Article

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TRANSCENDING NATIONAL CITIZENSHIP OR TAMING IT ? AYELET SHACHAR'S *BIRTHRIGHT LOTTERY*

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ABSTRACT

Recent political theory has attempted to unbundle *demos* and *ethnos*, and thus citizenship from national identity. There are two possible ways to meet this challenge: by taming the relationship between citizenship and the nation, for example, by defending a form of liberal multicultural nationalism, or by transcending it with a postnational, cosmopolitan conception of citizenship. Both strategies run up against the boundedness of democratic authority. In this paper, I argue that Shachar adresses this issue in an innovative way, but remains ultimately trapped by it. My argument has two parts. In the first one, I look at the analogy between property and citizenship on which Shachar rely to justify the obligations of wealthy states towards the global poor. I suggest that it does not work well to explain the rarity of citizenship and that the idea of taxing its value at the global level, however intuitive in liberal theory on property, could yield unexpected and non-liberal consequences. Nevertheless I also assess its merits. In the second part, I suggest that Shachar's claim that her argument generates a legal obligation toward the global poor is not binding. It could only be so with the kind of cosmopolitan political institutions that she eschews. Thus we return where we begin.

RÉSUMÉ

La théorie politique récente a tenté de dénouer les liens entre le *demos* et l'*ethnos* dans les sociétés libérales, ainsi que le lien entre la citoyenneté et l'identité nationale. On peut répondre à ce défi de deux manières différentes : soit en apprivoisant le lien entre la citoyenneté et la nation, par exemple, en défendant une forme de nationalisme multiculturel libéral, soit en le transcendant à l'aide d'une conception postnationale ou cosmopolitique de la citoyenneté. Ces deux stratégies présentent toutefois des difficultés du point de vue de l'autorité démocratique. Dans cet article, je soutiens que Shachar apporte une contribution originale à ce débat, mais qu'en dernière analyse, elle demeure prisonnière de ce dilemme. Mon argument procède en deux parties. Dans la première, j'examine l'analogie entre la propriété et la citoyenneté sur laquelle Shachar fonde les obligations morales des États riches envers les pauvres. Je fais valoir qu'elle répond mal au problème de la rareté de la citoyenneté et que l'idée de taxer la valeur de cette dernière à l'échelle globale, pour intuitive qu'elle soit dans la pensée libérale, pourrait avoir des conséquences imprévues et non libérales. Je reconnais néanmoins ses mérites. Dans la seconde partie, je montre que la prétention de Shachar à l'effet d'avancer un argument qui comporte une obligation légale envers les pauvres de la planète n'est pas fondée. Elle ne pourrait l'être que si l'on disposait d'institutions politiques cosmopolitiques globales, une possibilité qu'elle rejette. Or, cela nous reconduit à notre point de départ.

Ayelet Shachar's new book addresses some of the most pressing issues of our times in a creative and theoretically innovative way. The two big ideas she proposes that will concern me here are first, the analogy between citizenship and property; and second, the attempt, through this analogy, to provide a new way of justifying the obligations of wealthy states and their citizens towards the global poor. I want to begin by making some general remarks about the relation between citizenship and membership and then turn to these two ideas. I will conclude with a brief set of critical remarks — or at least a puzzle — about what I take to be Ayelet's central moral claim.

1

There are at least three dimensions to citizenship: self-government, protection and membership. Citizenship is meant to embody our status as a member of a self-governing community, a status that is both legal and moral: It represents a form of public standing based on public recognition and respect (a status held by individuals, but whose value is communally generated, to borrow one of Shachar's formulations). As a citizen, I am not only both author and addressee of the law, but also offered protection with regard to some of my most basic interests, and entitled to a set of valuable goods and resources; that is, nothing less than the structure within which to lead a decent life. To become a citizen is to acquire, therefore, the capacity to some form of self-government and to become a member of a bounded political community. *Ethnos* and *demos* overlap when one's membership in a *demos* is linked in some way to one's membership of a particular national community.

In recent political theory there has been an attempt to unbundle *demos* and *ethnos*, and thus citizenship from national identity. The moral claim (aside from any empirical or pragmatic one) is that in diverse, multicultural societies, citizenship should not be dependent on national identity, since this would make the important goods linked to citizenship (autonomy, membership and protection), dependent on a potentially narrow and exclusive form of identity. There are, at least, two possible responses to this kind of worry: (i) to defend a form of liberal multicultural nationalism, such that citizenship and national identity overlap, but that national identity is multicultural and inclusive, as opposed to narrow and exclusive; and (ii) to detach citizenship from nationality and states in general, and link it instead to discourses of human rights and membership in some kind of global political community, cosmopolitan solidarity, or 'humanity'. The first move seeks to 'tame' the relation between citizenship and the nation, the latter to transcend it.[1]

Here we face a familiar paradox or tension: The universalism of our ethics — that each individual is of fundamental equal worth and dignity — runs up against the boundedness of democratic authority. To define citizenship, no matter how inclusively, requires saying something about who should be denied that status.

How can we justify such exclusions? A democratic people can't, by definition, democratically define itself, since in order to do so it would already need to be a people. For example, the Maastricht definition of European citizenship awards citizenship to members of any constituent state: this immediately excludes the large 'resident alien' population present in Europe — one upon which many European economies depend[2].

One of the most striking developments in global politics in recent years has been the rise of the discourse of human rights and the slow emergence of transnational modes of governance and rights protection (once again, the EU is an example). Thus cosmopolitan or postnational citizenship is the idea that citizenship is defined by one's membership not in any particular political community (and therefore vulnerable to being revoked or denied according to particularistic considerations), but by one's membership in 'humanity', or some kind of postnational political order. But for postnational or cosmopolitan citizenship to be meaningful it must be the case that cosmopolitan norms of justice are both binding outside of the state and authoritative within it. They can't simply be imposed on the basis of pre-given philosophical authority (either via God or Kant or whomever), but must appeal to some notion of democratic self-determination. Our universal ethics must be reconciled with the particularity of democratic authority and law. At the very least, the validity of cosmopolitan norms of justice must be grasped from within the perspective of the *demos* in some way. But here we face some difficult questions: Why and how would the *demos* incorporate those norms? How do we mediate between the seemingly unavoidable boundedness of democratic authority and the universal values associated with cosmopolitan justice[3]?

A number of political theorists have emphasized the extent to which citizenship and human rights are beginning to become entwined in various ways. One way to think of what is happening is the slow unbundling of rights from citizenship. That is, that the gap between the protections and obligations of citizenship and those owed to any person who finds themself within the boundaries of a state should narrow — and eventually disappear. Clearly, states and others have obligations to protect the basic human rights and liberties of whoever is present within their borders (as difficult as this has been to ensure in practice). A further claim is that states are obliged to enable non-nationals to secure the means to various other important interests — for example, to accommodate various religious practise, to provide voting rights, to provide access to education, welfare and other services. What is important to notice about this argument, however, is that it can go in two different directions.

If unbundling is not accompanied simultaneously by the liberalization of the means to become a citizen (ie. the liberalization of naturalization), then it risks entrenching a division between citizenship and what we might call *subjecthood*.

The distinction between citizenship and non-citizenship, in other words, becomes meaningful for all the wrong reasons. This is arguably what happened with Turkish migrants in Germany, where they were originally admitted as guest-workers and allowed to stay for long periods of time, but remained cut off from the full range of civil and social rights possessed by German citizens. There has been increasing debate about the extent to which greater rights and a more liberal naturalization process should be extended to migrants in Germany, as well as in other parts of Europe. To the extent that unbundling occurs without the liberalization of naturalization, it can entrench inequality as opposed to mediating it[4]. To the extent that unbundling occurs with the liberalization of naturalization, it arguably serves as a process of 'proto-citizenship' — socializing both non-citizens and citizens into the wider political system and helping to create the conditions for trust and legitimation of important political institutions.

But note how this argument repeats the tensions mentioned above. Is the idea that we should be seeking to transcend the nation-state and national citizenship altogether, or rather tame it by making national citizenship more inclusive and compatible with basic human rights norms? The problem is that almost every liberal democracy, Australia included, has at one time or another promoted a vision of national identity (and thus accompanying processes of naturalization and integration) that was hostile to many of the peoples seeking refuge on their shores (as well as those who were here long before European settlement). And this leads some to suggest we should renounce the link between citizenship and nationality altogether.

Consider, for example, the kind of language found in the recent *Becoming an Australian Citizen policy* document, one motivated by a desire to be more explicit about the nature of Australian citizenship[5]. The discussion paper refers to common 'Australian' values — such as respect for equal worth and dignity of the individual, freedom of speech and association — reflect "Judeo-Christian ethics, a British political heritage and the spirit of European Enlightenment"[6]. The idea of a citizenship test, in other words, seems targeted at a very specific sub-set of the population, as opposed to a genuinely inclusive community-building exercise. As I mentioned before, another key test is whether the push towards a more explicit definition of citizenship is accompanied by a liberalization of not only naturalization processes (which has occurred in Australia and Canada), but also the continued unbundling of rights and citizenship in relation to the most vulnerable non-citizens — eg. asylum seekers and refugees (which arguably has not).

However, as I have suggested, it is not immediately apparent that a notion of post-national citizenship can escape these tensions and dilemmas either. If there is such a thing of global citizenship then it remains vague and difficult to see how it can effectively deliver the goods of citizenship — self-government, protection

and membership. And it also remains to be seen to what extent the validity of the universal norms of justice to which it appeals can be grasped by a demos in such a way that they acquire genuine democratic authority.

2

As in her previous book, *Multicultural Jurisdictions*[7], in her new book Shachar takes aim at many of the standard distinctions and assumptions in the field and provides a fresh re-orientation of the existing conceptual landscape. In that earlier work, Shachar provided a deft diagnosis of the 'multicultural dilemma' ("your culture or your rights"), followed by an innovative set of arguments and case studies that sought to dissolve (or at least lessen) the dilemma through a careful balancing of the accommodation of cultural and ethnic difference with the rights of women and vulnerable minorities.

In *The Birthright Lottery*[8] she performs another set of deft conceptual manoeuvres. This time she takes aim at some of the dilemmas I have outlined above and at what she claims are the unjustified privileges encased in the principle of birthright citizenship, whether understood in terms of *jus soli* or *jus sanguinis*. If the goods and resources associated with citizenship of a particular political community are significant — as they clearly are — then how can the mere circumstances of birth serve as the core determinants of one's entitlement to these goods and resources? This way of framing the question has a very powerful effect of turning around a common perception about the moral basis of the relationship between citizenship and immigration — that citizenship (and thus immigration) is a privilege, whose distribution is a matter of discretion for those who already possesses it. Instead, Shachar asks whether our practices and policies are not, in fact, constrained by duties to those who are excluded from the goods of citizenship. Once again, she proposes a fresh angle on a familiar response to this challenge: She embraces neither the cosmopolitan open borders argument, nor variations of the communitarian and democratic self-government argument. Instead, she introduces the idea of a 'Birthright Privilege Levy' (BPL), which is essentially — given her account of citizenship as a form of property — an inheritance tax. So she assumes that bounded political communities will continue to exist and indeed that states will continue to be the dominant political form in global politics for some time to come, but proposes that we tax the benefits citizenship confers to improve the opportunities of those excluded by the boundaries of the well-off states.

One of the key planks in the structure of her argument is the analogy between citizenship and property. It's the key analogy in the book and much of her argument depends on our accepting it. Shachar provides two general pictures or conceptions of property, a narrow and a broad view. The narrow view she associates with the kind of 'possessive individualism' described by C.B Macpherson and Robert Nozick. According to the narrow view, the emphasis is on property en-

tailing a strong right to exclude others from what you legitimately own, and acts as an equally strong constraint on what can legitimately be asked of you in terms of your obligations to others. She ties this concept of property to a general conception of social life as well — one in which "all inter-social interactions are characterized as 'trades'" and where "social atomism and unrestricted commodification rule, and where self interest is the core motivation for human action"[9].

According to the broader view of property, on the other hand, property is understood not primarily as a narrow, exclusive right to the tangible things to which it often refers, but rather as a "human made and multifaceted institution that creates and maintains certain relations among individuals in reference to things" (27). As Jeremy Waldron puts it (cited by Shachar), property relations offer a "system of rules governing access to and control of scarce resources" (29). Ownership and possession of property affects peoples' life-chances, opportunities and freedoms and thus conflicting interests arise around access, use and control of those goods — both tangible and intangible — that are scarce. This means, argues Shachar, that changes in social relations and values will modify our sense of what counts as protected property as well as (at least potentially) what the very nature of property is. And here is where her argument goes to work: the claim is that (a) citizenship is indeed property in this broader sense; and (b) that we should thus modify our existing practices and understandings of citizenship as property in such a way that the social relations they generate (and reify) are transformed.

Citizenship is a form of property then, in the sense that "what each citizen holds is not a private entitlement to a tangible thing, but a relationship to other members and to a particular (usually the national) government that creates enforceable rights and duties"[10]. If so, then it follows that it is patently wrong to distribute citizenship on the basis of the circumstances of someone's birth given the entitlements it delivers to the holder. The fact that I was born in Montreal, have an Australian partner and live in Sydney should not be the crucial factor in determining whether my children will have the resources and opportunities to lead decent lives, as opposed to children growing up in Somalia. It's not that birthright citizenship creates global wealth disparities in itself, but that it reifies and perpetuates very different life prospects[11].

I want to pause here and consider the analogy between property and citizenship a bit more closely. There is no question that it is an enlightening way of approaching the issue of global justice and our obligations to those excluded from our borders. It is one of the important contributions this book makes to our thinking about global justice today. However, I think the analogy needs some further analysis.

Shachar wants to draw an analogy between the legal notion of entail — the hereditary transfer of an estate that binds the hands of future generations in var-

ious ways — and the 'entail' of political membership. The discrediting of the former should cause us to question the seeming continuation of the latter. This is a powerful analogy and quite persuasive. But at least in some respects, the entail of political membership strikes me as importantly different from the case of inherited property. Citizenship is (at least in principle) much more fluid and changeable in nature then property tends to be. This is partly to do with the fact that the determination of political membership involves the construction and exercise of a certain kind of group right. A polity is free to amend its definition of membership in a range of ways (even the boundaries of itself — although that raises a host of problems). Moreover it's not clear that citizenship is an inherently scarce good — like land or natural resources — but is made so by states. So although both property and citizenship can be inherited, they also strike me as quite different things in themselves. However, perhaps this begs the question that Shachar is ultimately posing about the relation between property and citizenship.

Shachar draws a fairly stark dichotomy between what is usually present in any reasonable conception of property. As we know from as far back (at least) as John Locke, property is both inclusive and exclusive in nature. To have property in something is to have the right to exclude others from it, but never absolutely and always subject to various other conditions. I can exclude strangers from my house, but not if they are starving, or in need of urgent shelter or protection. Shachar embraces a relational and non-exclusive conception of property, but in doing so she risks undermining the rationale for thinking about citizenship as property in the first place. If property is as non-exclusive and relational as she suggests then why focus on taxation at all? Why would anyone have the right to exclude others from their property in the first place? Why not simply cut to the chase and attack the idea of birthright citizenship directly?

The answer no doubt is partly linked to Shachar's desire to take states as they are, at least to a certain extent, as a concession to what is genuinely possible in the world today. And yet this move is aligned with — at least along one dimension — a fairly radical re-conceptualization of property as it is generally understood in the world, as we know it. On the other hand, Shachar is appealing to the eminent reasonableness of not allowing inherited wealth to account for large social inequalities, a principle many advanced democracies already accept. And so, if citizenship is akin to inherited property, and if most liberal democratic polities accept the legitimacy of some form of inheritance tax on intergenerational transfers of wealth, then most should also accept something like the BPL. However, persisting with the analogy to property does leave some hostages to fortune, just insofar as it risks (perhaps unintentionally) reifying the very exclusive aspects of the concept — however much Shachar wants us to embrace the inclusive and relational model[12]. One need only consider the debate over the repeal of inheritance tax in the United States to see how easily the core assumption at the heart

of Shachar's argument about the reasonableness of taxing intergenerational wealth can be undone[13]. The revaluation of what counts as protected property can go in many directions — not all of them welcome from the perspective of liberal justice.

But having expressed two concerns about the analogy with property, let me mention two ways in which the analogy is particularly helpful. First of all, the vision of an inclusive and relational conception of property that is shaped by a more complex sense of our relational and mutual obligations across borders is a very welcome contribution to debates around distributive justice more generally. It bears an intriguing resemblance to the way legal and political theorists have been thinking about the property rights of indigenous peoples, for example, and the way they can not only be accommodated within western legal systems, but help transform them as well.[14]

Secondly, the argument generates a nice analogy for the second part of Shachar's project — what she calls the 'jus nexi' membership rule[15]. If our legal systems can allow someone who possesses property belonging to another for a sufficient period of time without the owner's permission to acquire title to that property — so long as the occupation is peaceful, continuous and visible — then so should long term residents, having settled and participated in public life in various ways, be entitled to citizenship (as opposed to merely nominal heirs). This is an attractive way of rethinking what we mean by 'naturalisation'.

My final comment concerns Shachar's claim that her argument generates not simply moral but legal obligations towards the global poor. The core of her moral argument against birthright citizenship is that those of us who have benefited from the arbitrary distribution of advantages have a positive duty to help those disadvantaged (in morally unacceptable ways) from being excluded (compare this with Thomas Pogge's claim that wealthy states have a negative duty to not to contribute to the maintenance of structures that entail the violation of basic human rights)[16]. A legal system should not entrench barriers to equal opportunity on the basis of morally arbitrary traits like the circumstances of one's birth. Shachar claims that her proposal moves claims for redistribution "from the realm of charity or morality to that of legal obligation, one that grows coherently from the analogy to inherited property"[17]. But I am not sure that it does: Or at least, I am not sure I how it does in ways that Thomas Pogge or Peter Singer's arguments, for example, don't, which she seems to imply. What makes her moral claim any more likely to be legally binding than Pogge's or Singer's? The BPL certainly follows from her core moral claim, but that in itself doesn't establish its legal bindingness. Moreover, if it were to be genuinely legally binding, then it would seem to require the kind of cosmopolitan political institutions that she elsewhere eschews. How else would such a legal claim, for example, be enforced? This returns us to some of the paradoxes and tensions with which we began between cosmopolitan and national citizenship.

NOTES

1 This language is from Will Kymlicka. *Multicultural Odysseys: Navigating the New International Politics of Diversity,* Oxford, Oxford University Press, 2007.

2 Etienne Balibar, *We, The People of Europe? Reflections on transnational citizenship,* Princeton, Princeton University Press, 2004.

3 For reflections on this particular question, see for example Seyla Benhabib, Another Cosmopolitanism (Cambridge, Cambridge University Press, 2006).

4 Of course, in some cases, migrants might not want to naturalize and so the issue of subjecthood might not seem to arise. But I think in some circumstances, even if migrants do not wish to naturalize and therefore do not resent or feel constrained by barriers to naturalization, it might still be a problem from the perspective of egalitarian justice.

5 Attorney General's Office, Commonwealth of Australia (2007)

6 *Ibid*, p. 5.

7 *Multicultural Jurisdictions: Cultural Differences and Women's Rights,* Cambridge, Cambridge University Press, 2001.

8 *The Birthright Lottery: Citizenship and Global Inequality*, Cambridge Mass., Harvard University Press, 2009.

9 *Birthright Lottery*, p. 00

10 *Birthright Lottery*, p. 29

11 Birthright Lottery, p. 26.

12 I discuss the idea of rights more generally conceived as property in *Rights,* Stocksfield, Acumen, 2008, chapter 3.

13 See Michael J. Graetz and Ian Shapiro, *Death by a Thousand Cuts: The Fight over Taxing Inherited Wealth,* Princeton, Princeton University Press, 2005.

14 See some of the contributions in Duncan Ivison, Paul Patton and Will Sanders eds. *Political Theory and the Rights of Indigenous Peoples*, Cambridge, Cambridge University Press, 2000; also N. Pearson, "Principles of Communal Native Title", 5 (3), 2000, *Indigenous Law Bulletin*, p. 4; and some of the interesting comments in the judgment in Western Australia v Ward [2002] HCA 28, 8 August 2002. For the broader argument alluded to here see Duncan Ivison, *Postcolonial Liberalism,* Cambridge, Cambridge University Press, 2002.

15 *Birthright Lottery*, p. 185.

16 Thomas Pogge, *World Poverty and Human Rights,* Cambridge, Polity Press, 2002.

17 *Birthright Lottery*, p. 101