Democracy versus human rights: Why Held and Habermas do not resolve the tension

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This version: 4 February, 2010
Work in progress – comments are appreciated!

Abstract

Prominent theorists of democracy, such as David Held and Jürgen Habermas, have recently claimed to present resolutions to the tension or conflict between democracy and human rights. Traditionally, democratic theorists have debated whether democratic procedures have priority over individual rights or vice versa. But both Held and Habermas claim that we really do not need to choose between the two, as they can be defined in terms of each other or are otherwise mutually constitutive.

I shall argue that their claims are unsuccessful, albeit for different reasons. Held and other cosmopolitan democrats propose an extensive list of fundamental rights and a global rule of law to uphold them, while leaving very little room for democratic procedures: democracy here comes to be defined as the implementation of certain human rights.

A central claim in deliberative democracy of the Habermasian breed is that rights and democracy are not conflicting principles but interdependent and co-original. By insisting on the internal relation and the co-originality of rights and democracy, deliberative democrats end up in a peculiar regress and they also have problems explaining how there can be international human rights in the absence of democratic procedures at the global level.

Democracy and human rights

Most of us would probably spontaneously hold that both democracy and human rights are important. We are so used to speaking and hearing of them in conjunction that we often regard them as more or less synonymous. Or we may think of human rights and democracy as sibling concepts, both expressing a common notion of human autonomy, dignity and freedom. Moreover, we usually see them not only as compatible in practice but also as conditions for each other – we cannot have democracy if human rights are not safeguarded and where democracy is lacking, the respect for human rights is usually wanting or worse.

However, despite our common intuitive and plausible notion that human rights and democracy are like two sides of a coin, so that we cannot have one without the other, we may also easily think of cases where the two seem to be in tension or outright conflict with each other. For instance, should a constitution with a bill of rights or international human rights conventions lay constraints on what the sovereign people may decide in a democratic order? And if so,

could such individual rights be decided democratically? If we perceive these questions as troubling, we also see why human rights and democracy may stand in a more problematic relation to each other than the common sense notion reveals. It is hardly surprising that human rights and democracy may conflict. After all, constitutions and international human rights treaties alike serve to restrict what a self-determining polity, however democratic its political system, may do towards its own members.[1]

The problem is as old as democratic theory: What is the proper relation and priority between popular sovereignty and individual rights, between majoritarian procedures and minority protections, between the liberties of the ancients and the liberties of the moderns? Traditionally, debates have focused on whether a self-governing, democratic community should and could constrain itself by a constitution protecting the rights of minorities and individuals against the tyranny of the majority. While liberal democrats traditionally have endorsed such constitutional constraints on democracy to safeguard the liberties of citizens, republican and radical democrats have often criticised and rejected such constraints. While the debate over human rights has often followed parallel tracks, human rights differ from constitutional civil liberties in some important respects.[2] Certainly, we often think of both constitutional rights and human rights as giving legal and political expression to a common conception of individuals as bearers of fundamental moral rights. Sometimes international human rights commitments even gain the legal status of constitutional and legal rights. However, constitutional rights are obligations towards its citizens which a political community accepts by adopting a constitution, whereas human rights are obligations to its subjects which a state accepts by ratifying international treaties.[3] You hold constitutional rights in virtue of being a citizen of a constitutional state, while you have human rights, as they are commonly understood, because you are a human being.[4]

Recently, however, certain theorists of democracy have suggested that this tension between human rights and democracy can be resolved: Much like our common-sense intuition, theorists of cosmopolitan democracy such as David Held and theorists of deliberative democracy such as Jürgen Habermas argue that democracy and human rights depend on and constitute each other or that they are not in fact in conflict because they are based on a common foundation of human freedom and autonomy. Democracy and human rights, properly understood, presuppose each other, they claim.

I shall argue, however, that these attempts at resolving the tension have been unsuccessful, albeit in different manners. Although they seemingly agree that human rights and democracy are two sides of a coin and although they tap similar resources in building their argument (basically, a theory of the modern legal state and a conjunction of liberalism and republicanism), on closer inspection they end up in quite different positions. Cosmopolitan democrats give an extensive scheme of human rights a priority so strong that democratic procedures, and the corresponding rights, are effectively reduced to a minimum. Conversely, by insisting that human rights and democracy are "co-original" and internally related, theorists of deliberative democracy have difficulties providing a theory of international human rights.

The paper is arranged in two sections. First, I turn to the central role that David Held assigns to human rights in his theory of cosmopolitan democracy in which the tension between

[1] Gould 2004: 190

[2] And this is to say nothing about the substantive content of each class of rights, their moral status or their political and juridical enforceability – aspects which may add to the distinction of constitutional rights and human rights.

[3] Both sorts of obligations may be positive or negative, or both.

[4] As Jack Donnelly puts it, "constitutional rights are held by human beings without their being necessarily human rights; that is, they are rights of persons without being among the rights of man." (Donnelly 1982)

human rights and democracy is resolved by a conceptual shift. I argue that by defining democracy in terms of the realisation of a fixed scheme of human rights, cosmopolitan democracy gives too little elbowroom for democratic politics. Second, I turn to Jürgen Habermas's claim that human rights and democracy are "co-original", interdependent and internally related. After reconstructing Habermas's claim, I discuss three problems inherent in his approach, most notably that if we anchor the system of rights in actual deliberative procedures, it becomes difficult to justify international human rights in the absence of global legal and democratic institutions.

Human rights in cosmopolitan democracy

David Held, Daniele Archibugi and other theorists of cosmopolitan democracy claim to turn cosmopolitanism into a political project by coupling it with democracy. That is, they claim to successfully combine the universalism of cosmopolitanism, whereby all humans belong to a single moral community, with the ideal of democracy, usually conceived as particularistic in the sense of presupposing a delimited self-governing political community. Cosmopolitan democracy promises to combine institutionally a strong account of universal human rights with democratic self-determination.

Is cosmopolitan democracy a successful innovation in this sense? I shall argue that it is not. While its advocates present themselves as democrats with a radical agenda, wishing to expand democracy to transnational levels and within and between states, they resolve the tension between human rights and democracy by defining democracy as the implementation and institutionalisation of an extensive, fixed and non-negotiable scheme of rights. Paradoxically, democratic processes become dispensable or, at any rate, get scaled down to a mere apolitical technicality. In the following, I start by reconstructing the cosmopolitan democracy approach to rights and democracy, starting from a principle of autonomy extending into a global "democratic public law", and thereafter address some problems in this cosmopolitan conception of rights and democracy.

Autonomy and the democratic public law

David Held starts his journey to cosmopolitan democracy from a principle of autonomy, as the smallest common denominator in modern democratic political thinking. "Autonomy", he suggests, "is the capacity of human beings to reason self-consciously, to be self-reflective and to be self-determining".[5] While the principle of autonomy expresses aspirations for self-determination in republicanism and Marxism, the liberal democratic tradition alone expresses it fully, Held argues, because radical democratic traditions "overly rely upon a 'democratic reason' – a wise and good democratic will – for the determination of just and positive political outcomes."[6]

The principle of autonomy, Held argues, requires that everyone has equal rights and duties to participate in constituting the political system which determines their collective life conditions, provided that they do not thereby violate other persons' rights:

> "Persons should enjoy equal rights and, accordingly, equal obligations in the specification of the political framework which generates and limits the opportunities available to them: that is, they should be free and equal in determination of the conditions of their own lives, so long as they do not deploy this framework to negate the rights of others."[7]

Hence, we may understand autonomy, in Held's view, as the ultimate baseline value, the promotion of which justifies both democracy and human rights, and which thus provides the key to

[5] Held 1995: 146
[6] Held 1995: 149
[7] Held 1995: 147

resolving the alleged tension between the two.[8] Two things are worth noting about this principle of autonomy. On the one hand, it ascribes to persons rights and duties to participate in determining their political framework – a positive conception of liberty, rather than the liberal concept of individual freedom from intervention. This indicates a first definitional shift serving to resolve the tension between rights and democracy, because the rights following from this conception of autonomy seem to restrict the scope of basic rights to collective self-determination: The basic rights that people should have are those that enable them to be self-determining. On the other hand, this resort to autonomy as an underlying, axiomatic value may also prepare the ground for an instrumentalist justification of democracy: Democracy is desirable to the extent that it fulfils or realises the principle of autonomy better than practicable alternatives. Thus, as Simon Caney notes, "valuing autonomy not only does not commit one to valuing democracy: it may lead one to wish to circumscribe democratic government."[9]

So how does cosmopolitan democracy move from this principle of autonomy to a scheme of rights? Rights are supposed to safeguard individuals from being deprived of their autonomy in various social and political institutional settings – what Held calls sites of power. Such deprivation consists in everything from war and violence to malnourishment and improper schooling, but takes different expressions in each site of power.[10] Each site of power also corresponds to a cluster of rights – health rights, cultural rights, political rights, and so on – necessary to enable citizens to participate on free and equal terms in regulating their own associations, that is, necessary for all citizens to be equally autonomous.[11] Taken together, the rights that are supposed to enable people to be equal participants in the political and social affairs of their society make up what Held calls the "democratic public law." The democratic public law sets up a democratic meta-framework, which provides "criteria by which one can judge whether or not a given political system or set of arrangements is democratic."[12] It lays down the agenda for democratic politics, Held suggests, but leaves open exactly how and in what order each of the items on the agenda should be interpreted and implemented in particular circumstances.

Now, in the following I shall argue, first, that the rights enshrined in the democratic public law can hardly serve as an agenda for democratic politics, because reasonable people may legitimately disagree over the goals of politics in a democracy and rights may themselves often be the source of conflicts in society. Secondly, I shall argue that by defining democracy as human rights, cosmopolitan democracy comes to present a political ideal that is both too wide, because it claims to encompass all spheres of society, and too thin, because it gives little room for actual

[8] Carol Gould similarly argues that the "democratic paradox" can be resolved since both democracy and human rights fall back on a common principle of autonomy (Gould 2004; 2006).
[9] Caney 2005: 155
[10] Held suggests that human life can be cut down to seven such sites of power: (1) the body, (2) welfare, (3) culture, (4) civic associations, (5) economy, (6) violence, and (7) the state. For example, the body as a site of power regards the individual's physical well-being and deprivation here means that you don't have the resources or opportunities, for example means of subsistence, that you need to be able to engage in social interaction. Likewise, economy concerns how to organise the way in which goods and services are produced, distributed, exchanged, and consumed, a site of power where systematic inequalities in social and economic resources lead to a lack of autonomy. But Held is less clear as to why precisely these seven sites of power are the most important ones (or indeed all there are) and whether they should be regarded as analytical constructs or as something that could and should be institutionalised as forms of governance.
[11] In practice, however, the ideal of autonomy might not always be fully attainable, but it is still worth striving for, Held argues. By anticipating an ideal autonomy and defending that it is desirable, we do not claim that it is also attainable and feasible. It should rather be regarded as a counterfactual posit.
[12] Held 1995

democratic participation. It fails to bring together the various democratic models it claims to draw upon.

Rights as an agenda

A first criticism of cosmopolitan democracy's account of human rights concerns precisely its conception of rights as an agenda for politics. Theorists of cosmopolitan democracy argue that rights could and should serve a steering role in the political process. The scheme of rights as expressed by the democratic public law both set the agenda for democratic politics and serves as an arbiter when interests conflict. Against this view, which seems to assume that rights implementation is a fairly technical matter, I shall argue that the conception of rights in cosmopolitan democracy makes them inapt both to serve as goals for political development and as arbiters when goals and interests conflict.

Cosmopolitan democracy, Held writes, "connotes nothing more or less than the entrenchment of and enforcement of democratic public law across all peoples – a binding framework for the political business of states and societies and regions, not a detailed regulative framework for the direction of all their affairs."[13]

And yet many of the rights he specifies in the democratic public law are detailed and specific, including rights to universal childcare, universal education and community services, rights to active membership of civic associations, and a guaranteed minimum income. Once rights to childcare, minimum income, and so on have been 'entrenched and enforced across all peoples', what scope remains for political disagreement and decision-making? By posing this fixed list of substantive rights as the very measure of democracy, Held suggests restrictions on democratic politics (or in fact on all sorts of politics, democratic or not). Other rights suggested by Held are notably open-ended, but may prove just as problematic when serving as an agenda for democratic politics. Exactly what are people entitled to in order to enjoy their rights to "physical and emotional wellbeing", or their rights to toleration, "peaceful coexistence" and a "lawful foreign policy"?[14]

Notably, Held does not address how the democratic public law could be changed, amended, replaced, or even abolished. He assures us that there is room for interpretation and deliberation by the democratic assemblies, courts and other institutions that are set to implement the provisions of the democratic public law. Priorities will differ in different contexts, Held argues. But the scope for negotiation concerns only how to interpret and implement the democratic public law. And it must be so, Held argues, since if we do not recognise that democratic principles provide this "non-negotiable set of orientation points for political practices", then "democratic rights would be no more than rhetorical, and democratic politics would be without a *constitutive core*" – the very feature that allows it to be characterised as democratic.[15] It largely follows from the instrumentalist justification of democracy and the principle of autonomy that the democratic public law cannot in itself be up for grabs in the political process, if it is to serve as an agenda and ultimate arbiter when political ends conflict ("to guide and resolve disputes"). Additionally, this approach seems to assume that the broad scheme of human rights form a harmonious, indivisible and interdependent unity. Thus, for example, rights of different kinds presuppose each other.[16] The claim that rights form a unity seems to be central if rights are to serve as agendas for political reforms.[17]

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[13] Held 1995: 233

[14] Held 1995: 192ff

[15] Held 1995: 201

[16] Goodhart 2005

[17] Or is it? A list of rights which prioritises between different rights, suggesting, for instance, that some rights are more basic than others, could presumably better set the priorities of implementing

But the claim that rights are unitary might seem to miss that rights are often themselves a source of conflict. Rights are political and they may give rise conflict when people claim them. Expressing a political understanding of human rights, Micahel Ignatieff argues that declarations, covenants, and conventions produced by the international human rights regime are not a harmonious, unitary, and balanced moral system. To the contrary, the noble human ends that these declarations proclaim conflict. And because these ends conflict, the rights that define such ends as entitlements conflict too. Even demands within a single right may conflict with each other, such as when the right to proselytize conflicts with the right to practise one's religion.[18] Such conflicts can be settled, but rights themselves rarely provide the means to settle them. It is thus naïve to believe that rights can serve to resolve political disagreement:

> "When political demands are turned into rights claims, there is a real risk that the issue at stake will become irreconcilable, since to call a claim a right is to call it nonnegotiable, at least in popular parlance."[19]

In order to reach closure in a political disagreement, we need other factors than rights-claims. Closure is reached when parties are exhausted with conflict or begin to recognise and respect each other, Ignatieff argues. But we may also reach closure by subjugating the dissenting party or by joining forces against a new common enemy. And the process is entirely political. Human rights is a kind of politics "that must reconcile moral ends to concrete situations and must be prepared to make painful compromises not only between means and ends, but between ends themselves."[20] Thus, a scheme of rights is not likely to function as an arbiter or even as an agenda to be implemented by political assemblies, even if we could get all parties to agree to the actual content of rights.

Moreover, as we have already seen, many of the rights suggested in the democratic public law are indeed not abstract and universal at all, but specific and particular. The rights' specificity make them less universal in scope – they are in fact modelled on contemporary, industrialised Western welfare states, and we can at least imagine societies where wage labour is not a predominant institution and where, consequently, such political concerns as childcare, terms of employment, or minimum income are simply irrelevant or undesirable.[21] But moreover, these are precisely the kind of topics that are contested and debated in the democratic process, even in those historically particular welfare states. Why couldn't a democratic political order allow ends like these to be fundamentally challenged? In democratic politics, conflicts concern the ends just as much as the means. As Jeremy Waldron argues, "Disagreement on matters of principle is […] not the exception but the rule in politics."[22] And that is why we need democratic processes to make up our collective mind. A conception of democracy that rules out such disputes over the goals of collective decision-making appears to be neither very realistic, nor very democratic. Cosmopolitan democrats here seem to put the carriage before the horse, since they presuppose a given, non-negotiable answer to all the important questions democracy is supposed to answer. To conclude, cosmopolitan democracy implies a rather strange move from a principle of autonomy which gives persons equal rights to be collectively self-determining to a strict substantive agenda for politics.

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institutions and also serve better as arbiters when rights claims conflict.

[18] cf. Gray 2000: 111

[19] Ignatieff 2001

[20] Ignatieff 2001

[21] cf. Gray 2000: 110; Gould 2004: 56

[22] Waldron 2001

Redefining democracy as human rights

Moreover, cosmopolitan democracy seems to resolve the tension between democracy and human rights by conflating the terms. Democracy is thus not only justified in terms of human rights, but defined as the realisation of a scheme of human rights. A consequentialist or instrumentalist justification of democracy holds that democracy is justified if, and only if, it produces better outcomes (according to some standard such as the common good, civic virtue, equality or respect for basic rights) than do other available decision-making procedures.[23] Cosmopolitan democracy however, goes farther than such general consequentialist justifications of democracy, by suggesting, in effect, that democratic procedures are *democratic* if and only if they lead to the desirable outcomes in terms of the democratic public law.

A consequentialist justification of democracy may well admit that there are cases where non-democratic procedures would result in better outcomes in terms of justice, utility or whatever standard is used for justification. Consequentialists about democracy do not balk at suggesting that institutions such as families, workplaces, courts, central banks, or international institutions should not be governed by majoritarian democratic procedures, since they would only have to prove that having them put under direct popular control would not lead to better consequences.[24] Consequentialist democrats are therefore sometimes charged with being authoritarian, elitist, and undemocratic.[25]

Theorists of cosmopolitan democracy seemingly wish to avoid such allegations. In claiming that institutions and decisions are democratic if and only if they conform to the democratic public law, Held seems to try to collapse the distinction between human rights and democracy, but he can do so only at the expense of the democratic procedure as a legitimating mechanism. This conflation between rights and democracy is problematic, and the case for cosmopolitan democracy would probably benefit from being understood as a plain instrumentalist justification of democracy, that is, by acknowledging limits on democratic rule for what they are.

But Held seems unwilling to acknowledge such limits. For sure, he motivates the principle of autonomy from two basic ideas, shared, he claims, by all proponents of the modern state project: that people should be self-determining and that democratic government must be limited government. Combined, he argues, these two ideas are supposed to keep at bay both the idea of the all-powerful state and the idea of the all-powerful people. Thus, Held identifies the modern state with a liberal democratic model of the constitutional state, an institutional order where political power is legally circumscribed, checked and balanced. On the other hand, Held also criticises the liberal democratic model for being too concerned with representative, constitutional government, a focus which he argues makes liberal democracy blind to power inequalities and "at best, a very partial form of democratic politics. […] for democracy to flourish it has to be fully entrenched in and among those sites of power which have unnecessarily restricted its form and efficacy."[26]

However, these claims both to incorporate the liberal democratic model and to extend democracy to all sites of power bring into the theory the very contradiction it aims to resolve: Powerful institutions restricting the "form and efficacy" of democracy are an essential part of the liberal democratic model. Within this model, different institutions are empowered to take on different tasks and objectives, not all of which concern fulfilling an agenda of a democratic public law, or even protecting basic rights, if this institutional order is to be preserved.

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[23] Arneson 2003; 2004

[24] cf. Arneson 1993; Majone 1996.

[25] Perhaps most deservedly so when they propose voting weighted by competence (Mill 1991 [1861]), disenfranchising the elderly (Van Parijs 1998), or abolishing local democracy (Arneson 1993), all in the name of the best outcome (but by different standards).

[26] Held 1995: 153; cf. Marks 2000

Moreover, as William Scheuerman points out, Held and Archibugi misread the concept of rule of law, the *Rechtsstaat*, which requires that state action rests on legal norms that are general in character, clear, public, prospective and stable. In liberal jurisprudence this notion of rule of law helps setting the limits on legitimate state intervention in the sphere of individuals. But in cosmopolitan democracy, rule of law merely implies that legislators and courts are to act in accordance with the rights enshrined in the democratic public law:

> "Archibugi and Held redefine the *Rechtsstaat* in terms of a set of basic rights purportedly able both to 'empower' legal actors and effectively 'circumscribe' them. But […] courts ultimately are destined to take on weighty discretionary authority. […] Given the fact that these rights 'must be defined broadly', one wonders how they, in fact, might succeed in effectively binding or circumscribing [state] authority."[27]

While disagreeing with aspects of cosmopolitan democracy, Michael Goodhart presents a conception of transnational democracy which, just like Held's, defines democracy as the implementation and institutionalisation of a broad scheme of human rights. Indeed, Goodhart calls his approach "democracy as human rights", which "understands democracy as the political commitment to universal emancipation through securing the equal enjoyment of fundamental human rights."[28] Following this definition of democracy, democratisation comes to mean:

> "extending the social guarantees of fundamental human rights beyond the familiar limits of the political as it has traditionally been understood to encompass all those conceptual domains [for instance, family, workplace, civil society, transnational sphere] where governance occurs and where domination and interference are thus likely. […] But 'democratization' does not mean creating majoritarian representative institutions; it means creating secure institutional guarantees for human rights."[29]

Thus, Goodhart here seeks to redefine the terms, so that democracy comes to mean the institutionalisation of human rights. The problem with this approach is not so much that it conflates the terms of democracy and human rights, so that democracy comes to mean nothing more and nothing less than the institutionalisation of human rights. After all, reformulating concepts is a legitimate task of a political theorist. More severely, first, the political aspects of democracy – democracy as a collective political process whereby people get along together even though they disagree – become subsumed, at best, under an institutional scheme designed to implement rights on behalf of people. Moreover, this institutional scheme is extended to include virtually all aspects of social life, while leaving few channels for citizens to actually influence the process of realising and securing their rights.

By thus redefining democracy as the institutionalisation of human rights, this brand of cosmopolitan democracy takes on a paternalist quality. This paternalism becomes evident in Andrew Kuper's account of representation as responsiveness. While asserting that a theory of representation in democracy should construe "citizens as agents with a degree of active control over rulers and policies", Kuper attempts to steer a middle course between letting the public judge its own best interest and handing over such judgment to rulers.[30] At the same time, he rebuts what he calls the subjectivist views, according to which interests are best judged by considering what individuals actually choose for themselves or what they would choose under ideal conditions. People may be misinformed about their true interests and systematically acting in ways which are not good for them, Kuper argues, and since ideal conditions, such as what we would choose

[27] Scheuerman 2002.
[28] Goodhart 2005: 150, emphasis removed
[29] Goodhart 2005
[30] Kuper 2006: 80f.

if we had perfect knowledge, are unattainable, they are of little use in determining our best interests. From this rejection of subjectivism, Kuper constructs his own argument for making political institutions more responsive to the people's interests, but not by means of electoral representation alone or even primarily, but via a broad range of accountability and advocacy agencies empowered to safeguard individual and collective interests.[31]

However, Kuper misconstrues the liberal view he criticises: The point is not that by letting individuals themselves judge what is in their own best interest, we could gain objective knowledge about what those interests are. Rather, the point is, first, that being the judge of one's own best interests is an integral part of being treated as an autonomous person. It is not an epistemic claim, but a moral claim that it is wrong not to treat people as the best judges of their own interests. Second, liberals argue that while individuals might be mistaken about their true interests and make suboptimal choices, the alternatives to letting them judge themselves are almost always worse, not only because it disrespects their autonomy, but also because people tend to be at least as poor judges of other people's interests as of their own.[32]

Thus, the scheme of rights takes a strong priority over democracy in cosmopolitan democracy. Gillian Brock gives a clarifying account of Held's view on the relation between rights, democracy and legitimacy. It is not democratic processes, but the democratic public law that confers legitimacy upon decisions, policies and institutions:

> "Held believes that under the cosmopolitan democracy model, systems would enjoy legitimacy to the extent that they enacted democratic law, so direct consent of the people is not always necessary for all policies to have legitimacy. Ideally, people would consent, but consent is not always necessary for all policies to have legitimacy."[33]

Democratic participation is actually not necessary to convey legitimacy to political decisions and institutions; it is only desirable, presumably, since the right to "direct involvement and/or elector (sic) of representatives in political bodies" is inscribed in the democratic public law as one right among many.[34] But then we have come a far way from Held's principle of autonomy, granting persons equal rights and duties in determining the political framework within which they live.

Along similar lines, David Chandler criticises cosmopolitan theorists for extending the concept of rights beyond the confines of the sovereign state without supplying mechanisms by which these new rights institutions can be made accountable to their subjects.[35] Chandler argues that the cosmopolitan framework can legitimise that existing rights of democracy and self-government are abolished, while the new democratic rights of cosmopolitan citizens remain tenuous. By placing the democratic public law above democratic procedures, cosmopolitan democrats seem to engage in a sort of contradiction. They suggest that we need democratic governance beyond the nation-state because nation-states have lost an important part of their political autonomy to increasingly independent international institutions. But the democratic public law turns out to be an international institution just as independent and unaccountable as the institutions it is supposed to override.

To conclude: the self-declared ambition in Held's theory of cosmopolitan democracy is to bring together the universalism of cosmopolitanism, granting universal and equal rights to all human beings everywhere, with the particularism of democracy, according to which people have a right to participate in determining their communities. But, as I have argued here, cosmopolit-

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[31] Kuper 2006
[32] Dahl 1989: Ch. 4-5; Mill 1991 [1859]
[33] Brock 2002
[34] Held 1995: 194
[35] Chandler 2003; Thaa 2001

an democracy is inconclusive precisely in this respect. By defining democracy in terms of the institutionalisation and implementation of a scheme of human rights, cosmopolitan democracy essentially collapses the former concept into the latter, so that the democratic aspects of the model virtually disappear. While Held claims to draw upon both participatory and liberal ideals of democracy, in the end, the model of cosmopolitan democracy neither includes the mechanisms of active, popular participation in self-government nor the liberal institutional model constraining government. And in that case, it remains unclear why we need to hold on to the concept of democracy, if it means nothing more and nothing less than implementing a scheme of rights.

Deliberative democracy and the co-originality thesis

Like most scholars approaching the problem of transnational democracy, some theorists of deliberative democracy have taken a profound interest in the relation between democracy and human rights. But whereas cosmopolitan democrats suggest that democracy should be understood as the realisation of human rights, theorists of deliberative democracy, and most notably Jürgen Habermas, instead argue that human rights and democracy are interdependent, co-original and co-constitutive. A central argument in deliberative democratic theory, the so-called co-originality thesis suggests that the values or principles of human rights and democracy are not only both fundamental and mutually support each other, but also co-original and co-constitutive – they "reciprocally presuppose each other".[36] As formulated by Jürgen Habermas, the co-originality thesis promises to solve what he suggests is a paradox between human rights and popular sovereignty in modern political theory.

In this section, I shall examine the co-originality thesis as a central claim in deliberative democratic theory.[37] Several critics argue that the co-originality thesis proves difficult to maintain and that it ultimately founders on the very dilemma it is supposed to overcome. I shall present three problems with the thesis that human rights and democracy are co-original. First, since the co-originality thesis implies that the precise content of individual rights must be articulated through actual deliberative procedures, it becomes difficult to justify such procedures unless we assume a principle of legitimacy demanding respect for persons as free and equal. Second, insisting on this view leads to a vicious regress, because everything seems to be up for grabs in the deliberative procedure among free and equal persons – even the conditions constitutive of deliberative procedures. Third, and crucially for a theory of transnational democracy, if we stick with the co-originality thesis, it becomes difficult to justify an account of international human rights, as distinct from the individual rights of citizens, because rights cannot be given particular content in the absence of universal democratic procedures. Before addressing these problems, however, I shall provide a brief outline of Habermas's thesis on co-originality and how he claims to resolve the alleged tension between human rights and democracy.

[36] Habermas 1996; 1998b; cf. Rummens 2006; Bohman 1998; Cohen 1999

[37] I do not claim that Habermas is representative or typical of the motley stock of deliberative democratic theory. Rather, his argument merits to be considered because he comprehensively and sophisticatedly elaborates and defends the co-originality thesis. Some deliberative theorists concur with the claim that human rights and democracy are interdependent (Thompson 1999; cf. Bohman 1998), while others elaborate no prominent normative function for human rights in the theory of deliberative democracy (Dryzek 2006; 1999; 2000).

The co-originality of human rights and democracy

"Which comes first", Habermas asks, "the individual liberties of the members of the modern market society or the rights of democratic citizens to political participation?"[38] Giving an historical account of how the principles of rule of law and popular sovereignty united into the seemingly paradoxical concept of constitutional democracy, Habermas develops his argument that human rights and democracy are internally related and co-original. The alleged paradox consists in that if we wish to justify constitutional democracy consistently, it seems that we must rank the two principles, human rights and popular sovereignty.

Liberalism, as Habermas understands it, has traditionally prioritised individual rights over democratic procedures, while republicanism has inversely regarded popular sovereignty as more fundamental than individual liberal rights. Put differently, while both traditions stress the value of autonomy, according to Habermas, liberalism privileges private autonomy and people are thus free to the extent that they can realise themselves and pursue their individual aspirations (without impinging on the same right of others), whereas republicanism privileges public autonomy: the collective self-determination of the political community; and citizens are free to the extent that they live by laws that they have given themselves.[39] Stuck between these two options, "political philosophy has never really been able to strike a balance between popular sovereignty and human rights, or between the freedom of the ancients and the freedom of the moderns."[40] That is what the co-originality thesis promises: To reconcile at a conceptual level the one with the other; public with private autonomy.[41]

Posing the question like a paradox, Habermas prepares the ground for his own solution: that human rights and popular sovereignty presuppose each other and are internally related to each other.[42] Neither comes first, or both, like the proverbial hen and egg:

> "as participants in rational discourses, consociates under law must be able to examine whether a contested norm meets with, or could meet with, the agreement of all those possibly affected. Consequently, the sought-for internal relation between popular sovereignty and human rights consists in the fact that the system of rights states precisely the conditions under which the forms of communication necessary for the genesis of legitimate law can be legally institutionalized."[43]

That is, if people are to be able to exercise their popular sovereignty by participating in making the laws that govern their society, they must also be endowed with the rights that make it possible for them to communicate and deliberate rationally with each other. Now, this solution seems only to justify the kinds of rights that enable people to engage in deliberation with each

[38] Habermas 2001a

[39] By extension, Habermas suggests that liberalism and republicanism correspond to his distinction between the moral and the ethical. More generally, Habermas wedges in his own discursive theory of democracy between liberalism and republicanism, suggesting that it rescues, reconciles and synthesises the best insights from the liberal-representative and republican-participatory models of democracy (cf. Habermas 1995).

[40] Habermas 1998b: 258

[41] Habermas 1996: 84

[42] Cf. Taylor 2000. Joshua Cohen suggests that while other theorists too stress that individual rights and democracy are equally fundamental and interrelated, Habermas's claim about the co-originality of private and public autonomy is best understood as a theory about why the two forms of autonomy are co-original (Cohen 1999). Moreover, Habermas's co-originality thesis can also be read as an historical thesis about modern constitutional democracies, which incorporated a certain concept of positive and legitimate law and – eventually – both human rights and popular sovereignty into "their normative self-understanding" (Habermas 1996: 94). But the relation is not simply an historical accident, but also conceptual or internal, in Habermas's terms.

[43] Habermas 1996: 104

other – rights to participate and to speak freely, for instance – but not those other rights that we may also consider important, such as civil liberties safeguarding individual privacy from government intervention. Equal rights to participate in political procedures are more or less by definition implied in the concept of democracy, but it is the other kind of rights, the non-political liberties, that account for most of the alleged paradox, precisely because they are not already implied in the democratic procedure. In that case, Habermas would only be able to justify rights instrumentally: Only those particular rights are justified that enable people to participate in democratic procedures.[44]

Presumably acknowledging this possible objection, Habermas argues that the non-political rights are already implied by the legal order as such.[45] Citizens of modern, complex societies must regulate and coordinate their interaction through the medium of law and law as such grounds a basic scheme of rights by constituting citizens as legal persons. Thus, the legal order that protects the private autonomy of the citizens also provides the institutional conditions under which citizens can address each other collectively as a democratic community, as authors of legitimate law, and that would explain why citizens must also be warranted classic liberal civil liberties in order to be both authors and addressees of legitimate law.[46] This solution is premised on Habermas's understanding of law and legitimacy, ultimately founded on the discourse principle, so we need to explicate the terms of the solution further.[47]

As a basic social fact, social life in modern, complex societies must be coordinated and regulated through law. Law also establishes a basic scheme of minimal personal liberty. A system of rights defining the status of legal persons is thus constitutive of the legal medium as such.[48] First, law allows people to decide whether to comply for strategic or normative reasons, and thus grants individuals the minimal liberty not to give account of their reasons for complying. Legally granted rights thus entitle you "to *drop out of* communicative action."[49] Second, modern law concedes to agents a certain "latitude to act"; people are free to do whatever they wish unless the law prohibits it.[50]

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[44] Furthermore, if the prime purpose of human rights is to enable people to participate in democratic procedures, then rights should be assessed as to whether they actually do so, and they might legitimately be restricted to the degree that they do not.

[45] Habermas 1998a: 176; 1998b: 259

[46] Habermas 1998a: 176

[47] As Jon Mahoney helpfully clarifies, Habermas relies on three arguments to justify rights: (a) The functional or sociological argument claims that "in complex modern societies there are no practical alternatives to the idea of a positivistic rule of law." Positive law is necessary to solve coordination and cooperation problems in such societies, but we still need to justify normatively the political model by which such problems are solved. (b) The normative argument is grounded in the discourse-theoretical idea that only norms to which all affected persons can assent are valid. (c) Combining (a) and (b), a functional-normative argument holds that "being able to address complex problems of social cooperation through discourses and institutions arranged so as to maximise accountability to democratic deliberation, can be achieved only if an institutionally enforced system of rights also exists. […] Rights are conditions for the possibility of a democratic rule of law." (Mahoney 2001)

[48] Habermas 1996: 119

[49] Habermas 1996: 120, emphasis in original. In Habermas's terms, the rights presupposed by the legal medium thus guarantees private autonomy by suspending the obligation of communicative freedom to respond to one's counterpart. That is, you are free not to explain yourself to others, to withdraw from communicative interaction.

[50] Habermas 1998b: 256. As Cohen suggests, the existence of a legal code only suggests that some individuals have some rights of private autonomy (not that each person is entitled to the same liberties as others), and it does not specify what might be prohibited or for what reasons (Cohen 1999). Rummens similarly notes that Habermas's reconstruction of private autonomy fails to explain why individual liberties should be granted in the greatest possible measure: "Indeed, we can envisage laws that embody very traditionalistic conceptions of society, granting very little individual liberty. Never-

However, the legal code alone only gives a minimal account of equal liberties. Moreover, the legality or positivity of the law does not explain why it is also legitimate. In order to explicate the legitimacy of the legal order and to give a fuller account of equal liberties, Habermas invokes the discourse principle, which sets the conditions under which action norms, whether moral or legal, are valid. Remember, the discourse principle states that "[j]ust those action norms are valid to which all possibly affected persons could agree as participants in rational discourses."[51] Unlike moral norms, however, legal norms are not only symbolic systems of knowledge, in Habermas's view, but they can additionally be binding at the institutional level as a "system of action". To specify what the discourse principle means for action norms that take a legal form, Habermas introduces the principle of democracy, which establishes a procedure of legitimate lawmaking. The principle of democracy states that "only those statutes may claim legitimacy that can meet with the assent (*Zustimmung*) of all citizens in a discursive process of legislation that in turn has been legally constituted."[52]

Habermas emphasises that rights are not things or natural endowments that individuals possess prior to politics, but rather relations that individuals mutually recognise and confer on each other when they agree to regulate their common life via the medium of positive law. Thus, there is a connection between positive law and individual liberty, implying that "insofar as individuals undertake to regulate their common life through the legal form they must do so in a way that grants to each member an equal right to liberty."[53] A coercive political order creates "legally secured spaces in which citizens can exercise their freedom without undue interference."[54]

What is the system of rights, more precisely? What particular rights follow from this account of co-originality? Habermas suggests that five different categories of basic rights can be deduced from the conjunction of the legal code and the discourse principle. The first category of rights concerns the maximal equal liberties of all. The legal form provides the legal status of citizens and the discourse principle supposedly explains why each person should have the greatest possible measure of equal liberties compatible with the same measure for all. The second category concerns rights that regulate membership in a determinate association of citizens, distinguishing members from non-members. The third category suggests that there must be rights that someone can invoke who feels that her rights have been infringed. These three categories of basic rights – to equal liberties, membership and legal remedies – grant citizens the status as addressees of law. But the categories do not in themselves provide a full account of classic liberal basic rights or any particular rights at all, because particular rights, Habermas maintains, can only be formulated and interpreted by a legislature.[55] Turning to citizens as authors of law, the fourth category of basic rights grants these now constituted legal subjects equal opportunities "to participate in processes of opinion- and will-formation in which citizens exercise their political autonomy and through which they generate legitimate law."[56] A fifth category, finally, grants citizens the necessary "living conditions" for exercising their rights to private and public

theless, even these laws have the formal characteristic of the medium of law Habermas refers to." (Rummens 2006: 476)

[51] Habermas 1996: 107

[52] Habermas 1996: 110

[53] Baynes 1995: 210

[54] Cronin 2006

[55] Habermas argues that we are still not "dealing with an organized state authority against which such rights would have to be directed," but moreover, the rights specified here are "unsaturated placeholders" for specific, particular rights (those that we find on bills of rights), because they "must be interpreted and given concrete shape by a political legislature in response to changing circumstances." Habermas 1996: 125f

[56] Habermas 1996: 123

autonomy. This category is not absolute, Habermas suggests, but rather relative and instrumental to the other categories of rights.[57]

It might seem here that Habermas presents a list of substantive (if abstract) rights, but he underscores that his system of rights is "unsaturated"; the system only takes concrete, determinate content when it is articulated in actual discourses by a particular historical legislator, and citizens must have a say in that process.[58] Moreover, rights are not derived from a theory of practical reason or a concept of moral autonomy.[59] For that reason, too, the system of rights is not imposed on the legislator from the outside: "legal persons can be autonomous only insofar as they can understand themselves, in the exercise of their rights, as authors of just those rights which they are supposed to obey as addressees."[60] Hence, while arguing that we can deduce these five categories of rights from the legal form and the discourse principle, Habermas leaves the actual particular rights and their content open, as they can only be specified in actual discourses. As Joshua Cohen argues:

> "In particular, specifically liberal rights – to conscience, to bodily integrity, privacy, property, etc. – do not emerge simply from the requirement that the legal code be specified through a process that satisfies the discourse principle, but emerge instead (if they do) from the actual exercise of civic autonomy under particular historical conditions"[61]

Insisting that the system of rights is unsaturated until it is articulated by a legislative assembly follows the procedural approach of discourse ethics. It aims to specify no particular moral norms that we ought to follow, just the rules by which we should decide what we ought to do: We should follow only those norms which we believe could be reasonably accepted by all affected, but the content of those norms would have to be decided through actual public deliberation.[62]

Thus, Habermas makes the bold claim to have solved what he believes to be a paradox that has haunted modern political theory since Kant and Rousseau, at least, who both failed, but for different reasons, to account for both human rights and popular sovereignty. Habermas's solution consists in claiming that human rights and popular sovereignty are co-original, a co-originality that follows from the legal code wed to the discourse principle. Already here, we anticipate the problems this theory of rights will run into as a theory of international human rights. By premising human rights so strongly on the legal code and actual discourses, Habermas has difficulties explaining how there can be universal human rights in the absence of a global democratic legal order. Before turning to the problem of international human rights, however, let us consider some critical remarks on the co-originality thesis as such. The first objection strikes at the heart of the co-originality thesis and suggests that contrary to Habermas, the discourse principle presupposes a liberal principle of autonomy, and that principle sets constraints on deliberative procedures. The second objection rather focuses on the consequences of Habermas's proceduralist account of democracy. If democracy is to go all the way down, that is, if nothing is

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[57] For a radical critique of Habermas's scheme of rights, see Noonan 2005.
[58] Habermas 1996: 125
[59] Mahoney 2001: 28: "To do so would, in his [Habermas's] view, burden the discourse theory with a natural law conception of rights, which Habermas thinks is inconsistent with postmetaphysical thought."
[60] Habermas 1998b: 258. The co-originality thesis also sheds light on Habermas's two-track model of the democratic process: The weak public sphere of civil society, where social problems are identified, interpreted and articulated, is sustained by the protection of private autonomy, whereas public autonomy is rather exercised via the more formalised strong public sphere where binding collective decisions are made.
[61] Cohen 1999
[62] Gilabert 2005

placed outside the purview of democratic deliberation, then we face a regress problem, because even the construal of persons as free and equal, which sets the parameters of democratic procedures, would seem to be up for grabs.

The moral content problem

The first problem with Habermas's view of rights and democracy as co-original and co-constitutive concerns their alleged lack of a moral content. Habermas aims to synthesise the best of both liberalism and republicanism by ameliorating on their failure to recognise the internal relation between rights and democracy. He charges liberalism with giving human rights a priority over popular sovereignty, whereas he thinks republicanism subjects public autonomy to the ethical values of a particular community.

While the promise certainly is outstanding, to crack the age-old nut of rights and democracy and synthesise the best in both liberalism and republicanism, many theorists have criticised Habermas for failing to anchor individual rights in the deliberative procedures stipulated by the discourse principle. Indeed, some like John Rawls and Charles Larmore even charge Habermas with misunderstanding his own theory – it does have the moral content of a fundamental respect for persons as free and equal, as a basic liberal ideal of legitimacy:

> "[The discourse principle] has moral content, and we can bring it to light by asking the simple question: Why should we believe, as this principle requires, that norms of action must be rationally acceptable to all whom they are to bind?"[63]

Habermas's own answer to that question, Larmore maintains, is not adequate. Habermas sometimes resorts to "universal pragmatics", suggesting that the discourse principle somehow follows from the communicative modes of reaching understanding, but this resort is insufficient to ground the discourse principle. Larmore argues that applied to both moral, inter-personal norms and political principles, which are norms backed by force and coercion, the discourse principle has moral content. First, as regards moral norms, reasonable people disagree about the general validity of the discourse principle, and:

> "this disagreement turns on different moral convictions about the conditions under which we may judge others morally and no doubt, too, on different appreciations of the moral ideal of individual autonomy. This suffices to show that contrary to Habermas, [the discourse principle], taken as a general principle, has a moral content and a controversial one at that."[64]

Secondly, regarding political principles, the discourse principle requires merely that because political principles are coercive, they must be rationally transparent to those whom they bind. But then, Larmore argues, the discourse principle boils down to the liberal principle of legitimacy, which in turn is morally based in a respect for persons, since such a respect for persons explains why it matters that people can reasonably agree with those political principles that they are coerced to obey. And such a principle of legitimacy cannot be independent of antecedent moral commitments. "If we believe our political life should be organized by some principle such as [the discourse principle], that is only because we embrace the moral principle of equal respect for persons."[65] This moral principle refers to a right of every person to be bound only by political principles whose justification he or she can rationally accept. And this individual right does set limits to democratic self-rule, Larmore argues, because it determines what sort of expressions of the popular will that shall count as democratic. The familiar constitutional rights of free

[63] Larmore 1999; 1995
[64] Larmore 1999
[65] Larmore 1999: 621

expression, property and political participation, too, have this rationale independent of democratic self-rule, although they no doubt also serve to enable democracy.

Similarly, Rawls argues that even if we could derive, by way of the internal relation, the civic liberties ensuring private autonomy from the political liberties enabling public autonomy, the civic liberties have an at least equally sufficient justification in that they protect the freedoms of persons as members of civil society with its social, cultural and spiritual life – in churches, associations, universities, media and so on (the public sphere, if you want). Taking part in them, citizens value these activities and that value constitutes "at least a sufficient, if not a vital basis for the rights of private autonomy."[66] That is, civic liberties are justified because they enable people to participate in civil society, not only or even primarily because such participation also enables people to enjoy the political liberties of public autonomy. Habermas seems to cede as much when he suggests that rights of private autonomy "obviously" have an intrinsic value which cannot be subsumed in their instrumental value for democratic will-formation.[67]

I believe these critical points rightly indicate that the co-originality thesis is difficult to support. Stefan Rummens suggests that while Habermasians should accept the criticism from Rawls, Larmore and others that the discourse principle contains non-trivial moral presuppositions, those presuppositions can be extracted from Habermas's discourse ethics, while toning down Habermas's reliance on the medium of law to explain or justify rights. It is not the medium of law as such which shapes individual liberties, Rummens argues, but the moral preconditions of deliberative practices. On the other hand, one might suspect that accepting such moral presuppositions, discourse ethics would betray its core idea that such moral presuppositions must be dialogically formulated, which leads us to the problem of regress.

The regress problem

A further problem follows from insisting that the democratic procedures do not presuppose moral content, but that collective norms, in a broad sense, should always be the product of actual, rational deliberation among free and equal persons. We shall now consider why this insistence leads to a regress, and then consider three potential ways to put an end to the regress.

As we have seen, the co-originality thesis entails that rational deliberation requires individuals already constituted by law as free and equal. A premise for rational deliberative procedures is, as formulated by Frank Michelman, "a set of basic institutionally supported norms – one might as well call them rights – that govern the treatment of persons by one another in respects pertinent to participation in public discourse."[68] However, even such fundamental norms, such as the basic rights constituting individuals as free and equal, are legitimate only if they might claim the agreement of citizens in a discursive process open to all. Note that this is not merely a hypothetical claim – it must always be possible to submit these issues to an actual deliberative procedure.

> "For Habermas, a crucial proposition is that no political philosopher or lawgiver, or select group of them, unaided by actual live dialogic encounter with the full range of affected others, can reliably presume to see and appraise a set of proposed fundamental laws as all those others will reasonably and justifiably see and appraise them."[69]

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[66] Rawls 1996: 420

[67] "Diese Rechte, die jedem eine chancengleiche Verfolgung privater Lebensziele und umfassenden individuellen Rechtsschutz garantieren sollen, haben offensichtlich einen intrinsischen Wert – und gehen nicht etwa in ihrem instrumentellen Wert für die demokratische Willensbildung auf." (Habermas 1998a: 176)

[68] Michelman 1997: 158

[69] Michelman 1997: 161

The regress results from the combination of a claim (a) that norms can only be legitimated through public deliberative procedures and (b) that the fundamental parameters of such procedures – even specifying what 'free and equal persons' means – must be legitimated through democratic deliberative procedures. That is, the procedure through which we democratically examine the laws in order to make them valid must itself be legally constituted. We need a legally constituted democratic procedure to deliberatively examine the laws (and thus confer validity to them) and to bring forth valid fundamental laws. But if so, we enter a regress, because:

> "then the (valid) laws that frame *this* lawmaking event must themselves be the product of a conceptually prior procedural event that was itself framed by (valid) laws that must, as such, have issued in their turn from a still prior (properly) legally constituted event. And so on, it would appear, without end."[70]

How could Habermasian deliberative democrats avoid the regress problem? Joshua Kassner discusses two solutions to regress problems of this sort. First, one way to halt the regress would be to argue that everything is up for grabs in the deliberative procedure, except for some core of participatory rights. "Free and equal" may state a sort of backstop for deliberative democratic procedures – this you may not put in question. We could argue that for a collective decision to deserve respect, it must "treat each individual affected by the problem as a separate moral agent."[71] Individuals thus must have a fundamental right to participate as free and equal in order for a deliberative procedure to be legitimate, and to be able to produce legitimate results.[72]

But there is no principled reason for excluding the values of democracy from the requirement that fundamental laws must be constantly resubmittable to actual deliberative procedures, and hence we again go into the regress. Whereas there might be practical reasons to assume the right to participate (for example, to avoid the risk of a regress, we might simply decide that everything, save for this very right, is up for grabs), doing so would be inconsistent with the co-originality thesis.

A second approach would state the right to participate as an initial condition, so that even if deliberation would eventually go all the way down, it would not do so in the initial phase. This solution too is inconsistent with the co-originality thesis, since it makes rights, if even only the right to participate as a free and equal person, conceptually prior to the democratic procedure.

Similarly, a third solution might regard the constitution as out of reach most of the time, but not always. Against the allegation that judicial review forecloses democratic discussion of the constitution and the rights enshrined in it, one might hold that constitutional rights are up for debate and discussion, but not all the time. People may discuss and debate constitutional issues in the public sphere, and they certainly do, but the additional step of modifying and changing the constitution is subject to various constraints (such as requiring two successive decisions by parliament interjected by a general election). Similarly, regress-troubled deliberative democrats could argue that the rights of persons to be free and equal in deliberation ought to be up for grabs, but just not all the time. It would then dispense with the idea that fundamental norms are constantly resubmittable to actual public deliberation.[73] In general, of course, deliberative procedures on any issue must be able to reach such closure, if only until next time the issue is raised. But again, this solutions seems to presuppose that there are certain values that are

[70] Michelman 1997

[71] Kassner 2006

[72] Rummens 2006

[73] Rawls argues, in response to Habermas, that the liberties of the moderns are subject to the constituent will of the people at the stage when a constitutional convention draws up the principles and rules which are to govern its constitution. This stage may be reopened when new circumstances call for it. Civil liberties would thus not be externally imposed on public deliberation and they are open to public deliberation, but just not all the time (Rawls 1996: 406).

more fundamental than, and thus legitimately put constraints on, the deliberative democratic procedure itself. This is what the co-originality thesis denies. Again, it seems that solving the problem on any of these terms would require concessions to liberalism.

Being aware of the regress problem in his account of democratic constitutionalism, Habermas argues that the regress is benign rather than vicious. Deliberative democracy will necessarily be "a recursively or self-referentially structured practical idea", but that does not make it logically or procedurally impossible.[74] Although such recursive processes may be infinite, they may sustain themselves. As Habermas writes, "the idea of the rule of law sets in motion a spiralling self-application of law."[75] In that sense, the original constitutional moment lays down a system of rights which is legitimated retrospectively by the constitutional project it initiates.[76] In the long run, we should understand the constitutional project as a "self-correcting learning process" involving the collective of citizens.[77] This recursive justification might gain further credibility if we understand the co-originality thesis not only as a normative claim, but also as a historical claim about constitutional rights and democracy.[78]

Solving the regress problem in this way, by emphasising how an initial constitutional founding might be recursively justified by consecutive generations of consociates under law, also serves to underscore that the co-originality claim presupposes not only a state in the form of a legal system, but also a particular constitutional project, which is to be recursively justified. But if so, how can we claim that human rights, and not just the public and private autonomy of citizens, are internally related to democracy? This leads us to the final problem of justifying human rights by means of the co-originality thesis.

The problem of international human rights

We finally turn to a problem that arises from the claim that human rights and democracy are co-original once we read it not as a justification of the public and private autonomy of consociates under law, but as a theory of human rights. I shall argue that by insisting that human rights are both normatively and historically internally related to democracy, this Habermasian variety of deliberative democracy has difficulties explaining why people should enjoy human rights in the absence of a universal democratic order, precisely because the theory claims that private and public autonomy are internally related, co-original and interdependent, and that individual rights and democratic procedures are mutually constitutive.

Habermas anchors his thesis about the co-originality of rights and democracy in the legal medium of the modern state, not only as an account of how they have developed historically in tandem, but also, as we have seen, in order to explicate their normative interrelation. According to this view, using the terms civil liberties and human rights as interchangeable, virtually synonymous terms, is not a conceptual confusion. Being a citizen of a legally constituted democratic community is a necessary condition for having substantive rights.

However, if individual rights must be articulated through actual democratic deliberation, as Habermas insists, there can be no international human rights without institutionalising such procedures globally. This pertains not only to particular, substantive rights, such as those typically declared in human rights conventions, but also the abstract, unsaturated categories in the

[74] Michelman 1997: 151

[75] Habermas 1996: 39

[76] Cronin 2006

[77] Habermas 2001a

[78] Habermas thus recognises that common identity and sympathy serve an important practical function in enabling democracy: "Constitutional principles can neither take shape in social practices nor become the driving force for the dynamic project of creating an association of free and equal persons until they are situated in the historical context of a nation of citizens in such a way that they link up with those citizens' motives and attitudes." Habermas 1996: 499

scheme of rights. Not even in the abstract sense can rights exist before consociates under law decide to regulate their common affairs by the medium of law. And if individual rights do not exist prior to the state, then they also seem not to exist outside of the state. Thus, in the absence of a global legal-political order, self-sustained through deliberative democratic procedures, it becomes difficult to maintain the co-originality thesis and to justify the idea of universal human rights. As Thomas McCarthy argues: "Insisting, as Habermas does, on the internal connection between individual rights and democratic politics implies that there could be no adequate institutionalization of human rights on a global scale without a corresponding institutionalization of transnational forms of democratic participation and accountability."[79] If democracy and human rights are interdependent, so that the one cannot be adequately realised without the other, it would not appear acceptable to have a system of human rights institutionalised internationally while democratic procedures remain provided for (at best) nationally. This is the problem we shall address in this final section.

Habermas's cosmopolitan theory is a complex work in progress, but it has evolved into a distinct three-tiered model of global governance aiming to establish what Habermas calls a global domestic politics without a world government.[80] In the following, I shall discuss the resources within this model of global governance for maintaining the claim that human rights and democracy are co-original, interdependent and mutually constitutive. My aim here is not to assess the merits of Habermas suggested order of global governance, but to address how the co-originality thesis fits into this scheme.

Habermas's model distinguishes global governance at three different levels, dominated by different types of actors: the supranational level, where a reformed world organisation takes pride of place, the transnational level, where functional regimes regulate diverse issues of "world domestic policy", and the national level, which remains an important source of authority and legitimacy. As I have argued, following the co-originality claim through would seem to require a democratic world government, but Habermas explicitly rejects the idea of global democracy. But the sources of democratic legitimacy he does endorse at the three levels turns out to provide at best a weak support for an international human rights regime.

Habermas rejects cosmopolitan democracy because the necessary bonds of solidarity would not be strong enough at the global level to underpin a cosmopolitan democracy. While he sees no structural reason why national civic solidarity and welfare-state policies could not extend beyond the nation-state, the global arena would simply lack an ethical-political identity and cosmopolitan solidarity that could bear the weight of a global democracy. Moreover, holding a surprisingly Schmittian objection against cosmopolitan democrats' call for an all-inclusive global democratic community, Habermas argues that democratic self-determination requires an enclosed rather than unbounded community:

> "Any political community that wants to understand itself as a democracy must at least distinguish between members and non-members. The self-referential concept of collective self-determination demarcates a logical space for democratically united citizens who are members of a particular community."[81]

However, Habermas still sees a potential for international law to gradually evolve into a binding legal order that puts passive constraints on global governance. The trick is to decouple the concepts of the state, as an hierarchical organisation for the exercise of power, and the constitution,

[79] McCarthy 1999: 198

[80] Habermas 1996; 1998b; 2001b; 2004; 2007. For commentaries on Habermas's cosmopolitan theorising, see Mertens 1996; McCarthy 1999; Fine & Smith 2003; Moon 2003; Lupel 2004; Anderson 2005; Hedrick 2007; Lafont 2008; Scheuerman 2008.

[81] Habermas 2001b: 107

defining a horizontal association of free and equal citizens.[82] Thus, the supranational level could still be constitutionalised without depending on a global state or a world federation to enforce it, nor on a particular demos and a constitutional founding moment. While this nascent global constitution is supposedly detached from democracy and governmental authority, it must remain connected to the "communicative flows" of legitimacy from democratic, constitutional states and national parliaments.[83]

Moreover, states still are the sole members of the world organisation, which Habermas suggests should be charged with two tasks: Securing peace and implementing human rights globally. But it does not take on the enormous tasks of a world domestic policy, such as economic redistribution, environmental problems and collective risks, issues which are assorted to the diverse, overlapping international regimes operative at the transnational level.[84] Habermas suggests that what goes on at the supranational level (in the United Nations or the International Criminal Court) are legal rather than political matters. This assurance rings hollow, Todd Hedrick argues: "as if there are no political controversies surrounding the substantive content, application, and enforcement of human rights."[85] Moreover, this also implies that international human rights, and the broader global legal framework, is precisely imposed on democracy (or on any political community) from the outside, beyond the control of consociates under law.

Now, Habermas might be right that there is little prospect for truly democratic procedures at the supranational level, so that we shall have to settle with a more limited, reformed international order, where any democratic legitimacy must be transmitted from national parliaments. But this must remain highly problematic for Habermas's theory of legitimacy, as Todd Hedrick argues:

> "Discursive democracy is called for among any group of any scope that wants to shape its social life through the medium of law. […] Habermas's thesis about the internal connection between the rule of law and democracy is a general one: it applies to all contexts in which the rule of law is institutionalized."

On the other hand, suggesting that both the supranational and transnational level rely on the "flows of legitimacy" from democratic, constitutional states, Habermas indicates that the ultimate anchor of democratic legitimacy rests with nation-states.[86] If all or most states were reasonably democratic, the absence of supra-national democratic procedures might seem less of a threat to the co-originality thesis. While relying on democracy at a national level to provide higher levels of the world order with legitimacy might seem both more feasible and more desirable, this fallback position also comes with a trade-off: the cosmopolitan ambition in the co-originality claim. Human rights would presumably be rather differently institutionalised in different democratic states. The result would not be a system of universal human rights interdependent with democracy, but (at best) a series of parallel systems of rights, legitimated and substantiated within each constitutional project and thus possibly quite differently institutionalised in each state.[87] This is more or less what Habermas admits when insisting that substantive rights must be formulated by a particular legislature. Moreover, this solution fails to provide a justification and specification of human rights in all cases where democratic procedures are ab-

[82] Habermas 2004: 135
[83] Habermas 2004: 139; 2007: 159
[84] Habermas 2007: 169
[85] Hedrick 2007: 407
[86] Donald Moon suggests that Habermas actually requires a great deal of conformity from the states in the international system. Unlike Rawls, for example, Habermas cannot allow for toleration of non-liberal but decent people: All states would need to become rights-based, constitutional democracies (Moon 2003).
[87] Fine & Smith 2003: 471f

sent, and one might suspect that those are the situations where such justifications are most desperately called for.

Conclusion

This paper has concerned how theories of transnational democracy construe the relation between human rights and democracy. While we often think of human rights and democracy as synonyms, they may also be thought to conflict with each other. Advocates of cosmopolitan democracy and deliberative democracy, here represented by David Held and Jürgen Habermas, have both addressed the alleged conflict, tension or even paradox between rights and democracy, albeit from very different approaches. They both claim to give expression and justification to our commonsensical notion that human rights and democracy are two sides of a coin. I have argued that their accounts are unconvincing. In Held's theory of cosmopolitan democracy, with its demanding idea of a global 'democratic public law' derived from a principle of autonomy, democracy gets redefined as the global institutionalization of human rights, an approach which leaves only a shrinking room for democratic decision-making to interpret and implement a non-negotiable set of rights. Habermas account of deliberative democracy seeks to synthesize the best of liberalism and republicanism and maintain that human rights and democracy are co-original, but we I have argued that this co-originality claim is difficult to sustain. As some liberal critics have argued, it seems difficult to justify democratic procedures unless we assume some underlying value of respect for persons.

Although attempting to walk the middle road between human rights and democracy, Held and Habermas actually slide down on opposite sides of the road. But the problems they face are similar. If we follow Held in defining democracy as the implementation of a stiff scheme of human rights, not only is democracy emptied of much of its substance that has little to do with rights enforcement, but also, human rights become less relevant for a democratic politics. Habermas, by contrast, has difficulties justifying universal human rights in the absence of a global democratic regime. Instead, he comes to endorse an international human rights regime and a binding framework of international law that has no grounding in the sorts of legitimating procedures he argues are necessary if citizens are to regard themselves as both authors and addressees of law. In that sense, neither Held nor Habermas successfully provides us with a theory by which to reconcile the tension between human rights and democracy.

In the light of these attempts, is there still a middle road to walk down, between Held's reinterpretation of democracy as the implementation of human rights and Habermas's insistence on the co-originality of human rights and democracy? Taking a step back, we may ask why we should assume, in the first place, that we could take two abstract concepts like human rights and democracy and align them perfectly under the same lodestar.

In *Two concepts of liberty*, Isaiah Berlin argues that the doctrine of monism – "the belief that some single formula can in principle be found whereby all the diverse ends of men can be harmoniously realized" – is demonstrably false.[88] Berlin argues that since human beings have different ends and goals in life, and since not all of them are compatible with each other, we cannot avoid conflict and tragedy in human life. And there is no measure, such as utilitarian happiness, by which we can sort out such fundamental conflicts of value. "The necessity of choosing between absolute claims is then an inescapable characteristic of the human condition."[89] And because those claims are absolute, choosing always comes at a cost. Berlin insists, in a nutshell, that fundamental human values are many, that they are often in conflict and that sometimes we cannot rationally solve such conflicts, since the values involved are incommensurable and can-

[88] Berlin 1969: 169
[89] Berlin 1969: 214

not be measured along some single, common standard of arbitration. John Gray has portrayed Berlin's position as an agonistic liberalism, different from other contemporary liberalisms by this notion of value-pluralism:

> "By contrast with the dominant liberalisms of our time, which in their claim that fundamental liberties, rights or claims of justice are (or indeed must be) compatible and harmonious are Panglossian in their optimism, Berlin's is a stoical and tragic liberalism of unavoidable conflict and irreparable loss among inherently rivalrous values."[90]

I think the two projects of transnational democracy that I have scrutinised in this paper both illustrate the problem in liberalism that Berlin put his finger on. While liberal value-pluralism might be a paradoxical oxymoron just as disputable as liberal democracy, it could offer an alternative to the unsuccessful attempts to bring the sometimes contradictory values of human rights and democracy together under one harmonious monist umbrella, by suggesting that we simply may have to learn to live with the tension, since there might not be a single standard by which we can rationally relate these rivalrous values to each other.[91] On this account, it would not always be possible to solve the tension and provide a universal account of how democracy and human rights go together.

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[90] Gray 1996

[91] Gray 1996; Galston 1999; Crowder 2002. While not usually associated to these liberal thinkers, Rawls too argues that any liberal democracy faces a true dilemma, a choice between two propositions that are both true but mutually incoherent: "One says: no moral law can be externally imposed on a sovereign democratic people; and the other says: the sovereign people may not justly (but may legitimately) enact any law violating those rights. These statements simply express the risk for political justice of all government, democratic or otherwise […] No special doctrine of the co-originality and equal weight of the two forms of autonomy is needed to explain this fact." (Rawls 1996: 416)

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