed as teachers in a permanent capacity amounted to unfair discrimination. The constitutional value of human dignity was central to the court’s reasoning. Mokgoro J reasoned that differentiation on the ground of citizenship has the potential to impair the human dignity of non-citizens in view of their minority status, lack of political power and general vulnerability. She also pointed out that citizenship is a relatively immutable characteristic and referred to South Africa’s history of the exploitation and instrumentalisation of non-citizens and invocation of citizenship as a pretext for racial discrimi-

similarities between temporary and permanent legal residents regarding their societal involvement, connection and contribution<sup>84</sup> and included temporary residents within the ambit of the relief granted.<sup>85</sup>

(c) *The dignity of (non-)citizenship*

Judicial reliance on human dignity in cases concerning the rights of non-citizens appears, then, to alternate between two registers. At times, the courts invoke an inviolable core of human dignity inhering in all human beings, regardless of their citizenship or immigration status. At other times, dignity is articulated with an extended notion of citizenship. This second use of dignity corresponds to the Constitutional Court's jurisprudence in areas such as equality and voting rights. For instance, in *August v Electoral Commission*, Sachs J famously pronounced that '[t]he vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts.'<sup>86</sup> Here, dignity is not used to refer to the abstract moral capacity inherent in every human being, but denotes the equality and self-government of members of a concrete human community who are embedded in particular social structures.<sup>87</sup> The reference to dignity is no longer a reference to a generalised, undifferentiated humanity, but to concrete human beings.

nation. In view of these considerations, she concluded that citizenship is analogous to the grounds of discrimination listed in s 8(2) of the Interim Constitution (paras 19–20). She further held that the discrimination in question was unfair in relation to permanent residents, who had been allowed to make South Africa their home and were entitled to equal employment opportunities. Discrimination against them in the employment sphere deprived them of job security and as a result, impeded them in making personal life choices relating to their family, social and professional life (paras 23–5).

<sup>84</sup> Williams *op cit* note 82 at 469.

<sup>85</sup> Although the Constitutional Court in *Larbi-Odam* *supra* note 83 focused on the position of permanent residents in its analysis of whether the regulation constituted unfair discrimination, it decided against making an order of partial invalidity which excluded temporary residents from its ambit. Mokgoro J noted that many temporary residents had been appointed to teaching positions for an indefinite period (paras 41–3) and thus suggested that, similar to permanent residents, some temporary residents have forged strong connections with, and make important contributions to their country of residence.

<sup>86</sup> *August v Electoral Commission* 1999 (3) SA 1 (CC) para 17.

<sup>87</sup> See François du Bois 'Freedom and the dignity of citizens' in A J Barnard-Naudé, Drucilla Cornell & François du Bois (eds) *Dignity, Freedom and the Post-Apartheid Legal Order: The Critical Jurisprudence of Laurie Ackermann* (2009) 112 at 142–7 on the distinction between the abstract dignity of humanity and the dignity of citizens. Writing in a slightly different context, du Bois notes that whereas Kant's moral writings conceive of individuals in abstract, impersonal terms and demand respect only for their moral capacity, his legal writings are concerned with the respect due to concrete, socially embedded persons. He argues that unlike the former, which does not support a strong version of moral self-determination, the latter is better equipped to ground a right of general freedom as construed by Ackermann J in *Ferreira v Levin* NO 1996 (2) SA 621 (CC).

As a result, dignity becomes imbued with the distinctions that are constitutive of a concrete political community.<sup>88</sup>

The majority judgment in *Khosa* suggests that the notion of citizen's dignity can play an important role in the contestation of the boundaries defining membership in the legal and political community. Given the imperfect fit between nationality and residence, the formal legal category of nationality or citizenship is but an imprecise approximation of the web of relationships, rights and responsibilities that are evoked by the idea of citizen's dignity. For this reason, citizen's dignity can be used to challenge the restriction of certain rights to a closed category of citizens (read 'nationals'). To paraphrase Benhabib, the disjunction between practices of democratic closure and the constitutional commitment to the equal dignity of everyone within the national territory can open up spaces for acts of democratic iteration, through which a political community reflects critically on its own practices of exclusion.

However, this is only one part of the story. The exclusion of temporary residents from the relief granted in *Khosa* suggests that, while a dignity-based jurisprudence can serve to politicise the distinction between the rights of man and the rights of the citizen, the resulting jurisprudence can also find ways of depoliticising that distinction. In *Khosa*, the open-endedness of the court's expanded understanding of citizen's dignity quickly gave way to a fairly rigid distinction based on the legal status of permanent residence.<sup>89</sup> Moreover, the majority downplayed the cost implications of its judgment for the state by suggesting that the state could adopt immigration policies that would ensure that only those 'who will profit, and not be a burden to, the State' are admitted to the status of permanent residence.<sup>90</sup> The expansion in *Khosa* of the community of equals thus went hand-in-hand with a re-drawing of the boundary between the community's inside and outside — in a way that resists the universality of the Constitution's own language — and a re-assertion of

<sup>88</sup> This understanding of dignity as attaching to embodied human beings and embedded in social relations is also evident from the Constitutional Court's understanding of equality, moral citizenship and the harm resulting from misrecognition. Consider, for example, Sachs J's statement in *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC) paras 15 and 60. See also Sachs J's concurring judgment in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) paras 107, 127 and 134 that an active rather than purely formal sense of citizenship presupposes the acceptance of people for who they are, and his finding that the moral citizenship of gays and lesbians was denied by laws which signalled that same-sex relationships were not worthy of equal legal recognition and protection. In the view of the court, the harm inflicted on gays and lesbians cannot be severed from the law's impact on their capacity to participate as equals in social and political life.

<sup>89</sup> See Jonathan Klaaren 'Constitutional citizenship in South Africa' (2010) 94 *International Journal of Constitutional Law* 94 at 108 who argues that the key to the Constitutional Court's jurisprudence on citizenship lies in 'the concept of lawful residence, rather than nationality per se'.

<sup>90</sup> *Khosa* supra note 74 para 65.

the state's sovereign power to define the class of persons entitled to permanent residence.<sup>91</sup>

The subsequent judgment in *Union of Refugee Women v Director: Private Security Industry Regulatory Authority*<sup>92</sup> confirms that, despite the fluidity of the distinctions between different categories of non-citizens, there are limits to the inclusivity of the court's vision of moral and social citizenship. In this case, the majority of the Constitutional Court held that legislation which restricted employment in the private security industry to citizens and permanent residents, did not violate the right of refugees to equality and non-discrimination. The minority framed their inquiry in terms of South Africa's international-law obligations to refugees, stressed the similarity between the situation of refugees and permanent residents<sup>93</sup> and focused on the social stigma and material disadvantage engendered by refugees' exclusion.<sup>94</sup> On the other hand, the majority held on to a more clear-cut distinction between permanent residents and refugees and paid considerable deference to the state's power to make distinctions on the basis of citizenship or immigration status, particularly on issues that have a bearing on security and the distribution of material resources.<sup>95</sup>

The Constitutional Court's order in *Mamba v Minister of Social Development*<sup>96</sup> reveals similar tensions, particularly when viewed in light of the Gauteng Provincial Government's response to the judgment. Faced with the imminent closure of the camps that had been set up by the government to accommodate victims of the xenophobic attacks of 2008, the court directed the parties 'to engage with each other meaningfully and with all other stakeholders . . . in order to resolve the differences and difficulties aired in this application in the light of the values of the Constitution, the constitutional and statutory obligations of the respondents and the rights and duties of the residents of the shelters'.<sup>97</sup> The extension of the requirement of meaningful engagement to disputes involving the rights of non-citizens appeared significant, especially in view of the fact that orders of meaningful engagement often are said to emphasise the agency and voice of those consulted and

<sup>91</sup> Sandra Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 161 writes, in view of this ambivalence: 'It remains to be seen whether the *Khosa* decision represents the first step in a gradual process of extending socio-economic rights to those marginalised by an intersection of poverty and nationality, or the outer limits of the Court's willingness to expand access to socio-economic rights to non-nationals.'

<sup>92</sup> *Supra* note 63.

<sup>93</sup> *Ibid* paras 99, 104–10.

<sup>94</sup> *Ibid* para 118.

<sup>95</sup> *Ibid* paras 36–42.

<sup>96</sup> (CC) unreported judgment in case no 65/08 of 21 August 2008.

<sup>97</sup> *Ibid* para 1. See also *Minister of Home Affairs v Scalabrini Centre, Cape Town* [2013] ZASCA 134, which concerned the decision to close the Cape Town Refugee Centre. The Supreme Court of Appeal held that the failure of the Department of Home Affairs to consult stakeholders was arbitrary and thus inconsistent with the constitutional principle of legality.

to treat them as equal participants in a constitutional dialogue.<sup>98</sup> Here, the basic dignity of the men, women and children who were violently expelled from the communities they lived in — i.e. the right to be treated with respect for one's intrinsic moral worth, regardless of citizenship or immigration status — flows over into the right to be active participants in a conversation about the terms of their reintegration into the community.

However, the Gauteng Provincial Government adopted a narrow reading of the court's order. Despite the granting of a second interim order,<sup>99</sup> the government started closing the camps without engaging meaningfully with those affected/stakeholders on the reintegration process. Clearly, the government found it difficult to conceive of the victims of xenophobia as fellow participants in a structured dialogue, aimed at creating an appropriate remedial regime. Arguably, it failed even to see that any of the victims' rights were being infringed or threatened.<sup>100</sup> Their extreme vulnerability and political powerlessness, coupled with the state of exception they found themselves in as the beneficiaries of temporary relief under the Disaster Management Act 57 of 2002, were not conducive to their being viewed as bearers of civic dignity or political agency. In addition, the manner in which the matter came before the Constitutional Court,<sup>101</sup> the way in which the order was furnished, the failure of the court to give content to the relevant constitutional provisions and to spell out the implications thereof for the

<sup>98</sup> See e.g. *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 41: '[T]hose seeking evictions should be encouraged not to rely on concepts of faceless and anonymous squatters automatically to be expelled as obnoxious social nuisances. Such a stereotypical approach has no place in the society envisaged by the Constitution; justice and equity require that everyone is to be treated as an individual bearer of rights entitled to respect for his or her dignity.'

See also *Occupiers of 51 Olivia Road, Berea Township v City of Johannesburg* 2008 (3) SA 208 (CC) para 20: 'People in need of housing are not, and must not be regarded as a disempowered mass. They must be encouraged to be pro-active and not purely defensive.'

See further *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC) per Sachs J para 408: '[Meaningful engagement] expands the concept of citizenship beyond traditional notions of electoral rights and claims for diplomatic protection, to include the full substantive benefits and entitlements envisaged by the Constitution for all the people who live in the country and to whom it belongs. At the same time it focuses on the reciprocal duty of citizens to be active, participatory and responsible and to make their own individual and collective contributions towards the realisation of the benefits and entitlements they claim for themselves, not to speak of the well-being of the community as a whole.'

<sup>99</sup> (CC) unreported judgment in case no 65/08 of 16 September 2008.

<sup>100</sup> This was the position of the court a quo. The High Court held in *Mamba v Minister of Social Development* [2008] ZAGPHC 255 that the applicants had not demonstrated that any of their rights had been infringed by the impending closure of the camps.

<sup>101</sup> Brian Ray 'Engagement's possibilities and limits as a socio-economic rights remedy' (2010) 9 *Washington University Global Studies Law Review* 399 at 407–8.

dispute at hand,<sup>102</sup> together with its acceptance of the need for the closure of the camps by a certain date,<sup>103</sup> all contributed to what Brian Ray describes as a lack of incentive, for the government to take the process seriously.<sup>104</sup> Indeed, the failure of the court-ordered engagement in *Mamba* highlights the structural barriers impeding access to justice for non-citizens, as well as the ways in which the political community tends to resist the inclusion of non-citizens in decision-making processes.

The idea of citizen's dignity thus vacillates, somewhat uneasily, between different understandings of the community of equals inaugurated by the Constitution. On the one hand, it presupposes the right of a self-governing political community to engage in practices of democratic closure while, on the other hand, it points towards a more encompassing vision, in which the rights of equal recognition and public participation extend to everyone living under the law's jurisdiction. Citizen's dignity remains linked to legal definitions of citizenship and/or residence, and yet can be used to question the restrictiveness of established legal categories. Sometimes, it is used to politicise the boundaries of the legal community and, at other times, to make them appear natural and inevitable.

## VI CONCLUDING REMARKS

Debates over the rights of non-citizens are traditionally framed in terms of a series of dichotomies, such as those between human rights and popular sovereignty, the rights of man and the rights of the citizen, and the dignity inherent in all of humanity and the dignity arising from membership in a particular community. However, the theoretical literature and the case law reviewed above suggest that these distinctions are unstable and that their deconstruction may be a condition of the very possibility of the right to have rights.

On the one hand, it is problematic to reduce democracy to the sovereign right of a political community to establish and maintain its own boundaries. As Etienne Balibar notes, 'the traditional institution of borders', which in the modern era has fulfilled the role of 'a "sovereign" or nondemocratic condition of democracy itself', today simultaneously serves, in a variety of contexts, as 'an instrument of security control, social segregation, and unequal access to the means of existence, and sometimes as an institutional distribution of life and death'.<sup>105</sup> To insulate civic and territorial boundaries from processes of democratic renegotiation, or to insist that only nationals participate in those processes, is to legitimate the above forms of institutional

<sup>102</sup> Liebenberg op cit note 91 at 422 notes that meaningful engagement 'had to occur in a normative vacuum' as the court, while referring to the need to resolve the issues in light of the Constitution, failed to provide 'substantive guidance' on the meaning of the relevant constitutional norms within the context of the dispute.

<sup>103</sup> Ibid at 422.

<sup>104</sup> Ray op cit note 101 at 408.

<sup>105</sup> Balibar op cit note 32 at 117.

violence and to stifle new democratic imaginations, in the name of a narrow identification of democracy with the institutions of the nation-state. While it is true that democracy presupposes a bounded political community, it is also the case that its continued vitality today depends on the availability of spaces for the contestation of legal and political boundaries, as well as procedures and institutions through which the gap between citizenship and the circle of those affected by decision making can be mediated.

On the other hand, just as the continued vitality of democracy and democratic citizenship depends on acts of renewed foundation, so too the capacity of human rights to challenge inequality and exclusion arising from civic and territorial boundaries derives from the dynamic interplay between the rights of man and the rights of the citizen. Those who, in Arendt's view, lack a place in the world from which their speech and action can register with the legal and political community nevertheless can enact scenes of dissensus by calling the boundary between man and citizen into question. We have seen that, for Rancière, it is the instability of this boundary that is constitutive of the political. In his view, politics exists where those who have no right to speak declare a dispute by requiring two worlds to confront each other: the world in which they do share a common stage with those who deny that they are capable of speaking and acting in public and the world in which they do not. By positing themselves as speaking beings and by raising matters that are not considered proper topics of political discourse, they are politicising the very distinction between a public realm of speech and action, and the bare humanity of those who are excluded from membership in an organised political community. To invoke Lindahl's work on boundaries, it is through a-legal boundary crossings that activists and non-citizens reveal the contingent nature of the boundaries that separate the polity's inside from its outside and serve as the basis of the distinction between the rights of man and the rights of the citizen. These boundary crossings draw attention to forms of domination and exclusion that typically fall through the cracks between the rights of man and the rights of the citizen, and challenge them in the name of alternative distributions of ought-places which the legal order, in terms of its self-inscription into a larger distribution of membership and place, ought to, but does not, accommodate.

An analysis of our case law confirms that the dividing line between the rights of man and the rights of the citizen is permeable. Judgments like *Larbi-Odam*<sup>106</sup> and *Khosa*<sup>107</sup> demonstrate that citizenship is a contested category, that the rights of citizenship have been extended, in varying degrees, to different categories of non-nationals, and that the rights of foreign nationals cannot and should not be confined to the abstract, generalised rights of man. Even claims ostensibly founded in rights that transcend differences in citizenship and immigration status — like the right not to be subject to degradation or humiliation — sometimes expose the instability of the

<sup>106</sup> Supra note 83.

<sup>107</sup> Supra note 74.

distinction between the dignity of man and the dignity of the citizen. For instance, the judgment in *Watchenuka*<sup>108</sup> situates the right to work at the interface of the distinction between abstract moral dignity and social citizenship, and thus creates room for claims, based on the rights against degradation and humiliation, to blend into claims questioning current distributions of the rights of citizenship.

However, we must resist the illusion that a dignity-based constitutional jurisprudence initiates the unfolding of a universal hospitality, in which obstacles to the full recognition of the humanity of non-citizens progressively will be overcome. Even a cursory overview of the case law suggests that official decisions vindicating the rights of non-nationals and/or resting on a more universal understanding of citizenship, exist side-by-side with decisions that tend to naturalise existing boundaries. The extension of the rights of citizenship to permanent residents or to nationals of certain countries could help trigger further victories for the rights of non-citizens, but they could also go hand-in-hand with new forms of exclusion, as demonstrated by events in Europe and elsewhere. This should not come as a surprise: the instability of the distinction between man and citizen, which enables challenges to domination and exclusion, may also serve to legitimate civic and territorial boundaries and even, to facilitate contractions in the body politic.

Against this background, it is important not only to theorise the possibilities of a dignity-based constitutional jurisprudence, but also to consider its limits. Rancière's distinction between politics and police provides one possible angle from which to start doing so. For him, politics disrupts the status quo by raising subjectivities that have no right to exist and by invoking claims that have no business being heard. Some such challenges succeed in reconfiguring current distributions of membership and power, by confronting them with the logic of egalitarianism. But once that happens, they are re-inscribed into the logic of the police and become part and parcel of a new configuration of membership, roles and powers that continues to exclude certain viewpoints, subjectivities and institutionalisations. Politics, therefore, does not consist in the inexorable march of the logic of universality and inclusion, but depends on the capacity of new disputes and subjectivities to keep pushing against the limits of current institutionalisations of membership and power. Nevertheless, these limits are resilient, not only to the extent that they make it difficult for new voices to be heard and for new disputes to register with the polity, but also in so far as they tend to blunt the radical edge of new subjectivities, by including them into the count of the polity, and thus, by inscribing them into the order of the given.

Lindahl's analysis of legal boundaries offers a different vantage point from which to consider the limits of a dignity-based constitutional jurisprudence. He notes that civic and territorial boundaries not only include the legal order within a larger distribution of ought-places, but in doing so, also exclude

<sup>108</sup> *Supra* note 63.

certain possibilities as foreign or strange. This outside is ineradicable and can never be overcome simply by invoking the universality of human dignity. To the extent that dignity has been positivised into a particular legal order, it is always already qualified by civic and territorial boundaries. While boundary crossings could interrupt the unity of legal spaces by drawing attention to the gap between current distributions of membership and place, and the legal order's commitment to a distribution of ought-spaces that respects the inherent dignity of every human person, not all the alternative distributions of ought-places evoked by these challenges will be capable of being recognised as the legal order's own.

The judgments in *Khosa*<sup>109</sup> and *Union for Refugee Women*<sup>110</sup> illustrate the ways in which distinctions in immigration status reinsert themselves into the notion of an expanded citizen's dignity, while the *Mamba*<sup>111</sup> case demonstrates the fragility of initiatives to include non-citizens in processes of democratic engagement. These cases not only serve as a reminder of the ineradicability of the tension between the legal order's inside and outside, but also of the dangers inherent in dignity-based mediations of the rights of man and the rights of the citizen. One such danger is that of collapsing the distinction between the universality of a human dignity that transcends legal and political boundaries, and those positive-legal guarantees of dignity that are always already qualified by the boundaries of a particular legal and political order. Another consists in the domestication of political subjectivity, by injecting the figure of the 'good citizen' or the 'good foreigner' into it. In this sanitised version, difference becomes an extension of sameness and the other loses her capacity to disrupt the order of the given. Rights of political participation are conditioned on conformity to idealised notions of belonging, thereby depriving politics of its agonistic dimension.<sup>112</sup>

If dignity is to play a critical role in the negotiation and renegotiation of legal boundaries, it needs to be severed from discourses which make these boundaries appear natural and straightforward, or which premise democratic agency on notions of dignified behaviour or conformity to the figure of the

<sup>109</sup> *Supra* note 74.

<sup>110</sup> *Supra* note 63.

<sup>111</sup> *Supra* note 96.

<sup>112</sup> See Bonnie Honig *Democracy and the Foreigner* (2001), who criticises romantic understandings of the capacity of foreigners to reinvigorate citizenship, and proposes instead a gothic reading which captures the ambivalence characterising the relationship amongst democratic subjects and between subjects and their attachments. See also Henk Botha 'Equality, dignity, and the politics of interpretation' in Wessel le Roux & Karin van Marle (eds) *Post-Apartheid Fragments: Law, Politics and Critique* (2007) 148 at 166–9, arguing that some Constitutional Court judgments depoliticise struggles for equality through their emphasis on moral choice and reputation and their conflation of dignity with dignified behaviour; and Marius Pieterse 'Procedural relief, constitutional citizenship and socio-economic rights as legitimate expectations' (2012) 28 *SAJHR* 359 at 374–8, where he criticises judgments which condition socio-economic rights on conformity to a neo-liberal concept of citizens as paying customers.

good citizen. A dignity-based constitutional jurisprudence needs to maintain a critical distance from exclusivist concepts of citizenship<sup>113</sup> and from discourses which equate citizenship with nationality.<sup>114</sup> It must accept that foreign nationals stand at the centre of a legal and political discourse through which they, together with and in opposition to legislatures, public servants, courts, citizens and non-governmental organisations, 'are generating and re-generating our contemporary script of South African citizenship'.<sup>115</sup> As far as possible, it must be alive to the ways in which they, through their boundary crossings, disrupt the distinction between the political community's inside and outside, and invoke alternative understandings of the distinction between the dignity of man and the dignity of the citizen.

<sup>113</sup> For different explanations of the exclusivity of popular understandings of South African citizenship, see Jean Comaroff & John L Comaroff 'Naturing the nation: Aliens, apocalypse, and the postcolonial state' in Hansen & Stepputat op cit note 6 at 120, arguing that an emphasis on 'autochthony', which treats belonging and inclusion as technical issues that can be answered with reference to nature, serves to depoliticise the boundaries of the South African nation-state and to legitimate a new politics of exclusion; and Jonathan Klaaren 'Citizenship, xenophobic violence, and law's dark side' in Loren B Landau (ed) *Exorcising the Demons Within: Xenophobia, Violence and Statecraft in Contemporary South Africa* (2011) 135 at 142–5 arguing, with reference to the work of Landau, that South African citizenship is shaped through the opposition between an exclusivist understanding of citizenship and the demands of migrants for the rights attaching to lawful residence.

<sup>114</sup> See Wessel le Roux 'Migration, street democracy and expatriate voting rights' (2009) 24 *SA Public Law* 370 for a critique of the reading advanced by the expatriate voting rights lobby of the Constitutional Court's judgment in *Richter v Minister of Home Affairs* 2009 (3) SA 615 (CC). In Le Roux's view, the said reading of the *Richter* judgment conflates nationality with citizenship, privileges national patriotism over constitutional patriotism and ignores the relationship between residence and democratic accountability. This interpretation stands in the way of struggles for the extension of voting rights to non-nationals who are permanently resident in South Africa because it ties political rights to culturalist notions of nationhood and belonging.

<sup>115</sup> Klaaren op cit note 113 at 144.