

# Continuing Contestation of the Concept of Democracy: A Norm or a Right?

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# Abstract

Democracy was one of the concepts given by Gallie as contested, and the practice and articulation of the concept since Gallie wrote in the 1950s suggest the understanding of democracy as a jural concept remains disputed. Gallie's theory of an essentially contested concept supposed there exists recognised or shared ideas of political or philosophical importance subject nonetheless to ongoing contestation as to their meaning that is not marginal. More recent scholarship has tended to affirm Gallie's analysis of democracy, with refinements about how to articulate the extent or character of contestedness, and notwithstanding the widespread adoption of democratic systems of government after the Cold War. Held identifies over ten different conceptions as to how a democracy can be structured, while scholars also disagree about the measurement of a democratic standard whatever the structural form self-described democratic institutions may take, especially regarding the concept of participation and regarding procedural and substantive accounts of democracy (or of the quality of democracy). Scholars have also recently disputed the status of democracy as a 'right', in the sense of it having a normative status beyond what recognition may be given to it in particular national systems. While the notion of democracy as a right may be considered the strongest expression of its normative value, international practice, including, for example, in the EU and Council of Europe, has strengthened claims for the global normative standing of democracy beyond individual States. Taking Gallie's concept of essentially contested concepts as a starting point, this paper considers to what extent a core normative content of the concept of democracy can be identified, including to what extent the concept overlaps or interacts with other politically and legally endorsed norms such as rights and the rule of law.

# Introduction

- In recent decades especially, democracy has gained **increased normative appeal** across the globe
  - e.g. end of Cold War perceived as decisive move towards ‘real’, representative democracy
  - Acceptance of democracy can be a criterion of recognition in international law and practice, e.g. in EU accession under Article 49 TEU (Copenhagen criteria)
- Democracy has been **less subject to international legal regulation than, e.g. fundamental rights and minority rights**: generally, international legal instruments do not express democracy as an individual right
- A general perception of democracy as government by the people is universal, but democracy remains an **‘essentially contested concept’** (Gallie), e.g. those who agree on the democratic principle can disagree on what it entails, e.g. managed democracy where the State apparatus exerts strong influence or a degree of control over political parties
- To what extent can there be a **convergence on a core normative understanding of democracy?** and **“Which exact feature or features of democracy as it currently exists are the ones to which people are supposed to be entitled?”** (Miller, p. 6)

# Essentially Contested Concepts

- Gallie's **essentially contested concepts** (1956);
  - evaluative or appraisive, in delivering value judgments;
  - internally complex
  - diversely describable, in having more than one and maybe many possible instantiation(s);
  - open, in that their meaning may be reviewed in different or novel situations;
  - reciprocally recognised, in that parties acknowledge their contestedness; and
  - capable of exemplars or paradigm examples, which anchor the concept and on which there is agreement
- ▶ The concepts are **appraisive and are disputed in at least some aspects of their core meaning**, while not being without any definable meaning or incapable of '**anchoring**' to at least some degree

# Held's Models of Democracy

- David Held's '**models of democracy**'
- Wide range:
  - Direct
  - Indirect
  - Republican
  - Liberal democracy
  - Technocratic
  - Socialist
  - Capitalist
  - Competitive elitism (Schumpeter)
  - Consociationalism (Lijphart)
  - Militant (Lowenstein)
- **Models v. cultures of democracy** (e.g. of latter competitive elitism)?

# Models of Democracy

- “The transitional paradigm suggests a false dualism between politically legitimate democracies and illegitimate non-democracies. **The dualism is false because it obscures the many ways in which even established liberal democracies contain authoritarian elements and, vice versa, how there can be multiple forms of political participation beyond those narrowly associated with a human right to democracy.**” (Peter, 2015, p. 12)
- “However, the absence of a universal political model does not negate universal democracy. **Both proponents of broad and limited perceptions of democracy consider the legitimation of governance by the consent of the governed to be the core element of a democracy.**” (Vandewoude, 2010, p. 991)

# A Norm or a Right?

- Hohfeld on **inter-relationship of norms types**
- Rights correspond or **correlate to a duty**, e.g. the right bearer is owed a duty to the right being upheld by other parties
- Dworkin's account of **rights as trumps** that prevail over collective or community goals
- **Democracy as a privilege?** Hohfeld contrasts rights with privileges in that the latter do not entail a duty to be upheld (though it might be supposed there may be a duty not interfere with someone else's privilege)
- If democracy is a **norm in a looser sense than a right**, democracy has a(n) (even strong) normative valence: it can be understood as **a jural privilege** and a **normative political aspiration**
- If not a right, the term norm captures **the more contested character of democracy** as a norm especially in an international and comparative context

# Democracy in International Legal Instruments

- UN Declaration of HR (Miller): ‘everyone has the right to take part in the government of his country, directly or through freely chosen representatives’ and refers to ‘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 26) + Article 1 on self-determination
- ECHR, Protocol 1, Article 3: individual right?
- Articles 2, 49 TEU, CFR: relates to EP
- Miller (2015, p. 3, fn. 7) quotes Waldron, 2010:  
“In its moderate and widely accepted form, self-determination simply means that the people of a country have the right to work out their own constitutional and political arrangements without interference from outside”. (Waldron, 2010, p. 397)  
→ collective right, including to waive democracy?
- International law at present only recognises a collective right to **cultural self-determination**

# Deriving a Right to Democracy

- Landwehr, C., Schäfer, 'A. The Promise of Representative Democracy: Deliberative Responsiveness'. *Res Publica* (2023), p. 2 of PDF, relate democracy, beyond its procedural character, to the values of individual (and collective) liberty, equality of citizens, and rationality:

“From a citizen perspective, democratic government bears at least three promises. First, having a say in collective decisions that result in binding law fulfils democracy’s **promise of individual and collective autonomy**, or effective self government. Secondly, democracy institutionalizes the **principle of equality**, or equal autonomy. In a democracy, every vote counts equally and every citizen is supposed to have the same say on laws that apply to all of them equally. Thirdly, democracy is associated with a promise of **rationality**: citizens expect democratic decisions to be reasonable and well-justified, and most of them tend to think that democracies are overall less likely to produce decisions to be regretted in the future than autocracies are. These promises have aspirational character, meaning that to date, no political system has truly fulfilled them. In the minds of citizens, however, they constitute an ideal normative standard for the evaluation of democratic institutions and practices.” (p. 1 of PDF)

→ Can these values be translated into the notion of an **individual ‘right to democracy’**?

→ Is democracy better understood **as a group or collective right**?

→ “There might be a human right to democracy because this is essential to support other rights that can be argued for directly” (Miller, 2015, p. 4)

# Deriving a Right to Democracy

- **Kelsen** understood that the modern as opposed to ancient concept of democracy was essentially of **liberal democracy**:

“To be sure, **the modern concept of democracy** prevailing in Western civilization is not quite identical with the original, the antique, concept, insofar as the latter has been modified by political liberalism to restrict the power of government in the interest of the freedom of the individual. **Under this influence guaranties for certain intellectual freedoms, especially freedom of conscience, have been included in the concept of democracy, so that a social order which does not contain such a guaranty would not be considered democratic, even if the procedure for its creation and application guarantees the participation of the governed in the government.**” (Kelsen, 1955, p. 3)

“The liberalism inherent in modern democracy means not only political but also **intellectual autonomy of the individual, autonomy of reason, which is the very essence of rationalism.**” (Ibid, p. 28)

# Deriving a Right to Democracy

- Conceptions of rights: **interest**, **will**, **status**
- See e.g. Miller:

“In the case of democracy, for example, we need to be clear whether it matters to us instrumentally, for the other goods and values it helps to promote, or whether it matters for its own sake. **Equally, in the case of human rights, if we are going to avoid the mistake of packing everything that’s important to us into that particular box, we need to explore the grounds of human rights, and see whether those grounds can get us all the way to an institutional arrangement such as democracy.** Those are the more philosophical reasons for exploring the question. But there is a second, more practical, reason. **If there is indeed a human right to democracy, and if, as many believe, for a state to be politically legitimate it must respect human rights, it immediately follows that the many undemocratic states that exist in today’s world are illegitimate, and don’t deserve the respect that we owe to all legitimate states.** ... It would significantly change the terms on which we interact with such states. We would have a moral responsibility to see that the human right to democracy was realised, even if this meant interfering in their internal affairs.” (Miller, 2015, p. 2)

# Deriving a Right to Democracy

- Miller divides arguments in favour of a right to democracy into two types:

(i) Consequentialist: other human rights, including the ones that rank highest on the scale of urgency, such as subsistence and bodily security, are most likely to be safeguarded in democratic societies (p. 4, citing Christiano, 2011), but such a link must be essential for democracy to be justified (Miller, 2015, p. 5)

(ii) Non-consequentialist: human rights as grounded in a concern for equality of status, and treats the human right to democracy as one key expression of that equal status (Miller, 2015, p. 11), e.g. Allen Buchanan and 'moral equality principle'

→ How important is equal participation in political decision-making? Miller doubts that it has such a fundamental importance:

**“Human rights, let us recall, are supposed to be the moral bedrock, conditions that are needed for any decent human life to be possible. Democracy takes us well beyond that.** It is a valuable political achievement, to be sought after and treasured when the conditions for its existence are favourable. It involves a particular way of associating together politically, on terms of equality, and where it exists it has the effect of promoting egalitarian norms in society generally. Nothing I have said is meant to detract from this value. But we should recognize democracy for what it is, a form of political association that has social preconditions and embodies particular values, rather than a universal prescription for achieving the conditions of a decent human life.” (Miller, p. 14)

# Deriving a Right to Democracy

- Peter distinguishes moral and justice-based conceptions of human rights and public reason (2015, pp. 4-6), referring also to right v. good: but **the 'orthodox' moral concept of rights he identifies seems to just re-point to the basis of morality itself** (which need not be compatible with public reason, or it must be so compatible)?
- A morality v. justice distinction may not reflect the **continuum between the domains of private morality and public justice**
- Democracy and **associated rights**
- Core of right to democracy:
  - ▶ **right on basis of universal suffrage to vote in free and regular elections for legislative/governmental authority**
- Landwehr & Schäfer three justifying grounds for democracy:
  - (i) Autonomy
  - (ii) Equality
  - (iii) Rationality

# Deriving a Right to Democracy - Autonomy

“According to this demand, **positively enacted law should guarantee the autonomy of all legal persons equally**; and the democratic procedure of legislation should in turn satisfy this demand. In this way, an internal relation is established between the coercibility and changeability of positive law on the one hand, and a mode of lawmaking that engenders legitimacy on the other. Hence from a normative perspective there is a conceptual or internal relation-and not simply a historically, accidental relation between law and democracy, between legal theory and democratic theory.” (Habermas, p.254)

→ law and democracy in conjunction secure **the equal autonomy of the individual, per Habermas**

- But law and recognition of other rights secures immediate autonomy of individual, e.g. foreign residents
- The problem of minority rights and majoritarianism (‘tyranny of majority’) is **not avoided by the conjunction of law and democracy**
- The core ‘right to democracy’ **enables autonomy less** than other associated rights?

# Deriving a Right to Democracy - Equality

- Maybe the strongest normative claim for democracy:

“... **the only public way to realize equality is to ensure that persons have equal opportunities to shape the society in accordance with their judgments.** This is not to say that the other substantive forms of equality are not important but it is to say that they cannot achieve the public realization of equality under the normal circumstances of political societies if the democratic realization is not present. Democracy is indispensable for this” (Christinao, cited in Peter, p.9)

- But the problem of minority rights and majoritarianism (**‘tyranny of majority’**) is also the biggest problem of democracy
- **Are rights to be defined other than through democracy** itself?
- If so, how essential is democracy to protecting equal rights?

“To argue for democracy, I think it is necessary to combine an argument for political equality with an epistemic argument. One way to do that is by focusing on how democracy performs and by defending it on grounds of its potential to achieve just outcomes.” (Peter, giving Estlund as an example) but **“democracy is best defended on grounds of the procedural epistemic values that it embodies, values that become significant in circumstances where a collective cannot establish what the correct decision would be”** (Peter, pp. 10-11) → and the latter is so because of pluralism, i.e. if there are not correct outcomes, then at least the majority should decide

# Deriving a Right to Democracy - Equality

- Habermas on co-originality of democracy and rights:

“However well-grounded human rights are, they may not be paternalistically foisted, as it were, on a sovereign. Indeed, the idea of citizens' legal autonomy demands that the addressees of law be able to understand themselves at the same time as its authors. It would contradict this idea if the democratic legislator were to discover human rights as though they were (pre-existing) moral facts that one merely needs to enact as positive law. At the same time, one must also not forget that when citizens occupy the role of co-legislators they are no longer free to choose the medium in which alone they can realize their autonomy. They participate in legislation only as legal subjects; it is no longer in their power to decide which language they will make use of. The democratic idea of self-legislation must acquire its validity in the medium of law itself.” (Habermas, 2006, p. 260)

- Is a normative conception of the person required prior to the establishment of democracy?

# Deriving a Right to Democracy - Reason

- View that democracy is **characterised by public reason**
- **Deliberative** conception of democracy
- Does this reflect the empirical reality? **'Populist' critique** of
  - i. manipulation of opinion (especially through social media),
  - ii. proneness of electorate to engage in reasoning?
- Problem of **factional or personal self-interest**: democracy as an aggregation of this
- Problem of **dis-engagement and low participation** in some democracies

# Conclusion

- ❑ Democracy is **not so self-evidently a right**
- ❑ Other rights may be **more immediate and fundamental**
- ❑ International law **probably does not recognise democracy as an individual right** beyond particular Treaty provisions: extent of it is unclear or minimal, confined to occurrence of free elections
- ❑ Democracy undoubtedly has **a strong normative claim**, it does connect with or further **autonomy and equality**
- ❑ The biggest problem for asserting a right to democracy is **how it relates to other rights: other rights are prior and may conflict with democracy?**
- ❑ Peter's argument for **right to political participation** in a weaker sense (not presupposing any particular set of institutions and putting the choice of political institutions more directly in people's hands than a version of this right that is constrained by a particular moral blueprint) more reflects actual practice and also the theoretical challenges of a 'right to democracy'
- ❑ Democracy as a **second-order right?**

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