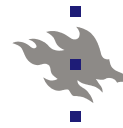




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**“THE HUMAN RIGHT TO DEMOCRACY -
A MORAL DEFENCE WITH A LEGAL NUANCE”**

by

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The principle of all sovereignty resides essentially in the nation. No body nor individual may exercise any authority which does not proceed directly from the nation.

(Article III Declaration of the Rights of Man and of the Citizen)

(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

(2) Everyone has the right of equal access to public service in his country.

(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

(Article 21 Universal Declaration of Human Rights)

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

(Article 25 International Covenant on Civil and Political Rights)

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Introduction

Needless to say, the relationship between human rights and democratic sovereignty¹ -or democracy, as I will refer to it in this chapter- is among the most classical questions of political and legal theory. Who does not remember having thought once at least about the priority of human rights over democracy or vice-versa,² about the democratic legitimacy of constitutional entrenchment of human rights or about that of human rights-based judicial review of democratic legislation?³ The *prima facie* paradoxical and circular idea of a human right to democracy is just as sadly (in)famous. Should and could democracy be protected *qua* human right, and if so, would not it be paradoxical to do so without or against the will of the people itself? Besides that paradox, would not such a human right risk being circular as a right depending on the realization of the very interests it aims at protecting: how else could one benefit from a right to democracy than through democratic channels?

Among the various reasons one may have to climb that mountain again, besides the pleasure to engage and disagree with fellow climbers on this classical question,⁴ one should mention the versatility of the question depending on how its two constitutive elements, i.e. 'democracy' and 'human right', are defined. This is particularly striking when the question is understood to refer to an *international* or universal human right to democratic participation, as it will be in this chapter,⁵ and not, as it has traditionally been the case, to a national or local right to democratic participation.⁶ *Prima facie*, indeed, when such a right is guaranteed from outside a given

¹ On the relationship between democratic sovereignty and democracy, see Cohen, J.L., 'Rethinking Human Rights, Democracy and Sovereignty in the Age of Globalization', (2008) 36:4 *Political Theory* 578-606; Forst, R., 'The Justification of Human Rights and the Basic Right to Justification. A Reflexive Approach', (2010) *Ethics* forthcoming.

² This is often exemplified by reference to Article 3 of the Declaration of the Rights of Man and of the Citizen, according to which human rights stem from political sovereignty. See also Forst, above n1.

³ See e.g. Waldron, J., *Law and Disagreement*, Oxford: Oxford University Press, 1999; Habermas, J., *Between Facts and Norms*, Cambridge Mass.: MIT, 1998; Habermas, J., 'Ueber den internen Zusammenhang von Rechtsstaat und Demokratie', in *Die Einbeziehung des Anderen*, Frankfurt: Suhrkamp 1996, 301.

⁴ See e.g. Menke, C. and Pollmann, A., *Philosophie der Menschenrechte*, Hamburg: Junius, 2007, Ch. 4; Dworkin, R., *Freedom's Law*, Cambridge Mass.: Harvard, 2006; Dworkin, R., *Sovereign Virtue, The Theory and Practice of Equality*, Cambridge Mass.: Harvard, 2000; Habermas 1996 and 1998, above n3; Alexy, R., 'Die Institutionalisierung der Menschenrechte im demokratischen Verfassungsstaat', in Gosepath, S. and Lohmann, G. (eds), *Philosophie der Menschenrechte*, Frankfurt: Hartkamp, 1998, 244-64; Böckenforde, E.W., 'Ist Demokratie eine notwendige Forderung der Menschenrechte', in Gosepath, S. and Lohmann, G. (eds), *Philosophie der Menschenrechte*, Frankfurt: Hartkamp, 1998, 222-43; Michelman, F.I., 'Parsing a „Right to Have Rights“', (1996) 3:2 *Constellations* 200-8; Brunkhorst, H., 'Are Human Rights Self-Contradictory? Critical Remarks on a Hypothesis by Hannah Arendt', (1996) 3:2 *Constellations* 190-99; Cohen, J.L., 'Rights, Citizenship, and the Modern Form of the Social: Dilemmas of Arendtian Republicanism', (1996) 3:2 *Constellations* 164-89.

⁵ As a result, I am leaving aside the question of international democracy. On this issue, see e.g. Besson, S., 'Institutionalizing global democracy', in Meyer, L. (ed.), *Justice, Legitimacy and Public International Law*, Cambridge: Cambridge University Press 2009, 58-91; Besson, S., 'Ubi Ius, Ibi Civitas. A Republican Account of the International Community', in S. Besson/J.L. Martí (eds), *Legal Republicanism and Republican Law – National and Post-National Perspectives*, Oxford University Press: Oxford 2009, 204-37; Besson, S., 'The Authority of International Law – Lifting the State Veil', (2009) 31:3 *Sydney Law Review* forthcoming; Christiano, T., 'Democratic Legitimacy and International Institutions', in Besson, S. and Tasioulas, J. (eds), *The Philosophy of International Law*, Oxford: Oxford University Press, 2010 forthcoming; Pettit, P., 'Legitimate International Institutions: A Neo-Republican Perspective', in Besson, S. and Tasioulas, J. (eds), *The Philosophy of International Law*, Oxford: Oxford University Press, 2010 forthcoming; Buchanan, A. and Keohane, R., 'The Legitimacy of Global Governance Institutions', (2006) 20(4) *Ethics and International Affairs* 405; Gould, C., *Globalizing Democracy and Human Rights*, Cambridge: Cambridge University Press, 2004.

⁶ It is not decisive for the argument, however, to regard that right as a right to national or international democracy, as the interest protected is largely the same and democracy can no longer be uniquely national, regional or international but has to include all levels of decision-making that can affect people's fundamental interests

political community and is as a result decoupled from that community, it seems both more plausible and more controversial; more plausible because the guarantee of a human right takes place from outside the citizenry and is hence less circular, but more controversial because the paradox of protecting democracy through non-democratic means looks even more intractable.

The recent boom in international law theory in general, and in human rights theory in particular, makes it particularly pressing to redefine both concepts in their relationship to one another,⁷ but also in relationship to broader concepts such as global justice and legitimacy. If human rights and/or democracy are commonly advanced criteria for international law's legitimacy,⁸ their relationship to one another needs to be assessed anew in the international context. Questions such as the democratic legitimacy of international human rights law or of international judicial review have now appeared more clearly in the wake of discussions of the legitimacy of international law in general. Furthermore, recent developments in human rights theory, and especially current discussions pertaining to the so-called political conception (of the function or of the justification) of human rights that explain human rights *qua* external limitations on state sovereignty⁹ make the idea of a human right to democracy more controversial and the relationship between human rights and democracy a central feature of future human rights theories. Finally, and more practically, the coming of age of international human rights law, and the consolidation of national democracies thanks to those rights in Europe and other regions of the world, justify stepping back to reflect on their impact on the circumstances of national constitutional democracy. This implies in particular developing a constructive critique of the democratic legitimacy of the legal *acquis* in the human rights context.

The question has now become even more interesting that the human right to democracy has become an integral part of positive international law. Since the 1990s and the end of the Cold War, the human right to democratic participation, and its various derivative or associated rights such as the right to free elections, freedom of speech or freedom of association, have clearly been identified among the rights protected by international human rights law.¹⁰ True, human

whether national or international and at the same time (see Besson 2009a, above n5 on *demosi*-cracy). I will come back to this question in section 4. For a joint treatment of both issues, see Forst, above n1; Cohen, above n1; Crawford, J., 'Democracy and the Body of International Law', in Fox, G. and Roth, B. (eds), *Democratic Governance and International Law*, Cambridge: Cambridge University Press, 2000, 91-122.

⁷ See e.g. Forst, above n1; Cohen, above n1; Griffin, J., *On Human Rights*, Oxford: Oxford University Press, 2008, Ch. 14; Beitz C.R., 'Democracy and Human Rights', (2007) 7 *Human Rights & Human Welfare* 100-104; Menke, C., 'The "Aporias of Human Rights" and the "one human right": regarding the coherence of Hannah Arendt's argument', New School Research Paper 2005; Cohen, J., 'Is there a Human Right to Democracy?', in Sypnowich, D. (ed.), *The Egalitarian Conscience*, Oxford: Oxford University Press, 2006, 226-248; Talbot, W.J., *Which Rights Should be Universal?*, Oxford: Oxford University Press, 2005; Buchanan, A., *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*, Oxford: Oxford University Press, 2004, 142-7; Gould, above n5; Beitz, C.R., 'Human Rights as a Common Concern', (2001) 95:2 *American Political Science Review* 269-282; Sen, A., *Development as Freedom*, New York: Anchor Books, 1999; Beetham, D., *Democracy and Human Rights*, Cambridge: Polity Press, 1999; Rawls, J., *The Law of Peoples*, Cambridge, Mass.: Harvard University Press, 1999; Shue, H., *Basic Rights: Subsistence, Affluence and US Foreign Policy*, 2nd edn, Princeton: Princeton University Press, 1996, 67-78.

⁸ See e.g. Buchanan, A., 'Human Rights and the Legitimacy of the International Order', (2008) 14 *Legal Theory* 39-70; Buchanan, A., 'The Legitimacy of International Law', in Besson, S. and Tasioulas, J. (eds), *The Philosophy of International Law*, Oxford: Oxford University Press, 2010, forthcoming; Tasioulas, J., 'The Legitimacy of International Law', in Besson, S. and Tasioulas, J. (eds), *The Philosophy of International Law*, Oxford: Oxford University Press, 2010, forthcoming; Besson 2009c, above n5.

⁹ See e.g. Rawls, above n7; Raz, J., 'Human Rights without Foundations', in Besson, S. and Tasioulas, J. (eds), *The Philosophy of International Law*, Oxford: Oxford University Press, 2010 forthcoming. With a slight difference, see also Beitz 2001 and 2007, above n7; Cohen, above n. 7. For a critique, see Tasioulas, J., 'Are Human Rights essentially Triggers for Intervention?', (2009) *Philosophical Compass* forthcoming; Forst, above n1; and Cohen, above n1.

¹⁰ See Steiner, H.J., 'Two Sides of the Same Coin? Democracy and International Human Rights', (2008) 41 *Israel*

rights in general were guaranteed and promoted in the post-1945 era also with the indirect aim to enhance national democracies, at a time where international standards for national democracy could not be developed due to fierce sovereignty-based resistance and where human rights standards seemed much less intrusive.¹¹ Through the gradual development and enforcement of mainstream human rights guarantees, bits and pieces of a democratic regime have started consolidating and confirming the growing interdependence in practice of international human rights protection and democratization.¹² However, it is only post-1990 that international law and international human rights law in particular have started openly setting and enforcing democratic standards to be respected in national polities. This has been true in Europe as much as beyond. Earlier guarantees such as Article 25 of the International Covenant on Civil and Political Rights (ICCPR) or Article 3 of the Protocol 1 to the European Convention of Human Rights (ECHR), that had remained dead letter for years, have finally come to be invoked, applied and interpreted further in practice.¹³ New guarantees have been adopted since, and in particular Article 23 of the American Convention on Human Rights (ACHR) and Article 1 of the Inter-American Democratic Charter (IADC).¹⁴ Nowadays, both kinds of international legal requirements have tended to reinforce each other to an extent that makes them largely indissociable from an international legal perspective.¹⁵ Faced with those developments in the positive law guarantees of the human right to democracy, some have deplored a conceptual mistake claiming human rights are used in this context as a proxy for legitimacy or, worse, as a justification for international intervention and not as moral propositions and hence as bases for correlative moral duties.¹⁶ Others, on the contrary, argue international guarantees of the human right to democratic participation are still too weak or insufficiently explicit.¹⁷ After all, the term 'democracy' is not expressly used in either of the main international law guarantees of the right to democratic participation (e.g. Articles 21 of the Universal Declaration of Human Rights (UDHR), 25 ICCPR and 3 Protocol 1 ECHR), although it is mentioned elsewhere in those instruments (e.g. Articles 29 UDHR and 14, 21 and 22 ICCPR). Even the General Comment no 25 of 1996 does not provide much detailed information as to what a democratic government ought to look like.¹⁸ Whatever answer we end

Law Review 445-76; and the essays in Fox, G. and Roth, B. (eds), *Democratic Governance and International Law*, Cambridge: Cambridge University Press, 2000 and in particular Fox, G., 'The Right to Political Participation in International Law', in Fox, G. and Roth, B. (eds), *Democratic Governance and International Law*, Cambridge: Cambridge University Press, 2000, 48-90; Franck, T., 'Legitimacy and the Democratic Entitlement', in Fox, G. and Roth, B. (eds), *Democratic Governance and International Law*, Cambridge: Cambridge University Press, 2000, 25-47 and Crawford, above n6. Compare with early discussions in Steiner, H.J., 'Political Participation as a Human Right', (1988) 1 *Harvard Human Rights Yearbook* 77; or Franck, T., 'The Emerging Right to Democratic Governance', (1992) 86 *American Journal of International Law* 46-91.

¹¹ See Steiner 2008, above n10, 447-9; Letsas, G., *A Theory of Interpretation of the European Convention on Human Rights*, Oxford: Oxford University Press, 2007, 18-21; Moravcsik, A., 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe', (2000) 54:2 *International Organization* 217-252.

¹² See Steiner 2008, above n10, 460 et seq.

¹³ See Fox, above n10; Steiner 2008, above n10.

¹⁴ Article 1 of the Inter-American Democratic Charter actually declares that 'peoples of the America have a right to democracy and their governments have an obligation to promote and defend it.'

¹⁵ See Steiner 2008, above n10, 450 and 476.

¹⁶ For this distinction, see Letsas, above n11, 21-9; and Cohen, above n1. See also Marks, S., *The Riddle of All Constitutions – International Law, Democracy, and the Critique of Ideology*, Oxford: Oxford University Press, 2000, 40.

¹⁷ See the debates in Fox and Roth, above n10; Steiner 2008, above n10, 455-60.

¹⁸ Human Rights Committee, General Comment *The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25)*, (Fifty-seventh session, 1996), U.N. Doc. CCPR/C/21/Rev.1/Add.7

up giving to those critiques, it has become clear to most commentators that the question is no longer whether there *is* a human right to democracy in international law, but whether there *should be* one and whether it should be guaranteed and protected differently. In other words, the question is no longer a positive, but a normative one.

There are two ways of understanding that normative question, however: a legal and a moral one. The question whether there *should be a legal* right to democracy is not exactly the same as the question whether there *is a moral* right to democracy. Clearly, both questions are related: the existence of a moral right to X can be a reason to recognize a legal right to X. However, the two questions are not identical and it is important to focus on the *existence of a moral right to democracy*, as I will in this chapter.

Two explanations are in order in this respect. First of all, there could be other reasons to recognize a legal right to X than the existence of a moral right to X.¹⁹ Of course, it is less likely to be true of human rights, but this possibility cannot be excluded. Buchanan mentions at least two reasons to recognize an international legal right to democracy that do not depend on the existence of a moral right to democracy: the instrumental value of democracy for the realization of other human rights, on the one hand, and the legitimation of the role of state consent in international law as democratic state consent, on the other.²⁰ In this chapter, I will not be considering those reasons except as contributing to an argument for the existence of a moral right to democracy, and for the legalization of such a right independently from a moral right to democracy. Secondly, not all moral rights to X give a reason to recognize legal rights to X. This is also true of human rights; it suffices to think of the moral human right to health or not to be poor and the lack of legal correspondents (at least for a very long time). Various reasons are often put forward for the legalization of moral rights, such as, for instance, clarity, security or effectivity.²¹ Importantly, those reasons may actually differ whether one is thinking of the national or international legalization of human rights.²² I will come back to this point later with respect to the passage from the moral human right to democracy to the international legal right to democracy.

The vast majority of authors who discuss the existence of a human right to democracy provide a positive answer to the question whether there is a moral right to democracy, or at least to democratic participation.²³ Most of them, however, associate human rights and democracy and

(1996), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 168 (2003).

¹⁹ See e.g. Raz, J., 'Legal Rights', (1984) 4 *Oxford Journal of Legal Studies* 1; Raz, J., 'On the Nature of Rights', (1984) 93 *Mind* 194. See also Besson, S., *The Morality of Conflict – Reasonable Disagreement and the Law*, Oxford: Hart Publishing, 2005, 421-4. Of course, most legal rights are also moral rights, but the latter need not exist prior to the former and can be created through legal means. See section 4.

²⁰ Buchanan, above n7, 142 et seq.

²¹ See e.g. Alexy, above n4 ; Besson, above n19; Besson, S., 'The European Union and Human Rights: Towards a new kind of post-national human rights institution', (2006) 6(2) *Human Rights Law Review* 323-360; Tasioulas, J., 'The Reality of Human Rights', in Pogge, T. (ed.), *The Right not to be poor*, Paris: UNESCO, 2007, 75-101; and the essays in Meckled-Garcia, S. and Cali, B. (eds), *The Legalisation of Human Rights*, London: Routledge, 2006.

²² See Gardbaum, S., 'Human Rights as International Constitutional Rights', (2008) 19:4 *European Journal of International Law* 749-68; Buchanan, A. and Russell, R., 'Constitutional Democracy and The Rule of International Law: Are They Compatible?', (2008) 16:3 *The Journal of Political Philosophy* 326-49.

²³ See e.g. Forst, above n1; Griffin, above n7 (albeit in modern conditions only); Menke, above n7; Talbott, above n7; Nickel, J., 'Gould on Democracy and Human Rights', (2005) 1 *Journal of Global Ethics* 207 (albeit at the national level only); Buchanan, above n7; Gould, above n5, 183; Beitz 2001, above n7; Sen, above n7; Beetham, above n7; Rawls, above n7; Shue, above n7. The exceptions are Cohen, above n1, 579; and Cohen, above n7, although they both seem to argue for a minimal right to political membership. The same applies to Beitz 2007,

move very swiftly, and sometimes too quickly, from the existence of a connection between the two to a stronger claim: that of the existence of a human right to democracy. That move needs to be carefully scrutinized, however. To assess the existence of a moral human right to democracy, my argument will be four-pronged. In a first step, I will define the two notions in the equation: human rights and democracy. I will then turn to the various connections one may identify between human rights and democracy. In a third step, I will discuss the validity of different arguments for the existence of a moral right to democratic participation, distinguish that right from other connected albeit distinct rights and respond to three main critiques. Finally, I will assess whether there should be a legal right to democratic participation, at the national or at the international level.

1. The Notions of Human Rights and Democracy

1.1. Morality, Human Rights and Democracy

As alluded to before, the answer to the question raised in this chapter will vary greatly depending on how 'human rights' and 'democracy' are defined.²⁴ It is essential therefore to start by defining what those terms will be held to mean in the context of the idea of a human right to democracy. The point is not to present an exhaustive account of those two eminently normative and hence essentially contestable concepts, but to provide sufficient elements to be able to turn to their relationship hereafter.

Before moving to the two notions and their relationship, it is important to distinguish both concepts from two connected albeit broader concepts in morality: justice and legitimacy. While both democracy and human rights are part of what makes the value of justice, they ought not be identified with it. Thus, it is not because justice requires democracy or because human rights are a requirement of justice, that there is a human right to democracy.²⁵ Nor, on the other hand, should the fact that both democracy and human rights may be regarded (together or alternatively) as important elements of the legitimacy of an institutional framework or of the international legal order imply that there is a human right to democracy. And this even though the recognition of an international legal right to democracy may contribute to enhancing the legitimacy of international law.²⁶ In what follows, the two concepts will be isolated therefore and defined separately from each other and from other concepts in morality.

1.2. Human Rights

Human rights can be understood as moral propositions, and more specifically as moral propositions that ground moral duties. They are part of morality, just as reasons, values, duties, principles or interests. They ought not, however, be identified with all the latter nor taken to exhaust morality. In particular, human rights are of value and can be justified on the basis of values, but are not themselves values.

More specifically, human rights are moral rights (i) of a special kind, as they protect fundamental and universal interests (ii). Those two elements will be presented in turn.²⁷

above n7.

²⁴ This can also be true for the same author (compare Cohen, above n1 who opts for a political conception of human rights with Cohen, above n4 who is ready to defend a universal moral right to political membership).

²⁵ See Cohen, above n7.

²⁶ See Buchanan, above n7, 142.

²⁷ For a detailed presentation of the modified interest-based theory of human rights, see Besson, above n19 and above n21.

To start with, a moral right exists when an interest is regarded as a sufficient ground or reason to hold someone else (the duty-bearer) under a duty to respect that interest vis-à-vis the right-holder.²⁸ For a right to be recognized, a sufficient interest must be established and weighed against other interests and other considerations with which it might conflict in a particular social context.²⁹ Rights are, on this conception, intermediaries between interests and duties.³⁰ It follows, first of all, that a right may be recognized and protected before specifying which duties correspond to it.³¹ Once a duty is specified, it is correlative to the right, but the right may pre-exist without all its specific duties being identified. The relationship between rights and duties is justificatory therefore, and not logical.³² A right is, secondly, a sufficient ground for holding other individuals under all the duties necessary to protect the interest rather than in terms of the details of these duties.³³ It follows that a right might provide for the imposition of many duties and not only one. Besides, rights have a dynamic nature and, as such, successive specific duties can be grounded on a right depending on the circumstances.³⁴ As a result, the determination of the duty-bearer(s) of a right and its claimability are not conditions of the existence of moral right.³⁵

Turning to the second element in the definition, human rights are moral rights of a special intensity, in that the interests protected are regarded as fundamental and universal interests. They include individual interests when these constitute part of a person's well-being in an objective sense. That person need not believe that it is the case for her interest to require protection as a human right. They also extend to others' interests in the community and even to common goods in some cases.³⁶ Those external interests can help boost the importance of an individual interest and justify the recognition of that interest as a human right.³⁷ The fundamental nature of the protected interests will have to be determined by reference to the context and time rather than established once and for all.³⁸ This is particularly important not only from the perspective of value pluralism but also of social pluralism, as human rights may protect a variety of different interests whose specific orderings may vary depending on the context.³⁹

What makes it the case that a given individual interest is regarded as sufficient to generate a

²⁸ Raz 1984b, above n19, 195.

²⁹ See Raz 1984b, above n19, 200, 209.

³⁰ See Raz 1984b, above n19, 208.

³¹ See MacCormick, N., 'Rights in Legislation', in Hacker, P. & Raz, J. (eds.), *Law, Morality and Society*, Oxford: Clarendon, 1977, 201.

³² See MacCormick, above n31, 199-202; Raz 1984b, above n19, 196, 200.

³³ See Waldron, J., 'Introduction', in *Theories of Rights*, Oxford: Clarendon, 1984, 10-11.

³⁴ See Raz, 1984b, above n19, 197-199.

³⁵ See Tasioulas, above n21.

³⁶ See Raz, J., 'Rights and Individual Well-being', (1992) 5 *Ratio Juris* 127, 135.

³⁷ See Nickel, above n23.

³⁸ See Tasioulas, J., 'Human Rights, Universality and the Values of Personhood: Retracing Griffin's Steps', (2002) 10 *European Journal of Philosophy* 79-100; Tasioulas, above n8. Contra: Griffin, J., 'First Steps in an Account of Human Rights', (2001) 9 *European Journal of Philosophy* 306.

³⁹ See Tasioulas, above n8.

universal duty and that, in other words, the threshold between a mere interest and a human right is reached, may be found, arguably, in the normative status of that individual *qua* equal member of the moral-political community. Those persons' interests merit equal respect in virtue of their status. However, human rights are not merely a consequence of individuals' equal status, but also a way of actually earning that equal status and consolidating it. Without human rights, political equality would remain an abstract guarantee; through human rights, individuals become actors of their own equality. Human rights are power-mediators:⁴⁰ they both enable political equality and maintain it.

In short, the proposed account and justification of human rights follows a modified interest-based theory, modified by reference to considerations of moral-political status in a given community.⁴¹ Under a purely status-based or interest-based model, the manichean opposition between the individual and the group, and between his private and public autonomy would lead to unjustifiable conclusions.⁴² More specifically, the proposed account is moral in the independent justification it provides for human rights and political in the function it sees them vested with as both shields against the state and guarantees of political inclusion. In terms of justification, its moral-political dimension differs both from accounts based on a purely ethical justification of human rights,⁴³ and from accounts that seek a political form of minimalist justification of human rights.⁴⁴ And with respect to the function of human rights, it can salvage their political role without diluting their moral justification.⁴⁵

Based on this account of moral human rights, one may gain useful insights about legal human rights. Legal (human) rights are legal propositions and sources of legal duties. More specifically, legal rights are legally-protected moral interests.⁴⁶ It follows that legal rights may also be regarded as moral rights. Of course, not all moral rights are or should be legally recognized, on the one hand. There can be moral rights therefore which do not give rise to legal rights. Rights should not therefore necessarily be understood as 'moral rights to have legal rights' along Feinberg's argument.⁴⁷ Law does not always ensure better protection of rights-protected interests than other means.⁴⁸ Nor, on the other hand, does this mean that legal rights necessarily always pre-exist as independent moral rights. Some do and are legally recognized moral rights, but others are legally created moral rights.⁴⁹ In some cases,

⁴⁰ For the original idea of mediating duties, see Shue, H., 'Mediating Duties', (1988) 98 *Ethics* 687-704, 703.

⁴¹ See Besson, above n19 and n21. See for similar attempts, Buchanan, A., 'The Egalitarianism of Human Rights', (2010) *Ethics* forthcoming for an egalitarian account of human rights; and possibly Tasioulas, above n9; Tasioulas, J., 'Taking Rights out of Human Rights', (2010) *Ethics* forthcoming.

⁴² See Tasioulas, above n41's critique of Griffin, above n7 (e.g. 249).

⁴³ See Tasioulas, above n38 ; Griffin, above n7.

⁴⁴ See Raz, above n9 ; Rawls, above n7. See also Beitz 2007, above n7; Cohen, above n1; Cohen, above n7.

⁴⁵ It comes very close to Forst, above n1; and Forst, R., *Das Recht auf Rechtfertigung. Elemente einer konstruktivistischen Theorie der Gerechtigkeit*, Frankfurt am Main: Suhrkamp, 2007 in this respect, but differs ultimately as Forst's accounts is based on a reflexive right to political justification and hence to political equality, whereas the present account is based on political equality and its mediation through human rights.

⁴⁶ Raz, 1984a, above n 19, 12.

⁴⁷ See e.g. Feinberg, J., 'In Defense of Moral Rights', in *Problems at the Roots of Law: Essays in Legal and Political Theory*, Oxford: Oxford University Press, 2003. See in the case of human rights, Alexy, above n4; Habermas 1998, above n3.

⁴⁸ See e.g. Tasioulas, above n21; Waldron, above n3.

⁴⁹ See Raz 1984a, above n19, 16-17.

law and politics may change a person's interests, thus in a sense creating the moral interest and its moral-political significance which are the foundations of the right.

1.3. Democracy

Democracy can be understood as an abstract value of political morality. Democracy relies on the principle of basic moral equality and equal moral consideration or respect. According to the corresponding principle of political equality, all persons have by reasons of their equal status a claim to equal participation in the most important political decisions that concern them.⁵⁰ By reference to political equality, democracy is the political regime, governance or scheme of collective decision-making in which all those whose fundamental interests are affected are included in the decision-making process and have an equal claim to participate (directly or indirectly) in making the decisions that affect them.⁵¹

Following Buchanan, there are three constitutive elements of democratic governance: (i) there are representative majoritarian institutions for making the most general and important laws, such that no competent individual is excluded from participation; (ii) the highest government officials are accountable to the people by being subject to removal from office through the workings of these representatives; and (iii) there is a modicum of institutionally secured freedom of speech, association, and assembly, required for reasonably free deliberation about political decisions and for the formation and functioning of political parties.⁵² The latter are usually protected through human rights that constitute internal limits to democratic authority, but also its internal pull. Those limits and pulls are grounded in the very same principle as democracy: basic political equality.⁵³

2. The Relationship(s) between Human Rights and Democracy

2.1. Moral Interdependencies

Qua moral entities of different kinds, human rights and democracy can enter into various relationships with each other. And this can be true independently from the existence of a human right to democracy.

Many authors derive the existence of a human right to democracy from one of those relationships.⁵⁴ Most of the time, however, they do so without clearly distinguishing having a human right to democracy from democracy being intrinsically or instrumentally valuable to the realization of human rights.⁵⁵ It is important therefore to clarify what those relationships can be before assessing in a third section whether those relationships can ground a human right to democracy or whether, independently from one of those relationships, such a right may be recognized.

⁵⁰ See Buchanan, above n7, 143, 145-7 ; Christiano, T., 'A Democratic Theory of Territory and Some Puzzles about Global Democracy', (2006) 37:1 *Journal of Social Philosophy* 81-107.

⁵¹ See Besson, above n19, with further references.

⁵² See Buchanan, above n7, 146.

⁵³ Christiano, above n50, 90.

⁵⁴ See e.g. Griffin, above n7; Talbott, above n7 ; Beitz 2001 and 2007, above n7 ; Sen, above n7.

⁵⁵ Shue, above n7 is an exception, as, in his account of the human right to democracy, basic rights are defined as rights whose recognition is necessary (albeit not necessarily sufficient) to respect other human rights. Of course, his argument is about the basic nature of the human right to democracy rather than one about its right's nature in the first place. On Shue's 'basic rights', see the recent essays in Beitz, C. & Goodin, R. (eds), *Global Basic Rights*, Oxford: Oxford University Press, 2009.

Relationships between human rights and democracy can be described as being either instrumental or intrinsic, depending on whether democracy is instrumentally related to the protection of human rights or whether they are more closely dependent. Both relationships are compatible and democracy may be both instrumentally and intrinsically connected to human rights. Of course, once the existence of a moral human right to democracy is recognized, another question would be whether that right is itself instrumentally or intrinsically related to other human rights, and in particular whether it is a more basic right in that respect.⁵⁶ However, as we will see, its connection to other right cannot provide a ground for the right in the first place; it may reinforce its justification by providing further reasons for the right or its implementation, but may not ground the right itself.⁵⁷

Most of the time, the relationship, whether intrinsic or instrumental, between human rights and democracy reveals the priority of one over the other. It is important to emphasize moreover that the instrumental or intrinsic relationship between human rights and democracy does not prevent them from entering into conflict in certain cases, and hence one from having to set *ex ante* priorities or from weighing and balancing *ex post*. Even in the absence of any instrumental or intrinsic relationship between human rights and democracy, those two kinds of moral considerations may enter into conflict and have to be ranked.⁵⁸ Unlike the conflict between two values or the conflict between two rights or duties, this kind of conflict between reasons and values has to be solved by reference to other standards of commensurability, if at all possible. One may, of course, imagine weighing human rights and democracy by reference to the values that ground some human rights, whether they are the same as those that ground democracy, as it is the case with political equality, or whether they are different altogether and plural –as it is the case most of the time.

2.2. The Instrumental Relationship

There are various ways of expressing the instrumental relationship between democracy and human rights. What those different approaches have in common, however, is that they view one of them as having instrumental value for the other.

Thus, democracy is said to have instrumental value for the protection of certain or even most human rights in that it is deemed to facilitate their realization and enhance their effectivity in practice.⁵⁹ Evidence for this has been gathered by Sen who shows that violations of the right to resources for subsistence, but other human rights as well are prevented where governments are democratic.⁶⁰ Another example that stems from political science may be the ‘democratic

⁵⁶ Scope precludes addressing this question in the present chapter, and in particular whether the human right to democracy ought to be ranked higher than other human rights in case of conflict. On the various relationships of interdependence and indivisibility between human rights themselves, see Nickel, J., ‘Rethinking Indivisibility: Towards a Theory of Supporting Relations between Human Rights’, (2008) 30 *Human Rights Quarterly* 984-1001: my inclination is to agree with the correlation Nickel makes between the greater implementation of human rights and their indivisibility. This means that burdening a developing country with indivisibility and the full implementation of the human right to democracy before the human right to subsistence is realized would not seem correct.

⁵⁷ See also Nickel, above n56, 999.

⁵⁸ No need to rehearse the famous opposition between the liberal critique of democracy based on human rights and the democratic critique of human rights based on community. See on this opposition, Menke and Pollman, above n4.

⁵⁹ See e.g. Griffin, above n7 ; Talbott, above n7 ; Buchanan, above n7; Beitz 2001 and 2007, above n7 ; Sen, above n7.

⁶⁰ See Sen, above n7; Sen, A., ‘Democracy as a Universal Value’, in Diamond, L. and Plattner, M. (eds), *The Global Divergence of Democracies*, Baltimore: The John Hopkins Press, 2001, 3. See also Talbott, above n7 ;

peace' argument, according to which democracies tend not to make war to each other and hence to lessen human rights violations that occur in wars. It is important to emphasize that democracy need not be effective and its impact on human rights verified for the instrumental value of democracy to be recognized.⁶¹ The reverse argument is also made, as human rights may be said to help realize democratic conditions of governance. This is clearly the case of political rights such as freedom of speech, freedom of association or the right to vote.⁶²

While both may be true, it is also possible to consider the instrumental value of democracy for human rights without endorsing the reverse. Most authors do, however, for the contribution of human rights to democracy is generally acknowledged.⁶³ When this is the case, the instrumental relationship can be regarded as reciprocal or bidirectional.

2.3. The Intrinsic Relationship

Alternatively or additionally, human rights and democracy may be said to stand in a relationship of conditionality, necessity or requirement.⁶⁴

Democracy may be regarded as a requirement of human rights and hence as a condition or ground for the latter. On that approach, being able to determine what affects us, that is what democracy guarantees, is an essential part of what having human rights is about.⁶⁵ It is usually taken as a necessary condition, albeit not a sufficient one.⁶⁶ Indeed, other conditions are often regarded as having to be granted for democracy to be effective and for its impact on human rights to be fully realized. The reverse, i.e. the requirement of human rights for democracy, may also be held, albeit not necessarily. However, it is generally regarded as less contested.⁶⁷ One could hardly imagine a functioning democracy without guarantees of free speech, freedom of association or the right to vote.

Whereas it may be possible for human rights to be intrinsically related to democracy without the reverse being true or vice-versa, when both are mutually connected in this way, they are regarded as indivisible.⁶⁸ There may, however, be cases in which the relationship between the two is bidirectional and hence mutual, but where it is not intrinsic on both sides, but intrinsic and instrumental; one may argue, for instance, that human rights are necessary for democracy, and that although the realization of human rights is facilitated by democracy, it does not absolutely depend on it. In such a case, one may speak of a lesser strong form of interdependence than indivisibility.

The intrinsic relationship between human rights and democracy, when it is mutual, is also

and a discussion of the evidence by Beitz 2007, above n7.

⁶¹ See Shue, above n7, 74-8. Contra: Beitz 2007, above n7, 101-2 who argues there is lack of evidence.

⁶² See e.g. Christiano, above n50, 90.

⁶³ See Griffin, above n7; Steiner 2008, above n10, 460-3.

⁶⁴ The terminology used varies: see Griffin, above n7 ('requirement'); Gould, above n5 ('linkage'); Böckenförde, above n4 ('Forderung'); Shue, above n7 ('need'); Beetham, above n7 ('intrinsic relation').

⁶⁵ See Waldron, above n3.

⁶⁶ See e.g. Shue, above n7; Gould, above n5.

⁶⁷ See Griffin, above n7; Crawford, above n6.

⁶⁸ See Nickel above n56, 988-91 *mutatis mutandis* in the context of a 'human right to human right' relationship.

sometimes referred to as co-originality.⁶⁹ Co-originality implies something stronger than indivisibility: human rights and democracy are not only mutually necessary in their respective realization, but that they are mutually founded. This can be the case *per se*. Most of the time, however, co-originality stems from the fact that they are founded in or justified by reference to a third value, such as moral equality⁷⁰, autonomy or the most fundamental of moral rights: the right to justification⁷¹. Their co-originality may even stem from their being founded in two further values that are themselves co-original, such as private and public autonomy.⁷²

3. The Human Right to Democracy

3.1. Justifying the Human Right to Democracy

Many authors derive the existence of a human right to democracy from the instrumental and/or the intrinsic relationship between human rights and democracy.⁷³ Most of the time, however, they do so without clearly distinguishing having a human right to X from X being intrinsically or instrumentally valuable to the realization of other human rights.⁷⁴ Clearly, something more is needed for a human right to be recognized. And the reverse is also true: a human right to democracy may be recognized without there being an instrumental or intrinsic relationship between human rights in general and democracy. Thus, there is a human right to privacy without privacy being in an instrumental or intrinsic relationship to human rights in general.

In what follows, I will assess three kinds of moral arguments for the human right to democracy. I want to examine how one may move, first, from considering democracy as being intrinsically valuable, whether or not it is intrinsically connected to other human rights, to having a right to democracy, and, second, from considering it as instrumentally valuable for other human rights to there being a right to democracy. A third argument I would like to consider is that the human right to democracy is the primary moral right that underlies both human rights and democracy. When assessing each of those arguments, I will also discuss the extent to which they fit the proposed revised interest-based account of human rights presented before and how they can as a result help justify a human right to democratic participation in that context.

3.1.1. Human Rights and Values: the Intrinsic Justification

The first question one may ask pertains to the relationship between values and human rights. How does a valuable interest or even a value itself justify holding someone in duty and hence recognizing a right? How does the fact that democracy is a value and that democratic participation a valuable interest help justify the existence of a human right to democracy?

In view of the definition given before of human rights, it is clear that there cannot be a human right to democracy *stricto sensu*: there cannot be a right to a value and democracy is such a value. A value can justify a right or at least explain why a right exists pertaining to certain

⁶⁹ See Habermas 1998, above n3, ch. 3 ; Wellmer, A., 'Menschenrechte und Demokratie', in Gosepath, S. and Lohmann, G. (eds), *Philosophie der Menschenrechte*, Frankfurt: Suhrkamp, 1998, 265-91; Beetham, above n7.

⁷⁰ See e.g. Christiano, above n50; Buchanan, above n7; Gosepath, S., *Gleiche Gerechtigkeit. Grundlagen eines liberalen Egalitarismus*, Frankfurt am Main: Suhrkamp, 2004.

⁷¹ See e.g. Forst, above n1.

⁷² See e.g. Habermas 1998, above n3, ch. 3.

⁷³ See e.g. Griffin, above n7, 242, 247 ; Talbott, above n7 ; Beitz 2001 and 2007, above n7 ; Sen, above n7.

⁷⁴ Shue, above n 7 is an exception, as, in his account of the human right to democracy, basic rights are defined as rights whose recognition is necessary (albeit not necessarily sufficient) to respect other human rights.

interests deemed sufficiently important to ground a duty. However, claiming there is a right to a value would simply get the normative order wrong.

The phrase 'human right to democracy' can only be used therefore as shorthand for a human right to a given democratic interest. There could, for instance, be a right to democratic institutions or to democratic participation or governance. This is also how authors writing about the human right to democracy qualify the right.⁷⁵ And this is also where they join the vast majority of political theorists in considering democracy as potential *content* for human rights,⁷⁶ as opposed to an *instrument* or a *ground* for human rights.⁷⁷ This re-qualification of the human right to democracy also makes clear that democracy remains a distinct and autonomous value and principle, which can be used to criticize or provide richer normative guidance in the interpretation of the right to democratic participation.⁷⁸

Even when it is re-qualified as suggested, the human right to democratic participation can only exist *qua* human right if it may be said to protect a fundamental interest sufficient to justify creating a duty for someone else. Not all objective interests justify creating duties. Of course, their ability to do so need not necessarily depend on their being justified by reference to a moral value, however fundamental. However, if they are, this can provide an important justification. It is the case, some authors argue, of the justification of the interest to democratic participation grounded in political equality,⁷⁹ or alternatively in autonomy⁸⁰ or fairness⁸¹.

Given the modified interest-based account presented before, and the role of political equality as threshold criterion in that account, but also given third parties' interest in democracy and the social benefits of democracy more generally,⁸² it is clear that the interest to democratic participation is among the most fundamental interests one ought to recognize as a human right in a democracy. The human right to democratic participation turns individuals into actors and protectors of their own equality, which is the ultimate value of political self-determination.

3.1.2. Human Rights and Basic Rights: the Instrumental Justification

Since democratic participation can be regarded as instrumentally valuable for the enjoyment of human rights, some authors have argued this makes it a human right, albeit of a special kind: an instrumental kind. So-doing, they refer to a quality thought of as constitutive of a specific kind of human rights: basic rights. Shue's argument about basic rights is the most well-known version of that argument. He considers basic rights, such as the freedom of political participation, as rights whose enjoyment is essential to the enjoyment of all other human rights, irrespective of the intrinsic value of their own enjoyment.⁸³

⁷⁵ See e.g. Buchanan, above n7 ; Cohen, above n7; Griffin, above n7, 242.

⁷⁶ See e.g. Dworkin 2000, above n4, 185.

⁷⁷ Note that Menke and Pollman, above n4 identify those three approaches to the relationship between human rights and democracy and see them as competitors, whereas I see the former as a consequence of the two latter.

⁷⁸ This placates the critique of the 'right' to democracy as antithetical to a 'principle' of democracy made by Marks, above n16, 109.

⁷⁹ See e.g. Buchanan, above n7, 143.

⁸⁰ See e.g. Gould, above n5 ('liberty'). Contra: Griffin, above n7.

⁸¹ Contra Beitz 2007, above n7.

⁸² See Nickel, above n23.

⁸³ Shue, above n7, 67.

This form of instrumental justification of human rights does not fit the account of human rights given before, at least *prima facie*. The justification of the fundamental interest protected by a human right is not instrumental, but intrinsic. There is a complementary way, however, to justify the human right to democratic participation besides referring directly to the fundamental interest that is protected and to its intrinsic justification by reference to political equality. The normative status of an individual in a given community, and in particular her basic equality, was invoked before as a threshold of justification in the modified interest-based account of human rights. With respect to the human right to democratic participation, basic political equality works as a threshold of justification⁸⁴ and builds the contribution to status into the justification of the human right to democracy. If there is a right that contributes to political equality and equal status by excellence and hence indirectly to all human rights, it is the right to democratic participation. An instrumental justification for that right may therefore be given on top of its intrinsic justification, and one may want to argue, although this may have to wait for another paper, that this is what makes it a basic human right. But that instrumental or supporting relationship and the further reasons it gives for the right do not in any case suffice to justify the right to democratic participation in the first place.

3.1.3. Human Rights and the Right to have Rights: the Right-based Justification

A third approach one may identify is one that echoes Arendt's right to have rights as only defensible human right.⁸⁵ Schematically, rights only make sense for Arendt inside a given polity and *qua* citizen of that polity. The only human right, guaranteed outside of such a polity, there could be therefore is the right to be a citizen of a polity and hence the right to political membership.

Authors such as Forst and Cohen have recently revived that idea of basic right to political membership.⁸⁶ Forst clearly founds both democracy and all human rights on one single basic moral right: the right to justification. If the right to justification is regarded as the source of both democracy and human rights, there is no further argument needed to get from that right to the right to democracy that is one of its concretizations. Whereas Forst actually also refers expressly to that basic right to justification as a right to democracy, Cohen is more cautious about the use of the concept of moral rights in this context.⁸⁷

While one may share Arendt's intuition, at least from the point of view of the effective protection of human rights in the national context, that right to political membership may be justified along the lines discussed before as any other human right, and in particular on grounds of political equality, without having to see that right as a basic human right anterior to other rights and as the common moral ground of both human rights and democracy. The real question is whether that right to political membership may imply as much as a right to democratic membership and participation,⁸⁸ and this is the question I will turn to now.

⁸⁴ See also Buchanan above n41 for a similar approach.

⁸⁵ See Menke, above n7; Arendt 1951.

⁸⁶ See Forst, above n1 ; Cohen, above n1.

⁸⁷ This is true of Cohen, above n1 who explicitly adopts a political account of human rights and argues against the right to democracy. By contrast, Cohen, above n25 argued openly for such a universal moral right. The same may be said about Cohen, above n7, who does not, however, choose between a morally founded account of human rights and a purely political one (see the critique by Forst, above n1).

⁸⁸ Cohen, above n7 sees that right to political membership as the most we can justify universally. As I will argue, mutual justification of the moral right to democracy ought not to be seen as a requirement of its legitimacy, and hence the lack thereof as a challenge to its justification.

3.2. Delineating the Human Right to Democracy

Provided a justification of the human right to democratic participation is given, whether through political equality or autonomy and whether through a justified interest or normative status, it is crucial to distinguish that right carefully from connected albeit distinct moral considerations and claims. As those distinct moral claims are often used to argue against the human right to democracy, keeping them distinct is essential to the clarity of the argument.

There are at least two I would like to distinguish in this chapter: first of all, the human right to self-determination and, second, the right to the institutionalization of one's human rights. Both rights are connected to the human right to democracy, but ought not be identified with it.

The right to collective self-determination, first of all, is the right to political autonomy. It does not in principle entail the right for a given people to become an independent state, but merely to organize oneself autonomously as political community within a given state.⁸⁹ It differs from the right to democratic participation in two ways therefore: it is a collective right,⁹⁰ whereas the right to democratic participation may be exercised individually even if it also protects collective interests; and it does not presume the democratic nature of the political regime that is adopted once the people can organize itself autonomously. True, the right to self-determination may be considered a part of the right to democracy: democracy implies political autonomy.⁹¹ But the reverse does not pertain, or at least not necessarily. Of course, as full political autonomy does imply political equality, inclusion and equal say, the existence of the right to self-determination has the potential to lead to the development of a right to democratic participation and one may even argue that it has that right as an in-built claim.⁹²

A second delineation needs to be made, not so much at the level of specificity of the object of the right, but at that of the duties it can trigger. It is important to distinguish the positive duties of institutionalization and proceduralization that are part of any human right, be they democratic in a democracy, from an actual human right to democratic institutions and its corresponding duty to provide such institutions. The former apply to all human rights. Further, even though there may also positive duties of that kind stemming from the human right to democracy,⁹³ those duties are derivative and do not correspond to interests that lie at the core of the justification of that right.⁹⁴ Finally, the human right to democratic institutions is a right to have access to democratic institutions and participate in them, not a right that such institutions simply exist. There can be no such human right.

3.3. Defending the Human Right to Democracy

Three important critiques are usually put forward against the existence of a human right to democracy: first of all, its unjustifiable consequences in terms of enforcement; secondly, its incompatibility with the principle of equal sovereignty; and, finally, its imperviousness to cultural diversity. All three critiques are related, but I will discuss them as putatively separate challenges to the human right to democracy to gain in clarity when addressing each of them.

⁸⁹ See Christiano, above n50.

⁹⁰ On the existence and justification of those rights, see Buchanan, above n7, 408-15.

⁹¹ See Beitz 2007, above n7, 103.

⁹² See Forst, above n1.

⁹³ See Buchanan, above n7, 142 et seq.

⁹⁴ Both elements are somehow conflated in Alexy, above n4.

3.3.1. Enforcement and the Human Right to Democracy

The right to democratic participation is usually opposed on the basis that it could justify an international (coercive or not) intervention into the national sphere of sovereignty. While authors who make this critique would be ready to see such an intervention as justified in case of violation of the right to political autonomy, they regard it as illegitimate in the case of the mere absence of democracy in a given state.⁹⁵ Destabilizing a functional albeit authoritarian regime would not only be counterproductive, but it would violate the right to political autonomy. In any case, government for and by the people ought to be organized by and for that people only and an international intervention in that process would not be justified. Because the human right to democracy cannot be enforced, it cannot, so the critique goes, be justified.

There are many difficulties with this position, difficulties which undermine the plausibility of its critique of the human right to democracy.

The first has to do with its conception of human right. This conception was first put forward by Rawls, and has since been developed by Raz as the political conception of human rights.⁹⁶ It defines human rights as external limits on state sovereignty and as justifications for international intervention. Not only does this approach fail to provide more than an empirical criterion for what human rights are.⁹⁷ But it excludes a whole range of human rights which do not justify state intervention, either because they apply only within domestic boundaries or because they have other duty-bearers.⁹⁸ Finally, the conception does not account for the fact that the enforcement of human rights is in principle a domestic responsibility and only subsidiarily an international one. Even in this last instance, means of enforcement entail periodic reporting, interstate and individual complaint mechanisms, judicial review and, only extremely rarely, coercive measures and even then those measures are rarely military and range from individual and collective economic sanctions to international criminal justice.

Another difficulty with the critique is that it is based on a skewed approach of human rights enforcement, and of its relationship to the existence of a human right. Based on the modified interest-based approach presented before, the relationship between human rights and corresponding duties is justificatory and dynamic. Specific duties will be generated according to the circumstances and there is nothing one can deduce from the indeterminacy of the duty-bearer or from the impracticability of certain duties for the existence or non-existence of the right itself.⁹⁹ As a result, the lack or difficulty of enforceability of the human right to democracy, whether at the international or at the national level, does not affect the moral existence of the right. This means that the absence of international community and centralized institutions that could be organized democratically and hence of addressees of the right to international democracy¹⁰⁰ cannot be held against the existence of such a right either. It will make the identification of the duty-bearers and the attribution of duties more difficult, but it does not undermine the existence or the justification of the right.

⁹⁵ See Cohen, above n7; Beitz 2007, above n7, 102-4.

⁹⁶ See Rawls, above n7; Raz, above n9.

⁹⁷ See Cohen, above n1.

⁹⁸ See Tasioulas, above n9.

⁹⁹ See Tasioulas, above n21; Besson, above n21; contra: Nickel, above n23.

¹⁰⁰ See Nickel, above n23 for such a critique of Gould, above n5's argument for a right to international democracy. The latter cannot be distinguished from national democracy in any case, as we will see in section 4.

3.3.2. Sovereignty and the Human Right to Democracy

Independently from international intervention *qua* mode of enforcement of the human right to democracy, a related critique pertains to the unjustified restriction of the principle of equal sovereignty of states that would result from the enforcement of the right to democracy.¹⁰¹ Once enforced internationally, this right would undermine its own object and run against the principle of self-determination.

Again, it is a critique based on the political conception of human rights presented before. There are two ways of responding to this critique: the first one is to point to the re-definition of the concept of sovereignty in the post-Westphalian era and its relationship to human rights and state responsibility for the respect of those rights; and the second is to show how the human right to democracy is intrinsically connected to political sovereignty so re-defined.

First of all, and although scope precludes explaining this in detail, state sovereignty has been going through a deep process of re-definition through international law and in particular human rights law in the last fifty years or so. From sovereignty *qua* independence, it has gained a new dimension and has also become sovereignty *qua* responsibility. Sovereignty is a normative concept imbued by the value of political autonomy, but also a result bound by it. A state is only sovereign to the extent that its citizens are and their political autonomy constitutes an internal limit to that state's sovereignty.¹⁰² This is also the case of all human rights. In those conditions, the right to democracy that stems from the principle and value of political equality is one of the internal boundaries to democratic authority and state sovereignty.

Secondly, even when sovereignty is re-defined as proposed, the human right to democracy remains problematic from the perspective of the principle of equal sovereignty, which is a cornerstone of the international legal order.¹⁰³ Unlike other human rights that constrain state sovereignty in internal affairs, the human right to democracy is a more incisive limitation on the organization of the state and also extends to external sovereignty. Again, the account of human rights used in this chapter enables us to evade that critique that is pointed towards political accounts of human rights that do not derive those rights from moral considerations and which have to gather sufficient empirical evidence for a specific right or at least sufficiently broad public justification.¹⁰⁴ If I am right about human rights and democracy being intrinsically connected and co-original because of their common foundation in political equality, human rights do not only constitute an internal limitation on political authority, but they also actually require political authority. This is especially true of the right to democracy. As a result, contrasting the right to democracy with state sovereignty is the wrong opposition. It is only when political authority no longer exists as such and power annihilates the right to democracy that that right can have any teeth against the principle of equal sovereignty.¹⁰⁵

¹⁰¹ See e.g. Cohen, above n1.

¹⁰² See e.g. Cohen J.L., 'Sovereign Equality vs. Imperial Right: The Battle over the "New World Order"', (2006) *Constellations* 13/4, 485-505; Cohen, above n1. See also Waldron, J., 'The Rule of International Law', (2006) 30:1 *Harvard Journal of Law and Public Policy* 15; Besson 2009c, above n5.

¹⁰³ See e.g. Cohen, above n1 and above n102.

¹⁰⁴ Cohen, above n1's argument is pointed mostly to Raz, above n9 and Cohen, above n7.

¹⁰⁵ On this minimal and justified infringement of the principle of equal sovereignty, see Cohen, above n1, 595-6.

3.3.3 Parochialism and the Human Right to Democracy

A third critique that is brought forward against a human right to democracy is parochialism or, more precisely, the claim that such a right is a parochial right. Democracy is allegedly a political regime that only exists in a few States in certain wealthy and powerful parts of the world and recognizing the existence of a human right to democracy would contribute to imposing a political model on other weaker and poorer States and people. Among human rights, political rights of this kind are the most likely to fall prey to the cultural relativism objection.¹⁰⁶

Parochialism is a well-known challenge to human rights that is based on a brand of moral relativism. On that view, human rights are derived from a 'parochial' set of values that are unjustifiably imposed on people and societies who do not share it. This has as much to do with the values themselves as with their specific ordering. It need not be based on moral scepticism, however, and it is enough to entertain the parochialism claim that values are plural and their orderings can be many without a complete and coherent ranking, and hence that, in circumstances of social and cultural pluralism, those orderings and value systems can vary.¹⁰⁷ Nor should one confuse this parochialism critique that is a serious critique with unconvincing versions of the cultural relativism challenge that are based on disagreement, on the lack of consensus or of mutual justification;¹⁰⁸ not only may people may be mistaken and themselves parochial when they disagree or do not consent, but disagreement and lack of consensus is a widespread and persistent phenomenon within Western societies themselves –the very societies accused of being parochial.¹⁰⁹

There are two main difficulties facing this critique: first, its moral validity and, second, within its residual ambit, its defeasibility.

First of all, the moral validity of the parochialism critique can be undermined by reference to an objective albeit pluralist conception of morality and a human rights account that reflects that moral pluralism. Adopting an objective view of morality does not equate with adhering to a monist conception of morality: the background to the following analysis is an objective albeit pluralist account of morality that can accommodate conflicts of values and different orderings between them.¹¹⁰ The interest-based account of human rights presented before fits this pluralist account of morality and can as a result accommodate a plurality of values and orderings thereof, and hence of justifications of the same human right and its corresponding duties.¹¹¹ Further, the separation between the recognition of rights through the identification of fundamental interests and the specification of duties allows for a contextualization of interests and hence for different orderings between them, but also between them and other considerations before the duties are specified.¹¹²

¹⁰⁶ See e.g. Griffin, above n7; Beitz 2007, above n7; Cohen, above n7. For a reaction, see e.g. Forst, above n1; Shue, above n7.

¹⁰⁷ See Buchanan, above n8. See also Tasioulas, above n8 for a discussion of both the pluralism-based and the scepticism-based accounts of the parochialism critique. I agree with him, however, when he considers that the strongest version of the critique is the pluralist one.

¹⁰⁸ For a critique of those, see Buchanan, above n8 ; Besson, above n19.

¹⁰⁹ See Buchanan, above n8 on the debunking of alternative accounts of the cultural relativism critique.

¹¹⁰ See Tasioulas, above n8.

¹¹¹ See Tasioulas, above n38 and n41.

¹¹² See Besson, above n19 and n21.

Secondly, even within its residual ambit, and in particular with respect to the difficulties raised by social and contextual pluralism, the parochialism critique can be defeated. It should be emphasized for a start that holding to moral objectivity does not mean denying the importance of contextualization of moral values recognized by international law at the domestic level, nor the possibility of the historical national localization of objective values recognized by international law and of historical changes in that localization in the course of time.¹¹³ Further, one may legitimately contend that the inter-cultural dialogue and mutual adjustment promoted by democratic coordination in international law-making, and international decision-making generally, pays sufficient attention to the issue of cultural diversity and the need for epistemic inclusion of different cultural perspectives when adopting or applying international law.¹¹⁴

Notice, however, that this pluralist counter-argument seems available only to an account of human rights that regards them not as underived moral norms, but as grounded in a multiplicity of other, non-rights-based considerations, such as universal human interests. So-called traditional ethical accounts of the justification of human rights face a difficulty here and cannot rebut the parochialism challenge as easily; those that do recognize the right to democracy ground the right in a single moral norm, such as autonomy or liberty and fail for reasons of cultural diversity.¹¹⁵ At the other end of the spectrum, political accounts of the kind discussed before face a distinct but daunting difficulty; they cannot avail themselves of universal moral grounds and have to face social and cultural relativism on empirical or at least justificatory grounds.¹¹⁶

As a result, withdrawing into the right to political membership as the most one may require from decent societies in a liberal framework of mutual justification¹¹⁷ is both too much to sail on that argument and too little to convince proponents of a modified interest-based argument for the human right to democracy. The right to political membership, advocated by liberal authors such as Cohen, is only distinct from the right to democracy as a matter of degree. Collective self-determination, as Forst argues, is 'a recursive principle with a built-in dynamic that favours those who criticize exclusions and asymmetries'¹¹⁸ and implies democracy when brought to its maximal breadth.

4. The Legalization of the International Human Right to Democracy

As alluded to in the introduction, the existence of a moral right to democracy does not necessarily imply or justify that of a legal right to democracy. There is no moral right to a legal right to democracy one may derive from the mere existence of a moral right to democracy. Nor does recognizing such a legal right imply the pre-existence of a moral right to democracy. Of course, once a legal right is created, it also generates a moral right except when the other conditions for the recognition of a moral right, and in particular the existence of fundamental interests sufficient to generate duties, are not provided.¹¹⁹ What we then have is a legal norm

¹¹³ This explains how the fact that a decent life was possible prior to the advent of modern democracy does not affect the universality of the human right to democracy.

¹¹⁴ See Buchanan, above n8.

¹¹⁵ See Griffin, above n7, 247-55 and the critique by Tasioulas, above n41.

¹¹⁶ Hence the difficulties faced by Rawls, above n7, 61 et seq; Beitz 2007, above n7, 103; and Cohen, above n7, as emphasized by Cohen, above n1 ; and Forst, above n1.

¹¹⁷ See Beitz 2007, above n7; and Cohen, above n7, trying to correct some of the defects of Rawls, above n7.

¹¹⁸ Forst, above n1.

¹¹⁹ See Raz 1984a and 1984b, above n19; Besson, above n21. Note that Buchanan, above n7 fails to see this in his argument for a legal human right to democracy.

that is not a moral right and not accordingly *stricto sensu* a legal right –except by name.

In this section, I would like to assess not so much the additional justifications there may be for recognizing a legal right to democracy, such as the legitimacy arguments mentioned in the introduction and in particular the instrumental value of democracy for human rights or the democratic state consent argument,¹²⁰ but the conditions under which the existence of a moral right to democracy may justify the legal recognition of that right. Of course, some of those conditions may also apply to the other reasons to recognize a legal right without a pre-existing moral right. I will proceed in two steps: first, I will assess why there should be a legal right to democracy; and, second, why that legal right should be an international legal right to democracy.

4.1. The Legal Human Right to Democracy

The first question one ought to ask is: what are the material elements which may provide reasons for the legalization of a human right? General reasons put forward for the legal recognition of a moral right are usually the following: security and clarity, intermediary agreement on a contested right or sets of interests, effectivity, sanctions or publicity.¹²¹ In some cases, counter-reasons may be put forward and in particular the non-antagonistic quality of social implementation mechanisms or the destructive individualization of human rights remedies.¹²²

In the case of the human right to democracy, the legalization of the right would enhance its realization, by both enabling democratic processes through legal directives and protecting them against themselves and their own unmaking.¹²³ Of course, the legalization of every human right triggers legitimation issues, especially when it functions as a limit on the outcome of democratic decision-making processes.¹²⁴ And this is even more so when the right that is legalized and needs to be legitimized is the right to participation in those very processes. This is the famous paradox of democratically guaranteeing democracy and self-determined self-determination I alluded to in the introduction. The best we can do in view of that paradox is to understand this process as an iterative one that starts from historical and current practises,¹²⁵ and the relationship between democratic procedures of legalization and the legal right to democracy as one of mutual reinforcement and mutual trigger of justification by one another.¹²⁶

4.2. The International Human Right to Democracy

The next question to arise is whether the legal recognition of the moral right to democracy

¹²⁰ See Buchanan, above n7, 142 et seq.

¹²¹ See Besson, above n19 and n21.

¹²² See Tasioulas, above n21.

¹²³ See Nino, C., *The Constitution of Deliberative Democracy*, New Haven: Yale University Press, 1996, 184; Benhabib, S., 'Toward a Deliberative Model of Democratic Legitimacy', in Benhabib, S (ed.), *Democracy and Difference: Contesting the Boundaries of the Political*, Princeton, Princeton University Press 1996, 67, 80 on democratic rights as rules of the game that make the game at all possible.

¹²⁴ See e.g. Waldron, above n3; Besson, above n19. Note that I am leaving aside the question of the constitutionalization of human rights.

¹²⁵ See Buchanan, above n7, 189 for a similar argument in the international legal context.

¹²⁶ Neither human rights nor democracy on their own can be sufficiently self-reflexive, however; it is their mutual foundation in political equality which makes them constantly seek justification from one another.

ought to occur through national or international law.

Given the universal scope of the right, an international guarantee (conventional or customary) would seem *prima facie* to constitute the obvious choice. But considerations of territorial scope ought not be a priority. Most international human rights guarantees are considered as minimal and subsidiary and give rise to duties of reception and enforcement within domestic law. Both levels of protection are usually regarded as complementary, therefore, rather than as providing competing guarantees. Further, many national constitutions are more advanced than international instruments with respect to their guarantees of certain human rights, like social and economic rights such as the right to health, but also of certain civil and political rights like the right to civil disobedience or, as a matter of fact, most political rights. As the experience with the European Union Charter of fundamental rights and in particular with social and economic rights in the Charter has demonstrated, national guarantees can then fuel later international (or regional, in this case) guarantees of human rights.

Primary reasons for the international legalization of a moral right relate to various elements in that right:¹²⁷ (i) its personal scope as international human rights have individuals as right-holders, but also other states and international organizations in the international community (through *erga omnes* duties of the state or through conventional duties based on a human rights treaty), first, and have all individuals residing in a given state and not only citizens as right-holders, second; (ii) its material scope as international human rights law may fill gaps in national protection or at least provide a minimal safety net in case of human rights relapse in a given state; and (iii) its territorial scope as international human rights law protect not only individuals within state boundaries, but also all individuals submitted to its extra-territorial jurisdiction. (iv) Additional reasons may also be found in the international mechanisms available to enforce international human rights duties, whether political or judicial and whether coercive or non-coercive and military or non-military. As Buchanan and Russell have interestingly captured, further reasons may be identified and grouped into self-regarding reasons and other-regarding or cosmopolitan reasons.¹²⁸

In spite of all those reasons, I would like to submit that national law remains the most legitimate locus for the legalization of human rights.¹²⁹ This has to do as much with human rights and the values underlying them, as with democracy itself. First of all, it follows from my discussion of parochialism and social relativism that fundamental interests need to be concretized and contextualized in a given epistemic community to be recognized as human rights. While a lot of that concretization may be done at the international level, its key contextualization can only take place at national level.¹³⁰ Further, by reference to the intrinsic relationship and the co-originality between human rights and democracy discussed before, and as long as international democracy is not only under-developed but as long as it has not entirely replaced national democracies as locus of decision-making,¹³¹ human rights ought to be incorporated and protected within national legal orders. This is where human rights law can be vested with its

¹²⁷ For those and other reasons, see Gardbaum, above n22, 764-8.

¹²⁸ See Buchanan and Russell, above n22, 330 et seq.

¹²⁹ On the difference between legislative and constitutional legalization, see Waldron, above n3; Besson, above n19.

¹³⁰ See Buchanan, above n8 on the need for inter-cultural dialogue and democratic concretization of international human rights.

¹³¹ On *demoi-cracy* and its relationship to (national and international) law-making, see Besson 2009a and 2009b, above n5.

democratic legitimacy.¹³² This explains why most international human rights guarantees are considered as minimal and subsidiary and give rise to duties of reception and enforcement within domestic law. Both levels of protection are usually regarded as complementary and as serving different functions, therefore, rather than as providing competing guarantees.

All reasons given previously for the international legalization of human rights would seem *prima facie* to apply to the moral right to democratic participation, at least *qua* minimal and general international human right, following the *caveat* I have just articulated. Given the interests protected by that right, and their intrinsic relationship to the principle of political equality, however, it is clear that its primary locus of legitimation and hence of legalization ought to be domestic. This has to do as much with the contextualization of democratic interests discussed before, as with the legitimacy of an international legal right to democracy.

Of course, the democratic legitimation of international law abides by criteria and refers to subjects very different from that of domestic law.¹³³ It would be wrong therefore to look for an international state-like political community that iteratively legitimizes a right to democratic participation through democratic practises along the lines discussed before. Furthermore, ultimately the regress will have to be curbed and current and historical democratic practises could be used as a starting point of reference bottom-up and then gradually legitimized through a self-reinforcing relationship between democratic practises at national and international level, on the one hand, and the right to democratic participation, on the other.¹³⁴

It is clear, however, that in current conditions of international law-making, the equal inclusion of all those affected and the means to get an equal say even in an iteratively democratic process are simply not guaranteed, whether from a domestic indirect perspective or from that of an international direct one. It would be even more paradoxical than at the domestic level, as a result, to protect the right to democracy and not to enable the beneficiaries of those rights to exercise that right when deciding about that very right and about their membership in the community of right-holders. The whole idea of self-determination through the human right to democratic participation would be defeated. Not to mention the absence of democratic mechanisms and institutions to interpret and apply that right at the international level once it has been adopted.¹³⁵

It is important to emphasize at this stage that this conclusion ought not to affect the legal validity of existing guarantees of the right to democracy under current international law.¹³⁶ Nor does it impact the moral reasons there may be for states to adopt or recognize international legal guarantees of a given human right in the first place, whether those reasons are self-regarding or cosmopolitan.¹³⁷ It only targets their legitimacy and at that only one of the main grounds for their legitimacy, i.e. democracy. Although democracy is particularly relevant, and one may even argue an inescapable one in the context of the legitimization of a legal human right to

¹³² As I have argued elsewhere (Besson 2009c, above n5), the legitimate authority of international human rights is different from that of other international law norms.

¹³³ See Besson 2009c, above n5.

¹³⁴ See Buchanan, above n7, 188-9.

¹³⁵ Of course, the legitimacy of international human rights institutions' decisions cannot necessarily be identified with that of the international human rights norms applied, the way it would in the domestic context.

¹³⁶ As I have explained elsewhere, however (Besson 2009c, above n5), the claim to legitimate authority that is connected to legal validity needs to be honored eventually and there should be a drive towards legitimizing international legal norms as a result.

¹³⁷ See Buchanan and Russell, above n22, 330 et seq.

democracy, other justifications for their authority may still be available.¹³⁸ Furthermore, there may be other reasons than ones of legitimacy for states to actually comply with that legal right, some instrumental (e.g. democratic peace or democratic state consent) and other justice- or fairness-related.¹³⁹ While those reasons are no justifications for the authority of the human right to democracy, they are reasons for compliance that co-exist and are important in international law.¹⁴⁰ All the same, the absence of (democratic) legitimacy of the international legal right to democratic participation defeats the potential justification of an intervention in the sphere of national sovereignty, and more generally any state liability and sanctions for not respecting that right.

Of course, the more democratic, or rather the more *demoi*-cratic international human rights law-making and human rights law enforcement becomes, the more legitimate the international legal right to democracy will be. In a global community of states *and* individuals,¹⁴¹ growing interdependencies imply mutually affected interests and hence generate the interest and claim of states and individuals to decide together over those issues and no longer on their own and separately or only very indirectly together.¹⁴² In those circumstances, inclusion and participation at all levels, including the national one, becomes a legitimate individual claim and, at the same time, participation in the decision-making process stems as a common interest. If those conditions pertain, the right to democratic participation will no longer be an interest over which only national democratic polities can decide, but an interest of the community of communities. This means that it is a right over which both states and individuals have to decide and which they have to protect together. And it also means that that common interest and this new kind of political equality¹⁴³ could become the object of an international legal right to democracy provided they can do so *demoi*-cratically. True, there is something *prima facie* circular in this argument, but if the relationship between international *demoi*-cracy and the international legal right to democracy is seen as one of mutual reinforcement rather than one of logical sequence, the circle may come to be seen as virtuous.¹⁴⁴

¹³⁸ See Besson 2009c, above n5.

¹³⁹ On such reasons to recognize an international legal right to democracy independently from the democratic legitimacy of that right, see Buchanan, above n7, 142 et seq. and 188-9.

¹⁴⁰ See Besson 2009c, above n5 on international law's *de facto* authority and the other reasons to abide by international law than its justified authority.

¹⁴¹ See Besson 2009a, above n5 for a discussion of global *demoi*-cracy as a middle path between international democracy and the indirect democratization of international law through national democracies.

¹⁴² See Besson 2009b, above n5 on the *demoi*-cratic international community.

¹⁴³ On political equality in international circumstances, see Roth, B., *Governmental Illegitimacy in International Law*, Oxford: Oxford University Press, 1999; Christiano, above n50; Christiano, above n5; Pettit, above n5; Besson 2009b, above n5.

¹⁴⁴ This is also Nickel, above n23's conclusion albeit for different reasons. His reasons pertain to the absence of a moral right to international democracy before democratic international processes and institutions are in motion and one can assess the existence of an objective individual interest to taking part in those processes and institutions. Because of the mutually reinforcing relationship between the human right to democratic participation and democratic processes, I do not see those reasons as undermining the justification of the *moral* right to democratic participation, but that of the authority of the *legal* right to democratic participation.

Conclusion

So, is there a human right to democracy? In this chapter, I have argued for a moral right to democracy *qua* international human right to democratic participation. I have distinguished the moral right to democracy from the legal right to democracy, and assessed various reasons to recognize either form of right.

After exploring them, I have separated the question of the instrumental or intrinsic relationship between human rights and democracy from that of the existence and justification of a right to democracy, developed a revised interest-based argument for such a right to democratic participation and discussed alternative arguments for that right. I have then delineated the human right to democratic participation from connected rights and responded to three main critiques raised against that right. In a final section, I have argued that such a right should be legalized, but that this should occur in priority at the national level. I have also argued that, provided the *demosi*-cratic credentials of international law-making are enhanced, the legal right to democracy could be guaranteed legitimately at the international level as a common interest of states *and* individuals.

In short, the claim has been that there *is* a universal moral right to democratic participation and that there *should be* a national legal right to democratic participation. I have also argued, however, that the international legal right to democratic participation that is currently guaranteed by international law can only be vested with democratic legitimacy provided international law-making processes and especially human rights-making processes are made both more democratic and context-sensitive. Of course, this is certainly not something a moral right to democratic participation can trigger on its own. This is because there is much more to democracy than human rights.