Aboriginal Sovereignty and the Democratic Paradox

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Against Jürgen Habermas, Chantal Mouffe insists that there is no necessary conceptual relation between democracy and human rights but only a contingent historical relation. Moreover, these principles are fundamentally irreconcilable: while democracy presupposes an historical act of *exclusion* in the political constitution of a *demos*, human rights presupposes a universally *inclusive* moral community. Yet, Mouffe argues, the accommodation of these conflicting legitimating principles within a liberal democratic regime is productive. Although irreconcilable, their paradoxical articulation keeps the limits that enable democratic deliberation and decision-making in view for being political and, therefore, contestable. Radical democracy, she argues, is premised on the recognition and affirmation of this 'democratic paradox'.[1]

In this chapter I examine whether a commitment to radical democracy requires that we affirm Mouffe's account of the democratic paradox. Might one be a radical democrat and yet understand human rights and popular sovereignty to be co-original as Habermas does? Specifically, I want to consider what is at stake *politically* in conceptualising the relation between these two legitimating principles of modern regimes. I will suggest that what is at stake is the representation of political claims. To understand human rights and democracy as 'co-original' in the way that Habermas proposes is to peremptorily exclude radical political speech and action that would fundamentally contest the terms of political association. For it diminishes the representational space in which a claim could be articulated that would contest the particular determination of the 'we' that authorises that order in the first place.

Mouffe's Schmittian thematisation of the political brings this ideological aspect of the co-originality thesis into view. First, because it

draws attention to the way in which Habermas posits the *contingent* and particular determination of political unity as a necessary condition for the universalising operation of law so that the demos, as socially determined, becomes a *given* within the field of instituted politics. Second, because it reveals how Habermas's characterisation of law as an enabling condition for politics means that social conflict is represented as already *internal* to the political unity that it necessarily presupposes. In other words, positing human rights and popular sovereignty as co-original removes the question of the determination of the 'self' of the demos from politics. This leads to a certain policing of the *agon* since only communal conflict can be recognised as legitimate.

I agree with Mouffe, then, that radical democrats ought to recognise the relation between human rights and popular sovereignty as paradoxically articulated. However, I also want to suggest that a fuller account of the democratic paradox is required than is afforded by a Schmittian conception of the political. Indeed, to identify democracy with an exclusive political identification and human rights with an inclusive moral cosmopolitanism, as Mouffe (following Schmitt) does, is to remain caught within the terms of liberal ideology. With Habermas, then, I concur that both popular sovereignty and human rights are 'janus-faced' since each principle has both a determinate institutional dimension (that *orders* ordinary politics) and a symbolic, quasi-transcendent dimension (that potentially *politicises* a social order). A radical conception of democracy requires that we affirm this symbolic (and, indeed, 'quasi-transcendent') aspect of the political rather than privileging its institutional determination.

Unpopular sovereignty[2] *and political paradox*

Rousseau is usually credited as the first political theorist to identify the democratic paradox in drawing a distinction between the general will and the will of all. Rousseau's point is that, while popular sovereignty means that what the people wills is right, it does not follow from this that the people has a right to will what is wrong. Rather, a people, by definition, always wills 'generally'. Whereas the 'will of all' refers to a simple aggregation of subjective wills, the formation of a general will involves the universalisation of these particular wills in relation to what is good for all (Rousseau 1997: II.3). The general will is good because it is public in the twofold sense of both appearing to all and being shared in common. In other words, the general will is

good not just because a set of particular interests happens to coalesce around it but part of its being good is that it is publicly constituted by free and equal citizens. In Charles Taylor's (1995) terms, it is an 'irreducibly social good'.

As such, the social contract is not merely an agreement among private persons to collectively secure the conditions that best secure their mutual interests. Rather, it purports to describe how a set of determinate individuals come to recognise the general will and thus to think of themselves politically, as collectively intending the universal law that binds them together. Although, in fact, society is divided according to conflicting interests, wills, opinions, beliefs and identities, the representation of this conflict as internal to society presupposes an original (counter-factual) consensus on the founding law that unifies the polity. The political paradox emerges in Rousseau's attempt to conceptualise this original consensus, which would explain how those subject to the law might also view themselves as its co-authors (1997: II.6). If, as Rousseau supposes, law is a pre-condition for civil society and, hence, for political co-operation, how could an original consensus about the foundation of the law be possible in a state of nature? Rousseau famously describes the paradox as follows:

> For a nascent people to be capable of appreciating sound maxims of politics and of following the fundamental rules of reason of State, the effect would have to become the cause, the social spirit which is to be the work of the institution would have to preside over the institution itself, and men would have to be prior to the laws what they ought to become by means of them. (1997: II.7)

Prior to the law there is only a multitude; only with the institution of a law that would regulate their life in common, identifying each natural person in the abstract as a free and equal member of the legal association, does a people appear on the political scene. But how could a 'blind multitude' be capable of founding the law that brings the people into being (Rousseau 1997: II.6; see Keenan 2003; Honig 2007)?

Of course, Rousseau's philosophical paradox need not be debilitating for political action. Indeed, it is vividly revealed in the revolutionary Declaration of Independence: 'We hold these truths to be self-evident'. As Arendt observes, this declaration combines the necessary truth of (self-evident) human rights with a contingent agreement (the fact of their being declared and the imputation of this declaration to a collective author, the people). Moreover, it reveals that 'those who would get together to constitute a new government

are themselves unconstitutional, that is, they have no authority to do what they set out to achieve' (Arendt 1991: 183–4). In the revolutionary moment, the will of the people lacks an institutional framework in terms of which it may be represented as such. As Bert van Roermund puts it, 'the people' who are supposed to be sovereign in a democratic polity are both inside and outside the legal order that is constituted; political power both institutes a new legal order while the newly instituted legal order is supposed to enable and restrain that very 'political power' (2003: 38). The democratic paradox here emerges in the circular relation between the constituent power and the constituted power, between the sovereign subject that founds the law and the law that delimits a space for politics within which the sovereign will can be expressed.

In his later work, Habermas has sought to resolve the democratic paradox by appealing to discourse ethics. Far from being potentially contradictory, he argues, the principles of popular sovereignty and rule of law necessarily presuppose each other in the self-understanding of a democratic society. Any apparent contradiction between these two principles of legitimacy could be resolved by recourse to the meta-political presupposition of the democratic enterprise: namely, that since self-determination is an act of co-legislation those engaged in this task must already implicitly recognise each other as legal persons (hence individual rights-holders).

To think through what is at stake politically in the conceptualisation of the democratic paradox, I want to keep before us the situation of indigenous people, their unpopular assertion of sovereignty and the representational space afforded to this claim within the actually existing democracy of Australia. In a national referendum in 1967, 90 per cent of Australians voted in favour of amending the constitution to include Aborigines in the census count and to allow the Federal Government the power over Aboriginal affairs, which had previously been reserved for State government. This has been commemorated in Australia as the moment in which Aborigines achieved citizenship rights. Yet, indigenous activist Kevin Gilbert objects that Aborigines 'never voted to be incorporated with non-Aboriginals. Australian citizenship was imposed on us unilaterally'(1993: 41). At stake in the political conflict between the settler society and indigenous people is precisely the sovereignty of the people, the terms of inclusion in the demos.

In this context, the (counter-factual) presupposition that indigenous people should be able to view themselves as co-authors of the law

with non-indigenous people risks perpetuating the logic of internal colonisation. As James Tully explains, with internal colonisation the land, resources and jurisdiction of indigenous people are appropriated not only for the sake of exploitation but for the 'territorial foundation of the dominant society itself' (2000: 39). While liberation from external colonisation is possible by forcing the withdrawal of the occupying imperial power, such tactics of direct confrontation are ineffective in the context of internal colonisation in which 'the dominant society coexists on and exercises exclusive jurisdiction over the territories and jurisdictions that the indigenous peoples refuse to surrender'. Both the colonisers and colonised, therefore, view the system of internal colonisation as a temporary means to an end. Indigenous people would resolve this irresolution by 'regaining their freedom as self-governing peoples'. In contrast, the settler society would resolve the irresolution by the 'complete disappearance of the indigenous problem, that is, the disappearance of indigenous people as free peoples with the right to their territories and governments' (Tully 2000: 40; cf. Ivanitz 2002).

On 26 January 1972, four young Aboriginal men (Billie Craig, Bert Williams, Michael Anderson and Tony Correy) planted a beach umbrella on the lawn of Parliament House in Canberra. In doing so, they claimed to establish an embassy to the Australian state on behalf of the Aboriginal people(s) within its territory. The delegation insisted that, since they were effectively aliens in their own land, indigenous people needed an embassy like other aliens in this country. Since its foundation, the Aboriginal Tent Embassy has been a focal point of political struggle by indigenous people in Australia (see Waterford 1992; Robinson 1994; Dow 2000; Foley 2002). In Arendt's terms (above), the tent ambassadors were unconstitutional: they had no authority to do what they set out to achieve. They were authorised neither by the Australian constitution (which positions them as co-authors of the law together with members of the settler society) nor by the sovereign Aboriginal nation that they claimed to represent. In both instances, such authorisation would only be possible retrospectively.[3]

The tent embassy invokes Aboriginal sovereignty as a right while testifying to the lack of sovereignty in fact. On the one hand, the embassy has the symbolic trappings of sovereignty: it flies its own flag and it claims the right to negotiate with the Australian state as the representative of a sovereign people. It is this assertion of Aboriginal sovereignty that representatives of the Australian state have found troubling. The Minister for Aboriginal Affairs in 1972 said that the

notion of an Aboriginal 'embassy' had a disturbing undertone since 'the term implied a sovereign state and cut across the Government's expressed objection to separate development'. This attitude has prevailed in the present government in relation to calls for a treaty between settlers and indigenous people. While in opposition, for instance, the former Prime Minister John Howard remarked that 'it is an absurd proposition that a nation should make a treaty with some of its own citizens' (cited in Patton 2001: 37).

On the other hand, the embassy is a tent rather than a permanent building. Resembling the fringe dweller camps of rural Australian towns, the tent embassy also symbolises the dispossession of indigenous people, their lack of sovereignty over their lands. This aspect of the embassy has equally troubled politicians who have frequently described it as an 'eyesore'. There have been several attempts by governments over the years to clean up the lawns of Parliament by offering to provide permanent meeting rooms, memorial plaques or reconciliation paths in exchange for the removal of the tent embassy. Following a review undertaken by the consulting firm Mutual Mediations in 2005, the Federal Government announced that the tent embassy will be replaced with a more permanent structure. A sign declaring 'No Camping' has been erected at the embassy, although the Minister gave an assurance that no residents will be removed against their will.

I want to consider what critical work Habermas's co-originality thesis and Mouffe's democratic paradox do for conceptualising indigenous people's unpopular claim to sovereignty *on its own terms*. To what extent are these frameworks adequate to understanding Aboriginal sovereignty as anything more than an 'absurd proposition'? Although recognised as citizens by the Australian state, it would be plainly difficult for indigenous people in Australia to regard themselves as authors of the law of this country. On the face of it, however, this would not invalidate Habermas's conceptualisation of the relation between democracy and rights. The question is whether indigenous peoples' struggle against colonisation can be adequately represented within the terms of Habermas's conceptual framework. Can indigenous peoples' objection to colonisation be accommodated in a demand to be recognised as free and equal participants in the legislative process? Or does the normative representation of indigenous and settler peoples as co-authors of the law lead to a certain co-optation of the insurrectionary political act of 'establishing' an Aboriginal embassy?

Mouffe's characterisation of the democratic paradox

Against Habermas, Chantal Mouffe asserts that there is 'no necessary relation' between human rights and popular sovereignty but 'only a contingent historical articulation' (2000: 3). In fact, these principles have distinct logics, which often come into conflict at the conceptual as well as the practical level. As is well known, Mouffe draws on Carl Schmitt to describe the opposing logics of human rights and popular sovereignty. Schmitt's work is attractive to radical democrats, such as Chantal Mouffe and Andreas Kalyvas (2005), because he insists on the primacy of politics over the rule of law, arguing against Hans Kelsen that 'the concrete existence of the politically unified people is prior to every norm' (cited in Lindahl 2007: 9). In a constitutional democracy there is a fundamental antagonism between its political aspect (at bottom a decision about the form the political unity will take) and its legal aspect (which imposes restrictions on political activity).

Appropriating Schmitt's interpretation of constitutional democracy, Mouffe (1993, 2000) argues that the democratic paradox arises from the fact that the exercise of popular sovereignty requires the delimitation of a demos, which necessarily excludes non-members in the act of including its members. This brings popular sovereignty into conflict with the universalism of human rights discourse. Stated in this way, the democratic paradox comes about because of the different constituencies to which popular sovereignty and human rights refer. Popular sovereignty refers to a political community: a concrete historical community that is necessarily *bounded*. In contrast, human rights refer to the moral community: an *unlimited* community that includes all humanity. Popular sovereignty is predicated on the substantive equality of citizens because it concerns, in Rawlsian terms, the distribution of the benefits and burdens of social co-operation. Human rights, in contrast, are predicated on the formal equality of moral persons because they rely on the ideal of human dignity and the categorical imperative (Mouffe 2000: 40–4).

Mouffe argues that in order to sustain robust liberal democratic institutions we need to acknowledge and affirm the democratic paradox (2000: 4). The tension between the principles of popular sovereignty and human rights cannot be philosophically resolved. They can only be negotiated politically – 'temporarily stabilised' in a way that establishes the hegemony of one principle over the other (Mouffe 2000: 5, 45). In other words, in certain periods liberal rights will take

priority over popular sovereignty. At other times popular sovereignty will take priority over liberal rights according to the contingencies of social and political power, the outcome of the struggle between left and right.

But far from being a weakness, Mouffe insists, the paradoxical articulation of human rights and popular sovereignty is the strength of the liberal democratic regime:

> By constantly challenging the relations of inclusion-exclusion implied by the political constitution of 'the people' – required by the exercise of democracy – the liberal discourse of universal human rights plays an important role in maintaining the democratic contestation alive. On the other side, it is only thanks to the democratic logics of equivalence that frontiers can be created and a demos established without which no real exercise of rights could be possible. (Mouffe 2000: 10)

Mouffe is here in agreement with Schmitt in according a certain priority to the political (understood as the determination of the commonality of political community in terms of a relation of inclusion/exclusion) over the instantiation of a universalising normative order that it makes possible. In the absence of their declaration or enactment within political community, human rights are without value since, in Habermas's terms, they lack 'facticity' in being socially recognised and enforceable. Against Schmitt, however, instead of viewing human rights as an 'unpolitical' *limit* to politics, Mouffe understands human rights as having a *politicising* role within the democratic polity. For Schmitt, liberal human rights could only ever amount to an inauthentic politics: a polemical discourse that disavows its own politics in the sense of favouring one form of political community over another. In contrast, Mouffe sees human rights as potentially enabling a legitimate contest within the political association over the terms of belonging. Although the distinction between citizen and non-citizen is the fundamental political distinction (which would contain all other political conflicts), the appeal to human rights enables an 'agonistic' politics within the democratic polity by bringing into view the contingency of that founding distinction and hence the possibility that it might be drawn otherwise.

Mouffe argues that Habermas's search for a conceptual resolution of this paradoxical articulation of popular sovereignty and human rights is misguided because it puts 'undue constraints on the political debate' (Mouffe 2000: 93; see also Mouffe 2005a: 83–9). Why? Because Habermas seeks to resolve the relation between these two

legitimating principles meta-politically rather than recognising this as an issue that can only be settled politically in a particular institutional setting. Mouffe accepts that some limits must be placed on democratic politics in order to make possible the kind of agonistic engagement that she favours. However, she insists, 'the political nature of the limits should be acknowledged instead of being presented as requirements of morality or rationality' (Mouffe 2000: 93). Mouffe's objection to determining the limits of democratic politics according to moral or rational standards is the same as Schmitt's critique of liberalism. Namely, that the appeal to supposedly meta-political criteria to set the boundaries of institutional politics is always disingenuous; it leads to an 'anti-political' politics, a denial of the political nature of one's own discourse, which is, in fact, a particularly intensive way of pursuing politics.

As Emilios Christodoulidis notes, the significance of the Schmittian conception of the political for radical politics is that it 'imports a reflexivity into politics, in the sense that the origin of political action is already political: it resides in the contingency of the recognition of what constitutes a political unity in the first place' (2007: 192). Radical politics thrives on the recognition of contingency since that is the basis of politicisation, opening the possibility that this unity might be constituted otherwise.

In this context, however, Christodoulidis draws an important distinction between the 'abstract conceptualisation' of the political and its 'concrete manifestations'. If, in its abstract conceptualisation, the political is the 'dimension of antagonism which [is] constitutive of human societies' (Mouffe 2005a: 9), its concrete manifestation would be the particular distinction that delimits the terms of belonging in *this* political association. The importance of differentiating these two levels of the political (i.e. between its abstract conceptualisation and concrete manifestations) is to show that the concrete manifestation could always be otherwise. Moreover, the abstract conceptualisation of the political is itself, to some extent, also contingent: what is integral to the concept of the political is that it refers to the institution of society. Whether this is brought about through antagonism or otherwise is also a matter of politics.

Habermas's co-originality thesis

In arguing that popular sovereignty and human rights are 'co-original' or 'equiprimordial', Habermas means that neither principle takes

priority in the philosophical order of justification. As such, he wants to show that the basic idea of human rights – that everyone has a fundamental right to equal individual liberties – should not be understood as a pre-political moral constraint on the sovereign legislator, as in liberalism. Nor should it be understood only instrumentally as an enabling condition for democratic expression, as in republicanism. Rather, the twin principles of popular sovereignty and human rights, on which the legitimacy of law depends, presuppose each other. The co-originality of popular sovereignty and the rule of law (as guaranteed by human rights) is expressed in the ideal of self-legislation: 'that those subject to law as its addressees can at the same time understand themselves as authors of the law' (Habermas 1996: 104). We are the *addressees* of the law in our role as private persons or rights-bearers whereas we are *authors* of the law in our role as citizens or 'co-legislators' (see Baynes 1995; Scheurman 1999; Maus 2002).

The first step in Habermas's argument is to insist, against Marx, on the inter-subjective basis of human rights. Habermas acknowledges that these subjective rights delimit the legitimate scope within which individuals may exercise free choice, regardless of their moral motivation. In the well-established liberal parlance, rights aim to maximise the liberty of each individual compatible with the same enjoyment of liberty by others. As such, rights free individuals to strategically pursue their private interests without regard for the common good. Or, in Habermas's terms, rights entitle individuals to 'drop out of communicative action' insofar as the 'legal subject does not have to give . . . publicly acceptable reasons for her action plans' (1996: 120). But rather than viewing rights as thereby institutionalising an amoral possessive individualism, Habermas describes the 'moral unburdening' of individuals as a functional achievement of legal rights, which complements morality (1996: 114–18). In their relation to the law as addressees, he argues, law unburdens individuals from the unprecedented cognitive, motivational and organisational demands of moral judgement and action in a complex society.

While freeing individuals for competitive and self-interested behaviour, however, human rights do not necessarily presuppose an atomistic conception of society, as the radical tradition has often charged. On the contrary, they are a form of social co-operation: 'as elements of the legal order they presuppose collaboration among subjects who recognise one another, in their reciprocally related rights and duties, as free and equal citizens' (Habermas 1996: 89). The inter-subjective foundation of rights – their status as norms shared by members of a

legal community – points the way to the principle of popular sover-
eignty in terms of which they are enacted as law.

The second step in Habermas's argument is to claim that the 'legal
medium as such presupposes rights that define the status of legal
persons as bearers of rights' (Habermas 1996: 119). The primordial
human right of each individual to equal subjective liberties is a foun-
dational principle of law such that a legitimate legal code cannot exist
without a system of rights: the subject of law is, by definition, a rights-
holder. Importantly, Habermas understands human rights only in
juridical terms (1996: 105). He rejects the natural law tradition,
according to which individuals possess pre-political moral rights in
the state of nature, which are recognised in positive law when they
enter into a social contract together. Rights do not exist in a determi-
nate form in the state of nature but are mutually conferred when
individuals undertake to regulate their life in common through the
medium of law.

This brings us to Habermas's third step. Stated bluntly, popular
sovereignty can only be exercised through the medium of law and,
since the general right to liberties is constitutive of the legal form as
such, the recognition of human rights is a necessary presupposition of
democratic praxis. Insofar as the exercise of popular sovereignty
requires individuals to reach an understanding on the basic principles
according to which they should regulate their collective life, they view
each other as co-legislators. Yet, in employing the medium of law,
they must already recognise each other as legal subjects and therefore
entitled to equal subjective liberties. In a striking formulation,
Habermas insists:

> . . . the medium through which citizens exercise their autonomy is not a
> matter of choice. Citizens participate in legislation only as legal subjects;
> it is no longer in their power to decide which language they will make use
> of. (2002: 201)

Importantly, the medium of law does not presuppose any substantive
human rights. Rather rights are present in the form of law only as
'unsaturated placeholders' for the specification of particular rights
that are to be given substance through the exercise of political auton-
omy (Habermas 1996: 125).

In reconstructing the logical genesis of rights in this way, Habermas
claims to have established a *necessary conceptual* relation between
popular sovereignty and human rights in contrast to Mouffe's insis-
tence on a *contingent historical* relation. This necessary connection

works in both directions to establish that the private autonomy of legal persons and the public autonomy of citizens mutually presuppose each other. On the one hand, human rights necessarily presuppose popular sovereignty to the extent that individuals can 'realise equality in the enjoyment of their *private autonomy* only if they make appropriate use of their political autonomy as citizens' (Habermas 2002: 202). Although rights are constitutive of the legal form, legality as such cannot ground any specific right. Rather, a system of rights can only be developed when the legal form is used to exercise popular sovereignty, i.e. when citizens exercise their right to submit only to those norms they could agree to in discourse. On the other hand, popular sovereignty presupposes human rights since individuals are only free to engage in democratic praxis to the extent that their independence from each other is guaranteed through the equal protection of their private freedoms, i.e. those rights that protect private goods (such as property, freedom of religious worship) thereby assuring the independence of civil society from the state.

It is no coincidence that Habermas's argument in support of the co-originality thesis bears a striking resemblance to the argument he makes to arrive at his discourse principle. As is well known, Habermas argues that certain validity-claims – to truth, sincerity and rightness – are *necessarily presupposed* in all communicative acts. As ideal conditions necessarily presupposed in factual communication these principles require no justification. Moreover, the fact that they are presupposed by language gives universal morality an immanent purchase within particular forms of life.

The structure of this argument is mirrored in Habermas's claim that human rights are a *necessary presupposition* of the legal medium through which democratic self-determination is enacted (Habermas 1996: 127). As a necessary condition of the legal form as such, the basic human right to equal liberty similarly requires no justification (Habermas 1996: 112). Moreover, like the presuppositions of the ideal speech situation, the presupposition of the basic human right in the legal form gives universal morality an immanent purchase within the historical project of democratic self-determination by a particular legal community.

As such, Habermas acknowledges the tension Mouffe identifies between the necessarily limited political community in which rights are articulated and enforced on the one hand and the unlimited moral community to which universal rights refer on the other. However, rather than presenting this tension as an external one between the

contending traditions of liberal constitutionalism and democratic politics as Mouffe does, he recasts this tension as internal to the law and located in the system of rights itself.

This tension between what Habermas calls 'facticity' and 'validity' is manifest in positively enacted human rights insofar as their legitimacy depends on their guarantee of liberty through coercion: 'legal norms are at the same time but in different respects enforceable laws based on coercion and laws of freedom' (Habermas 1996: 29). By facticity, Habermas refers to the decisionistic aspect of the law, its origination in the will of the sovereign and the fact that compliance with the law is externally motivated by the threat of sanctions. By validity Habermas means that the law's legitimacy does not depend only on the fact of social acceptance but also on the presupposition that the law is the outcome of democratic deliberation and decision-making. When confronted by the law's facticity we experience it as a constraint on our free choice; we obey it out of our self-interest in avoiding legal sanctions. When confronted by its validity, in contrast, we comply with the law out of respect for it since we presume that it expresses a rational democratic will-formation among free and equal citizens.

The tension between facticity and validity inherent in law enables Habermas to deal with Marx's (1987) critique that human rights alienate men and women from their species being – that in a liberal democracy they live a 'double life' between their heavenly existence as communal beings in the state and their earthly existence as egoistic individuals in civil society. According to Habermas, although those rights institutionalised by the law unburden individuals from the requirement of communicative rationality, it leaves them free to take 'either an objectivating or performative attitude' to legal norms (1996: 30). As addressees, they can view the law strategically as establishing constraints on their freedom of choice or they can obey the law out of respect for it on the presumption that it is rationally acceptable.

Against Marx's early account of political alienation in terms of the bifurcation of the subject as concrete particular 'man' and abstract universal 'citizen', Habermas insists that the 'citizens who mutually grant one another equal rights are one and the same individuals as the private persons who use rights strategically and encounter one another as potential opponents' (1996: 89). The idea of popular sovereignty is thus indispensable for modern law since it provides the basis on which the law's claim to validity might be redeemed. While individuals are free to pursue their self-interest unburdened by the

demands of communicative rationality within the constraints set by human rights, they are simultaneously free to recognise or contest the inter-subjective agreement on which human rights ultimately rest. By virtue of their public freedom to contest the validity of the law citizens are able to overcome their potential alienation from it.

According to Habermas, this tension between facticity and validity is originally present in everyday communicative practice. This is so because every speech act involves a validity-claim on which the hearer is free to take a yes/no position. In every speech act there is an implied promise to redeem our claim if challenged to do so by offering reasons that our addressee might accept as valid. Because validity claims implicitly refer to the 'ideally expanded audience of the unlimited interpretation community' in relation to which they might be redeemed, there is an 'ideal moment of unconditionality . . . ingrained in factual processes of communication' (Habermas 1996: 21). Consequently, every political claim contains both a universal aspect which transcends the spatial and temporal context in which it is raised and a particular aspect specific to the political-historical situation that is at stake in whether it is accepted or rejected. As such validity claims are 'janus-faced'. As claims they 'overshoot every context'. Yet they 'must be both raised and accepted here and now if they are to support an agreement effective for co-ordination – for this there is no acontextual standpoint' (Habermas 1996: 21). In the context of a constitutional politics, Habermas's point seems to be very close to Mouffe's when she argues that 'no real exercise of rights could be possible' in the absence of a bounded political community (2000: 10). The tension between facticity and validity is present in law to the extent that its validity depends both on the fact of its social acceptance and the presumption that it is rationally acceptable.

While Habermas barely remarks on it, this tension is particularly apparent in his reconstruction of the logical genesis of the system of rights when he refers to the interpenetration of the legal form which 'stabilises behavioural expectations' and the discourse principle according to which the 'legitimacy of legal norms can be tested' (Habermas 1996: 122). The discourse principle (D) states that 'just those action norms are valid to which *all possibly affected persons* could agree as participants in rational discourses' (Habermas 1996: 107). By 'those affected' Habermas means 'anyone whose interests are touched by the foreseeable consequences of a general practice regulated by the norms at issue' (1996: 107). While the norms of a legal order are necessarily expressed as rights, Habermas argues that the

discourse principle is required to establish the liberal legal principle that 'each person is owed a right to the greatest possible measure of equal liberties that are mutually compatible' (1996: 123).

However, in order to institutionalise these rights it is necessary to 'demarcate the bounds of membership and provide legal remedies for cases of right violations' (Habermas 1996: 124). In other words, when the discourse principle interpenetrates with the legal form, we shift from the universal/cosmopolitan principle of *affectedness* to the historical/republican principle of *membership* in order to determine the relevant constituency in relation to which the validity-claims of the law must be redeemed. This limitation of the discourse principle 'follows simply . . . from the facticity of making and enforcing the law' (Habermas 1996: 124).

But while the limitation of the discourse principle certainly follows from the facticity of making and enforcing law, Habermas elides too much in passing this concession off as a simple matter. First, because in losing their reference to natural law, human rights appear to lose their context-transcending aspect, their 'ideal moment of unconditionality', which was for Mouffe precisely what accorded them their potentially politicising aspect. In understanding human rights only in terms of their institutional determination, Habermas risks relegating them to a wholly regulatory function within the democratic polity. Second, because Habermas's insistence that democratic self-determination can only be exercised through the medium of law tends to reify the 'self' that is to be determining as already constituted through law. If self-determination can only ever be exercised within the law then this rules out in advance the possibility of any kind of radical action, understood in terms of an act of constituent power.

The problem emerges of how the violence that founds the facticity of the law in delimiting a finite political community could ever be redressed by the infinite validity that the same legal order is supposed to carry in its very form – without, that is, this becoming an ideological moment (see, for example, Motha 2002). In the context with which we are concerned, of course, this returns us to the problem of how indigenous people might come to view themselves as co-authors of the law to which they were originally subject as colonised.

The 'absurd proposition' of Aboriginal sovereignty

We have seen that Habermas does not ignore the tension between political exclusion and moral inclusion that Mouffe draws our

attention to. Rather than representing this tension as an external one between the principles of popular sovereignty and human rights, however, he casts it as one internal to law, between its facticity and its validity. The strength of Habermas's analysis is that it shows both human rights and popular sovereignty to be 'janus-faced' to the extent that we seek to realise them within particular contexts. This suggests that each principle has both an exclusive determinate aspect and an inclusive symbolic aspect. Yet, we have also seen that Habermas eludes the political since he passes too lightly over the exclusive foundation of law as following simply from the need to make and enforce it.

In other words, Habermas acknowledges but does not adequately address the 'boundary problem' in democratic theory (Whelan 1983). According to his discourse principle: 'Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses' (Habermas 1996: 107). But, as Habermas is aware, the principle of 'all possibly affected persons' will not do as a principle for identifying the relevant constituency for political deci-sions. This is because there is no democratic way of determining who all possibly affected persons are in the case of disagreement over whether particular persons are affected or not. Habermas readily admits that:

> From a normative point of view, the social boundaries of an association of free and equal consociates under law are perfectly contingent. Since the voluntariness of the decision to engage in a law-giving praxis is a fiction of the contractualist tradition, in the real world who gains the power to define the boundaries of a political community is settled by historical chance and the actual course of events, normally, by the arbitrary out-comes of wars or civil wars. (2001: 116; see also 2001: 144)

But there is a deeper conceptual problem with the cosmopolitan prin-ciple of affectedness which Habermas does not properly address. As Bert van Roermund observes, in determining those norms according to which the relevant constituency of the affected is to be decided we are left with three unsatisfactory options:

> Either the answer is simply decided upon (so that the phrase refers to the normative force of the factual), or it leads to infinite regression (who is to decide who is to decide . . . etc.), or it is based on *petitio principii* (who is involved is decided by who is involved in the first place). (1997: 150)

Habermas seems to opt for the first option, simply presupposing community as a legal fact.

Since Habermas understands human rights in terms of positive law, the relevant constituency must be defined in territorial terms if his discourse principle is to be translated into law. As Habermas acknowledges, as moral norms human rights 'refer to every creature "that bears a human face," but as legal norms they protect individual persons only insofar as the latter belong to a particular legal community – normally citizens of a nation-state' (2001a: 118). Thus, according to Habermas, the democratic principle, which is derived from his discourse principle, states that 'only those statutes may claim legitimacy that can meet *with the assent of all citizens* in a discursive process of legislation that in turn has been legally constituted' (1996: 110). But this is question-begging since it takes the demos as given rather accounting for how the 'we' that authorises the law is generated.

Following from this, Habermas's view of law as a medium for democratic expression places undue constraints on political deliberation because it represents social conflict as already internal to the political community. This is evident, for instance, in the following formulation:

> Political power is not externally juxtaposed to law but is rather presupposed by law and itself established in the form of law. Political power can develop only through a legal code, and it is, in the legal sense of the word, constituted in the form of basic rights. (Habermas 1996: 134)

It is certainly true that expressing political claims in terms of rights often provides a mechanism for translating one's private preferences into a publicly justifiable claim. Thus Habermas refers to democratic procedures as a 'filter that sorts out issues and contributions, information and reasons in such a way that only the relevant and valid inputs "count"' (1996: 462). The worry for radical democrats is whether law filters too much.

Sheldon Wolin, for instance, questions the identification of democracy with constitutionalism, arguing instead for an 'aconstitutional conception of democracy', which he defines as 'the idea and practice of rational disorganisation'. On this view democracy is 'inherently unstable, inclined toward anarchy, and identified with revolution' (1994a: 37). The value of Wolin's work is that it emphasises that democratic action fundamentally turns around the contestation of the 'we' that authorises the law. But whereas politics always refers to this 'we' as in the process of becoming, law represents the 'we' as always already (Christodoulidis 2007). To what extent, then, is the medium of law able to faithfully represent a claim that contests the 'we' on

which its legitimacy depends? Or, to put it another way, to what extent are radical claims co-opted in being represented as rights-claims to be adjudicated by reference to the authorising 'we' that is contested in the first place?

In response to this kind of probing, Habermas is forced to fall back on the principle of implicit consent to hold the place of the counter-factual consensus: 'The right to emigrate implies that membership must rest on an (at least tacit) act of agreement on the member's part' (1996: 124–5). But the tacitness of this act of agreement is precisely what is at stake in fundamental political conflict, which contests the terms of political association. Having recourse to the principle of tacit consent in the situation of indigenous people in Australia is clearly problematic, if not perverse. In cases such as this, the principle of tacit agreement – which amounts to 'if you don't like it you can always leave' – appears to rest entirely on the facticity of sovereignty rather than its validity.

Indeed, to exercise one's rights as a citizen of Australia, in this context, might simultaneously be to legitimate the monopoly over the means of violence assumed by the colonisers. This is why abstention from voting is a common form of political protest. Similarly, the recourse to legal remedies that rights make available may contribute to the further dispossession of a group within a nation-state. This was spectacularly witnessed, for instance, by the claims brought by indige-nous peoples to native title in Australia following the Mabo judge-ment, which effectively provided a legal means of extinguishing indigenous peoples' political claims to reparative justice by recourse to the facticity of sovereignty (see Motha 2002). As Kerruish and Purdy discuss, in making available the legal identity of 'native title claimant/holder' to indigenous people, Australian property law at the same time reinscribes the particular determination of the political unity that is at stake in the conflict between coloniser and colonised, namely that sovereignty was acquired through settlement rather than conquest (1998: 152f.). Indeed, it is precisely this presupposition that the tent ambassadors sought to contest by asserting the right that was not available to them in Australian law to demand a treaty with the invaders.

In certain circumstances, then, what Habermas calls the 'rational-ising character of the legal form as such' (1996: 126) can amount to just that: not an expression of an all-inclusive public reason but a rationalisation of political exclusion. Habermas acknowledges that the 'juridification of communicative freedom also means that the law

must draw on sources of legitimation that are not at its disposal'
(1996: 131). The question is how this is possible given his insistence
on the co-originality of sovereignty and rights and, hence, of the con-
stituent power as always already framed by the law. When under-
stood as such, how could law account for what is not at its disposal
except on its own terms? How might the extra-legal assertion of
Aboriginal sovereignty register as anything other than an 'absurd
proposition'?

Would indigenous peoples' unpopular claim to sovereignty fare
any better when understood in terms of the democratic paradox?
Mouffe's thematisation of agonistic politics certainly provides a
promising starting point from which to understand the political
conflict between settler and indigenous peoples in Australia. The
advantage of understanding democracy, in this context, in terms of
transforming an antagonistic relation into an agonistic one is that it
resists co-opting the political claims of indigenous peoples by repre-
senting these as already reconcilable with the claims of the settler
society.

As Mouffe puts it, 'agonism is a we/they relation where the com-
peting parties, although acknowledging that there is no rational solu-
tion to their conflict, nevertheless recognise the legitimacy of their
opponents' (1995: 20). The point of agonistic politics, as I understand
it, is that it recognises that politics ultimately concerns the terms
within which social conflict is represented; politics is the struggle to
determine the public good in terms of which one's interest might be
represented. As already noted, for Mouffe (contra Schmitt), it is the
appeal to human rights that enables this politicisation of the terms of
belonging within the political association. For, as a legitimating prin-
ciple of the regime, human rights provide the 'shared symbolic space'
that enables the casting of their conflict as 'social'. And, indeed,
indigenous people have often appealed to indigenous (human) rights
in their struggle for decolonisation.

Yet, as Paul Muldoon (forthcoming) has argued, the conflictual
consensus that Mouffe advocates ends up being limited to a struggle
within the (democratic) political association and consequently
according to the terms of inclusion that it already affords in appeal-
ing to its shared symbolic space. The political limits of democracy
come into view when conflict threatens the existence of the political
association. As Mouffe puts it, 'in order to be accepted as legitimate
[conflict] needs to take a form that does not destroy the political asso-
ciation' (Mouffe 2005a: 20). Passages such as this indicate the

limitations of the Schmittian conception of the political for a radical politics. In my view, a radical politics would precisely be one that would call into question the concrete manifestation of the political that delimits the terms of belonging within a particular political association. Indeed, it is precisely this (symbolic) threat that makes the assertion of Aboriginal sovereignty so unsettling to the settler society in Australia. Disturbingly, it seems that Aboriginal sovereignty might also amount to 'an absurd proposition' within Mouffe's framing of the democratic paradox because she understands the demos (with Schmitt) in terms of the determinate, concrete manifestation of the political while neglecting its symbolic, socially indeterminate aspect.

Conclusion

For indigenous people to effectively challenge the terms of their belonging within Australian society, they would need to be able to appeal not only to their human rights but to a notion of demos that would transcend its particular instantiation in the founding of the settler society. In other words, a radical politics must be able to contest a democratic regime in the name of democracy: to invoke the principle of equality in order to contest the exclusions of the demos's particular instantiation within a certain social order.[4] This, arguably, was precisely what the tent ambassadors sought to do in claiming a right (to sovereignty) that was not afforded to them by the liberal democratic order that they sought to contest. In Jacques Rancière's terms, it involved putting two worlds into one (2001: 21). On the one hand, they enacted their political equality by claiming to speak on behalf of a sovereign people. On the other hand, they demonstrated their social inequality as aliens in their own land. In this way, the tent ambassadors staged a dissensus by showing the world in which indigenous people are entitled to be addressed as a sovereign people and the world in which this sovereignty is in fact denied to be one and the same democracy that they share with their former colonisers.

Notes

1. Thanks to Keith Breen, Adrian Little and Moya Lloyd for their comments on an earlier draft of this chapter as well as to participants in workshops held in Melbourne and Florence in 2006.
2. I borrow this term from Bert van Roermund (2003) who uses it in a different but related context.

3. Indeed, this retrospective authorisation was arguably granted to the tent ambassadors by indigenous people. Despite the Minister for Aboriginal Affairs' claim that the 'campers' were unrepresentative militants, they were accorded full speaking and voting rights at a conference he convened of government-selected representatives of Aboriginal communities in October 1972. The conference passed a motion in support of the embassy, calling for it to be reinstated following its removal by police earlier that year.

4. In this regard, the recent work of Jacques Rancière (2004) is promising. See Schaap (forthcoming).