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COHEN V. COHEN: WHY A HUMAN RIGHT TO (DOMESTIC AND GLOBAL) DEMOCRACY DERIVES FROM THE RIGHT TO SELF-DETERMINATION

Nahuel Maisley

CONICET, Universidad de Buenos Aires, Grupo de Filosofía Política

RESUMEN

En este trabajo intento desafiar la idea presentada por Joshua Cohen de que no existe un derecho humano a la democracia. Para ese fin, utilizo argumentos presentados por el propio Cohen en otras ocasiones. En una primera sección, explico cinco contradicciones en las que creo que incurre Cohen con respecto a sus trabajos previos. En una segunda sección, explico dos conclusiones que creo que se pueden derivar de este desarrollo: primero, que el derecho de libre determinación de los pueblos no impide la existencia de un derecho humano a la democracia (por el contrario, no hay libre determinación posible sin democracia), y segundo, que este razonamiento no solo es aplicable al orden doméstico, sino también al internacional.

Palabras clave: Joshua Cohen – Libre determinación – Pueblos – Democracia – Derechos Humanos – Participación – Derecho Internacional

ABSTRACT

In this paper, I challenge Joshua Cohen's denial of the existence of a human right to democracy, using for that purpose arguments presented by Cohen himself in other occasions. In a first section, I explain five contradictions in which I believe Cohen incurs with respect to his previous works. In a second section, I explain two conclusions that I believe can be derived from this development: first, that the right of peoples to self-determination does not impede the

existence of a human right to democracy (on the contrary, self-determination is impossible without democracy), and second, that this reasoning is not only applicable to the domestic order, but also to global decision-making.

Key words: Joshua Cohen – Self-Determination – Peoples – Democracy – Human Rights – Participation – International Law

International law simultaneously acknowledges a human right to take part in the conduct of public affairs (articles 21 and 29 of the Universal Declaration of Human Rights; article 25 of the International Covenant on Civil and Political Rights), and a right of peoples to political self-determination (articles 1.2 and 55 of the United Nations Charter, article 1.1 of the ICCPR). The combination of these two rights –or of the ideas underlying them– has given place to an intense interpretive discussion as to whether they allow for a "human right to democracy" (Cohen 2006; Christiano 2011; Benhabib 2012; Gilabert 2012; Peter 2013) – usually understanding democracy as a series of institutions that guarantee equal respect among individuals, and that recognize their equal political capacity (Cohen 2006: 240).

The "most systematic challenge" (Gilabert 2012: 3) to the existence of this human right to democracy is usually considered to be the one presented by Joshua Cohen (2006), who is also, somewhat paradoxically, one of the primary and most fervent defenders of deliberative democracy (Cohen 1989, 1996, 1998, 1999). To reach the conclusion that such right should not exist, Cohen begins by rejecting the two extreme positions that can be adopted to interpret human rights: i) on the one hand, "minimalist" positions, i.e. those that associate human rights exclusively with bodily security; and ii) on the other hand, "maximalist" positions, i.e. those that relate human rights to the idea of justice. According to Cohen, a third, intermediate, way must be pursued: human rights should be

understood as a partial statement of a "global public reason", and thus, as a letter of membership to an organized political society. Applying these ideas to the issue of political participation, Cohen opposes both the minimalist positions that reject every political right, as well as the maximalist positions that pretend to impose their own conception of political justice as a universal right. Between these two options, Cohen defends a less demanding "right to collective self-determination", which requires i) that binding collective decisions result from a process in which the interests and positions of all those affected are represented, ii) the right to dissent and to appeal those decisions, and iii) that the government provides public explanations for its decisions, based on the common good of society (Cohen 2006: 233). For Cohen, everything that exceeds this model may constitute an obligation of justice, but not one of human rights.

A priori, this model of "collective self-determination" may look very similar to Cohen's own conception of democracy (Cohen 1989, 1996, 1998, 1999). However, there is a crucial difference. While in a democracy legal obligations are legitimate only when they are the result of a process in which all those potentially affected have an equal opportunity to participate and influence the outcome (Cohen 1989: 21–23), in "collective self-determination" it suffices that "the regulations reflect a concern with the good [of those individuals]" (Cohen 2006: 239). Cohen's self-determination model –just as John Rawls' (1999: 71-78) decent consultation hierarchy– is compatible with any method of political organization –including monarchies, oligarchies or other anti-democratic systems–, as long as all individuals are somehow taken into account. As explained by Seyla Benhabib, the intention of these authors is to prevent human rights from becoming comprehensive doctrines that cannot be shared in a pluralist world (Benhabib 2012: 202).

In this paper, I pretend to challenge Cohen's reasoning, using for that purpose arguments presented by Cohen himself

in other occasions. The article will be divided in two sections. In a first section (1), I will explain five contradictions in which I believe Cohen incurs with respect to his previous works. My purpose is to defend what I think is the best application to this discussion of the ideas present in some of his writings (Cohen 1989, 1996, 1998, 1999; Cohen and Sabel 2004). In a second section (2), I will explain two conclusions that I believe can be derived from this development. The first (2.1) is that the right of peoples to self-determination does not impede the existence of a human right to democracy. Much to the contrary, I will suggest that the self-determination of peoples is actually impossible without democracy. The second conclusion (2.2) is that this reasoning is not only applicable to the domestic order, but also to global decision-making. As explained by Cohen and Charles Sabel in 2004, the emergence of global rulemaking, which imposes duties on individuals, triggers certain demands of accountability, which can be accommodated through certain deliberative practices. There is no reason to consider these practices outside the scope of the human right to democracy.

1. The Five Contradictions

1.1. Collectivism and individualism

According to article 1.1 of the ICCPR, peoples have a right to self-determination, by virtue of which "they freely determine their political status"[1]. Cohen interprets this article as "a

1. ICCPR, art.1.1. Article 1(2) of the United Nations Charter establishes that one of the purposes of the Organization is to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace". The Human Rights Committee has explained that this right to self-determination "is of particular importance because its

normative requirement, but less demanding than a requirement of democracy, which is one form of collective self-determination" (Cohen 2006: 233). In other words, for Cohen, the system of government and the method for adopting political decisions may vary among societies, and this variation will be acceptable –even if the scheme adopted is somewhat exclusionary– as long as the selection of the decision-making method is made by "the people" itself.

However, as Cohen seminally acknowledged in 1989, the identification of the will of a collective, such as "the people", is a process that is particularly complex (Cohen 1989: 28). Carlos Nino suggests that several scholars have struggled with this task, leading to results that are either overtly incompatible with the respect for individual rights or that preclude the functioning of the government (Nino 1989: 374 onwards). For example, some have understood "the people" as the *unanimity* of individuals, making self-determination an impossible goal, as decisions could only be made in those cases where there were full agreements. Others have identified it with a *subgroup* within society –be it a circumstantial majority or a fixed group, such as "the poor", or "the proletariat"–, making the government a result of the will not of the whole people, but only of a fraction of it. Finally, several authors ended up assuming what Nino calls a *collectivist approach* (Nino 1989: 254, 376–377), according to which "the people" is understood as an inherently collective entity, one that transcends the collection

realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights" (Human Rights Committee, *General Comment No. 12: (Art. 1)*, (Mar. 13, 1984), U.N. Doc HRI/GEN/1/Rev.1 at 12, par. 1). In the actual practice of the international community, this right has proven to be an inestimably valuable tool for what has most likely been the most successful task undertaken by the United Nations, which was promoting the process of decolonization and freeing millions of people from foreign oppression (Thüre and Burri 2008; Khan 2011).

of human beings, having an existence, a well-being, and a destiny that is not reducible to the individuals that contingently conform it.

Seyla Benhabib identifies this latter strategy in Cohen's 2006 arguments, and criticizes him for assuming an internal homogeneity within peoples which is actually far from existing (Benhabib 2012: 203). For her, this line of reasoning "simply reduces peoples and their histories to a holistic counterfactual, which then results in the flattening out of the complex history of discourses and contestations within and among peoples" (Benhabib 2012: 203). The initial purpose of "liberal tolerance" is thus replaced by what Benhabib calls "liberal ignorance": "it leads us to assume that individuals from other cultures and traditions have not entertained throughout their histories similar kind of debates and concerns about human rights, justice and equality, as we have in ours" (Benhabib 2012: 204). Acknowledging that there is reasonable pluralism within our Western societies (Cohen 1996: 96) and rejecting the existence of such pluralism within other societies is both patronizing and empirically wrong.

However, the most powerful critique of collectivism is not empirical, but rather, theoretical. Carlos Nino explains that for a certain entity to be considered a "moral person" –i.e. to have morally relevant interests (Nino 1989: 253)–, "it must constitute, at least potentially, a point of view, a perspective from which, when it performs moral reasoning, it can situate itself to judge a situation" (Nino 2013: 121). In other words, it must be autonomously "self-conscious", in the sense that its judgments must be irreducible to the judgments of other beings. This is not the case with collective entities, such as nations, peoples or states. States, for example, do not have autonomous minds, and any reference to their conscience or their rationality "only makes any minimal sense, which is not purely metaphorical, if systematically associated with phrases regarding the conscience or rationality of an individual or group of individuals" (Nino 1989: 253). According to Nino, then, when the interests

of collective entities "are claimed in the context of this discourse, pretending that they are different from those interests of the individuals that conform it, it is usually with the purpose of reifying the point of view of certain individuals within the group" (Nino 1989: 254). Cohen seems to have agreed with this sort of reasoning in his 1989 article, when he suggested that it is impossible to distinguish the preferences of the people from the institutions through which they are formed, precisely because the "preferences of the people" do not exist in a vacuum, but are the result of an institutional process in which the individual positions of each citizen are defined and amalgamated through public discussion (Cohen 1989: 28).

The difference between normative collectivism and normative individualism, then, is central to any reflection on self-government. As a result of their unlimited flexibility in the identification of the will of "the people", holistic positions allow for the justification of almost any system of government – and they are in fact frequently used to justify the legitimacy of authoritarian regimes (Dworkin 1990: 336). On the contrary, individualist approaches are more demanding regarding what can be understood as self-government, since they consider that a truly collective decision cannot be reached unless there is a certain egalitarian treatment of all the individuals that compose the group. This is precisely why those who ascribe to the theory of deliberative democracy inevitably appeal to this line of reasoning, even if they do it implicitly. In the case of Cohen's own theory of democracy, this is clear when he states, for example, that there are "appropriate [and thus, also inappropriate] ways of arriving at collective decisions" (Cohen 1989: 20), and specifically, that these institutional schemes have at their core the idea that "free deliberation among equals is the basis of legitimacy" (Cohen 1989: 21).

However, assuming normative individualism as a starting point in the reflection on self-government is not unproblematic in itself. The most prominent challenge has to do with the sen-

se that is to be ascribed to a right that is eminently collective, as the one international law recognizes to "peoples". I think it is this difficulty the one that has led deliberativists like Cohen (2006) or Rawls (1999) to move away from the methodological paradigm of their first writings when they tackled the question from an international perspective (Pogge 2004: 1774; Beitz 2000; Nagel 2005: 135; Kuper 2000: 643; Benhabib 2012: 203). Since they found themselves unable to reconcile normative individualism with the idea of a collective having rights that are distinct from those of individuals, they understood that individualism was not the appropriate methodology to reflect on the question of self-government from an international perspective. As I suggested earlier, I think this way out is inconsistent with their previous works; and what is worse, I believe those previous works to be correct, and thus, this new approach to be inappropriate.

Luckily, other authors have proposed new ways to solve this problem, and to reconcile the idea of collective rights with a theory based on individualism. Peter Jones identifies two approaches to the question of group rights (Jones 1999). The first is what he calls a *corporate conception*, which resembles what Nino called a "collectivist approach". According to this conception, "we can think of a group's bearing rights in the same immediate and nonreducible way in which an individual person can bear rights" (Jones 1999: 362). Thus, for example, "a nation will be conceived as an entity with a distinct life and identity of its own which others must recognize and respect" (Jones 1999: 363). The problem with this conception, as stated earlier, is that it assumes that groups have an autonomous conscience, although it is impossible to identify said collective will without reference to the individual wills of the citizens themselves (Nino 2013: 119–124, 1989: 254; Jones 1999: 366; Pogge 2004: 1774). The second approach, which I believe to be more appropriate, is what he calls a *collective conception*. According to those authors who adopt this position, the rights of groups are not founded on the interests of an abstract collective entity, but on those of the very individuals that compose them (Margalit and Raz 1990; Post 2000: 212; Fabre 2014: 89–90; Waldron 1993: 360; Kymlicka 2002: 338–343; Beitz 2009: 113; Benhabib 2012; Peter 2013). The idea is that, in certain occasions, the best way to protect the rights of individuals is by acknowledging collective rights. For example, from this outlook, "nations have rights of self-determination only because those rights serve the wellbeing of individuals" (Jones 1999: 364). Charles Beitz explains the idea with great clarity:

> "[I]t is important to see that a value can have a collective dimension without being non individualistic. The value of self determination, for example, has a collective dimension because its importance to the individuals who enjoy (or wish to enjoy) it cannot be explained without reference to their group membership, but it is still an individualistic value: it is a value for the individuals who enjoy it." (Beitz 2009: 113).

Assuming this outlook, it is difficult to justify Cohen's argument denying a human right to democracy. If collective self-determination is only justified on the premise that individuals should decide –collectively, because they cannot do so individually– their own future, then the right loses every justification when those very individuals are excluded from the public decision-making process. As Cohen explained in 1996, a decision can only be considered a justified exercise of collective political power –i.e. an actual decision *of the people*– when, i) first, it is the result "of a free public reasoning among equals" (Cohen 1996: 99), and ii) second, the institutional tie between this deliberative justification and the exercise of collective power is respectful of the "principle of participation", i.e. it ensures "equal rights of participation, including rights of voting, association and political expression; rights to hold office; a strong presumption in favor of equally weighted votes; and a more general requirement of equal opportunities for effective

influence" (Cohen 1996: 106)[2]. When political decisions meet these two standards, they can be considered to be legitimately made by the people, "not because collective decisions crystallize a shared ethical outlook that informs all social life, nor because the collective good takes precedence over the liberties of members", but instead, says Cohen, because this inclusive deliberative process "expresses the equal membership of all in the sovereign body responsible for authorizing the exercise of that power" (Cohen 1996: 102).

1.2. The paradox of interests

In Cohen's "collective self-determination" model, peoples would not have to allow the effective participation of all citizens in the decision-making processes. Instead, they should simply take their interests in consideration (Cohen 2006: 233, 239). Now, this seems to lead to a paradox: if citizens are not allowed to participate in the decision-making process, then it is impossible that the rulers know precisely what their interests are, with the purpose of taking them into account.

2. Cohen provides three justifications for this "principle of participation". First, an instrumental justification, according to which equal political rights "provide the means for protecting other basic rights and for advancing interests in ways that might plausibly promote the common good" (Cohen 1996: 107). Second, a historical justification, suggesting that the actual practice of most communities around the world shows that most exclusions are unjustifiable. This, according to Cohen, "establishes a further presumption in favor of the principle of participation" (Cohen 1996: 107). The third –and probably the strongest– justification provided by Cohen is that "citizens [usually] have substantial, sometimes compelling reasons for addressing public affairs. Because they do, the failure to acknowledge the weight of those reasons for the agent and to acknowledge the claims to opportunities for effective influence that emerge from them reflects a failure to endorse the background idea of citizens as equals" (Cohen 1996: 107–108). Several other authors have attempted similar justifications (*e.g.* Rawls 1971: 36–37, 1993: 327–330; Gargarella 1998; Martí 2006; Waldron 1999).

Hence, they are either allowed participation, or they are not really taken into account.

Pablo Gilabert considers that it is hypothetically possible that a regime adequately considers the interests of citizens without consulting them (Gilabert 2012: 11)[3]. For him, the problem is that the probabilities of this happening are too low (Gilabert 2012: 11)[4]. My position is slightly different, since I start my reasoning from the premise, defended by Cohen in 1989, that "the relevant preferences and convictions are those that could be expressed in free deliberation, and not those that are prior to it" (Cohen 1989: 28). Or even further, that individuals only get to know their own positions in the course of democratic discussion (Cohen 1989: 24; Nino 1996; Martí 2006a). Without this process, it is not unlikely but straightforwardly *impossible* that rulers get to know the preferences of the citizenry.

A possible answer to this argument is that when Cohen states that decisions result from "a political process that represents the diverse interests and opinions of those who are subject to the society's laws" (Cohen 2006: 233), he is actually establishing a space for effective participation, where citizens can make their voices heard and where they have an equal opportunity to influence the decision. The "informal public sphere" that Cohen assures with this right would somehow become a "formal public sphere", since rulers would have the obligation, and not merely the ability, to pay attention to those

3. Thomas Christiano holds a similar opinion to Gilabert: "There is no conceptual or a metaphysical impossibility here. A decent consultation hierarchy is not impossible; it is just very unlikely. The normal operation of a consultation hierarchy is incompatible with the protection of the basic human rights involved with decency" (Christiano 2011: 157).

4. Although he later nuances this argument, when he asks: "How can they themselves develop a considered and reflective political outlook without robust and equal freedoms allowing not only open discussion but also experience in wielding political power and responsibility?" (Gilabert 2012: 12–13).

decisions and act accordingly. But if this were the case, then Cohen would actually be defending a pretty robust conception of self-determination, one whose differences with his theory of democracy would be scarce. In fact, in both models citizens would have equal influence over the conduct of public affairs, since everyone's voices would be listened and taken into account before decisions are made. This is why Seyla Benhabib considers that "Cohen's normative account of membership inevitably leads to more robust forms of self-government than he is willing to grant; his own account sets him on the slippery slope towards self-government whether through representative or more participatory forms of institutions" (Benhabib 2012: 205).

1.3. Legitimacy or Justice?

In his paper, Cohen seems to acknowledge –although a bit cryptically– the idea that human rights are conditions for political legitimacy[5]. In fact, this is precisely the reason why he pretends to distinguish human rights from aspirations of justice: if both were the same, then peoples would, for example, have a right to rebellion if their governments did not apply

5. First, according to Cohen, the concept of "global public reason" has the goal of "evaluating" political societies: What would he evaluate them for, if not to consider their legitimacy? And second, Cohen associates the idea of membership and inclusion to an idea of "political obligation": "Regulations cannot impose obligations of compliance on those who are subject to them unless the regulations reflect a concern with their good. If an account of political obligation along these lines is correct —and it is more plausible than a theory of obligation that makes the justness of processes and outcomes a necessary condition for political obligations— the rights that are required if individuals are to be treated as members would be identical to those that are required if the requirements imposed by law and other regulations are to be genuine obligations" (Cohen 2006: 239).

the Rawlsian difference principle[6]. However, Cohen understands that the possibility of participating as equals in political decision-making is not a matter of legitimacy, but one of justice. For a decision to be legitimate, it suffices that it takes the common good into account, that it is made in a context where there is freedom of speech, and that there is some sort of accountability (Cohen 2006: 233, 239).

Once again, this seems contradictory with the theory of deliberative democracy –and particularly, with an inclusive, egalitarian, version of said theory–, of which Cohen is a prominent defender (*see* Gargarella 1996: 360; Martí 2006b). According to this theory, the voices of those potentially affected by a decision must be heard, not as a matter of justice, but as a matter of legitimacy. It is precisely the participation in the decision-making process what makes subjects morally obligated to obey the decisions, and it is the lack of participation what makes these decisions gradually more fragile and less binding (Nino 1996: 128–134; Martí 2006a: 133–175; Gargarella 1998). As explained by Fabienne Peter, "the thought is that without some right to participate in the deliberative process that constitutes public reason, there is no justification and hence no political legitimacy" (Peter 2013: 13).

In Cohen's own writings, this deliberative requisite seems to be a result of the fact of reasonable pluralism, i.e. "the fact that there are distinct, incompatible understandings of value, each one reasonable, to which people are drawn under favorable conditions for the exercise of their practical reason" (Cohen 1996: 96; *see also* Gargarella 1997: 393). Since people disagree,

6. The idea that individuals have a right to rebellion against their governments if they do not comply with their basic human rights is suggested in the Preamble to the Universal Declaration of Human Rights ("Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law") and has been defended by several authors (*e.g.* Montero 2014; Pogge 2000; Peter 2013).

and unanimous decisions are impossible, an institutional arrangement must be devised in order to make collective decisions legitimately binding, despite the existing differences. This arrangement is democratic deliberation. "The fundamental idea of democratic, political legitimacy", says Cohen, "is that the authorization to exercise state power must arise from the collective decisions of the equal members of a society who are governed by that power" (Cohen 1998: 185, 1996: 95). This requisite is fulfilled when they arise "from the discussions and decisions of members, as made within and expressed through social and political institutions designed to acknowledge their collective authority" (Cohen 1996: 95). "Even people who disagree", Cohen concludes, "may accept the results of a deliberative procedure as legitimate" (Cohen 1998: 198).

If this line of reasoning is correct, and I believe it is, the decisions made by exclusionary political systems as those accepted by Cohen's "collective self-determination" model must be deemed not only unjust, but also illegitimate. Citizens of those states would be much less morally compelled to obey political decisions than they would be if they were allowed participation (Nino 1996: 128–134; Martí 2006a: 133–175; Gargarella 1998, 2015). Hence, the inclusive nature of the conduct of public affairs is not a matter of justice, but instead, a condition for political legitimacy; or, in other words, a human right.

Two objections could be presented to my reasoning. First, someone could argue that these conditions for political legitimacy are only applicable to some specific, "well-ordered societies", which have certain traditions and customs that allow for this system to be successful (Rawls 1999). However, conditions for legitimacy –i.e. human rights– are universal by their own nature, and cannot be applied selectively (Cohen 2006: 229). Political inequality, just like torture, rape, or censure, for example, cannot be justified on the basis of tradition or culture: even if nations have had exclusionary practices for decades, those practices are illegitimate, and constitute a violation of the human rights of those excluded from the conduct of public affairs.

The second objection to my argument could be that the standard I am suggesting is simply too high. If only fully inclusive decision-making processes were to be legitimate, then it is likely that a vast majority of the laws passed in every single nation would be bluntly illegitimate, and that people would not be morally bound to obey them. However, as stated before, the theory of deliberative democracy holds that legitimacy is not an "all-or-nothing" concept, but rather a progressive idea. Only when the democratic credentials of a certain system are very low, individuals may have a right to disobey those decisions (Nino 1996: 140; Gargarella 2015). This is not what usually happens in most nations, and thus, most legislation can be deemed somewhat legitimate, and thus somewhat morally binding.

1.4. Concepts and conceptions

In his arguments against maximalism, Cohen suggests that imposing a certain conception of democracy as part of a human right may imply a certain degree of intolerance (Cohen 2006: 235). To avoid this problem, his strategy consists in interpreting the right to "collective self-determination" as an ample concept, which allows for different conceptions. Thus, the underlying idea is that his/our conception of democracy is too narrow, and does not make room for peoples to exercise their self-determination and choose how to be governed.

However, Cohen himself seems to contradict this point when he later admits that the concept of democracy, understood as equal participation, is also very ample, and also allows for very different systems of government: "an idea of equality", says Cohen, "plays a central role in any reasonable normative conception of democracy. In fact, disagreements in normative democratic theory are typically disagreements about what is required in treating those subject to the rules (laws and regulations) as equals" (Cohen 2006: 239; Gilabert 2012: 7–9).

This latter part is also fully consistent with Cohen's previous works. In 1996, for example, he stated that "democracy comes in many forms, and more determinate conceptions of it depend on an account of membership in the people, and correspondingly, what it takes for a decision to be *collective*" (Cohen 1996: 95, 1998: 185).

Therefore, while it is true that the acknowledgment of this human right would restrict certain forms of government, it is not true that it would impose on peoples a specific scheme of decision-making[7]. Peoples would be able to choose their preferred mechanisms for the conduct of public affairs among an ample variety of democratic options, bearing in mind their own traditions and possibilities[8]. For example, they could choose a presidential, a parliamentarian, or a mixed system of government. They could have bigger or smaller electoral districts; they could have more or less autonomy for local political units; they could decide to conduct frequent referenda, or they could decide to avoid them completely. What they could not do is exclude certain people from the decision-making processes, just as they could not torture, or they could not assassinate. Those seem like reasonable limits for legitimacy.

7. In other words, the recognition of a human right to democracy does not necessarily require the adoption of a maximalist position with regards to human rights. The problem here is not between maximalist and minimalist positions, but rather, the problem is that Cohen's position is extremely minimal, to the point of leaving essential interests outside the scope of protection of human rights. One can hold that human rights requirements are different from the requirements of justice, and still defend the existence of a human right to democracy. For example, I believe parliamentary systems to be more just than presidential systems (Alegre 2008), but I would not claim that there is something like a human right to be governed by a parliament, or that presidential systems are in and by themselves illegitimate.

8. This is fully compatible with the current understanding of human rights, and of the ICCPR in particular. As explained by Sarah Joseph and Melissa Castan, the General Comment 25 of the Human Rights Committee "confirms that article 25(a) does not presuppose any particular system of government, so long as the State Party functions as a democracy. Indeed, the modalities of distribution of power and citizens' rights of political participation must be 'established by the constitution and other laws'; article 25 does not strictly dictate the content of those laws. Numerous political systems seem compatible with article 25(a), including Westminster systems, 'presidential' systems, bicameral systems, unicameral systems, unitary systems, and federal systems" (Joseph and Castan 2013: 22.08).

1.5. Fidelity

Cohen suggests that every account of human rights "must meet a condition of *fidelity*" with respect to the legal practice (Cohen 2006: 230). This means that reflection on what should be considered a human right should look for some compatibility with current norms: "at least some substantial range of the rights identified by the principal human rights instruments –especially the Universal Declaration– [must be included] among them" (Cohen 2006: 230). Of course, the identification should not be absolute, or perfect, but must occur "broadly" (Cohen 2006: 238). Otherwise, the theory would not only lose its critical capacity, but it would actually lose all sense (why discuss what should be a human right, if in the end the answer will depend on the current instruments?).

I believe that Cohen's model of "collective self-determination" is incompatible with the current legal practice, even looking at it in the broadest terms. In particular, I think it is irreconcilable with three elements that international law deems fundamental for the interpretation of its content: (1) first, with the text of the instruments themselves, including that of the Universal Declaration; (2) second, with the subsequent practice of states and the international community, which according to the Vienna Convention on the Law of Treaties must be taken into account to interpret international agreements[9],

9. Article 31.3.b) of the Vienna Convention on the Law of Treaties states

and which could also be constitutive of a customary rule in and by itself[10]; and (3) third, with the decisions of the competent organs for the interpretation of these instruments[11].

1.5.1. The text of the instruments

The Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) do not recognize a right "to be taken into account by political organs" –as there would be in Cohen's collective self-determination model–, but rather a right to "take part" in the conduct of public affairs (Gilabert 2012: 24–26; Benhabib 2012: 193). Both the ICCPR and the UDHR mention two specific applications of this idea, both incompatible with Cohen's model: first, the right to equal access to public service[12], and second, the right to vote and be elected[13].

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that for the interpretation of a treaty, "there shall be taken into account, together with the context: (…) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation".

10. According to article 38.1.b of the Statute of the International Court of Justice, if this general practice is "accepted as law" by states, it may become a rule of customary international law (Mendelson 1998; Akehurst 1975) .

11. According to article 38.1.d of the Statute of the International Court of Justice, "judicial decisions and the teachings of the most highly qualified publicists of the various nations" are "subsidiary means for the determination of rules of law".

12. Article 21(2) of the UDHR states that "everyone has the right of equal access to public service in his country". Article 25(c) of the ICCPR states that "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions (…) to have access, on general terms of equality, to public service in his country".

13. Article 21(1) of the UDHR states that "Everyone has the right to take part in the government of his country, directly or through freely chosen representatives". Article 21(3) states that "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures." Article 25(b) of the ICCPR states that "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions (…) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors".

But beyond these specific clauses, Cohen's anti-egalitarian argument seems to go against some of the most fundamental principles established in the main human rights instruments. As a matter of fact, articles 1 and 2 of the UDHR, article 2.1 of the ICCPR, and article 1.3 of the UN Charter establish that all the rights mentioned in these instruments belong equally to all individuals (Gilabert 2012: 19). Any unreasonable distinction (for example, for reasons of race, color, sex, language or religion) in the distribution of the freedoms acknowledged by these instruments is explicitly banned. Thus, any inequality in the access to the conduct of public affairs must be reasonably justified[14]. Cohen's collective self-determination model seems to be an argument for the exact opposite idea, i.e. that societies can adopt exclusionary decision-making processes without any justification whatsoever, without violating the human rights of their citizens[15].

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14. As stated by the Human Rights Committee, "Any conditions which apply to the exercise of the rights protected by article 25 should be based on objective and reasonable criteria. For example, it may be reasonable to require a higher age for election or appointment to particular offices than for exercising the right to vote, which should be available to every adult citizen. The exercise of these rights by citizens may not be suspended or excluded except on grounds which are established by law and which are objective and reasonable. For example, established mental incapacity may be a ground for denying a person the right to vote or to hold office" (Human Rights Committee, *General Comment No. 25: (Art. 25)*, (Dec. 7, 1996), U.N. Doc CCPR/C/21/Rev.1/Add.7, par. 4).

15. This incongruence is extremely relevant. Pablo Gilabert notes that "Being rendered second-class citizen (which is normally the case in a

Cohen may respond to my argument saying that these inequalities may not be arbitrary if they are justified with reasons that make sense in the context of domestic political traditions. The problem with this proposal is that, as stated previously, Cohen believes that human rights make sense as a statement of a "global public reason", i.e. as "a set of political values, principles, and norms for assessing political societies, both separately and in their relations, that can be widely shared" (Cohen 2006: 236). Although it is true that the implementation and interpretation of these rights must be in charge of these political societies separately –partly by virtue of the right to self-determination– (Cohen 2006: 237), the minimum requisite for it to be truly a "public reason" is that these peoples can justify their readings of these common standards through arguments that can be potentially shared by the other actors of the system (Rawls 1993: 217; Cohen 1996: 99–100). As explained by Cohen himself, particular reasons that can only be accepted by one subject are not appropriate for this sort of discourse: "one must instead find reasons that are compelling to others, acknowledging those others as equals, aware that they have alternative reasonable commitments" (Cohen 1996: 100).

1.5.2. The practice of the international community

The practice of states and international custom may seem *a priori* compatible with a model such as Cohen's: after all, the world is plagued with an astonishing amount of regimes which do not allow for an egalitarian participation of their citizens in political decision-making[16]. Nevertheless, the international community has recently adopted a series of measures which suggest that its interpretation of this right is more demanding than it seems at face value (Franck 1992; Steiner 1988; Fox 2000). On a discursive level, there are several instruments in which states accept that they have *duties* related to the establishment of a domestic democratic order. There are, for example, some commitments assumed at the regional level (the European Union, the Organization of American States and the African Union, among others, have instruments that impose democratic demands on governments[17]), and others entered into at the international level (for example, the Vienna Declaration and Program of Action, where it is stated that "the international community *should* support the strengthening and promoting of democracy"[18], or Resolution 55/96 of the United Nations General Assembly, where it reaffirmed "its *commitment* to the process of democratization of States, and that democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives"[19]). On a more factual level, meanwhile, several international organizations have assumed decisive roles in the promotion of free elections and egalitarian political participation (Fox 2008: 14–33). Two historical events show the relevance of the matter, for example, for the United Nations. In 1991, a *coup d'état* overthrew Haiti's President, Jean-Bertrand Aristide. The Security Council understood that the toppling constituted a threat to international peace and security and adopted binding measures to reinstate the

nondemocratic regime) is arguably injurious to an individual's dignity, or a failure of due consideration (Gilabert 2012: 13).

16. Currently, according to Freedom House, only 60% of the world's regimes are democratic (Freedom House 2012).

17. Gregory Fox explains the development of these instruments in the entry on "democracy" of the Max Planck Encyclopedia of Public International Law (Fox 2008: 24–33).

18. Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, article 8.

19. U.N.G.A. Resolution 55/96, *Promoting and consolidating democracy*, (Feb. 28, 2001), U.N. Doc. A/RES/55/96, Preamble.

president and to assure democracy in the island[20]. In 1997, a similar situation took place, this time in Sierra Leone, where President Ahmed Tejan Kabbah was removed from power by military groups. Once again, the Security Council declared that the situation allowed it to take binding measures, and adopted a series of provisions with the purpose of reinstating President Kabbah[21], something which finally occurred in 1998 (Nowrot and Schbacker 1998). The combination of these declarations and these actions show that, although there is still a long way to go, consensus over democracy is steadily growing (Franck 1992).

Now, someone could respond to my argument suggesting that all these developments cannot affirm neither the existence of a consistent interpretive practice, nor the emergence of a customary right that mandates the establishment of democratic regimes. However, some authors have suggested that the right to citizen participation can be understood as a "programmatic right" (Steiner 1988; Peter 2013: 11), i.e. as "a right that is responsive to a shared ideal, to be realized progressively in different contexts through invention and planning" (Steiner 1988: 130). It is, although maybe not explicitly, an application of the famous "principle of non-retrocession": states may maintain exclusionary regimes, but they cannot turn back in any steps they may have taken towards inclusion. To me, even this understanding of the right is incompatible with Cohen's model. If peoples have a *right* to limit the participatory opportunities of citizens, choosing a system of government different from democracy, then the simultaneous existence of an individual right to participation, even if programmatic, makes no sense. Even if a monarchy cedes certain participatory spaces for citizens, for example, it could not be said that these citizens have

20. U.N.S.C. Resolution 841/93 (Jun. 16, 1993), U.N. Doc. S/RES/841; U.N.S.C. Resolution 940/94 (Jul. 31, 1994), U.N. Doc. S/RES/940.

21. U.N.S.C. Resolution 1132/97 (Oct. 8, 1997), U.N. Doc. S/RES/1132.

gained a *right* unless the monarch has lost her own *right* to choose the system of government.

1.5.3. Case-law

The third element of the legal practice that I believe is incompatible with Cohen's scheme is the case-law of the various organs that supervise the application of the different human rights instruments. Probably the most relevant of them is that of the Human Rights Committee, the organ created by the ICCPR, which has interpreted article 25 of the Covenant in an explicitly inclusive fashion. For instance, the Committee has acknowledged direct ways of participation of citizens in the conduct of public affairs, such as "exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves"[22]. The Committee has further noted that:

> "Although the Covenant does not impose any particular electoral system, any system operating in a State party must be compatible with the rights protected by article 25 and must guarantee and give effect to the free expression of the will of the electors. The principle of one person, one vote must apply, and within the framework of each State's electoral system, the vote of one elector should be equal to the vote of another"[23].

Beyond this specific defense of the principle of "one person, one vote", the Committee has also emphasized that "no distinctions are permitted between citizens in the enjoyment

22. Human Rights Committee, *General Comment No. 25: (Art. 25)*, (Dec. 7, 1996), U.N. Doc CCPR/C/21/Rev.1/Add.7, par. 8.

23. Human Rights Committee, *General Comment No. 25: (Art. 25)*, (Dec. 7, 1996), U.N. Doc CCPR/C/21/Rev.1/Add.7, par. 21.

of these rights on the grounds of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"[24]. In sum, this interpretation of human rights –according to which the right to take part in the conduct of public affairs lies "at the core of democratic government based on the consent of the people"[25]– is inherently egalitarian and, thus, also incompatible with Cohen's "collective self-determination" model.

2. Conclusions: self-determination and democracy, domestic and global

2.1. Self-determination means democracy

Five sub-conclusions can be derived from the arguments presented in the previous section. The first (i) is that we ought to reflect on the right to self-government from an individualistic standpoint, understanding collective rights as a safeguard for certain individual freedoms (Cohen 1989: 28). Thus, the collective will of the people is not that of an abstract entity, but the result of the combined will of individuals, molded and expressed through a certain, pre-established process. This process (ii) must involve some degree of effective participation by all those potentially affected by the decision. For a process to be collective, it must consider the positions of all the members of the group, and the only way to know those positions and take them into account is by allowing those individuals to participate in the process (Cohen 1989: 28, 1996: 107–108, 1998: 222, 1999: 406). This (iii) is not just a matter of justice,

24. Human Rights Committee, *General Comment No. 25: (Art. 25)*, (Dec. 7, 1996), U.N. Doc CCPR/C/21/Rev.1/Add.7, par. 3.

25. Human Rights Committee, *General Comment No. 25: (Art. 25)*, (Dec. 7, 1996), U.N. Doc CCPR/C/21/Rev.1/Add.7, par. 1.

but rather a matter of legitimacy. If the system is exclusionary, citizens will have a less demanding moral obligation to comply with the decisions that are reached (Cohen 1998: 185, 1996: 95). Thus, (iv) peoples can choose among the wide variety of institutional arrangements which are compatible with minimum democratic standards (Cohen 1996: 95, 1998: 185). As long as they do so, they will be respecting (v) the text of the human rights instruments, the understanding of these rights by the international community and the interpretation settled by organs such as the Human Rights Committee.

As a result of these sub-conclusions, there seems to be no contradiction whatsoever between the right to take part in the conduct of public affairs and the right of peoples to self-determination. In fact, as explained by Cohen himself, "popular self-government *premises* the existence of [democratic] institutions that provide a framework for deliberation" (Cohen 1989: 28). In other words, no truly collective self-determination can be said to exist without assurances of equal political rights for all the members of the collective. Indeed, this seems to have been the general spirit of the drafters of the Universal Declaration of Human Rights (Glendon 2001: 40–41). As explained by Eleanor Roosevelt during the drafting process, "it is not exactly that you set the individual apart from his society, but you recognize that within any society the individual must have rights that are guarded" (Glendon 2001: 40–41). Otherwise, this society cannot be considered to be a true "political community" (Cohen 1998: 222, 1996: 102).

2.2. The human right to global democracy

The reasoning presented so far made reference to the rights of individuals qua members of peoples, and thus, to their capacities in the domestic decision-making processes of those societies. But there currently seems to be sufficient ground to extend these arguments to the global arena, i.e. to the conduct

of public affairs beyond the sphere of the nation-state (Peter 2013: 13–14).

Joshua Cohen has provided a few arguments that may lead the way in this expansion. In his 2004 article written with Charles Sabel, Cohen argues that a new kind of global politics is emerging. Despite a persistent diversity between societies, a new political space is being driven by a mounting economic integration and a rising amount of global rulemaking, which is "increasingly consequential for the conduct and welfare of individuals", even when it lacks independent coercive powers (Cohen and Sabel 2004: 764). This "global politics is thus not an occasional matter of sparse agreements; it seems, despite all the uncertainties of the situation, to be enduring and institutionally dense" (Cohen and Sabel 2004: 765). For Cohen and Sabel, this increasing network of political relationships can be said to have constituted a sort of "anomalous global demos", which may in turn "be sufficiently familiar to give substance to the now-fugitive idea of a global democracy without a global state or nation" (Cohen and Sabel 2004: 766). Specifically, they argue that global rulemaking should be made accountable to this global demos through the constitution of a "deliberative polyarchy" (Cohen and Sabel 2004: 772, 779–784), which they define elsewhere as "an attractive kind of radical, participatory democracy with problem-solving capacities" (Cohen and Sabel 1997: 313). In this model, as in Cohen's broader theory of democracy (Cohen 1989: 28, 1996: 107–108, 1998: 222, 1999: 406), actual deliberation is required, since it "helps to establish a presumption that results can be defended through reasons, and thus a presumption that the outcomes of collective decision-making are legitimate" (Cohen and Sabel 1997: 329).

If Cohen and Sabel are right, and this increasing practice of global rulemaking is indeed significantly affecting the lives of individuals, then I see no reason to consider the creation of this global deliberative polyarchy –or other similar schemes of global democracy (*e.g.* Bohman 2007; Peters 2009; Besson 2009)– as a matter of justice: I think we must see it as a

matter of legitimacy (Maisley 2015; Peter 2013: 13–14). The theory of deliberative democracy, as it was explained earlier, claims that rules are only legitimately binding on individuals if these persons had the chance to participate as equals in the creation of said rules. If individuals are subject to these global rules, and this subjection pretends to be legitimate, then citizens should be granted the right to participate in the elaboration of these rules (Bohman 2007; Peters 2009; Besson 2009; Martí 2010; Benvenisti 2014).

However, two sets of arguments have been put forward against this extension of the domestic human right to democracy to the global sphere[26]. First, Thomas Nagel has famously argued that international rules, as opposed to domestic law, "are not collectively enacted and coercively imposed in the name of all the individuals whose lives they affect; and they do not ask for the kind of authorization by individuals that carries with it a responsibility to treat all those individuals in some sense equally" (Nagel 2005: 138). Thus, since individuals would have the chance of avoiding the course of action required by these rules, they would not have sufficient standing to demand an egalitarian participation in their creation, or –what is the same– these decisions would be legitimate even without their participation.

In my opinion, the problem with Nagel's argument is that his recollection of the reality of international law is not sufficiently precise, for two reasons. First, international institutions do speak in the name of humankind, and thus, in the name of individuals around the globe. The fact that they do it through references to collective entities, like nations, peoples or states[27], does not mean that the ultimate reference is not to the individual human beings that populate the world, which

26. I develop and respond to these ideas further in another paper (Maisley 2015).

27. Nagel explicitly claims that "international institutions act not in the name of individuals, but in the name of the states or state instruments and agencies that have created them" (Nagel 2005: 138).

these entities merely represent (Lauterpacht 2013: 50). And second, as argued by Cohen and Sabel (2004), most of international and global law is indeed nowadays binding on states and their citizens, even when no centralized coercive mechanism is in place. The rules on the governance of the internet can be a good example of this (*see, e.g.* Oates, Owen and Gibson 2006; Benvenisti 2014: 90). These policies are not even formally compulsory, and nevertheless, states, corporations and individuals have no choice but complying with them, if they want to have access to the internet. The same happens with food labeling rules, sanitary and phytosanitary measures, aviation standards, financial regulations, money laundering policies, and a long list of etceteras (*see, generally,* Benvenisti 2014). In all of these cases, states and their citizens can indeed avoid complying with these rules, if they want to. However, they can only do so at the cost of losing access to the global good in question. The situation is thus comparable to that of an individual who does not want to be subject to the laws of a state, and decides to migrate to another. If in the latter case we consider that this individual has standing to demand an equal say in her state's decision-making process –as Nagel seems to do–, then we must consider the same regarding the former.

Second, some authors have argued that the direct participation of individuals in global decision-making can be counterproductive in terms of equality, since (i) it is impossible that every single human being participates directly in the global political process, unless an assembly of seven billion persons is constituted, and (ii) if only a few will participate, then representation via democratic states is the most egalitarian process available (Kymlicka 2001; Christiano 2010; Pettit 2010; Dahl 1999).

I believe there are three main problems with this argument. First, even if all states were to become democracies –something which is already a long shot (Peters 2009: 291)–, the representation of individuals in the process of international decision-making would still be uneven, given the predominance of the executive branch of government in the negotiations at the global sphere (*e.g.* they negotiate, sign and ratify international treaties, and their role is particularly crucial in the consolidation of custom). Supposing that all heads of states were chosen by 60% of the votes –which is very unlikely–, then an impressive 40% of the people in the world would not be represented in global political processes. Second, it is at least questionable that the diplomatic corps of states are –and ever could be– real representatives of their own citizens. Diplomats are regularly appointed by a non-elected official (the minister of foreign affairs), who is in turn chosen by another civil servant (the head of state) who is indeed elected, but usually for reasons very unrelated to the conduct of the international relations of the state. In turn, these non-elected officials negotiate behind closed doors, in locations far away from their constituencies, and speaking in languages which are hard to comprehend without adequate translators. Therefore, diplomats are some of the most discretionary and less accountable civil servants, making their role as the only adequate "representatives" of their citizenry a questionable issue. And third, certain powerful minorities, like corporations, interest groups, etcetera, cannot be said to benefit from the demand for equal participation, since their voices are already taken into account, as a matter of fact, in global politics, simply because they have the resources and the connections necessary for that purpose (Steinberg 2002; Lavopa 2009). Guaranteeing a right to participation would in fact imply leveling the playing field for other voices, which have bigger difficulties in being heard (Peters 2009; Maisley 2015).

In sum, I agree with Cohen and Sabel (2004) in two central ideas, which distinguish them from the two groups of objectors to global democracy that I discussed in the previous paragraphs. The first is that citizens around the world are, indeed, increasingly affected by global rulemaking, and thus, that they have a legitimate interest in participating in the decision-making process that occurs at that sphere (Cohen and

Sabel 2004: 763–772). The second is that this participation is not only valuable but also possible in practice, for example, through a global deliberative polyarchy (Cohen and Sabel 2004: 779–797). However, contrary to them, I believe that what is at stake is not a matter of justice, but one of human rights. The reason is simple, and was explained by Cohen himself in 1996, with reference to the domestic sphere. If these citizens have compelling reasons to address public affairs, and this is not materially impossible, then "the failure to acknowledge the weight of those reasons for the agent and to acknowledge the claims to opportunities for effective influence that emerge from them reflects a failure to endorse the background idea of citizens as equals" (Cohen 1996: 108), or what is the same, the background idea of human rights.

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