

Hobbes, Verschoor and a Legitimate Demos

Samuel Tschärner
Term Paper in the PLEP-Masterprogramm
Handed in to Prof. Markus Stepanians
University of Bern
20.09.2020

Content

0. Introduction	1
1. Hobbes' state and the boundary problem.....	3
2. The boundary problem and contractarianism.....	6
3. Verschoor's solution of the boundary problem	10
4. Discussion of Verschoor's solution	17
4.1 Hobbes' problem and Verschoor's solution	17
4.2 The democratic boundary problem and Verschoor's solution.....	21
5. Conclusion.....	24
6. Literature	25

List of Figures:

Figure 1: Prisoner's Dilemma in the state of nature, page 13.

0. Introduction

The line of argumentation in this paper is twofold. On one hand, it is inquired whether Hobbes' contractarian theory of state building becomes subject to the democratic boundary problem which is discussed intensively in recent political theory (e.g. Bauböck 2015; 2018; Dahl 1990; Goodin 2007; López-Guerra, 2005; Nasström 2007; Scherz 2013

Song 2012; Whelan 1983). On the other hand, a contractualist approach by Verschoor to solve the democratic boundary problem is considered and it is discussed whether it succeeds. The conclusion is going to be that although there is a problem in Hobbes' theory about constituting the group of individuals who covenant with each other which can be solved by Verschoor's approach, the problem should not be confused with the democratic boundary problem. Consequently, Verschoor's approach can with some slight adjustments answer an important question concerning Hobbes' theory of state formation but it cannot solve the democratic boundary problem. Concurrently, Hobbes' theory does not become subject to the democratic boundary problem.

The points made are interesting for two reasons: First, it gives an answers to a question about Hobbes' theory which he tacitly presumed. So, there is a point made in the context of research around Hobbes. Second, it is shown that Verschoor's approach cannot solve the democratic boundary problem. Nevertheless, it can solve a different problem, namely the problem of legitimately constituting the people in the framework of contractarian theories. So, there is also at least one important point made in the debate on the democratic boundary problem, namely that there are two very similar problems which are often taken to be the same. However, we should actually not confuse the two problems with each other. To achieve all this the structure of the paper is the following:

To understand the impression that Hobbes' theory of state formation may become subject to the democratic boundary problem, I first want to shed light on his theory. This will be especially important to check whether Verschoor's contractarian solution for the boundary problem is compatible with Hobbes' contractarianism. Since I am no expert on Hobbes, the reconstruction of his theory relies almost entirely on the work by Quentin Skinner and David Runciman.

In a second step I am going to introduce the democratic boundary problem. The section shows what the democratic boundary problem is and why one might think that it is identical to the problem which occurs in Hobbes' theory. The reason is, that the democratic boundary problem is often discussed as if there was no political authority which could decide how to constitute the demos. Hence, the democratic boundary problem is placed in a pre-political context. This seems to match well with the typical social contract theorist scenario.

In the third section, Verschoor's approach to solve the democratic boundary problem is presented where the contract-making procedure is conceived as an open and serial consensual binding procedure. The mutual consent as well as the openness and serial character of the procedure are taken to solve the problem how to constitute a demos legitimately.

Finally, in the last section I am going to argue for two things: First, Verschoor's approach can solve Hobbes' problem of legitimately constituting the multitude of individuals who are going to found the state. Second, Hobbes' problem is different from the democratic boundary problem and Verschoor's solution, although able to solve Hobbes' problem, is not able to solve the democratic boundary problem.

1. Hobbes' state and the boundary problem

Hobbes' account on the legitimate formation of a state and the legitimate political authority established therewith was developed in a turbulent time for politics in England which was also marked by severe disputes in political theory. As Skinner elaborates in rich detail (e.g. in 2002 or 2010), Hobbes places himself in the middle of a dispute between proponents of an absolutist theory of monarchism where the political authority of the king is derived from his divine rights and the popular theorists, namely the republicans and the still monarchistic „monarchomachs“, who ascribe more power or even the ultimate sovereignty to the people, (as Skinner calls them in 2002, 387 et seqq.).

Hobbes does not agree with the thesis of the absolutist monarchists that there is a divine right of reign but holds that only an authorized representative can bear the full political authority over the people because they are originally free from any political authority (Skinner 2010, 34-35). On the other hand, he refuses to accept the line of reasoning of the popular theorists. They argue that if the ultimate sovereignty lies with the people, then they would never give it up voluntarily (ibid., 33).

The republican theorists advocated that the only form of government which can maintain the freedom and thus the sovereignty of the people is the republic, where the members of government are merely elected officials which have to abide by strict rules imposed by the people (cf. Skinner 2002, 379-387). Consequently, from this perspective the people already had the absolute sovereignty before the formation of a state and keep it within the state. The monarchomachs, who were often still monarchists (ibid., 387), also believed

that human beings are originally free in their state of nature and would never give their freedom up voluntarily. At least they would not do so unconditionally. Hence, also in the view of the monarchomachs the king has to comply with rules defined in the contract between the king and the people. Under these conditions the people confer their authority on the king. Thus, the king nearly bears absolute sovereignty but still not quite. This is because the people always retain the right of resistance and to finish the reign of the king, if he does not comply with the conditions of his rulership (ibid, 388-389).

Hobbes does not want to accept the consequences from the popular theories. After all the political turmoil that led to the beheading of Charles I. in 1649, it is comprehensible that Hobbes feared that a division of sovereignty onto several institutions (e.g. people, parliament, king) would be a source of instability and ultimately result in chaos and civil war (cf. Skinner 2018, 218). Therefore, he plead for one political institution with absolute sovereignty, be it a king or an assembly. In a nutshell, he tried to give an account of a government which is installed and therewith legitimated by its subjects but which nevertheless bears absolute sovereignty. As Nasström (2007, 636) points out nicely, the problem which Hobbes tried to solve so vigorously in his *Leviathan* is that the political authority to be legitimate needs to be above the citizens and on the same time somehow identical to them.

The weak point of all popular theories which Hobbes attacked was their implication of a contract between the people and the institution bearing political authority. It presupposes that the people are able to act as one person and have the capacity to exercise a single will. This was to say, that there exists something like a unified people in the state of nature before any state and any political institution was founded (cf. Runciman 2000, 272; Skinner 1999, 18-19; 2002, 390; 2018, 211). Hobbes argues that it does not make any sense to talk about a unified people before the group of separate individuals becomes subject to a sovereign power. They are only a disunited multitude. Before the formation of a state all human beings live in solitude in a state of nature. In this state of nature anyone has to fear everyone else because human beings are equal enough that any person can be a threat to any other person (Hobbes 2015 [1651], 319). Hobbes writes further about the state of nature:

To this war of every man against every man, this also is consequent; that nothing can be unjust. The notions of right and wrong, justice and injustice have there no

place. Where there is no common power, there is no law: where no law, no injustice. Force, and fraud, are in war the two cardinal virtues. Justice and injustice [...] are qualities, that relate to men in society, not in solitude. It is consequent also to the same condition, that there be no propriety, no dominion, no *mine* and *thine* distinct; but only that to be every man's, that he can get: and for so long, as he can keep it. [...] The passions that incline men to peace are fear of death [...].¹ (Hobbes 2015 [1651], 321)

This quote not only does make it intelligible why Hobbes did not believe in a unified people that would have been able to negotiate with any aspirant for the position of rulership but is also going to be important below to understand Verschoor's solution to the boundary problem which Hobbes' account faces. Anyway, Hobbes' challenge is to contrive a procedure of state formation by a multitude of separate individuals in a state of nature and at the same time to secure absolute sovereignty to the government that is brought into existence by that very procedure. To achieve this, he introduces the concept of authorization.

By authorization Hobbes understands a voluntary transfer of rights from a represented entity onto a representative. The represented becomes the author of the actions by the representative. This means that he takes responsibility for the actions of the representative. Simultaneously, the represented gives up his rights to perform the concerned actions and to interfere with the action of her representative (cf. Skinner 1999, 9; 2010, 36). It is also possible that a person A authorizes a person B to act in the name of a thing, a non-person human being² or a fictional being C, if A owns C or has dominion over C either by bringing C into existence or by the power of the state (Skinner 1999, 17).

Although Hobbes saw possibilities to limit the scope of authorization or to attach conditions to it, they only pertained within the context of a state where contracts could be enforced by a superior political authority (Runciman 2009, 18). Thus, in the case where the governmental institution is authorized by the people, the authorization is absolute and unconditional. The individuals who authorize their ruler have to take

¹ The italics are not mine. Every omission of text is denoted by „[...]“.

² These would be minors or mentally disables individuals.

responsibility for all actions the ruler commits in their names. With this concept of authorization Hobbes secured the absolute sovereignty of the governmental institution. The procedure which brings about the legitimacy of the governmental institution without presupposing a unified people is the following (cf. Runciman 2009, 273; Skinner 1999, 19): Each individual covenants with each other individual in mutual and multiple acts of contract formation that they authorize a certain person or assembly G to act in their names, whereby G is no party of the contract.³ Subsequently, they are committed to take responsibility for the actions of G. This enables G to act and speak in a manner as if the representend individuals are a single unit because they all bear the responsibility for G's actions together. Thereby, the multitude becomes a unity, a „person by fiction“ (cf. Runciman 2000) which we call „the state“.

Since we are now in the know how Hobbes' account of state formation works, it is easy to recognize that he does not address the question who the individuals of the multitude are. He just starts his considerations from a presumed multitude of individuals and lets them covenant with each other. However, one could argue that if the legitimacy of the state depends on the covenant between the individuals of the multitude, it is an important question who should be part of the covenants that authorize the government, i.e. how the multitude should be constituted. For the state to be legitimate the multitude that brings it into existence should also be constituted legitimately.

The question about the constitution of the people is often debated under the name of the democratic boundary problem. In the next section the boundary problem is going to be introduced properly and some more points will be made why contractarian theories like Hobbes' might become subject to the democratic boundary problem.

2. The boundary problem and contractarianism

As Goodin (2007, 40) writes, one can describe a democracy semicircularly as an association in which a group of people makes collective decisions in a democratic way. He remarks next that democratic theory has mostly occupied itself with the questions about the democratic way of making decisions and meanwhile neglected all questions

³ That G is no part of the contract is obviously implied by Runciman and Skinner but is e.g. explicitly stated in (Nasström 2007, 637).

regarding the group of people that makes decisions in this way. Already Robert Dahl (1990) notes:

Strange as it may seem to you, how to decide who legitimately make up "the people"—or rather a people—and hence are entitled to govern themselves in their own association is a problem almost totally neglected by all the great political philosophers who write about democracy. I think this is because they take for granted that a people has already constituted itself. [...] If political philosophers have taken the answer for granted, you may think it foolhardy to pose the question. Let sleeping dogs lie.⁴ (ibidem, 46)

However, since this statement by Dahl the political theorists and philosophers have already made a bolt for what is nowadays usually called the problem of constituting the demos, the (democratic) boundary problem (as I am going to call it), the problem of a legitimate demos or the like and there is a quite remarkable debate going on about it (e.g. Bauböck 2015; 2018; Dahl 1990; Goodin 2007; López-Guerra, 2005; Nasström 2007; Scherz 2013 Song 2012; Whelan 1983).

The problem originates from the initially innocuous-looking question: „How should the group of individuals who have the right to make political decisions (within a democratic state) legitimately be constituted?“ In a merely theoretical context, where one theorist thinks about it in isolation, the question may not pose a considerable problem. However, in a political context the problem becomes unavoidable: How is a political community going to decide this question? For them to decide about the question presupposes that they have already decided about it.

The boundary problem is relevant for different reasons and concerns. As Goodin (2007, 40-41) points out it was mostly neglected by democratic theory and a solution would therefore be a big contribution to research about democracy. Scherz (2013, 1) argues in a similar direction but already hints at some practical implications, namely that if the legitimacy of the institution of the demos is in doubt, so are all its decisions and also its right to exclude others. These practical implications are also formulated as part of political considerations by Nasström (2007, 631) when she suggests that a solution to the boundary problem might be practically useful because unsolved problems in democratic theory could be used by antidemocratic forces to strengthen their position in politics.

⁴ Every omission of text is denoted by „[...]“

However, Goodin (2007, 43) argues that it is straight up incoherent to solve the boundary problem in the context of democratic politics. It cannot be solved by a vote of an electorate because the voters would become entitled to vote through that very vote. This paradox can be elaborated further than Goodin did by himself: Usually, the demos is understood as a group of individuals which legitimately hold the power to make political decisions. However, only by looking at a group of individuals, there are no indicators whether this group constitutes a legitimate demos, i.e. whether they hold this power legitimately. The very least there has to be for gaining an idea about the legitimacy of the demos is a principle of composition. The demos is taken to be legitimate if and only if it is in conformance with the principle. The paradox which some deem insoluble by democratic theory (cf. Nasström 2007, 644; Whelan 1983, 16, 40) is now this: If a current demos wants to decide which principle of composition it has to meet to be legitimate, there already had to be a decision over the principle of composition which renders the demos legitimate. This is the incoherency Goodin emphasizes. There is a logical impossibility in form of a vicious circle and „the vote does not concede legitimacy to the people. It presupposes it“ (Nasström 2007, 630). Therefore, within the philosophical debate the boundary problem is often understood as a pre-political problem. The authors ask how the group should be constituted before there is a decision-making body within the polity who can decide over this question.

Against this backdrop of the pre-political framing of the problem in the debate, it seems quite foreseeable that the boundary problem is taken to pertain to social contract theories. For answering question about building a legitimate state or government, establishing morality or principles of justice or a just structure of society, social contract theories usually do not give an account on the people who covenant with each other but presume a given people (Nasström 2007, 635; Verschoor 2014, 4; 2018, 4).

Contractarian theories, like Hobbes', are mainly based on two assumptions, namely that there is a state of nature without any rules or legitimate political authority and that there is a multitude of individuals who are rational and motivated to covenant with each other for their own advantage (cf. Cudd & Seena 2018). As we have seen above, Hobbes talks a lot about the state of nature. Furthermore, he has a lot to say about the properties of human beings who are situated in such a natural state (Hobbes (2015 [1651], Book I, 313-330). However, in spite of making it quite distinct that he does not believe in a united

group of individuals that exists before the founding of a state — as we also have seen above (cf. Runciman 2000, 272; Skinner 1999, 18-19; 2002, 390; 2018, 211) — he never addresses the question who the individuals of the multitude are who covenant with each other to build the state. Consequently, the legitimate composition of the multitude is of no concern for Hobbes and he only demarcates it from other multitudes over the shared enemies of the concerned individuals (Nasström 2007, 638).

However, as Nasström (ibidem, 635) points out, there are two different questions (or as she calls it „frameworks“) regarding legitimacy to find in social contract theories: one question regards the legitimacy of the government or state that is brought into existence by a social contract and the second question is about the legitimate constitution of the multitude of individuals who covenant with each other to bring the state into existence. If we only focus on the government question, there occurs the problem which Hobbes tried to solve so vigorously in his *Leviathan*, namely that the political authority to be legitimate needs to be above the citizens and on the same time somehow identical to them (ibid., 636). This is recognizable in his attempt to give the state absolute authority over his citizens while being constituted by them (ibidem; but also Runciman and Skinner). This was also expounded above.

On the other hand, according to Nasström (2007, 641) if we focus on the question about the legitimacy of the multitude, there is a need for the political authority to be prior but also simultaneously with the citizens. It needs to be prior in order that the boundary problem can be avoided because then the people do not have to decide who belongs to the people. At the same time, it needs to be simultaneous to the people because otherwise it could not have been legitimated by them. Her conclusion from this analysis is:

A fully legitimate people is indeed impossible to achieve, but therein resides its power.

The criteria of legitimacy make the people into a site of perpetual contestation. (ibid., 644)

And on a different page:

The gap in the constitution of the people is therefore not a problem. It is *productive*, a generative device that helps to foster ever new claims for legitimacy. (ibid., 626; original italics)

Her distinction of the different legitimacy questions within the social contract theories is of significant importance to see that there is an additional question to find in social contract theories, namely the question about the legitimacy of the people.

Thus, there is an open question in Hobbes' theory about the constitution of the multitude. Who should be able to covenant with whom to authorize a government and found a state? Obviously, this question cannot be decided by the individuals in a state of nature. To do so, they already would need to constitute a political community which can decide with a single will. Therefore, there really seems to be a kind of boundary problem for Hobbes' contractarian theory of state formation.

Within the debate on the democratic boundary problem many authors bring forward or discuss various principles of composition to decide whether a group of people who make political decisions is constituted legitimately. The most popular of these principles are the all-affected interest principles and the all-subjected to coercion principles. However, as Scherz (2013, 6) argues, the problem with these principle-based solutions is that they either are overinclusive, such that a (democratic) state could not function properly, or presuppose again a political decision to implement the principle. The above-mentioned vicious circle applies here again. Alternatively, the solution of the boundary problem should be of a procedural manner. For this reason, Scherz (2013) follows an account of Espejo (2011) which conceptualizes the people as a process. This account goes beyond the scope of this paper and would not be easily made compatible with Hobbes' theory. Thus, it is not of further interest here.

However, the solution of the democratic boundary problem brought forward by Verschoor (2014; 2018) is also procedural and explicitly built on a contractarian foundation. In the next section, his solution will be elucidated.

3. Verschoor's solution of the boundary problem

In two papers from 2014 and 2018 Verschoor tries to give contractarian solutions for the democratic boundary problem. For doing so, he starts quite exactly at the point where the last two chapters led to. He recognizes that social contract theorists generally neglected the question about the legitimacy of the people and took a given people for granted instead (Verschoor 2014, 4; 2018, 4). Furthermore, he finds that most authors concerned with the boundary problem hold, what he calls, an impossibility thesis. It

states that the boundary problem cannot be solved in a procedurally democratic way because it always results in an infinite regress. For Verschoor (2014, 3) a procedure counts as democratic, if it is based on the idea that political authority should be founded on mutual consent (Verschoor 2014, 3). Additionally, there has to be a form of collective decision-making which creates and sustains a common good (ibid., 16; 2018, 9). Obviously, this is a minimal conception of a democratic framework within which even Hobbes' theory can count as democratic.

It is important to remark that Verschoor's aim is not to solve the boundary problem in specific accord with Hobbes' contractarian theory. Rather, he wants to show that social contract theories in general (Verschoor 2018) or contractarianism in particular (Verschoor 2014) can account for the legitimacy of the people who covenant with each other, although they never addressed the problem explicitly in the past. For this reason, his layout of contractarianism is not specifically aligned with Hobbes' theory but is rather oriented towards the modern contractual theories by Gauthier (1986) or Buchanan (1975). Nevertheless, he explicitly includes Hobbes when he talks about contractarianism (2014, 5; 2018,7). Hence, I am going to accept his outline of contractarianism as presumptively concurring with Hobbes' account. This means I will not scrutinize and discuss all the elements which might still be under dispute among the proponents of different interpretations of Hobbes but accept the interpretation of Hobbes as true which is implied by Verschoor's characterization of contractarianism. Instead, I will only proffer critique where Verschoor's solution conflicts directly with the technical reconstruction of Hobbes' account presented above concerning the mechanisms of authorization and state formation. Verschoor describes the state of nature in contractarian theories as a state without morality. According to him (Verschoor 2014, 5), contractarian theories are accompanied by a constructivist approach to morality and a subjectivist theory of values. The quote of Hobbes in the first section emphasizes the plausibility of this interpretation. In the state of nature, before individuals meet and contract with each other to build a political community and agree on some rules for cooperation, there is no right or wrong, no justice or injustice. The value of objects or state of affairs does not exist objectively and independent of any human beings but is based on the desires or interests of people. Morality gets constructed by the people who agree with each other on rules and form a political community by concluding contracts. All individuals that have not contracted

with each other on the basis of mutual consent stay in a state of nature towards each other. In this state of nature, they do not have any duties or entitlements among each other, instead there is only positive liberty, i.e. free to do anything without any constraints. Hence, in the state of nature every person is for herself and does not have any rights or entitlements that would guarantee him safety of any kind. On the other hand, does an individual in the state of nature not have any duties or obligations towards others.

Individuals are taken to be equally free and sufficiently strong or rational to be a threat for anyone else and look to maximize utility according to their interests (ibid., 7, fn11). They are rational utility-maximizers and only contract with each other if it is in their self-interest which is based again on their subjective valuation of objects and state of affairs. The people who found a political community or a state are then understood as a „cooperative venture for mutual advantage“ (Verschoor 2018, 8). If they reach mutually compatible tenets and rules on which they can consensually agree, they create a political community in which they acknowledge a common political authority. Consequently, the community is exclusively constituted by the individuals who benefit from binding themselves to some negotiated rules and principles.

However, it is a well-known problem that in such a state of nature it seems to be irrational to cooperate because one can never know whether the counterparty is going to be deceiving and has actually no intention at all to fulfill the contract from the very beginning or if the counterparty is going to break the contract eventually after some time. This can be sketched as a normal-form game prisoner's dilemma as is intelligibly done by Gaus (2008, 106-108, see Figure 1 on next page).

Obviously, such prisoner's dilemma situation does not allow for rational individuals to cooperate with each other. If individual 1 cooperates she will always face the risk that individual 2 is going to betray her. This would mean that she loses everything and individual 2 would acquire everything that was hers. The same is of course true for individual 2. Thus, without any further conditions it is the most rational thing not to cooperate at all. To prevent the case of defection after some time of cooperation, Hobbes proposed to introduce a mighty government which punishes the defectors (ibid.).

		Individual 2	
		Defection	Cooperation
Individual 1	Defection	War (0,0)	Individual 1 kills, robs or enslaves individual 2 (4,-2)
	Cooperation	Individual 2 kills, robs or enslaves individual 1 (-2,4)	Peace (2,2)

Figure 1: Prisoner's Dilemma in the state of nature (this figure is patterned on the Figure 4-10 on page 407 of Gaus (2008)).

However, there is still the problem where one party has to fear that the other party has deceiving intentions and no plan to be cooperative in the first place. To solve this problem Hobbes' powerful government is not enough because it would never even be formed. Therefore, there must be some presumed conditions of cooperation which obtain. Otherwise it would never be rational for individuals in the state of nature to contract with each other. For this reason, Verschoor presumes the following conditions of cooperation (Verschoor 2014, 7; 2018, 8):

1. There is potential for mutually advantageous cooperation.
2. The individuals are capable and
3. they are willing to constrain their behavior towards one another.

These are the necessary conditions for cooperation. If these conditions prevail, the individuals can rely on each other's capability and willingness to cooperate as soon as the cooperation would be advantageous for them. Hence, it becomes possible for rational individuals to cooperate in the state of nature.

However, to solve the democratic boundary problem Verschoor adds two more conditions which he infers from the rationality and equality of the individuals and the three assumptions for cooperation. They hold that individuals

4. are open and

5. they negotiate serially (Verschoor 2014, 9; 2018, 8-9).

The openness follows from the assumption of rationality and equality about the individuals. If anybody can be a threat to anybody else, there is always potential for a benefit in cooperation because one does not have to fear for one's life or valued objects anymore. To assume that the individuals are not generally open to negotiate with anybody who comes along would contradict their conceptualization as rational agents. Consequently, the assumption of openness ensures that nobody is a priori excluded from negotiations (ibid.).

The fifth assumption is a direct criticism of the metaphor of the people gathering around the round table to negotiate how to set up a state which often comes into play in connection with social contract theories. The metaphor immediately prompts the intuition that there has to be a boundary problem because it suggests a determined group at a single point in time which makes political decisions, thereby bringing up the question who decided about the principle for legitimately constituting this group (Verschoor 2014, 8-9). However, this metaphor is misleading. Instead, the contracting between the individuals should be understood as serial. Any two individuals who do not have a mutual contract are situated in a state of nature in regard to each other. The four conditions of cooperation and the equality of the individuals determine that they should negotiate with each other to find out if their cooperation could be mutually advantageous. Hence, for every new individual that comes along, even after one has already covenanted with others, it is rational to negotiate with them such that no mutually advantageous agreement is missed.

On this basis, Verschoor characterizes the procedure of covenanting in a contractarian theory as a „open and serial consensual binding procedure“ (ibid., 4, 10). In general, the procedure can be understood as follows (cf. ibid., 10-11): For any random pair of individuals A and B who meet at a random point in time t_x in a state of nature, it will be the case that they engage in negotiations. The reason for this is the rationality and equality of the individuals and the prevalence of the conditions of cooperation. If they reach an arrangement which is mutually advantageous for both of them, they conclude a contract based on mutual consent, thereby forming a cooperative venture together. The mutual consent is justified again in terms of the given interests of each of them. Furthermore, the condition of serial negotiation means that if one of these individuals,

say B, later on at a point in time t_{x+1} meets a different random individual C, they will also engage in negotiations and form a cooperative venture if they can reach a mutually advantageous agreement.

To found a state and a political community on this basis Verschoor presents two possible views which he calls *individual contract view* and *social contract view* (cf. Verschoor 2014, 12-14).

In the former view⁵, the state is formed gradually by many different bilateral contracts over time. An individual A might hire an individual C for protection from violence against himself or objects he values, instead of being concerned about protecting himself and his valued objects all the time. Independent of this contract between A and C other individuals B, D, E,...,N_x might have the same idea and contract with C also independently of each other at different points in time such that C protects them from violence against themselves and objects they value. By protecting all her contract partners from external influences (non-contract partners) and by settling conflicts among her partners, C and her affiliates will build (in several independent bilateral contracts) the structures of a governmental apparatus and all institutions needed for a functioning state by division of labor, market pressures and rational self-interest.

In a „proper social contract view“, as Verschoor (2014, 12) calls it, all obligations and institutions are formed by a multilateral contract among all individuals involved (ibid., 13). In terms of the open and serial consensual binding procedure that he proposed, this means that all individuals involved (A, B, C, D,..., N_x) plus all individuals that will occur later on the stage will continually at different points in time decide in a collective manner about the features of their political association. This way, they form a political community and a state. Interestingly, Verschoor holds that Hobbes' account is a manifestation of this social contract view and he interprets Hobbes' contract of „every man with every man“ (ibid.) as such a multilateral contract. I am going to address the question to what extent these views are really corresponding with Hobbes' mechanism of state formation in the next section. For the conclusion of this section, it has still to be expounded, how all of these deliberations of Verschoor are intended to solve the boundary problem.

⁵ Verschoor refers to Nozick's deliberations in *Anarchy, State and Utopia* (1974, Ch. 2) which he says would be a Lockean version of this individual contract view of founding a state (cf. Verschoor 2014, 12, fn 15).

To understand Verschoor's basic idea for solving the democratic boundary problem his conditions for a democratic procedure, that were spelled out in the beginning of the section, need to be remembered:

1. The procedure has to be based on the idea that political authority should be founded on mutual consent. (Verschoor 2014, 3)
2. There has to be a form of collective decision-making which creates and sustains a common good. (ibid., 16; 2018, 9)

For the boundary problem to be solved, the group of individuals who found the state has to be a) legitimately constituted and b) the legitimization of the people must not lead into a vicious circle.

For understanding why condition b) is fulfilled, the distinction of output legitimacy and input legitimacy can be adduced. Bauböck (2015) used this distinction to argue that the problem of the vicious circle which consistently occurs in discussing the legitimate constitution of the people — as was already explained in section 2 — is due to the fact that the principles that are suggested for answering the question how to legitimately constitute the demos are concerned with the output of the process. They focus on how the output of the group is going to impact the individuals. However, to know how the output of the group will affect the individuals, one already needs to know how the group is constituted.

Verschoor's approach satisfies condition b) because the legitimization of the group who founds the state does not depend on the resulting state or on the impact it has on the individuals. Rather, he construes a situation in which every formation of a group is legitimate because it is based on consent. Who makes a contract with whom is not subject to any principle over whose legitimacy somebody should have already decided but it is random. Nevertheless, the situation does not allow that anybody is excluded from negotiations in advance. Hence, his legitimization of the people is input-based and can therefore redress the vicious circle.

The demarcation of the people is „random yet legitimate“ (Verschoor 2014, 13). It is random because the procedure takes place between all potential members of the people who happen to be around. Furthermore, because the procedure is open and serial nobody is excluded a priori and the procedure is repeated continuously for new potential members who happen to come across at a later point. Moreover, it is legitimate because the

demarcation is based on mutual consent which again is based on the coincidence of the interests of all the free and equal participants. Thus, his approach also fulfills condition a).

Obviously, this is true for both procedures of state formation which Verschoor presented. However, he argues that only in the social contract view the people can be democratically legitimate. This is due to the fact that in the individual contract view the people is an unintended side-effect of the procedure, while in the social contract view it is explicitly part of the decision of all the multilaterally contracting parties that they will form a political community. So, in the individual contract view the individuals do not actually consent to form a people. Thus, the constitution of the people in the individual contract view is legitimate, but it is not democratically legitimate (Verschoor 2014, 16-18). In contrast, the people constituted by the procedure of the social contract view are democratically legitimate under Verschoor's very weak conditions for a procedure to be democratic.

4. Discussion of Verschoor's solution

In the light of what was written in the previous sections, I want to make two points in this last section. First, I want to explain how Verschoor's solution solves the problem that occurs in Hobbes' contractarian theory of state formation even though both procedures Verschoor presents do not coincide with the procedure in Hobbes' account. Nevertheless, I want to argue in a second step that although his solution can answer the question who the individuals are that form the state and why they do so legitimately, it cannot solve the democratic boundary problem if we understand it as derived from the question who should be part of the demos, i.e. the group of individuals who have the right to make political decisions in a democracy.

4.1 Hobbes' problem and Verschoor's solution

As we have seen in the first section, Hobbes does not address the question who the individuals of the multitude are who covenant with each other to found a state. Although he explicitly does not believe in a people as a political community which could exist before the formation of a state, one could still argue that if the legitimacy of the state

depends on the covenants between the individuals of the multitude, it is an important question who should be part of the individuals among the contracts are concluded that bring about the state. If the state shall be legitimate, the multitude that brings it into existence should also be constituted legitimately. Furthermore, we have seen in the second section that within the discussion around the democratic boundary problem the question how to legitimately constitute the people is often set into a pre-political context because of the vicious circle that emerges when the demos has to decide how to constitute the demos. Nasström (2007) has even argued explicitly that there are two questions regarding legitimacy in social contract theories. One question about the legitimacy of the state and one question about the legitimacy of the multitude that creates the state.

Verschoor's work follows this idea of situating the democratic boundary problem in a pre-political context and focus precisely on this question about the legitimacy of the people within a contractarian framework. Therefore, it seems quite natural to assume that his approach might solve Hobbes' boundary problem.

The most obvious discrepancy between Hobbes' procedure of state formation and both procedures that Verschoor propounds is the inclusion of the government-elect into the contracting parties. In the individual contract view by Verschoor, all individuals contract independently with the government-elect at different points in time. In his social contract view, they all covenant with each other including the government-elect. In Hobbes' account, in contrast, the government-elect is no contracting party. Instead, the individuals of the multitude covenant with each other to authorize the government-elect, whereby the authorization is not understood as form of contracting. It could only be a form of contract in which the power of the representative is limited according to the authors wishes if the authorization takes place within a state where the government can supervise the contractual parties and enforce the compliance with the contract. However, in Hobbes account authorization that takes place in the state of nature has to be absolute and unconditional. It does not make sense to make a contract with the government-elect because nobody is going to supervise the compliance with the contract. Therefore, Hobbes claimed that the only possibility the individuals have to form a state is to covenant with each other to authorize the government-elect without imposing any conditions.

Furthermore, Verschoor thinks that the social contract view would correspond more with Hobbes' account than the individual contract view and that only the former can yield

democratic legitimacy for the people. However, it is not evident at all that Hobbes would have accepted a social contract view because it seems too demanding for a multitude. If there is no political community that is able to contract with a potential government but all individuals live in solitude and meet always with at least latent hostility, then they are probably not able to meet all together and negotiate a social contract. Hence, the individual contract view seems to be the more plausible option for Hobbes. Moreover, Hobbes was not concerned with the *democratic* legitimacy of the people. He argued specifically against the idea of a democracy because he was afraid that it would be unstable and lead to war.

Nevertheless, despite these discrepancies Verschoor's deliberations can answer the question about the legitimacy of the group of individuals who form the state in Hobbes' account. Verschoor's procedures do not necessarily rely on the government-elect being a contracting party. Even if the individuals do not contract with the government-elect but only among themselves, Verschoor's open and serial consensual binding procedure can still be applied — at least within an individual contract view. The individuals are equal and autonomous in their decisions and nobody is excluded a priori from negotiations. When they authorize the potential government, they do it consensually. There is only one issue in Verschoor's procedure which might be problematic for Hobbes' account, namely the serial character of it. This can be illustrated in a simplified example: If A covenants with B based on mutual consent to authorize G to represent and govern them, who covenants with C who comes around later? A and B gave up their right to covenant with C when they authorized G to represent them in an absolute manner but, according to Hobbes, C cannot covenant with G.⁶ One solution seems to be that C has to find another individuals D such that they can covenant with each other and authorize G. However, this solution seems unsatisfactory. If there are no connections between the covenants and their parties, an explanation is required why G should represent A, B, C and D as one group with the same interest and not A and B as one group and C and D as another group. Moreover, it would not match Hobbes' statement that every man covenants with every man. The solution seems to be that C does not covenant with G

⁶ This problem arises for Hobbes' account even independently of Verschoor's version of the contractual procedure. If Hobbes wants that the individuals covenant every man with every man at one point in time, he has to explain why they are politically cooperative enough to contract with each other but not to form a contract as a political group with the potential government. On the other hand, if he thinks that they make individual contracts at various points in time and independently of each other, the problem that I describe above arises again.

but with A and B represented by G. This creates a different puzzle in interpreting Hobbes because it could mean that C covenants with the state, since the state is the united group of individuals represented by G. However, this is a further matter of interpreting Hobbes which I am not going to tackle here. To make my point I only want to advert to some options of interpretation for solving this problem:

1. A and B are still allowed to covenant with C although they already authorized G. Here one would have to explain why this is not a right they passed on to G. One answer not far to seek would be that individuals in a state are usually still aloud to make contracts. There is no hint that this would be different in Hobbes' state.
2. G covenants with C not as a representative of the united group of A and B but in the name of each of them separately.
3. G covenants with C as a representative of the state but because G is also the one who will supervise and enforce the contract, G is not going to allow that C imposes conditions on the power of G. This option might be attractive regarding the fact that naturalization (becoming a member of the state) is nowadays usually a task performed between the state and the person who wants to become a citizen.

Whichever of these options is best suited to interpret Hobbes, it does not change the procedure to be open, serial and consensually binding.

Thus, the people in Hobbes's theory of state formation can be constituted legitimately, albeit not with *democratic* legitimacy. Putting the solution into a dialectical nutshell: Hobbes would say that there is no group of individuals that could be constituted legitimately before the formation of the state. Additionally, Verschoor would say that before the formation of a state or of a political community nobody is entitled to require the legitimacy of anything. Legitimacy is a normative category which only makes sense within a political community or a state. Nevertheless, critics may object, after the formation of the state there is a united group of people in Hobbes' theory and Hobbes does not consider whether this group is constituted legitimately. Based on Verschoor's elucidation of the procedure and the conditions within the state of nature the reply to this criticism might be the following: The group of people is constituted legitimately for the people within the group because they all consensually agreed on it. The people that

are excluded were not excluded a priori and they still have the chance to join. However, they have no entitlement to demand anything from the political community or its members because they are still in a state of nature in regard to them. Therefore, the united group of individuals in a state is legitimately constituted for all its members and this is all that matters in a contractarian framework.

Thus, if Hobbes' theory of state formation raises a boundary problem about the individuals who found the state, it can be resolved by the elucidations of Verschoor.

4.2 The democratic boundary problem and Verschoor's solution

Although Verschoor's deliberations explain how the people in Hobbes' account are constituted and why they are constituted legitimately this way, it is not evident that his contractarian approach to solve the democratic boundary problem succeeds. The problem is not that within Hobbes' account the social contract view is not applicable and therefore the people is without democratic legitimacy in Verschoor's sense. Rather, Hobbes' problem seems to be distinct from the democratic boundary problem. Generally, the problem of the legitimacy of the people within social contract theories elaborated by Nasström has to be kept apart from the democratic boundary problem. Consequently, there are three different problems concerning legitimacy:

1. The problem about the legitimacy of the government or the state. (LoS-problem)
2. The problem about the legitimacy of the people who found the state. (LoP-problem)
3. The problem about the legitimacy of the demos, i.e. the group of individuals who have the right of political decision-making within a democratic state. (democratic boundary problem = LoD-problem)

The first two are necessarily involved in a social contract theory, as Nasström (2007) points out. However, the democratic boundary problem is not. Thus, Verschoor's efforts target the wrong problem, namely the LoP-problem. However, even if his approach is applied to the LoD, it cannot solve it in a plausible manner.

The difference between the LoP-problem and the LoD-problem lies already in their presuppositions. To ask about the legitimacy of the demos only makes sense within a democratic state or at least within a legitimate state that is envisaged to become a democracy. Bauböck (2018, 7-18) argues explicitly that problems about democratic

inclusion should only be addressed by assuming already existing boundaries of political communities in regard to territory and membership, while the boundaries of territory and membership do not have to match up. He takes it to be essential to place the democratic boundary problem into a context of a polity which is surrounded by other polities because these are the general circumstances of democracy which describe the general empirical conditions under which democratic self-government is possible. In such a context there are also entitlements, rights and duties that have to be considered. However, the LoP-problem is situated in a completely different context. There are no rights, entitlements and duties of any kind in the state of nature and as Hobbes' theory illustrates the state which is going to be created does not have to be a democracy. Thus, Verschoor's deliberations can account for the LoP-problem but it is not immediately apparent whether they can solve the LoD-problem.

Verschoor's approach can be categorized as a consent theorist view on the democratic boundary problem. Whelan (1983) characterizes the content of that view in the following manner: Political authority can only be legitimate and create a valid obligation for a person if the person has consented to it. Since the demos arrogates political authority it should be regarded as a kind of voluntary association and a person can only become a member if she consents and if the members of the association consent. This coincides with Verschoor's idea of an open and serial consensual binding procedure. As Song (2012) puts it, in this view democracy is merely a method of decision-making for a certain group and who is allowed to make the decision is arbitrarily decided by the members of the group. There is no underlying democratic principle. There are only the assumptions about the individuals in the state of nature that they are equal and that they know what is best for themselves. However, as Hobbes' theory illustrates again, the procedure does not have to result in a state where these features of human beings should be preserved by normative principles which are fundamental for liberal democracies. Since Hobbes' procedure is a special case of Verschoor's procedures, the latter are not situated in a context of democratic polities and furthermore do not have to result in such circumstances.

However, as Scherz (2013, 1-2) points out pellucidly, the concept of the demos has a normative dimension. Although, we can characterize the demos descriptively as the group of people who have the right to make decision in their polity, there would still be missing

an element for a proper understanding of the concept. This becomes apparent, if we imagine, someone would apply the concept to the king in a monarchy or the group of rulers in an oligarchy. Despite correctly picking out the group of individuals who have the right to make decisions in their polity, we would consider the concept to be applied in a wrong way. Hence, there is this normative intuition to the concept of a demos that a group of political decision-makers need to include more people than just one person or even a handful of picked individuals to be a demos.

If one would ask, how many people with voting rights it takes to make a group the demos of a polity, the simplest and most natural answer would probably be, that all adults of the polity which are not mentally disabled need to be included. An argument for this democratic principle of inclusion, originally put forward by Robert Dahl (1998), is reconstructed by Lopez-Guerra (2005, 219). According to this reconstruction, it is the principle of intrinsic equality and the presumption of personal autonomy which grant this conclusion. The principle of intrinsic equality claims that nobody is intrinsically superior to another person and therefore everyone's interest should be equally considered. The presumption of personal autonomy in turn purports that for every (adult and sane) person should be assumed that she usually knows best what her own interests are and is the best judge about the measures which are in her interest. Both these assumptions are commonly taken as essential criteria for a democracy. Thus, as a consequence of these assumptions, a democratic principle of inclusion seems to be essential for the concept of the demos.

The usual criticisms against the consent view which can also be hold against Verschoor's approach is then that it does not consider the values which are preconditions for a democratic state, that it is ethically arbitrary and leads to absurd consequences (Song 2012)⁷, that it would leave many people excluded from any voting rights because of its arbitrariness and if one would want to restrict the arbitrariness one would be back at finding valid inclusion principles (Goodin 2007).

A consent theorist might argue that his theory does not clash with Dahl's democratic principles. If people consent to each other to obey decisions they make based on a majority rule, neither of the two principles is infringed. Moreover, if one is not accepted

⁷ The point of absurd consequences is often made by citing Dahl's reply to Schumpeter's consent theory. Dahl argues that, if Schumpeter is right and every group that votes is democratic then the south of the US was democratic even at the time when people of color were not able to vote (see the citation of Dahl in Song 2012, 42)

into the voluntary association kind of a demos this does not mean that the interests of that person are valued less (than for example of the person who does not give her consent for the admittance) or that someone's autonomy would be subverted. Therefore, the arbitrariness behind the consent does not matter.

The problem with this answer is that it neglects one essential feature of the political authority of states and governmental institutions like a demos, namely territoriality.⁸ As Whelan (1983, 24-28) points out, (democratic) states are territorial and compulsory and a person usually is not asked to consent to its authority but becomes a member by birthright instead. To maintain the claim that membership still is a matter of consent people should have a right to move freely and chose their state or set up their own state by having a right of secession. Neither a right of free migration nor a right of secession is usually granted to people by democratic states. Additionally, Whelan submits that the idea of a world inhabited by people with perfect mobility who decide which state they like most undermines the idea of a contractarian idea that states are established on a voluntary basis.

As soon as territoriality is considered, a consent theory immediately faces the problem that people who live within the territory may not be admitted to the demos. In this case, consent theory does in fact conflict with the democratic principles because it does not respect the presumption of individual autonomy and the principle of intrinsic equality. However, if territoriality is an essential feature of states and political authority and the necessary conditions for a democracy are existing polities and if that is the context of the democratic boundary problem, then consent theories are unable to solve the democratic boundary problem.

Thus, since Verschoor's solution to the democratic boundary problem can be categorized as a consent theorist approach, it cannot solve the democratic boundary problem.

5. Conclusion

In this paper I have argued two things: First, there is a question about the legitimacy of the multitude of individuals who found the state in Hobbes' contractarian theory of state formation. This problem can easily be mistaken for the democratic boundary problem.

⁸ See for example Moore (2020)

Furthermore, it can be solved by an approach presented by Verschoor with the goal to solve the democratic boundary problem.

Second, although Verschoor's approach can solve Hobbes' problem of the legitimacy of the multitude, it cannot solve the democratic boundary problem. On the one hand, this is because they are two different problems which presuppose two very different contexts. The legitimacy of the people in a contractarian scenario presupposes a context characterized by a state of nature, while the democratic boundary problem presupposes the context of a democratic state or at least a state which is envisaged to become such a democratic state. On the other hand, even if Verschoor's solution is applied to the democratic boundary problem and its appropriate context, it does not take into account the territoriality of the political authority of a demos or a state. For this reason, it is not able to consider the principles which are taken to be essential for a liberal democracy, namely the democratic inclusion principle. Thus, it cannot solve the problem of how to constitute a legitimate demos.

6. Literature

- Bauböck, R. (2015) Morphing the Demos into the right shape. Normative principles for enfranchising resident aliens and expatriate citizens, in *Democratization* 22, 820-839.

Link: <http://dx.doi.org/10.1080/13510347.2014.988146>.

- Bauböck, R. (Ed.) (2018) *Democratic inclusion*, Manchester, England: Manchester University Press. Link: <https://doi.org/10.7765/9781526105257>.

- Buchanan, J.M. (1975) *The Limits of Liberty. Between Anarchy and Leviathan*, Indianapolis:

Liberty Fund.

- Cudd, A. & Seena E. (2018) Contractarianism, in: E.N. Zalta (eds.), *The Stanford Encyclopedia of Philosophy*.

Link: <https://plato.stanford.edu/archives/sum2018/entries/contractarianism/>.

- Dahl, R.A. (1990) *After the Revolution. Authority in a Good Society*, New Haven & London: Yale University Press.

- Dahl, R.A. (1998) *On Democracy*, New Haven, Conn.: Yale University Press.

- Espejo, P.O. (2011) *The Time of Popular Sovereignty. Process and the Democratic State*, The Pennsylvania State University Press.

- Gaus, G.F. (2008) *On Philosophy, Politics, and Economics*, Wadsworth, Cengage Learning.
- Gauthier, D. (1986) *Morals by Agreement*, Oxford: Oxford University Press.
- Goodin, R. E. (2007) Enfranchising All Affected Interests, and Its Alternatives, in *Philosophy & Public Affairs* 35, 40-68. Link: <https://doi.org/10.1111/j.1088-4963.2007.00098.x>.
- Hobbes, T. (2015 [1651]) *Leviathan*, in: S.M. Cahn (Eds.), *Political Philosophy. The Essential Texts*, New York, Oxford: Oxford University Press, 312-343.
- López-Guerra, C. (2005) Should Expatriates Vote?. in *Journal of Political Philosophy* 13, 216-234. Link: <https://doi.org/10.1111/j.1467-9760.2005.00221.x>.
- Moore, M. (2020) Territorial Rights and Territorial Justice, in: E.N. Zalta (eds.), *The Stanford Encyclopedia of Philosophy*.
Link: <https://plato.stanford.edu/archives/sum2020/entries/territorial-rights>.
- Nasström, S. (2007) The Legitimacy of the People, in *Political Theory* 35, 624-658.
Link: <https://www.jstor.org/stable/20452587>.
- Nozick, R. (1974) *Anarchy, State, and Utopia*, New York: Basic Books.
- Runciman, D. (2000) What Kind of Person is Hobbes's State? A Reply to Skinner, in *Journal of Political Philosophy* 8, 268-278. <https://doi.org/10.1111/1467-9760.00102>.
- Runciman, D. (2009) Hobbes's theory of representation: Anti-democratic or proto-democratic?, in: I. Shapiro, S. Stokes, E. Wood, & A. Kirshner (Eds.), *Political Representation*, Cambridge: Cambridge University Press, 15-34.
Link: <https://doi.org/10.1017/CBO9780511813146.003>.
- Scherz, A. (2013) The Legitimacy of the Demos: Who Should Be Included in the Demos and on What Grounds?, in *Living Reviews in Democracy* 4. Link: <https://doi.org/10.5167/uzh-91127>.
- Song, S. (2012) The boundary problem in democratic theory: Why the demos should be bounded by the state, *International Theory* 4, 39-68.
Link: <https://doi.org/10.1017/S1752971911000248>.
- Skinner, Q. (1999) Hobbes and the Purely Artificial Person of the State, in *The Journal of Political Philosophy* 7, 1-29. Link: <https://doi.org/10.1111/1467-9760.00063>.
- Skinner, Q. (2002) From the state of princes to the person of the state, in *Visions of Politics*, Cambridge: Cambridge University Press, 368-413.

Link: <https://doi.org/10.1017/CBO9780511613777.017>.

- Skinner, Q. (2010) The sovereign state: A genealogy, in: H. Kalmó & Q. Skinner (Eds.), *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept* (pp. 26-46). Cambridge: Cambridge University Press.

<https://doi.org/10.1017/CBO9780511675928.002>.

- Skinner, Q. (2018) Hobbes on Political Representation, in *From Humanism to Hobbes: Studies in Rhetoric and Politics*, Cambridge: Cambridge University Press, 190-221. Link:

<https://doi.org/10.1017/9781316415559.010>.

- Verschoor, M. (2014) The quest for the legitimacy of the people: A contractarian approach, in *Politics, Philosophy & Economics* 14, 391-428.

Link: <https://doi.org/10.1177/1470594X14564506>.

- Verschoor, M. (2018) The democratic boundary problem and social contract theory, in *European Journal of Political Theory* 17, 3-22.

Link: <https://doi.org/10.1177/1474885115572922>.

- Whelan, F. G. (1983) Prologue: Democratic Theory and the Boundary Problem, in *Nomos* 25, 13-47. Link: <https://www.jstor.org/stable/24219358>.