

A Human Right to Democracy?

Fabienne Peter¹

University of Warwick

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1. Introduction

There is something counterintuitive about imposing democracy on peoples. In the recent debate in political and legal philosophy, many have argued against the human right to democracy, often on grounds of its conflict with another right, the right to self-determination (e.g. Cohen 2006; Lister 2012; Reidy 2012). The thought is that the human right to self-determination, which allows peoples to choose their own constitution and development, would be undermined by the human right to democracy, which requires a specific constitution and thus restricts developmental choices.

Thomas Christiano, in his contribution to this volume, challenges this line of thought. He argues that, properly understood, the right to self-determination presupposes the right to democracy.

Christiano's argument reverses the order of priority between the two rights. He aims to show that the right to democracy has priority over the right to self-determination. But he also wants to argue that affirming the priority of democracy need not imply reserving the right to self-determination to democratic peoples. The innovative core of his paper consists in his proposal for how the right to

¹ I greatly benefitted from a series of workshops on human rights that Rowan Cruft and others organized at the University of Stirling. I'm also very grateful for comments I've received from Tom Christiano and Massimo Renzo.

democracy can be made compatible with the right to self-determination even for peoples that are not democratic.

Christiano's argument involves the following main steps. He first defends the human right to democracy, both on instrumental and on intrinsic grounds. He then moves on to the right to self-determination and offers an interpretation of this right as grounded in the protection of the same interests as the right to democracy. This step aims to establish that there is no necessary conflict between the two rights.² The final step of the argument covers the case of the right to self-determination of undemocratic states. Christiano handles this through the introduction of a power to waive the right to democracy. He writes: "it makes sense to think that there is a power to waive one's right to democracy because this power can be grounded in the same interests in asserting control over one's political world that the claim right to democracy is grounded in" (ms p. 22). While the right to self-determination is thus contingent on the right to democracy, since the right to democracy, like many other rights, is one that can be waived, self-determination is possible even for certain non-democratic states.

Christiano's argument for the priority of democracy is intertwined with an interest-based, moral conception of human rights. On this interpretation, the case for the human right to democracy rests on the moral goods that democracy protects. And the case for the compatibility between the human right to democracy and the human right to self-determination rests, similarly, on the fact that the two rights protect the same moral goods. Both the right to democracy and the right to self-determination are defended as minimal requirements of justice.

Those who reject the human right to democracy tend to reject the sufficiency of such justice-based arguments for establishing a human right. They tend to argue that human rights are and should be distinct from moral rights based on justice – because of what human rights are and/or because of

² Gould (2006) and Altman and Wellman (2009) have also offered interpretations of the right to self-determination as requiring democracy.

how human rights are justified. They don't deny that there is a connection between justice and democracy for some societies. But they deny that this connection is sufficient to underpin the human right to democracy.

There are two main ways in which the case can be made.³ The first focuses on the nature of human rights. It stresses the functional role of human rights, for example with regard to the justification of third-party interventions or the exclusion from the international community. The second focuses on the justification of human rights and appeals to non-parochial normative foundations for human rights. In John Rawls' treatment of human rights, as well as in some other approaches, the two aspects are not sharply distinguished but are jointly invoked in support of a political conception of human rights that can underpin international legitimacy.

In this comment, I shall side with those who reject the justice-based case for the human right to democracy, focusing on the justificatory challenge that human rights face.⁴ My sympathies are with the political conception of human rights. I think it is a mistake to think about human rights in straightforwardly moral terms, as discovered rights that explicate certain universal moral facts. This strikes me as empirically and historically inadequate. It also obscures the significance of the achievement of contemporary human rights practice, namely that the practice has created a standard for international political legitimacy. Human rights apply to national, international and global politics. This standard is not set in stone, of course: human rights are a work in progress and as such subject to both negative criticism – focusing on problems of the current set of standards – and positive criticism – proposals for what should be included. But while the achievement may be fragile, this does not lessen the normative significance of the political project, it seems to me. Vice versa, the attempt to overcome this fragility by providing moral foundations to this project risks being too parochial to be successful.

³ I'm using Tasioulas's (2009) helpful distinction here.

⁴ It is based on ideas that I've developed more fully in Peter (2013a).

I think Christiano’s argument for the human right to democracy fails because it doesn’t sufficiently address the justificatory challenge. My comment doesn’t focus on the conflict between democracy and self-determination, however. I think Christiano is right to question the priority of the right to self-determination. Instead, I shall contrast the justice-based argument for a human right to democracy with a legitimacy-based argument for a human right to political participation – I understand the right to political participation in a weaker sense than the right to democracy. But I will discuss the implications of this right to political participation for self-determination in the final section.⁵

2. Two Conceptions of Human Rights

Christiano provides a moral defense of the human right to democracy. The defense rests on two claims: (i) that human rights are best interpreted as minimal norms of justice and (ii) that minimal justice requires democracy. Let me discuss them in turn, starting with the conception of human rights.

The normative commitment at the core of Christiano’s moral defence of the human right to democracy is that each person’s interests deserve equal consideration. This normative commitment explains both the significance of human rights and the value of democracy. Adapting a Millian thought, human rights are moral rights grounded in the protection of important individual interests. A moral right to x is a human right when the interests are such that there is “a strong moral justification for any state to respect, protect, and promote a legal or conventional right to x in all persons” (ms 3). Not all moral rights will pass this test and so not all moral rights are necessarily human rights.

⁵ I shall follow Christiano by focusing only on political participation in the domestic context. In Peter (2013a) I’ve commented on the possibility of broadening the right to political participation in the international and global context.

This conception of human rights follows the orthodox pattern. The orthodox conception contrasts with a political conception of human rights with regard to both the nature of human rights and the justification of rights. On the orthodox conception, human rights are moral rights that all human beings have qua salient features of their humanity. Salient features may relate to fundamental interests (e.g. Raz 1986) or basic aspects of human agency (e.g. Griffin 2008). On the political conception, human rights are a set of special rights that have their origins in salient features of contemporary human rights practice (Beitz 2009). Different conceptions identify different features of this practice as salient.⁶

With regard to the question of what justifies human rights, defenders of the orthodox conception typically maintain that ordinary moral reasoning is necessary and sufficient to establish what should count as a human right. Defenders of the political conception, by contrast, typically maintain that human rights are based on political norms and established by some form of public reason or public reasoning.

There are important objections to the orthodox conception of human rights. One concerns the justification of human rights. If human rights are to function as a standard of international political legitimacy, they need a non-parochial justification. The objection against the orthodox conception is that ordinary moral reasoning produces disagreement and as such cannot justify human rights.

⁶ Note that in addition to these pure forms of the traditional and the political conception of human rights, some writers have recently proposed mixed conceptions. Joseph Raz (2007, 2010) is, I think, best understood as defending a mixed conception. He accepts the political conception with regard to the first dimension – with regard to the question of what human rights are. But he combines this with the view that what justifies human rights is ordinary moral reasoning. Rainer Forst (2010) is drawn to the opposite move: he defines human rights on the basis of salient features of human agency, but answers the question of how they are justified by invoking an account of public reasoning.

I don't think Christiano has a good answer to this objection. He may claim that while moral disagreement is indeed common, it will be less common with regard to the minimal requirements of justice on which his account of the human right to democracy rests. That may or may not be so; it's an empirical question. But my point is that when disagreements do occur about how societies should be organized, the orthodox account doesn't have a strategy to confront them. Instead, it merely asserts one blueprint for how society should be organized.

When Rawls originally came up with the idea of a political conception of justice for the domestic case of liberal democracies, he proposed to circumvent controversies about the morality of justice by developing a conception of justice based on fundamental political values embodied in democracy (Rawls 1993). The thought was that while we might disagree about the good, we can agree that we live in a democracy and that a democracy is based on certain values. Defenders of a political conception of human rights are drawn to the same thought: while we are likely to disagree about what makes a life go well and what people need to make their lives go well, we can agree – and that's the achievement of the contemporary human rights practice – that there is such a thing as a human rights practice and that this practice is associated with certain political norms and values. Reference to salient features of the contemporary practice offers a way of settling disagreements that are likely to arise about human needs and interests.

A second important objection to the orthodox conception is that it has the wrong account of what human rights are. This objection comes in several versions. One focuses on the account of universality that the orthodox conception gives rise to. With regard to basic human rights at least, the orthodox conception appears to be committed to a timelessness about human rights that doesn't sit well with human rights practices. Human rights are not timeless, but that doesn't mean that they are not universal. As Raz (2010: 41) has convincingly argued, human rights are best understood as committed to synchronic universality – as rights all human beings alive today have. The political conception can easily accommodate synchronic universality.

With regard to the human right to democracy, I think that it is not plausible to claim timeless universality. Democracy is a political institution – or, more accurately, a family of sets of political institutions – that has evolved over time and, who knows, that may further evolve in the future or even disappear completely. So if there is to be a human right to democracy at all, it can only be a right that is relative to specific historical circumstances. But once this point is accepted, the question whether the relevant historical circumstances currently obtain internationally is once again wide open. The moral case for a human right to democracy thus doesn't seem to achieve that much.

A related version of the objection states that human rights are a set of explicitly political norms that only make sense in certain institutional contexts (Beitz 2009). Human rights get their distinctive content not from essential features of humanity as such, but from institutionalized relations between individuals and their governments and other political agents. The political conception of human rights is better equipped to capture this aspect of human rights practice than the traditional conception. Many have argued that this objection fails, however, as the orthodox conception of human rights can incorporate the institutional specificity of human rights (e.g. Liao and Etninson 2012). Indeed, as we saw, Christiano's version of the orthodox conception also emphasizes the role of the international community and of international law for human rights.

Still, the relationship between human rights and the institutional context that Christiano postulates rests on a set of fundamental interests that he identifies as essential features of humanity to which a conception of justice responds. As such, Christiano offers a particular moral interpretation of the political project that human rights stand for. But I don't think that a moral interpretation best furthers the human rights project; it's too divisive. This gets me back to the problem of justifying human rights. The political conception of human rights can deal with the specifically political project that human rights are more directly and already factors in the justificatory problem.

3. Justice, Legitimacy, and the Human Right to Democracy

Is it possible for Christiano to argue that because of the special way in which his approach emphasizes the link between justice and democracy, the objection from disagreement and the problem of justifying human rights are taken into account? I don't think he can and that's because I don't think his argument for the human right to democracy works.

Christiano defends democracy on both instrumental and intrinsic grounds. The instrumental argument, more fully developed in Christiano (2011), is based on the empirical claim that democracies better protect a range of human rights than non-democracies. There are some questions about this argument (Lister 2012; Reidy 2012). One is whether the correlation is actually with democracy or whether it is instead with observance of the rule of law. If the correlation is with democracy, another question is whether democracy is strictly necessary for the protection of the other human rights or merely often associated with it. Rawls, for example, captured the possibility of peoples that are non-democratic yet not human rights violating, through his category of "decent societies" (1999: 4). I shall leave these worries about the instrumental defence of democracy to the side.

The intrinsic argument is based on democracy's egalitarianism and is developed more fully in the *Constitution of Equality*. It starts from the normative commitment that each person's interests matter equally. According to this "egalitarian" argument, democracy is distinctive because it is the only political regime that publicly affirms equality. Here is what Christiano has to say in support of the relationship between democracy and justice understood as the public affirmation of equality:

"The fundamental argument for democracy at the domestic level is that it is necessary to the public realization of the equal advancement of the interests of the members of society.

Persons have fundamental political interests in shaping the society they live in. They have interests in correcting for the cognitive biases of others in determining how to shape the society. They have interests in being at home in the world they live. And they have interests

in being recognized and affirmed as equals. Against the background of conflict of interest, disagreement, cognitive bias and fallibility on how best to organize society, the only public way of realizing the equality of persons in a society is to give each an equal say in how to shape society” (ms. 9).

The demand for democracy is supported by three considerations, situated in a context of four main facts about our judgments about how the world should be organized. The four facts are: (i) conflict of interest, (ii) cognitive bias, (iii) fallibility, and, presumably as a consequence of the first three, (iv) extensive disagreement. The considerations supporting democracy are (i) the interest in correcting the cognitive bias of others, (ii) the interest in being at home in the world, and (iii) the interest to be recognized and respected. The main idea uniting them is that there is value in the connection between people’s judgments about how the world should be organized and how the world is actually organized. And only democracy can deliver the right kind of connection between the two, Christiano argues:

“the only public way to realize equality is to ensure that persons have equal opportunities to shape the society in accordance with their judgments. This is not to say that the other substantive forms of equality are not important but it is to say that they cannot achieve the public realization of equality under the normal circumstances of political societies if the democratic realization is not present. Democracy is indispensable for this” (ms p. 10).

I want to ask two main questions about this intrinsic argument. First, is the intrinsic argument a good argument for democracy? And, second, does it support a human right to democracy?

I am very much in sympathy with Christiano’s characterization of the background conditions that shape political decisions and the evaluation of political institutions. I also think he’s right to emphasize the significance of political participation as such and not just its outcomes. But I’m not

convinced by his justice-based argument for why political participation is significant and as a result I'm not convinced by his argument for democracy.

As others have also pointed out (e.g. Estlund 2009), Christiano's argument for democracy faces an epistemic challenge. The challenge is: why assume that democracy performs better than alternative political regimes in securing the "public realization of the equal advancement of the interests of the members of society"? Or, to put the same point slightly differently, what is the link between equality as a constraint on the decision-making procedure and equality as a constraint on the results? As we saw, Christiano's "egalitarian" argument aims to show that given the background conditions of politics, only democracy can secure (i) the interest in correcting the cognitive bias of others, (ii) the interest in being at home in the world, and (iii) the interest to be recognized and respected.

But, surely, even if we accept Christiano's moral theory, it's too strong to claim we each value our own political participation in order to secure these interests. I may have an interest that the cognitive bias of others is corrected – by me or by someone else. If someone else is able to correct others' cognitive biases on my behalf, that must be sufficient. Similarly, I may have an interest in seeing a connection between my judgment about how the world should be organized and how the world is organized. But that doesn't imply that I necessarily have an interest in expressing my judgment. Finally, the interest to be recognized and respected need also not have its prime expression through political participation – it may be possible for me to be recognized and respected in other ways that are more important. If we grant these limitations on the moral value of the collective decision-making procedure, however, then the necessary link to democracy is lost. It then becomes possible that non-democratic decision-making procedures are better suited than democracy to achieve a certain desirable outcome.

To argue for democracy, I think it is necessary to combine an argument for political equality with an epistemic argument. One way to do that is by focusing on how democracy performs and by defending it on grounds of its potential to achieve just outcomes. David Estlund (2008) has adopted

this epistemic instrumentalist approach, but I don't think that it is successful either. Instead, I think democracy is best defended on grounds of the procedural epistemic values that it embodies, values that become significant in circumstances where a collective cannot establish what the correct decision would be (Peter 2008; 2013b).

While the epistemic instrumentalist option, if it were successful, would retain the link between justice and democracy, the epistemic proceduralist alternative that I favour distinguishes more sharply between the legitimacy of democratic decision-making and the justice of its outcomes. The idea is not that democracy is legitimate because it tends to produce just outcomes. It is, rather, that legitimacy is a normative concept in its own right, significant in circumstances where more comprehensive moral assessments fail – because of value pluralism, for example. The reason why I favour the epistemic proceduralist approach is because I think that democracy has its natural space in situations where there is no access to a privileged position from which to make valid assertions about which decision should be made and where democratic procedures are themselves epistemically valuable. When it is possible to make valid factual or moral claims about how society should be organized, there is less scope for democracy.

This epistemic argument undermines the justice-based case for democracy even for the domestic context of liberal democracies. Meanwhile, many societies do not currently have political institutions that resemble a democracy. What are the implications of a legitimacy-based argument for a human right to democracy for those societies? I don't think that there is a clear legitimacy-based case for a human right to democracy. I shall focus on the ideal itself, leaving aside problems that would arise with implementing a particular set of democratic institutions (Beitz 2009).

Can political institutions that are not fully democratic – whatever exactly that is supposed to mean – produce legitimate decisions? The dominant view in democratic theory and democratization research has been that political institutions that are not fully democratic are seen as deficient and in need of correction in direction of full democracy. The recent literature on democratization (e.g.,

Carothers 2002) challenges this so-called transitional paradigm, however. Based on research on new forms of political participation both in Western liberal democracies and in countries with other political regimes, an alternative paradigm in democratization research is emerging that focuses on the possibility of a stable coexistence of elements from different regime types – democratic and authoritarian – and examines the diversity of channels of political participation beyond traditional democratic electoral politics (e.g., Norris 2002). The transitional paradigm suggests a false dualism between politically legitimate democracies and illegitimate non-democracies. The dualism is false because it obscures the many ways in which even established liberal democracies contain authoritarian elements and, vice versa, how there can be multiple forms of political participation beyond those narrowly associated with a human right to democracy. If the transitional paradigm is rejected in favour of a more pluralist model of political regimes, however, the legitimacy-based case for a human right to democracy crumbles.

This said, I find it very plausible that some political participation must be possible in light of the background conditions of politics that Christiano lists: cognitive bias, fallibility, conflict of interest, and disagreement. Nothing in what I have said so far, however, forces me to deny that there is a right to political participation as recognized by the Universal Declaration and the Covenant on Civil and Political Rights. And that is because the right to political participation, while it is frequently interpreted as a right to democracy, can be interpreted in weaker terms. Henry Steiner (1988) argues that human rights conventions encourage full-fledged democratic participation as a programmatic ideal, but they do not require it.⁷ The right to political participation has two parts: an “election clause” and a “take part” clause (Steiner 1988: 86). The take part clause is too vague to require any particular political system and would be satisfied by a right to participate in deliberative political processes. The elections clause is more specific, but it, too, can be satisfied by political

⁷ See also Lister (2012) for a recent argument in favour of treating democracy as an aspirational ideal, but not as a human right.

systems other than democratic self-government as modelled, say, on modern Western democracies. Both clauses can thus be interpreted in ways that do not require democracy. The right to political participation, understood in this way, neither presupposes democratic institutions nor does it demand that they be imposed where they are absent.

4. Political Participation and Self-determination

In this final part of my comment I want to return to my starting-point, the relationship between a right to democracy and a right to self-determination. The Covenant on Civil and Political Rights recognizes both a right to self-determination (article 1) and a right to political participation (article 25). The official comment on article 25 explicitly addresses the relationship to article 1 and emphasizes that the two rights are not in tension. It explains that while the right to self-determination is a right of peoples, the right to political participation is a right of individuals. The right to political participation, as mentioned, is the right of individuals to take part in political affairs, including in some form of elections. According to the right to self-determination, peoples should be free to choose their constitution and their “economic, social, and cultural development”. This article also formulates an obligation on all peoples to foster and respect the self-determination of other peoples.

To point to the distinction between a right of individuals and a right of peoples doesn't seem sufficient to rule out conflict, however. It is entirely possible that a particular right of peoples has implications that are in tension with some rights of individuals and, vice versa, that rights of individuals have implications for the decision-making of peoples. I thus think that Christiano is right to probe deeper. As mentioned, his paper attempts to dispel conflict by de-prioritising the right to self-determination and providing an account of the right to self-determination that rests on the right to democracy. According to Christiano, there is no right to self-determination that is compatible with the denial of the right to democracy. Self-determination, properly understood, just is the expression of the collective exercise of the right to democracy or, as an added twist, of the collective waiver –

not denial – of the right to democracy. The right to self-determination protects both the collective exercise of the right to democracy and the collective waiver of this right.

While this solution is very elegant, I'm not convinced by its normative appeal. And that is because I don't believe that the moral case for a human right to democracy is successful. As I've argued in the previous section, I think we should pursue a legitimacy-based approach and that this approach can only support a human right to political participation, not a right to democracy. But if there is no case for a human right to democracy, then the interpretation of the right to self-determination as based on the right to democracy also fails. And if we reject that interpretation, then the tension resurfaces: while the right to democracy implies that a particular constitution should be imposed on peoples, the right to self-determination implies greater choice in this regard.

Still, I think Christiano is right that we should question the priority of an unqualified right to self-determination. Is it possible to endorse the priority of the right to political participation and reconcile it with the right to self-determination? I think this is possible, along the lines of what the comment on article 25 suggests. If the right to political participation is interpreted in a weaker sense than the right to democracy, it does not presuppose a blue-print for how society should be organized. As such, it can, more plausibly than the right to democracy, be interpreted in individualistic terms, as a right to be heard in processes of public reasoning. Beyond that, it leaves it to peoples to determine what set of institutions they want to adopt.

Is that proposal unappealing because it is too undemanding? I don't think so. Note, first, that human rights don't fully determine political legitimacy – additional domestic constraints would apply. In addition, the human right to political participation is only one element, albeit an important one, of the minimal requirements of legitimacy. But, more positively, there is a sense in which a human right to political participation in the weak sense is more empowering than the human right to democracy, precisely because it does not presuppose any particular set of institutions. It puts the choice of

political institutions more directly in people's hands than a version of this right that is constrained by a particular moral blueprint.

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