

# **Democratic Legitimacy and the Politics of Rights**

**A comparative analysis of the conceptual relationship between  
democracy and rights in contemporary political theories**

**Iivi Anna Masso**

Academic dissertation

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## Abstract

*Democratic Legitimacy and the Politics of Rights* is a research in normative political theory. It is based on comparative analysis of contemporary democratic theories, classified roughly as conventional liberal, deliberative democratic and radical democratic. Its central question of focus is the conceptual relationship between alternative sources of democratic legitimacy: the democratic values of participation, inclusion and equality on the one hand and the liberal politics of individual rights on the other hand. The relationship between rights and democracy is studied through the following questions: are rights to be seen as external constraints to democracy, or as objects of democratic deliberations and decision making processes? Are individual rights threatened by public participation in politics; or reversely, does a constitutionalist conception of rights limit the inclusiveness of democratic processes? Are liberal values such as individuality, autonomy and liberty; and democratic values such as equality, inclusion and popular sovereignty mutually conflictual or supportive? Following feminist and postmodern critique of liberal rights discourse, the dissertation also revives the question about the relevance of Enlightenment ideals in current political debates: are the universalist political norms that liberal democracy represents inherently dependent on the rationalist “grand narratives” of modernity and thus in conflict with the ideals of difference and diversity?

The thesis is divided into three parts. Part I introduces the sources of democratic legitimacy as presented in the alternative models of democracy identified as *conventional liberal*, *deliberative*, and *participatory or radical democratic*. Part II analyses how the relationship between rights and democratic legitimacy is theorized in each of these models. Part III contains some major arguments posed by feminist and radical democratic theorists against the central tenets of universalist liberal democratic models, and responds to that critique by partly endorsing and partly rejecting it by arguing that while some versions of conventional liberal theory indeed rely on strong rationalist justificatory arguments that are hard to defend as genuinely democratic; the moral and legal universalism of political liberalism is not inseparable from such semi-metaphysical visions and is inherently connected to the notion of democratic inclusion, not opposed to it. The central argument promoted in the thesis is that while the deconstruction of modern rationalism indicates that rights are essentially *political* constructions as opposed to externally given moral constraints to politics, this insight does not delegitimize the politics of universal rights as an inherent part of democratic institutions. The research indicates; *contra* those conventional liberal as well as radical democratic theorists who conceive the tension between constitutionally protected rights and participatory democracy as an insoluble conflict; that democracy and universal individual rights are mutually interdependent and supportive rather than oppositional. Indeed, it shows that democracy is *more* dependent on an unconditional protection of universal individual rights when it is conceived in inclusive, participatory, agonistic and diversity-friendly terms and not just as robust majoritarian rule. Thus liberal rights are the *sine qua non* of genuinely inclusive democracy, constituting the necessary, even if not sufficient condition of deliberative and pluralist democratic politics.

The central concepts used and analyzed in the thesis are liberalism, democracy, legitimacy, deliberation, participation, inclusion, equality, difference, diversity, conflict, public sphere, rights, individualism, universalism, contextuality and contingency. The thinkers whose democratic visions are central for the research are John Rawls, Ronald Dworkin, Jürgen Habermas, Seyla Benhabib, Iris Marion Young, Chantal Mouffe, Wendy Brown and Stephen Holmes. The research focuses mostly on contemporary political theory; but arguments from the more classical work of John Stuart Mill, Benjamin Constant, Isaiah Berlin and Hannah Arendt are also included, as they bring continuously relevant insights into the current discussions on democracy, legitimacy and rights.

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## Introduction

*Democratic Legitimacy and the Politics of Rights* is a theoretical research, based on a comparative analysis of contemporary democratic theories classified roughly as conventional liberal, deliberative democratic and radical democratic. The central question that this analyzes focuses on is the conceptual relationship between deep democratic values such as participation, inclusion and equality; and the liberal politics of individual rights; both seen to a varying extent in the alternative theories as sources of democratic legitimacy. The relationship between rights and democracy is studied through the following questions: are rights to be seen as external constraints to democracy, or as objects of regular democratic deliberations and decision making processes? Are individual rights threatened by wide and active public participation in politics; and reversely, does a constitutionalist conception of rights necessarily limit the inclusiveness of democratic processes? Are liberal values such as individuality, autonomy and liberty; and democratic values such as equality, inclusion and popular sovereignty, mutually conflictual or mutually supportive? And, following feminist and postmodern critique of liberal rights discourse: are the universalist political norms contained in it inherently dependent on the objectivist and rationalist narratives of modernity; and therefore inherently in conflict with inclusion, difference, diversity and plurality?

The central concepts used and analyzed are liberalism, democracy, legitimacy, deliberations, participation, inclusion, equality, diversity, conflict, public sphere, rights, individualism, universalism and contextuality. The writers whose democratic visions are most central for the research are John Rawls, Ronald Dworkin, Jürgen Habermas, Seyla Benhabib, Iris Marion Young, Chantal Mouffe, Wendy Brown and Stephen Holmes. The research is constructed around specific *arguments* relevant for the particular research questions in focus; that is, the role of rights and democratic values as legitimating factors in democracy and their mutual conceptual relation. It is not its purpose to present an exhaustive review of either liberal, deliberative democratic or radical democratic theories or of the works of the particular writers in question. Given the broad variety of literature belonging to each of those theoretical categories, the works analyzed and compared have been selected for their estimated relevance in current political-theoretical discussions and for the clarity of their positions regarding the central research questions. The research focuses mostly on contemporary political theory, written from 1970-ies to this day; but insights and

arguments from some more classical work, like that of John Stuart Mill, Benjamin Constant, Isaiah Berlin and Hannah Arendt have been included.

The thesis is divided into three parts. In part I, I introduce the sources of democratic legitimacy as presented in the alternative theoretical models of democracy that I identify respectively as *conventional liberal*, *deliberative*, and *participatory* or *radical democratic*. In part II, I analyze how the relationship between rights and democratic legitimacy is theorized in each of these models. In part III, I present some major arguments posed by feminist and radical democratic theorists against the central tenets of universalist liberal democratic models, the conventional liberal as well as deliberative democratic. I respond to that critique by partly endorsing and partly rejecting it; indicating that while some versions of conventional liberal theory indeed rely on rationalist and objectivist “grand narratives” in their legitimating arguments that are hard to defend as genuinely democratic; the moral and legal universalism of political liberalism is not conceptually dependent on such “grand narratives” and is inherently connected with the notion of democratic inclusion, not opposed to it.

I argue in the thesis that the deconstruction of the “grand narratives” of modern rationalism indicates that rights are essentially *political* constructions, emerging from particular historical, political and cultural contexts. On the other hand, I argue that this insight does not delegitimize a universalist conception and politics of rights as an inherent part of democratic institutions. The fact that rights as political creations are inevitably subject to democratic public disputes, while they need to be protected in order to enable the free and open spaces in which such disputes take place, creates a tension; a paradox inherent in liberal democracy that reveals that democracy as a regime is continuously dependent on *both* an institutional framework and the *de facto* endorsement of its institutions and values by its actual citizens. The research indicates, however; *contra* those conventional liberal as well as radical democratic theorists who conceive the tension between constitutionally protected rights and open participatory democracy as an insoluble conflict; that democracy and a politics of universal individual rights are mutually interdependent and supportive rather than oppositional. Defying dichotomous oppositions between “liberal individualism” and “participatory collectivism”; I argue that democracy is indeed *more* dependent on an unconditional protection of universal individual rights when it is conceived in inclusive, participatory, agonistic and diversity-friendly terms and not as just robust majoritarian rule.

# I

## **Alternative sources of democratic legitimacy:**

**rights (reason), deliberation (consensus), participation (action)**

### **Introduction to part I**

In part I, I will compare the alternative sources of democratic legitimacy presented by the theoretical models of democracy that I identify as *conventional liberal*, *deliberative*, and *participatory* or *radical democratic* respectively. I will focus on the explicit or implicit foundations of democratic legitimacy in these democratic-theoretical discourses, and how the notion of *consent* (as a criterion of democratic legitimacy generally accepted in liberal democracy) is constructed. In democratic theory, the questions of *justice* (often connected with notions of *rights*), and the questions dealing with aspects of *democracy* (primarily with the concepts of legitimacy, participation, inclusion, equality, publicity, accountability etc.), have been perceived as constituting two separate discourses within the field of political theory. Nevertheless, the separation between the discourse of justice and the discourse of democracy is no longer obvious, as it has become recognized that the conceptions of justice and democracy are densely interrelated<sup>1</sup>. The question of democratic legitimacy is thus studied here as an issue that relates the discourses of democracy to the questions of justice, because both justice, through the concept of rights, and inclusion, through the concept of democratic participation, are theorized as normative concepts whose role is to legitimize certain institutional structures and political practices of liberal democracies.

In conventional liberal theory the institutional and political guarantees to protect the universal civil and political rights of individuals provide the crucial source of legitimacy for liberal democratic regimes: the state monopoly of coercive power is considered legitimate mainly because it promises to grant those rights equally to all individuals. Classical liberal theory considered it rational for individuals to consent to the existing power in exchange for security, as in the contractarian model of Thomas Hobbes from the 17<sup>th</sup> century – although not many contemporary liberal theorists endorse the Hobbesian model directly, its logic of tacit-consent-in-

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<sup>1</sup> On combining the discourses of democracy and justice, see Shapiro 1999, Young 1990 and Fraser & Honneth 2003.

exchange-for-secured-rights remains implicitly present in some contemporary rights-based models of legitimation. The Hobbesian vision that authorizes the sovereign power to the monarch in exchange for individual security of the citizens returns, albeit in an elaborated manner, in John Rawls's theory of justice, particularly in its figure of the consenting anonymous citizen in the Original Position who determines, from the point of view of an abstract Anyone, the content (and the primacy) of certain basic rights, which, once institutionalized, form an external framework to constrain democratic decision making, a framework that is itself set off the political agenda of public democratic disputes.

Conventional liberal theory, represented in its contemporary version by the theories of Rawls and Ronald Dworkin, encourages democratic public debate only within the limitations set by constitutionally established rights – the public is not expected to participate in political decision making directly, or to question or change the foundations of the existent political regime, such as the basic liberal democratic institutions of legal rights and representative legislative bodies. At the same time it is assumed that rights, protected from democratic interference, grant the regime democratic legitimacy, while the legitimacy of the conception of rights itself is based on a conception of *universal reason*: these rights are theorized as something that any rational citizen wants, or would want if given a chance to express her uncoerced opinion. Thus, the rational citizens supposedly give their consent to the existing liberal democratic institutions and refrain from further claims of participation in political decision making. Democracy is primarily seen as a process of securing that the administration indeed does respect the rights of the citizens, a control mechanism offering a chance to replace the leaders who fail to deliver the liberal promise. Political legitimacy is derived in this model not from public participation in political decision-making, but rather from its purported respect toward the universally wanted individual rights. (E.g. Rawls 1972, 118-192; Dworkin 2003, 241-257.)

In the theory of deliberative democracy, the relation between rights as the institutionalized expression of universal reason on the one hand, and public participation in democratic debate and decision making on the other, is more flexible than in conventional liberal theory, with more emphasis on inclusiveness and publicity of political decision making processes. Basic political and civil rights are conceived not as an external constraint to, but as the enabling condition of

democracy: the role of rights is also to make sure that no citizens are forcefully excluded from participation in the public deliberations of “free and equal” citizens. In the theory of deliberative democracy, the basis of legitimacy is not the universal hypothetical consent as envisioned in liberal contractarianism, but the democratic principle that anyone who is affected by the consequences of political decisions should be able to have a say in the making of these decisions.

The deliberative model of democracy is a participation-oriented approach in the sense that it encourages public participation in political decision making and also in scrutinizing the validity and foundations of the existing political regimes; and it makes no restrictions in terms of participants in political processes: politics is not restricted to official representatives. At the same time it retains some of the universalist and rationalist dimensions of liberal democracy, because reason is conceived as the regulating principle of the deliberation process – the competing arguments are to be evaluated by the criteria of rationality and reasonableness; and some universal moral norms are considered the prerequisite for legitimacy. The goal of the deliberation process, a process of generating informed consent and thus the legitimacy of political decisions as well as the institutions within which those decisions are made, is ideally universal consensus, to be reached by informed public acceptance of the weight of the best arguments (a good reason is one that through a process of public justification can be accepted by all involved parties). (E.g. Habermas 1999, 239-252; Cohen 1996, 99-108; Benhabib 1996, 67-87.)

The third model that I distinguish is what I call radical or participatory democratic model. By that I mean democratic theories that view the conventional liberal model of legitimacy with suspicion, because it is claimed to be designed to freeze as “ahistoric and permanent” a certain institutional system that in fact is historically and politically contingent. In spite of significant differences between proponents of different radical democratic visions, the theories of radical democracy can be studied together as models that value political agency and inclusion more than reason or universal moral norms; and that promote public participation, open conflicts, dispute, discussion and activism as inherently valuable and constitutive of democratic legitimacy. According to radical democratic critics, all rationalistic theories of democracy tend to support policies that favor existing privileged groups behind the mask of apparent neutrality, thus naturalizing and justifying their hegemonic position. In their view open conflict and contest express the real diversity

of political opinions as well as social identities better than universal rationalism or ideals of consensus.

The proponents of radical democracy do not believe democratic legitimacy is guaranteed by granting the citizens constitutional rights, nor do they believe in the possibility of a free and rational consensus, not achieved by silencing difference and discontent. In this view, the basis of political legitimacy is the agency of citizens and the existence of open political fora that allow different identities and interests to be articulated, without trying to pretend that any current decisions represent everyone's interests or a universal consensus. The position of rights in participation-based legitimizing models is ambivalent. In some radical democratic theories basic individual rights are seen as a necessary, but insufficient framework for a deep democracy; in others, rights are viewed with suspicion as means to implicitly protect existing privileges, or as a politicized expression of a particular individualist ethics. Also, the concept of rights may be considered to be simply irrelevant for theorizing the political. Alternatively, it can be seen as a deeply political concept and an inherent component of democracy, enabling it while depending on it: this implies the recognition that bills of rights can be seen as a contingent result of political agreement, criticizable and defensible through political and moral arguments. In this thesis I defend the latter view.

In the following I present the central arguments for the different interpretations of democratic legitimacy presented by conventional liberal (chapter 1), deliberative democratic (chapter 2) and radical democratic (chapter 3) theories respectively.

### **1. Conventional liberal model: rights and universal reason**

In conventional liberal theory, the legitimacy of political authority is based on informed, uncoerced consent of the citizens. The idea of consent is based not so much on a possibility for the citizens to participate in actual political decision making, but rather on the promise that the authority protects the basic rights of all individual citizens. Philosophically, public consent – or an assumption of its existence – to existing liberal democratic political institutions is envisioned in contemporary liberal theories as a *hypothetical expression of universal rationality*:

it is considered to be rational and reasonable for any member of a liberal democratic polity to endorse a regime that is committed to the protection of a certain set of universal individual rights and liberties; usually formulated as constitutions of liberal democratic states; and to the basic demands of justice (Rawls 1972, 118-192; 1993, 22-28; 304-310). In the background of this conception of legitimacy lies a concept of universal, objective reason; on the basis of which it is assumedly possible to know what is rational, or reasonable, for any person to expect from a political regime and of political authorities.

Several conventional liberal theorists base the legitimacy of liberal democratic institutions on thought experiments in various degrees of abstractness. Their goal is to represent as exhaustively as possible the point of view of a “universal citizen”, that is, of “everyone”, or “anyone”, constructed as a universalizable rational and reasonable person, who is also considered to be “free and equal” in relation to state institutions as well as fellow citizens (Rawls 1993, 29-35). Popular consent, which allegedly legitimizes the hypothetical liberal contract as well as the institutions whose task is to enforce the contracted principles (manifested, usually, in some kind of constitutional law), is not based on *de facto*, explicit consent of the citizens to the conditions of the existent “contract” (in practice, the legal and political institutions); nor is it based on the actual participation of the citizens in either the original process of making the contract or in ongoing political decision making processes. Rather, it is based on the idea that the principles articulated in the contract are *universally valid* and that they represent the best interests of all citizens (or any citizen), and also, that the administrative apparatus making and enforcing public decisions is *objective and impartial*, representing a universal concept of practical reason so that the rules that they follow in their actions and decisions are in accordance with the original liberal principles and with the terms of the liberal contract; that is, they respect and protect the rights of the citizens. The demand that the political administration be democratically elected is of secondary importance in this legitimation model. The role of the elections is not so much to channel a “will of the people” into the process of decision making through democratic representation, as to provide a way to the citizenry to check that the administration indeed does follow the legal order and the liberal principles; and to punish them by refusing re-election, if they fail to do so. (See e.g. Constant 1816, 7-11; Rawls 1972, 356-362.)

This traditional liberal approach to democracy, here very generally briefed, is more explicitly present in earlier liberal democratic theories (Constant 1816, Berlin

2002 [1958]), but its basic assumptions remain quite unchanged in some versions of what I call contemporary conventional liberal theory (particularly the formulations presented by Rawls and Dworkin that have reached a near-classic status); while some other contemporary liberal thinkers like Waldron, Shapiro and Holmes present the relationship between rights and public power in more ambiguous terms, as I will argue below in parts II and III. In order to specify how the principle of impartial objectivity and the assumption of universal reason work as legitimating patterns in contemporary liberal theory, I outline in this chapter the universalist legitimation models of Rawls (1971; 1993), Scanlon (1988, 189-247)<sup>2</sup> and Dworkin (1977; 2003, 241-257), with additional references to arguments of other contemporary liberal thinkers.

### **1.1. The Rawlsian model: legitimacy by impartiality**

Contemporary conventional liberal thought is most characteristically represented and most widely studied, defended and criticized through the work of John Rawls. It can be claimed that Rawls's theory of justice, as elaborated in *A Theory of Justice* (1971), and further developed in *Political Liberalism* (1993) has become a modern classic of conventional liberal thought. Although the primary focus of discussion in Rawls's theory is on *justice*, not *democracy* – sometimes theorists insist that these subjects form different discourses within political theory that should be kept apart, but it becomes increasingly acknowledged that they are intertwined in both theory and practice; even the earlier version of his theory of justice undeniably relies on a strong notion of what democracy is about and contains justificatory patterns that make the theory relevant also as a *democratic* theory conceptualizing political legitimacy.

The Rawlsian notion of political legitimacy is based on the classical liberal view, briefed above, that the ultimate source of the legitimacy of political authority is citizens' *consent* – as opposed to the premodern conceptions of divine, “natural” or birth-related origins of status and authority that were used to legitimate pre-liberal aristocratic, religious and monarchical political orders. This notion of consent also

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<sup>2</sup> Although Scanlon's justificatory model is presented primarily as a *moral* theory of justifying action rules, it also works as a justificatory model for *political* principles of justice that builds on the Rawlsian model, developing it from rationalism toward “contractualism”.

forms the basic element of the conception of *legitimacy* in Rawlsian liberalism. In Rawls's theory (and in much of the contemporary conventional liberal theory following Rawls's thought), democratic legitimacy is based primarily on the universality, objectivity and impartiality of the liberal moral-political principles, articulated in Rawls's theory as the "two principles of justice" (Rawls 1972, 60-65).

The Rawlsian model is universalist at two distinct levels. First, there is the legal-political level of *applying* the principles of justice, expressed in the constitutional right of equality before the law (thus, political universalism means here that the principles of justice, briefly explained below, grant equal rights to all, and the constitutional law based on these principles applies equally to all citizens). But Rawlsian theory is universalist also at the epistemological level of *generating* the principles; through the thought experiment called Original Position for which Rawls's theory is particularly famous. This second level offers the key to understanding the *philosophical* foundations of Rawlsian universalism (as opposed to its moral and political implications), because it is the epistemological universalism of the Rawlsian model that promises to guarantee that the two principles of justice constitute the best available foundations for political institutions and social practices in all thinkable circumstances (Rawls 1972, 11-22; cf. Young 1990, 96-121).

The epistemological universalism of Rawls's theory is important as a *legitimizing* and *justificatory argument*: the liberal principles (and the institutions based on them) are legitimate because, as the theory attempts to prove, they are the best or most just principles that *any* reasonable and rational person would choose *from an impartial, generic point of view*. Although Rawls gradually retreats from the original timeless universalism of *A Theory of Justice*, taking a more context-sensitive view by first moving the legitimizing thought experiment and the consequent principles of justice from "metaphysical" to "political" level, and then from universally political to a historically and politically specified level so that the principles thus articulated are seen to be fit particularly for contemporary liberal-democratic societies; he does not retreat from the objectivist construction of the Original Position whenever the democratic legitimizing process is considered relevant. Thus, the epistemological universality of the hypothetical process of *generating* the principles of justice suitable for a democratic society remains intact throughout Rawls's work, as does the universality of the equal application of the liberal law within liberal democracies; even as Rawls in his more recent work

acknowledges the historical, political and geographical particularity of liberal democracy as a regime. (Rawls 1972, 1985, 1993, 1999, 2001.)

For Rawls the foundations of liberal democratic politics are profoundly expressed through what he calls the two principles of justice: the first (the principle of liberty) ensuring the primacy of personal rights and liberties within the limits that allow others to enjoy the same rights; and the second, the “difference principle”, specifying the conditions for acceptable economic inequalities, stating that inequalities are acceptable insofar as they benefit those who are worst off. According to Rawls the political order is to be considered fair and just and thus legitimate, if the principles of justice are followed by its institutional design as well as its ongoing political practices. The legitimacy of the liberal democratic order is thus constituted on the one hand, by the universality of the basic rights and liberties that the institutions of a liberal democratic political body promise to guarantee to all its members; and on the other hand (at the philosophical level) by the universality and impartiality of the thought-experimental process of finding out *which* principles are the ones promoting universal justice. The epistemological universalism of the Original Position implies that the rights and liberties expressed by the Rawlsian principles and the political institutions that enact these principles are wanted more than any competing political goods by all equal and rational citizens of any polity. In other words, the principles worked out in Rawls’s Original Position are the ones that *any* rational person is bound to want if he or she understands his or her own good as a citizen of a polity, about which he or she knows the “basic facts” without knowing the specifics of his or her own position. Thus, any reasonable person is also expected to consent to the Rawlsian principles, when they are institutionally established and enforced: the requirement of consent is fulfilled. (Rawls 1972, 54-117; 118-161.)

In Rawls’s theory, the justification of the two principles of justice proceeds in four stages. First, the fictional contracting situation called the Original Position is created as an impartial standpoint from which the contracting parties, that is, rational “universal” citizens who are unaware of their own particular social position or personal characteristics, choose the principles as the ones that would turn out to be best for themselves, regardless of who they turn out to be. In that way, these principles are supposedly proved the best institutional foundations for politics for anyone in an abstract, universal sense. In the second step, the conception of justice worked out in the Original Position is expected to meet with hypothetical agreement

under the conditions of a pluralist society. In the third step, a constitution is designed on the basis of the principles so agreed to; and finally the rules of the constitutions are applied to “particular cases” by judges and administrators and followed by “citizens generally” (Rawls 1972, 195-201).

The basic rights of the citizens, once legislated as constitutional, are removed from the agenda of public deliberations and democratic decision making – they are only subject to judicial interpretation, whose goal is to safeguard and enforce the universal principles stated in the constitution, not to create new moral meanings or discuss the already settled moral foundations of the existing political institutions. Rawls does advocate “public discussion”, particularly in his later work; but that takes place in the strictly specified fora (the representative, administrative and judicial institutions of the existing political bodies), by selected participants (judges, administrators and legislators), and on limited issues: on the interpretation of “constitutional essentials” or matters of “common good”, that is, matters that can be collectively, thus politically, decided. Removed from the political agenda are “comprehensive doctrines”, defined as private conceptions of the good life that are considered non-negotiable and therefore apolitical (the Rawlsian model upholds the traditional liberal distinction between the public and the private that has been strongly criticized by feminist theorists, as I will indicate below in chapter 2, part II and chapter 1, part III); and also the principles of justice themselves as they have been established prior to all *de facto* political discussions. What remains to be discussed in the public sphere is what remains in-between the foundational constitutional principles and the privatized moral doctrines – according to some critics, that is not much (e.g. Honig 1997, 126-161; Mouffe 1993, 41-57).

The Rawlsian conception of legitimacy relies on the notion of *impartiality* and neutrality of the state between competing conceptions of “the good” – although in *Political Liberalism* Rawls makes a distinction between *impartiality* and *neutrality* and takes distance from the term “neutrality”, acknowledging that his principles of justice represent substantive values and that a state never can be fully neutral (Rawls 1993, 191-193). Impartiality, developed through the construction of the Original Position, relies in turn on a strong conception of the universality of reason. While the Rawlsian liberal model is based on a specific conception of reason, it also implies that reason in itself has an inherent value that legitimates political institutions. There is an assumption in this mode of argumentation that, by the right use of

reason, any reasonable and rational person comes to the same kind of conclusion about which are the fair principles of justice and how the society should be organized in order to be just and legitimate (see Young 1990, 107-111; a more elaborate introduction of the critique follows in part II). Also, in the background of the Rawlsian legitimating model there is a specific universalist conception of human need and to an extent also human psychology, revealed in Rawls's account of "primary goods" that the contracting parties are interested in securing for themselves (Rawls 1972, 90-95). Likewise, this model reveals an assumption that there is a universally rational solution to the problems of justice and democratic legitimacy, the access to which depends primarily on a person's capacity of rational reasoning. These basic assumptions of the Rawlsian model survive the shift from *A theory of justice* (1972) to *Political liberalism* (1993), that is, from the "philosophical" to the "political" conception of justice as fairness. The legitimating arguments and patterns are mostly similar in the two versions of the Rawlsian model.

Rawls explicitly states that the question of legitimacy ("of the general structure of authority") is "intimately connected" with the idea of public reason: in the background there is a view of citizens as "reasonable and rational" (Rawls 1996, 136). According to him the "liberal principle of legitimacy" is that the exercise of political (that is, collectively authorized) power is legitimate,

"when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal *may reasonably be expected to endorse* in the light of principles and ideals *acceptable to their common human reason*" (Ibid. 137, my emphasis).

These principles, as it shows, are the two Rawlsian principles of justice (in practice expressed in the constitutions of liberal democratic polities). In connection with this Rawls states that the questions arising in the legislature concerning "constitutional essentials" or the "basic questions of justice" should be settled *so far as possible* by "principles and ideals that can be similarly endorsed" (Ibid.). What is the meaning of "so far as possible"? And is there a certainty that the two principles of justice themselves, as evaluation criteria for public reason, are endorsed – or is it enough that they are, per definition, *expected to be endorsed* by "reasonable and rational" citizens; does the reservation clause "so far as possible" leave a space for the possibility that some parties in actual legislative discussions may not endorse these principles?

This can be interpreted so that these questions (those concerning constitutional essentials and the basic questions of justice) should be constitutionally settled and *protected from* democratic deliberations; or that eventual constitutional changes must be deliberated in accordance with the norms settled by the two principles of justice (the assumption that these principles are universally endorsed remains axiomatic while hypothetical). In Rawls's view this "political conception of justice" can "serve as a *basis of* public reason and justification" (Ibid. my emphasis); but it seems that it cannot be the *object* of such processes. This can be interpreted to mean that that conception needs no further justification itself, once it is established by the thought experiment that it stands the legitimacy test offered in the Rawlsian justificatory procedure. For Rawls "the political" – the area where the use of collective coercive power is legitimately exercised in accordance with the principles stated above – is a strictly restricted area. "The political", meaning the sphere of public use of power, is a space where, in contrast to "the associational, the personal and the familial", "the political values" override the "nonpolitical" ones in case of conflict (Ibid. 137-138).

According to Rawls, "public reason" can be used when "constitutional essentials and basic questions of justice are at stake", but only in ways that "all citizens can be reasonably expected to endorse in the light of their common human reason" – that is, in accordance with the two principles of justice. Issues about which citizens "differ uncompromisingly" should according to Rawls not intrude the sphere of the political. The political and the private sphere are separated as two distinct systems of value, whereas only the "political values" constitute the basis for public reason and justification. (Ibid. 139-140.) Regarding the democratic dimension of the legitimacy debate, it remains problematic that the constitutional essentials are settled in accordance with these same principles that guide the public debate regarding them. A question that needs to be further discussed concerns the scope of the issues and arguments allowed to be settled by "public reason", that is, by open democratic debate. The problem of the strongly limited scope of the conventional liberal democratic discussions has been addressed by several of Rawls's liberal as well as radical democratic critics, and will be further elaborated below in part II.

## 1.2. Scanlon's objective ideal of reasonableness

Moral and political philosopher Thomas Scanlon articulates the philosophical basis for liberal universalism through another thought experiment that is somewhat less abstract than Rawls's in the sense that it is based on the hypothetical consent of actual persons, in contrast to Rawls's imaginary universal contractors in the Original Position. Scanlon's liberal moral contract (that constitutes in the sphere of the political the presumed consent of citizens to the liberal institutions, thus granting the democratic legitimacy of those institutions) is nevertheless also based on a thought experiment with universalist ambitions, looking for universal moral principles that "no one can reasonably reject" (Scanlon 1988, 189-202). This thought experiment is based on a hypothetical contract situation in which not fictional universal contractors bared of their personal characteristics, but imagined particular people are hypothetically asked not just to consent to the liberal principles, but to be unwilling to reject them. The Scanlonian principle of non-rejection, in contrast to the minimalist requirement of positive consent, aims to take seriously the possibility of coercion and pressure as well as the existence of "adapted preferences" that develop under the influence of social powers, to make people consent to institutions and policies that are disadvantageous to them. In contrast, the rejection of general principles for rules and actions would, according to Scanlon, rely more genuinely on the concerned persons' own reasonable deliberations. Therefore, he argues that *the principle of non-rejection* provides more credibly universally valid rules for moral decisions and social interaction than the classical liberal principle of *consent* (Ibid. 202-218).

Scanlon challenges in an essential way the "rational choice" moment present in Rawls's vision of the Original Position: while in the latter, the primary motivation for fair and just choices is based on the abstract possibility of the choosing parties, unaware of their own particular characteristics, to end up in disprivileged situations *themselves*; in Scanlon's view the possibility that others *as others* may have good reasons to reject a principle is sufficient to doubt its validity. Thus, compared to Rawls's view, Scanlon's justificatory model is more intersubjective and less abstractly rationalist: it is based on a dialogical idea of taking into account the viewpoint of actually existing others rather than on a monological idea of a "universal person" choosing the principles that are likely to be best for himself. At the same time, Scanlon's principles also rely on a strong norm of universalizability: it is assumed

that it is possible to find through rational thought experiment what kind of actions, and principles allowing those actions, can be reasonably rejected by those affected by them. Thus, this “thin” liberal contractarianism is however not much less abstract than that of Rawls: it is based on a strong universalist conception of reasonableness; and also like Rawls’s, Scanlon’s contracting (or “non-rejecting”) parties are conceived as uncoerced, free and *reasonable*.

Thus, although Scanlon’s contractarian model is hypothetical at a different level than Rawls’s, appealing not to a fully fictional hypothetical contract situation but to reasons that actually existing, particular persons can hypothetically have to reject or not to reject the moral or political principles in question; it is partly still vulnerable to the same kind of criticism of universalism and rationalism that has been presented against Rawls: the universal political principles are created by and for “reasonable” contractors through rational tests of universalizability, and the contract remains hypothetical in practice. No actual deliberations between particular social agents about what constitutes good reasons for rejecting certain principles are envisioned; the criteria of “reasonableness” remain unchallenged; and the explicitly political moments when applying moral principles to political institutions, like the possibility of the emergence of public opinions and challenge the “reasonable” principles on more or less egalitarian and pro-democratic grounds, remain untheorized. (Scanlon 1988, 189-247.)

As in Rawls’s model any rational person is expected to accept the two principles of justice; in Scanlon’s model any reasonable person is expected to lend her tacit consent to liberal institutions without further claims to participate in their design. The *a priori* exclusion of positions deemed unreasonable or irrational is, as I will show further on, one of the central legitimacy problems that the liberal, universalist justificatory philosophy is seen to have. On the one hand, this conception of rationality can be seen as a problematic source of democratic legitimacy, posing tight restrictions on regular citizens’ and their organizations’ and associations’ possibilities to participate in public political decision making. On the other hand, the strong assumption of rationality and reasonableness of all citizens and legislators, as well as of the existence of a general consensus about the basic liberal values and principles also may make the model powerless in the face of eventual illiberal political claims: these may be dismissed or removed from the political agenda in accordance with the liberal principles and the criteria of reasonableness, but these

conventional liberal models of democracy offer no serious arguments about how to defend the liberal values, whose general acceptance is more or less taken for granted, if they nevertheless *are* challenged.

Neither the Rawlsian nor the Scanlonian model offer arguments to defend the liberal institutions in an open democratic forum in the face of substantial disagreement, in which some parties do *not* endorse the reasonable conditions or the liberal principles. There is no response in these models to the fact that the criteria of reasonableness may be questioned or challenged, or that there may occur disagreement even on such central liberal principles as the universal equality of all citizens before the law or the respect for individual autonomy and liberty. In the contractarian universalist justificatory models it is just assumed that these liberal values are endorsed by all; and thus, while the proponents of these models see these values as the ones legitimating and simultaneously constraining political decision-making, they are unprepared to defend them from illiberal political challenge, that may emerge from within a democratic framework, without recurring to axiomatic claims. As I will argue later, giving up the abstract, hypothetical claims of superior rationality and universal validity will indeed empower the political defense of liberal values, even if compromising the philosophical validity of the universalist argument. It seems, as I will argue in part III, that it will be more convincing to defend the norms and rules of liberal democracy, including the universal individual rights that have a strong legitimating role in the conventional liberal model, against eventual antiliberal arguments in explicitly *normative* terms than by appeals to rationality or to hypothetical universal consent.

### **1.3. Equality of rights as basis for legitimacy**

In contrast to the procedurally (through a hypothetical contract) justified contractarian models of rights-based legitimation, Ronald Dworkin, the most prominent proponent of a strong constitutionalist model of liberal democracy, offers a deontological justification of the primacy of liberal rights. In Dworkin's account a political order is legitimate if and when it respects the basic rights of the individual. Dworkin does not belittle the role of democracy but he interprets democracy itself through the concepts of rights: for him the protection of equal individual rights *constitutes* democracy as well as political legitimacy. In this version of the liberal

model, rights are not established through a thought experiment generating hypothetical consent of all “universal” citizens to a rights-based constitutional arrangement. Instead, they are more or less taken for granted as inherently valuable; if not as “natural rights” in a Lockean tradition, then at least as instantiations of some basic liberal moral-political values that Dworkin assumes that a legitimate political regime is bound to respect. In Dworkin’s theory individual rights as the expressions of a set of deontological moral values are superior to any process of democratic legislation and do not require a justification through such a process, actual or hypothetical. (Dworkin 1977; 184-205; 1984, 153-167; 2003, 241-257.)

In Dworkin’s view, rights are based on something more stable than, and external to, the political institutions of a liberal democracy *and* the views of its citizens. Arguing for “taking rights seriously”, Dworkin refers to *moral rights* as opposed to *legal rights*, the latter being the rights established by political authorities through legal norms, while the former essentially precede the positive law and exist prior to political processes and law: it is the task of political institutions to legislate those naturally existing moral rights, which are not derived from political processes. The actually existing possibility that legislatures may make decisions that wrongly override individual rights justifies according to Dworkin civil disobedience by those whose *morally* justifiable rights are violated by such decisions, even if these are made in a procedurally democratic manner and even if they are supported by existent positive law. This means that Dworkin rejects both the positive-legalist and democratic agreement- or participation-based arguments about the legitimacy of political decisions, including the legislative decisions establishing valid rights. In his view, legal rights should ideally be based on the moral rights conceptualized as both pre-legal and pre-political – in an ideal state, these two categories, legal and moral rights, coincide as a result of morally sound legitimate political decisions. But how do we know which moral rights we do have, once they are separated from the political processes of legislating and democratic decision-making, even at the hypothetical level? Dworkin offers two foundations on which his notion of rights is based: first, the Kantian notion of human dignity; and second, the idea of political equality (Dworkin 1977, 198). He does not pose the question whether these values are universally shared; in his view the legitimacy of rights is not dependent on their democratic endorsement.

Dworkin does not present additional justification for the values on which the notion of equal individual moral rights is based; in his view they apparently do not need justification. His position appears strongly *political* while presented as *moral* and deontological: he protects the institutionalization of these particular values as foundational in a legitimate theory as the undebatable *moral* values that a decent society rests on. Although Dworkin is arguably right about the constitutive position of the values of human dignity and political equality in liberal democracies, it is problematic for his position as *political theory* that it fails to theorize the extent to which these moral notions may inspire different political solutions even if generally endorsed (as they mostly, but not unconditionally and univocally, are in current liberal democracies). The notions of dignity and equality allow a wide range of interpretations which can result not only in a variety of policy options but even in different conceptions of *which* moral rights these values imply that we have; and which particular legal rights follow from those moral rights whose political institutionalization is agreed upon. This problem will be further discussed below in part III in connection with conflicts of rights, and along with the question of the basis of the legitimacy of constitutional rights, if democratic agreement by citizens or their representatives by itself is considered too instable to provide such basis.

In Dworkin's model of legitimacy the relationship between democracy and rights is not given much thought; it appears to be somewhat contradictory. On the one hand, Dworkin seems to take for granted the priority of rights to democracy: he presents a classical liberal argument on the potential threat that democracy as "the tyranny of majority" poses against individual rights and thus defends rights as a value that should be institutionalized and protected *from* democratic political decision making, in order for the political regime to remain legitimate from a liberal-egalitarian point of view. On the other hand, he still implicitly relies on the notion of consent when it comes to the basic liberal values that lend legitimacy to the moral rights of the individual: he seems to take for granted that these values enjoy universal endorsement and support, even if the political-legal establishment fails to respect them through the enforcement of respective legal rights; and even if the majority through democratic representation at particular moments passes legislation that overrides some of these rights. (Dworkin 1977, 184-205; 2003, 241-256.)

#### 1.4. Arguments for the universality of reason

As I indicated above, the notion of *reason* has a central place in the legitimating pattern of much of conventional liberal thought. In Rawls's and Scanlon's models, an universalist conception of what it means to be *rational* and *reasonable* is crucial for the arguments for the universal validity of liberal political institutions. It embraces both a conception of what is rational for a person to want for herself – like the Rawlsian notion of *primary goods*, and freely chosen *life plans*; and what is reasonable in her relationship to the others who have their own – but essentially similar – rational pursuits (Rawls 1972, 90-95; 407-416). As I will discuss below, the strong universalism implicit in the conventional liberal theories is a major object of criticism posed against the legitimating capacity of the justificatory arguments of those models. Universalist arguments are usually criticized either because of the anthropological assumptions contained in the notion of what can be universally wanted, rejected or avoided. The moral-egalitarian and legalist universalism, on which Dworkin bases his notion of legitimacy, is a less obvious target of criticism of universalism than Rawls's rationalist view, because it is explicitly based on a *normative* view of political morality rather than on a claim of objective rationality; but as I indicate in part II, radical democratic and postmodern skepticism toward *moral* arguments in politics expressed in the context of a growing moral, legal and political relativism also puts these tenets under question (see e. g. Brown 2004 and Mouffe 2005). Thus, arguments in favor of the political universalism of liberal democracy need to be presented in less metaphysical terms, and to appeal more consistently to democratic political values, if they are to be taken seriously in the debates on democratic legitimacy.

In order to comprehend more thoroughly the meaning of universalism in political theory, Seyla Benhabib's division of universalism to four different levels is helpful. Benhabib, herself a proponent of a "deliberative" model of democracy introduced in the following chapter, a critic of certain interpretations of conventional liberal theory and still a proponent of moral and legal universalism, makes a distinction between first, *philosophical* or *metaphysical* universalism; second, *rational* universalism as a justification strategy based on a faith in the universality of a certain notion of impartial critical reason; *third*, moral universalism: the principle that all human beings are to be considered as moral equals and entitled to equal moral respect; and

forth, *legal* universalism, the principle of equality before the law and equal legal rights for all. According to her, legal and moral universalism is endorsed by many theorists who do *not* subscribe to any versions of philosophical essentialism contained in the metaphysical levels of universalism. Some of them, she argues, also take distance from universalist notions of rationality, claiming that all justificatory strategies and pretenses of objectivity are products of particular cultural contexts. Benhabib agrees that moral and legal universalism in the above sense does not presume a metaphysical notion of an universal “human nature”, thus confirming that political universalism *can* be separated from strong metaphysical claims of universal truth. At the same time she is suspicious about the possibility of separating moral and legal universalism from *some* universalist notion of critical rationality, because in her view legal and moral universalism may be hard to defend without a “strong commitment to the normative content of reason,” meaning critical rationality as a justificatory device. (Benhabib 2002, 26-28.)

This division of universalism to separate levels is helpful to clarify the appeal of some aspects of universalist arguments in the light of the sometimes relevant, sometimes arguably exaggerated feminist, postmodern and radical democratic critique posed against universalism *as such* in political argumentation. It also helps to conceptualize the relationship between the universalism of individual rights and egalitarianism as a democratic norm – a relationship that is seen, particularly within feminist theory, as more complicated than the conventional liberal visions of rights and equality reveal (see chapter III). To summarize the arguments introduced in this section, it is helpful to recognize the different levels of universalism present in the Rawlsian justification model. As I indicated above, Rawls’s theory of justice is universalist first in the legal and moral sense that the “two principles of justice” and the rules, laws and decisions made in accordance with them apply equally to all members of the given polity; but also in a different, more profound sense, presenting a concept of “primary goods” that are universally wanted by every reasonable and rational person in any social and political context – a view based on assumptions about human nature that reach the metaphysical level of universalism, although Rawls denies that his theory has ambitions of stating a metaphysical truth.

The legal and moral universalism of the *application* of principles is based on some of the most foundational assumptions of political liberalism, like the Enlightenment ideal of the equal moral worth of all persons regardless of their personal characteristics and social position; and the ideal of personal autonomy that

follows from that ideal. That ideal is also followed by Dworkin; and it is, at some level, widely endorsed in current liberal democracies. As this research confirms, it is explicitly or implicitly also endorsed by most proponents of deep and radical democracy. The *epistemological* level contained in Rawls's construction of the Original Position is philosophically more intriguing; as the anonymous contractor is envisioned as *anyone* capable of making rational decisions, the assumption behind the vision is that *any* rational person, whatever his or her particular identity and social position turns out to be in reality, would reckon in the same way and come to the same conclusions about the two principles of justice insofar as he or she thinks rationally. The universally valid rational impartiality of the principles is allegedly guaranteed by removing all particular qualities and interests of the fictional contractors, but the assumption remains that anybody who could think objectively and rationally on behalf of everybody would deduce and legitimize the same institutional arrangements. (Rawls 1972, 118-161; Young 1990, 107-116.)

A central question to be discussed in the debate that follows is whether this strong conception of universal reason is necessary to defend liberal democratic politics. As I will indicate below, although Benhabib argues that the moral and legal universalism of liberal democracy is connected to some account of universal critical rationality (meaning, in Benhabib's interpretation, that not all arguments are strictly context-dependent in the sense that they cannot be seen as equally valid in different cultural and historical contexts), her own account of such critical rationality is more flexible and open than the Rawlsian version (Benhabib 1992, 3-7; 2002, 26-42). The conventional liberal model, and particularly the vision of the Original Position as an abstractly rationalist hypothetical foundation process, has been criticized by communitarian, feminist and radical democratic theorists for its overt abstractness and for failing to reflect the actuality of real-life social and political scenes, because in practice political debates inevitably take place between people who are aware of, and conditioned by, their actual social positions (see e.g. Young 1990, 102-107).

The dilemmatic aspect of the position of universalist arguments is that while much of the criticism of the more or less rigidly universalist conventional liberal models is well founded, many (albeit not all) of the critics themselves endorse at least implicitly the principles of moral universalism, without which their often strongly egalitarian arguments would make no sense. The question is, can egalitarianism as a morally universalist position be defended without a reference to

epistemological universalism and appeals to universal rationality? How strong must the argument for “rationality” be to resist relativist and communitarian objections to the universal individualism of political liberalism; or alternatively, how weak should the notion of reasonableness become in order to be able to accommodate the real-life diversity of not only social identities and political opinions, but also of discursive styles; without still equating *all* arguments without any selective qualification?

With regard to liberal universalism, it will be studied in the proceeding chapters: 1) which aspects of conventional liberal universalism remain vulnerable to criticism from democratic and egalitarian point of view (what is “wrong” with liberal, rationalist universalism); 2) to which extent the alternative models of democracy and feminist theoretical approaches that are critical toward some aspects of liberal universalism, remain themselves true to some universalist ideals; 3) what is the relationship between the different interpretations of universalist egalitarianism – does universalism have to lead to essentialism and homogenization, or alternatively, to abstract and detached individualism, as some critics claim; and 4) what would be the implications of giving up the liberal universalist ideals altogether for the sake of deeper democratic legitimacy? For now, I will refer to another central feature of the conventional liberal model of legitimation: the separation between “the right” and “the good”, the public and the private, and justice and morality.

### **1.5. Public justice Vs. private morality**

In addition to the strong conception of universality of reason, conventional liberal theories are based on a strong distinction between the public and the private spheres; and correspondingly between (public) justice and (private) morality, the “right” and the “good”, the political and the personal. This division is hierarchical when it comes to political decisions: “the right”, that is, instantiations of the values of political justice, has priority over the conceptions of “the good”, that is private conceptions of morality. According to the conventional liberal view, political institutions are designed to deal with issues of justice, while moral issues and the personal conceptions of the good are eliminated from the political sphere and protected from public intervention as a sphere of the private (Rawls 1972, 446-452; 1993, 173-211).

The central purpose of this hierarchy is for the state and the political institutions to enable a diversity of different moral conceptions and lifestyles to live

together peacefully: there are strict egalitarian, rights-based rules that guide the political life, regulating by legal rules what is “right”, or the issues of public justice; while the neutrality of the state in relation to private beliefs and “comprehensive doctrines” at the same time guarantees the freedom for people, families, cultural communities and associations to pursue their lifestyles and their conceptions of truth and morality in accordance with their own choices and convictions, without the state interfering in them. There is some disagreement between liberal writers as to which degree these “private” associations are allowed to follow illiberal principles in their intra-group communication; the liberal “golden rule” is that illiberal norms within a group are to be tolerated by the liberal state as long as belonging to those groups is considered voluntary and exit is possible – even though the exact meaning of voluntariness and the freedom to exit as well as the weight of the cost of doing so is disputed. Also, individual constitutional rights place obvious limits to “illiberal” behavior: while e.g. inequality in intra-group decision-making and division of labor can be accepted on the condition of voluntariness, the presence of physical violence or the threat of it e.g. within a family or a religious sect is so hard to reconcile with the concept of voluntariness that it cannot be accepted under any circumstances, according to the liberal point of view. A common view within conventional liberal theory is, however, that even if following illiberal principles within particular communities may be tolerated by the liberal state to a greater or lesser extent; those illiberal doctrines are not accepted in the political public sphere as valid arguments for justifying general policy decisions. (Rawls 1993, 58-66, 174-176, 190-200, 216-227; Holmes 1995, 202-235; Kukathas 1995, 228-256; Green 1995, 257-272.)

The main purpose of the conventional liberal distinction between what can be considered public and thus political; and what is respectively seen as private and thus beyond political disputes; is to allow for deeper differences within the private sphere than the political sphere is assumed to tolerate without violent conflict; and to make diverse moralities, cultures and ways of life compatible by offering a neutral institutional framework that enables diversity while setting limits to its impact on public political life (e.g. it establishes that religion can be freely followed without state intervention as a private lifestyle as long as it violates no one’s constitutional rights, but it cannot be used to justify public political arguments). In Rawls’s theory, the distinction between the right and the good, and the priority of the former over the latter, is expressed thus:

“In Justice as Fairness the priority of right means that *the principles of political justice impose limits on permissible ways of life*; and hence *the claims citizens make to pursue ends that transgress those limits have no weight*. [...] But just institutions permit and sustain ‘ways of life fully worthy of citizens’ devoted allegiance. A political conception of justice must contain within itself a *sufficient* space [...] for such ways of life” (Rawls 1993, 174, my emphasis).

This limitation of the content of what can be considered political and what is to be excluded from public discussions and relegated to the private sphere, while the acceptable content of the political is limited and safeguarded by “the principles of justice”; is a major object of criticism by proponents of different forms of “inclusive democracy”. Many of the arguments of these critics will be discussed in this thesis (in chapter 3 below and in parts II and III). In order to analyze that criticism and to compare the proposed alternatives, it is important to underline here the original purpose of the liberal public-private division with regard to the debate on the democratic legitimacy of liberal political institutions and decision making processes. While, as I will indicate below, much of the criticism is justified and the critics have relevantly extended the scope of the political to make it more inclusive of diversity and difference, some goals of the original liberal division that remain defensible from a democratic perspective seem to get lost in these discussions. The goal of the liberal idea of tolerance and of state neutrality, originally developed in response to violent religious conflicts and the tyrannical power of clerics and aristocracy, is to allow maximum plurality of ways of life and conceptions of the good that is compatible with basic individual rights. Rawls makes this point explicit when defending the conception of “overlapping consensus” in *Political Liberalism*; arguing that the liberal conception of justice supports a pluralism of values, while the alternative is a conception in which a political order allows only one possible “conception of the good” to be recognized by all its citizens (Rawls 1993, 134-135).

I will argue below that in the light of the radical democratic criticism of liberalism for too harsh restrictions of the scope and agenda of the political; and of feminist criticism for the allegedly male-biased construction of the rights-bearing individual and the unfair and anti-democratic implications of that bias for the politics of universal rights and institutional neutrality, the goals and merits of the original liberal argument need to be re-evaluated, revised and reconstructed, but not discarded altogether. A central question regarding the division between the private and the public, or the moral and the political, is: how are these boundaries defined,

and to what extent can they be open to democratic debate and dispute? Within existing liberal democracies, there is no doubt disagreement about which conceptions of good life are “worthy of citizens’ devoted allegiance”; and possibly also about what constitutes an intolerable violation of individual rights – a disagreement not properly acknowledged by Rawls, who seems to take the existence of such limits for granted. Furthermore, it is always hard to determine what constitutes voluntary membership in “illiberal” groups. Rawls argues that the limits are drawn by the demands of justice and that they cannot be drawn too narrowly (Rawls 1993, 174-178; 190-200). But how do we know where justice should draw the limit so that it is not too narrow?

One implication of the public-private division that has been criticized much in democratic theory is the limited sphere of the political – and thus, of the reach and extent of democratic decision making. For Rawls the major public institutions where democratic deliberations take place are courts and the parliaments; and the issues discussed there are strictly limited by the public-private distinction as well as by the two principles of justice that are settled prior to public disputes and removed from their agenda (Rawls 1993, 158-164; 213-216; Mouffe 1993, 41-59; Honig 1993, 126-161; Isaac et al 1999; 226-239; see also chapters 3 and III.4 below). Dworkin does not even discuss the role of wider public participation, for him “majoritarian democracy” is the decisions of the majority of elected representatives, that have to be constrained by the politics of constitutional rights. In his view the major political actors are the courts and the judges whose task is to interpret the given constitutional rights. Despite the differences between these conventional liberal writers, they share to a greater or lesser extent a strongly limited view of the role of democracy: the public sphere is limited in terms of participants as well as political agenda. Democracy is institutionally seen as representative, realized through the liberal democratic representative institutions; the general right to political participation is primarily the right to participate in the election processes whose primary function is to check that the administration follows the laws that manifest the rights and liberties of individual citizens. Citizens are not expected to participate in the ongoing deliberations on political decision making or in debates on the foundations of these decisions or of the principles on which the regime is based.

Summarily, it can be said that conventional liberal theory bases its conception of political legitimacy on a universalized notion of *rationality* (the idea that the organization of power represents optimized and impartial practical rationality); a

notion of *consent* (the contractualist idea that citizens express their tacit consent to the coercive power of the political authorities by taking part in the voting ceremony and in exchange to having their rights protected; the idea of universal consent to liberal institutions may also be conceptualized through a rationalist thought experiment whose role is to prove that any rational or reasonable person has strong reasons to consent to the regime in question); and a universalist politics of *rights* (the idea that the primary task of the administrative machinery is the protection of all citizens' equal individual rights, which are institutionalized – usually through a constitution – so that they are protected not just from the eventual arbitrary behavior of those holding administrative power, but also from such decisions, even if they are made through the appropriate democratic procedures, that might question or overthrow some of these rights). Active public participation in actual political decision making is not needed, according to these conventional liberal views, to guarantee or improve the democratic legitimacy of the regime and its norms and institutions, or of particular political decisions. It is sufficient that citizens have the chance to replace through public elections the representatives who do not live up to their promises, or to the requirements of the liberal constitutions in terms of rights. The constitutions, or bills of rights, are to be defended by strict procedural rules from being changed even by the elected representatives, let alone through processes of direct participatory democracy.

## **2. The deliberative model: rational discourse and consensus**

The theory of deliberative democracy presents a model of democratic legitimation that is based on the notion of discursive ethics developed by Jürgen Habermas. The deliberative model that I focus on in this comparative review is constructed mainly by the reinterpretation of the Habermasian idea in the Anglo-American tradition, by theorists like Seyla Benhabib, Joshua Cohen, Simone Chambers et al. Because the concept of deliberative democracy is widely used in current political theories and covers a wide range of quite different political-philosophical visions, I focus here on the version of the theory developed by these writers, and in particular Benhabib, whose view of open deliberative public space and its paradoxical interdependency with the moral and legal universalism needed to grant the equality of the

participants in that public sphere, constitutes most clearly a vision that is distinguishable from conventional liberal as well as postmodern radical democratic alternatives. The theory of deliberative democracy is studied here primarily as an attempt to “democratize” liberal democratic theory by making it more inclusive of difference, more participatory and more “political”; partly as a response to feminist, radical democratic, poststructural and communitarian criticisms of conventional liberalism as abstract, individualist, apolitical and elitist (some of these critical points will be presented and discussed below in parts II and III). The model of deliberative democracy presented by Benhabib et al embraces on the one hand a critical, intersubjective view of practical rationality (as opposed to the impartial objectivism of conventional liberalism), an open conception of what counts as political issues, and an encouraging, “republican” attitude toward public participation in politics. On the other hand, it contains a requirement that collective decision making be constrained by some general moral rules that are based on a universalist conception of reason and moral justification; which has provoked criticism that the deliberative model still represents a conventional, universalist model of democracy (see 4.2 in part II). (Habermas 1996, 287-328; 1999, 239-264; Benhabib 1996, 67-94; Cohen 1996, 95-119.)

The theory of deliberative democracy can be read as an attempt to develop liberal democratic thought in response to the criticism presented by communitarian, feminist, deep democratic and postmodern theorists that the universalism and abstract individualism contained in conventional liberal theory is homogenizing, “masculinist”, based on a pretentious conception of objective reason and promotes a restrictive or instrumentalist attitude to democratic participation. It has to be noted that the division lines between “liberal” and “deliberative” democratic theories are not always obviously distinctive, the difference being fluid rather than rigidly qualitative; as several current liberal writers, like Ian Shapiro, Stephen Holmes and Jeremy Waldron, endorse at least partly visions of politics that are generally associated with “deliberative” or radical democratic models: for example, as I will indicate later in this thesis, Shapiro emphasizes the flexibility of what can be considered political and Waldron and Holmes, albeit in different ways, argue for the interdependence of liberal constitutionalism and participatory democracy (See e.g. Shapiro 1999a, 1-45; Waldron 1999 181-312; Holmes 1995, 134-177). But for the sake of the clarity of the argument, and on the basis of some central distinctive features of the respective theories as well as certain arguments presented in critical dialogues

between them, I will keep up the distinction throughout this dissertation. Whether the theory of deliberative democracy can or should be seen as a democratic theory *alternative* to conventional liberalism or as a particular version of it is itself a matter of dispute. For my current purposes, I will focus on the features that distinguish the theory of deliberative democracy from more conventional forms of liberal thought. In the following, I outline the basic characteristics of the deliberative model of democracy.

### **2.1. The democratic ideal of the deliberative model**

The ideal of deliberative democracy is based on two central notions in Habermas's theory of communicative action: those of *discursive morality* and *critical rationality*. The basic principle in discursive morality is that only those norms may be considered morally acceptable which are endorsed by all who are affected by their consequences. From Habermas's normative principle of discursive morality the theory of deliberative democracy has developed a notion of *political* morality as a foundation of democratic politics. The application of this principle in politics implies that only those rules and arrangements can be considered valid which are, or at least can be, *de facto* accepted by all who are affected by them; and also that political decisions are better justified in terms of democratic legitimacy if all those who are affected by decisions can actually participate in their making on equal terms. Indeed, legitimacy in the deliberative model is based on the responsiveness of political decisions to the public opinions formed through free, open, unconstrained public debates (as opposed to the hypothetical and rationalistic formulations of political reason through which the Rawlsian conventional liberal model is justified). (Habermas 1994, 19-112; Benhabib 1996, 70.)

The concept of *critical rationality* is based on the post-metaphysical approach to epistemology developed in the tradition of critical theory, as a consequence of the late modern decline in metaphysical doctrines and accordingly, in the faith that there is "the truth" to be found in philosophy, approachable to the philosopher through solitary, impartial contemplation. Once it is denied that there is such an objective truth in moral and political matters, available through a solitary or imaginarily interactive thought experiment, practical rationality is conceptualized in discourse theory as rationality developed through interaction and dialogue. Taking seriously

the recognition of the impossibility of reaching a detached, absolutely objective point of view, and the denial of the existence of objective, extra-human truths about how to ideally arrange social and political relations, has consequences for democracy: if there is no privileged access to reason and objectivity, there can be no justification for the assumption of the undisputable primacy of any given set of rules or principles, like certain sets of rights or political and social institutions, to be administered by bureaucrats who stand above the democratic public.

Habermas's notion of *communicative* rationality is developed in opposition to *strategic* or *instrumental* rationality, rationality understood as the capacity to find the best available means for achieving given ends. Classical liberal theory made no distinction between rationality as maximizing self-interest in an economic sense and political thinking. This "economist" conception of political rationality is reflected in contemporary political theory in theories based on conceptions of "rational choice" and "public choice". In contrast, the ideal of communicative rationality conceives of reason as a pursuit of mutual understanding: the purpose of communicative action is to exchange information and arguments not just in order to promote one's own immediate calculated interest (understood in narrowly economic terms), but to increase knowledge and mutual understanding. Within conventional liberal democratic theory, Rawls also develops a concept of "public reason", but in Rawlsian theory the process of creating public reason is situated in limited fora within the framework of the already given liberal institutions whose legitimacy is established by the thought experiment based on a conception of "rational choice" made in the hypothetical thought experiment of the Original Position; thus "public reason" is not promoted as a means to found, legitimize or revalidate these institutions themselves, but as a virtue practiced and developed within the framework of these institutions (Rawls 1993, 212-254).

In the theory of deliberative democracy the Habermasian idea of communicative rationality replaces liberalism's quasi-metaphysical conception of objective reason as a basis for democratic legitimacy. The conception of communicative rationality takes into account the *intersubjective* dimension of the development of political reason: practical reason is developed in open public debate, that is, through the interaction of different actual viewpoints. This epistemological approach supports the inherent value of democratic participation - if practical reason is developed intersubjectively, there is no justification for reserving legislative power to certain groups or

individuals or certain historical moments only. The practical rationality of a deliberative democracy is developed as a process; it has no timeless wisdom or truth to rely on; and in accordance with the conception of *critical* rationality, it can always be revised and revalidated in the face of new forthcoming knowledge and arguments. Thus, no rules or decisions made in the past can be set aside beyond criticism and revision and wiped off the agenda of public discussions. As Benhabib writes: “In the discursive justification and validation of truth claims no moment is privileged as a given, evidential structure which cannot be further questioned” (Benhabib 1992, 5). As I will indicate below, this has implications for the deliberative model’s relation to constitutionalism.

Denying the existence of a superhuman metaphysical truth, and at the same time avoiding a relativist denial of any universal values that concern all human beings on the basis of their humanity, discourse ethics looks for the criteria for practical rationality in *dialogical interaction* between humans. Given that no participant in the dialogue has privileged access to objective truth, rationality and impartiality are sought through exchange of different particular viewpoints. This implies that as new and different perspectives are always available, the criteria for testing practical rationality cannot ever be fixed for all times and beyond dispute. In Benhabib’s words, the purpose of discursive morality as opposed to its more traditional liberal counterpart is

“the reformulation of the moral point of view as the *contingent* achievement of an interactive form of rationality rather than the *timeless* standpoint of legislative reason” (Benhabib 1992, 6, my emphasis).

In the realm of politics the “shift from legislative to interactive rationality” implies that

“if reason is the contingent achievement of linguistically socialized, finite and embodied creatures, then the legislative claims of practical reason must also be understood in interactionist terms” (Ibid.).

This non-metaphysical approach, while emphasizing the contingency and non-objectivity of political reason, also justifies the model’s moral universalism interpreted as universal inclusiveness: as neither “the truth” nor fully impartial objectivity is available and no rules and laws can be claimed to stem from such timeless truth, there is no valid justification to excluding any particular point of view in advance as irrelevant or inferior when establishing or evaluating those rules. As any of the participants of the public debate can bring along new viewpoints that potentially may question or refute the currently valid norms and principles; there is

no reason to exclude any persons or groups from the range of potential political agents or any of those norms from public scrutiny. Benhabib, explaining her deliberative account of moral, political and legal universalism, calls her position “interactive universalism”: a universalism based not on an assumption that there is an all-encompassing, universally and timelessly valid perspective that all should be convinced to comprehend and follow, but on a conviction, arising from the normative commitment to moral egalitarianism, that when developing practical reason in any given circumstances, *all* citizens should have a chance to be heard and all existing points of view taken into account. Interactive universalism, in other words, is an egalitarian political universalism that says that each individual perspective matters. (Benhabib 1992, 4-6.)

The egalitarianism of the deliberative model is established through its so-called *moral conditions*, whose task is to ensure that the political process is indeed that of free and equal citizens who have an equal say in the matters of their common concern. Those conditions are conceptualized as equality, symmetry, reciprocity, and equal mutual respect. These moral ideals serve as the ideal starting point for the democratic deliberations, but also as justification criteria used to evaluate the arguments presented in the process. Also, as the deliberations are envisioned as equal, symmetrical and guided by mutual respect, a continued commitment to equality is claimed to be an *outcome* of the deliberations, while also constituting its foundational value. (Cohen 1996, 102-106.)

In Habermas’ interpretation the public sphere of democratic deliberations is envisioned as an “ideal speech situation”: a space where instrumental rationality and narrowly egoistic goals, asymmetric power relations and existing inequalities are left behind, as the participants enter the public sphere as equal peers, ready to communicate, listen and reason, guided by mutual respect. The ultimate goal of such deliberations is *consensus* in matters of *common good*, although it is admitted that consensus may not always be reached, and that in those cases, deliberated compromises and majoritarian decisions will do to solve the issues at hand. Arguments presented in the deliberation process are subjected to the requirement of reasonableness, that is, they should be *universally justifiable*, so that anyone with a reasonable mind and due respect for fellow citizens can realize that the reasons given in support of an argument are good reasons from the point of view of justice and the common good. (Habermas 1996, 302-315; 1996a, 23-30; Chambers 1996, 163-168.)

## 2.2. The deliberation procedure

In accordance with the legitimizing principle of discursive morality, the “ground rule” of deliberative politics is that only those rules and arrangements can be considered valid and binding, which can be *de facto* agreed to by all who are affected by their consequences. Thus, the conventional liberal hypothetical contract is replaced with a view that citizens ought to have an actual chance of expressing their consent, or the lack of it, to existing or proposed norms and regulations. Following this moral commitment, the deliberative model describes political decision-making processes as ongoing *open and rational public deliberations* of free and equal citizens; guided by the *principle of discursive morality*; it is from these processes that the deliberative polity and its ongoing legislation drive their legitimacy. The deliberation processes are also characterized as processes of *public formation of preferences* through reasonable exchange of arguments and information, in contrast to the “aggregative” vision of democracy as voting about the given preferences, assumed to be essentially private and formed by autonomous individuals prior to the political process. Below, I will outline the basic rules and conditions that characterize and determine the deliberative model as envisioned in the writings of Benhabib and Cohen (Benhabib 1996, 67-87; Cohen 1996, 95-113).

Political decision-making in this version of deliberative democracy is featured as a process of *public reasoning*, focused on the *public good*, whose content is determined intersubjectively through open deliberation processes. As such, the deliberative conception of politics takes distance from the “economic” liberal view of democratic decision making as aggregation of given preferences, as well as from such rights-focused liberal view that perceives democratic politics instrumentally as a mainly a safeguard for protecting the pre-politically given rights (Benhabib 96, 70-71). The main general features of the ideal deliberative politics can be summarized as follows: 1) Political decisions are made through *rational public deliberation* of free and equal citizens; 2) The deliberative decision making process is guided by the *principle of discursive morality*: in political practice this implies the requirement that everybody affected by a decision be able to have a say about it; 3) the deliberation process is orientated toward a conception of the *common good*; and 4) This process is characterized as *public formation of preferences* through reasonable deliberation and exchange of information, in contrast to voting about existing preferences.

The formal features of the ideal deliberative *procedure* are characterized as follows: Deliberative democracy is an ongoing, independent association. Its *basis of legitimacy* is free deliberation among equals who share a commitment to the institutions that make deliberation possible as well as to the norms that are at the same time conceived as the results of deliberative agreement. It is *pluralistic* - the problems of collective choice are to be solved in a way that respects the diversity of preferences, values and interests. It is *public*: because the deliberative procedures constitute its source of legitimacy, the results of deliberation have to be manifest as such. And it is characterized by the mutual recognition of its members of each other's deliberative capacities. As to its normatively determined characteristics, the ideal deliberative procedure is determined by freedom, reason and equality: that it is *free* means that the participants are bound only by the results and preconditions of deliberation, not by any other pre-existing system of rules - this implies in principle that also the existing systems of rights can be an object of deliberation, not only its externally given restrictive framework (the implications of this condition will be discussed in parts II and III).

The condition that the deliberative process is *reasoned* means that participants are expected to publicly offer reasons for their claims and proposals that they regard to be acceptable to others as relevant in the pursuit for the common good; and the condition of equality means that the process is determined by both formal and substantial *equality* of the participant members, the formal equality referring to the equal participation rights and substantive equality to the expected lack of influence from any existing distribution of material or social resources that might affect the realization of those rights. Arguably, the meaning and interpretation of those conditions themselves is never unambiguous and may be an object of dispute in the course of the public deliberation. Although the stated goal of the deliberation process is *consensus* based on reasons that all participants find persuasive, if full consensus cannot be reached, the process is concluded by voting according to some majority rule. The proponents of the model argue that even in such cases, voting as a finale to the deliberation process is different from voting as mere aggregation of given individual preferences, as the deliberative processes, through public exchange of information and clarification of competing arguments, improve the quality of the preferences. (Cohen 1996, 99-108; Benhabib 1996, 68-74.)

The deliberation process is also characterized by radical *openness* - all participants have the right to bring up and contest issues and to question the current

agenda or the decisions already made, including, in principle, the rules of the discourse procedure itself. The political agenda is neither predetermined nor restricted, as far as the principles of equality, reciprocity and mutual respect are followed. There are no other *prima facie* rules limiting either the agenda or the participants. In contrast to the Rawlsian liberal conception of public debate, in deliberative democracy no issues are settled for ever and removed from the agenda of public political discussions: all decisions remain open to reinterpretation, revalidation, challenging and debate. At the same time, the deliberation procedure is guided and restricted by the universal moral conditions of equality, symmetry, reciprocity and equal respect; the meaning and content of which will be discussed further below (in part II, 2.4. and 3.2).

A necessary condition for this model of deliberative democracy to be feasible is the existence of a vital and open public sphere of political discussion. Theorists have different views on what this public sphere means in practice. The role of official administrative and legislative institutions and their connection to the civil society is seen differently by different proponents of the deliberative model - some proponents of deliberative democracy assume, like Rawls, that it is those official institutions that primarily constitute the spaces where the deliberative processes *de facto* take place (e.g. Gutmann & Thompson 1996); others, like Benhabib conceptualize the deliberative political public in more genuinely inclusive forms. There is no presupposition in any version of deliberative democracy of an existence of a “mass assembly” as a physical space of gathering, like an ancient Greek agora. Rather, the participatory public sphere includes formal political institutions as well as the media, electronic fora, civic movements and non-governmental institutions, all of which are seen as spaces for public deliberation and opinion formation. In Benhabib’s words, the deliberative public sphere consists of a plurality of loosely associated, “mutually interlocking and overlapping networks and associations of deliberation, contestation and argumentation” in the civil society (Benhabib 1996, 73-74).

### **2.3. Universal moral conditions**

Although radically open to re-evaluation and criticism of even its own foundations, the deliberative model is in practice ultimately dependent on the commitment of its

members to its specific, universalist conception of political morality. The requirement of universal, mutual and symmetrical moral respect is the ethical basis without which the model would necessarily be self-defeating. The advocates of the model describe the "moral conditions" as the basic principal framework on which the model is built, and which as a normative framework prevents its participants from treating each other instrumentally, or its majorities from threatening the rights and interests of minorities. These conditions, based on the ideals of discursive morality and equal citizenship, require that participation in the deliberative process be governed by the norms of *symmetry* and *reciprocity*. Those norms are compatible with the principle of *universalizability*: no participant can make claims to others that he or she would find unacceptable for oneself; and all participants have an equal right to make public claims. (Benhabib 1996, 69-74.)

The normative ideals of symmetry, reciprocity and equal respect constrain the deliberative process, constituting the "default rules of the game", while also functioning as *qualifying criteria* for public arguments. According to Benhabib, the universal moral conditions of the deliberative model are in practice often institutionalized as the constitutions of liberal democratic polities. Although the openness of the model requires that even the basic "rules of the game" and the foundational values on which the model is based must be open to reevaluation and criticism, Benhabib specifies, with some caution, what the theoretical possibility of putting the basic constitutional rights on the public agenda can mean in practice: the meaning, extent, interpretation and enforcement of constitutional rights can be debated through the deliberative public processes, but *violating* these rights would mean suspending democracy and replacing it with martial rule or dictatorship (Benhabib 1992, 107; 1996, 80).

This reservation implies an acknowledgement that deliberative democracy is ultimately dependent on preserving the universalist principles of reciprocity and equal respect of all members of the deliberative polity, enforced institutionally as a set of constitutional rights that can be disputed, but not overturned. The non-negotiable moral foundation behind these principles is the equal worth of each human individual. There is an apparent conflict between the radical openness of the political agenda proclaimed in contrast to liberal constitutionalism, and the fundamental nature of the underlying universalist principle without which the deliberative model could turn out to be self-destructive. This friction has been noticed and attacked by critics from two sides. Conventional liberal theorists claim

that if the deliberative moral constraints on democracy are strong enough to prevent “majority tyranny”, then there is no real novelty in deliberative theories in comparison to conventional versions of liberalism; and postmodern critics find the universalist norms remain repressive of difference and believe therefore that deliberative democratic theory makes hardly any real progress in terms of including formerly marginalized groups (Macedo 1999, 3-14; Meehan 2000, 39-52; Young 1996, 120-126). I will return to this discussion in part II.

In addition to symmetry, egalitarian reciprocity and equality the ideal of discursive morality embraces other explicitly normative qualities like impartiality; envisioned, when seen as a feature of individual participants (not as a sign of objective rationality as in the Rawlsian model), as a readiness to step back from one’s own immediate position in a conflict situation and try to understand the situation from the perspective of the others. Another, related quality is the attitude of mutual respect, that is, willingness to accept others as equal citizens, with equally important interests, values and concerns. Also, the qualities of openness and flexibility, concerning not only the positions of other participants, but also the contents and rules of deliberation itself, are required of the deliberating parties. It is these moral qualities, rather than rhetorical and persuasive skills, that are expected from the participants in order for the process to generate the best possible results. Particularly in Habermas’s ideal-typical model of “ideal speech situation” the free and equal participants are expected to leave behind their egoistic interests as well as *de facto* power inequalities. According to some critics, this idealized vision shares important features with the Rawlsian construction of the Original Position that is also conceived as free from power and particularities (Chambers 1996, 166-168).

While the moral norms of reciprocity, impartiality and symmetry allegedly govern the deliberative process as its normative constraints, the morality and thus the legitimacy of political decisions is not derived in the model from any specific moral principles settled prior to the process, but is expected to be created and recreated in the course of the process over and over again. In this sense, the political morality of the deliberative model is anchored in strong proceduralism: democratically deliberated decisions are expected to be morally sound because they are expected to be made in accordance with just procedures, in which the participants are required to adhere to the universal norms of equality and mutual respect. The deliberation process thus relies on these moral conditions while it is

supposed to permanently recreate and revalidate them. The implications of these assumptions to the position of individual rights in deliberative democracy will be discussed in part II.

#### **2.4. Intersubjective rationality and the ideal of openness**

As noted above, the ideal of openness of the deliberative model is based on an intersubjective conception of practical rationality. In that conception the sources of moral truth are considered to be neither extra- or superhuman nor strictly subjective, but *intersubjective*. Given that no participant in the dialogue has privileged access to objective truth, rationality and impartiality are found through exchange of different actually existing, publicly voiced viewpoints. The radical openness of the deliberative public sphere is proposed in continuity with these non-essentialist epistemological presumptions of discourse ethics. As the truth revealed through dialogue is never absolute and safe from further criticism, it follows that any agreements reached by public reasoning must be open to further critical review. Claiming that some principles are not open to revision would contradict the very epistemological foundations of discursive morality. Thus the idea of the radical openness of the political sphere is consistent with the intersubjective account of practical rationality, which leaves even its own presuppositions about self, society and rationality open to challenge.

Benhabib connects the norm of inclusiveness to the conception of rationality in a statement that simultaneously acknowledges that rigidly dogmatic and thus “irrational” viewpoints *can* emerge in a democratic public sphere; indicates that the open account of rationality does not allow such positions to be dismissed from it prior to public deliberations; and implies nonetheless that they recede from it by themselves:

“In a disenchanted universe, to limit reflexivity is an indication of a *rationality deficit*. That is to say, only a moral point of view, which can radically question all procedures of justification, *including its own*, can create the conditions for a moral conversation which is open and rational enough to include other points of view, including those which will *withdraw from the conversation at some point*” (Benhabib 1992, 43, my emphasis).

It follows that even if no final or absolute truth will ever be “discovered” in politics (on the contrary, any appeals to such truth betray the interactive conception of rationality); for pragmatic reasons the terms of interaction must be somehow institutionally defined. Assuming that the “rules of the game” are settled in accordance with the principles of universal respect and egalitarian reciprocity, the question can be raised what the possibility of questioning *all* justification procedures, including those constituting the foundations of the model itself, means for the deliberative conditions of equality and reciprocity. If it means that these basic conditions can be “radically questioned” but not changed, the possibility of questioning them remains merely formal. If, on the other hand, it means that *changing* the very basic principles of deliberative democracy is even theoretically possible, the ideal will be either self-contradictory or ultimately hanging on the egalitarian goodwill of the participants. The expectation that those points of view that do *not* share the deliberative ideals will “withdraw from the conversation at some point” indicates a firm conviction that the discussion remains guided by the deliberative principles, and those who do not endorse these principles are just expected to exit the deliberation process. But it remains to be shown how the alleged universal commitment to those principles survives, if their opponents choose not “exit” but “voice”; particularly if such actors gain wide support among the participants through the democratic process.

In other words, it is hard to see whether the deliberative model and its ideals of openness and intersubjective rationality adequately theorize situations in which a conflict about the constitutive democratic values themselves emerges and enforcing constitutional constraints even against strong democratically backed pressure appears to be the only way to secure the continuity of democracy itself. The recognition that some non-negotiable universal criteria are inevitably needed for the survival of the model is revealed in some of Benhabib's own arguments (e.g. Benhabib 2002, 128). But this means in practice that some issues *are* set off the democratic agenda of public dispute and discussion. Thus, it requires further discussion to see whether the deliberative model can be seen as a qualitatively different account of democracy compared with conventional liberal constitutionalist models without seeming self-deceptively dependent on an idealistically constructed *demos* committed to the democratic and egalitarian ideals; or whether it is rather a theory whose primary goal is to complement and review liberal democratic theory and practice in order to reclaim its democratic legitimacy and to separate the

conception of open constitutional democracy from rigidly rationalist and objectivist justificatory patterns.

## **2.5. Morality in Politics: blurring the distinction between the right and the good**

Nevertheless, there are certain innovations in theorizing democracy that clearly distinguish the deliberative view of democratic legitimacy from the conventional liberal one. One of the central differences between deliberative and traditional liberal theories is the notion of *inclusiveness* in the deliberative model - the scope of public political discourse is opened up in terms of agenda as well as participants. Philosophically, the position of universal objective reason as a foundation for acceptable political principles and institutions is questioned; which inevitably leads to a different view on the conceptual position of individual rights in relation to democratic participatory values: in the light of the discursive conception of morality and reason, the notion of rights cannot be seen as an externally, “naturally” given constraint to political processes, itself situated above or beyond politics. In contrast, even if the egalitarian universal norms pose strict constraints on which arguments and changes can be validated through a democratic process, the deliberative account of intersubjective reason implies that any given set of rights is a *political agreement* in its nature, and thus always itself an object of dispute and discussion, criticism, review and revalidation.

In immediate comparison with conventional liberalism, the deliberative ideal of openness means that the division line between “political” and “non-political” issues, and between public and private spheres, is blurred in the deliberative model. Any subject can be *made* political by bringing it up in public debates and backing it with convincing arguments. In Benhabib’s interpretation, the ideal of openness and critical rationality implies also that no issues are ever permanently removed from the political agenda: all issues, including those deemed non-political by conventional liberalism (like questions relating to family and domestic life as well as to “comprehensive doctrines”) and also the already existing rules and past political decisions, can be openly questioned, discussed and eventually reviewed. This is particularly interesting regarding the relationship between democracy and rights: in deliberative democracy, also the questions concerning individual rights and legal

decisions are subject to public revalidation and revision. The implications of this principle of openness in relation to liberal constitutionalism will be discussed below in chapter II: does this principle necessarily imply that the liberal democratic constitutions are on the agenda as subjects of democratic deliberation and public decision making; and if they are, then how can the universal egalitarian premises of the deliberative model be defended without recurring to circular argumentation?

While the openness of political agenda blurs the traditional division lines between political and non-political issues and leaves even the foundational principles of the model itself open to public scrutiny; the openness of the range of participants challenges the conventional assumption that public discussion and political decision making is reserved to official administrative and legislative institutions only. Individual citizens, nongovernmental organizations and activist movements are all regarded as equal participants in public opinion formation processes. The wider range of participants encourages the extension of the range of politically debatable issues as well: for example, presence of feminist movements in politics has raised many questions conventionally regarded as “private”, like those concerning intrafamilial relations, reproduction and gendered division of work, to the political sphere. As “the right”, as opposed to “the good” has traditionally defined the “properly political” issues of justice, it is a matter of democratic disputes which issues can be included within the range of that category. A deliberative conception of democracy makes room in the political space for such extensions, although it can never eliminate the disputability of the division line itself.

Although in the deliberative model no moral or ethical issues can be deemed private and excluded from the political sphere prior to any public discussion, some interpretations of the model uphold a distinction between “ethical” and “moral” questions; the former referring to a more relative category, related to individual or collective conceptions of a “good life” or preferred lifestyles; and the latter to a more profound universal normative category, based on the foundational assumption of all persons’ equal moral worth (Benhabib 2002, 40). The deliberative universalist morality, expressed through the principles of equality, symmetry and reciprocity, appears thus in the model as a less debatable category than ongoing political decisions as well as the scope and meaning of various ethical values’ relation to the political. The political morality of the deliberative model implies that democratic politics is ultimately based on a universalist moral conception of equality; in other words, the “moral”, instead of representing a private conception of “the good” or a

“comprehensive doctrine”, is here conceptualized as the ultimate *public* and *political* value, preceding and enabling the political as a minimal condition of democratic legitimacy. Thus, while the “ethical” questions *may* remain more or less private pursuits of persons or groups, like the private conceptions of “the good” in Rawls’s conception of “overlapping consensus”, or they may be brought to the political sphere *if* they appear to have political relevance to some; the deliberative model does not eliminate the “moral” questions from the political; indeed they are not even separable from the political, which is essentially intertwined with a strong egalitarian notion of moral universalism that constitutes the normative foundation of the model. The meaning of this politicized notion of morality in relation to the deliberative attempt to reconcile deep democratic participation with the universal politics of rights will be discussed further in part II, chapter 3.

### **3. Participatory models: agonistic democracy and identity politics**

The theories in the category I call agonistic or radical democratic theories emphasize the *democratic* or participatory dimension of politics; and downplay, or view critically, the universalist liberal politics of rights as either insufficient or downright reactionary as a legitimating basis for a democratic polity. Also, in contrast to the deliberative notion of democracy, radical democratic theorists see *conflict* and *difference*, instead of equality, consensus and harmony, as the defining characteristics of the democratic processes of public discussions. Questioning the assumptions about rationality as well as reasonableness as objective normative categories, radical democrats claim to recognize a hidden bias in any impartial, objectivist norms; instead of a pursuit to objectivity or the universality of some shared norms, they emphasize the inevitability of conflict in a plural world characterized by diversity of political, cultural and moral identities, interests and opinions. The conception of *power* is more flexible and complex in radical democratic models than in the more conventional models of democracy: power is seen neither as something material that can be restricted and controlled through the formal constraints enforced by the liberal institutions of legal rights and representative democracy; nor as something simply generated as a public will through the Habermasian discursive opinion forming processes. Rather, power is

seen by radical democrats as an ubiquitous social phenomenon, generated as well as practiced not only through institutions and formal positions to which coercive power over others is attached, but also through informal social relations, public and private discourses and daily interactions, as well as the very language articulating the moral and legal norms that regulate the institutions and practices of liberal democratic polities. Thus, according to the radical democratic view, democratic legitimacy presumes that equality be claimed and fought for at a more substantive level than the formal equality of citizens as bearers of universal liberal rights or as supposedly free and equal participants in public deliberation.

Radical or agonistic democratic theories are numerous just as conventional liberal and deliberative theories; and there are significant differences between them about how inclusion, participation, legitimacy and the relation of democracy to the politics of rights is conceptualized. For my current purposes, in order to summarize a radical democratic argument in contrast to the conventional liberal and deliberative ones, I will present the central features of just some of the radically participatory visions of democracy: the “agonistic” model of democracy, articulated by Hannah Arendt in the middle of 20<sup>th</sup> century as well as by Bonnie Honig and Chantal Mouffe during later debates; the “politics of difference” proposed by Iris Marion Young; and the poststructuralist “genealogical” vision of radical politics of Wendy Brown.

The relation of these different radical democratic visions to the politics of rights varies. Democracy is not automatically opposed to the politics of rights as such, although the conventional liberal conception of a “sovereign” subject as abstract, independent and autonomous rights-bearer with no conceptualized social and political relation to others is rejected by all radical democrats. Also, all radical theorists criticize the conventional liberal model for its allegedly insufficient democratic legitimacy; the supposed neutrality and objectivity of the liberal state is claimed to be just an ideological cover to a particular, historically and politically contingent, albeit strongly established, hegemony (Young 1990, p. 99-107; Mouffe 1993, p. 135-153, Brown 1995, p. 166-198). Radical democrats encourage public participation in politics at all levels and are skeptical toward the idealized model of rational public debate promoted by the deliberative theorists. But their visions of a more inclusive political sphere, as well as their relationship to the politics of rights vary from theorizing agonistic struggle in order to challenge the hegemony of the current institutions (Mouffe); or promotion of “special rights” for vulnerable social groups (Young); to a profound mistrust toward the language and politics of rights as

such and the liberal democratic state institutions (Brown). The relationship of the democratic visions of these models to the politics of rights, as well as some problems related to their positions, will be debated further in parts II and III.

### **3.1. The Agonistic Ideal of Participatory Politics**

According to the agonistic view of politics, deliberative democracy as a vision of a democratic regime that encourages public discussion and makes administrative powers accountable to reasoned public opinions, fails to express the real nature of democracy, because no democratic institutions or processes can be expected to eliminate dissonance and the imbalance of power so that the need for the more conflictual elements of democratic struggle, like rebellion and pressure, would be eliminated. In the agonistic view of participatory democracy, citizen participation has an inherent value; consensus should never even be a goal, because it is premised on suffocating difference; plurality, including the plurality of political opinions, is a value to cherish, not a problem to be solved; and conflict is, and remains, an essential component of “the political”. The agonistic model of democracy is represented here through the work of Hannah Arendt, Bonnie Honig and in the context of contemporary democratic debates, in particular Chantal Mouffe. Although the agonistic model includes elements of “Rousseauian” participatory democratic theory, I distinguish the agonistic model from such theories, because it explicitly rejects the idea that public participation does, or even should, be conceptualized as an expression of a common, collective “will”: the role of publicity and participation is to reveal, not to eliminate, diversity, dissonance and plurality.

In the agonistic model of democracy, political legitimacy is based neither on rights and implicit consent as in the conventional liberal model, nor on norms of openness, reciprocity and universal respect as in the deliberative model. Instead, participation itself is the legitimizing activity; the primary task of the public sphere is to enable participatory political action, not to regulate social power relations and the content of publicly presented arguments. This does not mean that liberal democratic legal-political institutions are irrelevant for this model (its relationship to these will be discussed below in part III); but it means that according to radical democrats, these are not sufficient to make a regime democratic and to lend the political institutions sufficient legitimacy. The agonistic concept of politics, with its roots in

the democratic ideals of the ancient Greek *polis*, was brought to contemporary political-theoretical debates by Arendt, who created the conception of the “world” as a political sphere of speech and action, in contrast to totalitarian or tyrannical polities that paralyze such public action in one way or another. In Arendt’s vision, action as public speech, a performance in the presence of others, is what constitutes “the political” – thus, although her criticism was directed primarily against the illiberal totalitarian political regimes, she also opposed the conventional liberal conception of a rights-bearing “sovereign” citizen, isolated and free *from* the others and left alone by politics. Arendt’s conception of political action defies the traditional division between the “individualist” and “collectivist”, “Kantian” and “Rousseauian” politics: in her agonistic view, political action reveals the individual excellence of the actor while the meaningfulness of action is essentially dependent on the presence of others. (Arendt 1989, 22-78.) This defiance of traditional political-theoretical dichotomies can also be traced in the later models of deliberative as well as agonistic theories, and has influenced liberal theory itself, as I will indicate below.

Honig develops her agonistic view of democracy by opposing the concept of political *virtue*, which in her view is central to liberal as well as communitarian political theories, to the alternative concept of “virtú” that she finds in Arendt’s and Nietzsche’s work, a concept emphasizing the heroic and conflictual side of political action. Dismissing what she calls “virtue” theories of politics for attempts to displace conflict, struggle, disruption and dissonance from politics and to replace politics with mere administration, Honig defends the agonistic “virtú” theories that theorize politics as “a disruptive practice that resists the consolidations and closures of administrative and juridical settlement for the sake of the perpetuity of political contest” (Honig 1997, 2). In her view, conventional liberal theory with its universalist politics of rights and its legalist emphasis on the constitutional, belongs, along with communitarian theories seeking a moral unity, to the category of “virtue” theories. According to Honig, this trend in political theory is largely motivated by fear of conflict and disruption and directed toward stabilizing political subjects and “eliminating” actual politics. In contrast, the agonistic theorists, in Honig’s view, recognize the inevitable existence of remainders, resistances and dissonances in every polity – which is why they “seek to secure the perpetuity of political contest”. The role of “virtú”, or heroism (which in Honig’s vision includes the “disruptive action” of rebels and even of criminals), is, in Honig’s interpretation of Nietzsche and Arendt, to make space for something new and unexpected, to prompt a re-evaluation

of values or to create new political and institutional realities. Here, the Nietzschean and Arendtian view depart from each other, insofar as for Arendt, this “beginning” can eventually mean founding political institutions that will enable political action in continuity. (Honig 1993, 2-4; 137-156.) I will discuss the argument that conventional liberals attempt to displace democratic politics; and the question to what extent the founding of liberal institutions itself can be seen as an instant of agonistic “beginning”; in part III.

Honig, like Arendt and Mouffe, emphasizes the perpetuity of contest and conflict in genuinely democratic politics and recognizes the need for a political space for such contest. Her reservations about conventional liberalism stem from the assumption that liberal theory attempts to stabilize the rights-based order to such an extent that such a space will be in effect eliminated, or at least made so narrow that it won't leave space for any meaningful public disagreement. In Honig's view, a politics that closes the spaces of genuine disagreement necessarily produces “remainders” that eventually may become a threat to democracy itself. Nevertheless, as in the discussions that follow further in the thesis indicate, the role of liberal-democratic institutions in granting the spaces for (non-violent) democratic contestations and controlling the eventual violent impulses of what she calls “remainders” is insufficiently recognized by Honig. For example, as Honig presents Rawls's justification of criminal punishments as proof that Rawls's model is insufficiently democratic, incapable of facing and accommodating “the other”; it needs to be asked whether *not* criminalizing violence, for example, would augment the democratic sphere as Honig appears to insist; or would it eventually shrink it, as justified fear for one's physical security always suffocates free speech and action? Honig points out, rightly, that leaving decisions to juridical settlements only and removing them from the democratic public agenda can eventually threaten currently achieved progressive goals, as it creates an *illusion* of stability by ignoring the eventual resentment of those unhappy with those decisions (Honig 1997, 14-15).

At the same time, as I will indicate in chapter 3 of part III, juridical settlements can promote progressive goals when the social resources do not suffice to defend them by democratic means. Honig does not seem to make a distinction (in particular when seeing the criminal “remainders” as “others” unfairly excluded from the liberal public sphere), between deliberating contesting opinions, identities and positions *within* the framework of liberal-democratic institutions and contesting these institutions themselves (e.g. by radical Communist, Fascist or theocratic

movements). As I will discuss below, this failure, occurring in the work of several radical democratic and feminist critics of liberalism, eventually makes these theories subversive of their own purportedly cherished values of democracy and equality.

Mouffe, another proponent of the agonistic model of democracy, calls her vision of democratic politics “agonistic pluralism”. Her model is partly based on an Arendtian conception of agonistic political action (although it differs from Arendt’s in some crucial ways); and it is developed in reaction to the “rationalist” ideals of the conventional liberal as well as deliberative theories of democracy. Like Honig, Mouffe emphasizes the importance of channels for open display of conflict and dissonance for a viable democracy and criticizes more conventional democratic theories for ignoring that vital dimension of democracy. Mouffe’s “agonistic pluralism” is a deeply pluralist conception of politics that replaces the notion of “common good” with that of *hegemony*, drawing attention to the fact that there are always conflicting interests and that conflict never disappears in the face of an apparent consensus. What may look like consensus is in fact always a hegemonic settlement that renders deviant viewpoints invisible; much like what Honig calls the “remainders” of legal and political agreements.

In Mouffe’s account “the political” does not refer to any set of smoothly functioning institutions; rather, it is theorized as ongoing open confrontation between different, even conflicting passions, affections and interests. Such openly conflictual vision of democracy is based not on “reciprocity” and “mutual respect” that mark the relation between participants in political debate in the theories of deliberative democracy, but on confrontational opposition between *adversaries*, in distinction from “enemies”: the adversaries’ standpoints is neither declared unsuitable for the political agenda nor wiped away as “irrational”, particularist or irrelevant; the “adversary” is respected in his own right to manifest his opinion on the political arena, while his views and positions may be openly confronted. This conception of democracy is based on the empirical claim that in the real world of politics, conflict never disappears, and there is no symmetry or equality in power between the participants. Therefore, for Mouffe, like for Honig, democratic legitimacy requires that conflicts be openly displayed in the public political debate, instead of pushing diverting views aside as “private opinions”, dismissed as irrational if deviant from the apparent rational consensus that in Mouffe’s view only reflects a current hegemonic position. (Mouffe 1993, 102-154; 2000, 80-128.)

Unlike deliberative theorists, Mouffe does not want to blur the distinction between morality and politics. On the contrary, she criticizes deliberative theorists as well as conventional Rawlsian liberals for confusing that distinction and replacing politics with morality, meaning the Kantian deontological morality focusing on the idea of universal respect for individual persons. In Mouffe's view of democracy, *collective* political allegiances are more important than the *individualist* concerns for the ethics of rights (Mouffe 1993, 112-113). This view is further emphasized (and radicalized) in Mouffe's later writings on transnational democracy, where she defends the primacy of collective values of "cultures" and sovereign states over the universalist policies of individual human rights (Mouffe 2005, 90-118). Also, in opposition to the perceived rationalism of the more conventional democratic theories, she emphasizes the importance of passion and affection in the choice of political allegiances, which, she claims, both deliberative democrats and conventional liberals ignore (Mouffe 2000, 95).

According to Mouffe, politics in a modern democracy "must accept division and conflict as unavoidable, and the reconciliation of rival claims and conflicting interests can only be partial and provisional" (Mouffe 1993, 113). The major difference with the competing models introduced above is the emphasis on accepting conflictuality as a necessary component of democracy instead of striving to eliminate, minimize or control it. In her opposition to the idea of the desirability of harmonious consensus, Mouffe's position resembles that of Arendt, who also denied that unanimity should ever be a goal in politics – not because it is unachievable, but because it could only be achieved at the expense of diversity of opinion, which for Arendt has inherent value. Unlike Young (whose account of radical democracy as the "politics of difference" will be introduced in the following section) and like Arendt, Mouffe sees the bases of disagreement, passions and allegiances as *political* rather than *social*, that is, expressed in terms of political opinions rather than social groups formed on the basis of shared ascriptive or cultural identities (Ibid. 74-89).

Interestingly though, while emphasizing the value of diversity and of conflicting political positions, Mouffe, at least in her earlier work, still takes some political values for granted – either seeing them as hegemonic beyond questioning even in an openly conflictual political sphere, or recognizing their necessity for liberal democracy to be conceivable at all. While estimating participation and conflict over rationality and consensus as the primary values guiding the democratic process, she admits that the participants in this agonistic democratic public sphere *subscribe to*

*the basic liberal values of liberty and equality*, while disagreeing about the exact meaning and content of these values (Mouffe 1993, 114). This connotation appears to set obvious limits to what the agonistic political debates are about: they are about competing *interpretations* of the liberal democratic values of liberty and equality, but not about the desirability of continued political protection of these values themselves. Thus, although criticizing Rawls for trying to cleanse the political sphere of “pluralism of values” by taking the (content of the) values of liberty and equality for granted (2000, 92-93), Mouffe herself also subscribes to *some* limits to the extent of “pluralism” in the political sphere: in spite of its emphasis on conflict, her theory contains no reflection on the position of *illiberal* arguments, that is, the arguments that *reject* the values of equality and liberty instead of contesting their hegemonic interpretation; apart from a brief renouncement that such arguments are illegitimate also in the agonistic debate (Mouffe 2005, 120-121). Also, Mouffe recognizes the necessity of basic constitutional rights as a prerequisite for the agonistic democracy in her earlier work; although she withdraws from this position when discussing transnational democracy (Mouffe 1993, 105; 2005, 100-103).

As I will discuss in part II, this shift of position reveals important factors about the relationship of the universalist politics of rights to democratic legitimacy, and about the limits of “political diversity” as well as of the critique of rights. The question to be discussed regarding the relationship of the agonistic model of democracy to the politics of rights is whether the conflictual, open and non-rationalist public debates take place within some rights-based framework that constrains the contents and outcomes of the debates; and if so, how the scope of those rights is determined. While Arendt did not see such a constitutional framework as problematic for agonistic democracy (indeed, she saw the foundation of such frameworks as the ultimate example of creative political action, and these frameworks themselves as institutions *enabling* political agency to flourish), current agonistic theorists are more evasive on the question, which is rendered complicated particularly because of the aversion, felt by radical democrats, toward “liberalism” and its rights-based morals and politics. The problems regarding the conceptual position of the politics of rights in radical democratic theories will be discussed further in the following parts.

### 3.2. Young's politics of diversity

The somewhat different radical democratic model presented by Young, a model that she calls “the politics of difference”, is based on the critical observation that democratic decision making and power in existing liberal democracies rarely reflect the *de facto* diversity of these societies in terms of gender, race, ethnicity and other collective categories – a fact which is seen by Young as problematic regarding democratic legitimacy. The main difference between Young's model of radical democracy on the one hand and the agonistic and also the deliberative model on the other, is that Young pays less attention to the procedures and contents of democratic struggles and deliberations, and more to the question *who* is participating in the procedures – the most important inherent value cherished in Young's model being the notion of *inclusiveness*. Young emphasizes not so much the broad inclusion of individuals, political positions, interests or opinions, but rather, the inclusion of what she calls *perspectives of social groups*. Although the deliberative model also recognizes inclusiveness as a norm – in that democratic ideal, everybody's point of view counts; Young finds the deliberative norms of rationality and reasonableness too restrictive, as they by excluding certain modes of argumentation also exclude certain groups of people who are associated with modes of speaking considered e.g. emotional, irrational or in some other way irrelevant. Also, Young pays greater attention than many other democratic theorists to the hidden modes of group-based (e.g. gender- or race-based) discrimination that neither the formal liberal rights nor the formal deliberative rights of equal participation as manage to eliminate (a more explicit introduction of Young's views on such implicit exclusion follows in part III, chapter 1.). (Young 1990, 39-65; 156-191.)

For Young the central socio-political unit that ought to be represented in a democracy to guarantee its substantive legitimacy is what she calls a “social group”: a collectivity based on certain shared biological or social characteristics; some shared cultural values and convictions and/or a common social experience – e.g. in case of what Young calls “oppressed groups”, that means an experience of social marginalization and exclusion. Young's central critical argument is that if a group suffers implicit marginalization, discrimination or a generally lower social status than other groups, democratic legitimacy requires that these groups be given special attention in terms of democratic representation and participation: for example, group representation in policy making, independent emancipatory institutions to

represent oppressed group members only, policies of affirmative action, veto-rights in questions directly concerning primarily the members of the given group, and in some cases, a degree of autonomy in deciding things concerning primarily the members of the group. Rejecting the notion that liberal democratic institutions and the universalist politics of equal rights suffice to encourage social diversity and remedy group-based discrimination and marginalization, Young claims that radical democratic pluralism

“acknowledges and affirms the public and political significance of social group differences as a means of ensuring the participation and inclusion of everyone in social and political institutions” (Young 1990; 167-168).

Young introduces the concept of *the social group* as a previously underestimated unit of democratic policies, to be acknowledged along with (or accommodated in) the political parties (representing political positions) and movements or associations (representing particular interests) that already represent the plurality of interests and opinions within the framework of representative democratic politics. Social group membership can be based on ethnicity, race, class, gender, sexual orientation, religion, ability etc. Shared political opinions do not, according to Young, suffice to constitute a social group the way that the shared social position does: thus, for example, feminists do not form a “group”, but an ideological-political movement, while “women” constitute a social group because of their shared biological characteristics and shared experience of social marginalization (Young 1990, 186).

This division proves eventually obscure in cases when social groups *do* represent distinct political ideologies (for example, in case of religious groups that Young also regards as “social groups”, a question arises whether the claims of religious leaders for special representation, group autonomy, group-based rights or instantiation of religious legal systems for the concerned religious groups are to be regarded as justified group-based “claims of justice”, cultural claims or specifically political claims). At the same time Young denies that social groups are essential, timeless or natural, emphasizing the *relationality* of groups: the shared identity of members does not determine them for historically continuous periods; rather groups are fluid and relational, emerging and dispersing along with changing historical situations and social developments. Also, while it is only the *oppressed* groups that need special group-based rights and representation in Young’s view, a shared social identity and experience does not necessarily mean in itself that a group should be

regarded as “oppressed”. Nevertheless, given the social reality of the currently existing groups, Young insists that a radical, plural democracy grant institutions of self-organization, group representation of policy programs so that decision makers “are obliged to show that their deliberations have taken group perspectives into consideration”, and group veto power in policies that affect a group directly, to all social groups *defined as oppressed* (Young 1990, 184-187).

Procedurally Young’s “politics of difference” is a combination of representative and participatory measures, with emphasis on diversity, inclusion and group representation in the representative bodies. Although the social group-based vision of democracy is mainly inspired by group-based “social movements” acting as political pressure groups primarily in non-institutional civil society, according to Young democratic legitimacy requires that group perspectives be included in formal political decision making as well, e.g. through forms of proportional representative quotas (Young supports e.g. the policies of “reserved seats” for social groups in representative bodies and group-based quotas for election candidate lists – though with some reservation in her later work) and through publicly sponsored channels of debate that force representative decision makers to listen to the perspectives and arguments of different social groups. As to the justificatory political values that lend legitimacy to political practices, Young focuses on *identity* and *difference*, while being critical of notions of equality, universality, rationality and impartiality (Young 1990, 96-121). Young emphasizes that social difference is a *resource* for democratic politics, not a problem to be solved or eliminated. She argues that democracy is not legitimate unless all different social perspectives get a chance to be heard on equal terms. The legitimating force of the inclusion of difference through group representation is not only normative, based on the inherent value of difference and diversity, but also epistemological: according to Young, objectivity is best achieved through the public argumentation of actual different perspectives, not through hypothetical rational argument presented from some particular point of view (Young 2000, 117). In this, Young’s argument resembles that of deliberative theorists. Also, although she celebrates difference as value and promotes the visibility of conflict in harmony with Mouffe’s view; *pace* Mouffe, Young exhibits optimism about the possibility of discursive consensus: she believes that inclusive deliberations with special attention to group representation help “transform conflict and disagreement into agreement” (Ibid. 118). Thus, not wanting to eliminate social difference, Young hopes to eliminate conflict by accommodating difference.

The norm of inclusion and the inherent value of difference and diversity as such appear stronger in Young's deep democratic vision than in any of the competing alternatives. While deliberative democrats emphasize the equal participation right of all in public deliberations, that right is not necessarily related to group-based criteria; and agonistic democrats focus on the possibility of *political* differences appearing in the public sphere in their full conflictuality; Young's model puts the strongest emphasis on the inclusiveness of *social group based differences*, in order to avoid the silencing of certain groups on the basis of bias against their collective characteristics. Some problematic implications of the identity-political dimensions of Young's vision (although she explicitly distinguishes group-based democracy from essentialism and "pure" identity politics), as well as of the group-specific politics of rights, will be discussed further in part III, chapter 1. Some problems are the ambiguities regarding how to determine group membership and the "oppressed" status of a group that would qualify it to the group-specific measures that Young proposes. Also, as I will argue below, a distinction needs to be made between on the one hand, the inclusive policies of increasing the range of participants in order to increase the legitimacy of the decision-making processes and institutions; and on the other hand, the more separatist notion of group autonomy and its implications for the egalitarian politics of universal individual rights, about whose desirability at some level most democratic theorists appear to have a somewhat safe consensus. These questions will be discussed in part III in connection with the study on radical democracy's relationship to the universalist politics of rights.

### **3.3. The genealogical approach: subversion and deconstruction**

A more distinctly "postmodern" or deconstructionist, approach to radical democratic politics is represented in recent literature by Brown, whose vision of subversive or disruptive radical democracy is inspired primarily by the work of Karl Marx, Friedrich Nietzsche and Michel Foucault. A self-defined critic rather than visionary, Brown does not explicitly construct a democratic model of her own, but rather approaches the subject through a critique of existing theories, policies, institutions and intellectual trends. An unconditional critic of all regimes, values and institutions defined as liberal, Brown also directs her critique toward many current critics of conventional liberalism, including those in favor of feminist and "identity political"

deep democracy as well as group-based “politics of rights”. Arguing that the legitimacy of liberalism has been irreversibly compromised as it has been exposed by feminist critics as masculinist and misleadingly progressivist (among those critics is Brown herself, see Brown 1995, 136-165); Brown envisions a radical democratic politics that is “released from conviction” and also from universal norms (Brown 2001, 94-95).

Taken literally, this deconstructive approach goes a step further than the theories introduced above in radically questioning *any* universal norms, procedural as well as teleological; expressed or institutionalized in the form of rights, rationality, reasonableness or reciprocity. Without presenting a blueprint of how a non-universalist and value (or conviction) -free radical democracy should work or what it exactly would imply in terms of practices, institutions or procedures, Brown states that democracy, to remain democratic, needs “disruptive” elements that are eventually antidemocratic (or perhaps violent) in a Nietzschean sense. Relying on Nietzsche’s opposition between on the one hand, creativity, aspiration and innovation, and on the other hand institutions, egalitarian values and the “homogenizing proceduralism” of liberal democracy, Brown emphasizes that to avoid that politics become dull, homogenizing and discursively repressive, a “struggle between democratic and antidemocratic impulses”, between egalitarian and inegalitarian desires and between “affirmation of strength and limitations of it” should be seen as invigorating rather than dangerous for democracy “if righteous platitudes and attitudes are not deployed to quell that struggle” (Brown 2001, 134-135).

Posing this position as a disruptive anti-democratic impulse *by theory* to disrupt politics, in order to keep democracy from sliding into technocracy or “base attachments to principle”, Brown apparently denies that there is a productive connection between political theory and politics. A major difference between her “genealogical” approach and that of other radical democratic critics of conventional liberalism is that instead of theorizing how to make democracy more inclusive, egalitarian, public and open she proposes the acceptance of “anti-democratic” impulses as a kind of a shock therapy for the dozing democracy to make it wake up. According to Brown, liberal democracy currently “risks more than ever a laconic, self-satisfied tendency” and

“rarely submits its cardinal values of mass equality and tolerance to interrogation without dismissing such challenges as antidemocratic; nor does it seriously engage critiques of its

tendency to submit all elements of life to market domination and political egalitarianism” (Brown 2001, 136).

Does this mean that Brown, unlike many other democratic theorists, acknowledges the possibility of the appearance of expressly anti-liberal and anti-democratic movements in the liberal democratic political sphere – a possibility currently so obvious that it cannot and should not be ignored when theorizing the limits of inclusiveness, not just of persons and groups, but of movements and positions – in the democratic public sphere? Still, Brown talks about *antidemocratic critique*, but of *democratic action*:

“just as democracy needs *antidemocratic critique* in order to remain democratic, so too the democratic state may require *democratic resistance* rather than fealty if it is not to become the death of democracy” (Ibid. 137, my emphasis).

It remains unclear, what kind of action “democratic resistance” is meant to signify; how disruptive is its relation to the liberal values of “mass equality and toleration” supposed to be (or how disruptive of these values it can be without losing the characteristics of *democratic action*), and why *antidemocratic critique* is assumed to inspire only *democratic* resistance; that is, action that will revive, but not overthrow democracy as we know it.

The legitimacy of a democracy, according to the genealogical approach, depends on its being able to grant a discursive political space that is radically free from all existing truths, values, convictions and commitments. The genealogists set as their task the creation of such a discursive space, for the interrogation of *all* existing values and policies; including the currently hegemonic “liberal” as well as radical democratic ones; without relying in their own critique on any “moral or political grounds”, because such normatively motivated criticism would imply the need to offer alternatives, something that Brown explicitly seeks to avoid. Brown’s genealogical model is expressly anti-normative, regarding both the content of the public political claims and the procedures of the interrogation and revaluation processes. Interestingly, while Brown’s vision of a need of democracies for an internal disruption, scrutiny and even rebellion in order to prevent it from stagnating and thus becoming its own opposite is shared by some liberal writers<sup>3</sup>; Brown explicitly questions the legitimacy of the liberal order as such. For her, liberalism’s legitimacy ultimately depends on its utopian story of egalitarian progress

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<sup>3</sup> See e.g. Isaac, Filner and Bivins 1999, 222-258.

and on an illusionary conception of abstract, sovereign individuals – narratives that Brown views as radically compromised by the criticism that has exposed liberalism as contingent and hegemonic; as well as hopelessly raced, sexed and gendered and therefore essentially unable to release its egalitarian promise (Brown 2001, 12-13).

Brown's position resembles that of Mouffe in its admission that arguments brought forward in *political* struggles are "bids for hegemony" rather than statements about values or truths. The question is; can theory ever be so radically value free, or so totally detached from its own consequences, as Brown claims? Brown writes: "Insofar as genealogy contests a linear, progressive historical narrative, genealogical politics cannot deduce any necessary perspectives or future outcomes from the present" (Brown 2001, 119); and: "Genealogy aims to unfix the contemporary political situation, [...]; but it doesn't tell us what is to be done, or even what is to be valued" (Ibid. 120). Here she relies on Foucault, while arguing that Foucault's particular political positions have no connection with his theoretical insights. According to Brown "the political value of genealogy is its ability to call into question the most naturalized features [...] of the present"; and

"what results from that exposé is a matter of political desire, political imagination and political timing. Hence Foucault's general unwillingness to say what is to be done about punishment or sexual regulation [...] in his genealogies on these subjects" (Ibid. 118).

But could this fascination with political desire and revolutionary disruption, along with a refusal to normatively evaluate the consequences of emerging political ideas and actions and a reluctance to take positions on "punishment" and "regulation of sexuality" have constituted a reason why Foucault enthusiastically supported the Iranian Islamic revolution of 1979, the foundation of an ultimately illiberal regime with the emerging theocracy complete with gender segregation, mass murder and imprisonment of political opponents and the reinstatement of a medieval religious system of punishments, including the stoning of women for adultery? What does Brown's claim that Foucault's political tastes have no relation to his theoretical positions say about Brown's own position? This theoretical moment has special significance for the research at hand: it is the moment when the quest for deepened democratic legitimacy within the framework of liberal democratic theory and practice reaches the edge of the illiberal, thus revoking the classical liberal concern for democracy's capacity to overthrow and annihilate itself. Given that there has been a certain tradition among Western critical thinkers to lend their support to

non-liberal, even totalitarian political regimes<sup>4</sup>, this moment will prove important in the theoretical search for the limits of “deepening” democracy.

The genealogical approach brings a significant epistemic insight to political theory: the recognition of the radical contingency and historicity of political life as well as the “arbitrariness of political values” (Brown 2001, 94). Nevertheless, the meaning and implications of that insight for further theorizing democracy is a matter of dispute. A central question to be discussed in the light of the deconstructive critique of conventional liberal as well as more participatory theories of democracy is whether revealing the historical and political contingency of the values and institutions that are currently “hegemonic” (that is, widely considered universally valid and legitimate), undermines the legitimacy of these values and invalidates the arguments of their proponents. Later in this thesis I will defend the genealogical argument about the contingency of any given political values, but I will also argue that the universalist norms explicitly or implicitly endorsed by conventional liberal, deliberative and inclusive radical democratic theorists are not necessarily in conflict with that insight, and that “liberalism” roughly conceived as egalitarian politics based on some conception of political equality and some conception of individual rights is not so dependent on the modernist narratives about “progress”, essential human nature and abstract “sovereign” subject as deconstructivist critics claim. The aversion of the proponents of the genealogical position toward universalist values in general and the liberal politics of rights in particular and the relation of this aversion to the conception of democratic legitimacy will be under particular scrutiny.

### **3.4. Identity, agency and subversion in the legitimacy discourse**

Radical democratic theorists are skeptical about some central concepts, norms and ideals of conventional liberal theory, like rights, reason, individual, rationality, universality, consensus and even equality. Instead of these, they prefer to appeal to concepts like participation, action, agency, identity, disruption, subversion, conflict, hegemony. One of the purposes of this study is to inquire to what extent these sets of concepts are contradictory, or how much they complement each other, or even

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<sup>4</sup> Other similar examples are Martin Heidegger’s and Carl Schmitt’s Nazi sympathies, Jean Paul Sartre’s post-WW II fascination with the Soviet Union as well as with Fidel Castro’s Cuba and a more general support that Soviet and other Communist totalitarian regimes enjoyed among Western left-wing intellectuals throughout the Cold War.

depend on each other. I will later return to the work of Arendt to indicate that the attempts to oppose these sets of concepts to each other eventually fail. Unlike later radical democrats who in many ways are inspired by her work, Arendt opposed neither liberal constitutionalism nor the idea of universal normative principles in politics. Arendt's concept of political action, built around a metaphor of *beginning* and exposing the dimension of the improbable, indeterminate and unpredictable in politics, was developed in reaction to the explicitly politically oppressive and violent totalitarian regimes of the 20<sup>th</sup> century, not as an alternative to what we refer to as liberal democracy. Although skeptical of the traditional liberal concept of individual sovereignty and keen to emphasize the intersubjective side of freedom as action in concert with others, Arendt cherished the individuality of the human person. As a Jewish refugee from Hitler's Germany, she knew the value of institutionalized rights and thought about the possibilities of universalizing "the right to have rights" to concern all humanity (Arendt 1973, 296-302).

The contemporary social movements such as the feminist, civil rights and anti-racist movements in Western democracies in the 1970-ies gave rise to a redefinition of the traditional liberal values of equality and justice in terms of *identity* rather than *equality*. This turn in radical politics has affected much the ways of theorizing democracy and the political. Young's "politics of difference" emphasizes the importance of identity in democracy (although she denies that she explicitly defends an "identity politics"); meaning that in order to counteract the injustices based on social identity – that is, gender, race, ethnicity or sexual orientation, one had to refer to the vulnerable identity in order to raise its status and give it a voice in the democratic public. Skeptical of the eventual essentialism of "identity", other postmodern theorists prefer to speak about "agency" instead of both identity and subjectivity, the latter concept being deemed as abstract and fictional. Likewise, the concepts of "subversion" and "disruption" replace the more traditional rationalist concepts of deliberation and critical rationality. But what do these shifts in terminology mean for how we think about political legitimacy? What are the differences between the theories really about: institutional settings; laws, norms and regulations; the role of individual citizens and groups (political or social) in political decision making; or mostly, just how democratic politics and "the political" in general are conceived?

In the final chapter of part I, I articulate the conflict that appears to constitute a primary disagreement between the competing liberal democratic approaches to

politics: the conflict between the universal politics of rights and the egalitarian, participatory conception of democratic legitimacy. Does the politics of rights represent the “modern” set of values: individualism, universalism, rationalism and equality; while democratic legitimacy, in the light of current experience and available criticisms of existing liberal democratic theories and politics, requires that we question the sources of institutionalized rights, emphasize participation, difference, conflict and diversity of social positions and identities? Does embracing the latter position require abandoning the norms that the former is based on? If inclusion, equality and diversity are the key values of democracy, is it possible to include the positions of those who do not embrace these values, and at the same time to protect these values from such anti-egalitarian and anti-inclusivist challenges? Can democracy be improved by abandoning the restrictive, individualist and rationalist notion of rights, or are rights nonetheless indispensable in order to preserve democracy?

#### **4. Is there a conflict between democracy and rights?**

The idea that there is a conflict, or at least a tension, between the institution of individual legal rights and the values and processes of democracy, has been articulated by traditional liberal as well as radical democratic thinkers. The perception of that tension has given rise to the traditional liberal suspicion toward too inclusive participatory democracy as well as to radical democrats’ skepticism toward the liberal politics of rights. At the same time, democracy and the politics of rights do co-exist institutionally; both rights and at least some degree of institutionalized democracy being crucial constituents of the political institutions in existing liberal democratic regimes. According to some theoretical interpretations, rights and democratic participation are indeed interdependent to the degree that one is hard to conceive without the other. Also, all interpretations of liberal rights include some political participation rights that entitle the citizens of the given regimes to at least some degree of participation in the democratic process, although the content, extent and meaning of such rights can vary greatly.

Thus, if there is a tension between the liberal and the democratic values, liberal democracy is bound to perpetually balance that tension, without eventually being

able to discard either of the components without becoming self-destructive. Given that, what is the attitude of the proponents of deep democracy to the concept and politics of rights that potentially restricts the scope and range of democratic decision-making and the possibility to democratically change the existing “rules of the game”? And are liberals justified to fear that deepening democracy, in terms of participation as well as decision-making procedures, might pose a threat to individual rights? Is democracy in conflict with the conception of the universality of certain political and moral values, like those of human dignity, equality and freedom, or is it a product of these values and dependent on them; and is its more inclusive instantiation an expression of a *stronger* public commitment to these values?

According to Mouffe, there is a “fundamental tension” between “the logic of democracy” and “the logic of liberalism” that can never be eliminated. In her view, “democracy” and “liberalism” are based on two totally different discourses, arising from different traditions with no necessary relation to each other, so that only a “contingent historical articulation” binds them together in the institutions of the existing democratic regimes. Together, these separate and competing discourses, the discourse of liberty and the discourse of equality, create a permanent tension within liberal democracy, which only contingently has combined those traditions into a regime marked by both. Mouffe claims that the discourse of *individual liberty* and of *human rights* that constitutes the “liberal” does not stem from the *democratic* tradition, whose core values are *equality* and *popular sovereignty*. The tension between the values of equality and liberty; or between individuality and democracy understood as popular sovereignty, that is, the identity of the governed with the governing; is what according to Mouffe constitutes “the democratic paradox” (Mouffe 2001, 2-3; 93). But can these discourses, the discourse of democracy and the discourse of liberalism, really be conceived separately and independently of each other; is there such an inherent conflict, or an enmity, between them as Mouffe claims there is? While there is no empirical historical evidence of a separate politically institutionalized existence of the “liberal”, and the “democratic”, the conceptual relation between these allegedly competing political traditions needs to be clarified. This is a major task of the research at hand.

Brown argues that the legitimacy of liberal democracy is essentially connected to liberalism’s strictly universalist and progressivist conception of history and politics; thus, it is dependent on the validity of such metanarratives and therefore vulnerable in the face of an eventual recognition of the contingency of its political

values (Brown 2001, 9-10; 94). The argument entails that because it is connected to a metanarrative about Nature's rational plan, the politics of rights loses its legitimacy when revealed as contingent. While there is no doubt that such rationalist and progressivist elements were present in early liberal thought, it can be disputed whether the legitimacy of the moral and legal universalism contained in the liberal values of equality and dignity and expressed in politics through the institutionalization of universal individual rights, could be retained, even if the rationalist dream of perpetual progress that originally accompanied the development of these ideas is undermined by the recognition of its historical, political and cultural contingency. Apparently, according to many other theorists, that would be possible.

Interestingly, while the central critical claim about liberalism made by the above mentioned authors concerns its alleged failure to acknowledge the political and contingent nature of the universalist politics of rights; many contemporary proponents of the conventional liberal position do not view contingency as a problem for Kantian universalist values. On the contrary, they increasingly describe the liberal politics of rights as ultimately political, historically contingent and thus dependent on democratic support for its survival<sup>5</sup>. For example, Ian Shapiro, a proponent of liberal constitutionalism, criticizes as "antipolitical fallacies" the traditional liberal separation of the public and the private spheres, as well as what he calls "depoliticizing politics". Interestingly, Shapiro attributes the latter "fallacy", which Mouffe pictures as a distinctive *liberal* feature, primarily to *communitarian* utopias and "appeals to idealized pictures of traditional communities". *Contra* communitarians, Shapiro argues that the question of justice (that is to be addressed through a politics of rights) "comes into play whenever there is conflict over the goods valued in a community", disregarding the size of the "community" in question (Shapiro argues, for example, against the view that the family as a "community of affection" should be beyond demands of justice). According to Shapiro, whenever there is an issue of justice (that is, a question of rights) at play, there is also disagreement about its interpretation (rendering it simultaneously a question of democracy). Thus, as the political questions of justice essentially arise from disagreement about justice, rights and democracy are political questions not

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<sup>5</sup> See e.g. Waldron 1999, Shapiro 1999, Donnelly 1997 and Ignatieff 2001.

exclusive of each other or mutually contradictory, but indeed inseparable, and intertwined with each other. (Shapiro 1999, 6-8.)

Likewise, rights theorist Jeremy Waldron emphasizes the political nature of rights and elevates the right of political participation as “the right of rights”. Michael Ignatieff, in his defense of universal human rights, describes the ideal of individual rights as essentially political, in contrast to the radical democratic view that the politics of rights is an antipolitical, individualist and moralist approach to political questions. The international human rights theorist Jack Donnelly speaks of the conception of universal rights as a historically *contingent* achievement that is to be welcome and cherished as a *political* ideal. (Waldron 1999, 211-231; Donnelly 1999, 71-102; Ignatieff 2001, 3-48.)

How do these arguments fit the view that the logic of democracy and the logic of liberalism are essentially in conflict, or that the legitimacy of the liberal politics of rights is ultimately dependent on a faith in perpetual historical progress and in an essential, apolitical “naturalness” of those rights? Some of these dilemmas will be discussed in more detail in part III. For the current discussion, it suffices to note that there is disagreement between democratic theorists about whether democratic participation and the politics of rights are mutually conflictual, compatible or interdependent. It cannot be taken for granted that contemporary liberal theory regards rights as given, prepolitical and beyond democratic review and interpretation. The eventual conflict between rights and democracy is not necessarily conceived as a conflict between rights (as an apolitical entity) *and politics*: it is widely accepted that the question what rights should be protected from democratic decisions is itself a highly political issue. Eventually the protection of certain rights as universal remains a precondition for democracy: thus there is not just tension or a paradoxical relationship, but also a mutual interdependence between democratic legitimacy and the politics of rights. What can be established this far is only that the position politics of rights is itself a *political* question. What follows from this recognition in the light of the different theories studied here, will be discussed in the remaining chapters.

In part II I will analyze more closely how the conventional liberal, deliberative and radical schools of democratic thought theorize the relationship between democratic participation and the politics of individual rights.

## II

### The tension between democratic values and individual rights

#### Introduction to part II

I treat the relationship between democratic legitimacy and the politics of individual rights as a question about the conceptual position of rights in relation to democratic decision-making: whether legally enforced individual rights are conceived primarily as *external constraints to* or *objects of* democratic deliberations and contestations. As I will argue below, the question does not deliver an “either-or” answer; but for the sake of the argument it is initially posed this way. The question whether rights in liberal democracy should be seen as an external constraint to democracy or as political norms accepted, revalidated and eventually changed in the course of ongoing democratic processes (in no different manner than other political decisions); is related to the question whether rights are perceived as a universally valid or essentially context-related category in politics that will be further discussed in part III. For the sake of clarity it needs to be pointed out that when the question about the conceptual relationship between rights and democracy is discussed, “democracy” is not always conceived as participatory or “radical” democracy as opposed to traditional liberal “representative” democracy; it is not necessarily a question about a choice between “Kantian” liberal democracy, based on individual autonomy, and “Rousseauian” participatory democracy, based on a notion of collective self-rule; although it is sometimes presented that way.

Sometimes the eventual tension between rights-thinking and democratic values is articulated as a conflict between equal individual rights and *majoritarian* democracy, regardless of whether the latter is realized through representative institutions or direct public participation; and regardless of which kinds of decision-making procedures it follows. Conventional liberal writers mostly mean by “majoritarian decisions” decisions taken by *elected representatives*, not “the public” through direct participatory processes; although they may acknowledge a deeper involvement by the public at *some* level. The relevant question is for them whether or not majoritarian decisions are *constrained by constitutional rights*, not how much the public is allowed to participate in making those decisions. Still it is often assumed that increasing public participation in democratic deliberations and

political decision making deepens the potential conflict of the democratic processes with the concept and politics of inviolable individual rights. I will argue later that this needs not be the case, but I will take that assumption into account when comparing how proponents of “conventional liberal”, “deliberative” and “radical” democratic theories conceptualize the relationship between democratic participation and the politics of individual rights.

In this part I compare the conceptual position of rights in the above mentioned sense in the alternative democratic theories. In connection with that I compare their interpretations of the concepts of freedom, equality, individual and collective autonomy, and democracy itself. I also try to see how the different schools of democratic thought conceptualize eventual *threats* to democratic values and how they propose to protect these values from them; and I pay attention to how the notion of *participation* is related to democratic legitimacy and to perceived internal or external threats to democracy.

As I noted above, in a roughly simplified way the question about the conceptual position of rights resembles the debate about of the relationship between the “Rousseauian” or “participatory” Vs. the “Kantian” or “liberal” view of democracy; or in the classic words of Benjamin Constant, between the “liberties of the ancients” and “the liberties of the moderns”; or, as Mouffe puts it, between “the logic of democracy” and “the logic of liberalism” (Mouffe 2000, 2-3). The research reveals that much of the work written on the subject does not handle the question in such dichotomous terms; and even some of those authors who insist that there is a tension between the politics of rights and the processes of democratic decision making refer to this tension in terms that defy the traditional dichotomous oppositions between “equality” and “liberty”, “communal” and “individual” values, or between the language of democracy and participation and the language of justice and rights. As I will indicate, rights-based constitutional constraints on democracy may be defended with reference to the values of *democracy* and *equality*, not to the primacy of *individual liberty* as opposed to those values; and radical democratic opposition to the conventional liberal politics of rights may be based not on an appeal to communal or egalitarian values, as the traditional dichotomy assumes, but e.g. on the critique of the “normalizing” or homogenizing power of liberal “legalism”, or on reference to diversity and the conflictual nature of “the political”. Therefore, in my analysis of how democratic theorists envision the relationship, I will make little

reference to classical arguments about that supposedly dichotomous relationship; and make no attempt to reduce the current debates on democratic legitimacy and the position of rights to such original dichotomy. Instead, after introducing those classical arguments that I *do* consider relevant for the current discussion, I will follow the contemporary arguments on the subject, focusing on their mutual differences and similarities.

The differences between democratic theories regarding the relation between rights and democracy do not necessarily reveal their different evaluation of the importance of rights as such. More often there is disagreement about which rights are most important and how they are to be protected – *from* democracy, *by* democracy or *for the sake of* democracy; and about how it is determined what rights people should have. For conventional liberal theorists the major potential conflict between democracy and individual rights is constituted by the threat of “majority tyranny” inherent in democracy, that is, the possibility that a majority decision, even if taken in a procedurally democratic manner, may override the rights of individuals, in particular the rights of numeric minorities; or that a democratic majority, when enticed by a potentially totalitarian movement, may make political decisions that submit the whole society to a regime that is ultimately undemocratic and illiberal – that is the argument about democracy’s inherent capacity to destroy itself. Those are the central liberal arguments to justify imposing legal and procedural constraints on democratic decisions. On the other hand, some proponents of more participatory models of democracy argue that individual civil rights can only be adequately protected if participatory political rights are sufficiently guaranteed so that no perspective is overridden in decision making processes and elites can be effectively controlled by the public.

I will indicate further in this thesis that the tension between democracy and individual rights, assumed explicitly by earlier liberal theorists as well as some contemporary critics of liberalism, is a simplification that does no justice to the complicated nature of the relationship between the ideals of democratic participation and universal individual rights. Here I analyze how the alternative democratic theories envision the relationship between, on the one hand, the universal norms expressed as systems of rights in general and as constitutional constraints on democratic decision making in particular; and on the other hand public participation, with the emphasis on inclusion of difference (understood as a

reflection of the *de facto* diversity of societies in regular political decision-making as well as in determining the content of those universal norms).

I compare the conventional liberal arguments for institutionalizing the universal norms through a politics of rights, to: a) *radical democratic* and *feminist* criticism of the liberal model as being repressive of diversity and their alternative proposals of more inclusive, and thus more legitimate alternatives; b) attempts of the theorists of *deliberative democracy* to reconcile the democratic norm of inclusiveness with the liberal notions of universal moral norms in general and individual rights in particular; and c) the view of the proponents of “*agonistic*” *radical democracy* that the conflict between “equality” and “liberty” is inevitable, and that it cannot be reconciled, but should be openly politicized. In connection with that I analyze the relationship between politics and morality and ask how the distinction between them correlates with the relationship between the universal and the particular and how it is obscured, blurred or reconstructed in the theories under scrutiny. Making that distinction is a high priority in conventional liberal theory while feminist, communitarian and multiculturalist theorists have challenged it as a tool to exclude certain aspects of life as well as certain kinds of power relations from the public realm and political disputes. Proponents of deliberative democracy are willing to preserve some division line between private and public issues, while recognizing the inevitable intertwining of political and moral questions and thus the perpetual need to review the division line through democratic deliberations. Some radical democrats are wary of introducing *moral* arguments into politics at all, arguing that moralizing political questions means privatizing, thus depoliticizing them.

Ultimately, the question at hand is this: is the liberal conception of rights a precondition for *any* kind of democracy, representative as well as participatory; or does it inherently contradict democratic values? Does liberal “legalism” displace democracy or is it an essential part of the democratic process, enabling it while having its own legitimacy perpetually revalidated by democratic processes?

## 1. The liberal argument: the threat of majority tyranny

Recent political theory has often treated discussions on rights and on democratic participation as separate discourses. Rights-based *theories of justice* have dismissed the issue of political participation or viewed it with suspicion as irrelevant or even dangerous, while primarily participation-based “republican” or radical democratic theories have criticized the rights-based accounts of liberal democracy as excessively individualist, undemocratic, abstract or elitist. Within feminist political theory, the discourses of rights, and later even any universal normative claims in politics, have been criticized as justifications for “white male” domination. Nevertheless, in some contemporary political theories the issues of justice and those of democracy are increasingly intertwined, as it is increasingly recognized that the character and form of democratic processes affects the contents of legal decisions; and that issues of justice and rights, unavoidably subject to disagreement, are essentially *political* issues, to be solved by democratic means in order for the outcomes to be legitimate. Furthermore, the ability of citizens to participate in public political debates and decision-making is itself recognized to be a matter of justice. (Young 1990, 3-14; Shapiro 1999, 1-5.)

The tension between democratic participation and individual rights can also be formulated in rights language as a tension between “political” and “civic” rights. The dichotomy in which individual civil rights and the right to political participation are conceived as mutually competitive and conflicting, if not exclusive, was articulated most explicitly by classical liberal writers like Benjamin Constant, who famously formulated the dichotomy as a the tension between the “liberties of the moderns” and the “liberties of the ancients”<sup>6</sup> (Constant 1816). This research indicates that different writers, even if talking about the same tension, see the problems and fears associated with it in very different light. For the sake of clarity I introduce the “liberal” position through examples from earlier as well as contemporary writers. Apart from conventional liberal writers, the idea about the existence this dichotomy is sometimes also endorsed by participatory democrats, while proponents of deliberative democracy see democratic values and rights as mutually compatible and even interdependent, arguing that civil rights can only be adequately protected if

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<sup>6</sup> The concepts “rights” and “liberties” are used interchangeably in this context.

sufficient political rights are guaranteed; or reversely, that equal participation presumes the universality of basic individual civil rights.

The main critical argument posed against rights-based theories is that they are rigid, formal, abstract and as such, blind to the needs and interests of particular persons in culturally and socially embedded contexts and particular political and social situations (e.g. Brown 1995, 96-134; Young 1990, 48-62). On the other hand, critics of liberalism are blamed for ignoring the importance of the notion of rights as a political safeguard from certain threats that latently always haunt politics: discrimination, persecution, torture and political violence. Without a legal framework that prevents political actors from resorting to such measures, legitimate democracy is hard to conceive of. (E.g. Holmes 1995, 8-11; 134-177.)

### **1.1. Traditional liberal view: the fear of majority tyranny**

As I mentioned above, classical liberal skepticism toward participatory democracy is pronounced more explicitly by the authors of the 19th and mid-20th centuries than in the contemporary liberal discourse; therefore I briefly introduce here also some earlier liberals' views on the issue in order to better highlight the contemporary debate. Benjamin Constant famously articulated the division between the “two kinds of liberty”, that of the “ancients” and that of the “moderns”, in 1816; John Stuart Mill presented his well-known skepticism toward the public rule as a potential “tyranny of the majority” in 1859; Isaiah Berlin, following Constant, conceptualized shortly after WWII the distinction between “negative” and “positive” liberties, which roughly, although not quite, parallels the current notions of civil and political rights. Common to these defenses of “liberal” (or “civil” or “modern”) rights from the excesses of “popular sovereignty” or “majority rule” is, apart from a stark opposition of individual rights to political participation, a skepticism about the feasibility of an account of participatory democracy in modern mass societies and a fear that “too much participation”, or too extensive collective decision power, would threaten the individual rights and liberties of persons by subordinating them to the whims of the popular will of unpredictable majorities. Ultimately, a full-blown “participatory

democracy” is seen in this classical view as a potential threat to liberal democratic values, leading to totalitarian control and tyranny<sup>7</sup>.

In the light of current debates on rights and democracy it is tempting to rethink the persistent relevance of the issues raised by these early liberals and criticized from many directions. What in those reservations could be still considered as valid; to what extent has the early liberal view been incorporated into the mainstream political practices of existing liberal democracies; which fears have been proven exaggerated and which, if any, are still relevant? What kind of liberties did the early liberals want to protect, and more importantly, what kind of “democracy” did they have in mind when talking about “popular rule” and “majoritarian decisions” – and by what criteria could the feared “tyrannies” be described as *democracies*, if at all? Why are liberty and participatory democracy seen in such oppositional terms by some proponents of both; and why are the ideals of liberty, autonomy and equality seen with such skepticism by current democratic and feminist critics of liberal political theory?

Constant gives the liberal reservation about democratic participation a classical expression in his lecture from 1816 on the “two kinds of liberties”. This expressed reservation is based partly on the assumption of the practical difficulty of arranging public participation in political decision-making on an ongoing basis, and also on the supposed will of the liberal citizen to be “left alone” by the state and political affairs:

“The constant exercise of political rights, [...], would only cause trouble and fatigue to modern nations, where each individual, occupied with his [...] enterprises, the pleasures he obtains or hopes for, does not wish to be distracted from them other than momentarily, and as little as possible” (Constant 1816, 4).

Talking about the time constraints that *working* places on ongoing political participation, Constant also points out that slavery was an enabling factor of the ancient Greek participatory democracy – a factor not present in modern democracies where slavery is abolished and free citizens have to work for their living: “Without the slave population of Athens, 20 000 Athenians could never have spent every day at the public sphere in discussions” (Ibid.). Constant even sees ancient Athenian political participation as an activity for the free men, plagued by “painful inaction”, to fill their days. Another argument concerns the size of modern societies and the

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<sup>7</sup> This view has been interestingly confirmed by those proponents of “participatory democracy” who *have* been openly supportive of *de facto* tyrannies as allegedly exemplary cases of popular sovereignty or participatory democracy; e.g. Sartre and Foucault, as noted above in part I.

relative impact on each individual participant: while in the ancient city-states each (free, male) citizen enjoyed a significant share of the public power, in modern times, “lost in the multitude, the individual can almost never perceive the influence he exercises”; thus the mere size of the modern democratic polities renders public participation meaningless and speaks for the restriction of democracy to a representation function only (Ibid. 5).

Apart from these mostly practical considerations, Constant had explicitly normative complaints about the idea of participatory democracy: he viewed the attempts to restore the “ancient” form of democracy with its extended political rights as dangerous; eventually leading to, or at least excusing, ultimate tyranny. Constant blames Rousseau’s account of democracy as an expression of “popular will” for “furnishing deadly pretexts for more than one kind of tyranny” by failing to “recognize the changes brought by two thousand years in the disposition of mankind” (Constant 1816, 5-6). According to Constant Rousseau’s followers represent

“a system which, according to the maxims of ancient liberty, demands that the citizens should be entirely subjected in order for the nation to be sovereign, and that the individual should be enslaved for the people to be free” (Ibid.).

Individual and collective liberties are thus presented as mutually exclusive. Constant sees “individual rights” in opposition to “participation in social power”, so that the increase of one necessarily implies the shrinking, or more dramatically, the sacrificing of the other (Ibid. 7). Interestingly though, while calling individual liberty the “true modern liberty”, Constant acknowledges that “political liberty is its guarantee” and thus indispensable, although he insists that the former should not be *sacrificed* to the latter (Ibid. 8-9, my emphasis). In his vision the role of democracy, which has to be representative in form, is the “checking” of the government by the voters: like a “landlord checks on a steward hired to manage his affairs”; the citizens should have power to control and replace their representatives through regular elections. In all his skepticism toward the political activity of ordinary private citizens, Constant also warns them of a total surrender of the political power by being *too preoccupied* by private affairs; for him the challenge of liberal democracy consists ultimately in *combining* the “two kinds of liberty”, instead of sacrificing either of them (Ibid. 11). But why should one assume that such a sacrifice would be an option, or a threat, in the first place?

Mill expressed his reservations against excessive collective power through his argument against the “tyranny of the majority” in the essay “On Liberty” (1859). There, he fears that eventually the sovereignty of the people can destroy that of the individuals; and that “government of the people is not necessarily freedom at all, for *those who govern are not necessarily the same ‘people’ as those who are governed*, and democratic self-government is not the government of ‘each by himself’ but of ‘each by all the rest’” (Mill 1991 [1859], 8; my emphasis). Mill warns that “the people” in a democracy may in practice mean “a majority” either in numbers *or in strength* (curiously in the light of later criticisms of liberalism, Mill noted that the “majority” that actually made decisions and formed opinions was the dominant class of middle-class white men); and that the possibility of “the tyranny of the majority” over the weaker parts of society establishes a permanent need for limiting the power of any collective administrative body, even a democracy, because there is no relevant difference between the tyranny of the majority and other kinds of tyranny (Ibid.)

Mill’s main reservations regarding the role of the “society” concern the limits of its control over the individual: for him the excess of collective power is not so much related to the question of participation and inclusiveness, that is, to the question *who* participates in decision making, but rather to the question of legal limits to that power concerning *what* it can legitimately decide and to what extent individuals should be protected *from* that power. In other words, Mill’s primary concern is the scope and reach of collective decisions, no matter how democratically taken, with regard to the rights and liberties of individual citizens (Mill 1991, 83-84). Mill’s thesis does articulate the classical liberal dilemma between “democracy” or collective power on the one hand and individual rights and liberties on the other; and there is no doubt where he stands on this: he explicitly states that rights must constitute *external constraints* to the legitimate power of collective decision making bodies (and even to the influence of public “opinion”).

However, Mill’s thesis, unlike that of Constant, should not be read strictly as an argument *against inclusive democratic participation* in ongoing political decision making, and can even be seen as a statement in support of it, as long as its effective power is constrained by the citizens’ individual rights. These rights are determined by Mill as matters concerning the individual himself, whereas his liberty can be legitimately limited in matters where his actions affect and eventually harm others. (Mill recognizes that it may be difficult to draw the division line between these; and while some of his examples sound outdated from today’s perspective, others, like the

emphasis on freedom of speech, opinion and conscience as the rights to be protected beyond compromise, remain undoubtedly relevant in contemporary debates.) Although Mill is wary of the effects of also the potentially moralizing “public opinion” on individual liberty, this suspicion is primarily directed against what he calls “the government” and “the state”, conceived as an *institution* of executing collective power, separated from individuals and their networks of associations and initiatives known now as “civil society”. Indeed, Mill’s vision of a society in which individual initiative is fully respected resembles in many ways later visions of republican or participatory democracy; in his view distributing power so that individual initiative is widely encouraged in all matters that *can* be freed from direct governmental control teaches the citizens democratic participatory skills and active citizenship – just not within the institutions of the state, but complementing it. (Mill 1991, 83-103.)

Nearly a century later, after the emergence of totalitarian regimes and two World Wars from within the European developing democratic tradition, Isaiah Berlin picks up Constant’s dichotomy, introducing in his famous essay “Two concepts of liberty” the distinction between what he calls “negative” and “positive” liberty, based roughly on Constant’s earlier division between the liberties of the moderns and those of the ancients, a dichotomy later theorized also as negative Vs positive concepts of *rights*. Setting aside here the later meaning of “positive rights” as a category used mostly in connection with issues regarding socioeconomic justice, it suffices to recall that in this initial division “negative” liberty essentially meant freedom *from* coercion and intervention; thus corresponding to certain core areas of the contemporary liberal notions of individual civil rights and liberties; whereas “positive” liberty was interpreted in politicized terms as a liberty to self-fulfillment and a right to active participation in collective social and political life. (Berlin 2004 [1958], 166-217.)

Berlin also subscribes to the idea that there is an internal tension, or at least no positive correlation, between “liberty” and “democracy”. He argues that democracy may “deprive the individual citizen of a great many liberties which he might have in some other form of society”, just as a “liberal-minded despot would allow his subjects a large measure of personal freedom”; thus “there is no necessary connexion between individual liberty and democratic rule”, or between the question “who” governs and the question *how much* the government, democratic or not, interferes with the private liberties and rights of an individual citizen. Berlin argues: “The

connection between democracy and individual liberty is a good deal more tenuous than it seemed to many advocates of both” (Berlin 2004, 176-178.) Following Constant and Mill, Berlin argues that democracy can “crush individuals as mercilessly as any previous ruler”; and that

“[genuine] belief in the inviolability of a minimum extent of individual liberty [...] has little hope from the rule of majorities; democracy as such is logically uncommitted to it, and historically has at times failed to protect it, *while remaining faithful to its principles*”

(Ibid. 209-210, my emphasis).

Berlin also describes the democratic public as manipulable. While Constant defends even political rights as crucial for liberty, Berlin establishes, through a hierarchy between civil and political rights, the instrumental value of democracy:

“Perhaps the chief value for liberals of political – ‘positive’ – rights, of participating in the government, is as a means for protecting what they hold to be an ultimate value, namely individual – ‘negative’ – liberty” (Ibid. 211).

Berlin interprets the liberal tradition as a faith in the absoluteness of certain rules of inviolability of persons, based on a moral sense of what a human being is, and what human beings can acceptably do to each other – in the light of later criticisms of liberalism this view is expressed in a notably non-essentialist sense and as an expressly *normative* claim, arising from a historically developed understanding of humanity and from a conception of freedom *not* stemming from a total universal concept of rationality of human nature (a concept that Berlin considers potentially totalizing, leading to the opposite of freedom if understood in a too strong sense), but from an insight of the need of certain restrictions to the authority of *any* political power, no matter how democratic. Although Berlin acknowledges the need to sometimes compromise liberties in the name of other important values like equality or solidarity, his main motivation for defending the liberal stance is his *recognition of the fact of plurality*, the fact that there is, and will always be, disagreement about values; and that a total harmony without such disagreement is never to be found and is indeed not desirable, for any attempt to establish such a harmony is bound to happen at the expense of suffocating and repressing difference. (Ibid. 211-217.)

It is worth emphasizing with regard to the discussions following below that the early liberals who are explicitly concerned with the threat of “majority tyranny” or with the potentially oppressive collective power of the multitude over the individual pay less attention the questions *how* democratic the power in question is, how fair, inclusive and just its procedures are, or how the diversity of existing perspectives is

represented in collective decision making (even limited suffrage is rarely notified as relevant – with the exception of Mill, who supports women’s suffrage and notes that the collective opinion in practice tends to be that of the dominant group of bourgeois white men). Rather, the issue in focus is *how much that collectively channeled power affects the individual*; what the authority, whether democratically representative or not, is allowed to do to, or demand of, the individual citizen. With the exception of Constant, no explicit claim is made that increasing the participatory impact in collective decision making would in itself make the decisions more threatening to individual rights and liberties; but neither is it assumed that increased participatory inclusiveness would lend *more* legitimacy to the collective decisions and prevent their potentially harmful impact on individual citizens. Mill indeed argues that not just official representatives, but *public opinion* can be oppressive of the individual, a claim in apparent opposition to deliberative democrats’ later work emphasizing the legitimizing role of public opinion in the democratic process and the obligation of governments to take it into account. The central argument, in sum, is nonetheless not that participation as such should be restricted in order to protect individual rights, but that the *reach* of political decisions, no matter how fairly taken, should be constrained by *establishing legal or constitutional rules that protect individual rights beyond the reach of temporary collective, political decisions*.

## **1.2. Rawlsian “political liberalism”: the public Vs. the political**

To what extent is the classical liberal wariness toward “majority tyranny” and the conviction that if not the scope of participants, then at least the agenda of the “political” regarding the extent to which collective decisions can be allowed to affect individual citizens still present in contemporary liberal theory?

Although much of the rhetoric and terminology has changed, the idea that democratic decision-making proceeds within the framework of institutionalized individual rights, rather than decides over it, has been established as a rarely questioned component in contemporary liberal thought. At the same time, conventional liberal theory has made attempts, following radical democratic criticism, to reconcile democratic participation and public deliberations with the liberal framework of individual rights; to enhance the role of public reasoning in

liberal democracy, and to recognize the dependency of liberal constitutional regimes on *de facto* democratic support for their continuous viability. The somewhat derogatory rhetoric about “the majority” being eventually dangerous, manipulable, excessively moralist or simply wrong has withdrawn from liberal theoretical thought, giving space to arguments more related to institutional designs than to human psychology or to the assumed democratic and rational capacities of citizens. Still, the perception of a need to constrain democratic participation and decision-making by rights has not disappeared from liberal theory. While justifications for these restrictions have shifted from descriptive statements about the nature of majoritarian “masses” or the rationality and universality of certain political truths (although those are not as plain as critics claim in the classical texts either) to more explicitly normative, politically motivated statements. This development can also be followed in the chronology of Rawls’s own work, as he moves on to describe his theory of “justice as fairness” as a “political” instead of “metaphysical” doctrine (Rawls 1972; 1985; 1993).

As I noted in part I, Rawls’s “Original Position” as a contractual justificatory construction is based on a rational thought experiment, not on *de facto* assembly of the existing citizens of any particular polity. Insofar as this construction settles the principles that are to ground the constitutional framework on which the rest of the institutional design of a liberal democracy is based, Rawls presents a contemporary classical version of a conventional liberal theory that conceives of democracy and public discourse within the framework of pre-given rights-based institutions, not as something on which these institutions essentially depend. At the same time, though, in the course of his discussion with Habermas, Rawls denies that democracy in his vision is *subordinated* to the politics of rights, or that his version of liberalism makes political and private autonomy of the citizens compete with each other (Rawls 1993, 396). Thus, while establishing the primacy of rights in line with earlier liberal thinkers, Rawls, unlike them, denies that there actually is a discrepancy between democracy and rights. This view could be attributed to his limited conception of democracy, but as I will indicate below, it can be also defended when democracy is conceived of in more inclusive terms.

Rawls’s work on political participation reveals a distinction between on the one hand, “public discussion” in the political sphere that is limited to the representative, administrative and judicial institutions of liberal democratic polities; and on the

other hand, the “civil society” of private citizens and their associations that is in principle indefinitely inclusive, but that remains outside the sphere of “the political”. Thus, the role of wide public participation in *forming* the institutions and in actual legislating and decision-making processes remains unspecified, and does not appear to be explicitly endorsed by Rawls. The political institutions, established in accordance with the principles of justice, are theorized so that they do not allow such religious or philosophical “comprehensive doctrines” or private “conceptions of the good”, that are incompatible with the principles of justice, to participate in the political processes. Rawls does not discuss the possibility that such ideologies might *try* to enter the sphere of public discourse, or specify how his conception of political equality treats the supporters of such inegalitarian ideologies. (Eventually, Rawls’s position can be seen as a prioritizing choice in cases where the idea of the equality of *persons* conflicts with the idea of equality of *political positions*: the principles of justice elevate the moral equality of persons above the political equality of *doctrines* that do not recognize such equality. I will return to this train of thought in part III.)

As I mentioned above, according to Rawls his political conception of justice serves “as a *basis of* public reason and justification”, thus it cannot be the *object* of such processes. For Rawls “the political” – the area where the use of collective coercive power is exercised in accordance with the principles stated above – is a restricted area, where “the political values”, that is, those in accordance with the principles of justice, override the “nonpolitical” ones. Thus, his argument about the relationship between public participation and basic rights is somewhat circular: the practice of “public reason” is encouraged in cases where “constitutional essentials and basic questions of justice are at stake” – in other words, when debating the basic issues of rights; but it cannot be used to *compromise* the rights established in accordance with the principles of justice. (Rawls 1993, 137-140.)

Rawls’s debate with Habermas indicates that compared with the proponents of deliberative democracy, he has a remarkably different view of the “public sphere” in which public deliberations and discussion can be unlimited in terms of agenda or participants. What Rawls identifies as Habermas’s “public sphere”, he calls “the sphere of the social”: the sphere of “background culture” that contains “comprehensive doctrines of all kinds” that are argued about “as long as society has vitality and spirit”; that includes debates within universities, churches, societies and associations, “endless political discussions of ideas and doctrines are commonplace everywhere”. This “public debate” that for deliberative democrats is the political

debate with a binding impact on the outcome of *de facto* political and legislative decisions, is for Rawls strictly separated from the properly political: “it is the culture of the social, not of the publicly political” (Rawls 1996, 383). For Rawls, this public discussion in the “social sphere”, in contrast to that in *political* institutions, is not framed by normative constraints: it *may* contain “pursuits of morality, truth and political reasonableness”, but the realization of those values remains ultimately dependent on the virtues and intelligence of the participants; it is not subject to institutional norms (Ibid. 384).

The concept of “justice as fairness”, with its foundational political principles (freedom and equality of citizens, society as fair system of co-operation), is developed prior to and apart from this open public forum and is just *presented* to the citizens to consider and understand; the citizens are not consulted during the process its formation. The role of the citizens in founding the initial, basic terms of justice remains limited to the hypothetical participation in the thought experiment of the Original Position. The principles forming the concept of “justice as fairness” are settled beyond public debate: it is conceived as a *framework* to public discussions rather than their object. At the same time, that restricted framework of “constitutional essentials” constitutes the *only* area of public life that is seen as properly “political”. Thus, for Rawls, “the political” is essentially separated from “the public”: while the public is free to participate in open discussions in the non-political “social sphere”; the area *within the political* that is open to debate and discussion, is limited, as critics have noted.

Rawls does not explicitly discuss the role of citizens in actual political decision making or the questions of inclusiveness of the representative democratic institutions in terms of social position or “social group” membership. “Public participation” is seen either as participation in elections that constitutes the ordinary citizens’ only link to the properly “political” sphere, or as participation in debates in the “civil society” that is separated from that sphere. This means that the public does not get directly involved with “political” matters. As for the public’s role in questions concerning constitutional rights, Rawls denies that the thought experiment of the Original Position means that factual citizens have *no* say in the processes of founding, amending and reviewing constitutions. He acknowledges the historicity of the founding of the existing liberal democratic constitutions and claims that his political conception of justice is open to reflection and revalidation. At the same

time, he still insists that constitutional rights are settled in accordance with the principles of justice as the constraining framework to such reflective processes that all reasonable participants assumedly endorse. Not denying the importance of the “Rousseauian” political autonomy of citizens, Rawls argues that *protecting constitutional bills of rights from majoritarian decisions is not in conflict with such autonomy and indeed enables it by upholding the freedoms of conscience, thought and speech*, eventually by protecting them from such majoritarian decisions that might threaten them. (Rawls 1993, 399; 404-405.)

Thus, regarding the relationship between the liberal constitution granting liberal rights to all citizens and majoritarian democratic decisions, Rawls, in spite of his reluctance to confirm it in later discussions, takes the conventional liberal position stating that *constitutional rights work as external constraints to democratic decisions and should be protected from the eventual consequences of such decisions*. At the same time Rawls does not admit what many critics blame him for: that the content of liberal constitutions is above political debates and public scrutiny. He acknowledges the historicity of the US constitution as well as its initial shortcomings in the form of allowing slavery and group-based (gender- and race-related) inequalities of rights, which indicates the importance of the consequent amendments made to that constitution. Perhaps surprisingly to the readers familiar with the central arguments of his critics, Rawls emphasizes that *the processes of founding constitutions are essentially political*. He also argues that no constitution can be enforced or enacted without a profound democratic support of the citizens; it cannot express values that are not generally endorsed by them and cannot thus be fully conceived as an external normative framework imposed on a citizenry from above, prior to consulting their moral and political sensitivities.

At the same time, despite his expressed awareness of the dependency of political founding, legislating and revalidation processes on the (at least implicit) consent and the political attitudes of the existing citizenry, Rawls fails to incorporate actual citizen participation in his legitimizing scheme. As I indicated in part I, Rawls’s extended legitimizing pattern is a “four-stage sequence” in which first, principles of justice are selected in the Original Position; second, the Constitution is sketched *based on these principles*; third, legislators enact laws *as the Constitution allows*; and finally, judges interpret them in the course of their enactment. All of those stages stem logically from the Original Position, and none of them actively involves actual citizens. Thus, there is a tension between Rawls’s awareness of the

dependency of democracy on its citizens and the lacking role of those citizens in the theoretical legitimation of the institutions and principles that they are supposed to endorse. (Rawls 1993, 385-406.)

Contrary to some classical liberal writers as well as to those critics of liberalism who see a necessary conflict between “the logic of democracy” and “the logic of liberalism”, Rawls denies that liberalism needs to entail a contradiction between individual civil rights and political participatory rights; on the contrary, he sees them as co-originate from the same sources and thus logically and inherently compatible. In Rawls’s view the dilemma between “democracy” and “liberalism” is a false dilemma, but he admits that liberalism faces an *inherent* dilemma between its universalist moral law and its democratic ideal of people’s sovereignty; between the statements “no moral law can be externally imposed on a sovereign democratic people” and “the sovereign people may not justly<sup>8</sup> [...] enact any law violating [the universal individual basic] rights” (Rawls 1993, 416). But that dilemma is according to Rawls not limited to liberalism but expresses a general risk that is present in all political institutions, none of which can ever be perfect. Is that a statement just dismissive of the inherent flaws of existing liberal democracies, like imperfect inclusiveness and limited democratic legitimacy? Or does it express an insight in the necessarily imperfect nature of *any* political institutions and organizations that no theoretical design is able to eliminate; indicating that Rawls’s protective position on the primacy of liberal rights (civil as well as political) is based on the acknowledgement of that imperfection, as a normative defense of the next-best political system in the absence of the perfect one? (Ibid. 412-420.)

### **1.3. Constitutionalism: protecting democracy from itself**

In the constitutionalist school of contemporary conventional liberal thought the idea that liberal individual rights have to be secured from the possibly unpredictable effects of democratic decisions is preserved in a more explicit form than in the Rawlsian tradition of semi-deliberative contractarian liberal thought. Instead of an actual or hypothetical contract, the constitutionalist tradition relies in its

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<sup>8</sup> Rawls adds in parenthesis: “but may legitimately”; thus making a distinction between “justice” and “legitimacy” and confirming that they may contradict each other. Rawls himself sees justice as more important value than legitimacy, but acknowledges that a different position can be legitimate under some circumstances (Rawls 1993, 428).

justification to the Kantian idea of each individual person's moral autonomy and integrity that cannot be compromised by any collectively cherished values or collectively supported decisions. The constitutionalist tradition follows the early liberal skepticism toward the democratic public; it unapologetically underlines the need to protect the individual rights from the eventual whims of the majority – that is the task of the constitution, juridically hard to change without creating a serious legitimacy crisis for the polity itself. A major driving force behind constitutionalist thought is the idea that democracy is structurally able to eliminate itself by enacting, in the course of due democratic procedures and while respecting the will of the majority, illiberal or undemocratic laws; or by electing leaders who are willing to replace the liberal democratic order with a totalitarian rule. Thus the explicit goal of constitutionalism is to constrain democracy, not just in order to safeguard the rights of individuals, but also to preserve democracy itself. A means to protect the democratic system from its own excesses is *judicial review*, the power of independent judges to block democratic decisions that are deemed unconstitutional. In this chapter I analyze how the relationship between democratic participation and constitutional rights is envisioned in the work of a major proponent of this branch of constitutionalism, Ronald Dworkin.

In his defense of what he calls a “constitutional conception of democracy”, Dworkin touches the core question at stake in this study. Admitting that majoritarian democracy is not necessarily at odds with the idea that individuals have “important moral rights that the majority should respect”, he writes: “In some political communities, [...] the majoritarian premise has been thought to entail that *the community should defer to the majority's view about what these individual rights are, and how they are best respected and endorsed*” (Dworkin 2003, 241-242; my emphasis). Dworkin argues that that is the case in Great Britain, while in the US most people agree “that *the majority should not always be the final judge of when its own power should be limited to protect individual rights*”, and accept that “at least some of the Supreme Court's decisions that overturned popular legislation, [...] were right” (Ibid. 242, my emphasis). Thus, he explicitly argues that rights should *not* be conceived of as objects of democratic deliberations and decisions rather than its external constraints. Instead, the ultimate authority on what rights we have is the Constitution of a given liberal democratic polity, and the authority to interpret and enforce rights is to be left to the courts, not to democratically elected bodies.

Dworkin does not find this position problematic from a democratic point of view; all disagreement within liberal thought on this matter appears to be just a question of interpretation of the meaning and value of democracy. He even claims to make this argument *for the sake of democracy*, on the premise that the most important value in democracy is *equality*. In Dworkin's view, the legitimacy of constitutional democracy is based on the value of equality. Equality, he argues, is better protected by the imposition of equal individual moral rights than by following the will of the majority. Thus it is legitimate to restrict the majoritarian premise in order to preserve rights, if a majority's decision would threaten the equality of status and rights of citizens. In Dworkin's interpretation the "defining aim of democracy" is that "collective decisions be made by political institutions whose structure, composition, and practices treat all members of the community, as individuals, with equal concern and respect"; not that collective decisions always be those that a majority of citizens would favor (Dworkin 2003, 242). Based on this conception of democracy, the constitutional constraints on democratic governments are seen *as an imposition of democratic conditions* - that is of equal status for all citizens; not a restriction that compromises them.

If the task of the judicial review is to prevent majority-backed representatives from enacting discriminatory laws (Dworkin provides a clear-cut example of a law banning a group from public office on the basis of their race), Dworkin argues that instead of compromising democracy, it indeed has the power to enact it. This way, the view that majoritarian decisions ought to be restricted by undebatable equal moral and legal rights of all individuals does not place rights in conceptual opposition to democracy but views them as a tool for its enforcement (albeit in a limited mode; in order to defend it from itself). Dworkin's positive vision of democracy pictures a community of "moral membership" that in contrast to overwhelmingly collectivist (communitarian) ideals of community is based on the mutually recognized dignified status of its each member. Political participation in such a polity that equally respects all its members is an essential right but not a means for self-fulfillment (Dworkin, like Constant and Berlin, regards the idea of political participation as a way of self-fulfillment as potentially dangerous): a moral member of a "genuine political community" must have a say in collective decisions, a stake in them ("an opportunity to make a difference"); and also *independence from them*. That condition requires "universal suffrage and effective elections and representation", while it "does not demand that these be the only avenues for

collective decisions”; it “also insists on free speech and expression for all opinion, not just on formal political occasions, but in the informal life of the community as well” (Dworkin 2003, 248). Thus, the non-negotiable democratic rights that Dworkin subscribes to are similar to those argued for by Mill; and like Rawls, he makes a distinction between the properly “political” sphere of representative institutions and the “informal life of the community”, where the bulk of public discussion is supposed to take place.

Dworkin takes issue with the proponents of what he calls the “communitarian” account of democracy; those who believe that “special benefits [...] follow, both for people as individuals and for the political society as a whole, when citizens are actively engaged in political activity in a certain spirit”, arguing that

“they rely on a dubious but rarely challenged assumption that public discussion [...] is of better quality and engages more people in the deliberative way that the communitarians favor if these issues are finally decided by legislatures rather than by courts” (Dworkin 2003, 252).

He believes, contrary to the proponents of “communitarian” or deliberative democracy, that public debates, or the individual citizen’s chances of effectively participating in them, are not any worse in degree or quality when their goal is to influence *judicial* decisions than when they are directed at decisions made through *legislative* processes. True to the liberal tradition introduced above, Dworkin thus does not oppose public participation in open moral and political discussions in the “civil society” (he even supports it), but he takes for granted that political and legislative decisions are taken in the “proper political” sphere of representative democratic institutions *or courts*; and he argues that democratic majoritarian decisions must be constitutionally limited with reference to individual moral rights, through judicial interference in the decisions of legislative bodies, if necessary in order to defend those rights. Those constraints, however, are not established in explicit defiance to democratic values, but in order to protect democracy from itself.

In contrast to the proponents of radical and deliberative models of democracy, Dworkin does not pay specific attention to the quality and inclusiveness of democratic procedures; “democracy” as a value is expressed in the norm of equality that in his account is best guarded by the enforcement of equal individual rights for all. “Majority rule” is discussed as *representative* democracy, and although Dworkin admits that there can be different interpretations of how to best institutionalize it, he does not even consider the possibility of wider public participation in “proper”

political decision making, certainly not in deciding on the questions of establishing, interpreting and enforcing rights. Regarding the relationship between democracy and rights, the constitutionalist account of democracy states clearly that constitutional rights should remain beyond the grasp of majoritarian decision making and that in case of conflict, disagreements over rights should be solved in courts, not by citizens or legislative bodies. Because rights, being equal, are assumed to fulfill the main premise of democracy – the premise of equality; the constitutional limits to democracy create no problem regarding democratic legitimacy. Dworkin admits that disagreement can occur about which laws or decisions can be deemed sufficiently “undemocratic” to qualify for rejection by judicial review in the name of democracy, but he argues that also those disagreements should be settled in courts, because the representative bodies may be fallible or biased. In Dworkin’s view, such arrangement cannot be objected as undemocratic, because it is undertaken for the sake of democracy in the first place. Judicial review of democratic decisions in order to guarantee their compatibility with constitutional rights is the guarantee of democratic legitimacy, because it defends the ultimate democratic ideal, the equality of all people before the law. In Dworkin’s view the legitimacy of a democratic regime is to be found in its egalitarian politics of rights rather than in the inclusiveness of its decision-making procedures. (Dworkin 2003, 242.)

Dworkin’s interpretation of “majoritarian” democracy is a rather Rousseauian (albeit not participatory) vision of democracy as “collective self-determination”, not as intersubjective action between individual citizens deliberating on common concerns. He perceives such conception of democracy as the greatest threat to individual rights, and thus to the ideal of equality and therefore to democracy itself: “Self-determination is the most potent – and dangerous – political ideal of our time” (Dworkin 2003, 246). Dworkin describes the idea of *participatory* democracy as a decision making order in which the citizens can *identify with* their governors – an idea vaguely reflected, albeit in positive terms, by Mouffe. In Dworkin’s view this identification often implies a concrete, romantic shared identity, like that of ethnicity, language, religion or race; while Mouffe talks about collective “political” sovereignty. Curiously, they share the view that democracy implies an *identification* between the governors and the governed – albeit for Dworkin, that is a horrific vision and for Mouffe, a genuinely democratic one. It is also interesting to compare Dworkin’s *equality-based* defense of constitutional rights as constraints on democracy with Mouffe’s view that democracy, with its core value of *equality*, is in

tension with liberalism, whose core value is, in her view, *freedom*. This contradiction raises questions about the position of the concept of equality in liberal democratic theory: does the liberal politics of rights *promote* the value of equality and thus democracy (like Dworkin claims); or is it in contradiction with it, as Mouffe argues? (Mouffe 2000, 2-5.)

#### **1.4. Internal critique of “apolitical” liberalism**

The criticism posed against the conventional liberal model by radical democrats and “poststructuralist” theorists will be presented and discussed in more detail below in chapters 2 & 4, but I introduce a summary of one of their central arguments here before discussing similar critical points made against conventional liberal theorists *within* the tradition of liberal political theory.

Mouffe, relying on Carl Schmitt’s earlier criticism of liberalism, blames liberal theory for attempts to eliminate “the political” from politics. According to her, Rawls’s theory tries to remove any actual disagreement from democratic politics: people are supposed to seriously disagree only about religious and philosophical questions, which are rendered to the non-political sphere of privacy; not about questions of justice that are considered properly political. In Mouffe’s view, these cannot be separated from each other, because comprehensive world views include opinions on justice and on ways to organize the social world – thus, the “right” cannot be separated from “conceptions of good” and prioritized in the political sphere. According to Mouffe, liberal theory reduces political discourse to rationalist *moral* discourse (which she finds has *individual*, not political nature), so that conflicts, antagonisms, relations of power and forms of submission and oppression are made to disappear. Mouffe argues that in reality such a final agreement on public interest can never be reached: “to imagine such a situation is to dream of a society without politics;” and adds: “One should not hope for the elimination of disagreement but for its containment within forms that *respect the existence of liberal democratic institutions*” (Mouffe 1993, 50. My emphasis, with reference to discussions below in chapter 4 and in part III.).

Mouffe’s and others’ critique of the alleged liberal escape from confrontation, conflict and real pluralism in the political sphere will be discussed more elaborately

in chapter 4. There I also indicate that Mouffe's own position appears at some moments to be closer to that of conventional liberals and deliberative democrats than she claims, while at other moments her ambiguous commitment to liberal democratic values indicates her conditional support to democracy as such. (Mouffe 2005, 1-7, 90-118.) Below, having summarized some of the most clear-cut conventional liberal positions on the conceptual position of democracy and rights, I present some arguments from contemporary liberal discourses that are partly in line with the radical democratic criticism; which, coming from thinkers who still support a version of conventional liberal politics of rights and representative democracy, undermines some critics' claims that "liberal" (pro-rights) positions necessarily represent an inflexibly universalist, anti-pluralist and conflict-averse view of politics.

Jeffrey C. Isaac, a proponent of a form of Arendtian radical democracy, but also a supporter of core liberal values, interestingly poses some arguments similar to those of Mouffe. While his concern about the "apolitical" nature of Rawlsian liberalism is not so much motivated by revealing hidden power relations, exclusion of disadvantaged minorities or an alleged "moralism" of liberalism; but rather by ensuring the survival of liberalism itself in the face of the eventual resentments that its excessive legalism, and its restrictive account of what constitutes a legitimate political argument, may create. Together with Matthew F. Filner and Jason C. Bivins, Isaac criticizes, in accord with radical democratic critics like Mouffe and Honig, Rawlsian "political liberalism" for its attempts to eliminate "the political" from the sphere of politics, to silence disagreement and to invalidate and disqualify, on the basis of the strict liberal criteria of "reasonableness", illiberal arguments like those of religious fundamentalists from the range of acceptable political claims. (Isaac, Filner & Bivins 1999, 222-264.)

Isaac, Filner and Bivins criticize how "political liberalism" deals with the pursuits of metaphysical "comprehensive doctrines" (like religious fundamentalism) to intrude into the political sphere. Although they agree with Rawlsian "political liberals" about their skepticism toward moral absolutism in politics; and believe that the historical achievements of individual freedom of expression and cultural and religious diversity are "*political* concerns that cannot be sustained by appeal to metaphysical truth-claims and that presuppose certain ways of organizing political power"; they disagree with "the depoliticized politics that political liberals endorse as a way of dealing with the challenges presented by fundamentalism" (Isaac et al 1999,

224). They argue that the “models of avoidance” by which political liberals “seek to insulate public debate and to privatize discourses on the good life are both philosophically and practically deficient” and in “disturbing tension with democratic values of associational freedom, political pluralism, and collective self-government” (Ibid.). Like Honig and Mouffe, Isaac et al call political liberalism “apolitical”, wrongly privileging civility and orderliness over democracy and open debate in its conception of public life. They also criticize its tendency to privatize and bracket out matters of identity and moral concern from political debates. Rejecting such limitations, even in case of “fundamentalist” positions, they defend a “radicalized, robustly democratic liberalism, one that sees the importance of historically achieved liberties and constitutional limits on public authority, but that also sees these achievements as subjects of chronic democratic contestation” (Ibid. 225-226).

Isaac et al’s position is interesting in the context of the “liberal Vs radical-democratic” disputes for several reasons. Their primary concern is not the inclusive participatory values that other radical democrats explicitly promote (although they are sympathetic to such aims), but democracy itself as a value, here seen in tension with such “liberalism” that tries to limit its scope. Unlike many other democratic thinkers who do not really seem to take into account the existence of conservative, fundamentalist or communitarian illiberal positions in the political sphere and who do not discuss with such positions; Isaac et al explicitly defend also the illiberals’ right to articulate their concerns in the public sphere and not be dismissed with reference to liberal values. Unlike, for example, the feminist writers who criticize the same liberal norms on partly the same grounds but who seem to take it for granted that those excluded as deviant from liberalism’s “reasonable” norms are women, sexual or ethnic minorities or other vulnerable and politically progressive groups; Isaac et al recognize that the liberal conditions of reasonableness may be used to dismiss *anti-egalitarian, illiberal* and *conservative* positions. Their primary complaint against “political liberalism” is its tendency to “legalize” politics: it displaces matters of disagreement, like the issues where “comprehensive doctrines” have intruded the public sphere, *from the sphere of democracy to the courts*; to be decided by judicial review. This, they claim, is anti-democratic as well as self-defeating, because the resentment that the undemocratic power of the judicial review represents may be channeled *against liberalism*, in support of illiberal conservatism. Thus, their critique of liberalism is not directed at liberal premises: they claim to criticize “political liberalism” *in order to defend liberalism*. (Isaac et al 1999, 239.)

I will discuss some problems connected with Isaac et al's position in part III. The relevant import of their argument to this section is that a critique of overt reliance on judicial review and the consequent "legalization" of politics; as well as an ambition to enlarge the sphere of the political in terms of agenda and to promote the open articulation of conflict in democracy, can be presented along with the support of some universal liberal values. Likewise, Shapiro criticizes liberal theory for attempting to "escape the political"; or at least to minimize its reach through "constitutional constraints on the range of decisions that legislatures should be free to enact"; arguing that disagreement – also on rights – is an essential part of social life and thus belongs to the sphere of democratic politics. He calls such attempts to "fly from politics" chimerical, because they rest in his view on implausible assumptions that there are some "pre-collective" or "perfectly private" states of affairs, and therefore depend on "misleading views of political reality". He notes ironically that the prospect of changing constitutions "makes liberals nervous", awakening images of "intimidating Big Brotherism shrouded in fraternal communitarian rhetoric" (Shapiro 1999, 15-16).

Like Isaac et al, Shapiro, claiming to seek a "middle way between the liberal and communitarian positions", argues in favor of extending the area of democratic participation at the expense of the restrictive sphere protected by liberal legal rights. He also emphasizes the *political* nature of all social questions, including the institutional questions of justice; and rejects any pretenses of neutrality, presenting an explicitly *partial* defense of a democratic approach. (Shapiro 1999a, 231-232). Recognizing that rights are not prepolitical, and that there is much disagreement about rights, Shapiro regards rights much as an object of democratic disputes, rather than their external determinator; in his view the political sphere is located "both everywhere and nowhere", thus he significantly extends the Rawlsian notion of what constitutes the political sphere (Ibid., 8-10). Still, the politics Shapiro defends can in many essential ways be considered "liberal". While he argues for bringing issues of justice and thus of rights onto the arena of democratic debates, because they are objects of major disagreement and should thus be decided democratically; he, contrary to Isaac and in line with Rawls, supports constitutional restrictions against bringing "comprehensive views" – such as religion – to the political sphere. Shapiro explicitly supports the Establishment Clause of the First Amendment of the US constitution that prevents state institutions from engaging with religion; not in order to "eliminate disagreement", but because in his view, disagreements on such issues

are potentially so strong (“explosive”) that they could destroy the sphere of *democratic* politics altogether (Shapiro 1999c, 31).

What these and other “internal” critics of liberalism share is a sense that there should be *some* boundaries on the agenda, scope, reach and influence of democratic deliberations and decisions; but that the boundaries set by Rawls and the proponents of judicial review are too narrow for a genuine democracy. The question is, which the appropriate – or necessary – boundaries are and how they are to be found and established: through democratic processes (which leads circularly, to a search for boundaries to *those* democratic decisions, etc.); through a conception of a minimal politics of rights; or in some other way.

Waldron resists the idea of rights as an external constraint to democracy from an explicitly liberal point of view. He makes a distinction between “rights” and “bills of rights”; claiming that there is “no necessary inference from a rights-based position in moral or political philosophy to a commitment to a Bill of Rights as a political institution along with an American-style practice of judicial review” (Waldron 1999, 212). Waldron points out that Bills of Rights are *political* creations with no prepolitical content and encourages political philosophers to be hesitant about “the enactment of any canonical list of rights, particularly if the aim is to put that canon beyond the scope of ordinary political debate and revision” (Ibid.). He argues that as there are disagreements on rights, attention to processes of decision-making on rights is no less important than to those on settling other political disagreements; and that the liberal ideal of autonomy requires that individuals in a democracy be able to participate in interpreting and deciding the most basic moral and political issues in society, including the question which rights they have. In Waldron’s view, the value of liberal autonomy that rights are based on implies that the autonomy of the *collective decisions* taken by those autonomous citizens must be also respected: the same reasons – mainly the faith in people’s moral responsibility – that make individuals suitable bearers of rights also make them suitable bearers of political responsibility. Thus, the values of autonomy and responsibility, on which the liberal politics of rights is based, require also that a person have a right to participate in making important decisions that concern her:

“That right to democratic participation is a right to participate on equal terms in social decisions on issues of high principle and not just interstitial matters of social and economic policy” (Ibid. 213).

The idea of removing the most crucial social issues from the sphere of democracy to courts indicates, according to Waldron, a lack of respect to such participatory rights. For Waldron, self-government and rights are not at odds, and should not be seen as such, but coexist necessarily together:

“It is precisely because I see each person as a potential moral agent, endowed with dignity and autonomy, that I am willing to entrust the people *en masse* with the burden of self-government” (Waldron 1999, 223).

Waldron questions the traditional conceptual opposition between “majority” and rights, arguing that the majority consists of rights-bearing subjects. His argument in favor of democratic decisions on rights is based, in addition to a specific interpretation of the liberal ideal of personal autonomy, on the deliberative democratic principle that people affected by decisions should be able to participate in making those decisions. On the question “[who] shall decide what rights we have”, he answers: “The people whose rights are in question have the right to participate on equal terms in that decision” (Waldron 1999, 244). The alternative is the solution, profoundly undemocratic in Waldron’s view, to entrust the final authority “to a scholarly or judicial elite”. Therefore he regards *the right of political participation* as the “right of rights”; and any authority given to judicial elites to reject democratic decisions on rights is deemed illegitimate. Arguing against the constitutionalist view of democracy, Waldron dismisses the idea of the possibility that a majority might eventually support an unjust and tyrannical regime by a relativist reference to epistemic uncertainty about what *should* be considered unjust and tyrannical (Ibid. 247).

I discuss in part III some problems with Waldron’s position; e.g. his deduction from the liberal *norm* of respect for the moral autonomy of each person an empirical assumption that the majority of those individuals always *will* respect each other’s autonomy; or the paradox that a commitment to the political “right to participation” on equal terms itself imposes some restrictions on the decisions made by a majority, if that commitment is to be continued in time. Here it suffices to point out that Waldron’s position further complicates a clear-cut division of positions within democratic-theoretical debate into “radical democratic” and “conventional liberal” ones, because while Waldron takes an explicitly “democratic” position in the question of the conceptual relationship between democratic decision making and rights, he remains conventionally “liberal” in his account of democracy: the question

of democratic legitimacy concerns protecting democratic decisions from the constitutional constraints and the “elitist” process of judicial review; but not necessarily deepening and making more inclusive the representative democratic processes and institutions themselves.

While Waldron’s position regarding the relationship between democratic decisions and the politics of rights is that the latter should be subordinated to the former; “democracy” in his interpretation is traditional liberal representative democracy; and while arguing in favor of increased institutional trust toward the deliberations and decisions of such a democracy, he is not concerned with how representative of all possibly interested parties and how inclusively made such democratic decisions are. In a way, Waldron’s position explicitly defies Mill’s warning that what rights individuals have should not be determined by a democratic opinion that for several reasons itself may represent an elitist position, rather than a genuinely inclusive one. It follows that the constitutionalist position may be more compatible with those theories of democracy that are concerned with the struggles of the most disadvantaged sections of the society than is generally assumed in these debates.

To summarize a “liberal” position on the conceptual relationship of the politics of individual rights to democratic participation (while admitting that such a generalization is hard to make), it can be perceived that although earlier liberal writers explicitly opposed the idea of “too much democracy”, openly considering too extensive democratic participation as a potential threat to individual rights; contemporary liberal theory is more ambiguous and more flexible on the issue. Rawls, although establishing the priority of individual rights and liberties in his first principle of justice, denies that his theory explicitly subordinates the logic of democracy to the logic of individual rights. He advocates a conventional liberal view, according to which the constitutional protection of rights and liberties does constitute a constraint to democratic decisions; but he also recognizes, at least in his later work, the role of democracy as a process needed to review, revalidate and re-justify those rights; and he recognizes the historical and political nature of the processes of constitution-making. On the other hand, his account of democracy remains obscure: while emphasizing the role of the democratic citizenry as a whole, that citizenry is relegated to a civil society separated from the proper political sphere which remains restricted to the official representative institutions of the liberal

democratic states. Nor does Rawls pay attention to the genuine inclusiveness of the democratic processes of revising the existing rights. Thus it remains unclear how much public participation in “real politics” he actually welcomes or whether he would see such inclusiveness still as a potential threat to the politics of liberal rights.

Even Dworkin’s strictly constitutionalist position cannot be directly interpreted as one opposing “democracy” to “liberalism” and proposing to restrict the former for the sake of the latter. Rather, Dworkin has a different conception of democracy, stating that majority decisions need constitutional constraints *in the name of democracy*, not in opposition to it; because for him, equality of rights is the ultimate manifestation of democratic values, such as political equality and the moral autonomy of all persons. Both Rawls and Dworkin refuse to equate “majoritarianism” with democracy understood as the “will of the people”, implying that sometimes a majority may pass decisions that are “undemocratic”; thus indicating that endorsement by a majority cannot be the only criterion of the democratic legitimacy of decisions, rules or laws. The classical liberal “majority tyranny” argument, both in its earlier simpler and later more sophisticated forms, indeed appeals to the value of *equality* – expressed in the liberal doctrine through the politics of equal legal rights; thus defying those critics of liberalism who oppose the concept of equality to that of liberty, claiming that liberals overemphasize the latter at the expense of the former. Ultimately, the disagreement between contemporary conventional liberalism and its radical democratic critics is not so much over whether democratic legitimacy and equality are inherently important values or subordinated to the values of individual rights and liberty; but over the interpretation of the meaning of “democracy”, over the capacity of equal legal rights to generate justice and the desirability in a democracy of a constitutionally enforced politics of rights.

As to the question whether rights are primarily conceived as external constraints to or objects of democratic deliberations; the liberal position, originally certain on the former, has become more flexible with time; particularly regarding the epistemologically universalist view of rights as “natural” expressions of a timeless, apolitical and ahistorical moral imperative rather than a normative moral, legal and political commitment. Contemporary liberals, even when defending the political doctrine of constitutional rights as constraints to democratic decisions, increasingly recognize the political nature and the historically contingent development of those rights (to which I will return in part III). Also, they recognize the role of democratic

processes in creating, establishing and perpetuating the existing conceptions of rights. Some liberal theorists recognize that without democratic endorsement, constitutions have thin chances of survival. At the same time, the belittling attitude toward the value of inclusiveness and toward more substantive public participation remains present in many current liberal accounts of democracy. It is unclear whether increasing the participatory and inclusive dimensions of democracy are simply not seen as relevant or whether such dimensions are still seen as threatening individual rights. If there are accounts of democracy “too democratic” for the liberal taste, would such accounts be able support the continuity of democracy itself?

It is worth noticing the different, sometimes opposite meanings that some concepts acquire in these debates. For example, just as “democracy” is different in Dworkin’s, Mouffe’s or Waldron’s interpretation; “participation” may be comprehended in a Rousseauian, communitarian way as a way of being “part of a whole”, melting into an idealized but suffocating harmony which represses difference, dissonance and disagreement; or it can be seen as a way of granting publicity to that same diversity of positions, interests, opinions and identities – which paradoxically requires that all the participants have at least a right to express their claims in public with no direct or indirect repressions and no fear of reprisals. Ironically, the pursuit of a repressive and homogenizing sense of harmony is ascribed by liberals to communitarians and participatory democrats and by radical democrats to liberals and deliberative democrats. On what conditions can participatory democracy be repressive of difference? Or, when can liberalism turn “communitarian” in the same way, if it can?

## **2. The egalitarian argument: rights as privileges**

In this chapter I take up some of the central arguments against the conventional liberal conception of the primacy of rights and the conventional liberal understanding of democracy; posed within democratic theory debate by radical democratic, feminist and poststructuralist writers who argue for more participatory, inclusive and pluralist conceptions of democracy. Their arguments are not “illiberal” or anti-liberal in a traditional sense, as they stem from the same egalitarian premises as liberalism and are presented on behalf of the allegedly marginal and vulnerable

social groups that have been historically excluded or disadvantaged on the basis of differences of gender, “race”, sexuality, class or ethnicity. It is their central shared argument that those groups continue to be disadvantaged by a political system that is formally egalitarian, universalist and neutral, albeit in a less explicit manner; and that the universalist politics of individual rights tends to perpetuate the existing injustices under the guise of its apparent egalitarianism, partly because the officially neutral system of rights has institutionalized some of the unjust social structures that privilege some groups and marginalize others.

The critics claim that liberal democracy as we know it, as well as the Enlightenment humanist ideal of equality and autonomy that it emerged from, developed in a historical context that systematically excluded women, ethnic minorities and lower social classes from the range of free and equal personhood; thus liberal political theory and practice, even when acknowledging the equality of all persons regardless of their gender and other social or biological qualities, inherently still carries along the structures that were initially created to protect the privilege of the white heterosexual men of emerging successful economic classes. It is claimed that liberal rights as the rights of free, autonomous citizens, were designed from the perspective and the experience of that particular privileged section of society, and that the subordination of women and minorities is structurally inscribed in them. Thus, according to critics, liberal rights inherently privilege men and can impossibly recognize women’s and minorities’ substantive equality in practice, even if it is formally extended to them; because their experience and perspective was never consulted when establishing the liberal democratic system in the first place.

Because of the skepticism toward the potential of the rights-based framework to provide substantial equality, feminist and radical democratic critics are wary of the idea of restricting democracy in order to protect individual rights from its influence. Rights are not necessarily opposed, but they are viewed with skepticism and their importance as legitimizing device is put under scrutiny. The ideal of state neutrality, central in liberal thought, is also viewed with skepticism, because the liberal state is perceived to be inherently biased in favor of the more privileged groups: men, whites and upper social classes. Given the *de facto* inequality of social groups, formal equality and neutrality is blamed for preserving the *status quo* and thus sustaining the inequality, in spite of its pronounced egalitarian values. Therefore the critics who view rights primarily as institutionalizations of the privileges for those who already hold strong social positions while for those with limited opportunities the existing

formal rights may remain useless in practice, support deep democratic arrangements that allow the public to participate in legislative processes in order to correct the existent injustices. Here, the focus is not only on the relation of public decision-making power to existing rights, but also on *what kind of democratic procedures* are followed: conventional representative democracy, in which the role of the citizens is primarily that of a voter in elections, is considered insufficient to voice the perspectives of the less privileged and underrepresented groups. Therefore, modes of direct participatory democracy as well as specific policies to enhance group-based social equality are favored by progressive critics of liberalism.

Communitarians as well as radical democratic and feminist critics challenge the liberal conception of rights as individualist, abstract and unrealistic, ignoring the social ties, emotional relationships and ethical concerns of social actors and such forms of social power that are hard to resist through legal means. Furthermore, the very language of law and rights is found “normalizing” and thus potentially oppressive, constitutive of certain kinds of subjects as determined by the law and state institutions. The universalism of liberalism is found homogenizing, suffocating difference and prioritizing privileged groups by universalizing their experience and marginalizing others. As a response, critics have developed visions of inclusive democracy that is claimed to be more capable of incorporating different social perspectives than conventional liberalism. In those visions participation conceptually supersedes rights, although the relationship is not so simple: also other aspects than the legal or the democratically procedural are considered important. The greatest danger to democratic values is seen to be *patriarchy* and the *elitism* of the dominant groups and ruling classes, as well as a rigidly rights-centered approach to politics that delegates political power to non-democratic institutions like courts.

The critics also challenge the conventional liberal division lines between “the right” and “the good”, the private and the public, politics and morality. They claim that such division lines are artificial and encourage a tendency to control certain modes of power while ignoring others, and to exclude certain issues, as well as certain social groups, from the sphere of the political. Below I take a closer look at how the relationship between rights and participation, private and public and the universal and the particular is conceptualized in the arguments of some radical democratic, feminist, and/or poststructuralist critics of liberalism, like Young, Mouffe, Brown, Catherine MacKinnon and Carole Pateman.

## 2.1. Democratic critique of liberalism

As I noted above, the universalist model of political legitimation of conventional liberal politics has been criticized from many directions; communitarian, radical democratic and feminist criticism being just some of them. In this section I focus on some of the viewpoints of the radical democratic critics that I briefly introduced above. The major critical arguments discussed here are the claims that the liberal contract is inherently undemocratic, because it *assumes* the consent of the citizens without actually consulting them; and because it reduces political citizenship to the passive role of a voter for representatives while attempting to eliminate serious disagreement and certain sections of the citizenry from the political sphere. It is also claimed that the Rawlsian rationalist thought experiment cannot represent in reality all sections of the society and therefore the principles that it generates, or constitutional institutions stemming from these principles, should *not* be protected from public scrutiny. In the radical democratic view the liberal politics of rights cannot be treated as absolute, beyond the reach of democratic revision and change, because the procedures used to generate it fail to be sufficiently justified and the historical conditions that constitute its background have favored some social groups at the expense of others. Critics suspect that the universal politics of rights is likely to stabilize and perpetuate that initial injustice rather than cure it. (See e.g. Pateman 1988, 1-18; MacKinnon 1998, 215-234; Young 1990, 96-121; Brown 1995, 135-165.)

I will briefly return to the arguments about political liberalism's tendency to eliminate disagreement from the political sphere, presented by Mouffe and Isaac, Filner and Bivins; and then introduce the critical argument developed by Young that the alleged exclusion of difference is inherent in the justificatory model of liberal thought rather than contingently connected to it. In Young's view political liberalism fails to promote universal justice, because it is *ideological* in its bias toward the privileged groups of society while pretending to be neutral and equally representative of all reasonable social perspectives (Young 1990, 96-121).

As I noted above and discuss in more detail below, Mouffe criticizes the liberal ideal of politics for attempting to eliminate conflict through rationalist exclusions and for its allegedly moralist politics of rights. Her primary concern with conventional liberalism is that it suppresses substantial disagreement and discourages open political disputes. She regards the conventional liberal conception of politics as

hostile to pluralist democracy, because *in its quest for consensus* it allegedly excludes genuine disagreement from the political sphere and thus encourages apathy and alienation among the public, who can become frustrated and even violent because of the lack of the possibility to publicly articulate their grievances (Mouffe 2000, 104). Similarly Isaac et al, as also noted above, criticize the tendency of “political liberalism” to privatize and bracket from political debates “the matters of identity and moral concern”; arguing that the Rawlsian ideal of “civic reason” *illegitimately* excludes certain arguments or “modes of discourse” from the public sphere. Admitting that political liberalism does not attempt to *proscribe* political speech, they note that it nonetheless *dismisses* speech that is not in accord with the requirements of public reason, as unconstitutional: “[...] while there exists a perfect civil freedom of expression, the role of the ideal of ‘public reason’ is, it would seem, to underprivilege, an indeed politically *invalidate*, certain modes of discourse” (Isaac et al 1999, 231-232). They claim that the constitutional “gag rules”<sup>9</sup> by which political liberals “seek to insulate public debate and to privatize discourses on the good life” while relying on an implausibly “thin” conception of political identity and of public discourse; are “both philosophically and practically deficient” and “*in disturbing tension with democratic values* of associational freedom, political pluralism, and collective self-government” (Ibid. 224, my emphasis).

Although Isaac et al, like Mouffe, criticize the conventional liberal restrictions on democracy for their violation of some deep democratic values; they do not see these restrictions as expressions of a utopian quest for harmony and consensus the way Mouffe does. On the contrary, they interpret Rawls’s theory, particularly its later version in *Political Liberalism*, as a “liberalism of hard times”, a vision whose goal is to *deal with the existence of irreconcilable differences and conflicts of value* in a period of disillusion, after the social democratic vision of universal welfare and happiness of the 1960-ies and 1970-ies has given way to an atmosphere of civil strife and emerging fundamentalisms, exacerbated by the decline of economic growth and increasing scarcity. More specifically, they read Rawls’s “political liberalism” as an explicit attempt to keep religious fundamentalism out of liberal politics, in continuity with early 16<sup>th</sup> century liberalism, especially its ideal of tolerance and plurality emerging from the European religious wars; and with Mill’s defense of liberties, in

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<sup>9</sup> See Holmes 1995, 202-235.

particular the freedom of expression that was originally presented with special emphasis on individual citizens' right to be free from religious compulsion:

“Indeed, the most important respect in which political liberalism recommends itself [...] is that it guards against the coerced imposition of religious belief that remains likely whenever ‘comprehensive moral doctrines’ and contentious conceptions of the good enter the public sphere and make claims upon the organization of political authority” (Isaac et al 1999, 228-229; see also Rawls 1993, 37 and Mill 1991, 20-61).

Although they emphasize that they share the liberals' “commitment to defending the achieved equality and civil liberties from the claims of religious fundamentalists”, Isaac et al do not agree with the measure of bracketing “comprehensive doctrines” or illiberal, unreasonable claims, from the political sphere; not only because they regard such approach to be in conflict with democratic values, but also because they fear it may cause resentments and frustrations that may make it harder to defend *both* liberal and democratic values. They blame proponents of “political liberalism” for the *juridification* of problems that should be dealt with *politically*; arguing that the Rawlsian model renders matters of disagreement, that is issues where “comprehensive doctrines” have intruded the public sphere, from democratic fora to the courts, to be decided by judicial review. In opposition to the Rawlsian view, they argue that the “background assumptions” and moral commitments *cannot* be separated from the political and are indeed an important constituent of political consensus (that, as many agree, in turn is essential for the stability as well as legitimacy of a constitutional order). Stating the history of modern feminism as an exemplary case, they claim that indeed the history of modern liberalism *is* a history of democratization, which includes contesting the given boundaries between the public and private, political and non-political spheres. (Isaac et al 1999, 233-235.)

This argument raises some important questions about the possibility of treating all political positions – liberal as well as illiberal - as equal within a liberal democratic framework. Feminist and other emancipatory civil rights movements challenged the early liberal restrictions of the public sphere on the premises of liberalism itself – its proclaimed commitment to the individual dignity and equality of all human beings was in apparent conflict with the *de facto* exclusion of women, the poor and the non-white peoples from the spheres of politics and justice. Can similar arguments against the current protections of liberal political values be made to allow the entrance of religious identities and along with them anti-liberal and

anti-egalitarian positions into the liberal political sphere? Courtney Jung, in her response to Isaac et al, argues that there is a substantial difference in whether the identity-based claims are made under the assumption of a liberal value system or in opposition to it (Jung 1999, 269).

These questions, particularly the question whether democracy, in order to be inclusive, should be able to accommodate also undemocratic and illiberal political positions or whether it must be able to qualify publicly acceptable positions according to some universally applicable criteria, will resurface in this debate in connection with feminism, multiculturalism and transnational democracy and will be discussed in more detail in the following chapters. It is also interesting to discuss whether the liberal constraints on democracy are motivated by a *too optimistic* view regarding the possibility of achieving political consensus (as Mouffe claims); or, on the contrary, a *too pessimistic* one (as Isaac et al assume).

While Mouffe and Isaac et al criticize mainly the alleged tendency of conventional liberal theory and politics to narrow down the political sphere to an unjustifiable extent and place too strict demands of “reasonableness” on valid political arguments so that a serious democratic discussion on substantial disagreements becomes impossible; Young criticizes the Rawlsian universalist-objectivist justification model and the ideals of political neutrality and impartiality for having a hidden ideological agenda whose *de facto* effect is the exclusion of the perspectives of those who fail to comply with the universal norm, from the public sphere. Young’s criticism of liberal rationalism reflects Mouffe’s position in the observation that under the conditions of inequality the supposedly neutral and universal principles of the liberal state in fact represent the interests of the strongest; that those with real power are able to dictate the contents and meaning of “common good” and that the apparent neutrality just works as an ideological cover, making the particularity of the dominant perspective invisible, presenting it as universal and thus silencing different opinions as “particular” and “deviant”.

Young argues that in spite of liberalism’s proclaimed egalitarianism, the liberal ideal of impartiality fails to neutralize such oppressive power relations that cannot be defined as direct legal discrimination and eliminated through the equality of formal rights. She criticizes the ideal of impartiality as an “idealist fiction”, because in her view it is impossible in practice to adopt a fully unsituated moral point of view, and thus the hypothetical universality of the Rawlsian and Scanlonian rationality is

bound to remain just hypothetical. Young emphasizes that human perspectives are inevitably situated in particular social positions; and a situated point of view can never be totally universal, standing apart from and understanding all other points of view. She argues that the liberal ideal of impartiality exposes “a logic of identity” that represses difference, because assuming that all rational trains of thought lead to the same conclusions, it must also assume that everyone who thinks rationally thinks identically. But as different particular viewpoints *do* exist in reality, their eventual deviance from the “universal” rational perspective gives the norm of impartiality an ideological character: if the particularity of the dominant perspectives is hidden behind the idea of their supposed universality, the universalist justificatory model implicitly justifies the existent hierarchical decision making structures in which the supposedly impartial class of rulers claims to represent *anyone* as a similar “universal person”. By presenting difference as deviant from the impartial rational norm, the ideal of universal reason perpetuates the exclusion from publicity of the perspectives of “the oppressed and marginalized” that were never consulted in formulating that norm. Thus, according to Young, the ideal of impartiality means in practice that the hegemonic perspective of a dominant group is *presented as* universal and impartial, while alternative perspectives are positioned as “particular” and deviant. The supposed neutrality thus legitimizes existing hierarchies, marginalizing those who challenge them as representatives of particularist “special” interests. (Young 1990, 104-105; 111-116.)

Young does not reject the liberal concept of universal individual rights altogether, although she does not regard universal politics of rights as sufficient in granting equality, justice and democratic legitimacy to the liberal democratic order. As I will indicate below, Young defends to some extent the slip of rights universalism to an alternative, group-specific politics of rights, in order to reinforce group-specific emancipatory policies and group representation in public policy-making and to fight group related social disadvantage. Those group-specific democratic rights include, as indicated in part I, rights to proportional participation in political decision making as well as a degree of group autonomy and self-determination. As I will argue below, both notions include problematic aspects regarding the conceptions of identity and equality. The particularist conception of group autonomy is particularly problematic in cases where granting a “group” a right to self-determination would mean accepting that some members of the groups are denied equality within the group as well as in the society at large.

Young's attitude toward universalist politics is ambivalent: if the idea of universal reason is unable to deal with real-life injustices as the less privileged groups remain underrepresented in the processes of formulating general principles and in actual decision making, the question remains if the problem is the universalist ideal itself or the exclusive practices legitimized by *an illusion* of universality. If an apparently universalist politics is criticized for excluding in practice some groups or political positions, then it might be criticized not for universalism *per se*, but for the failure of being universal enough. At some level the ideal of democratic inclusiveness is itself an universalist norm; thus its relation to the universalist politics of rights is bound to remain complicated: on the one hand, radical democrats criticize the attempts to establish normative universality in the political sphere as attempts to homogenize the public sphere, depoliticize political discourse and silence differences; on the other hand, as I will argue later in more detail, any account of radical, pluralist and inclusive democracy turns out self-defeating if it rejects the norms of moral and political universalism altogether.

The above is in no way an exhaustive review of the radical democratic criticism of conventional political liberalism, but it contains some of the crucial arguments that proponents of liberal universalism and a politics of rights that restricts the range and scope of democratic decision making have had to respond to. I discuss the relevance of some of the radical democratic arguments, along with their problematic aspects, in part III. To summarize the currently presented critical arguments relevant for this discussion: the conventional liberal view on the relationship between democracy and rights – the view that democracy should be constitutionally constrained by some conception of universal individual rights in order not to be able to intervene, by collective decisions, too much in the life and choices of individual persons and in order to preserve democracy itself from potentially destructive political forces – has been criticized by radical democrats for being insufficiently democratic; not only because of the restricted scope and quality of its political sphere, but also because its justificatory foundations allegedly implicitly favor the privileged at the expense of more vulnerable and marginal social groups. The assumption behind this criticism is that a concept of democracy that is more inclusive in terms of participants and *also more permissive about the style and content of political arguments as well as the reach of collective decisions*, would bring along a more just social order. That

assumption will be explained in more detail below in this chapter; and some of its implications will be criticized later in part III.

## **2.2. Feminist critique of liberalism**

As radical democratic critics of liberalism have focused on its alleged tendencies to limit the political sphere, they have strong appeal to feminist thought, because one of the central features on which the explicit as well as implicit exclusions of conventional liberalism are claimed to be based is gender. As liberalism has been criticized for implicitly favoring the most privileged class of the historical context in which it emerged – European, white, middle-class, heterosexual men; feminists in their quest for gender and sexual equality have taken issue with the allegedly male-biased construction of the liberal citizen and self, the hidden mechanisms that perpetuate the exclusion of the originally disadvantaged groups such as women and the failure of the formal equality of contemporary liberal democracies to eliminate those ways of reproducing inequality. Therefore it is not surprising that there are many feminist writers among the most vocal critics of liberalism; especially within the “social progressivist” section among those critics as opposed to communitarians and conservatives who reject the theory and practice of liberalism on different grounds and who often defend *more traditional* gender roles and “family values” than liberalism. Interestingly, feminist critics do not often compare liberal thought to its *conservative* alternatives; rather, the “patriarchy” of liberalism is pictured as a shortcoming in comparison to utopian theoretical visions of less hierarchical and more inclusive societal patterns. In a way, those visions can be described as *more liberal* than conventional liberalism, if considered in traditional terms of “social liberalism” as opposed to “social conservatism”, a position supporting strict gender roles, traditional family values and established social hierarchies<sup>10</sup>.

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<sup>10</sup> The relationship of feminist critique to communitarian thought is also complicated: they present some similar arguments critical of liberalism, like the critique of the alleged individualist egoism of the liberal “sovereign” citizen; but for feminists, that exemplary free person is specifically male, while communitarians are wary of women turning out “egoist” as well. Also, both feminists and communitarians criticize the allegedly abstract nature of liberal rights, lacking attention to the importance of social and familial bonds and excessive emphasis on the *rights* of individual persons at the expense of the relational values of *duty* and *care*. As a solution, though, communitarians often search for the lost communal values in a return to nostalgic traditionalism, while feminists question the traditional communal values as well as the allegedly male and individualist premises of liberal freedom. Some feminist writers blame liberals for not questioning traditionalism strongly enough; for promising emancipation to all, but delivering it to men only. Others form “unholy alliances” with

It is not my purpose here to present a comprehensive review of all feminist criticism of conventional liberalism. I focus on the criticism that is most relevant for liberalism *as democratic theory*, the criticism that claims to reveal the implicitly gender-biased character of the apparently universal thought experiment of the liberal legitimation model and consequently of the universal principles that it generates, as well as the politics of rights that follows from those principles. In addition to the views presented in the previous section, some of which serve as feminist arguments as well as general calls for a more inclusive conception of democracy, I introduce here some specifically feminist critical arguments about liberalism's alleged *gender bias* that are relevant for the discussion at hand: Pateman's argument against liberalism's allegedly gendered contract theory, MacKinnon's radical feminist argument about the hidden male bias of its apparent neutrality and Brown's "poststructural" feminist argument about liberalism's inherent and incurable sexism. As part II is focused on the relation between rights and democratic participation; I will return to the feminist discussion in part III to compare some feminist positions to each other and point out some problems with their critical arguments that have relevance for the central question of this thesis.

In addition to the general arguments about the insufficient inclusiveness of the conventional liberal conception of democratic politics, some feminist critics claim that the liberal conception of citizenship is *premised* on the exclusion and subjugation of women. Although sharing many such critical assumptions, feminists of different streams of thought differ in their conclusions and suggested remedies: summarily, Pateman argues for giving up the liberal notion of *contract* as a gesture expressing *consent*, in order to include women as fully equal citizens in a free society; MacKinnon suggests reconsidering the politics of rights through a feminist lens so that the male bias of the apparently neutral liberal state be revealed and repaired; and Brown prefers a profound skepticism toward liberal politics as such, including its political institutions as well as its language of individual rights. Brown rejects liberal as well as radical feminist remedies as either just cosmetic (leaving the original male-biased liberal ideology and practice intact) or essentialist

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communitarians, especially in connection within recent debates on "multiculturalism", because representatives of "non-Western" cultures are increasingly seen by feminists as fellow victims of the "white male" hegemony of liberal universalism; thus support to "cultural claims", even if they are explicitly gender hierarchical, is perceived as a positive policy of "diversity" in defiance of the allegedly homogenizing universalist tendencies of conventional liberalism. Thus, the relationship of feminism to liberalism is also bound to be ambivalent: while its universalist policies of liberalism are conceived *implicitly* gender hierarchical, many of its alternatives are *explicitly* so. See e.g. Young 1990 and 2000; Brown 2001 and 2004.

(reconstituting the vulnerable category of “women” through a politics of “women’s rights”); and prefers a *genealogical* approach as described in part I, to thoroughly subvert and deconstruct its normative foundations and its mechanisms of producing and reproducing social injury. (Pateman 1988, MacKinnon 1989, Brown 1995.)

Pateman, analyzing the history of liberal contractualism from feminist perspective, argues that the liberal contract of “free and equal citizens” is implicitly founded on another contract, the unspoken “sexual contract” quietly concluded in the private sphere that liberal contractualists declared apolitical. In Pateman’s view, while the early liberal contract was a contract of freedom in the sense that it freed the “sons” from the patriarchal power of their fathers, it was also a contract of “subjection” in the sense that it established (or re-established) men’s political and sexual right over women. In accord with many other feminist critics of liberalism, she regards the liberal contract not contingently, but essentially patriarchal: “Contract is far from being opposed to patriarchy; *contract is the means through which modern patriarchy is constituted*” (Pateman 1988, 2, my emphasis). She presents a critique of the traditional liberal division between public and private spheres and the subsequent view that the private sphere is politically irrelevant; and argues that the very concept of “individual” as the subject of liberal rights is constructed as male; not only because women were not considered individuals, equipped with the necessary capacities for entering social-political contracts, by most original contract theorists; but also because the “individual” was constructed from the “male body” and “men alone have the attributes of free and equal ‘individuals’”, while women “represent everything that the individual is not” and “are born into subjection” (Ibid. 221; 41).

In Pateman’s view, women are not parties to, but subjects of the liberal social contract. She argues that the rhetoric of freedom puts women in an ambiguous position: it appeals to women through extending the message of civil freedom to them too, while they lack the capacity to enjoy that freedom. Excluding women from the category of the “individual” is still reflected, in spite of the formal equality of liberties, in the social and legal arrangements that deny women the equal civil standing with men: as an example Pateman quotes the difficulties to criminalize rape within marriage; thus exemplifying the non-individual status of women in contemporary marriage contracts. She considers marriage the prime example of the sexual contract, through which the woman “voluntarily” trades her autonomy for the safety of the economic and social position that marriage offers. In return she is

bound to unpaid reproductive work and obligation of sexual availability. Thus Pateman argues that the freedom of the (male) individual in fact *depends* on the sexual contract and the subjugation of women. (Pateman 1988, 3-7; 221-223.)

Pateman defines “contract” theories broadly, meaning all modern liberal theories that reject all other justifications of subordination except for those based on voluntary consent: thus, the term covers the ideological and political development of liberal democracy as such, not necessarily only the theories called “contractualist” or “contractarian” within liberal theory. She makes a strong and controversial claim about those “contract theories”; arguing that the originally revolutionary liberal idea that declared all humans naturally free and equal and thus de-legitimized all “divine”, “natural” and traditional sources as justifications of authority and hierarchy, turned that “subversive proposition into a defense of civil subjection” and thus had no genuine emancipatory effect, at least not for women (Pateman 1988, 39). Pateman argues: “Rather than undermining subordination, contract theorists justified modern civil subjection,” (Ibid. 40). In her view, the theoretical non-recognition of women’s historical inability to be “individual” at the dawn of liberalism has contributed to the perpetuation of her subordination in practice through the evolution of different “contract theories”; so that the subjugation is constantly recreated by renewed versions of the “sexual contract” (like marriage, prostitution, sexual division of wage labor etc.), in which the alleged voluntariness of women’s consent to the demeaning conditions of those contracts makes their subjugation just *look* like freedom.

Pateman’s strong rejection of the notion of the “individual” as an *essentially* masculine construct that is *not* neutralized by extending the status of rights-bearing individuals formally to women, leads necessarily to a skeptical attitude toward the conventional liberal notion of individual rights and their constitutional protection, an attitude dominant in much of the feminist theory at the end of the 20<sup>th</sup> century. Her critique of the concept of an “individual” can be disputed, not only by appealing to the practical development in many existing liberal democracies in which the recognition of women as individuals have resulted in policies improving women’s position within family as well as in public life. She seems to essentialize the “masculinism” of liberal individualism, deducing from the historical fact of women’s subordinate status at the dawn of liberal thought and the misrecognition of women as individuals by many early liberal thinkers (with the notable exceptions of Hobbes and Mill) an assumption that women necessarily and naturally *cannot* be individuals

in the traditional liberal sense. The political implications of this assumption, also from a feminist perspective (which can only be fully recognized when compared to the politics that explicitly fail to recognize women's equal individual personhood), will be discussed further in part III. Pateman's recipe for a more just and genuinely free society is to give up any notion of "contract" that in her view necessarily perpetuates the relations of subjugation and subordination under the guise of imagined freedom; and also to be ready to restrict freedom in the name of "real" autonomy. That would imply that the constitutionalist "contract" regulating democratic decision-making would have to give way to more extensive collective decision-making, also (or especially) on the limits of "individual" freedoms and rights. (Pateman 1988, 153-188; 232.)

MacKinnon also rejects the conventional liberal universalist and impartial conception of equal rights, on the basis that it is in fact neither universal nor impartial, but constructed by a certain social formation – a male dominant one; and representing a particular point of view – that of the privileged group of white males. In MacKinnon's view, liberal politics constructs gender *difference* as gender *hierarchy*, while *equality* is conceived as *sameness*: therefore, the inequality of the "different" is naturalized and made acceptable under the conditions of apparent impartiality. She argues that the liberal dynamics of sameness and difference, and the liberal politics of equality, in practice turn out to be able to treat women equally only in situations where they already have achieved a socially equal position by following *male* standards of behavior. At the same time, real inequality (occurring in the sphere of family and sexuality and in educational and professional gender differentiation) is treated as "difference" and seen as "natural", acceptable or even inevitable. According to MacKinnon, gender inequality is aggravated by the epistemological construction of gender difference as both essential and sexual: as the mainstream sexual culture constructs male and female identities as dominant and submissive through practices that glorify and naturalize male domination over women, those identities become generally seen as essential and "natural". Thus male dominance becomes a matter of *natural difference*, not *political inequality*, and is ignored by neutral, universalist equality laws. (MacKinnon 1989, 125-234.)

As a lawyer and legal scholar, MacKinnon nevertheless does not reject the notion of rights and liberal law as willingly as many other feminist critics of liberalism. She does not argue against the idea of impartiality as such but against a

biased interpretation of it; nor against the rhetoric of rights as such, but against a specific construction of rights that allows too many violations of women's rights in the name of "natural" gender difference. She suggests that only a change in the legal system can make a difference about gender equality. Instead of *equal* rights within the existing political framework where equality is allegedly constructed as sameness (with a model individual constructed as male), MacKinnon calls for a *feminist jurisprudence* to balance "male dominance" as a social system that constructs "maleness" and "femaleness" as domination and submission. She argues that as long as the legal system *assumes* equality as the existent norm and sees inequality as exception; and does not recognize the existence of *structural* inequality, it will treat systematic inequality as "just a question of difference" and thus preserve the *status quo*. MacKinnon's argument, although presented as a critique of the "liberal state", is not so much an argument against liberal constitutionalism as such or its conception of individual rights; but rather it can be read as a call to question the prevailing ways of *constructing* universality and equality; and to direct feminist political action toward the *legal system* and its interpretation of equality and difference, in order to change it toward substantive equality rather than ignore it or denounce it as irrelevant or reactionary *per se*.

Brown, like Pateman, denounces liberalism, along with many of its central concepts like "individual" and "rights", as inherently and incurably "masculinist". She also traces this fact to the historical context of classical liberalism: the shrinking economic role of the family in the emerging industrialism of early modern times; the Hobbesian-Lockean visions of "the state of nature" and the "original contract" in which men are assumed to have neither attachments nor obligations and are thus free, while women are attached to men and obliged to children and thus essentially unfree. But *contra* Pateman, who sees the notion of "contract" as the central means to perpetuate women's subordination, Brown argues that now both liberalism and women's subordination are sustained without contract: liberalism no longer needs a contract to perpetuate women's subordination, because it has been so effectively incorporated in liberal theory and practice. Brown claims that liberalism as the contemporary hegemonic discourse is *premised* on gender subordination while perpetuating it; gender hierarchy thus being an essential, not just contingent feature of the liberal discourse. She describes liberalism as so essentially sexist that its gendered nature survives not just the achievement of legal equality for women, but

also the changes in the sexual division of labor and in patterns of family life, as well as the occasional success of individual women. With the liberal subject constructed as male, equality for women means just sameness, a license to participate in the male public culture:

“the masculinism of liberal discourse [...] supersedes [...] express subordination, that is contained in the masculinism of the civil subject cut loose from the family, that constructs and positions women in socially male terms [...]” (Brown 1995, 139).

In Brown’s view, liberalism is the discourse of male dominance. (Ibid. 137-139; 152.)

Summarily, the feminist skepticism toward conventional liberal, universalist politics of rights persists, although women in existing liberal democracies have been included in the range of legally equal rights-bearing citizens. The central grounds for this skepticism are the claim that the “free individual” that liberal rights are supposed to protect is constructed as male; and that the supposedly impartial and neutral policies of liberal universalism are based on not real inclusiveness of the perspectives and experiences of all citizens, but on attempts to universalize the experience of men *as if* it were equally valid for all, while it in practice is not. From the democratic perspective, liberal universalism is blamed for naturalizing the power of a particular group (male, middle-class, white) and representing the discourses initiated by that group as “universal” and “neutral”, while particularizing different points of view as pretentious claims of “special interest”. Feminists do not regard the universalist politics of rights, particularly the one established through the doctrine of constitutionalism, as sufficiently democratic. But while many of them agree about the critique, their remedies differ. I will return to discussions on feminist political strategies in part III. I will also present a critique of the political implications of the rejection of universalism and “individualism” by feminism; and question the benefits of such rejection for democratic inclusion. Below, in section 2.4., I will introduce the ideal of *inclusiveness* as a political norm, presented as an alternative to the politics of rights that constrains democracy while enabling it within a limited framework.

### **2.3. Poststructural critique of rights discourse**

Along with the radical democratic and feminist criticism of conventional liberalism and its politics of rights, focusing on its alleged tendency to *concretely* exclude less

privileged groups and unconventional political discourses from the public sphere, one can distinguish a more theoretical thread of critique, partly (but not exclusively) presented by authors who also represent the feminist and/or radical democratic views: the “poststructural”, also called “postmodern”, critique of the *discourse* that constitutes the theory and politics of rights. This critique lends some of its basic ideas from Foucault who, while not a political philosopher in a traditional sense and certainly not a liberal political thinker, has affected current political thought by introducing to the political debate the immaterial conception of power: the idea that the use of power is not limited to that of directly coercive authority, but that an immaterial, *discursive* power is overwhelmingly present in all everyday speech and action as well as in all institutional arrangements; thus power is not a faculty “owned” by those with position of authority over those who lack such position, but it is used, produced and reproduced by all social actors, subjects as well as “rulers”<sup>11</sup>. The Foucaultian idea of “discursive power” and the subsequent idea of the capacity of such powers to generate social realities and constitute identities is at the centre of the “poststructural” critique of rights discourse: universalist “rights talk” is not only criticized for its potential capacity to exclude deviant perspectives from the political realm and to conserve the existing social relations as allegedly just, impartial and universally justifiable; but also for its discursive effects – its influence on social realities and the self-perception of the social actors in them.

As I noted above, Brown’s work combines radical feminist arguments with Marxist and Foucaultian ones; with somewhat confusing consequences, as I will argue in more detail later. Apart from her feminist criticism of liberalism as inherently and incurably “masculinist”, Brown presents a substantial criticism of the discourse of rights from two distinctive perspectives: skeptical toward “liberal” universalism<sup>12</sup> as delusive at best and violently homogenizing at worst, she also criticizes the politics of “feminist rights” or “special rights” as proposed by MacKinnon and Young respectively. Regarding the politics of universal rights, Brown argues against the optimism related to the achievement of *equal* rights to women and minority groups.

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11 See e.g. Michel Foucault: *Power/Knowledge* : Selected Interviews and Other Writings, 1972-1977. Pantheon Books, New York 1980 (esp. “Two Lectures”, p. 78-108); and *Power: Essential Works of Foucault 1954-1984*, vol. III (ed. James D. Faubion, series ed. Paul Rabinow). The New Press, New York 2000 [1994].

12 “Liberal” is often in quotation marks with reference to Brown’s critique of liberalism, in order to distinguish the term from references to the theories identified here as “conventional liberal”, because of Brown’s use of the term covers a wider scope of theories and practices.

As liberalism is allegedly inherently masculinist, equal rights are bound to fail to cure the “social injuries” of women and other disadvantaged groups. Brown argues that formal equality may even make it harder for those groups to question their disadvantaged social position, because the responsibility for their failure is shifted by political universalism from the unjust social structures onto individual persons; thus discrimination becomes more subtle and harder to recognize as a source of social injury affecting disproportionately the already disadvantaged groups. Thus, Brown is skeptical about the emancipatory power of universal *equal* rights as well as the language of “special rights” meant to improve the position of disadvantaged groups, appealing to the “*subject forming*” effect of all such rights (Brown 2002, 420-434).

About the emancipatory power of individual equal rights Brown argues, relying on Marxist criticism of liberal rights and echoing earlier feminist criticism of the public-private division, that the liberal politics of universal equal rights leaves social inequality intact by separating the political, the "social" or "civil" spheres from the sphere of the private. While equal rights are recognized in the "political" realm, that is, in a relationship between the individual to the state, the production and reproduction of inequality in the private and social realms become privatized, depoliticized and made invisible: having equal rights before the law, the marginalized can only blame themselves for their lack of social and personal success. Challenging Patricia Williams' argument that equal individual rights have granted the status of inviolable individual to people who were formerly owned as chattel<sup>13</sup>, Brown argues that

"[...] rights may [...] be one of the cruelest social objects of desire dangled above those who lack them. For in the very same gesture in which they draw a circle round the individual, in the very same act with which they grant her sovereign selfhood, they turn back upon the individual all responsibility for her failures, her condition, her poverty, her madness - they privatize her situation and mystify the powers that construct, position and buffet her" (Brown 1995, 128).

Still, as I noted above, Brown is also skeptical about demands of “special rights” by women and other vulnerable groups and about legislation against group-related “hate speech” and harassment; because, given the discursive, identity-forming powers of the legal language, that might reinforce the status of the “protected” group as particularly weak and vulnerable, thus stabilizing their “victim” identity instead of

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<sup>13</sup> Presented in Patricia Williams: *Alchemy of Race and Rights*. Harvard University Press, 1991.

curing it (Brown 1995, 128-134; 2002, 421-425). With Janet Halley, Brown questions the “liberal” faith in the conception of state neutrality, institutionalized through the equality of rights; claiming, in addition to the more broadly accepted Marxist point referred above, that these allegedly neutral social institutions have been “historically beholden to socially dominant powers”, and that rights and law also have important “regulatory capacities”, which makes them actively *productive* of social powers rather than just neutrally arbitrating between existing ones (or even passively failing to do so justly). Thus the problem of the discursive power of rights follows *any* politics of rights: while liberal universalism produces a certain kind of individuals based on the normative figure of a sovereign “self-made-man”, claims of special rights by disadvantaged groups generate new identity-producing sites that are *also* regulatory. Brown and Halley argue that “liberalism”, under the mask of apparent neutrality, exercises social power while denying its existence:

“When liberal legalism frames rights as empty, formal, procedurally rather than substantively bestowed and bestowing – when it insists that rights merely protect the potential choices of the autonomous selves we are and always have been – it nevertheless produces and orders subjectivities while according these grave rearrangements of social life the importance, on a scale of one to ten, of approximately zero” (Brown & Halley 2002, 18).

Thus they are wary of emancipatory movements using the liberal language of rights *at all*, because these suspicious powers, together with the mechanisms of denial of their existence that hide their effects, are at work in *any* legal language, no matter whether it speaks about “universal” or “special” rights. (Ibid. 16-25.)

I will return to these arguments in connection with the discussion on the position of rights in democracy in part III. In particular I will ask to what extent the recognition, at least partly to be acknowledged as valid, of the discursive effects of rights, can and should affect the role of the politics of rights in legitimating (and eventually perpetuating) democratic regimes. Brown and Halley argue that liberals view the politics of rights as a neutral *tool* for achieving certain political ends, although it should be seen as active, biased *politics* that *generates* social power while using it. Obviously, when the concept and the institution of rights is conceived as *politics* formative of social realities rather than a neutral, apolitical framework within which democratic politics takes place, removing rights from the political agenda appears even more problematic than in the light of the previously presented critiques. Who has the authority to formulate the language of rights (in addition to determining

what rights we have); through what kind of procedures should it be done; how can the politicalness of rights talk be recognized in democratic politics; and is political liberalism capable of performing such a recognition as well as surviving it – these are just some questions to be discussed in the light of this critique of “legalism”. Brown and Halley do not imply that the critique of rights must de-validate the institutions and politics of rights altogether; their primary concern is to raise the awareness of its unintended “side effects”. Still, regarding progressive democratic goals they argue that instead of appealing to the deceptive and normalizing concept of rights, those who care for social justice should rather focus their attention to the injury-producing social structures. The question is whether this approach is in conflict with arguments for universal rights; and if it is, then how?

#### **2.4. Inclusiveness as a Political Ideal**

The critical positions summarized above share, in spite of their different perspectives, in one way or another the notion that the conventional liberal politics of rights (which, in spite of many local differences in political institutions and styles is the currently “hegemonic” norm established in most existing constitutional democracies today; although elements of radical, deliberative, feminist and multiculturalist policies have been occasionally added to it) is elitist; that it tends to guard the privileges of the dominant groups – typically still characterized as male, white, heterosexual and middle class – instead of promoting universal justice for all. As I argued above, the relationship between the universalist politics of individual rights and democratic decision making processes can be analyzed at two different levels: on the one hand there is the question whether certain rights should be protected from democratic decision making and removed from the regular political agenda or whether rights should be regularly on the agenda as objects of democratic processes; and on the other hand there is the issue of democratic inclusiveness, the question whether democratic decisions, no matter to what extent they are constrained by an institutionalized conception of rights, should be left to conventional representative democratic institutions, or whether they should be made through participatory procedures that include all existing social perspectives disregarding whether they have achieved success through electoral processes.

Those two aspects are intertwined in the sense that if the constitutional framework of liberal democracies is considered insufficiently democratic, it is likely that the political participatory rights it grants through electoral systems are considered insufficient as well. On the other hand it appears from the positions presented above that one can support public participation and still keenly protect individual rights from democratic decisions, like Mill; or argue that rights should be subjected to democratic decision-making processes, while conceptualizing democracy in conventional representative manner, like Waldron. When talking about theories of radical democracy whose project is to challenge the alleged elitist tendencies of conventional liberalism and make decision-making more inclusive of different, traditionally disadvantaged or marginalized perspectives; the limits that traditional concepts of liberal democracy set to the political agenda and the range of participants are both challenged, albeit the latter more obviously than the former. As a broad umbrella concept, “inclusive democracy” is a concept marking theories that emphasize the importance of public participation in political decision making as well as the non-exclusion of marginal identities or “non-reasonable” political positions in democratic debates; and that theorize emancipatory strategies for groups that have felt marginalized, ignored or treated otherwise unjustly by officially neutral policies.

The projects of “inclusive democracy” are studied here as attempts to broaden the scope of the political and increasing the potential of achieving social justice by deep democratic measures; not so much as attempts to reverse the traditional liberal subjection of democratic decisions to the norms of individual rights, so that rights would single-mindedly be subjected to democratic processes instead. Nevertheless, given the bulk of criticisms presented against the conventional liberal politics of rights as well as normative universalism in politics *per se*, at least some extent of democratic scrutiny about the existent sets of rights tends to be advocated in connection with visions of inclusive democracy. As for the inclusion of “disruptive” political styles and “non-reasonable” political positions, as opposed to the reasonable universal norms imposed on democracy by conventional liberalism, the limits of inclusivist criticism are revealed: the project of inclusive democracy is usually inspired by strong egalitarian sentiments; its critique of liberalism is focused not against liberalism’s egalitarian premises, but against its failure to deliver its egalitarian promise. Thus, a test for the conceptual position of rights as constraining norms in politics is constituted by the question whether the inclusive democratic ideals of equality and plurality require that also explicitly *anti-egalitarian* political

positions be accepted as equally valid in its public sphere. That paradoxical possibility eventually indicates the inherent limits of the ideal of inclusion, and also of the criticism of normative universalism in the name of democracy.

I perceive the theory of deliberative democracy, whose view of rights in relation to democracy I discuss in the following section, as a project to increase the inclusiveness of liberal democracy, while retaining some universal norms to guide it. That is the theory that explicitly attempts to combine (albeit a permissive account of) the liberal politics of rights with an inclusive and participatory notion of democracy – a necessarily failed attempt by some critics that I will defend in the face of that criticism. Other visions of inclusive democracy include the “agonistic” project of radical plural democracy; the “politics of difference” developed by Young in response to liberalism’s allegedly false politics of impartiality; other “identity political” efforts proposed by feminist and “multiculturalist” writers; the “genealogical” understanding of democracy; and the “robustly” participatory, but certainly not antiliberal conceptions of democracy proposed by Isaac et al and earlier by Arendt.

The main general objective of inclusiveness as political ideal is to bring back to politics the particularities that are allegedly suppressed by liberal universalism – the particular identities, perspectives, cultures, arguments and ideologies that for some reason feel or seem to be marginalized or excluded by the universalist framework of constitutional principles that is supposed to represent them all. Plurality, difference and diversity are the key values cherished by proponents of inclusive democracy; while *equality* as a concept is viewed with skepticism by some as a concept compromised by the pressure of homogeneity and sameness. At the same time, exclusion can be perceived as problematic only by appealing to equality as an underlying norm. That is the dilemma behind the much debated dynamics of “equality and difference” that is also related to the question about the relationship of universal rights to particular political claims.

Young, perhaps the most prominent current proponent of “inclusive democracy”, following her criticism of liberal impartiality as implicitly ideological; and her analysis of non-legal modes of social oppression (introduced in 1.2. of part III), argues for a participatory democracy that relies on social difference as a “resource” and emphasizes the role of “social group identity” in the constitution of political identities. To counter social oppression and the subsequent political injustice that cannot, in Young’s view, be balanced by the ideal of neutrality of the liberal state, she

proposes some institutionalized measures of inclusion, as described in chapter I (e.g. proportional group representation, group veto rights regarding decisions that concern the group in question, group autonomy and affirmative action). As to the politics of universal rights, Young recognizes that her inclusive project presumes *some* range of universal rights, although she does not specify *which* ones and *how* their scope should be determined. She advocates a two-level approach to rights: particular “group-specific” rights and “general civic and political rights of participation and inclusion”:

“A democratic cultural pluralism [...] requires a dual system of rights: a general system of rights which are the same for all, and a more specific system of group-conscious policies and rights” (Young 1990, 174).

Young defines social groups as groups united by collective identities, rooted in “shared social experience”, often of marginalization and oppression. It is the groups that suffer from various forms of social oppression that are entitled to specific rights and representation, in order to balance their disadvantaged position that tends to remain unchanged under neutral conditions. Thus, *some* rights are to be considered equal at a universal level, but this universality is restricted to the democratic rights of “participation and inclusion”. Young gives no specific answer about which rights are to be considered universal and “same for all”, and how it is determined which groups, and under which conditions, are sufficiently oppressed to be entitled to group-specific rights. In a sense, the conventional liberal idea of protecting universal individual rights from democratic decisions is seriously challenged by Young: it is rendered to the democratic community to determine which rights are to be considered universal, which group-specific; and which, eventually, can be eliminated if the inclusive public decides so. (Young 1990, 174-175; 2000, 81-83; 149-153.)

Young’s vision of group identity based inclusive democracy is also vulnerable to criticism regarding the questions how to define group membership and how to deal with social and political differences within groups. These problems will be discussed in chapter 1 of part III. Another question raised by the inclusive ideal of democracy and its relation to rights and liberal constitutionalism concerns the question how the notion of *equality of persons* is related to the notion of *equality of social groups* (as emphasized by Young) and the equality of *political positions* and ideologies. Mouffe, as I have shown, presents a less essentialist project of inclusive democracy based on *political*, not on *social* identities (although both writers would apparently allow

those to be overlapping at times). As I argued above, the project of inclusive democracy is motivated by egalitarian political sensitivities and by the notion that the conventional liberal rights-based conception of democracy is insufficiently inclusive of different social positions and thus insufficiently egalitarian in spite of its apparent egalitarian premises. Most arguments in favor of more inclusive and deeply participatory democracy, in defiance of the normative restrictions imposed on the public sphere by conventional liberalism, appear to be based on the assumption that as those restrictions are deemed elitist, loosening them and increasing the inclusiveness in terms of not just persons and groups, but also in terms of political styles and arguments, will make democracy more just by opening it up to the perspectives of the least advantaged and most vulnerable groups, such as women as well as ethnic and sexual minorities. Nevertheless, the critique of liberal “rationalist” restrictions presented by Isaac et al, otherwise resonant of similar feminist critique, reveals that the positions filtered out of the political sphere by the liberal norms of reasonableness are not necessarily feminist and socially progressive, but may be conservative, illiberal and even totalitarian in their nature.

I discuss such examples in more detail below; here it suffices to establish, against the apparent intuitions of many proponents of inclusive democracy, that there is no necessary correlation between robust *inclusive* democracy (in terms of political contents as well as participants, especially if those contents are normatively unqualified) and normative egalitarianism. The force of that insight becomes more apparent in connection with some feminist arguments against liberalism. As I indicate in the following section, theorists of deliberative democracy, perhaps more aware of the possibility of such paradoxes, establish qualifying discursive norms to guide public deliberations; norms defined still too restrictive, rationalist and elitist by more radical proponents of democratic inclusion. But can the ideal of inclusion remain feasible *without* such norms?

### **3. Deliberative democracy: dissolving the tension**

The deliberative model of democracy, as it has been noted by its defendants as well as its critics, is *the* model of democratic theory that attempts to combine the moral

universalism contained in the notion of universal individual rights with the value of democratic inclusiveness that is sometimes presented as incompatible with such institutionalization of universal norms. This attempt at balancing the values of freedom, equality and diversity through a normatively guided inclusive democracy is based on an idea that while the norm of critical rationality encourages the questioning of previous decisions and existing norms, the moral conditions of symmetry, equality and mutual respect guarantee that the open political sphere cannot be used for promoting anti-egalitarian and illiberal goals. If no one can insist on imposing on others demands that they would not accept themselves, then the rights of minorities and vulnerable groups are assumed to be protected from “majority tyranny” despite the fears of constitutionalists. Thus the alleged tension between inclusive democracy and the moral universalism of liberalism is dissolved: in genuinely open deliberations, in which all participants can present their point of view, but have to prove the universalizability of their demands, oppressive claims have no chance of survival. (Habermas 1998, 449; Benhabib 1996, 79; Cohen 1996, 99; see also Mouffe 2000, 92-93.)

There are, nevertheless, a number of questions that need to be addressed. One concerns the institutional role of the moral conditions: there is the practical question *how* they are established, linked to the theoretical question whether the justification for establishing them through a protected legal framework differs essentially from the theories of liberal constitutionalism. Another question, related to the former, concerns the status of illiberal political positions in the deliberative public sphere: they are allowed to enter it (because even the positions questioning the premises of liberal democracy are theoretically welcome to *enter* the deliberative process), but they are expected to disappear, because they are inconsistent with the deliberative norms (thus it is assumed that the proponents of such positions are convinced through the deliberative process to either change their mind and endorse the liberal premises implicit in the deliberative conditions, or withdraw from the process).

Does not deliberative democracy also have to appeal to legal processes in order to dismiss unacceptable arguments from the public sphere? Can the theory be founded on the optimistic assumption that those who enter the public sphere with anti-liberal or anti-egalitarian arguments will be convinced of the impropriety of such arguments and withdraw them voluntarily? This question is also related to the role of *conflict* in democracy, raised by the proponents of the agonistic model: does the theory of deliberative democracy offer insights about dealing with anti-

deliberative political positions if they are *not* convinced by the deliberative arguments and do not leave the political sphere voluntarily? Below I analyze the position of universal norms in relation to democratic participation in the deliberative model of democracy; giving credit to their thesis that some universal norms in form of protected rights are not only compatible with, but indeed the prerequisite of a working inclusive democracy that is to survive in time. At the same time I question whether the deliberative ideal can be promoted without subscribing to some, albeit eventually limited, notion of constitutionalism.

### **3.1. Universalism and the ideal of openness**

As I noted above, the political norm of openness that guides the deliberative model, inspired by the critical insight that no one holds a final truth in human affairs, implies that all previous political decisions, including the foundational norms of democracy itself, can be questioned and put on the political agenda for debate and discussion. While introducing the central features of the deliberative model in part I, I raised the question about the implications of this principle of openness for the notion of constitutionalism: does acknowledging the political right of all citizens to question the moral foundations as well as the presently valid norms and rules imply that liberal democratic constitutions are on the agenda as subjects of democratic deliberation and public decision making, along with any other current political decisions? And if so, can the universal egalitarian norms of the deliberative model be defended without either referring to circular argumentation or relapsing to traditional constitutionalist arguments?

The deliberative model, in its effort to combine an inclusive public sphere with universally justifiable political reasons, claims to respond to the challenges raised by radical democrats about the insufficient democratic inclusiveness of the conventional liberal conception of democracy, while avoiding the problems associated with popular democracy by proponents of constitutionalism. Benhabib particularly construes her deliberative model as a response to the radical democratic and feminist claims that liberalism universalizes a certain dominant point of view as neutral and uniformly rational, by applying the principles of critical rationality and discursive morality to the sphere of democratic politics as a means to open it up to difference and diversity. At the same time she endorses legal and moral universalism

as a necessary precondition for inclusiveness. I discuss here some of the theoretical difficulties with this combination, although I find the deliberative view of the relationship between democracy and rights more plausible than both the conventional liberal and radical democratic visions.

The theory of deliberative democracy does not subscribe to a holistic understanding of participatory democracy that connects participatory politics to some kind of unity of a homogeneous “ethical community”. While trying to convince feminist and postmodern critics that liberal democracy *can* be made more inclusive in terms of diversity of both identities and opinions, deliberative democrats also try to convince liberal skeptics of inclusive democracy that the protection of individual rights is *not* in contradiction to promoting public participation in politics; and that participatory inclusion needs not threaten individual rights and freedoms. The deliberative model claims to guarantee the protection of citizens against the violation of their basic rights through its moral and procedural conditions, even if the *extent and meaning* of rights can be questioned and debated. If that claim is feasible, then the assumed tension between individual – both political and civil – rights on the one hand, and democratic participation and majority decisions on the other, can be bridged, if not eliminated. (Benhabib 1996, 74-77 and 81-84; Cohen 1996, 97-99.)

As I noted in part I, in the theory of deliberative democracy practical reason is sought within the intersubjective human framework of participatory reasoning. Once it is admitted that values and norms, as well as political institutions, are the product of human thought and action and not results of divine or natural plans or of the evolution of a metaphysical rationality, the possibility of human error and the human capacity of improving the existing concepts, rules and institutions has to be acknowledged. Deriving from that insight, the theory of deliberative democracy envisions political decision making as an ongoing process of inclusive public deliberations: no subject – no previous political decisions, or even the foundations of the regime itself, are set beyond public critique or revision. Benhabib extends Habermas’s visions of the implications of discursive morality in politics by further opening up the critical dimensions of deliberative politics and blurring the distinction between the “properly political” and non-political issues. In her interpretation the process of deliberation is radically open in terms of participants as well as agenda.

Rejecting the Rawlsian limitation of public discourse to discussing the “constitutional essentials” in courts and parliaments, Benhabib claims that there are no *prima facie* rules limiting either the agenda or the range of participants of deliberative politics. *Contra* Rawls, she also argues that in deliberative democracy no issues are settled for ever and removed from the public discussion – *all* previous political decisions remain open to reinterpretation, challenge and debate. All participants can bring up and contest issues; they can question and ask to revalidate any past political decisions or existing norms, including the fundamental values of the society and the rules of the discourse procedure itself. As to the constitutional constraints to the power of democratic processes to interfere with individual rights, Benhabib emphasizes that in accordance with the principles of discursive morality, anyone relevantly affected by the norms under question can have “the right to initiate reflexive arguments about the *very rules of the discourse procedure*” (Benhabib 1996, 70, my emphasis). This would imply that individual rights are, in principle, also on the agenda, open for challenge and revision. (Ibid. 69-74.)

As proponents of the deliberative model take distance from metaphysical concepts of rationality, they are bound to perceive also their own project reflectively, as a *contingent* result of certain political and intellectual developments. Denying the existence of superhuman rationality while avoiding a relativist denial of *any* universal values that concern human beings on the basis of their humanity, discourse ethics finds the criteria for rationality in *dialogical interaction* between humans. Thus the sources of moral truth are considered neither extra- or superhuman nor strictly subjective, but *intersubjective*. Given that no participant in the dialogue has privileged access to objective truth, rationality and impartiality are searched through the exchange of different viewpoints. This implies that, as new points of view are always available, even the *criteria* for testing practical rationality cannot be fixed beyond dispute. The deliberative model, aware of the historical-political contingency of its own values, defends them not on the grounds of abstract rationality, but on openly *normative* grounds as politically and morally preferable to currently existing alternatives. As noted above, Benhabib sees the purpose of discursive morality as opposed to its more traditional liberal counterparts as “the reformulation of the moral point of view as the contingent achievement of an interactive form of rationality” (Benhabib 1992, 6).

In politics the “shift from legislative to interactive rationality” implies: “if reason is the contingent achievement of linguistically socialized, finite and embodied

creatures, then the legislative claims of practical reason must also be understood in interactionist terms” (Benhabib 1992, 6). Benhabib also argues: “In the discursive justification and validation of truth claims *no moment is privileged* as a given, evidential structure which cannot be further questioned” (Ibid. 5, my emphasis). This can be read as a challenge to constitutionalism: given the contingency of the products of human reason, no founding processes can be cemented beyond further review and political challenge. The intersubjective view of practical rationality reflects the feminist and postmodern criticism of liberal “illusions of abstract objectivity”, albeit not by rejecting the ideal of impartiality as such, but by insisting that impartiality in political decision-making can be pursued in a less detached and more openly political way than is assumed in Rawlsian liberalism. The non-metaphysical approach of deliberative theory does not lead to a rejection of universalism; indeed it may function as a justification of the pragmatic moral universalism the model defends: as neither extra-human truth nor fully impartial objectivity is available in political matters, there is no excuse to exclude any particular point of view in advance as irrelevant or inferior. This implies that institutions and norms must be constructed so that no persons or groups are deprived of the capacity to participate in public life: that presumes, among other conditions, a guarantee of the universality of certain basic rights.

The work of Benhabib is central for understanding the role of universalism in the deliberative model, because she is more responsive than many other deliberative theorists to feminist and radical democratic critique and proposes a bold vision of radical openness of the deliberative public sphere, while *not* rejecting universalism as a norm and the concept of institutionalized universal rights. Benhabib deduces her radically open view of the political sphere from the premises of critical rationality: claiming that some principles are not open to revision would contradict the critical epistemology of discursive moral philosophy. The principle of openness is consistent with the intersubjective account of practical rationality, which leaves even its own presuppositions about self, society and reason principally open to challenge – although some critics find that *any* universal norms in politics necessarily hang on an untenably rigid interpretation of those categories. Benhabib presents the norm of critical openness as a matter of principle, inseparable from the critical account of rationality. Interestingly though, while defining rationality and political morality in a radically open and flexible way, she also acknowledges the limits of openness, by

insisting that the positions that do not share the deliberative values withdraw from the deliberative processes at some point (see Benhabib 1996, 43; cf. 2.4. in part I).

As I noted above, deliberative theorists rely on the deliberative moral conditions to grant the equality of the participants and the fairness of ongoing political procedures. In practice, those conditions are institutionalized in the form of constitutional rights. In a somewhat circular move the deliberative theory thus *presumes* universal equal rights while it advocates their openness for revision. The role of democracy in relation to rights is less restricted than in conventional liberalism, though: the task of democracy is, in addition to giving a voice to all citizens, to perpetually revise and revalidate *all* existing political and legal institutions, including the content, extent and meaning of individual rights.

### **3.2. Reconciling rights and democracy?**

As I noted above, proponents of deliberative democracy view democratic legitimacy and universal rights as not only mutually compatible but interdependent. Habermas, who is more restrictive than Benhabib regarding the boundaries of political agenda and the public-private distinction, describes the legal framework identified as “the rule of law” as mutually interdependent with democracy as “popular sovereignty”:

“the desired internal relation between ‘human rights’ and ‘popular sovereignty’ consists in the fact that the requirement of legally institutionalizing self-legislation can be fulfilled only with the help of a code that simultaneously implies the guarantee of actionable individual liberties. By the same token, the equal distribution of these liberties [...] can in turn be satisfied only by a democratic procedure that grounds the supposition that the outcome of political opinion- and will-formation are reasonable. This shows how private and public autonomy reciprocally presuppose one another in such a way that neither can claim primacy over the other” (Habermas 1998, 455).

Joshua Cohen also argues that deliberative democracy combines rights and democracy in a way that not only renders them compatible, but interdependent:

“A deliberative conception of democracy does not face the same troubles [as the conventional liberal ‘aggregative’ conception of democracy] about reconciling democracy with nonpolitical liberties and other substantive, nonprocedural requirements” (Cohen 1996, 99).

In Cohen’s interpretation of deliberative democracy political participatory rights are indeed *constitutive of* the effective protection of other rights, because in his view

substantive political rights uphold and help to enforce the egalitarian ideals that the universal politics of rights is based on:

“[...] given the principles of deliberative inclusion and of the common good, the deliberative view can avail itself of conventional instrumental reasons in support of equal political rights. Such rights provide the means for *protecting other basic rights* and for advancing interests in ways that might plausibly promote the common good. [...] The idea [...] is that ensuring that all citizens have effective political rights serves as a reminder that citizens are to be treated as equals in political deliberation...” (Ibid. 107, my emphasis).

Cohen does not specify in this context, however, how those political rights are formulated and whether their form and content is protected from political challenge. The question whether some rights are elevated above the outcomes of democratic procedures is thus still unclear.

Benhabib also assures that the deliberative democracy “transcends the traditional opposition between majoritarian politics vs. liberal guarantees of basic rights and liberties...”, albeit with the specification:

“...to the extent that the *normative conditions of discourses, like basic rights and liberties*, are to be viewed as rules of the game that can be contested within the game but only insofar as one first accepts to abide by them and play the game at all” (Benhabib 1996, 80, my emphasis).

This means that the deliberative moral conditions are institutionalized as “rights and liberties”, and Benhabib is explicit that without them, inclusive deliberation is not feasible; she is also firm about the universality of those rights in a sense that they belong equally to all. At the same time, what these institutionalized rights and liberties exactly are, is subject to open deliberations: “In a constitutional democracy the question as to which aspects of the higher law are entrenched against revision is itself always open and contestable” (Ibid.). This leaves the account somewhat ambiguous about the politics of rights, stating that some rights, to some extent, are to be “entrenched against revision”, but it is subject to debate *which* rights belong to this category. For Benhabib, though, this is not contradictory or problematic. She recognizes basic rights and liberties as a necessary, although not perhaps sufficient, condition for democracy to be feasible at all; while acknowledging that their exact content and meaning is debatable. Benhabib argues:

“When basic rights and liberties are violated the game of democracy is suspended and becomes either martial rule, civil war, or dictatorship; when democratic politics is in full session, the debate about the meaning of these rights, what they do or do not entitle us to, their scope and enforcement, is all that politics is all about” (Ibid.).

Here she follows Habermas, who describes the deliberative process of legally controlled reflection and rational debate on law and rights as a logical follow-up to the deeply established Kantian ideal of “the rule of law”: if law is to regulate and control the actions and powers of lawmakers, it is also to be subject to such reflective processes itself: “within the discourse-theoretical approach, [Kant’s idea of a state subject to the rule of law] is carried further to give rise to the notions that additionally the law is applied to itself” (Habermas 1996, 449). In deliberative democracy laws, constitutions and notions of rights are subject to inclusive democratic deliberations, contestations and critique within the framework that they themselves constitute to these deliberations. This is thus envisioned as a circular process of mutual dependency between legal rules and deliberative processes; whilst the legal rules must remain such that the inclusiveness of the procedures and the equality of the participants are retained, they are otherwise subject to change or revalidation through those procedures.

As rights are on the agenda of the deliberative political arena, the *deliberative conditions* are claimed to work as safeguard to guarantee that the basic rights of persons or minorities are not violated. One of them is the condition of *publicity*, the obligation of all political actors to make their claims public and to present universally appealing, justifiable reasons to support them. If rationality is interpreted as the capacity of giving justifiable reasons for one’s arguments, discriminatory claims against someone’s basic rights are supposed to lose their argumentative power when put under the test of public acceptability. Under such conditions, proponents of deliberative democracy claim, publicity itself forces the participants to reconsider their arguments: discriminatory demands cannot be justified as reasonable, because they cannot be backed by good reasons acceptable to all participants. Thus arguments against someone’s basic rights supposedly lose their argumentative power by their mere publicity. Also, the conditions of egalitarian reciprocity, universal moral respect and symmetry constitute restraints on the democratic procedure. The norms of reciprocity, based on the principle of universalizability, imply that no claims can be made to others that one would find unacceptable for oneself. This implies that no majority can accept, or even propose, discriminative rules against a minority. The conditions of equality, symmetry and reciprocity also mean that all rules and decisions bind all participants equally. Thus the fundamental conditions for deliberative democracy are not fulfilled, unless the

liberties which form part of the framework that makes the model conceivable, are guaranteed equally for all. (Benhabib 1996, 72, 78; Cohen 1996, 99-101.)

The possible violation of rights by “majority tyranny” is also claimed to be prevented by the method of “*recursive revalidation*” that grants all participants the right to question the already passed decisions. The methodological procedure of recursive validation is supposed to prevent the abuse of majoritarian decision making by granting the right to all participants to contest collective decisions after they are accepted. Recursive validation allegedly works as extra protection against the violation of minority rights, ruling out the too strong conditions for universal consent that skeptics fear undermine the deliberative model, and the possibility of “majority tyranny”. Majority decisions in deliberative democracy are valid *until challenged and reconsidered by good reasons*. According to the rules the consent to abide by collective decisions must be voluntary and free. It follows from the norms of universal respect and egalitarian reciprocity that even minorities can withhold their assent and challenge the rules and the agenda of public debates. (Benhabib 1996, 77-80; Cohen 1996, 99-107.) Because these “rules of the game” indicate that deliberations on the given terms are not possible without the basic rights and liberties of the participants being enforced, deliberative democracy claims to have dissolved the alleged tension between rights and majoritarian politics. Nevertheless, some questions remain: how is it guaranteed that the deliberative preconditions themselves are fulfilled; to what extent is coercion legitimate in order to enforce the collective decisions that are made by the deliberative “rules of the game”, but still rejected by some sections of society: how does deliberative democracy treat the citizens and political actors who do *not* agree to be bound by the deliberative rules, norms and conditions?

### **3.3. “Rules of the game” as justificatory criteria**

The deliberation process, as has been shown above, is constrained not by a fixed, unchangeable and undebatable constitutional framework, but by the “rules of the game” that are conceptualized simultaneously as the *preconditions* as well as the *outcomes* of the public reasoning processes. The preconditions require that the deliberation process be equal, symmetrical and reciprocal. For the process to be able to continue, the outcomes need to respect those norms as well. This raises the

question about the eventual institutional restrictions of the effective power of the deliberative democratic processes: they are not allowed to overthrow the norms that constitute their preconditions. How is that possibility prevented? Although the conditions are in practice envisioned as constitutional rules, the deliberative norm of openness in principle subjects constitutions themselves to the democratic processes of debate and change. Benhabib appears ambivalent on the possibility of questioning the “rules of the game”. On the one hand she emphasizes, as noted above, that in accordance with the principles of discursive morality all participants can in principle question the very rules of the discourse procedure itself. Regarding the position of constitutional rights she writes that “basic civil and political rights”, embodied in most democratic constitutions, “are never really ‘off the agenda’ of public discussion and debate” (Benhabib 1996, 79). Making an *empirical* claim about deliberations in existing liberal democracies, Benhabib argues that the (Rawlsian) “language of keeping these rights off the agenda mischaracterizes the nature of democratic debate in our kinds of societies” (Ibid.). At the same time, though, she asserts that the democratic “rules of the game” can only be questioned by players who commit themselves to abiding to the rules when entering the game (Ibid. 80; Benhabib 1992, 107).

The deliberative “rules of the game” do not only constitute the initial framework within which the deliberations take place: they also function as *qualifying criteria* for arguments posed in public. Thus, even as these ground rules can be legitimately questioned and challenged as *a foundational normative framework* of the deliberative processes, they still guard the process as *justificatory criteria* used to evaluate, and eventually refute, political arguments put forward in the public sphere. While such norms are morally convincing to anyone subscribing to egalitarian and democratic values, this appeal to them is vulnerable to critical charges of circular argumentation and to claims about the overt dependency of the deliberative model on the political virtue of citizens; or alternatively, about an inevitable slip to a defense of liberal constitutionalism, from which proponents of deliberative democracy explicitly take distance (see e.g. Benhabib 1996, 75).

Benhabib argues that there is no conflict between the open conception of practical rationality and the universalist moral constraints exactly because the deliberation process is simultaneously bound by the *preconditions* as well as the *outcomes* of public reasoning, and because the preconditions of equality, symmetry

and reciprocity that guide the deliberation process also define the *criteria for justification* of the arguments given in the process. Discriminatory arguments, even if free to *enter* the deliberative process, lose their argumentative power when tested for universal acceptability: they cannot be justified as reasonable, because they cannot be backed by good reasons acceptable to all participants. It is assumed that the universal moral norms automatically imply that even if all questions down to the model's very foundations are open to challenge, no majority can accept discriminative rules against a minority, as they would violate the norms of reciprocity, symmetry and equality. This is where the argumentation gets circular: if it is the *justificatory criteria* of deliberative democracy that ensure that the procedure will not end up violating its egalitarian preconditions, what justifies these criteria if not the preconditions themselves?

Benhabib is aware of the circular moment in the deliberative argument; but she describes it “not a vicious circle but rather a hermeneutic circle that characterizes all reasoning about morals and politics” (Benhabib 1996, 78). The task of the moral conditions is to ensure that while the meaning and content of liberties may be subject to deliberation and dispute, liberties constitute at the same time part of the framework that makes deliberation possible. Through this reasoning, the moral framework appears to guarantee the equality and basic rights of the participants of itself, with no need to protect it from eventual results of the public deliberations through an external constitutional framework. But how are these conditions secured without compromising the radical openness of the political process? As far as the conceptual position of basic rights remains unclear and subject to circular reasoning, deliberative theory remains vulnerable to criticism from defenders as well as opponents of constitutionalism. Thus, the conceptual position of rights as moral arguments in deliberative democracy needs to be clarified more explicitly. The question is, can one conceive of deliberative politics that is more open to popular influences and more responsive to the claims of the non-privileged than conventional liberalism that has been criticized for excluding such claims; without compromising the notion of every human being's equal worth and the unconditional political principles that arise from that notion?

The universal norms of deliberative democracy are not just instrumental for keeping the deliberation process democratic; they have inherent value as moral and political ideals that the deliberative process is bound to uphold and protect. Although equal respect to all participants requires that no views are suppressed or

excluded in advance, the openness of the agenda is not unconditional. While Benhabib argues, *contra* Rawls, that the issues of “the good” should not be excluded from the political debates, she also states that

“communicative ethics is a deontological theory to the extent that it *constrains* conceptions of the moral good in accordance with *certain restrictions* upon procedures of moral justification;” adding: “Yet it is reflexive, it allows the *non-dogmatic* questioning of *its own presuppositions*” (Benhabib 1992, 45-46, my emphasis).

Once it is accepted that the moral constraints *are* allowed to restrict the content and scope of public arguments and decisions, the question is how these restrictions are justified and enforced, and whether they should be conceptually distinguished from the issues that can be discussed in a genuinely unconstrained manner? The quotations above indicate that not all challenges to democracy’s presuppositions are acceptable after all. Allowing “non-dogmatic questioning” implies that “dogmatic” claims can be excluded; this calls for a way of making the difference in order to justify the exclusion. The fact that some viewpoints are expected to leave the discussions at a point implies that those defending unacceptable views realize their mistake and withdraw from the public sphere. But such exclusions can only be legitimately made if some justificatory criteria are settled *beyond questioning*.

Benhabib, while challenging Rawls’s and Habermas’s restrictions to political agenda, emphasizes that the deliberative moral universals determine *the criteria for justification*, not the *content* of issues under public debate. But if indeed even the foundational values and rules of deliberative democracy can be challenged, it is unclear why that unlimited right to question the existing norms would not include the right to challenge those same norms also *as justificatory criteria*. That would mean, however, that deliberative democracy structurally endorses in its public sphere political movements that call for its destruction. Alternatively, if those criteria are protected from questioning, some distinction analogical to the conventional distinction between “the right” and “the good” must be made between more and less openly debatable issues. Thus, the deliberative notion of interactive universalism would be more understandable if its two crucial principles were more clearly distinguished in an order of priority: first, the deontological *moral* principle of equality, the core value behind the normative conditions of equal respect and universal reciprocity that constrain the deliberation procedure and help evaluate political arguments; and second, the *democratic* principle of openness that states

that all *other* issues are discussed openly *within the constraints* set by the principle of equality.

In Benhabib's model, the core principle of equality functions as the moral premise as well as the validity criterion for any public claims: in order for arguments to be counted as reasonable and acceptable, they must meet the conditions of equal respect and universal reciprocity. Thus, the principle of openness is conceptually subordinate to the principle of equality. If the principle of openness is fully unconstrained (so that the principle of equality can be legitimately questioned) and the principle of equality is invoked as the criterion of justification, the argumentation cannot avoid a vicious circle: the principle of equality (as a foundational value) can be criticized, but the criticism will be refuted by an appeal to the same principle of equality (as validity criterion): thus that principle is invoked to revalidate itself. For example, if a racist movement defies the egalitarian foundations of deliberative democracy and tries to re-legitimate the inferior status of dark-skinned people, it challenges the principle of equal respect by claiming that not everyone deserves equal respect. The deliberative public would reject the claim as unreasonable on the grounds that it fails to comply with the justificatory criterion of equal respect. But on what grounds is *that* criterion defended when challenged? Apparently deliberative democracy must fix some of its principles as *unquestionable* basic norms, if it is to persist as a political system: to create a barrier against the potential political success of anti-egalitarian claims, and to prevent openness from becoming subversive of the model's core values.

Thus it seems that the proponents of deliberative democracy can avoid circular reasoning only by fixing the universal egalitarian norms *as a constitution* that is protected from challenges from political actors who do not accept these norms. Combining the open agenda and critical attitude with the constitutionally fixed egalitarian criteria for justification is not problematic, as long as the separation of the two different levels is acknowledged. This means that the deliberative model turns out to be closer to the conventional liberal model than its proponents are willing to admit. The main remaining difference is that the area in politics protected from democratic scrutiny is more limited, and the scope of issues open to public debates and participatory decision-making is wider in deliberative democracy, and the boundaries between these two categories are conceived as more flexible and admittedly debatable. Still, this difference can be seen as a matter of degree rather than quality. Although the norm of equality allows for a wide scope of different

interpretations of the meaning, content and extent of rights, Benhabib's more recent work confirms the view that a distinction between fixed constitutional and openly debatable questions is inevitable even in the deliberative model. Discussing multicultural issues, Benhabib is surprisingly explicit on this: "I am not suggesting [...] that legal norms should originate through discursive processes" (Benhabib 2002, 118). In contrast, she insists that local, particular decisions be made in a deliberative manner, by listening to all involved parties (Ibid.). This means, in effect, that there are different levels of decision making, of which discursive processes guide particular decisions with local importance rather than the *legislative decisions* of a democratic state; although in Benhabib's earlier visions of deliberative democracy public discourse is what gives *all* political decisions, including laws, their legitimacy.

The need to differentiate the two levels of moral principles does not contradict the insights on the epistemological uncertainty and contingency of practical reason. The constraining principles of equality and universal respect are fixed as the *normative* moral and political criteria for an inclusive model of democracy, not as abstract claims of moral truth. Justifying those normative criteria is an issue of further debate; but as Benhabib and others have argued, giving them up would spell also the end of democracy. The universalist egalitarian norms can be defended, for example, on the basis of simply the common humanity of human beings, or of the lack of valid arguments for excluding anyone's views prior to discussions. Those who criticize universalism as repressive often back this argument with the *empirical* claim that formal universal norms tend to dismiss the voices of the less educated and privileged. Still, with no normative assumption of the moral equality of persons, there is no case for defending the marginalized. Equality as a norm, explicit or not, lies in the background also of the demands for further inclusion of difference.

### **3.4. Discursive morality and constitutionalism**

It appears from the discussion above that even if no final truth will ever be discovered in politics, for practical purposes the terms of interaction must be somehow institutionally defined, to grant deliberative democracy continuity in time. As argued above, the principle of openness raises the question what the possibility to publicly question, and eventually refute through democratic procedures, *all* norms

and rules, including those constituting the foundations of the model itself, means for the conceptual position of the deliberative norms of equality and reciprocity. If it means that these basic conditions can be “radically questioned” but not changed, the possibility of *seriously* questioning them remains merely formal. If, on the other hand, it means that *changing* the very basic principles of deliberative democracy is even theoretically possible, the ideal will be either self-contradictory or totally dependent on the egalitarian goodwill of the participants for its continuity.

Expecting that those points of view that do not share the deliberative ideals will “withdraw from the conversation at some point” implies a firm assumption that the discussion remains guided by the deliberative principles mainly thanks to the democratic commitments of the participants, and those who do not endorse these principles are free to exit. But it remains to be shown how the principles survive if their opponents refuse to withdraw from the public sphere and particularly if they gain political support through the democratic process – a possibility that is mostly treated as extremely unlikely in current democratic theories, but that is nevertheless always latently present in politics. In such cases only an *unquestionable* and legally fixed normative framework can prevent the egalitarian processes of open discussion from being discontinued *through democratic procedures* (while no institutions can finally protect democracies from *violent* overthrow, but discussing such possibilities is beyond the scope of the present *democratic* theory debates). The recognition by the proponents of deliberative democracy that *some* protection of universal norms is inevitable for the survival of the model appears self-contradictory, because such institutional protection means that some issues *are* removed from the political agenda and structurally protected from the eventual outcomes of public discussions and democratic decisions.

As I argued in the previous section, Benhabib’s own texts confirm at least implicitly that deliberative theory cannot get rid of a distinction between on the one hand, the discursively created political principles that are open to ongoing public challenge, and on the other hand, the “ground rules” that should not be compromised because without them the inclusive framework of deliberations would itself not survive. Particularly in her later work, Benhabib supports a limited version of liberal constitutionalism, although she explicitly still promotes the ideal of deliberative democracy. But in spite of the emphasis on openness, strains of constitutionalism can be detected also in her earlier work. In 1992, Benhabib

described constitutional rights as the institutionalized expressions of the moral foundations of her model:

“...the metanorms of communicative ethics like universal respect and egalitarian reciprocity are often embodied in the constitutions of liberal democracies as basic principles of human civil and political rights. These rights are the ultimate moral principles to which appeal must be made in a situation of *prima facie* ethical conflict between different ways of life” (Benhabib 1992, 45).

Thus the conventional liberal conception of the priority of “the right” is redescribed here as a “metanorm”, the ultimate moral good. It is unclear to what extent rights as the legal expressions of *moral* principles are perceived to be an *outcome* of interactive, inclusive public political processes instead of their external constraints. Given the quite wide scope of rights established in the constitutions of existing liberal democracies, the assumption that it roughly correlates with the “metanorms” of deliberative democracy implies that the scope of issues that *can* be openly debated in the public sphere may still be not much less restricted in deliberative democracy than in conventional liberal theories.

The unconditionality of Benhabib’s moral and legal universalism, as well as her acknowledgement of the need to distinguish between debatable and undebatable issues in politics, appears most clearly in connection with discussions on the position of universalism in multiculturalism. Disputing Ayelet Shachar’s legal pluralist visions of “multicultural jurisdictions” that make some space for parallel legal systems within liberal democracy for particular ethnic or religious groups, Benhabib argues that Shachar’s legal pluralism as a solution to multicultural conflicts may lead to “legal eclecticism, which may undermine one of the cardinal virtues of the rule of law, namely, ‘equality for all before the law’” (Benhabib 2002, 128). She notes that unless the claims of cultural rights are backed by reasons that *all* can be expected to share, there is reason to fear a “refeudalization of the law”, and argues:

“Without establishing *very clear lines* between *nonnegotiable constitutional essentials* and those practices, rights, and entitlements that may be governed by different *nomoi* groups; and without specifying *the capacity of constitutional principles to trump over other kinds of legal regulations*, we may not be resolving the paradox of multicultural vulnerability, but simply permitting its recirculation [...]” (Ibid., my emphasis; see also Shachar 2001, 88-116.)

Arguing for the need to safeguard the nonnegotiable universal constitutional rights above other political and legal values, norms and arguments, Benhabib takes an

explicitly constitutionalist position while defending a deliberative approach to the disputes, negotiations and discussions held in the public sphere of *civil society*. This confirms that in her version of deliberative democracy, although all critical points of view are welcome to enter the discussion, possibly on the basic norms of the deliberative polity itself; the egalitarian criteria of justification are bound to ensure that those claims that defy the norms of equal citizenship will be rejected as *unconstitutional*. This vision, while unconditional in its rejection of the arguments that defy the values of democracy, universal individual rights and equality, echoes the Rawlsian insistence that such demands be restrained to the non-political sphere of quasi-private associational life and eliminated from the *political* debates that have actual consequences for the legal makeup of democratic societies. Although Benhabib insists on including e.g. religious fundamentalists in the public deliberation processes, in which they would have to complement, under the conditions of symmetry and universal respect, their own demands of equal respect with clarifications on how they respect the similar claims of others; the bottom line is that unless the participants yield to the deliberative norms and *respect the equal constitutional rights of all citizens*, they cannot validate their claims through the deliberation process (Benhabib 2002, 118-119).

This indicates that regarding the conceptual position of individual rights in relation to participatory democracy, the model of deliberative democracy is closer to liberal constitutionalism than its proponents might like to admit. Although the deliberative model contests the boundaries of the political and the traditional division lines between “the public” and “the private” spheres in a way that challenges many assumptions of conventional liberalism; it has to rely on some limits of acceptability of arguments presented and endorsed through the deliberation processes, if it is not to be potentially self-destructive. Because the feasibility of deliberative democracy is ultimately dependent on preserving the universalist principles of reciprocity and equal respect for all members of the deliberative polity, these principles need to be enforced through a politics of universal constitutional rights that can be criticized, disputed and discussed, but not overturned, in the course of democratic deliberations.

The non-negotiable moral foundation behind these principles is the strong humanist notion equal worth of each human individual that also motivates conventional liberalism as well as its egalitarian critics. The politics of rights in deliberative democracy is thus not endlessly “democratic” in a sense that existing

basic rights could be compromised even by following proper democratic procedures that theoretically might support such a compromise. The “metanorms” are fixed constitutionally as principles that any discussion on the further content and meaning of rights must respect by keeping other rules and decisions compatible with them. While the theoretical ideal of political openness means that the scope and meaning of rights is open to public scrutiny, practical political realities require that the norm of openness must be compromised to some extent. The fact that no one is in a position to hold final truth claims about practical morality does not necessarily imply that the conditions for everyone’s equal participation and equal claim to respect need *not* be fixed beyond further challenge in particular political settings.

#### **4. Agonistic pluralism: politicizing the tension**

While conventional liberal democracy, particularly its strong constitutionalist version, conceptually subordinates democracy to the politics of universal individual rights and proponents of deliberative democracy either deny that there is an inherent tension between democratic legitimacy and the politics of rights or claim that the model of deliberative democracy reconciles the tension; proponents of “radical pluralist” or “agonistic” participatory democracy emphasize that there indeed is a deep contradiction between “the logic of democracy” and “the logic of rights”, and that instead of denying or downplaying it, that contradiction should be recognized, exploited and even celebrated when theorizing the political. Representatives of this position tend to be skeptical about individual rights in general, and of constraining democracy in the name of constitutionally established universal rights in particular, although they do not necessarily fully reject all politics of rights.

Mouffe as a devote contemporary proponent of “agonistic” politics and a radical democrat with ambiguous democratic allegiances, presents what she describes as an “irreducible tension” and “necessary conflict” between liberal and democratic values as “the democratic paradox” (Mouffe 2000, 1-20; 139-140). In her view, this tension is created by the fact that contemporary democracies are constituted by two totally different historical traditions that in spite of the fact that they are institutionally combined in current liberal democracies are not inherently linked, but only contingently coexistent; while following totally different, mutually contradictory

values and logics. These two traditions are “the liberal tradition constituted by the rule of law, the defense of human rights and the respect of individual liberty”; and “the democratic tradition whose main ideas are those of equality, identity between governing and governed and popular sovereignty” (Ibid. 2-3).

Thus, *contra* the proponents of deliberative democracy and even many contemporary conventional liberal thinkers, Mouffe revokes the traditional division line between the “Kantian” and “Rousseauian”; the “moral” individualist and the “political” collectivist approaches to modern politics. *Pace* writers like Shapiro or Cohen who explicitly invoke the mutual interdependency of substantive democracy and individual rights (Shapiro 1999, 1-16; Cohen 1996, 107); Mouffe denies such harmonious connection: “There is no necessary relation between those two distinct traditions but only a contingent historical articulation” (Mouffe 2000, 3). With the thesis about the conflict between the values of liberty and the values of democracy as her starting point, Mouffe’s central argument is that in contemporary liberal democracies and world politics the former have gained too much ground at the expense of the latter; and that therefore the prevailing conceptions of rights, as well as liberal and deliberative conceptions of democratic politics that are framed by those conceptions, should be revised in favor of a vision that gives more space to “democracy” as an agonistic arena for articulating political differences – if necessary, at the expense of currently “hegemonic” understandings of the universality of rights.

Mouffe, arguing against Habermas, refutes his claim that “there is a conceptual internal relation, and not simply a historically contingent association between the rule of law and democracy” (Habermas 1998, 449; quoted in Mouffe 2005, 84); claiming that his aim is “no less than to establish a privileged rational nature of liberal democracy and consequently its universal validity” – a goal that Mouffe forcefully refutes as I will indicate below (Ibid.). She describes the claim about the reconciliation of rights and democracy as a plot to label any opposition to “liberal democratic hegemony” as “a sign of irrationality and moral backwardness and as being illegitimate” (Ibid. 84-85). Although not offering a vision of a *democratic* regime *outside* the liberal democratic framework, Mouffe makes a strong statement that there is a necessary conflict between the logic of liberty and rights on the one hand, and of democracy and equality on the other; and that that conflict should neither be denied nor attempted to eliminate or reconcile. Instead, it should be politicized by openly debating the controversies regarding the extent and limits of equality or liberty in the agonistic public sphere.

#### 4.1. The return of “the political”

As I noted in part I, critics have argued that there is a tendency in conventional liberalism, and even in the theory of deliberative democracy, to “eliminate the political” from politics. The Rawlsian idea of “overlapping consensus” about the core values of a democratic society, the reliance on constitutional principles as unquestionable and the deliberative pursuit to reach “reasonable” consensus through open discussions on matters of “common concern” are criticized for silencing serious dissent and homogenizing and rationalizing public discourse to the extent that it suffocates the real diversity of opinion, and, ultimately democracy itself. While Isaac et al focus their criticism on the Rawlsian version of “political liberalism” and believe that the ideal of deliberative democracy better opens up public channels of confrontation and dispute over major political differences, Mouffe sees no difference between conventional liberal and deliberative approaches, blaming both for trying to escape genuine pluralism. (Rawls 1993, 133-172; Isaac et al 1999, 253; Mouffe 2000, 91-93.)

For proponents of agonistic democracy the main problem with conventional liberal democracy is its allegedly apolitical nature, its tendency to explain away conflict and dissent: the issues that cause serious disagreement are wiped off the political arena; liberalism is presented as a politics of fake harmony that, taking its assumption of non-existence of principal political conflict as its starting point, in fact eliminates such conflict by coercion. Honig, assuming like Mouffe that there is a fundamental conflict between “liberty” and “equality”, criticizes Rawls for thinking that conflict away:

“Rawls imagines a political culture whose fundamental conflicts (between liberty and equality) are ‘settled’, a civic culture that engenders no resistance to itself, [...], a political economy untroubled by politics” (Honig 1993, 127).

Rawls’s ideal of political liberalism is presented by Honig as an ideal whose goal is “reconciliation, not politicization”. As that ideal is unrealizable, it becomes a hidden coercive project for eliminating dissent by strengthening the state that is *supposed* to be fully neutral and universally serving all its citizens when it in fact is not. Describing the state as the institution with “final and coercive authority over a certain territory and population” that “affects permanently men’s positions in life”, Honig argues:

“one response to this circumstance might be to politicize the relationship between the citizen and the state, to call on citizens – in the name of a radical democratization – to decenter the state as the privileged site of political action by creating [...] ‘multiple publics’ and by recognizing those multiple publics that already exist...” (Ibid. 128-129).

Instead, Rawls, in the name of a more democratic politics, “recenters the state that other democratic activists are actively involved in decentering” (Ibid. 129). Honig is ironically skeptical about the democratic dimensions of the Rawlsian project: “By theorizing a state-centered arrangement that free and equal rational beings could consent to if they were ever given the opportunity to do so, Rawls distracts from the fact that the opportunity never actually arises” (Ibid.).

One of Honig’s main concerns is that an open democratic culture will eventually suffer from such “politics of reconciliation” that ultimately passivizes citizens. In her view, Rawls’s approach insists that citizens not *experience* the state as a coercive institution, thus it encourages citizens to become passive “consumers of the state’s goods and services”, unaware that “their survival as a democracy might require them to engage and resist – not simply reconcile themselves to – the state’s status as the privileged and legitimate bearer of political power and coercion” (Honig 1993, 129). Thus, in Honig’s view the threat to democracy is constituted not just by the eventual public political apathy that the ideal of reconciliation encourages, but also by excessive reliance on the state and its institutions as both mediators of justice and sites of political action. She argues that the Rawlsian politics of reconciliation cannot deal with “the remainders” of politics, e.g. criminals, and “non-reasonable” or non-adaptive citizens; and that instead of opening spaces for confrontation for such “remainders” Rawls strives to a *closure* of political spaces emerging between the expectations and realities of the existing liberal democratic institutions. According to Honig, Rawls’s “apolitical pluralism” fails to see the *positive* connection between pluralism and politics, offering no possibility to politicize the different co-existing lifestyles, while the apparent neutrality of the state in fact naturalizes the dominant culture’s forms of life – its gender roles, family structures, work morals etc. Fearing that privatizing and depoliticizing the diversity of values and life-styles eventually encourages “social homogenization”, she asks rhetorically: “what if genuine pluralism is the *casualty* of the public-private distinction that Rawlsian justice postulates as the *condition* of pluralism’s possibility?” (Ibid. 130).

Mouffe argues in a similar manner that the Rawlsian liberal conception of justice tries to eliminate the dimension of “the political” from the public sphere. According to Mouffe the Rawlsian model presupposes that there is no disagreement on the basic liberal values (liberty and equality) as the political foundation of liberal democratic societies and refuses to recognize those values as specifically *political*. The problem stems, in Mouffe’s view, from the confusion of *political* and *moral* debates that she reckons should be kept apart. To apply “a mode of reasoning specific to the moral discourse” to the field of politics is “to reduce it to a rational process of negotiation among private interests under the constraints of morality” (Mouffe 1993, 49). Mouffe argues that “to think politics in terms of moral language [...] necessarily leads to neglect of the role played by conflict, power and interest” (Ibid.). Relying on Schmitt’s earlier critique of liberalism, she adds:

“conflicts, antagonisms, relations of power, forms of subordination and repression *simply disappear* and we are faced with a *typically liberal vision* of plurality of interests that can be regulated without need for a level superior to political decision [...]” (Ibid., my emphasis).

Mouffe blames Rawlsian liberals, and later also deliberative theorists, for cherishing an “illusion of pluralism without antagonism”; and argues that “completely missing” from their approach is “‘the political’ in its dimensions of power, antagonism and relationship of forces” (Mouffe 2000, 31). She summarizes the liberal position as follows:

“Their objective is to provide a moral, *albeit minimal*, consensus on political fundamentals. Their ‘political liberalism’ aims at defining a core morality that specifies the terms under which people with different conceptions of the good can live together in political association. [...] Given that it is neutral with respect to controversial views of the good life, they believe that such a liberalism can provide the *political* principles that should be accepted by all despite their differences” (Ibid. 23, my emphasis).

Thus Mouffe recognizes that the liberal core morality (based on the conception of moral equality and individual autonomy of all persons) is expressed as a set of *political* principles and institutions, but she believes however that liberals underestimate the political dimension of their own position. Against what she sees as an illusory conception of shared *moral* foundations, Mouffe argues that in fact the liberal position is based on a *political* conception of reasonableness that relegates “unreasonable” doctrines to the private sphere so that they do not jeopardize the “dominance of liberal principles” in political sphere. She criticizes Rawls for denying the pluralism of “principles of political associations”; and for *excluding conceptions*

*which refuse the principles of liberalism.* Interestingly though, Mouffe elsewhere also supports excluding anti-liberal political positions from democratic political sphere; thus, as I will argue below, her own position on the “dominance of liberal principles” is ambiguous. Her main argument is apparently that such exclusions should be recognized as explicitly *political*, not justified on *moral* grounds (Ibid. 24-25). I will return to this question in part III, to inquire to what extent liberals indeed deny that *political* dimension, and to contemplate whether the *moral* dimension can, or should, be eliminated from political arguments altogether.

According to Mouffe, Rawls’s conceptions of rationality and reasonableness imply that it is illegitimate to question the existing political arrangements once the institutions of a “well-ordered society” are at place, since they embody “the principles of justice”. This, she claims, leads to a “dangerous utopia of reconciliation” that allows no rivalry in political *or* economic interest. Mouffe fears that “justice as fairness” offers only one “correct” *interpretation* of “how the democratic principles of equality and liberty should be implemented;” and claims that “for Rawls, a well-ordered society is a society from which politics has been eliminated” and that in Rawls’s ‘liberal utopia’ *legitimate dissent would have been eradicated from the public sphere* (Mouffe 2000, 29-30, my emphasis).

In Mouffe’s view, such “final consensus” is neither possible nor desirable; and attempts to accomplish it do not eliminate dissent and disagreement, but provoke different ways of its expression, like attachment to essentialist political identities and *antagonistic*, hostile and violent political movements. That is what she perceives as dangerous in what she calls “post-political” theories and practice, claiming that it is the consensus-oriented “third way” politics in Europe that has encouraged the rise of nationalist right-wing populism and even religiously motivated terrorism. Mouffe follows Schmitt in claiming that politics always requires an “other”, a “they” as opposed to a “we”; and argues that *democratic* politics is about airing the conflicts that arise from such oppositions, not shunning from them. The main task of democratic institutions is, in Mouffe’s view, to provide legitimate sites for expressing and debating disagreement: sites that turn “antagonism” into “agonism” and the hated political enemy to a respected political opponent. For Mouffe, “the political” is necessarily conflictual, while in a genuinely agonistic political sphere that is not a problem, but a positive resource. (Mouffe 1993, 5-6; 2000, 101-103; 2005, 19-25, 29-34, 69-72.)

According to Mouffe as well as Honig, plurality and diversity in politics should be celebrated and enhanced. At the same time, there are some differences in their interpretations of what returning the displaced political arguments to politics actually means. While for Honig bringing back “the political” to politics means legitimizing and recognizing what she calls the “remnants” of the “well-ordered society” and the articulation of dissent *outside* the official political institutions, e.g. through civil disobedience or other “disruptive” action like demonstrations; Mouffe calls for open disagreement *within* the framework of those institutions: at times her criticism is concretized to the critique of European, and in particular British, left parties moving to the center so that real disagreement disappears from debates *between the left and the right*. Mouffe explicitly calls for a return of a distinct left-right division in politics and implicitly insists that repoliticizing the disagreement on issues of socio-economic justice would prevent a revival of more essentialist political identities, such as nationalist and religious ones. (Mouffe 2000, 108-116; 2005, 64-72.)

The primary danger to democracy, in this radical democratic view, is constituted by allowing liberal democracy to embrace not too much, but too little public participation and political dissonance. Liberal and deliberative conceptions of politics are either blamed by radical democrats for threatening democracy *indirectly* by pursuing a politics of consensus that represses the articulation of serious difference and thus produces latent resentments that can be exploited by potentially anti-democratic forces; or their alleged hostility to diversity is seen *directly* as potentially totalitarian, because of their alleged drive to homogenize the political sphere and repress “real” difference. I discuss below whether liberal politics is as averse to difference and disagreement as radical democrats claim. As the discussion on reveals, differences between these theoretical positions seem to be more about rhetorical styles than the institutional settings of democracy: in spite of their aversion to the rhetoric connected to it, proponents of radical democracy are reluctant to actually renounce the liberal politics of rights. In the following section I discuss why the efforts of the proponents of deliberative democracy to increase the inclusiveness of liberal political spheres fail to convince radical democrats.

## 4.2. Critique of deliberative rationality

As I argued in part I and in the previous chapter, theorists of deliberative democracy try to conceptualize political sphere and democratic decision making processes as more inclusive than in conventional liberal theory and at the same time to reconcile the universal norms of liberal democracy, institutionalized as constitutional rights, with the values of inclusive democracy and the recognition of difference, diversity and plurality. The central thesis of deliberative democracy in this regard is that *anyone* should be able to enter the political sphere with *any* issues that can eventually be politicized even if they are not regarded properly political prior to the public deliberations; given that she abides by “the rules of the game”, that is, the deliberative moral conditions of universal respect and egalitarian symmetry, and is prepared to publicly justify the claims she makes by giving generally acceptable reasons in its favor.

Mouffe’s argument presented in the previous section indicates that the proponents of radical democracy are not convinced by the deliberative attempts to conceive the values of democracy as compatible and indeed interdependent with the universalist politics of rights; and that they dismiss such attempts as just ways to expand and naturalize the liberal hegemony and lend it democratic legitimacy by appeals to *apparent* inclusiveness that is bound to remain illusionary unless the conflictual dimension of “the political” is explicitly recognized. Here I introduce some other aspects of deliberative theory that proponents of radical and inclusive democracy find problematic. These are related to the universal moral and rational values contained in the deliberative argument; like the meaning and content of the “rational” norms as criteria for evaluating political arguments; the reasonable style of argumentation that allegedly discriminates “different” styles of speech and action; and the norms of symmetry and mutual respect as well as other idealistic dimensions of the Habermasian “ideal speech situation” that in the real world of existent inequalities are claimed to contribute to the perpetuation of existing inequalities rather than help to cure them.

Mouffe, as it appears from the discussions above, does not regard “deliberative democracy” as a democratic theory that can be distinguished from conventional liberalism. She does acknowledge a difference between “aggregative” and “deliberative” modes of liberal democracy, and places Rawls and Rawlsian liberals as well as Habermas and other proponents of deliberative democracy in the latter

category. The theory of deliberative democracy does not in Mouffe's view escape the difficulties of the more conventional Rawlsian model of democracy; indeed it earns even more severe criticism for *pretending* to do so, for allegedly believing in the possibility of finding "harmonious" consensus in political questions through rational and inclusive deliberations and for asserting that political decisions can be made without exclusions, from an intersubjectively achieved *impartial* standpoint and *equally in the interests of all*. Against the hope that the deliberative conditions contribute to more legitimate and just outcomes of democratic procedures, Mouffe, holding on to her Schmittian definition of democracy being based on a frontier between "us" and "them", argues that "the obstacles to the realization of the ideal speech situation – and to the consensus without exclusion it would bring about - are *inscribed in the democratic logic itself*" (Mouffe 2000, 48). She criticizes deliberative democrats for denying the contingency and the contestability of all political decisions and for naturalizing political decisions by making them *appear* as if they were achieved through inclusive deliberations and unanimous consensus; and argues:

"Consensus in a liberal-democratic society is – and always will be – the expression of hegemony and a crystallization of power relations. The frontier that it establishes between what is and what is not legitimate is a *political* one, and for that reason it should remain contestable" (Ibid. 49, my emphasis).

It is hard to see how for example Benhabib's account of deliberative democracy, with its emphasis on ongoing deliberations and the principally open possibility to contest all results of previous deliberations and accepted norms, contradicts that statement. However, Mouffe is convinced that due to its commitment to *rationality*, and to the universality of certain norms as those expressed through the institutionalization of basic rights, the deliberative model is bound, just like Rawlsian liberalism, to "escape politics" and implicitly try to displace genuine disagreement by establishing a unity of certain *moral* norms that all reasonable persons are expected to share. Mouffe's critique particularly focuses on the attempt by deliberative democrats like Habermas, Benhabib and Cohen to secure the link between democracy and liberalism, popular sovereignty and individual rights; and on their emphasis on *normative*, as opposed to merely instrumental, *rationality*. In Mouffe's view *all* arguments invoking morality and rationality are out of place in the political sphere, and any attempt to introduce such arguments to political justification processes is an

attempt to deny the *political* dimensions of democracy and ultimately to repress difference. Above all, Mouffe criticizes deliberative democrats as well as Rawlsian liberals for trying to deny that there is a “fundamental tension” between the logics of “liberalism” and “democracy”, a tension whose existence Mouffe herself firmly asserts. (Mouffe 2000, 83-93.)

From a slightly different angle, Young, who is generally more sympathetic toward the deliberative model, also expresses her concern that it insufficiently increases the inclusiveness of the political sphere. Like Mouffe, she perceives its demand of rational arguments to be too restrictive in terms of inclusion – not because it is in conflict with some crucial ontological features of “the political”, but because it allegedly discriminates styles of expression other than those characteristic of the dominant groups and discourses. Young considers deliberative democratic theory to be far too idealistic in terms of the possibility of removing the influences of inequalities of power and resources from the political sphere. She points out that *theorizing* politics as free of coercive power and particular interests does not necessarily *make* it so in practice; and that eventually, presenting democratic politics *as if* it is symmetrical, equal, mutually respectful and free of partial interests, makes existent imbalances of power and influence just harder to distinguish in real life deliberations. Like some other feminist theorists, Young introduces a *psychological* dimension to the debate, arguing that removing the tangible indicators or social power from political debates will not remove internalized social roles and the norms that elevate the speech of some people, while marginalizing that of others:

“Deliberative theorists tend to assume that bracketing political and economic power is sufficient to make speakers equal. This assumption fails to notice that the social power that can prevent people from being equal speakers derives not only from economic dependence or political domination but also from an internalized sense of the right one has to speak or not to speak” (Young 1996, 122).

Young invokes the historical development of liberal democratic ideals in general and the ideal of public deliberations in particular, reminding of the exclusions, based on gender, class and “race”, which have contributed to the Enlightenment ideal of reason and the bourgeois ideal of the civic public. Thus, the pretense of universality of the deliberative values is necessarily false:

“Despite the claim of deliberative forms of orderly meetings to express pure universal reason, the norms of deliberation are culturally specific and often operate as forms of power that silence or devalue the speech of some people” (Young 1996, 123).

Young argues in accord with Mouffe that contrary to the ideals of deliberative theory, power cannot be bracketed from political debates in practice; and that in reality, political deliberations should rather be described as competitive and agonistic. She also claims that contrary to the deliberative ideals of universal respect, public forums tend to favor some styles of speech at the expense of others, for example assertive and argumentative speech is preferred to tentative or conciliatory. Thus, they implicitly also favor the groups who have been socially and culturally prepared to follow the dominant norms, such as men and majority cultures. Similarly, the norms of rationality make dispassionate speech appear preferable to more emotional forms of expression; articulate and educated speech to slang and dialects etc. Young also takes issue with the ideal of “unity” and the appeal to common good in deliberative democracy: given the *de facto* inequality of participants, “common good” is likely to be defined by those in privileged position while the rhetorical universalizing of their definition just makes it easier to marginalize deviant positions. (Ibid. 120-126.)

Young later argues that paradoxically, the tendency to favor *status quo* and thus implicitly protect the existing inequalities is inherent in the logic of democracy:

“Where there are structural inequalities of wealth and power, formally democratic procedures are likely to reinforce them, because privileged people are able to marginalize the voices and issues of those less privileged” (Young 2000, 34).

To break out of this disturbing “logical circle” that seems to force the more marginalized sections of society to wait until the society becomes more fair in order to be able to assert their conception of fairness, Young suggests, in addition to her account of identity-based “politics of difference” (that I will discuss further in part III), that deliberative democracy extend the range of acceptable modes of political communication and loosen the norms of rationality and reasonableness. Like Honig, she argues that “disruptive, annoying or distracting means of communication are often necessary or effective elements in [...] efforts to engage others in debate over issues and outcomes” (Ibid. 50). Instead of dialogue, Young prefers to conceive of democracy as *struggle*, because in her view it takes struggle from the least privileged to put their issues of concern on the political agenda. She is nevertheless less inclined to remove all normative considerations from the political sphere than

Mouffe, Honig or Brown: a purely agonistic vision, in her view, is not very different from a “model of interest group competition in which aggregated might makes right” (Ibid. 51). Young is willing to retain the legitimacy of public appeals to justice as well as *communicative orientation* towards normative reason; as long as it is not formally so restrictive that it enhances exclusions instead of opening ways to contest them. (Ibid. 36-51.)

The critique introduced here raises many questions about the legitimacy of normative universalism in politics that will be further discussed in the remaining chapters. If the norm of symmetry indeed implicitly favors those with dominant position and character, is there any sense to theorize democracy as free and equal public debate of all citizens in the name of public good? If the liberal politics of universal rights is implicitly oppressive of difference, and the deliberative criteria of reciprocity, symmetry and equal respect remain likewise because of their inherent endorsement of the same morally universalistic ideal, is there any alternative to a return to conceptualizing the political in terms of “might is right”? Does the theory of deliberative democracy manage to envision a political sphere that respects inclusion of diversity *and* the equality of rights, or is it just another formulation of the same old story of “impartial” liberal rationality, as some critics claim? Some confusing issues in connection with this debate need to be clarified. One regards the ambiguous relation of radical democrats to the politics of universal rights. The framework of rights, treated by deliberative theorists as “the rules of the game”, is, as I will argue in more detail below, accepted somewhat reluctantly by radical critics of liberalism in practice as a *contingent* definition of “our way of life”, as a likewise contingent outcome of the current political hegemony, or as something we “cannot not want”, but should not be too enthusiastic about (Brown 2002, 420-432); while heavily criticized at the rhetorical level. Benhabib challenges the critics of morality in politics by arguing that they *assume* what they are unwilling to explicitly endorse:

“[...] antifoundationalist theories of democracy are circular in that they either posit or simply take for granted precisely those moral and political norms of citizens’ equality, freedom and democratic legitimacy for the justification of which what are dubbed “foundationalist” models were developed in the first place” (Benhabib 1996, 71).

Another question regards the meaning of the notion of inclusiveness: Young is concerned for the capacity of the deliberative political sphere of including different political styles primarily because *persons or groups of persons* who are likely to

represent disprivileged styles are thus excluded from participation on equal terms; while Mouffe, Honig and Isaac are more concerned for the capacity of the liberal or deliberative constraints to exclude certain kinds of *political arguments* from the public sphere. I will argue below that there is a difference, not always acknowledged, between those conceptions of inclusiveness, and that indeed they may contradict each other in cases where political positions are excluded from the political spheres *because* they are exclusive of persons or groups of persons: in those cases, proponents of inclusiveness face a choice that they may be reluctant to make. Apparently, inclusiveness cannot be divorced from normative universalism as easily as the critics of the latter seem to assume.

### **4.3. Democracy as conflict**

In the following two sections I take a closer look at Mouffe's version of agonistic, "radical pluralist democracy" that is based on the idea that there is a necessary tension between the politics of universal individual rights and the values of democracy conceived as *equality* and *collective sovereignty*; and investigate how this model of democracy relates to the politics of universal rights and liberal democratic institutions in practice. Mouffe, as I indicated above, conceptualizes democracy as a sphere of inescapable conflict, in which any passed decision, and any apparent moment of consensus, is in fact expression of the *hegemony* of certain positions at that given moment, necessarily based on exclusions of competing positions and necessarily *political* and thus contestable, and therefore never justifiable by appeals to *moral* arguments. This concerns also the politics of constitutionally institutionalized individual rights: the politics of rights is also a considered to be a contingent achievement, indicative of certain hegemonic situation. At the same time liberal democratic institutions appear as a necessary background framework for even "agonistic, plural democracy" to be feasible. A question is, does this framework include a universalist politics of rights?

As I indicated above, Mouffe's central thesis, borrowed from Schmitt, is that in politics one can never get rid of adversaries; that it is always about division lines between "us" and "them" and any attempt to deny this is bound to lead to repression of different opinions and to hiding the fact that the current states of affairs reflect a hegemony, not a universal consensus. In Mouffe's view the task of "the political" is to

domesticate the necessarily existent political adversary by turning him to a “legitimate enemy”, an opponent whose views one resists while respecting her right to express them. That process Mouffe calls the shift from *antagonism* to *agonism*; from open hostility between enemies to civilized confrontation between adversaries. The task of democracy is, in Mouffe’s scheme, to offer legitimate sites for publicly articulating dissent and for airing conflict and disagreement. If there is no such space, or if the views of the antagonist opponent are declared illegitimate and excluded from the public sphere, the hostilities that have no legitimate channels to develop into civilized opposition through public airing, may turn into populism or violent resistance. (Mouffe 1993, 111; 2000, 98-105; 2005, 10-21.)

Mouffe strongly argues against the idea of rights as a normative, moral framework to politics; emphasizing that it is just *a* possible way of conceiving and institutionalizing the political, currently hegemonic, but in no way necessary for democracy as such to be realized. She argues that “in order to radicalize the idea of pluralism, so as to make it a vehicle for deepening the democratic revolution, we have to break with rationalism, individualism and universalism” – values identified by her with “liberalism” and its universal politics of individual rights (Mouffe 1993, 7).

Mouffe’s suspicion of liberal universalism and her views on the tension between the values of liberalism and democracy rely on Schmitt’s critique of liberal “rationalism” and his unconditional opposition of “democracy” to “liberalism”. Mouffe does not share Schmitt’s view that those values are in irreconcilable conflict, but she follows his critique to insist that there is a tension between them that always creates disagreement within liberal democracies. Mouffe does not quite accept Schmitt’s view that totalitarian dictatorships like Nazism and Bolshevism could be “democratic” while “antiliberal”; she dismisses his totalitarian understanding of “democracy” by stating that democracy “no longer” can be conceived as the total identity of rulers and ruled (not discussing whether it ever could be; thus failing to acknowledge that a regime where *no one* can meaningfully participate in the public discussions on common affairs, because such discussions are non-existent and any dissent from official ideologies is prevented in advance by institutionalized political violence, can and never could, be called democratic by any criteria). Mouffe admits that Schmitt’s allegiance to Nazism stemmed from his hostility to liberal pluralism and “individualism”, but this does not prevent her from endorsing Schmitt’s critique of liberalism as “antipolitical”; or from arguing against the universality of human

rights by using Schmitt's complaint against the pretense of "liberal universalism" of offering "the true and only legitimate political system". (Mouffe 1993, 109-111; 2005, 78.)

The role of liberal values in general and rights in particular in Mouffe's agonistic model of democracy remains thus strongly ambivalent. *Pace* Schmitt, she claims to endorse the liberal values of pluralism and even individual rights:

"[...]under modern conditions, [...] the democratic logic of identity of government and governed cannot alone guarantee respect for human rights. It is only by virtue of its articulation with political liberalism that the logic of popular sovereignty can avoid descending into a tyranny" (Mouffe 1993, 105).

Mouffe also argues that political liberalism is a "central component of a project of radical and plural democracy" (Ibid.). Elsewhere, however, she insists that liberal democracy is a contingent form of government, representing a specific conception of political good that should "renounce its claim to universality" (Mouffe 2000, 62). This view is further emphasized in her arguments on international politics that I will discuss in the following section. Although Mouffe apparently does not endorse Schmitt's ideas about viable alternatives to liberal democracy, she shares his resentment against the claim of liberal democracy to universality and insists that there must be "a *plurality* of legitimate answers to the question of what is the just political order" (Ibid.), and also different legitimate forms of organizing democratic society, without specifying either empirically or normatively, which *legitimate* and *democratic alternatives* to liberal democracy she has in mind, given that her own model is admittedly based on the premises of political liberalism (Ibid. 73).

Regarding the tension between "liberalism" and "democracy", Mouffe does not make a "choice" either for liberalism like Rawls and Habermas allegedly do, or against it like Schmitt, but argues that instead of prioritizing either of these, modern democratic politics should be theorized as "agonistic confrontation" between *conflicting interpretations* of those constitutive liberal-democratic values" (Mouffe 2000, 8-9). Thus, the Mouffeian agonistic political debate and open disagreement is basically about the *meaning* and the *interpretation* of the values of equality and liberty, both of which are constitutive of liberal democracy (Mouffe 1993, 114.). Interestingly, Mouffe assumes that while agonistic conflict is generated by competing *interpretations* of those values, all participants in agonistic democracy endorse these values *per se*: she criticizes Rawls for not leaving any space for the agonistic confrontation among *contested interpretations of the shared liberal democratic*

*principles* (Mouffe 2000, 30); and states that “adversaries” in agonistic politics are *legitimate* “enemies” exactly because they have a “shared adhesion to the ethico-political principles of liberal democracy: liberty and equality”, while they disagree about the meaning and implementation of those principles (Ibid. 102). She even subscribes to a certain notion of consensus as a condition of democracy:

“consensus is needed on the institutions constitutive of democracy and on the ‘ethico-political’ values informing the political association – liberty and equality for all – but there will always be disagreement concerning their meaning and how they will be implemented” (Mouffe 2005, 31; see also 121).

This indicates that the conflictual dimension of agonistic politics can hardly be unlimited; and that all participants are assumed to share the basic liberal *and* democratic values and disagree just about their interpretation and implementation. This restricts noticeably the range of *real* disagreement and dissent that may legitimately emerge even in agonistic democracy: there is no recognition in Mouffe’s account that some participants actually may *reject* the values of liberty or equality or both, or indeed democracy itself as a legitimate social order. Thus, Mouffe, despite her strong emphasis on the conflictual side of politics, does not acknowledge, any more than the competing theories she criticizes for “eliminating the political” from politics, the possibility of genuinely *illiberal* political positions gaining support and destroying democracy through proper democratic procedures. She offers no suggestions how “radical plural democracy” should deal with such positions, except – perhaps surprisingly – by excluding them from the political sphere: she argues while defining “the limits of pluralism”, in full continuity with the proponents of deliberative conditions and even of judicial review, that “some demands are excluded [...] because they challenge the institutions constitutive of the democratic political association”; and that

“a line should [...] be drawn between those who reject those values [liberty and equality for all] outright and those who, while accepting them, fight for conflicting interpretation” (Mouffe 2005, 120-121).

As this argument strongly resembles Benhabib’s argument regarding the limits of negotiability when it comes to the basic values of liberal democracy (quoted on p. 139-140 above), the question can be raised how different Mouffe’s radical democratic vision actually is from deliberative and even conventional modes of liberalism; and more generally, how possible it is to conceive of a conception of democracy that is totally inclusive of unlimited and unqualified range of positions and arguments. I

will take up the question of liberal constraints to democracy and present a more elaborate argument about the dependency of democracy itself on such constraints in part III. Mouffe, aware that her limitations regarding legitimate positions within democracy appear similar to those of her opponents, emphasizes that defining such frontiers is a *political*, not *moral* decision, and as such, always contestable. In part III I will compare that claim to corresponding assertions in alternative theories. Also, I critically review Mouffe's claims about the attempts by proponents of conventional liberalism and deliberative democracy to eliminate disagreement from the political sphere and ask whether there indeed is so strong longing for unity, harmony and "pure rationality" in deliberative theory as critics claim. Below, I analyze Mouffe's position specifically with regard to the conceptual position of liberal democratic institutions and follow her move away from her allegiance to the basic liberal democratic values when transferring the discussion to transnational arena.

#### **4.4. Agonistic pluralism and the politics of rights**

Mouffe does not present her model of agonistic democracy as *alternative* to liberal democracy, in spite of her increasingly harsh criticism of the "liberal" conception of politics. Rather, her project is about changing the way of conceptualizing "the political" and opening up spaces within the institutional framework of liberal democracy to air conflict, disagreement, dissent and confrontation. Liberal democratic institutions thus appear as a necessary, but not sufficient condition for achieving democratic legitimacy in the agonistic sense. This interpretation is confirmed in Mouffe's recent critique of visions of cosmopolitan democracy and universal politics of rights as a project of securing human rights for *all* human beings at the global level. As I will indicate in this section, Mouffe rejects globalizing the politics of human rights both because she regards it as specifically "Western" and because she opposes it as part of the project of universalizing *liberal democracy* as a political regime that she considers suitable for "Western" culture only (although not specifying how she defines "Western" geographically, culturally or politically).

In this critique, she implicitly acknowledges the inherent link between the universalist politics of rights and liberal democracy. As she elsewhere emphasizes the importance of the institutions of liberal democracy for *any* democracy, also the agonistic model, to be conceivable; one can make the conclusion from her critique of

universalizing liberal democracy that democracy *as such* is suitable for some collectivities, but not for others. Mouffe tries to avoid this problem by hinting to the theoretical possibility of conceiving “different *forms* of democracy” or “different concepts of human dignity”, but without specifying which forms and concepts she has in mind she fails to make an argument for the *democratic legitimacy* of such possible alternatives. This case is not made clearer by Mouffe’s insistence that there are no relevant criteria for deciding which regime is democratic: such argument, along with the rejection of the universality of human rights, is on the verge of a relativism that might be used to legitimize *any* political regime. (Mouffe 2000, 73; 2005, 81, 87, 124-126, 129.)

To enter discussions on international politics or on legitimate measures for promoting human rights on global level would be beyond the topic of this thesis. Nevertheless, an excursion to Mouffe’s criticism in this area reveals something about the conceptual interconnectedness of democracy and universal rights, although not necessarily in the way that Mouffe has intended.

I indicated above that Mouffe assumes that in her agonistic model of democracy the adversary participants share the basic liberal democratic values of liberty and equality, although they disagree about their interpretation and implementation. She perceives, not unlike Habermas, liberal institutions as constitutive also of deep forms of democracy: “the interconnection between liberal institutions and democratic procedures is *the necessary condition* for the extension of the democratic revolution into new areas of social life” (Mouffe 1993, 105). And along with classical liberals, she regards liberal rights as a safeguard against the possibility of collective power sliding into tyranny. Thus, although Mouffe argues there is a tension between “liberty” and “equality”, she sees liberal institutions as a precondition for creating the public sphere where to politicize that tension. In her later work Mouffe retains her support to the liberal democratic structures and institutions and admits that these need to be protected to enable democratic pluralism to flourish: “When parliamentary institutions are destroyed or weakened, the possibility of an agonistic confrontation disappears and it is replaced by an antagonistic we/they” (Mouffe 2005, 23).

An interesting question is, then, how would the arguments that explicitly denounce those democratic institutions and the liberal values that they embody, fare in the adversarial public sphere of agonistic democracy? As liberals can use constitutionalist and rights-based arguments to dismiss explicitly anti-liberal

positions from the range of valid political claims, and deliberative democrats refer to the “moral conditions” to do the same, Mouffe presents the agonistic model as more permissive and more “pluralist” in terms of political arguments than those models. For example, she criticizes what she calls “post-political” theorists for recognizing only “fundamentalist” enemies, not “agonistic” adversaries, as their opponents in the democratic debate. According to Mouffe, that approach “forecloses the possibility of giving an ‘agonistic’ form to political conflicts; the only possible form of opposition is the ‘antagonistic’ one” (Mouffe 2005, 50). In apparent contrast, Mouffe assumes that in her genuinely pluralistic political sphere, “antagonism” is turned into “agonism” by taming the “enemy” into a respectable adversary who shares the basic liberal-democratic values. But assuming that the “legitimate enemy” will eventually be “tamed” to share the basic liberal democratic values, Mouffe follows Rawlsian liberals and deliberative democrats in failing to theorize political confrontation *in democratic terms* with the “enemy” who persists in rejecting those values. As I noted above, Mouffe admits that even agonistic pluralism cannot recognize *all* demands as legitimate; some of them must be excluded from the democratic debate:

“I do not believe that a democratic pluralist politics should consider as legitimate all the demands formulated in a given society. The pluralism I advocate requires discriminating between demands which are to be accepted as part of the agonistic debate and those which are to be excluded. A democratic society cannot treat those who put its basic institutions into question as legitimate adversaries. [...] Some demands are to be excluded, [...] because they challenge the institutions constitutive of the democratic political association” (Mouffe 2005, 120-121).

Like Benhabib, Mouffe is explicit about the need to constitutionally exclude anti-egalitarian claims as well as demands of parallel legal systems in connection with multicultural debates:

“[O]ne can establish a rough distinction between a set of demands whose satisfaction can be granted without jeopardizing the basic liberal democratic framework and those which would lead to its destruction. This would be the case for instance with demands whose satisfaction would require the implementation of different legal systems according to the ethnic origin or religious beliefs of groups. [...] *A democratic society requires the allegiance of its citizens to a set of shared ethico-political principles, usually spelled out in a constitution and embedded in a legal framework*, and it cannot allow the coexistence of conflicting principles of legitimacy in its midst. [...] Such a system [of legal pluralism] is *incompatible with the exercise of democratic citizenship which postulates equality for all the citizens*” (Mouffe 2005, 122-123, my emphasis).

Thus, even in this explicitly conflictual “political” account citizens can be coerced to follow the principles fixed in the liberal constitution, and persistent fundamentalist demands can be excluded as incompatible not just with the universal politics of rights, but also with democracy itself. Mouffe’s position reflects that of Jung in her response to Isaac et al’s *democratic* argument against *liberal* constraints to the range of legitimate political claims:

“To the extent that fundamentalisms are articulated in such a way that they stand in totalitarian opposition to democracy, they cannot be processed within a democratic system” (Jung 1999, 272).

Mouffe’s position on the relationship between constitutional rights and democratic legitimacy changes, however, when the debate shifts to international politics and “cosmopolitan democracy”. While in liberal democracies respecting constitutional rights is a precondition for pluralism, in the international arena Mouffe defends “another type of pluralism”: here, the “*absence of effective pluralism*” is equaled with the *spread of liberal democracy* (Mouffe 2005, 123, 82). In the international arena Mouffe revokes the Schmittian opposition between “liberalism” as the politics of rights and “democracy” as “popular sovereignty” and protects the “democratic right” of nations to “self-government” from interventions by international human rights law (Ibid. 115-116). She argues against the idea of the universality of human rights on the global scale, claiming that an international politics of human rights is an unacceptable imposition of “Western values” on the rest of the world. Although she does not specify which geographic, political or cultural entities she categorizes as “Western” and “non-Western” (for example, it remains unclear whether the liberal democracies in e.g. Japan, India and South Africa are considered “Western” or whether the democratization of e.g. Eastern Europe should be interpreted as an illegitimate imposition of “Western values” on the “non-Western” Communist regimes); Mouffe equates the democratization of “non-West” with its “Westernization”, and even with “cultural extermination”. (Mouffe 2005, 83-87, 100-103, 117, 123-128.)

While Mouffe single-mindedly equates democracies with “the West”, she argues that “to defend a model of society *different from the Western model* should not be seen as an expression of backwardness” (Mouffe 2005, 124). Not without a sense of nostalgia over the collapsed Communist tyrannies, Mouffe complains:

“nowadays the possibility of maintaining socio-political orders *different from Western ones* has been drastically reduced since all international organizations are more or less directly under the control of Western powers led by the United States” (Ibid. 81).

Transferring to the international arena the agonistic argument that repressing “difference” in politics eventually leads to violence, Mouffe explains even the recent rise of Islamic jihadist terrorism by this alleged “lack of alternatives” under *the international human rights regime*: “It is [...] not a coincidence that since the end of cold war, [...] we have witnessed a significant increase in terrorist attacks” (Ibid.). She argues that terrorism “tends to flourish in circumstances in which there are no legitimate political channels for the expression of grievances”; assuming that jihadist terrorism stems from the global human rights regime repressing alternative *collective voices of non-liberal political orders* on the international arena; while ignoring the lack of legitimate sites of non-religious resistance *within* the Middle-Eastern and Central Asian dictatorships where the ideological forces behind that violent movement have gained strength (Ibid. 81).

By equating democratic institutions with the “Western” model and at the same time opposing the extension of the “Western model” to “non-Western” polities, Mouffe effectively de-legitimizes any efforts in what she defines as “non-West” to democratize the societies or to promote human rights. She does not specify whether there also should be “sites of legitimate dissent” *within* “non-Western” societies and if so, how these would be arranged without the respect for basic human rights like freedom of speech, conscience and association, rights to inviolability of the person, fair trial and equality before the law. She bars non-democratic regimes further from external critique by arguing that any attempt to make a distinction between “democratic” and “undemocratic” states represents “Western” standards and is thus illegitimate (Mouffe 2005, 87). By delegitimizing attempts to evaluate policies of sovereign nations, and by dismissing the plurality of interests, power relations and the contestability of traditional values *within* the collectivities she generalizes as “non-Western”, Mouffe represents a tendency that Haideh Moghissi, an exile Iranian author, has warned about in postmodern theory. Moghissi argues:

“Whatever their intent, arguments which assert the right of different cultures to establish, define and exercise their own standards, meanings and principles play directly into the hands of political and economic elites, religious leaders and authoritarian regimes, and, above all, fundamentalists, who argue, for their own purposes, that the notion of human rights is

‘culture-bound’ and Western, that international measures for human rights are imperialist ploys” (Moghissi 1999, 62).

Relying on her experience of “non-Western” regimes, Moghissi is more skeptical than Mouffe about raising the legitimacy of collective self-determination over that of human rights:

“Authoritarian leaders in Islamic societies sometimes oppose what they describe as ‘Western’ notions of individual rights in the name of collective values of the sanctified community of believers, the *umma*. Their main concern, however, is somewhere else. They wish, first of all, to insulate themselves from internal challenges and international scrutiny. And they wish to continue their open, sometimes legally sanctioned, political, cultural, ethnic, religious and sexual discriminatory practices directed against individuals and groups who do not belong to the dominant political and cultural interests” (Ibid. 62-63).

While Mouffe argues that “it is high time to question the belief in the unique superiority of liberal democracy” (Mouffe 2005, 87), she does not provide examples of legitimate political regimes that do not follow the international treaties of human rights. She regards “culture” as legitimate ground to reject human rights, but does not analyze the relationship between “culture” and politics, or acknowledge that there are minority “cultures” and contested interpretations of “cultures” within “non-Western” regimes. Nor does she specify what legitimizes the “sovereign” decisions of those polities that do not grant basic rights or equal citizenship to all their subjects or offer internal sites for expressing “legitimate dissent”. Thus, Mouffe’s position against the universality of human rights can be read as justification for oppressive regimes as long as they are defined “non-Western”. As no regime that does not respect the human rights of its subjects is known for opening legitimate political spaces for articulating grievances for those who would like to question or challenge the foundations of that regime, Mouffe’s statement about *the limits of liberalism* also defines *the limits of democracy*, establishing what she apparently denies in her argument against Habermas: that there is an inherent relation between democracy and the politics of universal rights as an institutionalized collective commitment to the equality, freedom and dignity of all citizens.

It is easy to agree with Mouffe’s claim that democracy as a value system is partisan: it is based on a certain set of values that are not “neutral”, and its defense is an explicitly political enterprise. As I will argue in part III, many “liberal” writers are less reluctant to agree with that statement than Mouffe claims in her critique. But

admitting the “politicalness” of rights does not answer the question whether one can support democracy while rejecting the basic rights of each citizen within it. The debate on cosmopolitan democracy, in particular the question to what extent collective values can override the individual rights of community members, recurs also *within* liberal democracies as the debate on multiculturalism (that I will briefly discuss in the following chapter). As I indicated above, Mouffe does not accept inequality based on collective values *within liberal democracies*; but the problem is more general: hardly any political regime can be perceived inclusive, egalitarian or *democratically* legitimate if it allows the non-recognition of the equality and basic rights of some of its members. Indeed, her protection of parliamentary institutions and her statements on the “limits of pluralism” indicate that the relationship between democracy and rights is after all not very differently conceived in agonistic democracy, compared to conventional liberal and deliberative models.

Despite Mouffe’s critique of liberalism and deliberative democracy for “eliminating the political from politics” and her claim that Habermas’s argument about the interdependency of rights and democracy just works to illegitimately extend the sphere of liberal democracy in the world, Mouffe’s own account confirms that argument rather than rejects it: the main quarrel here concerns the role of open conflict in public debates *within the framework of the liberal institutions*, not the conceptual position of constitutional rights in relation to democracy. As Mouffe agrees that respect for equal rights is a precondition of liberal democracy, and that liberal democratic institutions constitute the precondition for agonistic democracy; her resistance to global universal rights and defense of “different kinds of social orders” does not prove that there can be *non-liberal democracies*, it only states that democracy is not the preferred social order for all societies: an argument against the universality of rights is also an argument against the universality of democracy<sup>14</sup>.

Thus, as Mouffe’s “agonistic” model of democracy enriches the democratic-theoretical debate with valuable insights in the inevitably conflictual nature of politics, it also indicates the limits of promoting “democracy” *in opposition to*

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<sup>14</sup> The difficulty of establishing non-liberal “democratic” regimes is currently being painfully revealed in connection with the attempted democratization processes in the Middle East, in which democratic elections tend to result in religion-based legal orders that severely limit the freedom of speech and conscience of the citizens – as is indicated by the recently internationally debated demands of death sentences for blasphemy and apostasy in Afghanistan, for crimes such as speaking up for women’s equal rights (the case of Ali Mohaqeq Nasab) or converting to Christianity (the case of Abdul Rahman). As genuine democracy is unthinkable without the right of citizens to think and speak freely, those developments confirm that majoritarian elections alone cannot guarantee the *democratic* legitimacy of a political regime.

*universalist politics of rights*: it appears from Mouffe's discussion of international politics that defending "democracy" while opposing the universality of rights is a slippery slope; eventually legitimizing tyrannical collectivism which necessarily compromises the inclusive egalitarian ideals of radical democracy itself. Thus, while there indeed is a tension between institutionalizing rights beyond the reach of the democratic public and the democratic ideal of inclusiveness in making *all* collective decisions; extending that tension into an insoluble conflict undermines not only the politics and ideal of rights, but democracy and democratic ideals as well.

### III

## Rights in democratic politics

### Introduction to part III

In this part I engage in a discussion on several of the critical points made against normative universalism in politics in general and the universalist politics of rights of conventional liberalism in particular; and I return to the conceptual relationship between rights and democracy and state an argument in favour of their mutual interdependency rather than their mutual contradiction. I endorse the critical arguments, posed by feminist and postmodern critics against the strictly objectivist and semi-metaphysical dimensions of liberal thought, that the concept of rights as a political creation and normative institution expresses a historically contingent and politically specific development; but I also argue that a universalist politics of rights is not necessarily dependent on philosophically objectivist and morally absolutist notions for its justification. Rather, because of its role in the instantiation of democratic and egalitarian values as a necessary, even if insufficient condition of inclusive democracy, the politics of universal individual rights can be defended as a *political* institutionalization of a specifically *normative* value, not as a logical, rational, moral or natural necessity.

Thus, while the objectivist-rationalist thought experiments of some conventional liberal justificatory models are easily refutable as insufficiently democratically constructed sources of legitimacy, the inherent connection between democracy and the politics of rights renders the latter defensible without the need to invoke such highly abstract justificatory patterns. Also, while legitimacy cannot be generated by the politics of rights alone; and the limits of participation and political agenda are constructed as unnecessarily narrow in some versions of conventional liberal theory; rights-based constitutional constraints on the outcomes of democratic procedures cannot be conceived as illegitimate from a democratic point of view, because without such constraints, a continuity of genuine democratic inclusion is unconceivable.

In the first chapter of part III I return to the feminist critique of liberalism and the concepts of inclusion and diversity and reveal, through a critique of identity politics,

the inherent *positive* connection between moral and political universalism on the one hand and inclusion and diversity on the other: if political universalism is compromised in the name of the diversity of collective modes of social organization, diversity and the inclusiveness of decision making *within* the collectivities in question is inevitably compromised too. In the second chapter I elaborate the arguments about the contingency of rights; agreeing that rights are historically and politically contingent I argue that the acknowledgement of such contingency is not necessarily in conflict with normative support to the political institution of universal rights. In the third chapter, following the insight about the contingency of the politics of rights, I discuss the *political* nature of rights and the need to politicize rights discourses; and analyze some concepts connected with the discourse and politics of rights, like humanism, individualism and equality; indicating, *pace* several feminist and radical democratic critics, that those concepts do not necessarily bind the politics of rights to such absolutist and moralist conceptions of self, citizen and society that are oppressive to difference and diversity; and that those universalist humanist notions can be invoked in order to promote the interests of the potentially vulnerable and socially disprivileged individuals and groups, not just to oppress and marginalize them, as many critics appear to assume.

In the final chapter I return to the relationship between democratic legitimacy and the politics of rights. I defend the deliberative democratic view that democratic and liberal values are interdependent rather than conflictual; and argue that a non-metaphysical, explicitly political conception of limited constitutionalism is not only compatible with the inclusion of difference and diversity in democracy, but constitutive of such inclusion and more conscious of the potential conflictual dimensions of democratic politics than more idealistic conceptions of inclusive democracy. While genuine democratic legitimacy presumes more inclusive and participatory public spheres and decision making procedures than many versions of conventional liberalism recognize in theory and most existing liberal democracies offer in practice; without the effective enforcement of universal individual basic rights the egalitarian and inclusive ideals that constitute democratic legitimacy cannot be credibly promoted.

## 1. Rights and Inclusion

In this chapter I take a closer look at the relationship between the politics of rights and the conception of inclusiveness that is considered constitutive of democratic legitimacy by proponents of radical and feminist democracy. I return to the feminist criticism of liberalism introduced in part II and present some of its additional aspects that are relevant for the current debate. I analyze the merits as well as the limitations of the feminist critique that initially filled an essential gap in political theory by adding the dimension of gender hierarchy to the analysis of liberal politics, extending the questions of democratic legitimacy, equality and justice to include the power imbalances related to gender – a dimension traditionally neglected in political theory. As gender constitutes a notable source of political power in all societies, attention to gendered power relations, including gender balance in political decision making, is a central dimension of democratic legitimacy. Feminist theory has contributed to theorizing questions concerning inclusion, discrimination and marginalization also at a more general level; through discourses that now include theories and practices of antiracist, multicultural, sexual equality and other emancipatory movements, whose shared concern is the implicit oppression of minorities and disadvantaged groups by socially and culturally dominant groups even under the conditions of formal legal equality and procedurally fair democracy.

Above I introduced a central feminist argument against liberal theory, that about the alleged male bias of the liberal construction of the individual as a self-sufficient rights-bearing subject. Some other feminist arguments about the insufficiency of rights to generate substantial equality and balance oppressive social relationships include the allegation that legal rights fail to address social inequalities that are perpetuated in the private sphere or through subtle practices and attitudes that are not easy to change through legal means; and that the legal language of rights itself exercises potentially oppressive discursive power. I also study arguments in favour of *difference* and *diversity* presented in opposition to the allegedly homogenizing and oppressive universalist norms of *equality* and *rights*; and argue that excessive emphasis on diversity and difference at the expense of universalism, individualism and equality makes feminism (especially in connection with debates on multiculturalism) potentially illiberal, allied with communitarian and conservative positions that raise collective community values above the rights, dignity, individuality and autonomy of the individual members of those

communities: paradoxically often women, sexual minorities and children, the groups that feminist politics traditionally protects and whose equality it asserts. I examine the “identity political” alternative to traditional liberal politics and its limits; arguing that in the light of this discussion a politics of universal individual rights as constraints on democracy, conceived in pragmatic, non-metaphysical terms, is not in conflict with the ideals of inclusiveness and equality but supports it. While I endorse the critique of the liberal politics of rights as *insufficient* for substantial equality, I argue that when the critique turns *against* such a conception of equal rights, it is self-deceptive, potentially undermining the values on which the critique was originally based.

It is the paradox of inclusive democracy that while universalist conceptions are often criticized for excluding and marginalizing difference, it is hard to improve the inclusion of vulnerable groups without a certain level of assertive universalism that emphasizes everyone’s individual right to dignity and voice. Thus I will also analyse the relationship of the politics of rights to the inclusive values generative of democratic legitimacy, like equality, diversity and plurality and to the protection of vulnerable groups and persons; and the tension between inclusiveness in terms of *political arguments* and inclusiveness of *groups* and *persons*; with specific attention to gender. As an example I study the contradiction between the multicultural assertion of diversity and the liberal norm of equality; and the ambivalent position of feminist theories on it. The discussion leads to the conclusion that even if majoritarian democracy understood robustly as “popular sovereignty” or absolute majoritarian decision making may indeed contradict the universalist politics of rights; democracy understood as inclusive in the deliberative and communicative sense *presumes* such minimal conception of rights in order to be feasible.

### **1.1. More feminist discussion on rights talk**

In part II I introduced some of the central critical feminist arguments about liberal theory presented by Brown, Pateman, MacKinnon and Young, who from different perspectives and in different ways express the overlapping concern that the apparent neutrality of the liberal state is in fact biased toward men and groups privileged in economic, racial and cultural terms; and that the liberal universalist politics of rights systematically and structurally, rather than contingently and accidentally,

discriminates women and other disprivileged groups such as lower socioeconomic classes and ethnic or sexual minorities. In this section I present some more feminist arguments critical of liberal theory, including the critique of some foundational premises of liberal democracy and the language of rights as such, even if used to *counteract* existing structural inequalities through group-specific rights or antidiscriminatory policies. The analysis of those arguments leads to the conclusion that *antiliberal* arguments in feminist theory are potentially self-defeating and ambiguous about gender justice as well as inclusive democracy. Like Mouffe's "agonistic pluralism", feminist arguments implicitly *demonstrate* that there is a connection between the egalitarian ideology of inclusion and a universalist politics of rights, while attempting to promote the former *at the expense* of the latter.

As I noted above, I regard feminist theory an essential component of democratic theory, as gender relations constitute a significant source of power, rules and regulations in all social and political life. As numerous critics have pointed out, early liberalism systematically excluded women from the conception of liberal citizenship and from participating in public affairs and political decision making (which does *not* mean that they have been in better position in *illiberal* societies – a fact often overlooked by the critics of the patriarchal remnants of liberalism). The major concern for current feminist theory is that the elimination, subsequent to years of feminist political struggle, of explicit, legally sanctioned gender discrimination has not eliminated gender-based inequalities and power imbalances at a more implicit level. Many feminists have argued that achieving gender justice is not just a matter of including women into the previously male-only range of citizenship or of granting them the rights that were originally reserved for men; but of completely changing all the structures, concepts and institutions of liberal democracies that are considered incurably sexist and thus impossible to make more inclusive by mere reformist change.

It is a matter of dispute whether the remaining gender inequities should be seen as casual setbacks in an otherwise encouraging development (implying that the egalitarian logic of liberalism has *produced* the feminist and civil rights movements that struggle against the discriminatory traits that early liberalism endorsed in spite of its egalitarian teachings; and recognizing that liberal democracy *has* increased substantive equality, albeit imperfectly); or whether, as Pateman and Brown argue, "liberalism" as the foundational ideology of liberal democracy is so inherently sexist

that it impossibly can ever deliver its seemingly egalitarian promises. Against the latter position I will argue that liberal rights discourse should not be regarded an enemy of feminism. The discussions analyzed here indicate that when feminist criticism shifts from a critique of the liberal democratic framework as necessary but *insufficient* to achieve the equality of less privileged groups, to a rejection of the politics of rights as inherently oppressive; it lends its support explicitly or implicitly to policies *more* hostile to gender and sexual equality and hardly conducive of a democracy inclusive of the perspectives of the most vulnerable social groups.

Much of the feminist criticism of liberal theories focuses on the perceived conflict between the abstract universalism of rights and the factual diversity of the social world in terms of gender, culture, ways of life and social positions. A central allegation, as indicated above, is that the universal person protected by liberal rights is assumed to be a propertied, white heterosexual male; and the apparently neutral framework of the liberal state in practice protects the privileged lifestyle of that particular group rather than the generic human person. Because the citizen as a rights-bearer and democratic participant is modelled on male experience and qualities, the critics claim, the formally equal rights do not eliminate gender inequality in practice: given their biased premises, they fail to change the political, cultural and social practices that reproduce and reinforce inequality through social interaction in spite of the formal legal equality. (Brown 1995, 96-134; 135-165; Young 1990, 39-65; 96-121; MacKinnon 1989, 215-236; cf. 2.2. in part II.) The tension between the perceived “maleness” of liberalism’s “universal person” and the feminist quest for genuine inclusion of women and minorities has for decades inspired discussions on the relationship between equality and diversity, universality and difference. Feminist critics offer different alternatives to liberalism’s alleged inherent masculinism, even if they share a suspicion toward the promise of the conceptions of neutrality, impartiality, equality and rights to deliver justice.

For example, MacKinnon, Brown and Young all see gender inequality as neither a *casual*, accidental failure to recognize the universal humanity of women (which the neutral politics of equal rights will cure in due time), nor a *natural* feature of human behaviour (and thus unchangeable), but a *political* condition that is socially constructed, historically contingent and thus also politically contestable. They all associate inequality with a notion of identity and with identity-forming political processes; and argue that such processes have to be addressed by credible policies of gender justice. A question of dispute is *how*: they choose different paths to challenge

the existing gender order. As I indicated in part II, MacKinnon promotes changing the prevalent politics of rights in order to make it genuinely universal by *legally* interrupting in the processes by which gender identities are constructed as dominant and subordinate. She rejects neither universalism nor the politics and rhetoric of rights *as such*. Young, presenting a list of forms of “oppression” existing beyond the legal notions of equality and discrimination (that I specify in the following section), politicizes group differences by positively emphasizing marginalized *identities*. Her feminist vision is built on affirmative identity politics (that I discuss in section 3 below), which is part of her democratic vision, the “politics of difference”, that I introduced in part I. In contrast, poststructuralist feminists like Brown criticize *any* politics of rights for surrendering to the liberal vocabulary that they see as inefficient or even oppressive. They are also wary of “identity politics” that they fear discursively stabilizes the identities that are socially constructed through oppressive relationships. Instead, as I indicated above, they advocate a politics of radical subversion of the dominant political *discourses* (Brown & Halley, 2002, 1-37).

MacKinnon rejects the liberal conception of equal rights not because it is universalist, but because it is not *really* universal, but implicitly represents a particular – male – point of view. She theorizes gender subordination primarily by analyzing sexual culture and sexualized violence against women as political expressions of social power. Convinced that gender hierarchy plays a major role in constructing both social reality and political identities, MacKinnon attacks the legal systems of existing democracies for supporting such hierarchies by systematically failing to confront the harm done to women and children by pornography (both by making it and using it), prostitution, rape, sexual harassment and incest. Unlike Young, MacKinnon sees inequality not primarily in how the *existent* social groups are treated (although that is relevant too), but in how their identities are *constructed*. In her view the oppressive sexualized practices constitutive of the dominant and subordinate identities of men and women are protected with appeals to the *rights* of freedom of speech or privacy, while the women victimized through such practices are silenced and lack privacy of their own (MacKinnon 1993, 69-110).

Although following the critique of the impotence of *legal equality* under conditions of *social inequality* that Brown also refers to, MacKinnon does not question the ideal of legal equality, but calls for a change of legal practices to promote *social* equality. Choosing legalism as her feminist tactic, she argues: "The

point of view of a particular system emerges as particular only when confronted, *in a way it cannot ignore*, by a demand from another point of view" (MacKinnon 1989, 239, my emphasis). In a system based on law and rights (a reference primarily to the US, but also to liberal democracies in general), the confrontation that "the system cannot ignore" must proceed through legal discourse. Thus MacKinnon suggests that only a change in the legal system can make a difference about gender inequality: just as "consciousness raising" subverts the dominant ontology by revealing it as a particular epistemology, promoting "women's rights" as *politicized lawmaking* reveals that the law's supposed neutrality in fact is not neutral but already a "special pleading of a particular group" (Ibid. 249). As opposed to the deceptive universalism of the supposedly neutral rights, the goal of the feminist politics of rights is "not to make legal categories that trace and trap the status quo, but to confront by law the inequalities in women's condition in order to change them" (Ibid. 242).

Radical feminism is often considered essentialist in terms of gender identities, but MacKinnon sees the reason for failed liberal equality not in the marginalization of *existing* "natural" difference, but in the process of *constructing* difference. She argues, like Brown, that equality in liberalism is constructed as *sameness*, while gender is constructed as *difference*; she does not regard "difference" as a positive concept like Young, criticizing the rhetoric of difference as a tool to justify and naturalize inequality. Unlike Young's, MacKinnon's feminist vision is not worked into a model of democracy. Rather than envisioning an inclusive public sphere, MacKinnon voices a particular political view within the existent one. Hers is a vision of increasing women's political equality, not of conceptualizing a democratic arena on which it is enacted. That vision does not contradict the framework of liberal democracy: indeed, some changes of court practices – changes that *have* proceeded within the legal systems of many existing liberal democracies, like revising the punishments for sexual crimes, treating them as crimes against the dignity and self-determination of individual women, not as issues of public morality, and criminalizing sexual harassment and rape within marriage – improve gender balance in the field that most concerns her without compromising the premises of liberal democracy. On the other hand, regarding the relationship of democracy to rights, MacKinnon's call for a feminist re-interpretation of the prevalent politics of rights supports the deliberative democratic view that *interpretation* and *implementation* of rights should be open to public scrutiny and challenge.

While proponents of a strictly universalist conception of neutrality might see such feminist politics of rights as an unjustified promotion of particularist "special rights", other critics remain suspicious about the politics of rights as such. Brown is not convinced by MacKinnon's attempt to enhance gender equality through legal reforms. In her view such approach risks essentializing women's victimized identities by writing them into the timeless book of law. Although MacKinnon emphasizes that the "concerns of feminism with power and powerlessness are first *political*, not *moral*"; Brown blames her for "moralizing" politics by emphasizing women's "victim" status. Opposing MacKinnon's politicization of contingent social identities (such as gender) as potentially essentializing, Brown ignores that MacKinnon's feminism questions a politics of *identity construction*; thus its goal is not stabilizing identities but changing them by interfering, *through a politics of rights*, with the powers that generate them. (Brown 2001, 40; 56; 130-131; MacKinnon 1989, 196.)

As I noted above, Brown argues that liberalism is inherently and essentially, rather than contingently, "masculinist". She builds this argument on the observation that in the early liberal construction of "the state of nature" men were regarded as "autarkic and obligated to nothing", while women were "always already attached to men and obligated to children"; a construct that naturalizes the family and "illuminates something about the gender of the generic person figured by liberalism" (Brown 1995, 148). In Brown's view the liberal naturalization of families implies that women *simply cannot be the possessive individualists men are*. Thus she insists that the formulation of *man* contained in the concept of "the Rights of Man" has a more literal meaning than most liberals want to admit; implying that the omission of women from the range of rights-bearing persons was less contingent and more intentional than is generally believed (Ibid.). Brown emphasizes the central role of the concept of "individual" in liberalism while dismissing the concept as a masculinist "fallacy upon which liberal doctrine is built"; alleging thus that the whole idea of liberalism is based on misconceived male-biased premises (Ibid. 149). In her view women's subordination explains how the apparent tension between the ontological individualism and the illiberal "familialism" (that is, attachment to "family values" and the sanctity of the private sphere) of liberalism can be reconciled: the *male individual* is rendered free by women's subordination (Ibid. 149-150). Brown argues that the constitutive terms of liberal political discourse depend upon their implicit opposition to a subject and set of activities marked as 'feminine', through dualisms such as equality-difference, liberty-necessity,

autonomy-dependence, rights-needs, public-private; that operate as *male dominance at the heart of liberal discourse* while being constitutive of it (Ibid. 152).

Interestingly, Brown does not question the assumption that *difference, necessity, dependence* and *needs* mark the “feminine”, while equality, freedom, autonomy and rights are “masculine”. She does not discuss the fact that those gendered premises, undoubtedly present in (at least early) liberal thought to some extent, also have permeated (and continue to do so) those *illiberal* ideologies and regimes that do not offer the channels, existent in liberal societies, for publicly questioning and challenging them. According to Brown “the liberal formulation of equality does not merely serve to mask privilege and social inequality [...]. Rather, liberal equality is masculinist *because* its terms are sameness and difference”; it is based on an ontology of *masculine sameness* that is premised upon its differentiation from women, while female difference constitutes the *conceptual opposite of the liberal human being* (Brown 1995, 153-154). As she rejects the concept of equality as another liberal fallacy, for her the relevant question for feminism is not the dilemma between equality and difference (terms she sees as premised on liberal “masculinism”), but how to challenge the sovereign, rights-bearing subject of liberalism both as an “empirical fiction” and a normative ideal; and to displace the “masculinist” liberal discourses of *rights, liberties, autonomy and formal equality* and replace them by discourses of “need or mutual dependency in crucial domains of public life”, in order to get rid of its governing masculinist norms (Ibid. 165).

Although “discourses of need and mutual dependency” are no doubt important in civic debates on social policies, it is easier to see such discourses as supplementary to the “masculinist” discourse of liberty, equality and rights, than as its replacement. In the context of discussions on democratic legitimacy it is not obvious how such discourses promote gender balance in political participation unless an appeal is also made to women’s equality, liberties and rights. As “mutual dependency”, while undeniably a fact of human life, does not conceptually presume symmetry or equality (there is a relationship of mutual dependency also between master and slave), it is hardly a useful concept for challenging oppressive and hierarchical social or familial relations. Moreover, recent discussions on multicultural, transnational and global politics reveal the implications of the explicit rejection of the basic liberal values in a particularly problematic light (just as in case of Mouffe’s concept of agonistic

democracy): such radical critique of liberal democratic institutions, instead of recognizing them as insufficient but necessary conditions for substantive justice and egalitarian inclusiveness, is conducive to endorsing explicitly inegalitarian authoritarian collectivist practices. (Brown 2004, 69-76.)

## **1.2. Injustices beyond legal remedy**

As I noted above, one of the major concerns behind the feminist criticism of liberal thought and the discourse of rights is that the formal equality promised by it fails to deliver substantive equality to women and other disadvantaged groups in practice. Treating the universal politics of rights as *insufficient* to guarantee substantive equality, feminist theory has extended the scope of political thought, introducing to it the categories of identity and inclusion, deconstruction and subversion, consciousness raising and empowerment. Most of these strategies do not explicitly challenge the institutional framework of liberal democracy: the extra-legal goals of feminist politics can consist in thinking about the *meaning* of equality, diversity and rights *within* the framework that liberal democracy offers through its institutions of civil and political rights, representative bodies and public spheres. But when feminist theory challenges the values and institutions of liberal democracy as inherently flawed and thus no better than any conceivable alternative political regimes; then it hardly works for the inclusiveness and legitimacy of democracy. This thin line between the critique of rights-thinking as *insufficient* because of its incapacity to eliminate all social injustices and the *rejection* of rights-thinking as impossibly conducive to a just and egalitarian society works as a test of the commitment of feminist thought to democracy itself; revealing the connection between rights and inclusive democracy in a way that indicates their interdependence in the shade of the apparent tension between them.

In this section I introduce the argument behind the feminist suspicion of the universal politics of rights that *social powers* – patterns of thinking, behaviour, tradition, attitude and habit; sustain and reproduce identity-based inequalities and social hierarchies even when all people are declared equal before the law and enjoy the same legal rights. The critics of universalism argue that those mechanisms of exclusion and marginalization cannot be fully remedied by the language of rights or

by representative democratic procedures; and that the supposedly neutral politics of the liberal state tends to support *status quo* and thus the persistence of such relations by making them invisible. The conscious or subconscious mechanisms of exclusion and production of otherness are theorized for example by Brown, who calls the group-based inequities that the “new social movements” have addressed during the last few decades in most democracies for “social injuries”; and argues that not only are “social powers” beyond the reach of the legalist politics of rights, but the language of law itself exercises such power; and by Young, who describes discriminatory social structures as “oppression”, distinguishing five “faces of oppression” that apart or together continuously reproduce the social disadvantage of the less privileged groups. (Young 1990, 39-65; Brown 1995, 3-29; 52-76; 96-134.)

As I indicated in part II, Brown relies in her earlier critique of rights on Marxist criticism of liberal rights, arguing that liberal equality leaves social inequality intact because it separates the political sphere from the private: while equality is established in the former, inequality is reproduced in the latter. The “social powers” that reproduce inequality are in Brown’s view constituted by property and wealth as well as by gender, race and sexuality. She argues that rights “mystify and reify” those powers as “natural possessions of private persons”; thus abstracting individuals from social and political contexts and privatizing issues that *could* be subject to political contestations, such as gender and economic relations (Brown 1995, 123-124). In her later critique of rights Brown focuses more on the discursive powers inscribed in the very language of rights. Critiquing “liberal legalism”, Brown and Halley contest the assumption that liberal law is just neutral and not particularly political; and the understanding that rights protect individuals *from* the state, while they in their view are expressions of positive *state action*. They emphasize that law and the liberal state are not neutral or just prohibitive, regulating the subjects’ behaviour and offering a *framework* for political action; they are positively normative categories, not only protecting citizens with *given* identities, but *producing* identities and subjectivities. Brown and Halley argue that because law has regulatory and identity-forming power, progressive democratic movements should not focus too much on legal reform or rights talk, as they would thus risk becoming so integrated into the liberal discourse that is identified as their primary enemy. (Brown & Halley 2002, 16-25.)

In this debate the liberal democratic state and the liberal institutions, including the establishment of rights, figure as an all-embracing giant ready to absorb all

progressive movements and radical democratic efforts by “normalizing”, regulating and ultimately suffocating them. This argument contains two problematic assumptions: that the “discursive” impact of legal language is necessarily negative; and that the relationship between the liberal state and emancipatory political movements is necessarily one-directional – the argument leaves no space for the possibility that those movements also influence state institutions and the meaning of law.

In Brown’s later texts the “social powers” exercised by the language of rights appear *more* threatening than the “social powers” in action in the legally unregulated private spheres. For example, ending the discrimination of gay couples by granting them equal right to marry allegedly subjects them to the “normalizing powers” of that “heterosexist” institution; and laws protecting women from sexual harassment at workplace *construct* them as sexually vulnerable. (Brown 2002, 425-6; Warner 2002, 259-289.) Brown even questions the preferability of equal legal rights of women, granted by liberal democratic states, to alternative gender orders: if liberalism as inherently “masculinist” ideology is both immutable and necessarily hostile to women; and the liberal politics of rights is either helpless in the face of oppressive “social powers” acting beyond its reach or exercising “discursive powers” that are “normalizing” in a necessarily undesirable way; then the political and moral value of the institutions of rights can indeed be seriously questioned (Brown 2004 60-76). This chain of argument does not imply comfortable conclusions for either feminism or democracy.

Young’s argument about the insufficient capacity of liberal politics of rights to improve justice is related to Brown’s earlier argument, indicating that equal rights remain formal and inefficient because there are social powers beyond the reach of legal rights that reproduce inequality: Young calls them “oppression” and “domination”, whose sufferers as well as exercisers are *social groups*. Young explains the use of the term “oppression”, a quite strong term to describe implicit forms of discrimination in the absence of explicit state-sponsored tyranny, by appealing to the reality of its impact to its subjects, not alleviated by its non-intentionality. Young’s concept of oppression “designates the disadvantage and injustice some people suffer not because a tyrannical power coerces them, but because of the everyday practices of a well-intentioned liberal society”; and “refers to systemic constraints on groups that are not necessarily the result of the intentions of a tyrant” (Young 1990, 41).

Young sees oppression as all-encompassing and omnipresent, while unintended, subtle and everyday:

“In this extended, structural sense oppression refers to the vast and deep injustices that some groups suffer as a consequence of often unconscious assumptions and reaction of well-meaning people in ordinary interactions, media and cultural stereotypes, and structural features of bureaucratic hierarchies and market mechanisms – in short, in the normal processes of everyday life” (Ibid.).

Constituted by “social powers”, this oppression is beyond the reach of law:

“We cannot eliminate this structural oppression by getting rid of the rulers or making some new laws, because oppressions are systematically reproduced in major economic, cultural and political institutions” (Ibid.).

In this theory of structural discrimination the eventual success of individual persons who belong to the allegedly oppressed groups is perceived not as a consequence of liberal equality, but as an accidental exception to the rule or as “tokenism”, that is, a result of insincere attempts by those in power to *appear* egalitarian and inclusive without making serious substantive changes in social structures and attitudes that perpetuate group-based oppression. Therefore Young proposes group-based identity politics as an alternative strategy to empower the oppressed groups.

Young describes “the five faces of oppression” as exploitation, marginalization, powerlessness, cultural imperialism and violence. These are identified as ways of social discrimination and modes of reproducing group-based hierarchies that formally egalitarian rights-based liberal politics fails to cure – as I indicated above, in Young’s view it is partly because that politics in fact represents the particular perspective of a dominant group rather than a genuinely universal perspective (Young 1990, 104-116). Young defines “social group” as a group defined by a shared sense of identity that may or may not be based on “a shared set of attributes”: more importantly, a group is defined by *identification* with a social status, a common history based on it, or shared cultural forms and self-identification based on those qualities: groups can be founded on gender, sexual orientation, ethnicity, “race”, ability and other such partly ascriptive, partly self-defined qualities. Young argues that structural oppression disproportionately affects members of some groups, although particular groups can be more or less strongly influenced by particular forms of oppression. She defines “oppressed group”; a group that in her model of “politics of difference” (introduced in part I) is entitled to group-specific representation, veto rights concerning issues affecting the group in particular and self-determination; as a group structurally affected by any of the five “faces of

oppression". Treating "social groups" as equal when in fact they are not fails in Young's view to challenge the existing structural hierarchies and inequalities. (Young 1990, 39-65.)

By *exploitation* Young means a relationship characterized by economic inequality in a Marxist sense, extending the notion of class to social groups in general: it is a relation through which the labour and energies of one group is systematically used to augment the status, power and wealth of another. She attributes exploitation also to gender, arguing that the unpaid domestic work by women is systematically used to enhance the power and status of men. Likewise, the disproportionate representation of racial minorities in low-pay menial jobs constitutes the exploitation of those groups (Young 1990, 48-53).

By *marginalization* Young means the circumstances in which some people or groups are not needed at all; deemed superfluous, they are not *even* exploited. She describes this as the most dangerous form of oppression, because in addition to material deprivation, the marginalized suffer from the lack of "opportunity to exercise capacities in socially defined and recognized ways". As welfare dependants, they are deprived of the rights to "privacy, respect and individual choice"; thus it is an oppressive condition even if their basic material needs are satisfied by social welfare (Ibid. 53-55). *Powerlessness*, in turn, is defined apart from the two previous conditions as the condition of those "over whom power is exercised without them exercising it"; it is the condition of people who take orders and do not give them. Powerlessness is often defined by class status as the status of menial as opposed to professional workers; and is characterized by a lack of work autonomy and of social "respectability" (Ibid. 56-58).

By *cultural imperialism* Young means a system of values and norms in which "dominant meanings of society" render the perspectives of less privileged groups invisible, unimportant or deviant, while stereotyping them and marking them as "other". The dominant groups are made to look normal and universal, while those who differ are marked by deviance and inferiority. Young argues that according to the logic of cultural imperialism only "white males", free of "different" group marking, are seen as individuals, while others are defined by their group characteristics. She insists that this attitude is also at work in the political claims to universality that she criticizes as masking the partial perspectives of the dominant groups as those of the universal citizen (Young 1990, 58-61). Finally, *violence* fulfils the criteria of group-based oppression when it is motivated by hatred toward a group

and directed at persons *as* members of groups. In addition to physical violence, Young regards harassment, intimidation, humiliation and ridicule as aspects of structural violence. She argues that violence toward a group is a matter of social injustice, when group members have to be afraid of random violence on the basis of their group characteristics; and when violence against groups is structurally tolerated, overlooked or considered as “called for” by the victims (Ibid. 61-62).

As I noted above, Young defines “oppressed groups” as social groups who suffer from at least one of the “faces” of structural oppression. Groups may suffer from some “face of oppression”, not necessarily from all. For example, sexual minorities suffer from violence and cultural imperialism, but are not economically exploited; while menial laborers as a class suffer from exploitation and powerlessness, but not from group-based violence. Women as a group, as Young argues, suffer more or less from all of the named oppressive measures; and cultural imperialism affects all non-dominant groups. (Young 1990, 39-65.) A problem with this vision, as Brian Barry points out, is that in the US, it classifies 90% of the population – including women, non-white ethnicities, sexual minorities, the disabled etc. – as “oppressed” (Barry 2001, 306). Even if it can be argued that the remaining 10% indeed enjoy structural privileges compared to all others at least in some aspects of life; that empirical fact has relevance for the discussions on democratic legitimacy and universalism: it is hard to legitimize “special” rights claims for 90% of the people. Although many of the subtle faces of hardly definable discrimination are rightly identified by Young; and some (but not all) aspects of group-based disadvantage are confirmed by statistical evidence, institutionalizing group-based identity politics as the “politics of difference” is a problematic response to those injustices, as I will explain below. While establishing “special group rights” for a significant proportion of citizenry is complicated, it is even harder to assume that all members of the groups whose membership is often fluid, ambiguous, overlapping and voluntary only to a varying degree, share enough of political agenda in distinction from the rest of the society for group representation to be politically meaningful, democratically legitimate and not harmful for the members’ capacity to act as citizens in the society at large.

A problem with theorizing “social powers” as political realities is that it is often presented as an alternative to theorizing the politics of rights; social powers are seen as a “side effect” of rights talk; at best ignored, at worst aggravated by the latter. It is rarely notified in these discussions that “social powers” are at work in *any* human

society; also where universal (or any) rights are *not* enforced. It is rarely discussed what the effects of social hierarchies, power imbalances and identity-based prejudices would be if they were *not* regulated by egalitarian legal universalism or if they were explicitly legally sanctioned. While feminist critique convincingly indicates that equal rights may be insufficient for achieving substantive justice and inclusion and demonstrates the importance of gender conscious and other egalitarian policies for those whose objective is to promote such goals; it is self-deceptive if posed as an argument *against* the “individualist” universalism of liberal rights, because denying equal rights to members of disadvantaged groups can only aggravate their condition, directly *and* through “discursive” powers. I will elaborate this argument below.

### **1.3. Identity politics and its limits**

I noted above that Young’s feminist politics as well as her democratic vision are based on a collectively empowering identity politics that she calls “the politics of difference”. “Identity politics” is a term generally used about the politics of group-identity-based emancipatory movements, such as feminist, gay liberation, ethnic, racial, cultural or religious movements that emphasize the belonging of their members to the given particular group that is experienced and theorized through a shared sense of *identity*. Emphasizing identity often replaces arguments for institutional or structural reforms; mostly because those are considered delusive or insufficient when social inequality, oppression or marginalization is perceived to be based on the identity in question: in such cases politicizing the marked identity is seen as the most efficient way of resistance to structural inequality, prejudice and group-based marginalization. In this section I discuss some aspects of “identity politics”, mostly of Young, with reference to some other versions, and discuss its merits as well as problems as a strategy to enhance the inclusiveness of democracy.

Young presents her politics of identity as an alternative to the liberal norm of impartiality; a cultural-political resistance to “cultural imperialism” and the political hegemony allegedly granted by the apparently neutral universalist liberal institutions to the white, male, heterosexual propertied class. It is motivated by the scepticism, presented above, about the empowering potential of equal legal treatment. As oppression as defined by Young is directed at social groups; the politics of difference is based on the positive enhancement of the identity of those

groups. There are different “identity political” responses to the persistence of group related inequality under conditions of formal equality. The one most generally recognized as “identity politics” is *cultural* or *affirmative* identity politics, which emphasizes marginalized identities in order to reclaim their underestimated value and to give members of the groups a sense of pride about their “difference”. In feminist theory its most conspicuous representative is “cultural feminism”, the movement emphasizing “feminine values” in defiance of the masculine norms of the society. Also empowerment movements such as gay pride or Black Nationalist movement are culturally identity-political; emphasizing the difference of the group in question and feeling pride for it instead of inferiority. The central emancipatory goal of cultural identity politics is *recognition*<sup>15</sup>. The *legal* status of the group members is secondary, and the ambitions of questioning the foundations of the identities are rarely on the cultural identity political agenda. Young supports cultural identity politics, particularly in her earlier work, but her “politics of difference” as a democratic vision also includes specifically political claims to group-based rights and political representation, as I indicated in part I. (Young 1990, 168-173.)

Affirmative identity politics treats *difference* as intrinsically valuable and prefers preserving differences to assimilation in principle; thus it is inherently averse to universal norms. The emancipatory force of such identity political movements is constituted by asserting the equal (or higher) value of the disregarded identities *in their difference*; not by appealing to the equal worth of the discriminated persons as equal citizens *in spite of their difference* from those who represent the prevailing norm. In an attempt to reverse the hierarchical cultural norms, the message of cultural identity politics is: I am what you call me and proud of it. That way of thinking, according to Young, liberates the oppressed from a “double consciousness” under cultural domination that pressures them to try to be what they are not and to belong to the majority while inevitably marked as different. Cultural identity politics thus improves the self-image and confidence of members of marginalized groups and contributes to their visibility, normalizing differences in the society at large. It also helps cast the dominant culture as particular, while emancipating the symbolically marginalized groups who suffer from “cultural imperialism”. (Young 1990, 166-173.)

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15 A term introduced into these debates by Charles Taylor, in *Multiculturalism and the Politics of Recognition* (Princeton UP 1992). For more recent debates on the political meaning of the term, see Fraser & Honneth (2003).

Young's democratic model, as I indicated above, also contains political and legal measures for improving the equality of oppressed groups and achieving more social justice than is offered by the universal norms and institutions of liberalism. Her *political* identity politics implies, in addition to the symbolic enhancement of difference as a positive resource, group-based "special rights", including group representation, affirmative action and various degrees of group self-determination, including a veto right in matters that particularly affect the group in question. The idea behind the request of group representation in official administration is that equality remains an illusion as long as the political decisions that condition the lives of all are disproportionately made by dominant groups. Group-based participation is promoted through inclusive deliberations, inter-group round tables and quotas for membership in administrative bodies or candidate lists. The primary motivation of political identity politics is the egalitarian ideal of inclusion; the idea that if some groups are underrepresented in political decision making as well as certain sections of professional or educational life, the polity lacks democratic legitimacy. Representative identity politics and the politics of group rights intends to cure that defect and thus make politics more inclusive and consequently more legitimate in democratic terms. (Young 1990, 156-225; 2000, 121-153.)

The identity politics described above, whether conceived as cultural, political or legal, mostly treats existing group identities as given, even when admitting that social group identities may be fluid and socially constructed (Young 2000, 99-102; MacKinnon 1989, 218-222). As far as "identity politics" constitutes a discourse within the public sphere of civil society and a consciousness raising strategy, it is hardly in conflict with either liberal universalism or other feminist or radical democratic strategies. But neither universalists nor all feminist theorists are enthusiastic about the idea of particular group-based *rights*. "Legal identity politics" is questioned both by liberals who consider the neutral framework sufficient for justice and equality, and by poststructural critics of "legalism", who, relying on the conception of discursive power, apply their critique of "liberal rights discourse" also to identity-related rights claims. (Barry 2001, 299-328; Brown & Halley 2002; 1-37.)

Poststructuralist feminists, in contrast to most proponents of identity politics, refuse to regard existing group identities as given or "real" and remain skeptical about "the politics of difference", even if they are equally critical of the universalist discourse of liberty and equality. Brown rejects affirmative identity politics,

criticizing it for essentializing identities that are historically contingent and socially constructed, often under conditions of domination and oppression. She argues that "the problem with a politics of 'difference' is that it lacks a vision of the future that overcomes the political significance of such differences" (Brown 2001, 40). But poststructuralist feminists also appeal to a specific kind of identity politics that I call *subversive*. Instead of enhancing the identities perceived as contingent and often oppressive or calling for the improvement of the situation of existing identity groups by legal means, they question the reality of the identities by revealing their socially constructed nature. Thus, wary of emphasizing "female identity" or demanding equality for women, deconstructionists strive to overcome rigid distinctions between gendered (or sexual or racial) groups by emphasizing their contingency and fluidity.

Poststructural feminism is identity political in the sense that its focus is on *identity* – albeit on *questioning* identity – instead of *equality* and institutional reforms to promote it. Brown suggests that instead of legalizing the vulnerable status of women and minorities through protective laws that simultaneously construct them as victimized groups; those groups should refuse to adapt "victim identities" (Brown 2001, 45-61). Ironically, the skepticism towards identity politics expressed by those suspicious of the "normalizing" powers of *all* political discourses is shared by conventional liberals who reject group identity politics for the sake of universal equality and the right of the subject to "choose" her identity along with her life plan (Barry 2001, 317). Indeed, the recognition of the contingency of social identities works implicitly as an argument *in favor of* universal humanism: if social, political and cultural membership is fluid and contingent, *any* identity can be discarded to reveal a human being who could under different circumstances equally well belong to another group.

Identity political visions were created as a response to the perceived incapacity of universal liberal politics of individual rights to grant substantive equality, justice and democratic legitimacy. I finish this section by pointing out some problems of that approach. The problem of identity politics, in particular when enforced by legal and political means, is not so much that its expected goals are achieved *at the expense of* the liberal values of individual "liberty" and universal rights – in cases where identity-based policies genuinely defy discrimination and marginalization they indeed promote those values; but that *when* it compromises those values in the

name of “difference”, it also compromises its own stated values and goals of inclusion and equality.

A problem with cultural identity politics is essentialism, the tendency to enforce and reproduce contingent and socially constructed identities. When identities are related to hierarchical social roles, the liberating effect of affirmative “politics of difference” is questionable. Identity politics is particularly problematic, however, when enforced by legal means *as a politics of democratic inclusion*. Although even this approach has its merits – relieving the under-representation of some groups in decision-making bodies through affirmative action may in some particular cases positively combat their marginalization; the existence of overlapping identities and multiple forms of marginalization makes it hard to implement without doing injustice either to minorities or dissenters within the groups or to members of “competing” groups. When “oppressed groups” are defined as broadly as in Young’s vision, it is nearly impossible to determine group membership and define which groups are “oppressed” to the extent that they are entitled to group representation; and which questions concern group members, and not the rest of society, to the extent that the group should have particular decision rights on them. As all people belong to more than one group at the same time, there is a risk that hierarchies *within* groups are reinforced by group-based politics. Another problem is connected with the fluidity of groups and *political* differences within groups: members of social groups do not necessarily have such common goals that they automatically represent each others’ best interests, and all those positioned as members do not necessarily feel allegiance with groups in question at all. For example, taking issue with Young’s examples of “oppressed groups”, Barry argues:

“it is surely clear that ‘Asians’ [in USA] do not constitute a group at all, on Young’s definition of a group, since there is nothing in the way of ‘cultural norms, practices, or way of life’ common to all and only Asians” (Barry 2001, 307; see also Young 1990, 40).

In diverse, multiethnic societies it is often impossible to determine group memberships without remnants. There are people with mixed backgrounds, and there are, in Stephen Lukes’s words, “identifiers” as well as “quasi-identifiers, semi-identifiers, non-identifiers, ex-identifiers, multi-identifiers and anti-identifiers” in all social groups (Lukes 2003, 142). Admitting that groups can be internally diverse, Young defends political group representation as the representation of a supposedly shared *perspective*, otherwise underrepresented in political decision making;

arguing that those sharing some background qualities share a perspective even if they do not have common goals (Young 2000, 136-141; 146). Thus Young's politics of group representation dismisses dissidents or "non-identifiers" within groups who cannot represent the group but would probably be barred from mainstream politics, if "their group" were separately "represented". Identity politics tends to homogenize groups, disregard individual differences and silence dissent *within* groups; while enhancing differences *between* groups, thus promoting segregation, parallel societies, enclaves and even "balkanization" (Benhabib 2002, 129-130).

In particular "multicultural" identity politics may reinforce the power of "community leaders" over community members and perpetuate oppressive tribal practices. Many immigrant feminists in liberal democracies who fight *against* group-based "politics of difference" and *for* the enforcement of universal equal rights, argue that the "community elders" who represent religious or cultural groups are often authoritative, conservative leaders prone to control and subjugate group members, particularly women and children<sup>16</sup>. In the next section I discuss this problem in connection with Susan Moller Okin's argument about the conflict of group-based *cultural* politics with feminist politics, a paradox Young omits while defining women as well as ethnic, religious and cultural minorities as oppressed groups (Okin 1999, 9-24). This discussion reveals how officially sanctioned inclusion of *groups* may contradict the equality and inclusion of *persons*. Feminist critics of universalism need to face such conflicts between universal individual rights and the claims of collective values; or their attempts to *democratize* liberalism end up supporting *less egalitarian* arrangements when collective claims contradict the universal values of liberty and equality. Even if rights discourse has a limited capacity to solve problems of identity, inclusion and diversity; the conflict between individual equality and group diversity falls back on the legal-political question whether the equality of all individuals before the law is a more important right than certain group-specific collective rights or not.

Compared to Young's "politics of difference" *subversive* identity politics is less rigid and opens up channels for critical thinking about group identities. At the same time

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16 For example, such position has been publicly promoted by Ayaan Hirsi Ali in Holland; Fadela Amara and the feminist organization "Ni Putes, Ni Soumises" in France; Azam Kamguian and the Committee to Defend Women's Rights in Middle East in the UK, the late Samira Munir in Norway (who died allegedly through suicide 14.11.2005); and Sara Mohammad and the organization "Never forget Pela and Fadime" in Sweden .

there is a tension in the poststructuralists' simultaneous aversion to the politics of difference *and* to liberal universalism. The call for those suffering from social injuries to refuse to internalize their vulnerable identities follows the conventional liberal conception of individual autonomy and sovereignty; as those facilities can be seen as preconditions for an individual's ability to defy the surrounding identity-forming discourses and to refuse to accept their ascribed identities. Given Brown's critique of liberalism as an irrevocably masculinist discourse, her also rejecting particularist feminist politics as essentialist leaves few political measures for increasing gender justice and inclusion. In the following section I will highlight some problems related to "identity politics" when conceived as "politics of rights" in feminist and multicultural contexts.

#### **1.4. Rights, recognition and diversity**

As I noted above, another powerful source of the critique of liberalism, along with feminism, is communitarianism, the theory that emphasizes the significance of *community* for the meaning, fulfilment and quality of individual lives. Discussing communitarianism in detail is beyond the scope of this thesis; for the present discussion it is sufficient to note that its central ideas such as the critique of the liberal conception of autonomous individual as allegedly ignorant of the constitutive role of social environment and the emphasis on *recognition* as a social good conducive to personal well-being has made a significant contribution to feminist, "identity political" and multiculturalist theories. Feminist critique of liberalism follows communitarianism in its emphasis on social relations, mutual dependency and the notions of duty, care and community; in contrast to the concepts of rights, liberties, autonomy and equality that are considered abstract, individualist and "masculine". Theories of multiculturalism, inspired by the communitarian emphasis on the importance of collective background for individual development and well-being, have also promoted the notion of "group rights" in opposition to individual universal rights. Originally designed for protecting the linguistic rights of ethnic minorities or the indigenous lifestyles of native minorities in modern liberal democracies; under the conditions of globalization and increasing migrations debates on multicultural group rights have shifted to questions about the rights of immigrant communities to preserve their "cultures" and even culturally motivated

alternative legal systems in their liberal democratic adopted homelands. That poses a dilemma to proponents of inclusive democracy: does “inclusion” mean including all groups *as collectives* – as in Young’s model; or all *persons* as equals disregarding to which “groups” they are perceived to belong? (See e.g. Taylor 1994, Young 1990 & 2000; Barry 2001; Fraser & Honneth 2003.)

Recognition, as theorized by Taylor and Honneth, is a social relationship without which the discourse of rights offers no ground for personal self-fulfilment and equal opportunities. While Honneth conceives of recognition in more universal terms as a general condition of justice; proponents of multiculturalism see recognition in group-based terms; claiming that the basis for the recognition of an individual is the recognition by the wider society of her particular *culture*. Likewise, diversity as a social value can be promoted in universalist as well as particularist terms: while Rawlsian liberals argue that diversity is best generated by the universal neutral framework and the politics of rights and liberties that allows people to freely associate, express their cultural allegiances and practice their religions uninterrupted by the state, critics of universalism argue that such “neutrality”, while permissive of cultural and associational expressions, implicitly favors majority cultures and market-economy-guided lifestyles, and is therefore still homogenizing: thus diversity must be protected by active group-based “multicultural” politics. (Taylor 1994, 25-73; Honneth 2003, 160-197; Barry 2001, 61-98; Waldron 1995, 93-119.)

The latter position is often, although not always, taken by feminist proponents of deep democracy, although it is paradoxical when “group rights” claimed in the name of culture are in conflict with gender equality. The key concepts of both feminist and multiculturalist identity politics, apart from “identity”, are “difference” and “diversity”, constructed in opposition to the liberal notion of equality, seen as an equality of “sameness”. In Young’s vision feminist identity politics merges with the politics of multiculturalism that Okin defines as a policy based on the claim that “minority cultures or ways of life are not sufficiently protected by the practice of ensuring the individual rights of their members” and that therefore, they “should also be protected through special group rights or privileges”, including the right of groups to “govern themselves, have a guaranteed political representation or to be exempt from certain generally applicable laws” (Okin 1999, 10-11). Okin’s critique of multiculturalism indicates why such merger is self-contradictory. As another anti-universalist feminist position, Brown’s defence of multiculturalism against Okin’s critique is based not on a “politics of difference” which she regards essentialist, but

on a moral relativist stand against the universal values of liberalism, along with her conviction, discussed above, that “liberalism” itself is so permeated with “masculinism” that no alternative cultural or political arrangement can be seen as *worse* for women. (Brown 2004, 69-76.)

I pointed out above the difficulties of determining the group membership of many people in modern culturally and ethnically diverse societies. Another problem of enhancing diversity through the politics of collective rights is, as shown by feminist critics of multiculturalism and communitarianism, that the preferences of “communities”, particularly when they conflict with the universal liberal norm of equality, are often defined by “community leaders” who tend to be male, authoritarian and more conservative than the “group” at large (Okin 1999, 9-24; Shachar 2001, 17-20). Thus the attempt to enhance democratic inclusion by emphasizing diversity may lead to granting collective rights to internally *undemocratic* groups. A paradox is created if the group enjoying or requesting collective rights does not recognize its members as equals: in such cases, multicultural group rights and the basic liberal principle of equality before the law are in conflict. A conventional liberal answer to this dilemma is that illiberal associations are to be accepted within liberal societies insofar as belonging to them is voluntary and the option of exit is open to all members at any time. (Rawls, 1993, 195-200; Kukathas 1995, 228-254). But critics have pointed out that in many cases it is hard to determine how voluntary the belonging is; in case of ethnic and religious groups to which one is born rather than voluntarily joined as adult, exit may be emotionally inconceivable or mean the loss of all social and familial relations and networks of economic security. For example, Barry argues that membership in the economically self-sufficient religious community of the Amish in the USA cannot be seen as voluntary even though the young are given the opportunity to leave the sect at a certain age, because membership presumes giving up official social security, making the cost of exit at mature age unbearable. (Barry 2001, 187-193; see also Green 1995, 262-267.)

Often it is gender equality that is compromised in the name of collective cultural rights. Okin argues against the politics of multiculturalism that in most cases when cultural groups demand “special rights” in the form of group self-determination, political representation or the privilege to be exempt from some generally applicable laws; it is the equality and rights of women and children within

the group that are compromised or violated (Okin 1999, 9-11). This makes the relationship of feminism to multiculturalism dilemmatic: on the one hand the policies enhancing diversity and defying the dominant universal norms that allegedly privilege “white males” are seen as allies to the feminist politics of difference; on the other hand increasing equality *between* groups through compromising majority norms and collectively empowering minorities is likely to reinforce inequality and oppression *within* groups. Okin argues that “cultures”, often meant synonymously with “traditions”, tend to be patriarchal. She has provoked a lot of criticism for this generalizing use of the term “culture” (Benhabib 2002, 100-103; Brown 2004, 69-71); although while indeed not questioning the meaning of the concept, her critique responds to claims explicitly made in the name of preserving “cultures” (Okin 1999, 12-13).

Okin argues against accepting inegalitarian, misogynist and violent practices like polygamy, female genital mutilation and forced or child marriages in liberal democracies in the name of cultural plurality; and accepting “cultural defences” to alleviate sentences for rape, wife beating or killing if those actions are claimed to be accepted in the defendant’s “culture” (Okin 1999, 14-19). While recognizing the persistence of a degree of sexism in liberal democracies, Okin insists that some success *has* been made in terms of gender equality as a result of persistent feminist action; and that accepting openly misogynist practices in the name of multiculturalism may cause regress in this fragile success in democratic societies. Not opposing cultural group rights *per se*, she argues, in accord with the deliberative principle that *all* persons affected by a decision should have a say in its making, that when debating such rights, not only (the usually elderly male) “community leaders”, but also the women of the group, in particular younger women who have been less fully socialized into its traditions, should be listened to before granting such rights:

“Unless women [...] are fully represented in negotiations about group rights, their interests may be harmed rather than promoted by the granting of such rights” (Ibid. 23-24; see also 19-20; 23).

Brown, in her response, accuses Okin of “Orientalist feminism” and “liberal imperialism” and of enhancing the civilisational superiority of “liberalism” and “the West” while labelling the “rest” uncivilized and barbarous (Brown 2004, 60-76). Reacting to Okin’s use of the term “barbaric” in describing a law in Peru that excuses gang rapists if one of them offers to marry the victim (Okin 1999, 15); Brown argues:

“Susan Okin’s designation of selected non-liberal cultural practices as barbaric and her inability to see ‘barbaric’ practices within liberalism perfectly mimics the etymological slide of barbarian from *foreigner* to *uncivilized* to *wild brute*, and inhabits as well the blindness to colonial or imperial domination that this slide entails” (Brown 2004, 60).

Brown argues that Okin picks “non-Western” practices as unacceptable exactly because they are “non-Western”; and challenges Okin’s argument against allowing forced child marriages and genital mutilation of girls in liberal democracies by appealing to the alleged moral equivalence of those “liberal” practices that in her view are equally barbaric, like beauty surgery or sperm donorship. Denying that practices like FGM or forced marriage of preteen girls are more morally condemnable than the “equally sexist” practices allowed by liberal law, Brown poses a radically relativist argument: “what if barbarism, like beauty, is in the eye of the beholder, and the eye is always culturally situated?” (Ibid. 74). Equating forced veiling, sanctioned by the threat of flogging and prison in Islamic theocracies with “Western” dress codes and “norms that regulate female beauty”; and explicitly patriarchal family laws with allegedly equally oppressive “social powers” within liberal cultures, Brown implicitly denies that women’s equal rights have brought along *any* progress in terms of gender justice:

“why is Okin more horrified by *legal* control of women by men than by the controlling cultural norms that regulate beauty, sexual desire and behavior, weight and physique, soul and psyche, that course through modern Western societies?” (Ibid. 75).

Referring to her own earlier criticism of “liberalism” as essentially patriarchal, Brown refutes Okin’s assumption that the fact that women are “legally guaranteed many of the same freedoms and opportunities as men” makes women’s position any better compared to situations in which they explicitly lack such freedoms and opportunities (Ibid. 71).

Brown’s attack against Okin implies a conclusion that there is no serious reason from a feminist point of view to prefer the norm legal equality of all people, including women, to alternatives that are explicitly inegalitarian and authoritarian: the minimal requirement of legal equality, considered by most feminists as the necessary but insufficient condition of inclusiveness and justice, appears not to be desirable at all. Such argumentation makes it hard to protect legal gender equality against conservative, openly sexist ideologies, also when they are homegrown within “Western liberal culture”. Relativism in feminism is a slippery slope: accepting open

gender discrimination within some groups declares it generally acceptable; a development that through the combined effects of discriminating practices and the “discursive powers” mediated by their public acceptance affects *all* women’s position as persons and democratic citizens. Brown’s insistence that “liberalism” is just another “culture”, not better or worse than other “cultures”, is analogous to Mouffe’s critique of international human rights as an expression of particularly “Western” *culture* in its refusal to make a distinction between “culture” and politics. Equating political regimes and contested traditions with a holistic notion of culture and at the same time insisting on the moral equality of all cultures, they both refuse to acknowledge that illiberal *political regimes* do not fully coincide with the “cultures” of their subjects; and that they may indeed be *undemocratic* and genuinely authoritarian, tyrannical and oppressive.

Criticizing Okin for trusting legal equality too much and underestimating the impact of “social powers” (that appear to be necessarily oppressive, particularly in liberal democracies); Brown contradicts her own claim that the *language of rights also exercises social power* (that I discuss below in 2.3.). Although the emergence of liberalism undeniably coincides with certain *cultural* as well as historical developments and favors some cultural forms over others, liberal democracy is distinctly a *political* regime capable of embracing a plurality of cultures while enforcing individual rights and political freedoms. Although, as Benhabib argues, eliminating cultural arguments from politics is not as easy as Rawlsian liberals insist, because political passions are increasingly culturally motivated (Benhabib 2002, 129); when “liberalism”, that is, liberal democratic political system is identified as “a culture”, the difference between liberal democracies and illiberal regimes becomes posed as just a cultural difference; and arguments for protecting universal rights within liberal democracies appear as expressions of “cultural imperialism” of majority cultures.

As I mentioned above, globalization and the consequent increase in the ethnic diversity of democratic polities make it increasingly hard to separate debates on international democracy from debates on multicultural policies within liberal democracies. As Okin’s argument concerns primarily group-based “special rights” within liberal democracies, Brown’s response can be seen also as a defence of relativism within liberal societies. An example to illustrate Okin’s argument is the recent debate in Ontario State in Canada over the legal status of religious family law as a medium of “multicultural” civil arbitration. Within the framework of Arbitration

Act from 1991 that already had accommodated religious arbitration of Orthodox Jews and Catholics, Muslim community leaders, represented through the Canadian Islamic Institute of Civil Justice, attempted to introduce the use of Islamic religious law, the Sharia, as family law with legally binding authority for the local Muslim community. The proposal was vocally protested by Muslim women<sup>17</sup>, because Islamic law explicitly discriminates against women by giving them inferior status as witnesses and in matters of inheritance, marriage, divorce and custody: in all questions that the private family law is entitled to regulate. The reference of the proponents of the Sharia to the voluntariness of using religious arbitration was compromised in the eyes of the opponents not only because the communal and familial pressures to abide by it affect most the most vulnerable among the women concerned; but also because the “community leaders” demanded for the religious community the right to punish those who refused it as apostates. In practice, making religious law legally binding would have forced Muslim women to choose between their constitutional equality and their community and religion. Accepting at first the community leaders’ demands over the women’s protests, Canadian officials prepared for the implementation of the Sharia for years, until the whole Arbitration Act was finally cancelled in fall 2005. The readiness of the authorities to accept the denial of Muslim women’s constitutional right to equality because of their combined religious and gender identity literally illustrates Okin’s warning that “group rights” enforce the demands of most conservative community leaders, if the women in the group are not listened to.

How does feminist and radical democratic theory treat such cases? As I noted above, Mouffe condemns “legal pluralism” that denies some members of a polity their equal rights as unacceptable in liberal democracies, although she opposes the idea of similar universality of rights in societies she deems “non-Western” (Mouffe 2005, 121). Benhabib, who criticizes proponents as well as critics of multiculturalism for too rigid, holistic concepts of “culture” and calls for a “recognition of the radical hybridity and polyvocality of all cultures”, insists that all sides be engaged in deliberations and defends everyone’s equality before the law (Benhabib 2002, 25; 128). Young’s “politics of difference”, with its group-based policies along with a vaguely determined general right of “inclusion”, is more ambiguous. Like defining “Asians” as a “group” in spite of the diversity that such a qualification contends by *all*

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17 Some of the women’s positions are available on the Internet at [www.ccmw.org](http://www.ccmw.org) and [www.nosharia.com](http://www.nosharia.com).

social characteristics (origin, ethnicity, culture, religion, history, class etc.), Young defines also Muslims as a “group” entitled to self-determination, ignoring the diversity, along with gender and ethnic divisions, of *political* positions within that group, also regarding the role of the religion that supposedly offers them a “shared perspective” – ranging from those who, like the Islamic Institute of Civic Justice in Canada, insist that *all* Muslims, wherever they are, *must* live in accordance with Koran-based medieval religious laws, to those who have immigrated to liberal democracies *in order to escape* those religious laws. The “politics of difference”, preferring “difference” to “equality”, is more likely to support the former position.

Also Brown’s view, granting no merit to “liberal” legal equality, is compatible with “multicultural” policies that deny the equal rights of some groups or persons within minority groups: if liberal equality is seen as a totally powerless tool of justice or even as the ideology *generating* injustice, there is no ground to object the legal inequality of certain groups even within democratic polities. Still it is obvious that a woman who is forced by a religious court to give up all her material assets or agree to never see her children again in order to get a divorce from a man who is abusive or has already married another wife or two<sup>18</sup>, is not in a position of an equal citizen in the “inclusive” democratic arena. Thus the politics of group self-determination does *not* necessarily promote the universal inclusiveness and equality of *all* citizens. (Young 2000, 81; 88; 110.)

The possibility that “group rights” compromise the equality of individual rights within groups indicates that diversity without the unconditional protection of universal equal rights is not *democratic* diversity, if the concept of democracy includes the assumption of the moral and legal equality of all citizens. In contrast to the anti-universalist positions, Benhabib tries to combine the diversity of cultural perspectives with the universal values of equal respect and symmetry, challenging all participants in public discourse to indicate in connection with their demands of special rights, how they respect the rights of others. The revival of religious arguments in democratic politics indicates the continuous actuality of Rawls’s position on “comprehensive doctrines” in politics and Mill’s views on the power of religion over individuals. In deliberative democratic framework, “comprehensive” arguments are not blocked from political debates in advance of public discourses, but the deliberative conditions, openly *political* in their defence of universal

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<sup>18</sup> Reference to cases discussed in connection with the Sharia arbitration clause. Such cases are produced by family law that endorses male polygamy and grants divorce at his discretion only.

democratic values, disqualify the demands that compromise the norm of equal respect. Such dismissal is not undemocratic if done in order to preserve a framework in which the equal participation of *all* continues to be possible. Endorsing the universalist premise of moral and legal equality of all people, Benhabib presents a view not just more “liberal” than that of Brown or Young, but also more *democratic*, if democratic inclusion is understood as the inclusion of *all* available perspectives. (Benhabib 2002, 114-132.)

Below I discuss the alleged individualism of rights discourse and the meaning of the concept of universal humanity in democratic theory debates. In the following section I revisit, in the light of the discussion above, the concept of democratic inclusiveness and its relationship to the politics of universal rights.

### **1.5. Rights, inclusiveness and equality**

The dilemma of universalism and difference; equality and diversity is currently much discussed in democratic and feminist theory. As the liberal citizen is claimed to be modelled on the experience and perspective of “white, middle class male”, feminists are suspicious about the universalist ideals of individual rights and equality. They fear, as I indicated above, that equality is constructed as “sameness” so that to become *equal* to the privileged groups, others must become *similar* to them; being different means implicitly being excluded from the range of equal humanity, a concept itself suspected to be conducive to homogeneity and the imperial power of the stronger. Thus, inclusion is conceived as inclusion of *perspectives; collective* perspectives of social groups marginalized by the dominant conceptions of citizenship and humanity, like women or ethnic, religious and sexual minorities. As the conceptions of humanity, equality and rights are perceived as oppressive, there is no objection to accepting the perspectives that resist such conceptions: once the particularity of the “liberal” perspective is revealed, it has no claim to universal validity.

Although the motivation behind the discourses of inclusiveness is a genuine pursuit to improve democratic justice and resist the oppressive tendencies of implicit discrimination, the trouble with some visions of inclusion is that by collectivizing perspectives on the basis of certain shared characteristics it risks to dismiss the

diversity of opinion, interests and sense of identity *within* those (partly self-defined, partly ascriptive) collective entities; thus shifting the relations of domination from a democratic society at large to smaller units within it that may be *more* oppressive of their defiant members who for some reasons still want or need to identify with those units and are thus not automatically free to “exit” the group and enter the majority as isolated free individuals. Ironically, although group-based policies are often justified with arguments that *oppose* the traditional liberal ideal of the “sovereign” citizen and appeal to the importance of social, familial and communal relations as a necessary condition of individual well-being; they are also defended by appeals to “freedom of exit” of those who are not pleased with the rules of the groups, although such freedom presumes nearly absolute sovereignty from those who make use of it. Indeed the argument for universal equal rights of all individuals, disregarding to which social group they happen to belong, is *supported by* the recognition of the mutual dependence of people within families and communities: acknowledging that the sense of belonging to familial, ethnic, cultural, religious or other communities is important for the well-being of many people, it is ultimately unfair to force some people born to some particular groups to make the hard choice between that sense of belonging and their right to equal citizenship and fully human legal status.

As I noted above, there are moments in democracy when inclusion of certain perspectives or positions conflicts with the inclusion and equality of all individuals; in such cases the former may only be prioritized by compromising the basic democratic premise of the equal moral worth of all people. Inclusion of all individuals can only be guaranteed by a politics of universal rights: although rights are not sufficient to grant equal “voice” to everyone on the democratic arena, their lack quite certainly guarantees the *unavailability* of such privilege. A minimal conception of universal rights is thus a precondition for democratic inclusiveness *if* all persons are considered equal: while it is possible to conceive of “democracy” apart from the politics of individual rights if it is understood as absolute majoritarianism or sectarian pluralism balancing multiple collective perspectives; it is hard to speak of *inclusive democracy* if some of its members can be excluded from the range of equal citizenship. As I indicate elsewhere in this thesis, respecting illiberal arguments as equally valid is presented by some theorists as a matter of democratic inclusion (Isaac et al 1999, 222-264). Nevertheless, although it is debatable *which* arguments can be deemed unacceptably illiberal and how (e.g. at certain stages of

the democratic processes or by judicial review); the constitutive condition of inclusive democracy that *all* its members have an equal right to be heard limits the *content* of acceptable *arguments*: as soon as a the democratic arena accommodates a position that would eliminate the equal right to citizenship of some participants, it stops being inclusive. Thus, protecting the inclusion of all *persons* can justify limitations to inclusiveness of *political positions*.

The dilemma of including all *perspectives* while retaining the equality of *persons* is met in Benhabib's "circular" argumentation for protecting universal rights while opening up their meaning and interpretation to public scrutiny (discussed in part II): anyone can introduce discussions on any subjects, but the rules of inclusive democracy must be protected so that the egalitarian institutional framework to those discussions is not overthrown. Benhabib argues for allowing the cultural challenges to liberal democracy to enter public deliberations:

"Precisely because multiculturalism, in so many of its manifestations, challenges key assumptions of liberal democracies, it needs to release its conflictual and explosive potential in the public civil sphere through the dialogue, confrontation and give-and-take of ordinary citizens" (Benhabib 2002, 129).

The primary role of such contestations, however, is not to compromise the basic principles of democracy, but to revalidate and re-interpret them in the light of the changing conditions:

"there is a dialectic between constitutional essentials and the actual politics of political liberalism. Rights and other principles on which the liberal democratic state rests, such as the rule of law, the separation of powers, and judicial review, need to be periodically challenged and rearticulated in the public sphere in order to retain and enrich their original meaning" (Ibid. 130).

As rejecting those principles altogether would mean rejecting democracy itself; the principles of egalitarian reciprocity, voluntary self-ascription and *unconstrained* "freedom of exit and association" need to be protected – apparently through a politics of constitutional rights (Ibid. 128, 130-131).

Ironically the feminist aversion toward liberal universalism and its emphasis on "difference" and "diversity" implicitly (if not explicitly) conduces to the acceptance of less than equal status of women as well as sexual minorities and political dissenters within groups identified as other than "Western", "liberal" or "secular". The focus on the alleged masculinity of the liberal rights-bearing citizen diverts attention from the question of reinterpreting that concept consistently with the diverse identities of human individuals and the factual developments of existing liberal democracies,

including the changes in gender systems that have occurred as the result of decades of feminist struggles: indeed there is nothing that conceptually or empirically supports arguments about the impossibility of women being individuals in the liberal sense, that is, morally autonomous beings. Likewise the feminist critique of the “individualism” of rights discourse is self-defeating because wherever legal respect for individuals is not universal, it is women whose individuality and autonomy is first denied. Holmes even argues that it is the “abstractness” and universality of rights discourse that makes it deeply egalitarian, offering all individuals channels to challenge their familial, economic, political, religious, racial and gender roles (Holmes 1996, 230).

Those feminists who reject such anti-determinist promises of rights talk as necessarily empty or dismissive of “social powers” effective in spite of the formally equal rights, ignore the possible alternative of *not* having such rights as regulatory barriers to those social powers; they do not speculate what the impact of such powers could be if they were unrestricted by the egalitarian politics of rights. Objecting to equality as a norm in the name of diversity is also conceptually confusing, because diversity could hardly be seen as intrinsically valuable with no underlying normative assumption of the *equality* of different perspectives, “cultures” or life-styles. Another problem with the feminist critique of the politics of universal rights is that it is implicitly assumed while deemed oppressive: while fighting universalism as a particular value of the hegemonic “white male” culture, critics fail to notice oppression outside of that particular hegemony. Even if the liberal politics of rights appears *insufficient* to cure the structural discrimination of women and minorities, it is a mistake to treat it as *the source* of such injustices. Rather, the debates on gender equality and cultural diversity confirm that universal rights constitute a necessary, albeit insufficient condition of equality as well as democratic inclusion.

## **2. The contextuality of rights**

One argument of the critics of the liberal conception of universal rights is that its proponents believe in its timeless and context-independent validity, while in fact it is a contingent consequence of particular historical, political and cultural developments in the geopolitical space defined as “the West”. In this chapter I

analyze this claim and its position in the democratic theories studied here; and its possible implications for the political and moral arguments in favor of the universality of rights. The claim that the politics of rights is a *contingent* result of certain political and historical developments is obviously empirically true and undermines the conception of “natural rights” that humans automatically possess in the capacity of their mere humanity. I will argue that this, however, does not affect the validity of arguments for the moral and legal universalism contained in the politics of universal rights: the fact that such politics is neither “natural” nor necessary does not contradict its moral and political appeal.

The critics of the universality of rights who see the declarations of rights as milestones of a certain cultural development of particular societies and thus unfit for other societies and contexts (e.g. Mouffe 2005, 102-103; Chris Brown 1999, 103-123), see that cultural-historical development in communitarian, holistic terms as a harmonious and inevitable for those societies, ignoring the fact that even there rights and egalitarian values emerged through a multitude of political struggles, sometimes against the odds. The conception and politics of liberal rights has in many polities been introduced as a politics of resistance to curb the hierarchical and antidemocratic powers – aristocratic, theocratic, Fascist, Communist or other – that emerged from *within* the same cultural spaces. As Ignatieff points out, the Universal Declaration of Human Rights was drafted in the aftermath of WW II as a reaction not to “non-Western” societies, but to the barbarism of war and totalitarianism in Europe, in an attempt to prevent similar developments from occurring again (Ignatieff 2001, 63-67).

Insofar as some classical liberals have treated rights as “natural” and thus beyond moral and political disputes, they are indeed vulnerable to the anti-foundationalist critique pointing out the contingency and contextuality of rights. On the other hand, few proponents of moral and legal universalism, even among conventional liberal theorists, actually subscribe to such totally objectivist view of rights. Pointing out the contingency of the emergence of rights discourses constitutes a valid critique against rigid conceptions of rights as given and undebatable; but it does not undermine, and may clarify and strengthen, *political* arguments in favor of the universality of certain rights. In the discussions on whether or not a universalist conception of rights is a precondition of democratic legitimacy and egalitarian justice, the meaning of the concept of rights is often left unquestioned. By “rights” conventional liberal writers usually mean a set of “rights and liberties” that most

liberal democratic states have established in their constitutions or that UDHR declares globally inalienable. In contrast, as indicated above, radical democratic, multicultural and feminist discourses, if using the rhetoric of rights at all, attempt to extend the range of enforced rights; relativize them through a politics of “special rights” for social groups; or question the whole rights discourse as either irrelevant or downright harmful for the interests of less privileged groups and persons. This wide range of positions indicates in itself that the meaning and extent of rights to be enforced in particular polities is debatable and by no means self-evident.

Acknowledging the contingency and contextuality of the concept of rights I will revisit its meanings in order to re-evaluate its use in democratic political discourses and highlight the conflicts, contradictions and dilemmas about rights that are unavoidable in modern democratic societies and render the enforcement, interpretation and implementation of rights inevitably debatable and thus impossible to settle beyond democratic deliberations. At the same time I will argue that recognizing the contingency of rights does not make the concept irrelevant for promoting egalitarian, inclusive politics. Nevertheless, the contingency of rights has implications for how the concept can be used in political and theoretical discussions. The variability of the use of the concept of rights indicates that it has no singular, uncontested meaning. Even if the universality of certain political and civil rights is a widely accepted (that is, “hegemonic”) value in current liberal democratic theories and practices, the awareness of the contingency of the concept reminds its proponents of the relative historical newness and political fragility of their explicitly *political* commitment whose permanence cannot be taken for granted.

In spite of the relative consensus on certain universal rights in current liberal democracies, there are disagreements even about which rights are basic and absolutely inviolable, and which rights are to be enforced by states, local authorities or the international community *against* states. Discussing the meaning of the concept of rights I will ask what the justificatory power of the concept is based on; what makes the concept politically vital and what it means for democracy. I revisit the argument about the discursive powers of the language of rights and law, accepting it as an empirical observation, but questioning its assumption that those powers have a *negative* effect on the subjects they form and produce. Finally I will argue that the recognition of the contingency of rights and the discursive powers they implicitly exercise is not incompatible with justifications of the commitment to some universal rights as a premise of all egalitarian and democratic politics,

assuming that rights are conceived of in non-metaphysical, openly normative and political terms.

### **2.1. Liberalism and progressivist rationalism**

One of the critical arguments against rights-thinking and “liberalism” as such is that it is based on strong universalist, progressivist and rationalist narratives and thus loses its legitimacy once those narratives are deconstructed<sup>19</sup>. Once the timeless and absolute “truth” claims are questioned, the critics claim, the universalism of the liberal politics of rights is compromised beyond remedy and can no longer lend legitimacy to a political regime or favor its further democratization. “Liberalism” is seen as a project of *political modernity*, representative of the Enlightenment humanist ideals that have been compromised by decades of critique; thus its values have limited relevance for the problems and struggles of our “postmodern” times.

For example, Mouffe takes distance from “liberalism’s modernist values” in her call for a break with rationalism, individualism and universalism (Mouffe 1993, 7). For her, nonetheless, “[this] does not imply the rejection of any idea of rationality, individuality or universality, but affirms that they are necessarily plural, discursively constructed and entangled with power relations” (Ibid.). Mouffe acknowledges that what she calls “democratic revolution” is a product of the Enlightenment; but she also argues that “the reformulation of the democratic project in terms of radical democracy requires giving up the abstract Enlightenment universalism of an undifferentiated human nature”, implying that liberal universalism, as defended by the proponents of conventional liberal as well as deliberative democratic theorists, still relies on such semi-metaphysical notions (Ibid. 13). Later, Mouffe presents her project of radical democracy more explicitly in opposition to “Enlightenment universalism and rationalism”, of which she sees both Rawlsians and Habermasians as representatives. She claims that liberals see the “postmodern” questioning of categories like “human nature”, “universal reason”, “rational autonomous subject” and the faith in unconditional universal truth as threatening to liberal democracy as such, asserting that actually it is not (Mouffe 2000, 17).

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<sup>19</sup> Here, critics use the term “liberalism” broadly, meaning not just conventional liberal theory, but liberal democracy in general terms as politics based on the idea of universal rights, the rule of law and some institutions to channel democratic decision making. Thus I use it in quotation marks.

Brown argues in more unconditional terms that liberalism's legitimacy is pined on "the story of emancipatory and egalitarian progress", a story that in her view has been rendered incredible by its "constitutive others": in her view, the

"perceived stratifications along lines of class, race, gender, and sexuality not only challenge egalitarian civil and political enfranchisement as the primary criteria of justice; they also expose the formal equality promised by liberalism as severely compromised by the character of a (white, bourgeois, male, heterosexual) hegemonic subject" (Brown 2001, 9).

Brown connects liberalism's legitimacy problem circularly to the loss of credibility of the progressivist narrative: not only does the cracking faith in "progress" compromise liberalism as a theory because it is seen as dependent on such faith; but the practical shortcomings of liberal democratic regimes prove that progress in terms of freedom and inequality not only has "not yet" been achieved, but is essentially unachievable. She argues:

"An understanding of liberal universalism as not simply containing a history of excluded others but having specific normative content – heterosexual and patriarchal families, capital, and 'property in whiteness' – erodes the credibility of its classic story of progressively widening its scope of freedom and equality, extending the goods of enfranchisement and abstract personhood to more and more of the world's populations" (Ibid.).

This argument; while underestimating the extent to which "liberalism", with its emphasis on individual and political rights and freedom of association and speech, has *enabled* the disprivileged groups to publicly question, challenge and change some of its allegedly immutable "normative contents", especially in comparison to illiberal regimes where any such questioning is automatically forcefully silenced; binds moral and legal universalism to a determinist narrative of "progress" in the way that the non-determinist recognition of the contingent, particular and imperfect characteristics of liberal universalism is bound to disqualify it also as a moral norm and political project.

Along with the "modern" narratives, Brown questions the "individual" as not only a "masculinist" concept, as seen above, but also as a *modernist fiction*; thus the political progressiveness of individual constitutional rights is also put under scrutiny: "the fiction of the autonomous, willing, reasoning, rights-bearing subject convened by modernity is articulated in liberal democratic constitutions and a host of other liberal institutions" (Brown 2001, 10). For Brown the death of modernist essentialism implies the death of the liberal conceptions of freedom, equality and personal autonomy: "The developments in philosophy and in feminist, postcolonial and cultural theory have *eroded freedom's ground*" (Brown 1995, 18-19, my

emphasis). As the subject is inevitably constituted by “social powers”, she cannot be *free*, even if granted legal rights as an individual. Brown argues that feminist critique has led to the disintegration of the “‘universalist’ ground and context of Enlightenment formulations of freedom” as well as the “solipsism” and “fictional sovereign individualism” of liberalism (Ibid. 20-23). She claims that “liberalism”, as well as more conventional strains of feminism, rely on notions of “Truth”; “Morality”, “subject” and normativity that in her view have been delegitimized by the postmodern discourses: thus in effect, “liberalism” as the ideology of liberal democracy is delegitimized too. Brown questions all central liberal concepts such as “willing”, “consent”, autonomy, “deliberate”, and right; claiming that each of them has been denounced as either racist, ethnocentric, heterosexist, culturally imperialist or all of these. Trying to purge democratic politics from such compromised modernist notions, Brown prefers to theorize democracy as “multiple struggles against domination”. (Ibid. 37-40; 47-48.)

The idea of purging politics of normative notions raises many questions like why and how one would resist domination without appealing to *any* normative claims; and whether, lacking normative qualifications, all political struggles should be regarded equally relevant; and whether such equivalence itself can be implied without an appeal to the norm of equality. I will return to the meaning of the basic humanist notions of “individual” and “humanity” for the politics of rights *and* democracy in the next chapter; here I will focus on the question whether legal and moral universalism, as retained in theories of conventional liberalism and deliberative democracy, indeed is so strongly bound to the progressivist “modern” narratives that delegitimizing the latter necessarily also delegitimizes the former; asking: is the notion of rights connected to absolutist notions of truth, morality and human nature, so that it stands or falls with them? Must the concept of rights be seen as a strictly universal category; timeless, ahistorical, apolitical, independent of social and political contexts – and must it be discarded if *not* seen as such? Does acknowledging the impossibility of absolute objectivity compromise the notion of rights as a moral and political category; and does the recognition of the historical contextuality of the politics of rights affect its capacity to provide legitimacy to political regimes?

## 2.2. The historical and political contingency of rights

Historically the liberal humanist conception of rights is not unique in the sense that persons are granted legally enforced entitlements and regulations how they can be treated. What is unique with Enlightenment “individualism” is the idea that *all* individuals are entitled to the *same* rights. This idea, emphasized in the Kantian notion of human dignity, based on the idea of moral autonomy and intrinsic value of each human being, still constitutes a central foundation of contemporary liberal democracy. As many contemporary critics point out, the category of rights-bearing individuals was initially limited and did not in fact mean *all* individuals: economically dependent people, including women and laborers, were not considered autonomous and thus not treated as individuals entitled to equal rights and status. It can be argued, though, *pace* the critics who see the idea of individual rights as *necessarily* exclusive of all but white, heterosexual and bourgeois men, that the initially revolutionary idea of all individuals’ equal moral worth carried in it the subsequent enlargement of the concept, as the categories of exclusion have proved impossible to justify on the premises of the idea itself.

The historical development of the idea and practice of universal rights confirms the claims about its contingency, although it stems from the progressivist and rationalist ideology of the Enlightenment: the critics are right that the politics of rights emerged not as a necessary development of “reason”, but as a result of certain cultural circumstances *and political struggles* at a certain historical moment. The fact that there is disagreement about which rights should be implemented by democratic states and about the content, interpretation and meaning of rights even among the liberal theorists who regard the politics of rights as the most important component of political legitimacy; confirms that rights are political and debatable. But does this affect the moral and political of the arguments for the liberal politics of universal rights?

Antifoundationalist critics of rights universalism have appealed to Arendt’s critique of the conventional liberal conception of freedom as “sovereignty” (e.g. Brown 1995, 8). Arendt criticized the concept of “sovereignty” as a vision of freedom *from* others – a perversion in her view of an understanding of political freedom that she saw as freedom to engage in concerted action *with* others. Arendt’s critique of “sovereignty” revealed the failure of its proponents to recognize the interactive dimensions of

political freedom. Arendt also criticized the classical liberal idea of “natural rights” and the rhetoric of human rights, relying on a particular historical context, the experience of WW II, the Holocaust and the situation of the Jewish refugees who escaped Hitler’s Germany but were not accepted anywhere else as members of political bodies that could have enforced their human rights. This, in Arendt’s view, indicated that a conception of rights *outside* the context of political communities was an empty signifier. She blamed the political powerlessness of the concept of “human rights” on its inherent abstractness: “From the beginning the paradox in the declaration of inalienable human rights was that it reckoned with an ‘abstract’ human being who seemed to exist nowhere” (Arendt 1973, 291); and mocked the lofty promise of human rights rhetoric when it was actually confronted with human beings who were *only* human:

“The conception of human rights, based upon the existence of a human being as such, broke down at the very moment when those who professed to believe in it were for the first time confronted with people who had indeed lost all other qualities and specific relationships – except that they were still human” (Ibid. 299).

Arendt saw the horrors of the Nazi regime combined with the unwillingness of other states to protect the rights of the emerging “stateless” refugees as empirical proof that there is no such thing in the political world as naturally given rights. She argued that “human rights” was an empty phrase unless enforced through the laws and institutions of particular political bodies; the precondition for the conception of rights to be meaningful is the *membership* of the right holder in a political community. In practice, what had been thought of as “human rights” proved to have been national citizenship rights:

“The Rights of Man [...] had been defined as ‘inalienable’ because they were supposed to be independent of all governments; but it turned out that the moment human beings lacked their own government [...] no authority was left to protect them and no institution was willing to guarantee them” (Arendt 1973, 291-292); “The Rights of Man, supposedly inalienable, proved to be unenforceable [...] wherever people appeared who were no longer citizens of any sovereign states” (Ibid. 293).

But Arendt’s reservations about the abstractness and the difficult practicability in world politics of the idea of universal rights did not drive her to a conclusion that the idea should be discarded. Rather than a smashing criticism of the politics of universal rights her critique constitutes a reminder that implementing such politics

presumes certain institutions and a collective political will. Recognizing that rights inevitably depend on a political community willing to grant them to its members, Arendt coined the concept “a right to have rights” as a normative statement that all people are morally entitled to belonging to such a community:

“We became aware of the existence of a right to have rights (and that means to live in a framework where one is judged by one’s actions and opinions) and a right to belong to some kind of organized community, only when millions of people emerged who had lost and could not regain these rights [...]” (Ibid. 296-297).

Arendt thus indicated that the most important of all rights was the right to belong to a political community willing to recognize one’s rights: without that no other rights made any sense. Ironically, this contextualist argument against the abstractness of rights at the same time serves as an argument for the politics of universal rights: as we “live in one world”, by which Arendt meant that the whole world is civilized with no retreats where those expelled from existing civilizations could create one of their own, the political will to institutionalize rights *should* be found within the existing civilizations. Her idea of “a right to have rights”, while denying the timeless, apolitical universality of rights, promotes a universalist politics of rights that creates the conditions in which the freedom and humanity promised by rights discourse *could* be realized. In Arendt’s view, rights were neither given by “nature” nor did they emerge from abstract humanity; but they could, and should, be given to people by other people through political institutions. (Ibid. 296-298.)

Arendt’s position on rights illuminates the importance of *membership* as a precondition for any rights claims and defies the argument that the politics of rights is patently “individualist” or dependent on a conception of freedom as “sovereignty”: her political vision of rights indicates, on the contrary, that no individual can have rights on her own, outside institutionalized relationships to others. When theorizing participatory political action as a central element in democratic politics, Arendt praised liberal democratic institutions, including individual civil and political rights, as prerequisites of a viable democratic world. She celebrated the American founding process and the establishment of the Bill of Rights as one of the most promising moments in democracy’s history. Defying divisions between “individualism” and “collectivism”, Arendt revealed the social and political embeddedness of rights and at the same time defended “a right to have rights” as a moral universal that constitutes a *normative* guide to democratic politics. She did not oppose universal rights as a

potentially totalizing vision like many later critics of rights discourse; she just denied their givenness by appealing to the historical circumstances that proved that rights were grounded not on humanity as such, but on the citizenship of a nation state.

In effect, Arendt's critique of rights separates political rights discourse from Enlightenment rationalism and progressivism. Although the current radical democratic criticism of rights universalism has been presented decades after Arendt's theory of totalitarianism, Arendt's view on the politics of rights not only supports the criticism of the abstractness of certain ways of thinking about rights; it also defies it by showing that normative arguments in favor of effective politics of rights can be consistently made in spite of such criticism. Returning to explicitly "liberal" arguments for rights, I will indicate below that even these are not so strongly connected to ahistorical and context-independent conceptions of truth, rationality and morality as the critics appear to claim.

### **2.3. Rights and contexts in liberal thought**

As I indicated in part I, some conventional liberal justificatory models indeed pose abstract universalist arguments that are hard to justify from a *democratic* perspective. For example, in Rawls's model liberal rights emerge from the principles that *anyone* would allegedly choose as a rational agent abstracted from his own social position: thus, as Young indicates in her critique, he assumes that anyone who thinks rationally would come to the *same* conclusions (Rawls 1972, 118-161; Young 1990, 107-111). Scanlon exposes similar epistemological rationalism at only slightly less abstract level, proposing principles that "no-one would reasonably reject". At the same time defences of moral and legal universalism are increasingly presented by authors who reject such strong conceptions of objectivity or rationality. Benhabib, with her conception of legitimacy based not on abstract thought experiments but on the possibilities for all affected parties to participate in public deliberations; traces attempts to separate legal and moral universalism from metaphysical truth claims in many contemporary political philosophies, including those of Habermas and Rawls. She supports that project while making a distinction also between universalism as a metaphysical belief in a fundamental human nature, reflected in early Enlightenment thought; and *justificatory* universalism as a commitment to a "normative content of reason". She believes that the former can be easily discarded

while defending moral and legal universalism, but suspects that the latter remains connected to it. (Benhabib 2002, 26-28.) The question is; does a “commitment to a normative content of reason” presume rigid objectivism; and is it still so strongly connected to absolute conceptions of Truth or Morality that it cannot survive the deconstruction of those concepts?

Interestingly, a look at even some of the works cited as classical representatives of conventional liberal “individualist” position makes it hard to maintain the allegation that they ignore the historical and contingent moments of the ideals they cherish. Even Rawls, although his legitimating model is founded on strong epistemological and rational universalism, acknowledges the historicity and contextuality of his rights-based conception of democratic justice by admitting that applying his theory of justice presumes “reasonably favourable conditions,” including certain political traditions and the existence of political will. He argues that the priority of liberty is required not under all conditions, but

“under social circumstances which, *provided the political will exists*, permit the effective establishment and the full exercise of these liberties. These conditions are determined by a society’s culture, its traditions and acquired skills in running institutions, and its level of economic advance [...] and no doubt by other things as well” (Rawls 1993, 297, my emphasis).

Rawls also explicitly recognizes the historicity of the liberal institutions: “the [liberal] institutions are the work of past generations who pass them on to us as we grow up under them” (Ibid. 399). Thus, while he in his earlier work indeed treats liberal institutions as a completion of political reason, he does not see them as timeless and necessary. Later he detaches his position further from his initial strong universalism and denies that his principles of justice are universally applicable, arguing that they are historically and culturally embedded in a certain tradition. At the same time, he still promotes them in the contexts where he finds it feasible (Rawls 1999, 11-88).

Even such classical proponents of “liberal individualism” as Mill and Berlin express deep reservations about strong conceptions of rationalism, progress and “true” self. They both present their odes to individual liberty in explicit resistance to attempts to collectively define “human nature”. Rather than by a absolutist notion of the “truth”, their defence of liberty and individual rights is motivated by an appeal to the plurality and diversity of existent concepts of truth and a normative commitment to allowing that plurality to flourish. Mill, while indeed describing individual as “sovereign”, does that in a *normative* sense: in his view, an individual should be

allowed to govern his or her own decisions on certain matters. At the same time, he acknowledges that certain social conditions are needed for a capacity to do so to develop. Like Arendt later, Mill treats the concept of individuality as a human *possibility* that can be developed under favourable circumstances (a combination of socioeconomic conditions, education and a tolerant social atmosphere that offers non-punitive spaces for exposing non-conformity with prevalent norms), and that can be suffocated, destroyed and eliminated by certain forms of human relationships and collective action. The role of the political institutions that grant rights and liberty is to create favourable conditions for individual development, not to liberate the individuals conceived as free and autonomous “by nature”, independently of social circumstances: thus, individual freedom is described as a collectively enabled condition, not a naturally universal, essential human characteristic. Mill also treats Europe’s relatively progressive development of his time as an explicitly contingent historical development, not as a sign of necessary rational progress, ascribing its secret to the co-existence of a plurality of traditions living together. Showing little signs of progressivist optimism, he expresses his fear that the Europe of his time is *regressing* in terms of liberty and plurality and toward conformist uniformity (Mill 1998, 80-81).

Berlin, who declares Mill’s vision of individual sovereignty too individualist, is particularly sceptical toward strong conceptions of “human nature”, a “true” or “real” self, “rationality” and “progress”: in his view it is exactly those ideas, and attempts to determine their content too strongly, that have perverted the conception of liberty to its very opposite and that inspire potentially totalitarian ideologies. He criticizes as dangerous “those who put their faith in some immense, world-transforming phenomenon, like the final triumph of reason [...],” and emphasizes the contextuality of political terminologies: “Political words and notions and acts are not intelligible save in the context of the issues that divide the men who use them” (Berlin 2002, 166; 168). Berlin recognizes, in accord with later antifoundationalist ideas, that the conception of *freedom* is contingent upon that of *self*:

“[...] conceptions of freedom derive from views of what constitutes a self, a person, a man. Enough manipulation of the definition of man, and freedom can be made to mean whatever the manipulator wishes” (Ibid. 181).

He explicitly states that the longing for individual liberty does not stem from a timeless sense of reason or human nature, but from the empirical, subjective perception of a personal will and agency:

“Paternalism is despotic [...] not because it ignores the transcendental reason embodied in me, but because it is an insult to *my conception of myself as a human being*, determined to make my own life in accordance with my own (not necessarily rational or benevolent) purposes, and, above all, *entitled to be recognized as such by others*” (Ibid. 203, my emphasis).

It can be argued that the concept of “purposes” regarded as “one’s own” still constitutes an essentialist view of an autonomous self – but rejecting such concepts altogether would make it hard to justify any liberal or democratic values or meaningful conceptions of agency at all. The recognition by Berlin of the role of others for the liberty of the self is also notable, given the volumes of criticisms of the liberal person as abstract and detached:

“My individual self is not something which I can detach from my relationship with others, or from those attributes of myself which consists in their attitude towards me. Consequently, when I demand to be liberated from [...] the status of political or social dependence, *what I demand is the alteration of the attitude towards me of those whose opinions and behaviour help to determine my own image of myself*” (Ibid. 202, my emphasis).

This emphasis on the role of others in determining one’s identity and of social institutions in forming their attitudes and thus the rights-bearer’s social status as well as his identity, effectively anticipates the current debates on discursive powers and social construction of identities; and on identity politics, as Berlin adds that the claims of liberty, status and recognition can equally well be made by groups as by individuals. Finally, Berlin explicitly recognizes the historical contingency of the ideal of freedom, acknowledging that it may be “only the late fruit of our declining capitalist civilization”, not dreamed of before and perhaps to be forgotten later; but arguing also that contingency does not compromise the normative appeal of the idea: “Principles are not less sacred because their duration cannot be guaranteed” (Ibid. 217).

A lot can be said about the incapacity of these classical proponents of individual liberty to duly recognize aspects of social powers such as structural inequalities; and about their views on civilization and “barbarity” or on “what constitutes a man”. Nevertheless, the quotes above indicate that even in their most classical interpretations the liberal ideals of freedom, individuality and rights are not so

tightly bound to metaphysical or semi-metaphysical conceptions of self, human nature, reason or progress as critics of liberalism still claim; and that they are not in conflict with the understanding of individuality and rationality as “plural, discursively constructed and entangled with power relations” (Mouffe 1993, 7). Institutionalizing universal rights and liberties is proposed in order to *enable* freedom, plurality and diversity to flourish, not in order to realize liberty’s pre-conceived forms. As normative and political ideals, not ontological truth statements, liberal concepts are more open to re-interpretation than their critics believe. From a feminist point of view one may question Berlin’s conception of “what constitutes a man”, but this does not mean that it is impossible to enlarge the meaning of what constitutes a person as a rights-bearer without needing to discard Berlin’s ideal of liberty. To assume that only white bourgeois men can have a sense of agency that they are willing to protect from external coercion would deny this human faculty from the majority of human beings.

In a sense, Rawlsian liberalism appears less aware of its own contingency than the earlier liberalism of Berlin and Mill. But non-essentialist defences of universal values reappear in current political theory. In the final section of this chapter I will return to some recent non-essentialist arguments for rights universalism presented in connection with international human rights discourses. For example, Ignatieff argues in what he calls a “minimalist” and pragmatic defence of universal human rights: “Human rights is misunderstood [...], if it is seen as a ‘secular religion’. It is not a creed, it is not a metaphysics” (Ignatieff 2001, 53). He also argues:

”A prudential – and historical – justification for human rights need not make appeal to any particular idea of human nature. Nor should it seek its ultimate validation in a particular idea of the human good” (Ibid. 55).

Similar arguments, along with those appealing to the norm of inclusive democracy, can be posed as non-essentialist justification for a certain level of rights universalism *within* existent liberal democracies, particularly in the face of recent challenges posed by multiculturalism, relativism and the “politics of difference”. Although those arguments can be confronted by saying that the liberal conception of rights just *claims* not to be essentialist while it is; empirical observations of non-liberal alternatives tend to support the “thin” universalist arguments of Berlin, Ignatieff, Benhabib and others. As I will argue below, it is hard to conceive of inclusive democracy without some sense of individuality and agency ascribed universally and equally to all citizens, even when recognizing, analyzing and challenging the

structural forms of social powers that make it harder for some people and groups to develop into “individuals” and make use of the formal freedom granted to them by the liberal institutions: without such rights, those most concerned by these discussions would likely be fully excluded from participating in it. Declaring the universal concepts of “liberalism” necessarily sexist, racist etc. is a self-defeating strategy exactly because – as I will elaborate below – it is the most vulnerable persons and groups who suffer most from compromising the universality of rights.

Thus, while it is easy to accept the antiessentialist and feminist arguments that the liberal conception of rights cannot escape the fact that it is a result of contingent historical and political developments; it is harder to accept that the liberal politics of rights is bound to an essentialist ontology that denies such contingency, and dependent on such ontology for its justification. Admitting the contextuality and contingency of the conception of rights does not erode its moral and political significance, although it validates the claims that the content and meaning of rights is not given and thus cannot be legitimately fully eliminated from the agenda of democratic discussions. Also, as I will indicate in the following section, the variation of the use of the concept of rights even within conventional liberal theories proves that the concept does not have an unquestionable meaning. Still, exposing the idea of rights as neither timeless nor natural needs not make it vulnerable, if it is defended not as absolute truth or even a necessarily shared set of values; but as a *political* norm that constitutes minimal conditions of equality universal agency and thus also of inclusive democratic discussions, when such shared sets of values do not exist.

#### **2.4. Conflicts of rights**

The historical and political contingency of rights is further emphasized by the fact that disagreements about rights are prevalent in both political theory and practice: about what kind of values rights are meant to enforce; which rights are primary and should be established through national constitutions and international treaties; and the meaning, implementation and interpretation of even those rights on whose importance there is otherwise wide consensus. In political discussions appeals to rights are made to justify different, sometimes even contradictory policies from all sides involved. There are disagreements about priorities when rights conflict, which they inevitably do; and rights claims change along with changing social and political

circumstances and technological developments. Globalization, environmental issues and the development of IT and biotechnology, as well as certain historical-political changes, bring along new rights claims, reveal new perceived threats to existing rights and cause a need to re-interpret them in accordance with the changing circumstances. This, along with the recognition that there is no given, unchangeable, apolitical and undisputed set of “natural” rights, is conducive to arguments that rights and their political implementation need to be at least to some extent subjected to democratic deliberations if the decisions made on rights are to be considered democratically legitimate. As the implementation and protection of some universal rights remains still inevitable as a minimal condition to enable a fair chance for all to participate in those deliberations, the question of the balance – which rights should be protected from the outcomes of majoritarian decisions in order to protect the continuity of democracy itself; and which should be subjected to democratic procedures for interpretation and revalidation or questioning and challenging – is bound to remain difficult and divisive.

For the clarification of the conceptual relationship between rights and democracy, not only the concept of democracy, but also the concept of rights needs to be specified. A conception of rights as “trumps” that automatically overwhelm other considerations fails to respond to the fact that rights claims conflict and raise disagreement about their meaning and interpretation (Dworkin 1984, 153-167; Waldron 1999, 213). As rights language can be used to justify different policies; appeals to rights cannot automatically justify legal or political decisions even in strong constitutionalist regimes. The concept of rights contains certain unconditionality; an assumption that the entitlement appealed to is non-negotiable. Philosophically it is interesting what gives this aura of non-negotiability to rights claims and how this aspect of rights discourse; necessary to maintain to a certain extent to preserve its intended political effect; can be reconciled with the uncertainties connected with the implementation of rights *and* with the democratic requirement that all relevant political decisions be made through participatory public democratic procedures.

There is no uniform definition of rights. Rights can be thought about as certain restrictions of how people are allowed to treat each other, as positive obligations that we “owe to each other” (see Scanlon 1998), or as relationships implying special duties on others – official institutions as well as private and legal persons – with regard to rights-bearers. A right can be thought of as a *justified claim* to others on the

basis of individual *interests* that are considered so strong and relevant, or so widely shared as to be regarded commonly human, that they offer compelling reasons to impose unconditional moral duties on others. This justification is generally implied by liberal conceptions of rights. It does rely on a certain conception of human nature, which reveals a subjective dimension in rights thinking that is arguably open to contestation and different interpretations. Different dimensions of rights thinking: the philosophical *foundations* or *justifications* of rights, the *content* of particular bills of rights and the *meaning* and interpretation of rights; belong to different levels of political discourses. They all contain uncertainties that preclude privileged interpretation; none automatically validates particular sets of rights beyond dispute. The *philosophical foundations of rights* can be e.g. the metaphysical idea of natural rights, an empirical appeal to interests arising from some shared human qualities; or the normative Kantian notion of *human dignity*, the idea of the inherent value of each human being. The latter, in turn, is conducive to principles of *personal autonomy*, *inviolability of the person* and *dignity of the person* that serve as grounds for rights to physical inviolability, freedom of conscience and thought; and against several modes of coercion, political and other. None of even those foundations on whose importance there is a relatively wide consensus within liberal thought, is directly conducive to a distinct set of rights that automatically deserves political protection with no further discussion. (Kant 1993, 95-104; Nino 1994, Waldron 1984, 1-20.)

I will not enter here a discussion on the philosophical foundations of rights. It is, however, relevant for the discussions here whether strong philosophical foundations are needed to justify any politics of rights or to establish rights universalism as an essential component of legitimate democracy; and whether those foundations are necessarily based on *too* strong assumptions about human nature or metaphysical claims about truth or morality, so that they lose their argumentative power once those metaphysical claims are rejected. I assume that relatively “thin”, political and pragmatic defences of rights presume no such deep metaphysical assumptions; but as a justificatory element a certain conception of human dignity and of equal moral worth of each human being; not as an empirical idea of a given “human nature”, but as a normative guideline for political regulation of human relations; needs to be maintained: it is not possible reject such normative premises like the ideal of human dignity and equality without rejecting the idea of democracy as such. Thus, attempts

to purge liberal politics from any normative foundations could indeed delegitimize the whole idea of liberal democracy; but then proponents of alternatives should be challenged to be explicit on the visions of the alternatives they offer.

While there is a relatively wide consensus among democratic theorists about *some* normative assumptions that constitute the foundations of any politics of rights; *the content of rights* to be enforced by particular polities or transnational treaties is more obviously disputable. Even the question which rights are “basic” is contested within theoretical and political discourses. Although many theorists who support rights-based legitimation patterns assume a certain set of rights as a standard; in practice the bills of rights enforced in particular liberal democracies varies to a considerable extent. Given those differences, it is inevitable that the content of rights enforced by particular polities is not given prior to and settled beyond political decisions: it always reflects a certain political consensus, based on the “hegemony” of certain moral values and a balance of ideological powers at certain historical moments. This has implications for how existing rights-enforcing institutions, including constitutions and charters of rights should be treated in political theory: as the currently prevailing universal politics of rights have come to be seen as self-evident, it is easily forgotten that these “hegemonic” conceptions of rights are historically relatively new (particularly the conception of *universal* rights that indeed includes *all* citizens) and politically relatively fragile arrangements whose status is not timelessly fixed and which are dependent on structural *and political* protection for their continuity. Also, the persistent disagreements and uncertainties remind that the politics of rights can be complemented and improved in the light of emerging new knowledge. The challenge is how to open up rights for such changes without making them vulnerable to compromises that could be destructive of those institutions, or of democracy itself.

Furthermore, even when the content of a list of institutionalized rights is agreed upon, the *meaning* of rights is open to interpretation. Different interpretations of the underlying values of equality, freedom, dignity and autonomy lead to different conceptions and interpretations of rights. Even the most basic of rights, the right to life, can be seen as either just the right to not get killed, or the right also to *stay alive* under different adverse circumstances, which calls for duties of public officials or co-citizens, ranging from social welfare systems to publicly funded emergency services to rescue adventure hikers from extreme conditions that they voluntarily seek. Likewise, another essential liberal right, the right to freedom of speech, can be

protected as totally unrestricted, or balanced with considerations regarding the possible harm that e.g. incitement to violence or libel may cause. The freedom of conscience, protected by liberal institutions as an unconditional right, becomes subject to controversy when the practice of a religion is claimed to require the instantiation of religious *political* rules that deny the equality of some members of the religious group (or those outside of it). These are just a few examples indicating that as the interpretation of even the most basic rights is not always undisputable, “rights talk” can hardly be excluded from democratic deliberations even when there is a “hegemonic” consensus about the need to protect the universality and equality of basic rights.

Apart from conflicting interpretations of even basic rights, there are conflicts of rights that are more obviously disputable: for example, between the extent and limits of property rights and “social rights” like the right to subsistence, education and health; in cases like surrogate motherhood the parental rights of the birth mother may contradict the contract rights of the contractual parents; in recent debates on preventing religiously motivated suicide terrorism the right to privacy, association and fair trial of suspected terrorists is opposed to the right to life of their potential victims. In an inclusive democracy such divisive issues should be subjected to public democratic debates, not only to judicial or administrative bodies, even if the final decisions on these matters are made through those institutions. In addition, the question of membership, of who are entitled to the rights that a particular community offers, and who can participate in the deliberations on those rights, is increasingly contested, because the impacts of many political decisions (in particular on economic, ecological and military issues) are felt beyond the borders of particular polities; and because of the increase of free movement of capital as well as people increases the number of potential non-members in each polity.

The contingency of rights, the unavailability of absolute truths about rights and the factual disagreements on rights in theory and practice are acknowledged and discussed within contemporary liberal discourses; and the recognition of such uncertainties is seen to have consequences for the relationship of rights to democracy. For example, Waldron argues:

“The idea of rights has often been seized on precisely as a way of avoiding the casuistry of trade-offs and complex moral calculations [...]. But if rights themselves are morally complicated, the spectre of casuistry reappears. [...] it was the *simplicity* of right-based

constraints that was supposed to be their main advantage over other [...] modes of moral reasoning. The sad fact is, however, that this simplicity and moral certainty is unavailable. No one in the trade now believes that the truth about rights is self-evident [...] (Waldron 1999, 224-225).

Similarly Shapiro, in his critique of both the traditional liberal attempt to safeguard rights beyond the reach of political decisions and the communitarian attempts to describe traditional communities as harmoniously unified and thus essentially apolitical, points out that because of the inevitability of disagreements on rights and the power interests involved in resistances to politicizing certain issues of justice, conflicts of rights should be seen as *political* and solved through democratic procedures (Shapiro 1999a, 6-10).

I return to the relationship between rights and democracy in the final chapter. The discussion here establishes this far that the conception of rights, just as democracy, follows a contingent historical path of intellectual and political development; and that despite the “hegemonic” position that liberal democratic institutions currently enjoy in parts of the world, there is no total certainty even within existing democracies about the meaning, content, justification, explanation, interpretation or implementation of rights. This means that the contingency and uncertainty, pointed out by the numerous critics of conventional liberal approach, cannot be ignored when discussing democracy, justice and the conceptual position of rights in democracy. On the other hand, contrary to what some critics of “liberal discourse” claim, many participants in that discourse do not deny the contingency of rights or the disagreements regarding rights; nor do they all rely on absolutist notions of truth, morality, self, progress and human nature. Thus, I assume a possibility to separate such notions from debates on rights even when these contain defences of rights-based restrictions on the scope of democratic decisions.

This discussion also indicates that even though liberal theories see rights as political goods attached primarily to individuals, politically rights can be understood and enforced only as *relational*: someone’s right always correlates with someone else’s duty to act or abstain from acting; and, as Arendt argues, it takes a polity and collective political will to grant individual rights. The insight into the political dimension of rights reveals the view that the conception of individual rights is necessarily “individualist” in an abstract sense of separating individuals from each other or from “communities” as misleading: even though rights determine how individuals and collectives can treat other individuals, their primary role is not to

*separate* individuals from each other, but to regulate the terms on which they associate with each other. Although the focus on the individual is what distinguishes liberal rights talk from alternative notions of human dignity, individual rights are relational and thus political. Given the ever present disagreements on rights; and that rights claims inevitably conflict, rights cannot be treated in political theory as embodiments of absolute truth. To recognize this, however, is not to deny that appeals to rights constitute compelling political arguments or that a politics of universal rights enables fair and open political deliberations. In the following section I analyze arguments about the “subject-forming” power of rights discourses; and argue that although empirically relevant, those insights do not delegitimize rights discourses any more than appeals to their contingency.

## **2.5. Rights and discursive power**

As I indicated above, apart from the arguments that liberal rights discourses rely on “modernist” notions of progress, individuality and humanity, critics of “liberalism” argue that the “discursive powers”, immanently exercised by legal norms and the language of rights, have normalizing, disciplining and subject-forming effects that progressive political theorists and actors should beware. They warn of such discursive effects of the universal liberal language of rights as well as the particularist claims of “special rights” or extended inclusion rights by marginalized identity groups. The central claim of this critique is that the liberal politics of rights, while presented by conventional liberal theory as neutral, established to restrict the power of the state upon the autonomous individual and to impose rules to regulate their behaviour; in reality constitutes positive *politics* that *produces* social relations and thus forms and constitutes individual subjects. As Richard T. Ford puts it: “Legal rights are a *form* of state action, not a limit on state action” (Ford 2002, 63).

In chapter 1 I introduced the feminist critique of rights that appeals to the “social powers” unreachable by legal rights. The critique analyzed here goes a step further to argue that the language of rights; in addition to being unable to cure the social injuries caused by non-legal structural, psychological and cultural factors; itself actively exercises power over subjects, affecting not only what they are allowed *to do*, but also how they conceive of themselves and construct their identities. As I

indicated above, the postmodern critics of “liberalism” argue that because the *discursive power* of legal language extends the immediate regulatory impact of legal rules, law is not just neutral or prohibitive, but positively normative, productive of identity and subjectivity. The subject-forming capacity of legal language is presented as a necessarily negative feature: according to Brown and Halley, because “legalism deploys liberalism as a normativizing, regulatory form of power”, the focus of progressive democratic movements on legal reform constrains and compromises their intellectual virility and their capacity to act for genuine egalitarian justice. Legalistic debate, it is claimed, *substitutes* progressive democratic politics instead of conducting to political change for a more just society. (Brown & Halley 2002, 5-7; 11-17.)

Following the recognition of the discursive powers inherent in rights and law, critics of “legalism” attack both the liberal universalist ideal of equality before the law, deemed too abstract to produce substantive equality, and the particularist *identity politics* oriented towards legal reform or group rights. They insist that legal remedies against social injustice are bound to remain just “cosmetic”, unable to transform the powers that produce inequality; and that politicizing wounded identities as basis for rights claims tends to essentialize and stabilize those identities instead of exploring and challenging their social and historical sources. But this critique is not only addressed at claims of “special rights” for women and minorities, such as MacKinnon’s feminist politics or Young’s “politics of difference”. Some critics of “legalism” even reject requests made by marginalized groups against legal discrimination; because their legal equality allegedly subjects them to the norms prescribed by oppressive majorities that affect their behavioural patterns and self-perception. For example, calls for universalizing marriage rights by including gays as a previously excluded group are criticized for risking to subject gays to the “normalizing” powers represented by those rights: the equal right to marry offers dubious equality to homosexuals, as it discursively subjects them to the allegedly heterosexual norms of the institution of marriage. (Brown 2002, 420-425; Warner 2002, 259-288.)

This argument against the equal marriage rights of homosexuals is based on the assumption that marriage is a normatively heterosexual institution. Warner argues that gay marriage should be seen as “the ultimate conformity” of gay people to heterosexual norms (Warner 2002, 260). Also, marriage is not just necessarily heteronormative even if rendered gender neutral (but remaining a voluntary

intimate relationship of two adults); it is also discriminatory, placing the relationships and intimate lives of *unmarried* people in an unequal position. Thus Warner equalizes arguments for the institution of monogamous marriage, allegedly raising the status of relationships of those who are married above that of unmarried couples; with conservative or homophobic arguments raising heterosexual relationships above homosexual ones: “Marriage sanctifies some couples at the expense of others. It is selective legitimacy. This is *a necessary implication* of the institution [...]” (Ibid., my emphasis.). He argues that marriage discursively “ennobles” certain relationships, making other relationships appear less worthy, and concludes: “Marriage, in short, discriminates” (Ibid.). He also accuses “the state” for regulating, supervising and coercing the intimate lives of non-married couples while legitimizing those bound in marriage. For example, he resents norms limiting the age of sexual consent and regulating the institutions of prostitution and producing “sexually explicit materials”, describing them as punishments imposed by the state on non-married people solely for the “sin” of not being married (Ibid. 267).

Brown, in her critique of the regulatory power of legal language, questions the benefits of civil rights in general and women’s rights in particular, presenting them as paradoxical: admitting that such legal measures as criminalizing racist hate speech and sexual violence may indeed protect individuals from structurally enacted harms, she argues that they at the same time they categorize the protected groups as vulnerable, “hurttable” and “hatable” and thus stabilize their “victim identities” instead of eliminating the mechanisms of victimizing (Brown 2002, 422-430). Halley constructs a more controversial argument against sexual harassment laws and the feminist conceptions of physical inviolability and a non-hostile working environment. She uses as example the case of *Onacle v. Sundowner Offshore services, Inc.* in which US Supreme Court criminalized same-sex sexual harassment as sex discrimination. In that case, the (male) plaintiff, working on an oil rig in an all-male workforce, had sued his supervisor and two other (male) coworkers for sexual threats and assaults, including threats of rape and physical sexual harassment. In her “alternative reading” challenging the court order in favor of the plaintiff, Halley offers an interpretation of the case as a “homosexual panic case”: she finds the court order problematic as authorizing a prohibition of “eroticism” at workplace, building her argument on the assumption that the plaintiff

“willingly engaged in erotic conduct precisely the kinds described in Oncale’s complaint (or that he engaged in some of that and fantasized the rest; or even that he fantasized all of it), and then was struck with profound desire to refuse the homosexual potential those experiences revealed in him” (Halley 2002, 94).

Thus, Halley describes the harassment victim as a potentially gay or bisexual man suing his playmates just because of the problems he has recognizing his own sexual identity; turning the case into an instance of legalized homophobia instead of a rightful response to sexualized violence. Halley is not disturbed by the fact that the assumption that threats and harassment by three men would have been *unproblematic* if the man indeed *had* been homosexual is not different from an assumption that a heterosexual woman harassed or raped by three men had “actually secretly enjoyed it” or just “fantasized it”. Her case, constructed as a case against homophobia, emerges thus as a case against criminalizing sexualized violence as such. She problematizes the court ruling by appealing to “complexities of desire” and the presence of “power, fear and disgust” in sexual feelings; and claiming that “the edgy experience of unwantedness in sex is probably cherished by more people than are willing to say so” (Ibid. 98). Blurring thus the distinction between consensual and non-consensual sexual activities, she concludes that the “queer project undermines our reasons for believing women who assert that they are sexually injured by men” (ibid. 100). She rejects the “feminist regulatory project” of criminalizing harassment, claiming that its costs – controlling “eroticism at work” – outweigh its benefits and that therefore, “sex harassment law has become a mechanism for sexuality harassment” (Ibid. 101-103).

The arguments of Halley and Warner are controversial as arguments posed in favor of more genuine equality and justice than “liberalism” offers, because they are in apparent conflict with some basic liberal values without which equality and justice are hard to conceive of, such as the physical inviolability of person and respect for individual autonomy; as they relativize and delegitimize not just conservative “patriarchal” or “heterosexist” norms, but also the liberal and feminist norms concerning sexual self-determination, prohibition of coercion and violence and avoiding harming children. Thus, they fail to prove that the “regulatory” effects of rights constitute a source of injustice: indeed, they help to clarify the argument that such effects, when recognized, do *not* need to render the politics of rights morally or politically untenable. The critics are obviously right arguing that the norms

implemented through rights and laws are actively political, not passively “neutral”; and that besides regulating behaviour and establishing public norms, rights and legal regulations actively produce identities. The question is whether the impact of those subject-forming powers should be seen in negative terms, as a source of inequality and injustice. To answer that question, the regulatory impact of the currently prevalent politics of rights as well as of the eventual changes that the legal reforms proposed by egalitarian movements would bring about, should be compared not to an abstract state of ideal anarchy in which no social powers are at play at all – because such a state does not exist; but to feasible alternative states in which *different* sets of rights, laws and rules, with *their* own regulatory impact, are enforced. The alternative to existing legal discourses is not “no discourse”, but some other discourse. Thus, once it is acknowledged that law *is* politics (not just a protection of certain spheres of life *from* politics), it is all the more important *what kind of norms* it generates, and what kind of identities it produces.

Brown’s argument that anti-harassment legislation produces “victim identities” may be challenged with a claim that legal protection of vulnerable groups and interference with the processes that construct victimized identities may also be a precondition for making the escape from the trap of despised group identity possible. Brown pictures the attempts by vulnerable groups to criminalize harassment and hate speech as an expression of revengefulness, resentment and even as a symptom of childhood traumas (Brown 2001, 45-61). But punishing sexist, racist and homophobic aggression does not *need* to be an action of revenge by a victimized psyche that ultimately re-enforces the victim status. It can be seen as assertive political action to *empower* the members of oppressed groups by ensuring that their oppressors have no license to harass or insult them. Indeed, as Halley’s example of male-to-male sexual harassment indicates, it may be more constructive to voice the ban of harassment in non-group-specific terms; as identity neutral but case-specific language grants the double benefit of protecting also those who do not belong to the typically victimized groups and avoiding the discursive stigmatizing of such groups that Brown is wary of. The important point here is that the effective enforcement of self-determination rights does not just have a negative “regulatory” impact beyond its immediate coercive force; it can also be *discursively empowering* beyond its immediate liberating effect for the potential victims of the banned violence. The mere knowledge that harassment is outlawed not only constrains the potential

harasser's behaviour; it also lends confidence to those most easily marginalized in certain kinds of working environments.

Likewise, while the discursive effect of the universal politics of individual rights may be viewed as generally "normalizing"; legal *discrimination* also has identity-forming effect; creating and stabilizing the identities of those defined legally second-class as inherently, "naturally" and necessarily inferior. Political tyrannies that deny their subjects the protection of individual rights, free inquiry and freedom to political action, also produce certain kinds of subjects: scared, apathetic and passive. Compared to such alternatives, liberal legal universalism is an improvement from a democratic and egalitarian point of view *also when measured by its discursive effects*. The politics of universal rights has a particularly empowering discursive impact for those people and groups who are more likely to be hurt by oppressive "social powers" when these are not legally regulated. Within progressive democratic movements, the politics of rights is often contrasted to the politics of "consciousness raising" as either additional or alternative strategy. At the same time, progressive legal reforms are often prevented by appealing to the attitudes of the majority, while discriminatory or conservative laws also exercise "discursive powers" that easily cement such attitudes. Sometimes laws are changed to a more progressive and egalitarian direction through legal activism, when the same changes are hard to achieve through democratic procedures. In such cases legal reforms, through changing accepted practices and thus public norms, change the attitudes of the wider public: through the discursive power of legal language, the politics of rights works as "consciousness raising" process. Given that words, practices and norms *always* produce discursive "side-effects", there is always reason to ask what kinds of practices the existing law normalizes and what kind of identities it produces; and how would possible reforms, new laws or the *absence* of legal regulations affect those regulatory processes?

Interestingly, the postmodern writers who otherwise readily appeal to the contingency of rules, norms and social realities, treat the legal and administrative institutions of their societies as rigid and unchangeable, immune to changes in political discourses and social realities. When Brown insists that sexual-harassment legislation craves the vulnerability of women into the "ahistoric discourse of law" as "absolute truth", she treats the law itself as ahistoric, timeless and unchanging, not a contingent political arrangement that in a democracy is open to challenge and

revalidation. (Brown 1995, 130-132; Brown 2001, 37). Regarding marriage, Warner denies that opening it to gay couples would change the institution itself – although the conservative opponents of gay marriage are well aware of such potential impact, using it as a central argument in their defense of marriage as a union between “man and woman” (Warner 2002, 259-260). Just as extending citizenship rights to women and lower social classes changed the meaning of democratic politics and citizenship; extending legal access to family life to queer people changes the meaning of the family. The argument that equal marriage rights for gays would just subject gay relationships to the conventional norms of heterosexual marriage is based on the assumption that the institution of marriage and its normative content is unchangeable. But the recognition that the discursive influences of legal reform do not just work in one direction contests that assumption: granting equal rights to gay couples changes the institution of marriage and the norms it represents, also for heterosexual couples – it is no longer the union of a male “head of household” and a female “wife”.

That is why gay marriages are legally titled “civil unions” whenever the democratic majority is willing to grant equal partnership rights to gays but not to challenge the meaning of the institution of marriage. As for the hierarchy between married and non-married couples with repressive regulatory powers directed at the latter, Warner’s argument appears weak at least in those societies in which there are no legal inhibitions for any adult couple to marry or not, and there is freedom to choose alternative lifestyles and no repressions of consensual adult sexual activity outside of marriage. Regarding the regulations that Warner quotes as punitive use of state power over the sexual behaviour of unmarried people; alternative solutions should also be analyzed with regard to the power relations they encourage. It can be argued that the goal of restrictions on e.g. child sex, violent pornography, and human trafficking is not to punish unmarried people, but to avoid harm to some of the involved parties; and that the deregulation of those practices would hardly contribute to a more egalitarian, just and democratic social order. It should not be automatically assumed that the more specific the law, the more it “normalizes” in a condemnable, power-abusing sense. Rights may also alleviate and counteract the subject-forming effects of previously unregulated ways to abuse power.

It is not self-evident that the discourses subsidized by the state and enforced through law have the strongest regulatory impact in liberal societies. Discourses sponsored by private corporations, advertising and entertainment industry or

educational and religious institutions also exercise “normalizing” power. When the regulatory powers of non-state social forces are harmful, legal restrictions imposed upon them, albeit perhaps “normalizing” themselves, can balance not just harmful actions but also their potentially harmful subject-forming effects. Taking into account the subject-producing power of also the practices that the progressive politics of rights aspires to change (like identity-related harassment and violence, discriminatory treatment of gays as partners and parents, victimizing women as sexual prey or undervaluing the work of “racially” marked groups); such politics generates improvement also *because of* its discursive influence.

The critics of “legalism” expose scepticism toward the liberal democratic state as necessarily alien and oppressive. In the background there lures a libertarian assumption that rights *should* protect individuals first of all from the state, not from each other or from private associations. Participation in public deliberations on the politics of rights is considered a dubious engagement for genuinely progressive movements, because the discursive powers of state-enforced institutions are seen as more threatening than those exercised in private spaces. Nevertheless, if the insight about the subject-forming capacity of public discourses is taken seriously, it must be recognized that it applies to *all* discourses, practices and norms; and thus should *encourage* active deliberations on rights by those caring for equality and justice. This insight indicates, perhaps contrary to the intentions of some of its proponents, that forming and changing legal norms constitutes an essential part of democratic discourses; and that more attention should be paid to the language of rights and to the question *which* norms are mediated, directly *and indirectly*, through existing legal rules as well as their possible alternatives.

## **2.6. Contingency and universalism**

The discussions referred here indicate that not much about rights can be taken as given, objectively universal or timelessly apolitical. The concept of rights is historically contingent, its meanings and implications debatable, its contents and interpretations internally conflictual and its effects more complex and manifold than a strictly juridical interpretation admits. All this undermines rigidly objectivist, rationalist and progressivist concepts of “natural rights”. At the same time, there is hardly a better concept than that of individual rights to politically establish an

egalitarian and tolerant understanding of human dignity and freedom that allows resisting violence, coercion and injustice wherever and in whatever human relations it occurs; and to make the respect for such dignity a binding obligation for institutions as well as individual persons. The argument I proceed is that while the insecurity, politicalness and debatability of rights claims calls for democratic deliberations, among other political issues, on the politics of rights; the norm of inclusiveness also requires establishing the universality and unconditional protection of some rights in order for the equality of participation in democratic deliberations to be feasible.

The dilemma between the contingency of the politics of rights and the need for a universalist legal framework to enable democracy and a minimum standard of equality is real. Can moral and legal universalism be defended, once the contingency, debatability and complexity of rights is exposed? The question can also be reversed: can one protect egalitarian values and respect to all persons despite their differences in terms of identity, opinion and interests, without some commitment to certain universal values? The arguments about the contingency of any political ideals, including the currently “hegemonic” ones, indicate the limits of universalism, but they do not necessarily delegitimize universalism as a political norm; nor do they offer convincing reasons to give up the conception of a person – each person equally – as potentially an individual, capable of having a will and a sense of her own interest, and entitled to a status as equal citizen. The apparent dilemma between the contingency of rights and the egalitarian appeal of this universalist political norm indicates that rights need to be treated as *political norms*, not instantiations of incontestable rational truth; but also that they should not be replaced by communitarian duty-oriented concepts that easily legitimize coercion and oppression.

As I indicated above, universalism in politics can be understood differently. Rawls, in his vision of the “Original Position”, harnesses universalism at an epistemological level as a means to achieve objectivity through rationality. That kind of universalism, as I argued above, is hard to justify from a democratic point of view, because it prevents the inclusion of actually existing social perspectives from the processes of producing the rules that bind them. Alternatively, Benhabib presents a vision of “interactive universalism” as a moral norm conducive to democratic inclusion: rationality is constructed not through a thought experiment of the philosopher capable of figuring out what is in the interest of any rational person; but

through promoting forms of political interaction that enable the inclusion of different perspectives: that ideal requires equality and universality of certain rights to preclude the silencing of particular persons or groups; thus it is also universalist, but not in the rationalist sense like Rawls's. From a democratic point of view it is easier to object to the claim to universal validity of a particular pattern of thought than to the call for inclusion of all persons as equally entitled citizens. Likewise, from the historicist perspective acknowledging the contingency of the liberal politics of rights, the Rawlsian justificatory model with its strong appeal to abstract rationality can easily be seen as negligent of the specific political struggles and historical contexts that contributed to its emergence; but Benhabib's model, presenting universal rights as instantiations of moral norms to promote certain political goals and not as an outcome of a progressively unfolding rationality, is perfectly compatible with the notion of rights universalism as a *contingent* political ideal realized within particular cultural and historical contexts. (Rawls 1972, 17-22, 118-192; Rawls 1993, 22-28; Benhabib 2002, 26-28.)

The criticisms of conventional liberal as well as deliberative democratic theories, posed by radical democratic theorists who argue that they are insufficiently inclusive of difference and plurality, is paradoxical exactly because the values of inclusion and plurality are essentially universalist. Although moral and legal universalism and the ideal of impartiality, promoted at some level by all theories broadly labeled "liberal", are blamed for negligence of certain effects of power; without implicit normative assumptions of universality and impartiality no power relations would matter. There is confusion between the *ideals* of impartiality and universality and such formulations of the ideals that *present* some particular viewpoint as impartial and universal. One can criticize those who claim to represent universal interests from a particular perspective for their lacking regard for other perspectives. But discarding the ideal of universality at all levels would leave no reasons to promote egalitarian justice or participatory democracy. Democracy conceived just as a scene of multiple "struggles", with no normative foundations, is a democracy where the stronger wins; it would not serve the interest of the marginalized or vulnerable, but of those with best means to make themselves heard and strongest appeal to majorities. Far from promoting diversity or equality, democracy purged of universal norms would fall back on an "aggregative" conception of democracy as "counting heads"; or majoritarianism with no protection of minorities and no means to counteract

structural injustices. That is hardly an attractive conception of democracy from a feminist, “queer” or minority-sensitive point of view.

The critics of “liberal” universalism as necessarily masculinist, rationalist, elitist and unable to recognize its own contextuality, rarely compare the liberal or deliberative notions of democracy with their actual alternatives, but rather to idealized states of affairs. Despite their emphasis on genealogy and contextuality, critics of universalism appear to forget that historically political liberalism was not an ideology whose goal was to cement a historical moment of sexism and bourgeois oppression of workers and non-white peoples; but an ideology created as a reaction against the rigid social hierarchies presented as divine or natural. Once such justifications have been rejected, differences in social positions appear contingent, may be challenged and need to be justified. If the sources of social powers are recognized as human, excluding some humans from participation in common affairs requires justification. Although these democratic implications of the liberal ideology were not obvious from the start; it can be argued that given its tenets of the natural equality and equal moral worth of all human persons, liberalism has proved unable, from its own premises, to justify the exclusions that originally characterized its politics. Universalism, as a principle of both political inclusion and legal equality, has its roots in the Enlightenment ideals; but while recognizing this contingency may explain these ideals, it offers no good reasons to reject it.

Another question is, as noted above, whether proponents of the universal politics of rights are aware of the contingency of such politics; and whether such recognition affects the normative content of those theories. Mouffe argues:

“What we understand by ‘liberal democracy’ is constituted by sedimented forms of power relations resulting from an ensemble of contingent hegemonic interventions. The fact that *their contingent character is not recognized today* is due to the absence of counter-hegemonic projects” (Mouffe 2005, 33, my emphasis).

But do the theorists who conceptualize democracy as interdependent with universal rights, not recognize the contingent character of liberal democracy and the “hegemonic interventions” that constitute it? I indicated above that some classical liberals appear to have been more aware of the contingency of the liberal ideals than is currently acknowledged – perhaps not surprisingly, writing under the circumstances where the “hegemony” of liberal values was not self-evident. But also some contemporary proponents of universal rights present their arguments in the

context of explicit awareness of their historical contingency. As I indicated above, Mouffe directs her critique of rights universalism particularly against the idea of universal human rights at a transnational level, while accepting liberal democratic institutions in what she defines as the “West”. Thus it is noteworthy that those who defend universal human rights in international politics expose their awareness of the contingency of that ideal with particular clarity. The positions of Ignatieff and Donnelly confirm that arguments for the universality of individual rights need not be based on a denial of their historical contingency. Although presented in the context of international relations, these non-essentialist defenses of rights also serve as arguments for legal universalism *within* liberal democracies, when it no longer enjoys an uncontested hegemonic position. The “minimalist” defense of human rights by Ignatieff also helps to define the minimum of rights to be protected by a constitutional framework from democratic decisions, even while questions concerning the extent and meaning of rights are on the agenda.

Ignatieff presents an explicitly political, or “minimalist” and “pragmatic” defence of human rights as a “shared language”:

“We need to stop thinking of human rights as trumps and begin thinking about them as a *language that creates the basis for deliberation*. In this argument, the ground we share may actually be quite limited: not much more than the basic intuition that what is pain and humiliation for you is bound to be pain and humiliation for me. But this is already something. In such a future, *shared among equals*, rights are not the universal credo of a global society, not a secular religion, but something much more limited and yet just as valuable: the shared vocabulary from which our arguments can begin, and the bare human minimum from which differing ideas of human flourishing can take root” (Ignatieff 2001, 95; my emphasis.).

Using Wittgensteinian language like Mouffe, Ignatieff draws the opposite conclusion: he also treats the discourse of rights as “a language game”, one that can be shared and understood by all, compatible with a plurality of different lifestyles and “conceptions of the good”. As opposed to essentialist ideas of rationality or progress, Ignatieff grounds his argument on the historically proven capacity of humans to treat each other badly:

“We know from historical experience that when human beings have defensible rights – when their agency as individuals is protected and enhanced – they are less likely to be abused and oppressed” (Ibid. 4).

He argues for progress not as a metaphysical necessity, but as a moral *possibility* fully dependent on political will; and for humanity and individuality as moral, not ontological entities:

“Progress may be a contested concept, but we make progress to the degree that we act upon the moral intuition that Dr. Pannwitz (chief of the chemical department of Auschwitz who reportedly saw Jews as a different species) was wrong: our species is one, and each of the individuals who compose it is entitled to equal moral consideration. Human rights is the language that systematically embodies this intuition, and to the degree that this intuition gains influence over the conduct of individuals and states, we can say that we are making moral progress” (Ibid.).

Ignatieff also indicates that the socially rebellious dimension of liberalism that grants an individual the right to challenge her conventional social role and the expectations of her “superiors”, gained historically novel dimensions as a manifest of equality with the subscription of UDHR; and has hardly lost its relevance yet:

“For the first time, individuals – regardless of race, creed, gender, age or any other status – were granted rights that they could use to challenge unjust state law or oppressive customary practice” (Ibid. 5).

Donnelly describes the ideology of universal human rights as a contingent political value, even unlikely to have emerged:

“Such a conception of human dignity, well-being or flourishing is, in a broad cross-cultural and historical perspective, *extremely unusual*” (Donnelly 1999, 81; my emphasis).

He explicitly presents the conception of human rights as a “social construction”; and gives a historical overview of how the discourse and the politics of human rights developed through political struggles and against many odds. Donnelly emphasizes the historical novelty of the idea of the universality of rights:

“Human rights – equal and inalienable rights, held by all human beings simply because they are human and exercisable against state and society – are a distinctive, *historically unusual* set of social values and practices. The universality of human rights is a moral claim about the proper way to organise social and political relations in the contemporary world, not an historical or anthropological fact” (Ibid. 81).

He also recognizes the debatable dimension of the concept: “Human rights are an eminently *contestable* basis for ordering social and political life” (Ibid. 81-82). Donnelly describes the emergence of such particular set of moral concerns as an institutionalized part of international politics as a contingent historical process; and criticizes contemporary liberals for being “tempted to see in this history a gradual unfolding of the inherent logic of natural rights;” arguing that they should be wary of

such “comfortable teleological views of moral progress” (Ibid. 71-76; 82-85). He fully rejects determinism about the history of rights:

“There is nothing natural, let alone inevitable, about ordering social and political life around the idea of human rights. Furthermore, the particular list of rights that we take as authoritative today reflects a *contingent response to historically specific conditions*. [...] Contemporary conceptions of human rights reflect a long process of social and political struggle that might easily have turned out differently” (Ibid. 84).

At the same time Donnelly supports the universality of the politics of rights. In his view, recognizing the contingency of rights does not weaken the appeal of rights as political arguments:

“The historical contingency of international human rights norms, however, does not make them any less authoritative” (Donnelly 1999, 85).

He describes rights as universal values in the sense that every human being *deserves* them. While arguing that the idea of rights rests on and seeks to realise *a particular conception of* human nature, dignity, well-being, or flourishing, he sees that conception as worth protecting; impossible to reject for anyone who recognizes the idea of the equal worth of all human persons (Ibid. 80). Arguing, in line with postmodern critics of rights discourse, that the idea of human rights is *not* politically neutral (Donnelly 2003, 86), he describes the ideal and politics of rights as an efficient ground for political action against tyrants (Ibid. 77). In a manner that rarely recurs with the same clarity in democratic theory discourses, Donnelly argues that the central achievement of the politics of human rights has been to “discredit moral and political doctrines based on fundamental inequalities between human beings”; defying the view of rights as “individualist”, he argues:

“it is the *radical political egalitarianism* of human rights that has had the most profound implications, both nationally and internationally” (Ibid. 96).

In his defence of universal rights as a historically contingent political achievement, Donnelly is more optimistic about the egalitarianism of rights discourse than the feminist critics of liberal universalism:

“For all the shortcomings of this particular construction of right and wrong in international relations, I find the rise and persistence of human rights as a regulative international political ideal an unusually promising political ideal for the future” (Ibid. 100).

It appears from these arguments that if the ideal of rights is conceptualized as an explicitly normative and political ideal, the defence of its universality does not need to rely on metaphysical notions of rationality, human nature or progress. The

universality of rights is defended because it is seen as a political discourse that is both morally appealing and politically efficient against various modes of tyranny. The positive aspects of this kind of contingency-aware rights thinking are first, that if the ideal of the universality of rights does not stand on proto-metaphysical rationalism and progressivism, it does not fall with them. Second, it offers a “minimal” but strong defence of universalism that does not treat existing sets of rights, enforced in particular polities or treaties, as incontestable “trumps”; it allows for democratic deliberations on the content and interpretation of rights while establishing the universality of certain rights as a precondition for such deliberations to be feasible on egalitarian terms. A contingent defence of universal rights serves as a reminder that rights are neither “natural” nor “divine” nor based on “objective” reason, and that thus the source and content of rights are debatable; it opens the chance for polities to look for democratic procedures to debate rights, while justifying constraints on collective decisions on rights, to avoid “majority tyranny”.

Also within the “human rights” discourse, Ken Booth takes the non-essentialist view regarding “human nature” still further. In accord with Arendt’s cynical remark after the historical experience of concentration camps that “man’s ‘nature’ is only ‘human’ insofar as it opens up to man the possibility of becoming something highly *unnatural*, that is a man”<sup>20</sup>; he argues: “We should have human rights *not because we are human, but to make us human*” (Arendt 1973, 455; Booth 1999, 52; my emphasis.). Likewise, as Arendt describes the politics of equal rights not as a realization of an ontological human equality, but as a means to *produce* political equality: “We are not born equal; we become equal as a group on the strength of our decision to guarantee ourselves mutually equal rights” (Arendt 1973, 301); Booth argues:

“The anxieties of some Western academics about ‘sameness’ seems a trivial and patronizing concern when compared with the anxieties of women in desperate circumstances, needing a hand. If left exclusively to local patriarchal power-brokers, that hand will be the traditional fist” (Booth 1999, 55).

It is ironic that the ideals of equality and universal rights have been particularly strongly questioned within feminist discourses, which, having articulated the justified recognition that the politics of universal equal rights has not proved *sufficient* to achieve social equality and universal inclusion; have proceeded toward skepticism of universalism, equality and rights discourse *per se*; and in their

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<sup>20</sup> Arendt uses traditional grammar, referring to “man” as to “human being”; in the context this should not be read as another proof that the rights-bearing person after all is necessarily male.

subsequent infatuation with “difference” and relativism have offered justifications for *less than equal* treatment of some groups – often women – within certain culturally determined groups or on the international arena.

Non-essentialist arguments for the equality of rights; constructed in defiance of political forces capable of constructing *inhuman* social realities; indicate that there is no necessary connection between political universalism and philosophical essentialism, and no necessary conflict between the recognition of the contingency of political ideals and the conviction that some of them can be protected as universal, that is, potentially concerning all people. The recognition of the contingency of rights forces proponents of universal rights to present their arguments not as abstract truth statements but as the political arguments that they are. Indeed, non-essentialist arguments for universalism are hard to refute merely by the critique of essentialism and rationalism. Below I will return to discussions on the “individualism” of rights discourse and the role of the individual in democratic theory debates; and to the concept of “humanity” and its role in the discussions on exclusion and powerlessness; in order to further illustrate the connections between the moral and legal universalism of liberal politics and the notions, cherished also by radical democrats and feminists, of diversity, plurality, difference and inclusion.

### **3. Politicizing rights discourse**

The insight about the contingency of rights has consequences for the analysis of the position of rights in democratic politics. Once it has been indicated that the conception of rights is not based on extra-human sources or absolute doctrines about truth, morality or human nature; it follows that it is essentially a *political* conception; and that arguments in favor of particular interpretations and implementations of rights are inevitably *political* arguments about what kind of values to institutionalize and protect through legal rules, why and how. Therefore it is appropriate to talk about *the politics of rights* even when talking about universalist politics that is supposed to offer an impartial, “neutral” framework for freedom and the diversity of different conceptions of morality to flourish. I argued in the previous chapter that neither the historical contingency of rights nor the discursive powers

acting in spite of, or through, the language of rights and law; offer compelling reasons for rejecting universalist politics of rights, or the values on which the currently “hegemonic” conceptions of rights are based, for the sake of deeper democracy. Instead, such insights provoke the proponents of politics of rights to present their arguments in political terms as normative claims, not as claims to represent truth, morality or rationality. In this chapter I specify the argument about the need to politicize rights discourse and connect the notion of universal rights, as well as statements about morality, humanity and individuality that are often used as justificatory arguments in rights discourses, to debates on democracy; in particular the concept of inclusive democracy and the values of equality, justice and diversity that are often appealed to *in opposition to* rights-based universalism.

Acknowledging that the “obsession with rights” of contemporary liberal democratic politics is not thoroughly unproblematic; I argue that compromising rights discourse *as such* is not a constructive response to those problems. Although the language of universal rights alone offers neither a short cut to egalitarian and emancipatory politics nor an automatic guarantee of democratic legitimacy; rights are still “political goods” without which egalitarian, democratic politics is hard to conceive of. Both the weight of rights as political arguments and the recognition that the language of rights is a politically active form of power indicate the enormous political significance of *how* rights are conceptualized and institutionalized. Rights can be appealed to for preserving *status quo* in some cases, while in others it can promote progressive policies when democratic procedures fail to recognize justice claims by marginalized groups: thus, as I argue in section 3 below, the discourse and politics of rights cannot be automatically seen as means of preserving existing privileges and marginalizing those who are “particularized” by the universal norms; indeed it can be seen as an empowering discourse for particularly those who are too politically powerless to advance their interests through democratic procedures. Against certain violations and symptoms of structural inequality the language of rights still constitutes the most effective argument. Throughout the history of the politics of rights, many political issues considered radically emancipatory and progressive have been posed as rights claims (that has been the case with e.g. civil rights, “women’s rights”, “gay rights” and “social rights”). Just as disagreements on rights, questions concerning universalizing the existing rights and introducing “new rights” can be objects of heated debates in democratic public spheres. Although there is much in current liberal constitutions that is worth perpetuating and protecting,

there is no reason to assume that the existent bills of rights are ever final and “ready” so that disputes on them would vanish or become superfluous.

When rights are understood politically, also disagreements on rights need to be seen as political. Although other values, concepts and arguments are, and need to be, used in political debates; rejecting political discussions on rights as expressions of excessive “legalism” is problematic for proponents of inclusive democracy exactly because of the political weight that legal rules and rights discourses have; ironically, the “postmodern” wariness of “legalism” in political disputes is inherently supportive of such strong objectivist conception of rights that prefers to keep disagreements on rights off the agenda of democratic public sphere. In contrast, the deliberative model acknowledges both the role of universal norms as enablers of public deliberations and the democratic potential of putting the politics of rights on their agenda. The content and meaning of rights in democratic politics is ultimately dependent on the political agents themselves; therefore it matters, not only what rights there are, but also, *who* participates in the processes of deciding over their interpretation and content. As I noted above, the intertwined nature of the discourses of rights and justice on the one hand and democracy and inclusion on the other has been indicated convincingly by e.g. Young and Shapiro. At the end of this chapter I will also turn to the concept of “participatory parity” by Nancy Fraser that crystallizes this connection and thus supports the position of deliberative democrats like Habermas and Benhabib that universal rights and inclusive democracy are interdependent rather than contradictory as political values.

### **3.1. The political nature of rights**

I argued in the previous section that although the arguments about the contingency of the liberal conception of rights are empirically valid, they do not undermine the position of rights as means to politically enforce certain moral commitments – e.g. the norm of the equal moral worth of each human being. The main contribution of that insight to the discussion on rights and democracy is revealing the *politicalness* of rights; the recognition that in order to defend, or challenge, a politics of rights, one needs to present one’s position by explicitly *political* arguments. The political nature of the concept of rights is particularly clearly revealed in Arendt’s insight that “a right to have rights” essentially means a right to belong to a rights-granting

political community, because rights are not “given” by nature, but can only be granted through political institutions. Arendt’s call for “a right to have rights” is itself a political statement, a normative claim that every human being should have the chance to be treated as a right-bearing subject and a descriptive observation that she is not such a subject automatically, by virtue of her humanity. (Arendt 1973, 267-302.)

As I also noted above, Arendt’s critique of “natural rights” indicates that the allegedly individualist notion of rights has a collective dimension that tends to be underestimated by the most committed proponents as well as the harshest critics of the liberal politics of rights. Here I discuss the implications of the unavoidable partiality of the politics of rights for the relationship between democracy and rights; and argue that while the recognition that rights are political indicates that allowing democratic deliberations on decisions regarding rights is crucial for democratic legitimacy; it also helps clarify arguments for rights as the normative statements that they are. Ignatieff cautions proponents of rights from placing their arguments into a position above political disputes:

“Human rights activism likes to portray itself as an antipolitics, in defense of universal moral claims to delegitimize ‘political’ (i.e. ideological or sectarian) justifications for the abuse of human beings. In practice, impartiality and neutrality are just as impossible as universal and equal concern for everyone’s human rights. Human rights activism means *taking sides*, mobilizing constituencies powerful enough to force abusers to stop. As a consequence, effective human rights politics *is bound to be partial and political*” (Ignatieff 2001, 9; my emphasis).

Comparing Ignatieff’s arguments on the politics of human rights with those of Mouffe, they share the view about the partiality of rights; and they both reject explicitly moral, as opposed to political, arguments for rights; but they draw opposite conclusions about the desirability of promoting that partial politics. (Mouffe 2005, 5, 101-103, 123-126.)

Shapiro, in similarity with the feminist critique of public-private divisions, criticizes as “antipolitical fallacy” the tendency of conventional liberalism to define the private sphere as apolitical. According to him, the view that some sets of rights are above political disagreement stems from the natural-rights tradition of early liberalism and has a *religious* origin: as soon as the idea of rights is secularized, that is, it is recognized that rights have no extra-human divine or natural source; the question *which* rights are to be protected by and from politics inevitably becomes debatable.

In his view the argument that rights are somehow prepolitical and the primary role of politics is to defend those naturally given rights from public scrutiny is implicitly refuted by the natural-rights tradition itself, because it contains very different understandings of what natural rights there are. Defying the assumption of prepolitical rights, he argues that no domain of human interaction is beyond politics – not even the “private sphere” that tends to be protected by privacy rights; and that the division lines between the private and public spheres are themselves political:

“Because the boundaries to the private sphere are themselves politically constituted and change over time, no argument for an a priori distinction between public and private can be sustained” (Shapiro 1999, 6-9. See also Okin 1989, 25-40; 110-133).

It is noteworthy that this argument for interpreting rights politically is posed within the liberal tradition by a writer who defends limited constitutional “gag rules” to constrain the reach of democratic decisions and a Rawlsian vision of liberal democracy; albeit emphasizing “democracy” rather than “liberal” and redescribing that position as explicitly political and partial as opposed to neutral and rational:

“whereas Rawls’s ‘political, not metaphysical’ stance is advertised as neutral among rational conceptions of the good life, mine is *explicitly partial*. It is intended to load the dice *in favor of goals that can be realized democratically*, and to give people incentives to refashion aspirations that cannot. [...] Rawls’s political conception is liberal [...]. Mine is a democratic conception. It aims at enabling people to live by their values, but always in ways that permit opposition and take due account of the affected interests of others” (Shapiro 1999, 232, my emphasis. See also Shapiro 1999c, 31).

The explicitly political, and still distinctly liberal, positions on democracy and rights presented by Ignatieff, Shapiro and others indicate that there is in liberal political theory a revival of the recognition, present also in the earlier writings of Mill and Berlin, of liberalism’s explicit partiality; and of an awareness of the non-givenness and normative dimensions of its political goals. It indicates that current liberal theory is not stuck with Rawlsian objectivism and rationalism, and has entered constructive dialogue with the radical democratic and postmodern critique that has delegitimized the rationalist and objectivist justification models and thus forced the proponents of liberal conceptions of democracy to provide explicitly political justifications for their position. The major problem with Rawls’s model is that he treats the liberal constitutional essentials as non-political, even though he emphasizes that his view is *political*, as opposed to “philosophical” or “comprehensive” (Rawls 1996, 399-401).

Rawls's vision is political only in the sense that it does not rely on metaphysical truth claims, but it is non-political in the sense that it assumes that "the principles of justice" are there prior to any actual political debates and democratic processes. Rawls, even in his recent replies to critics, fails to acknowledge that even the processes of establishing those norms are essentially political: in practice, those norms were outcomes of actual political struggles. Although he sees US constitution as a result of a historical process, he upholds the theoretical construction of the Original Position that contains no reference to the historical particularities of such processes, as the justificatory scheme for liberal democracy; and treats it as a sufficient argument to establish that

"our ideas of justice are already fixed, we cannot change them to suit our rational interests or knowledge of circumstances as we please. Checking them by considered judgment is, of course, another matter" (Rawls 1993, 399).

Thus, for Rawls the political process with actual citizens involved can be a process of *checking*, but not of *creating* "ideas of justice". This view raises a number of questions, starting with how to cope with the facts that the Founding Fathers in the US were partial actors not negotiating from behind "the veil of ignorance", and that they did in fact not subscribe to the universally egalitarian norms currently "hegemonic" in the liberal democratic world.

Shapiro introduces a stronger democratic dimension into the liberal conception of legitimacy. Agreeing that the principles of justice and the issues of rights are political decisions on which there is persistent disagreement; the questions *who* makes the decisions and *how*, become as important as *what* the decisions contain. The primary implication of the recognition of the politicalness of rights for democracy is that it makes it harder to justify the removal of rights from the democratic agenda. As political decisions, decisions on rights can, from a democratic point of view, be legitimate only if all those concerned by those decisions can have an equal chance to contribute in their making. At the same time, as I will indicate later, the same egalitarian legitimizing logic that lies behind this claim implies that to enable inclusive democratic deliberations, certain rights must be granted to all citizens in order for that argument for legitimacy not to undermine itself: with no protection from arbitrary coercion, constitutional guarantee of equality, freedom of speech and thought and equal political rights; the ideal of inclusive democracy has no substantive content: thus subjecting rights to democratic deliberations does not eliminate the need of democracy for a mechanism to disqualify arguments that

undermine those basic democratic rights. Politicizing rights talk is not equal to arguing *against* the universal politics of rights; rather it is a reminder that not legitimized by any extra-human or rational sources, such politics needs to be actively defended in order to protect and preserve the conditions of inclusive democracy.

A problem with the Rawlsian view is also, as several critics have pointed out, that Rawls, conceptualizing the “overlapping consensus” on the shared political values between supporters of different “reasonable” doctrines, expects everyone, despite their different social positions, worldviews or lifestyles, to endorse the principles of justice. He does not discuss the possibility of the emergence in the political sphere of “non-reasonable” doctrines (Rawls 1993, 387). I return to the position of illiberal or antidemocratic political doctrines in inclusive democracy in the final chapter and argue that an explicitly normative position on the universal politics of rights is more convincing than both the Rawlsian *assumption* of consensus on the liberal democratic values that ignores the possibility of those values actually being challenged; and such agonistic conception of inclusive democracy that rejects *any* normative criteria to evaluate, and eventually exclude from the range of legitimate political claims, arguments and doctrines presented in the public sphere. Especially in such cases it is useful, and honest, to defend the arguments for universal rights and egalitarian norms as explicitly normative rather than to dismiss competing views as “irrational” or “non-reasonable”, or ignore their existence. This recognition imports into the deliberations within liberal democracies on the status, content and interpretation of rights the dimension that Ignatieff emphasizes in international politics: on the one hand, appeals to universal rights are not above politics; rights are not a “set of moral trump cards whose function is to bring political disputes to closure and conclusion;” and that

“[human] rights is nothing other than politics, one that must reconcile moral ends to concrete situations and must be prepared to painful compromises not only between means and ends, but between ends themselves” (Ignatieff 2001, 21-22).

On the other hand, Ignatieff recognizes that talking about the politics of rights in non-absolutist terms may *increase* its democratic political appeal:

“Human rights might become less imperial, if it became more political, that is, if it were understood as a language, not for the proclamation and enactment of eternal verities, but as a discourse of adjudication of conflict” (Ibid. 20).

Arguing against the idea of rights as “trumps”, he notes that at best, rights create a common framework that can help parties to deliberate together. At the same time, the language of rights offers limits to debates and compromises:

“Human rights language is also there to remind us that there are some abuses that are genuinely intolerable [...]. Rights talk, therefore, helps us to know when deliberation and compromise have become impossible” (Ignatieff 2001, 22).

Ignatieff's depiction of rights talk as an explicitly political struggle against traditional, religious and authoritarian sources of power reveals an aspect of rights talk that has been significant in the history of the gradual institutionalization of liberal rights and that remains relevant in the face of political struggles between different “liberal” and “conservative” forces within liberal democracies; although “liberal” has become conceptually identified with “conservative” by those proponents of radical democracy who see the currently “hegemonic” rights-based institutions as stagnated and potentially oppressive (Brown & Halley 2002, 5). The recognition of the politicalness of rights is conducive to the recognition that the current development of the politics of rights is neither “finished” nor one-directional; the emergence of explicitly anti-egalitarian backlashes remains an ever-present possibility. The facts that the nature of “political struggles” is not necessarily progressive, as proponents of radical democracy appear to assume; and that the goal of agonistic political movements is not always to liberate and empower the vulnerable; cast a different light also on the conception of rights as moral norms that constrain and regulate the content of acceptable political arguments. The role of morality in liberal politics is ambivalent and complicated: on the one hand, rights universalism is posed as an amoral political doctrine that allows a plurality of different conceptions of morality to flourish; on the other hand, the norms of freedom and equality that this vision rests on are arguably moral norms.

Although Rawls explicitly denies the *moral* dimension of the liberal politics of rights, insisting that the goal of his *political* vision is to enable a plurality of competing moralities; and Mouffe, on the contrary, criticizes Rawlsians and other proponents of universal rights for replacing politics with individualist *morality*; it is harder to separate the political from the moral than they both assume. The moral dimension of the politics of rights is revealed when facing the challenges of antiliberal and antiegalitarian positions, against which the liberal doctrine of equality, and individual autonomy and freedom inevitably appears as a moral argument: thus, while rights talk, as Ignatieff argues, defines the acceptable limits of compromise in democratic politics, it also reveals its inescapable moral foundation: the conception of the equality and autonomy of all persons. When not univocally

recognized, this moral universalism appears as a particular normative doctrine. Nonetheless, if this moral partiality is seen as a problem, rejecting rights universalism for the sake of democracy would hardly solve it, for, as Courtney Jung argues, democracy itself is a “conception of good” based on particular norms. (Jung 1999, 271; Mouffe 2005, 12-13; on the normative content of liberal democracy see also Benhabib 1992, 2; 7.)

Below I return to some of the concepts central in the moral vision behind the universal politics of rights and that have been allegedly delegitimized by the critics of liberalism, universalism and modernism: “individual” and “humanity”.

### **3.2. Rights, individualism and humanism**

As I noted above, the central arguments by feminist and radical democratic critics of liberal rights discourse is that it is “individualist”, in opposition to the positively conceived collectivist, egalitarian, democratic and community-friendly values; that the “individual” as a rights-bearing subject is constructed as a sovereign male egoist, independent of familial and social networks; and that the discourse is based on a totalizing and homogenizing concept of “humanity” that is inherently sexist, racist, imperialist; oppressive of femininity and diversity. While Pateman and Brown describe the “individual” as a category necessarily exclusive and repressive of women and liberal “equality” as a recipe for “sameness” modelled on such male individual (Pateman 1988, 1-7; 41; Brown 1995, 135-165); Mouffe, appealing to Schmitt, describes the concept of “humanity” as an ideological weapon for imperialist expansion and “humanitarian ethics” as a vehicle of economic imperialism (Mouffe 2005, 78).

As I also noted above, the core idea of the universalist argument is that each human person is an *individual* entitled to equal moral respect. The critics of the ideal as totalizing, exclusive or conducive to “sameness” rarely specify under which conditions it could be legitimately compromised. Brown & Halley, in their critique of rights, admit that “liberalism’s dearest treasure, equality before the law” is preferable to *inequality* before the law, and is just seen by critics as “too abstract to produce substantive egalitarianism without transformation of the social powers that produce inequality” (Brown & Halley 2002, 6). But this admission that legal equality is

preferable to inequality is vague and unconvincing in the face of the volumes of criticism by these and other critics of the egalitarian values classified as liberal; thus a clarification is needed whether these concepts indeed are as oppressive as the critics indicate. The shift in democratic theory discussions from the national toward the transnational arena and to the themes of cultural plurality within liberal democracies reveals that the idea of universal humanity and the respect for the individuality and equality of each person is rejected by the critics of liberalism with particular clarity with regard to people seen as outsiders of the native communities of the existing well-established liberal polities; in the name of diversity and in resistance to liberal universalism which in the transcultural context is described also as “imperialist”. Nevertheless, exactly the transnational and –cultural context offers examples that contest the assumption that the universal concepts of individuality and humanity only serve the interests of powerful, white, heterosexual and middle-class men.

The question whether there is a shared humanity that serves as a basis for the politics of rights falls back on empirical arguments: the perspectives and experiences of existing human beings. At the one end of the specter of the conceptions of “human nature” there are perfectionist, rationalist notions that have played a significant part in modern utopias and provoked strong criticisms for their essentialism; also from classical liberal thinkers. At the other end is the relativist view that humans cannot be seen as “naturally” sharing any capacities or characteristics: through that perspective even the enslavement of some humans by others is hardly a moral problem. Ignatieff presents a non-essentialist conception of a shared humanity, defining it through the perception of what can be experienced as abuse and humiliation by *any* human person. Arendt, while critical of the abstract idea of rights, emphasizes the importance of the recognition individuality and personhood, including *juridical personhood*, for political equality. Just as she criticized “statelessness” and “rightlessness” as a condition worse than even slavery; she described the Holocaust as a process of destruction of humanity in which, prior to killing the unwanted people they were destroyed as *legal persons* – by denying their citizen rights; and as *moral persons* – by destroying their sense of autonomy in the concentration camps where the victims were forced to murder and oppress other victims. The ultimate political violence is connected with the destruction of individuality – a process of which the politics of universal individual rights is an

opposite. Arendt describes the conception of *individuality*, the notion that distinguishes people from one another, as the worst enemy of despotism and totalitarianism. She sees the recognition of moral and legal personality as a prerequisite for individuality; which in turn is the precondition of all human diversity and creativity, including the capacity of political action:

“After murder of the moral person and annihilation of the juridical person, the destruction of individuality is almost always successful. [...] to destroy individuality is to destroy spontaneity, man’s power to begin something new out of his own resources, something that cannot be explained on the basis of reactions to the environment” (Arendt 1973, 455; 437-459).

Arendt’s concept of individuality and her emphasis on legal personhood as its precept starkly contrasts the subsequent radical democratic view of the politics of universal rights as an expression of apolitical “individualist” morality, hostile to diversity, plurality and political struggles for justice. Ignatieff supports this diversity-constitutive aspect of the “individualism” of rights discourse:

“To protect human agency necessarily requires us to protect all individuals’ right to choose the life they see fit to lead. The usual criticism of this sort of individualism is that it imposes a Western conception of individual on other cultures. My claim is the reverse: that moral individualism protects cultural diversity, for an individualist position must respect the diverse ways individuals choose to live their lives” (Ignatieff 2001, 79).

Ignatieff refutes the arguments about the alleged “imperialism” of rights universalism by reminding that from the Western perspective, drafting UDHR in 1947 “was anything but triumphalist” (Ibid. 64); and that although reflecting certain Enlightenment ideals “it was written when faith in the Enlightenment faced its deepest crises of confidence” (Ibid. 65). He argues that the Declaration, representing a plurality of traditions, was “not so much a proclamation of the superiority of European civilization as an attempt to salvage the remains of its Enlightenment heritage from the barbarism of a world war just concluded”; and it was “not so much a declaration of the superiority of European civilization but a warning by Europeans that the rest of the world should not seek to reproduce its mistakes” (Ibid.). Among those mistakes Ignatieff counts *the surrender of individualism to collectivism*. It is in this context he sees the “individualism” of universal rights discourse: without remembering this “disastrous heritage of European collectivism”, its individualism could indeed appear to be “nothing more than the ratification of Western bourgeois capitalist prejudice”; while given the context, it was rather “a studied attempt to

reinvent the European natural law tradition in order to safeguard individual agency against the totalitarian state” (Ibid. 65-66). The criticism of rights appears to be based on a certainty that despotic political forces no longer emerge. Thus, a conflict between constitutionalism and radical democracy may be not so much a conflict about democracy’s *ends* as about the optimism or pessimism regarding the *possibilities* implicit in democracy.

Ignatieff explicitly defends the “individualism” of rights discourse, arguing that rights are *meant to* protect the individual from oppression by political authorities, communities or families. He warns against the desire of relativists and communitarians to water down the individualism of rights discourse by “tempering” it with emphasis on social duties and communal responsibilities:

“...this tack mistakes what rights actually are and misunderstands why they have proven attractive to millions of people raised in non-Western traditions. Rights are meaningful only if they confer entitlements and immunities of individuals; they are worth having only if they can be enforced against institutions like the family, the state and the church” (Ignatieff 2001; 66-67).

Treating rights as political arguments, Ignatieff recognizes that rights claims stem from already ripe conflicts, often between an individual and a collective or institution; and that it is because of that conflictual nature that rights talk is invoked to protect the individual in such cases. He points out that in conflicts the language of rights is often appealed to protect the *more vulnerable* part:

“Rights are inescapably political because they tacitly imply a conflict between a rights holder and a rights ‘withholder’ [...] There will always be conflicts between individuals and groups, and rights exist to protect individuals. Rights language cannot be parsed or translated into a nonindividualistic, communitarian framework. It presupposes moral individualism and is nonsensical outside that assumption” (Ibid. 67).

Ignatieff also challenges the critique of rights discourse as inherently “racist and sexist”:

“Human rights is *the only universally available moral vernacular that validates the claims of women and children against the oppression they experience in patriarchal and tribal societies*; it is the only vernacular that enables dependent persons to perceive themselves as moral agents and to act against practices – arranged marriages, purdah, civic disenfranchisement, genital mutilation, domestic slavery and so on – that are ratified by the weight and authority of their cultures. These agents seek human rights protection precisely because it legitimizes their protests against oppression” (Ibid. 67-68, my emphasis).

This discussion has entered political theory debates *within* liberal democracies through the politics of multiculturalism and the feminist debate on it initiated by Okin. In Ignatieff's account, as in Okin's, the "individualism" of universal rights is a means to protect the position of women and children in vulnerable situations. Interestingly, while Ignatieff sees such rights conflicts as *political struggles about power*:

"The conflict over the universality of human rights norms is a political struggle. It pits traditional, religious, and authoritarian sources of power against human rights advocates, many of them indigenous to the culture itself, who challenge these sources of power in the name of those who find themselves excluded and oppressed" (Ignatieff 2001, 76-77);

feminist theorists, otherwise promoting "plurality" and depicting democratic politics as "multiple struggles" resisting the power of the state as well as families, communities and religious institutions; assume that similar institutions are free of power and conflict in polities and communities defined as culturally "other". Referring to the struggles of dissidents within those "other cultures", Ignatieff poses an argument similar to Moghissi's, cited in part II:

"What they seek is protection of their rights as individuals within their own culture. Authoritarian resistance to their demands invariably takes the form of a defense of the culture as a whole against intrusive forms of Western cultural imperialism. In reality this relativist case is actually a defense of political and patriarchal power. Human rights intervention is warranted not because traditional, patriarchal or religious authority is primitive, backward or uncivilized by *our* standards, but by the standards of those whom it oppresses. The warrant for intervention derives from *their* demands, not from ours" (Ibid.).

As an example that confirms Ignatieff's argument, I cite three outcries about women's human rights that have recently caught international attention. In August 2005 an Iranian teenage girl, Atefeh Rajabi, was hanged in religious courts where she was initially sentenced to regular flogging for "immoral behaviour"; her sentence was changed during the process for her using "sharp tongue" when trying to defend herself. In the second case, a Pakistani woman, Mukhtar Mai, was sentenced by a tribal village court to be gang raped as a punishment for her brother's alleged crime of getting involved with someone from a superior tribe; and in the third, an Indian Muslim woman named Imrana was sentenced by a local Sharia court, as a punishment for being raped by her father-in-law, to divorce her husband and marry the rapist in order to re-purify the sacred relationship between father and son. None of these examples would have received international publicity, had they not been

seen as outrageous cases of injustice by the victims themselves. The cases were raised as human rights issues by people *within* the polities and “communities” that authorized the abuses at local or national level.

These examples are conspicuously not so much “non-Western” (although the “Western” politics of universal rights could not have authorized such sentences – the case of Imrana was made possible in India by the multicultural politics accommodating Sharia courts); as *anti-liberal*, in conflict with the conception of individual autonomy and the protection of the individual from arbitrary coercion and violence: Atefeh’s execution was only vaguely related to her own actions and she had no chance to fair trial. Mukhtar was punished by the “community” for what someone else allegedly did; not as an autonomous person, but as an organic part of her family; and Imrana for what was done to *her* – because the (male) “family bonds” and the collective notion of honour were raised above her personal autonomy and dignity. As these women or their supporters pose their claims against the respective patriarchal powers in terms of rights and as calls for recognition of their individuality and autonomy; the critique of the “masculinism” of universal rights discourse along with romantic appeals to “community”, “culture” or “familial bonds” sound hollow and unconvincing as *feminist* or *egalitarian* arguments.

The argument about the inherent sexism of universalist rights discourse is undermined by the fact that the equality of individual rights can effectively be appealed to when protecting women in contexts, within or outside existing democracies, where their second-class status is otherwise taken for granted; just as the arguments about its “imperialism” are contested by the fact that people within politically “other” contexts appeal to rights in their struggle against local oppression. The fact that conflicts arise within “communities” and people feel injured by the traditional practices of “their own” political, religious or tribal cultures, indicates that struggles against “multiple forms of oppression” occur wherever oppression exists; and that the enforcement of basic individual rights is a precondition for those struggles to be advanced to organized resistances against structural patterns of oppression. In Ignatieff’s view it is exactly the subversive capacity of rights talk to challenge established power hierarchies that explains the strong opposition against it: “Rights doctrines arouse powerful opposition because they challenge powerful religions, family structures, authoritarian states, and tribes” (Ignatieff 2001, 68). Thus the politics of rights, although it *can* be also be harnessed in the interests of the

powerful, constitutes an effective tool in resisting authoritarian modes of power held by states or heads of particular “communities” within or without democratic polities. Therefore, regarding the conflicts between universal rights and the “politics of difference”, it should not be forgotten that the collective interests of communities are often represented by those who hold power within the groups in question, as Okin argues (Okin 1999, 22-24).

Defying the discourses that oppose the vocabulary of equality to the “individualist” ideals of freedom, autonomy and rights; Donnelly finds that the “individualism” of rights language is inherently connected to the ideal of equality and indeed follows from it:

“The basic moral equality of all human beings, once accepted, logically requires that each person be specially recognized as an individual. Some degree of individualism is inescapable when our moral and political starting point is the equality of each and every human being” (Donnelly 1999, 98).

He also connects the ideal of equality to that of autonomy:

“The core human rights commitment to individual equality leads ‘naturally’ to an emphasis on individual autonomy. If one is equal to others, they have no right to force you to comply with their ideas of what is right and proper [...] they may not force on you ideas that treat you as less than an equal moral agent. In fact, it is difficult to separate the ‘natural’ moral equality of individuals from the autonomy of these equal persons” (Ibid. 97).

It can be argued that the assumption of “natural” equality and autonomy is exactly the fallacy that makes the discourse of rights inefficient in practice; but in Donnelly’s argument the “naturalness” of equality, placed in quotation marks, is presented as an explicitly *normative* claim; implying not that “natural” equality should be realized through the sovereignty rights of an autonomous person conceived as a “possessive individualist”; but that the norm of equality is logically connected to the norm of respect for individual autonomy: if all people are equal, each is entitled to a certain degree of independence from others even when being connected to them through familial, communal or political bonds.

Holmes challenges the charge of “atomism” and “individualism” of liberalism by recalling the *de facto* experiences of illiberal “collectivist” regimes. He points out that it is the oppressive societies that do not respect individual rights that produce social atomism, creating an atmosphere of fear and apathy through repressing free exchange of ideas and freedom of association. He argues that liberal rights, instead

of facilitating “atomism”, make social relations possible by keeping open channels of communication, association and free discussion that “obviously facilitate group activities”. Recalling that a society that encourages citizens to watch each other’s political views (or morality) is a Hobbesian society where no one can trust anyone and everyone is potentially everyone else’s enemy, he claims:

“In fact, the more tyrannical the autocracy, the more ‘atomized’ social life becomes, as twentieth-century communist societies have so grimly shown. In general, liberals valued individual rights [...] as a *precondition* for all manner of social cooperation” (Holmes 1995, 225-226).

Similarly, Booth argues, defying the view of universal equality as “sameness”, that universality of rights is not in conflict with diversity but encourages it:

“universal standards may indeed sustain diversity rather than the opposite. The spread of feminism and gay rights breaks up the universal transcultural presence of patriarchy, and without universal principles, it is difficult to see how indigenous peoples have any chance of surviving” (Booth 1999, 55).

Booth also calls attention to the homogenizing capacity of “local” powers and traditions:

“If homogenization is the fear, the record suggests that we should worry about it locally before universally. Why is the eradication of difference in the face of (local) communitarian power less worth struggling for than any eradication of difference as a result of external ‘imperialism?’” (Ibid. 56);

and appeals to *human* solidarity to enhance diversity: “it is only by recognizing our human sameness in *an other* regarding universal solidarity that we will actually protect human diversity” (Ibid.).

Booth explains the motivation behind the criticism of universalism as follows:

“The fundamental weakness of the critics of universality is that they take too territorial view of the idea of human community, human political solidarity and human social affinity. Their perspective is conservative, overdisciplined by constructed notions of states and cultures” (Booth 1999, 61).

Interestingly, in an earlier debate between universalist and “postmodern” position, Benhabib argues the apparently opposite: that the anti-universalist and anti-foundationalist postmodernism presupposes

“a superliberalism, more pluralistic, more tolerant, more open to the right of difference and otherness than the rather staid and sober versions presented by John Rawls, Ronald Dworkin and Thomas Nagel” (Benhabib 1992, 16).

Benhabib argues that “aesthetic modernism” has always “parasitically depended upon the achievements of modernity in the sphere of law and morality” (Ibid.).

While welcoming the postmodern “superliberalism”, she criticizes its proponents for hypocrisy insofar as they claim to reject the values that they take for granted:

“What is baffling though is the lightheartedness with which postmodernists simply assume or even posit those hyper-universalist and superliberal values of diversity, heterogeneity, eccentricity and otherness. In doing so they rely on the very norms of the autonomy of subjects and the rationality of democratic procedures which otherwise they seem to so blithely dismiss” (Ibid.).

She argues that the multiple struggles promoted by the critics of liberalism are indeed dependent on the liberal values: “social criticism of the kind required for women’s struggles is not even possible without positing the legal, moral and political norms of autonomy, choice and self-determination” (Ibid.).

So are the critics who expose scepticism toward the universal liberal values as potentially homogenizing “superliberal” or conservative? It seems that they are both at the same time: Benhabib is right that the politics of inclusion and diversity, endorsed by “postmodern” thinkers, is based on the liberal assumptions of individual freedom, plurality, autonomy and choice. But in their aversion toward the legal universalism that enables such freedom as potentially homogenizing and representative of sexist, racist and heteronormative powers; and in their affection toward difference and diversity, not only of identities and opinions, but *also of modes of political and social association*; they endorse a conservative position regarding the polities and communities seen as cultural “other”; thus celebrating or at least tolerating oppressive practices in those contexts as signs of cultural and political “diversity”. The aversion toward the oppression within “other” communities is suppressed by relativizing; the diversity and “multiple power struggles” *within* “other” communities remain invisible when the “culture” in question is sufficiently distant. Nevertheless, the discussion above reveals that once it is recognized that oppression and political struggles occur in *all* human collectives, the emphasis on individual rights as protection against institutional as well as communal and familial oppression is easier to see as a precondition for *any* inclusive notion of democracy. In the remaining sections of this chapter I revisit the meaning of the politics of rights to the position of those in politically powerless position; and return to the implications of these findings for the relation of rights to democracy.

### **3.3. Rights and the politics of the powerless**

The argument that universal rights is constitutive of diversity has an obvious empirical appeal: if there are institutional safeguards against people being punished for voicing opinions challenging the official notions of truth, making individual choices that defy the orders of their superiors or exposing an identity different from those conventionally accepted; diversity is enhanced, not suppressed. Regarding the relationship between rights and democracy it is interesting that while the proponents of radical democracy and the politics of “difference” treat the politics of rights as a relatively *conservative* approach as opposed to participatory democracy, there are cases in which socially progressive policies are promoted through appeals to liberal rights and opposed by appeals to democracy and public opinion. For example the US Supreme Court’s decision to de-criminalize homosexuality in Texas in 2003 was defended by liberal appeals to universal rights and resisted by appeals to democracy within the state. Likewise in Finland, in the currently actual discussions on the rights of single and lesbian women to medically aided reproduction, proponents of the equality of non-conventional families refer to their equal rights while their opponents prefer to appeal to “democratic” public opinion.

I return to these examples below; the lesson to learn from them is that progressive proponents of radical democracy, preferring normatively unqualified political “struggles” to appeals to (equal) rights and majoritarian democracy to constitutionalism, dismiss the possibility that not only within minority communities, but also within liberal democratic states the political allegiances of majorities may be more conservative than their own; and that not only progressive identity-political groups, but also groups with conservative or even with openly sexist, racist or proto-Fascist agenda may be willing to engage in “multiple struggles” against the “hegemonic” liberal mainstream. This also indicates that normative universalism, promoted in somewhat different forms by theorists of liberal constitutionalism and deliberative democracy, is not necessarily hostile to the values of diversity and inclusion or to the interests of the marginalized, powerless or “different”.

In debates on human rights, relativist sceptics of the politics of universal rights tend to treat foreign polities and culturally alien communities as compact wholes – in practice, they endorse the rules and practices that appear foreign to their own concept of justice on the conditions of those who hold power in the communities in

question. The same is often true about the “groups” granted collective rights, including exceptions from general law, in the framework of the multicultural “politics of difference”. In contrast, proponents of universal rights focus on the perspective of the *victims* of oppressive policies and practices who often lack the power to voice their perspective within the communities regarded as their own. This casts into a paradoxical light the claims of the critics of normative universalism that their goal is to question “hegemonic powers” and support struggles for equality and justice, in the interests of the most marginalized, powerless, discriminated and vulnerable groups. As also seen in the previous section, Ignatieff connects the “individualism” and universalism of rights talk explicitly to the protection of the powerless:

“Rights are universal because they define the universal interests of the powerless, namely, that power is exercised over them in ways that respect their autonomy as agents” (Ignatieff 2001, 68).

Contrary to Mouffe, he sees the global spread of the ideal of rights as a sign not of imperialist hegemony, but of the appeal of rights languages to those who have no other vocabulary at hand to challenge the powerful: “human rights has gone global [...] primarily because it has advanced the interests of the powerless” (Ibid. 7). He emphasizes the *empowering* force of the language of rights: “If human rights has not stopped the villains, it certainly has empowered bystanders and victims” (Ibid. 8).

In this interpretation it is the most criticized dimensions of rights discourse, “individualism” and universalism that serve the interests of those whose resources are not strong enough to promote their goals through democratic procedures. Ignatieff connects rights language also to agency:

“Human rights is a language of individual empowerment, and empowerment of individuals is desirable because when individuals have agency, they can protect themselves against injustice” (Ignatieff 2001, 57).

Challenging the view that rights discourses are “imposed” on collectives, he explains the spread of rights thinking with its inherent appeal to the powerless and the victims of oppression: “Human rights has gone global by going local, *empowering the powerless*, giving voice to the voiceless” (Ibid. 70, my emphasis); and argues that especially women in theocratic, traditional or patriarchal societies find rights language attractive. Are these arguments based on a liberal fiction of autonomy and individuality; an imagination of free souls where in fact collective bonds, “culture” and family matter more to real people? If autonomy and agency are seen in a *normative* sense not as ontological faculties to be “realized” by politics, but as

*possibilities* that can be politically encouraged or suppressed and destroyed; then it is hard to see from an egalitarian perspective, why they should be encouraged in case of some people but not of others. Defending rights from the perspective of the powerless, Ignatieff argues that traditional communities are oppressive to individuals not because they represent “different” values and conceptions of dignity, but because they rob the possibility from the individuals to develop and express their *own* conceptions: the task of rights is to create the conditions in which processes of self-determination and dialogue are available to everyone. He agrees that the “individualistic bias” of rights discourse is not neutral, but finds that bias normatively attractive: directed against authoritarian leaders, it challenges the “habits of obedience that keep patriarchy and authoritarianism at place” (Ibid. 73).

When rights discourse is thus *opposed to* authoritarian power and the political culture of coercion and obedience; arguments against rights language *as* modes of power need to be revised: in Ignatieff’s interpretation the language of universal rights appears as a mode of *progressive, egalitarian* and *subversive* power challenging undemocratic political authorities as well as traditional social hierarchies. As I noted above, the assumption that the discourse of universal rights has not receded to a socially stagnating power even in those parts of the world where it is widely considered “hegemonic” can be illustrated by the public discussions on legislation regarding family and partnership in the US as well as Finland. In the US, where same-sex partnerships were still criminalized in several states by “sodomy laws”, the Supreme Court ruled in summer 2003 against such law in Texas as unconstitutional, thus in effect invalidating similar laws in other states as well.

The arguments in favor of the Supreme Court’s decision were constructed upon the rhetoric of constitutional rights, privacy and equality as well as the liberal harm principle; while dissenting statements appealed to democracy, “community morality” and majority opinion. Thus, in his explanation of the decision, Justice Kennedy appealed to liberty, privacy, and personal autonomy as protected by the Due Process Clause of the Fourteenth Amendment. Admitting that the condemnation of homosexuality was anchored in the moral values experienced as “deep convictions” by many Americans; Justice Kennedy argued that “[the] issue is whether the majority may use the power of the state to enforce these views on the whole society through operation of the criminal law”; and stated that “our obligation is to define the liberty of all, not to mandate our own moral code”. In contrast, in

their dissenting opinions, Justice Falwell lamented that the court “had put the right of privacy ahead of respect for community standards of morality”; and Justice Scalia appealed to *democratic* values and criticized the alleged elitism of the Court’s decision:

“the Court has taken sides in a culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed. [...] I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means. [...] But persuading one’s fellow citizens is one thing, and imposing one’s views is something else. [...] it is the premise of our system that those judgments are to be made by the people, and not imposed by a governing caste that knows best...”<sup>21</sup>.

The “discursive effects” of the Court’s decision were described by its proponents as well as opponents as necessarily further “humanizing” gay people and promoting their equality in employment as well as family matters such as child custody, adoption and visitation; and the decision was seen to logically lead to legalizing gay marriage. In this context, it is hard to see either the discourse of rights and liberties that was invoked in the decriminalization decision; or the expected subsequent equality discourse, as “normativizing” gay people in an oppressive and coercive manner; particularly in the light of the publicly voiced alternatives. Just as in case of women victimized by local traditional power structures in “non-liberal” contexts, also here the discourse of universal rights is used to empower – both legally and discursively – individuals and groups that have been discriminated against through traditional “communal” values. Given the appeal by conservative judges to “community morality” and the democratic will of the majority, it is hard to justify the condemnation of liberal rights talk as necessarily sexist, racist, heterosexist etc; or to prove that discourses appealing to “duty” or “community” would promote more progressive and egalitarian values.

Similar discourses, albeit at a generally less conservative level, surface also in other liberal democracies with political cultures and legislating traditions different from those of the US with its strong constitutional tradition. Thus, in the public debate in Finland on the “fertility treatment law” that is going on at the time of writing this, polls show a 60% public resistance to extending the right to in vitro fertilization to single women and lesbian couples. The conservative opponents of that right appeal to public opinion, tradition and public morality; while those promoting

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<sup>21</sup> As referred in New York Times, June 27, 2003.

the equality between different forms of families invoke the equality of individual rights, the autonomy and liberty to choose one's partner and orientation; and the liberal harm principle, indicating that growing up in gay families causes no harm to children.

The examples referred here hardly suffice to establish that rights discourse necessarily always promotes egalitarian justice and socially progressive goals and attitudes. But in order to analyze the role of rights in inclusive and egalitarian democracy it is important to realize that at least sometimes it does; and that it cannot be seen as inherently hostile to such objectives. The recognition that rights discourse indeed can promote deeper egalitarian justice than may be achieved by democratic procedures not only "rehabilitates" liberal rights discourse; it also indicates how complicated the relationship between individual rights and democracy is, if the democratic values of inclusion, justice and equality are taken seriously. While it is relevant to argue that the content and extent of rights should be subject to democratic discussions and decisions, the egalitarian impact of this participatory dimension appears more problematic if such procedures result in some groups or individuals being confined to a less than equal position. In the final section of this chapter I invoke Nancy Fraser's notion of "participatory parity" to further confirm the intertwined nature of democracy and justice; participation and rights.

### **3.4. Equal rights and participatory parity**

Fraser, a proponent of a deep, radical democratic interpretation of deliberative democracy, introduces the term "parity of participation" to describe the condition that combines different aspects of political justice in order to increase both democratic legitimacy and substantial equality. The parity of participation, in Fraser's view, is a norm establishing that justice requires "social arrangements that permit all (adult) members of society to interact with one another as peers" (Fraser 2003, 36). In this concept, Fraser combines the two competing dimensions in recent discourses on social justice: *distribution* and *recognition*, the economic and the cultural-structural dimension; and argues that justice in both is crucial for democratic legitimacy, because both economic maldistribution and cultural-structural misrecognition constitute obstacles in persons' possibility to participate in

public affairs on equal terms with the others and to have and use a public “voice” to articulate their perspectives and interests (Ibid. 34-37). Later, recognizing also the increasingly transnational dimension of democratic justice, Fraser adds a third dimension; the *political*. She argues that although distribution and recognition are both important for, and intertwined with, the parity of *political* participation as a dimension of democratic justice; the latter should be distinguished as an independent factor ensuring democratic equality. As the questions of justice have, according to Fraser, traditionally dealt with the questions of “what” of social justice, or the *content* of just social politics; the political dimension focuses on the question “who”; and also “how”, focusing on *who* can participate in deliberations on those contents and *on which terms*. In other words, the political dimension of democratic justice concerns the question of *membership* and of *procedures* – of whether the debates and decision making mechanisms enable the participation or representation of all concerned parties on equal terms. (Fraser 2006.)

Thus, Fraser’s concept of participatory parity emphasizes the interconnection between justice, legitimacy and political equality. She takes up the political dimensions of justice in the context of globalization and the decreasing relevance of the nation state in the historical situation in which, like Benhabib also has argued, the range of those affected by particular decisions often reaches far beyond particular nation states. Fraser is concerned especially with the fact that many poor people of the world who are affected by the economic and political decisions of global financial and economic organizations are not able to participate in deliberations on those decisions; and with the lack of democratic accountability of those global actors to the people over whom they exercise power. Thus she argues that the question of membership – *who* participates in decision making; and also which, in any particular case, is the relevant *community* whose membership determines the conditions of participation (ranging from local to global), should be reconsidered in the context of the changing world. Fraser argues that as the nation state as the institutional framework for democratic procedures and decisions is no longer the only or even the primary political unit; the criteria for membership and participation should be changed accordingly.

Fraser compares the lack of the political voice of some people in the world with the condition of rightlessness as defined by Arendt; arguing that it makes those people “non-persons with respect to justice”, subject to benevolence and charity by others but not to rights and claims of justice. Thus, the new global politics calls for a

“reframing” of democratic arenas that also supersede the borders of nation states (Fraser 2006). Calling for the extension of democratic participation toward transnational fora, Fraser focuses on the asymmetric relationship between the transnational political and economic institutions and the majority of the people whose lives their decisions affect. Theorizing the possibilities of extending the concepts of democratic equality and participatory parity to a global scale, she emphasizes the legitimacy deficit of the transnational institutions, but does not discuss the role of the internal lack of political freedom and equality in non-democratic polities in the denial of a democratic voice to their citizens. However, it also matters for the depth of global democratic inclusion whether particular polities as members in global democracy are *internally* democratic.

Fraser does not theorize the concept of participatory parity through the concept of rights, but she constructs the phrase around the liberal egalitarian notion of the equal moral worth of each person and appears to recognize that the equality of rights is a necessary, albeit not sufficient condition for participatory parity (Fraser 2003, 224). It is obvious that lacking the equality of rights, one cannot participate in public life and interact in society on equal terms with others. The interconnectedness of democratic equality with the politics of equal rights is easily clarified, again, through negation; with reference to social orders that are *not* egalitarian. Thus, Fraser’s call for extending the ideal of participatory parity beyond liberal nation states contrasts the relativist accounts of democracy denouncing the universality of rights in “different” regimes.

Interestingly, even Rawls, who has constructed a strictly objectivist and rationalist justificatory model of liberalism and whom Mouffe, in her critique of rights universalism, pictures as a major representative of “apolitical” liberalism, accepts the lack of political equality in cultures defined as “other”. Distinguishing “liberal” from “decent hierarchical” societies, Rawls, not unlike Mouffe herself, defends the legitimacy of the latter, if they respect *some* basic rights of minorities and dissenters even though they do not grant them *political equality*. As an example, Rawls depicts a fictional, “idealized” Islamic people that allows only Muslims to “hold the positions of government authority and influence the government’s main decisions and policies” – in other words, it denies political equality to its religious minorities; but “tolerates” them and grants them “civic rights” (Rawls 1999, 75-76). Interestingly, Rawls claims that in this “decent” non-democratic religious state

minorities are *not* “treated as inferior by Muslims in public or social relations”; and that “dissent is respected” and “liberty (but not equal liberty) of conscience” is guaranteed as a class of “urgent rights” (Ibid. 76-79). Ignatieff, despite his otherwise defensive position on universal rights, subtly supports Rawls’s view: “It is not obvious that there is a Kazanistan, but if there were, there is nothing in Rawls’s view – or mine – that would mandate interference in the domestic affairs of such a state” (Ignatieff 2001, 36).

It is fair to note that neither Rawls nor Ignatieff claims that the imaginary “decent” theocracy is *democratic*, or even *just*. But it is interesting that here the “apolitical fallacy” of the liberal view consists not in the insistence on the universality of rights, but in the failure to recognize the connection between political equality and social justice. What strikes as a contrast between Fraser’s notion of “participatory parity” and Rawls’s view of a “decent” or legitimate political regime is the role of political rights for social equality. Constructing “Kazanistan” as a fictional entity, Rawls escapes the need to analyze the *de facto* discrimination of religious minorities and the repression of dissenters in existing Islamic theocracies; or to explain whether, or why, political discrimination of minorities is more justified in some particular religious-cultural contexts than in others. What is theoretically interesting in this example is his assumption that civil and political rights are separable in a way that makes it possible to respect and enforce the former without the latter; and that civic equality could be compatible with political discrimination.

The idea that private civil rights are enforceable without corresponding political rights is indeed a “fallacy” that needs to be challenged from a democratic perspective; Fraser’s conception of “participatory parity” consisting of economic, cultural *and* political dimensions reveals this with extraordinary clarity. In practice it is hard to conceive of “liberty of conscience” without “*equal* liberty of conscience”; of minorities being excluded from positions of political influence but “not treated as inferior” in public life; or of “respect for dissent” where that dissent is institutionally barred from exercising political influence. If anything, this thought experiment confirms the importance of the equality and universality of *all* basic rights as a precondition for democratic equality; and the impossibility to separate the politics of universal rights and the notion of equal citizenship from democratic legitimacy. While it is beyond the scope of this thesis to discuss the conditions of international *interference* in regimes that deny the equality of their citizens; there is no reason for

proponents of democracy to assert the legitimacy of anti-egalitarian regimes or to *not* recognize the calls for equality by women or minorities within them as legitimate claims of justice; especially as there is, as Fraser argues, the structural need to extend the membership of the democratic community to the transnational arena.

Thus, if Fraser is right that increasing global justice and extending the democratic concept of “participatory parity” beyond the borders of traditional nation states requires increased accountability from transnational institutions and a creation of transnational fora for more universal representation on issues with a global reach; it is also increasingly hard to justify the exclusion of women and minorities within different political contexts from these increasingly intertwined global deliberations. Although the establishment of democratic institutions remains difficult in many existing polities for many different reasons; admitting that defending democracy is a highly normative particular political position also makes it possible to assert from this position that certain regimes are preferable to others. Although there can be legitimate disagreement on the *universal* preferability of democracy as a form of political organization and universal rights as an institutionalization of an egalitarian moral code; it is hard to deny the connection between those two.

Both Fraser’s emphasis on the political dimension of participatory parity as a “radical-democratic interpretation of the principle of equal moral worth”, and Rawls’s somewhat awkward attempt to construct a “decent” but non-democratic society that respects private rights but not political equality; confirm that democracy, especially if conceived in inclusive and egalitarian terms, presume a conception of universal, equal civil *and political* rights as its necessary condition. Ignatieff, even though supporting Rawls in his reluctance to justify international *interference* if the violation of rights is not explicitly brutal; recognizes this connection when describing rights discourse as a language that creates the basis for deliberation: “Rights language says: all human beings belong to the table, in the essential conversation about how we should treat each other” (Ignatieff 2001, 94). He is under no illusion that a politics of rights that increases the diversity of voices included in democratic deliberations would create a harmonious chorus. Unlike Mouffe, he sees the politics of rights as a means not to silence dissent, but to enable it: “a world of moral equality is a world of conflict, deliberation, argument and contention” (Ibid. 95).

Fraser clarifies through her concept of “participatory parity” the way in which the equality and universality of rights is connected to inclusive democracy. If inclusive democracy indeed means that even minorities and those in socially disadvantaged positions have a fair opportunity to voice their perspectives in public deliberations and decision making processes; then the examples above just confirm that such a conception of democracy is very different from “democracy” conceived as pure “popular sovereignty” in a Rousseauian sense. Thus, although some proponents of inclusive democracy are particularly critical of liberal universalism, a certain interpretation of liberal constitutionalism and the minimal equal civil and political rights that it promises appears to be *the* necessary, even if not sufficient condition for inclusive participatory democracy. This is recognized, to a degree, by Habermas when he insists on the inherent interdependency between democracy and rights; but even he, arguing that equal rights stem from the mutual recognition of equality of the members of a democratic polity, underestimates the degree to which such rights, granted through a process of constitution-making that may initially not enjoy *universal* popular support, ground the conditions for such recognition of mutual equality where there is no obvious willingness of *all* to recognize the equality and universal rights of all others. (Habermas 1996, 454-458.)

It seems in the light of the arguments given both in favor and against universalism, “liberalism” and rights that the relationship between the universal politics of rights on the one hand and inclusion, equality and diversity on the other, is more correlative than it appears to be acknowledged throughout these discussions. The relativist drive of feminist and radical democratic theories to lend legitimacy to “different conceptions of democracy”, illiberal regimes and “cultural communities” within liberal states that are internally not egalitarian, inclusive, free and open in the sense of allowing dissent, free discussion and political diversity; inflates the conception of legitimacy by applying it to “democracy” conceived as a communitarian expression of collective “will”, unqualified power of majorities or just *de facto* power of leaders and dominant groups. Arguments about the implicit effects of legal universalism or of rights discourse do not refute these implications. Thus, rejecting the legal universalism of liberal constitutionalism and the moral universalism of deliberative democracy in the name of “difference” and diversity does not contribute to conceptions of democracy that are more accommodative of diversity and plurality. Rather, constitutionalism, although restrictive of the reach

and content of democratic decisions (arguably *too* restrictive in some interpretations), appears to be a precondition of democratic legitimacy especially if the latter is understood in the deep egalitarian sense defended by proponents of inclusive democracy. In the last chapter I return to the relationship between democracy and rights to elaborate this argument.

#### **4. Rights and democratic legitimacy**

In this chapter I return to the question of the relationship between democracy and rights as factors constitutive of democratic legitimacy. In preceding chapters I indicated that many of the arguments on which the feminist and radical democratic suspicion of the discourse and politics of rights have been based can be refuted as self-defeating; especially when the purpose of the critique is to envision a democratic politics that is more participatory, egalitarian and inclusive of diversity and difference than currently existing liberal democracies. While recent democratic theory has questioned the narratives elevating systems of rights above political struggles and revealed the non-essential, non-natural, contingent and explicitly political character of the politics of rights; these revelations do not undermine the significance of the concept of rights in democratic politics: the politics of universal individual rights remains an inescapable component of the institutions that constitute democracy in general and inclusive democracy in particular. While legitimacy cannot be guaranteed only by the institutions of rights; critics of liberalism overestimate the extent to which liberal authors actually claim that it can. As I have indicated above, not all proponents of conventional liberal models oppose active citizen participation in public deliberations on political issues; the differences between their vision and those of deliberative and radical democratic models rather consist in differences in their estimation of the capacity of existent liberal institutions to offer channels of participation to all people and groups; and in their view on the scope, reach and nature of the decisions that can be made through democratic procedures.

Nevertheless, acknowledging the contingency of any politics of rights increases the pressure for its defendants to provide justification for its implementation in the absence of metaphysical and absolute moral foundations. I have indicated that

universal politics of rights, just as democracy itself cannot escape the appeal to foundational moral values; and that in case of democracy as well as the politics of rights, the value without which neither can be adequately protected is the norm of equality based on the Kantian ideal of equal dignity and autonomy of each person – stated not as metaphysical or empirical truth but as a moral and political norm on which the ideal and practice of democracy has been based. I interpret the alternative models of democracy as competing interpretations of that ideal or accounts of its appropriate institutional implementation.

Below I return to the alleged dilemma of the position of rights as an enabler or an object of democratic politics; and discuss some remaining difficulties that it creates particularly when the political nature of rights is acknowledged and the possibility to appeal to abstract truth claims in their favor thus eliminated. In the first section I further discuss some arguments that oppose the universal politics of rights to democracy; in the next ones I clarify how the universal politics of rights is inherently connected to the concept of inclusive democracy rather than in conflict with it. I revisit the constraining role that rights universalism has on democracy; and the dilemma, inevitably rising in an inclusive and free public sphere that allows a multiplicity of doctrines and views to flourish, of the position of *illiberal* doctrines in democratic politics: the conflict of the equality of persons with that of ideologies. I argue that an inclusive concept of democracy should protect the equality of individuals before the equality of ideologies if such a conflict arises, in order to protect its inclusive character, even if this implies the restriction of some political positions as unacceptable.

As most doctrines that deny the equal worth of all individuals use characteristics such as gender, sexual orientation or race as the basis for discrimination, the critique of universal individualism posed from feminist and antiracist positions is self-defeating. When denouncing equality as “sameness”, proponents of radical democracy or the “politics of difference” fail to seriously consider the possible alternatives to formally egalitarian politics. On the other hand, the problem with many accounts of liberal democratic theories is that they take the loyalty of all citizens to the values of equality, liberty, symmetry and mutual respect for granted: the dimension of conflict should be recognized but not romanticized. In the final section I discuss to what extent the politics of rights still needs to be on the agenda of democratic politics. I support the deliberative view that combines the norm of inclusion with that of moral and legal universalism and conceptualizes

rights and democracy as interdependent; adding that establishing such democratic politics or protecting its continuity may itself constitute an “agonistic” struggle and should not be seen as “hegemonic”, unchallengeable and unchangeable.

#### **4.1. The politics of rights vs. democracy?**

I indicated above that apart from the feminist and communitarian arguments against the individualism, abstractness and masculinism of the liberal politics of rights, a critical argument of proponents of radical democracy against liberal and deliberative conceptions of democracy is that those universalist theories ignore or attempt to suppress genuine disagreement and conflict in political debates. The question is to what extent the conceptions of the moral, political and legal universalism of conventional liberalism as well as deliberative democracy restricts the diversity of legitimate positions in democratic public spheres; to what extent such restrictions are needed to prevent democracy from undoing itself; and to what extent an institutionalized universalism *enables* diversity and the airing of dissent through public confrontation.

As noted above, Mouffe argues that “the political” is “completely missing” from the liberal approach and that “‘political liberalism’ is at pains to eliminate is the element of ‘undecidability’ which is present in human relations” (Mouffe 2000, 31). She criticizes the division between “reasonable” and “unreasonable” doctrines; claiming that it serves a *political* purpose of distinguishing between “permissible” and “unacceptable” pluralism, the former referring to the plurality of religious, moral and philosophical doctrines “as long as they can be relegated to the private”; the latter to a political pluralism that would “jeopardize the dominance of liberal principles in the public sphere” (Ibid. 24-25). According to Mouffe this means that there cannot be pluralism “as far as the principles of political association are concerned” (Ibid. 25). In her view such *political* elimination of illiberal views from the public sphere, masked as a *moral* commitment to reasonable norms, removes the possibility of genuine political disagreement and renders democratic challenging of the existing forms of power illegitimate. In contrast, Mouffe claims, her view of agonistic democracy protects genuine *pluralism* against attempts at closure, to keep the dynamics of the democratic process alive (Ibid. 32-33).

It is easy to accept Mouffe's insight that politics always involves power struggles; and that Rawls constructs a too exclusive model of social contract that presumes the commitment of all to tightly predetermined principles of justice before any actual deliberations between existing social agents. But I have also indicated that other conventional liberal writers and proponents of deliberative democracy, whom Mouffe criticizes on similar grounds; have presented more flexible and open models of democracy while still defending certain universalist criteria for qualifying democratically acceptable arguments. The question is thus, is a politics of rights that constrains democracy and qualifies its contents necessarily restrictive of plurality; or does democracy *need* some such constraints in order to function and persist? As I also indicated above, Mouffe insists elsewhere that the disagreements that her agonistic conception of democracy enables are between different *interpretations* of the values of liberty and democracy; not between those who accept those values and those who do not. She argues that those demands that challenge the democratic institutions can be excluded; and that "[a] line should be drawn between those who reject [the ethico-political values of liberty and democracy for all] outright and those who, while accepting them, fight for conflicting interpretations" (Mouffe 2005, 120-121).

This sounds much like the attempt to "establish a 'minimal consensus on political fundamentals'" that Mouffe rejects in Rawls's theory. Although Mouffe emphasizes that those division lines are *political*, a fact she claims "liberals" ignore, it can be asked how far her own position is from making the Rawlsian distinction between "permissible" and "unacceptable" pluralism? Does she not confirm, by re-introducing such division lines, that democracy even in its agonistic form can only function within a constitutional framework of rights and institutions, the challenging of which jeopardizes not just "liberalism" but democracy itself? At least some proponents of constitutionalism defend the rights-based constraints on democracy not because they fail to recognize the existence of power in democratic politics, but because they recognize that some modes of power must be restricted in order to preserve democracy (e.g. Holmes 1993, 1995).

The arguments of Isaac, Filner and Bivins, introduced above, also call for a "more overtly political and *democratic* way of addressing the problem of religious fundamentalism, and of identity politics more generally, in public life" than "political liberalism" offers (Isaac et al 1999, 225, my emphasis). Using as an example the role of Christian religious fundamentalism in US politics; Isaac et al criticize liberalism's

tendency to privatize and bracket out the matters of identity and moral concern from political debates. Like Mouffe, they find such limitations undemocratic (see II.2.1. above). The question is, is it always democratically illegitimate to invalidate certain modes of discourse in politics? Would also the norms disqualifying political speech that promotes gender segregation and inequality, or defends slavery, or preaches racist or Fascist doctrines, be illegitimate from a democratic point of view? Isaac et al say they prefer the deliberative democratic approach to that of “political liberalism”, arguing that it is more open and more willing to allow moral disagreements to be aired through public political disputes (Ibid. 253). But although such a model may indeed be less quick to subject “unconstitutional” positions to judicial review; the deliberative model, with its norms of symmetry, equality and universal mutual respect institutionalized as constitutional rights, also has to disqualify the positions challenging such norms at some point.

The main concern of Isaac et al is that “political liberalism” pushes matters of serious disagreement (that is, issues where “comprehensive doctrines” intrude politics) from the democratic public sphere to the courts. Unlike some other critics of liberalism (including Mouffe), they grant the later Rawlsian theory the merit of acknowledging the political nature of justice and institutional design of society. They acknowledge that it does not pretend to represent a universal vision of self, human nature or the progress of reason, but favors liberal institutions as a *political choice* to be preferred to other, e.g. authoritarian forms of organizing public life (Isaac et al 1999, 233, my emphasis). They mostly long for this political conception to be more open to differences of opinion and “politics of identity”, comparing the current entrance of religious fundamentalist identity politics to the earlier identity politics of feminism and civil rights movements. They see the opening of the democratic public sphere in historically progressive terms, recalling that the history of modern liberalism is a “history of democratization”, arguing it would be false to assume that now the liberal world is “ready”, with no more exclusions and injustices to struggle against (Ibid. 235-237). While it is hard to reject the latter statement; this argument, constructing the opening of the liberal public sphere as a progressively one-directional process, makes no normative difference between liberal and illiberal doctrines. Thus, if the “identity politics” that now challenges the limits of the acceptable political arguments is an *illiberal* politics that could *reverse* the progressive development toward increased equality; should it be granted equal

status by liberal institutions with the earlier campaigns to extend the universal rights to people of colour, women, former slaves and gays?

The question that follows is whether democratic legitimacy requires that all political positions and demands, ideologies and doctrines be treated as equally valid. While questioning and challenging the existing rules and norms is a fundamental democratic right, it remains a relevant question whether at least the institution of certain universal rights should be the unconditional criterion for disqualifying certain political positions. In Isaac et al's example, the problem at hand is connected primarily to questions of certain civil rights: the reproductive rights of women and the right of children to equal access to education and the basics of scientific knowledge that is, if not "the truth", then widely regarded as relevant. The example raises also wider questions about the continued validity the Rawlsian exclusion of "comprehensive doctrines" from politics. While "Christian fundamentalists" rarely question the secular law as a whole, although they make explicitly illiberal claims regarding not only educational and reproductive rights but also the right to equality of e.g. homosexuals; Islamic political movements call for the institutionalization of a compact religious law that explicitly denies the essential constitutional rights of some members of their religious community, from gender and sexual equality to the freedom of conscience and speech<sup>22</sup>.

If religious arguments are accepted as the basis of illiberal, anti-egalitarian legislation for some groups in the name of "multiculturalism" (as in the Canadian case); they will be harder to resist in other contexts as well. This means that when the "democratic" equality of doctrines and the constitutional equality of persons contradict; that is when such doctrines attempt to enter politics that do *not* recognize the equality of all persons; liberal democracy faces a choice. It is not a choice between "democracy" and "individual rights"; but between different *conceptions* of democracy, one that accepts all political doctrines equally and allows the democratic procedures to determine which ones will ultimately win, irrespective to the

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<sup>22</sup> For example, Syed Mumtaz Ali of the Canadian Islamic Institute of Civil Justice has argued that Muslims as a collective should have a constitutional right to punish the members of their community for apostasy in accordance with the Islamic law – for leaving the religion, or for refusing to abide by the religious family law had it been institutionalized. Similar claims have been made by several officially recognized Islamic organizations in other liberal democracies, such as Sweden, UK and US. The right to punish apostates is often presented as a constitutional religious right of Muslims as a religious community. Thus arguing against the individual rights to freedom of speech and conscience by appealing to *collective* religious rights they effectively attempt to ban criticism of the religion by its own adherents even in liberal polities. See e.g. <http://www.muslim-canada.org/apostasy.htm>.

consequences to some individuals and groups (and ultimately, to the continuity of democracy itself); and one that unconditionally treats all its citizens as equals, allowing them all a voice in the political public sphere, but also containing mechanisms to disqualify the positions of those participants who refuse to recognize each other's equality and who threaten the continuity of free deliberations.

Isaac et al's suggestion to solve the dilemma of Christian fundamentalism is that instead of appealing to qualifying criteria such as "public reason", the democratic procedure itself should function as a legitimizing device. They argue that only the commitment to the ideals of procedural democracy can legitimately constrain public authority; implying that such norms may invalidate certain forms of political conduct, like those involving the use of terrorism, promotion of violence and physical intimidation of opponents, or "those that result in the exercise of governmental authority directly to silence or disenfranchise particular individuals or groups" (Isaac et al 1999, 237-238). They criticize liberalism's reluctance to allow (illiberal) comprehensive doctrines in the public sphere as "a politics of avoidance" that is practiced "in spite of the refusal of many constituencies to acknowledge its legitimacy", which implies that "those who cannot be convinced [about the rightness of the liberal principles] must be coerced" (Ibid. 239). This, they argue, is why courts assume a prominent role in liberal politics, representing a power outside and above the "unruly multitudes of the demos" (Ibid.).

But would it benefit democracy if such "coercion", that is, the binding appeal to the constitutional principles, were *not* used to protect the equality of basic individual rights? How "coercive" is liberal constitutionalism, in comparison with the alternatives it attempts to bar from the political sphere? Obviously, as Isaac et al acknowledge, it does not restrict political speech as such. Thus the question is, does it create a legitimacy problem for a democracy if its citizens are "coerced" to respect the equal constitutional rights of other citizens? Can a democracy be inclusive without such "coercive" restrictions – or does this dilemma just indicate that democracy can never be fully "free" (of coercion, "rule of law" or normative criteria); that democratic politics necessarily implies choices between competing *modes* of power, including competing reasons for and methods of coercion? Jung argues that proponents of democracy need to recognize that certain political doctrines are incompatible with democracy. She recalls that if it is the *normativity* of the liberal rights that bothers its democratic critics, it should not be forgotten that democracy is

also based on certain values: “Substantive democracy holds a conception of the good that includes freedom of expression, association and worship, critical thought, and opposition” (Jung 1999, 271).

Thus democracy shares the major flaw of liberalism: it is not totally neutral. Jung notes also that procedural democracy alone does not guarantee just and legitimate outcomes: it is likely to favor the interests of the groups that are well organized, rich and/or big. She argues: “[where] liberalism and democracy struggle, democracy is not obviously the moral victor” (Jung 1999, 271-272). That remains so when democracy is procedurally participatory and inclusive: for less resourceful and numerically small groups; including political minorities within well represented groups; equal constitutional rights appear to constitute the minimal requirement for them to have a chance to participate at all. Although it is legitimate and should be possible in a free and open public sphere to scrutinize the prevalent criteria of “reasonableness”; as the feminist movements have done, thus significantly opening up existing political spaces to previously depoliticized but politically relevant issues; granting this right of scrutiny to all groups and participants does not have to mean that all challenges lead to positive changes or that all political “struggles” are equally democratically legitimate. The problem with the strictly proceduralist approach is that illiberal and antidemocratic doctrines *can* succeed through democratic procedures without recurring to violence or threats. This possibility is not taken seriously by the proponents of radical inclusive democracy who see constitutional constraints as illegitimately restricting the democratic process. In contrast, Jung argues that anti-democratic doctrines cannot be accommodated in democracy exactly because of their capacity to overthrow democracy. Defining “fundamentalisms” as religious, economic, ideological or cultural identities articulated as “essentialist, all-encompassing, totalitarian and exclusive”, she argues that fundamentalisms are “alternative to democracy and therefore cannot be processed within democracy” (Ibid. 269).

The critics of the neutrality of liberalism often fail to note that while liberalism indeed is “partial”, democracy also is a politically and morally particular ideal. The vision of a perfectly neutral and all-inclusive self-regulatory democratic sphere is not less illusionary than the vision of a perfectly neutral framework of liberal rights; but it is more idealistic in the sense that it refuses to acknowledge the political threat represented by antidemocratic movements acting through democratic procedures. It

seems that those who oppose constitutionalism in the name of democracy believe that democracy can be arranged without making any normative choices. The illusion that an agonistic self-regulation of multiple struggles for power brings about the most just and egalitarian outcomes probably also motivates much of the feminist aversion towards the “individualist” liberal norms. Nevertheless, the sheer existence and recurrent resurfacing of not just different religious fundamentalisms, but also of openly racist, sexist and Fascist movements in democratic political spheres should make the proponents of inclusive and agonistic democracy acknowledge that there must be some normative limits to the inclusion of doctrines, ideologies, political positions and arguments, as opposed to individual participants, in the democratic public sphere.

However, the position in an inclusive democracy of such political doctrines that refuse to be “convinced” to respect the equality of all citizens and the general principles of liberal democracy is conspicuously absent in most democratic theories. Critics are certainly right that Rawls too confidently just *assumes* the universal commitment to the liberal principles and thus denies their explicitly political dimension. But similarly, proponents of deliberative democracy assume that citizens universally accept the principles of symmetry and mutual respect. And Mouffe, in her radical democratic vision, assumes that the disagreements, no matter how conflictual, occur about the competing *interpretations* of the values of equality and liberty, not about those values themselves; just as postmodern feminist critics of all forms of normative universalism assume that a spontaneous democratic field of “multiple struggles” is likely to provide outcomes that are desirable from their progressive perspective. None of them explicitly discusses the position of illiberal or antidemocratic politics in democracy; those resenting the institutional mechanisms of exclusion apparently prefer to expect such positions, if they exist, to disappear once there is enough freedom for all voices to be heard.

In this sense, deliberative and radical democratic positions are not very different from conventional liberal ones. When Isaac et al admit that they criticize “political liberalism” *in order to defend liberalism* from eventual conservative resentments; they assume that the conservative positions are more likely to go away when given a chance to be aired in public. This implies an assumption that in a totally free public sphere, reasonable positions ultimately win. Similarly, Benhabib argues that including fundamentalist positions in democratic deliberations will at least force them clarify their political positions, while excluding them may radicalize

them further. She is nevertheless more aware than many other writers about the need to draw lines in such discussions; defending the “equality of all before law” and “nonnegotiable constitutional essentials” (Benhabib 2002, 118-119; 128). Rawls, discussing briefly the liberal attitude toward the “intolerant” argues that the intolerant, when comprehending the benefits of a just, free and stable society, will “acquire an allegiance” to the liberal state in a while: “The liberties of the intolerant may persuade them to a belief in freedom” (Rawls 1972, 219). In the unlikely case that the intolerant sects or movements will *not* gradually “convert to liberty”, he argues that the liberty of the intolerant can be limited, to preserve freedom under a just constitution, only “when the tolerant sincerely and with reason believe that their own security and that of the institutions of liberty are in danger” (Ibid. 220). All these views contain assumptions that proponents of illiberal positions will, when appropriately included, realize that it is more reasonable to revert to liberal positions. In this sense the constitutionalist conception of “gag rules” as explicit limits to what is acceptable in a democratic public sphere, is more openly “political” and more “agonistic”; as it acknowledges the possibility of conflict and disagreement on serious issues: they offer institutional safeguards against illiberal political positions for the perhaps unlikely, but historically not unprecedented, possibility that instead of accepting the liberal values at a point, they grow and gain political influence *through democratic procedures*. (Holmes 1993, 201-205; 1988, 195-240.)

The politics of universal rights, and the ever present possibility of political positions that do not recognize them, makes proponents of *any* model of democracy to face a choice. If inegalitarian “comprehensive views” are allowed to participate on equal terms in actual legislative processes guided just by procedural rules, democracy itself could be threatened by the political success of such views. If they are allowed to participate in “public debate in civil society”, but blocked from exercising political power, moments of exclusion and criteria for justifying exclusion are impossible to escape. So how can a democracy avoid acts of *illegitimate* exclusion and encourage serious political contestation without risking its own continuity? If radical democrats criticize political liberals for eliminating genuine political differences but admit that they also support the protection of universal rights, what are the “disagreements” that they encourage and proponents of political liberalism try to silence? Is it true, as Mouffe claims, that liberals attempt to eliminate “democratic struggle among ‘adversaries’, that is those who *share the liberal-democratic principles*, but have

different interpretations of what liberty and equality should mean” (Mouffe 2000; 30, my emphasis); or is the task of the universalist politics of rights to protect democracy from those who reject liberty and equality outright? Once it is recognized that the politics of rights represents a particular political ideal (as does the politics of deep democracy); is it illegitimate from a democratic point of view to justify an institutional protection of this ideal, if it also is a condition without which democracy has not yet proved to be feasible? Also, if proponents of political liberalism indeed try to “eradicate legitimate dissent” for the sake of consensus, why do they protect the freedom of speech? Is the motivation behind the liberal “gag rules” strife to harmonic reconciliation as Mouffe insists, or the fear that such reconciliation is not available, as Isaac et al argue (Ibid.; Isaac et al 1999, 226-230)?

Isaac et al’s example of liberal courts excluding religious fundamentalist positions as “unreasonable” reveals the possibility that a participatory democracy that is widely inclusive in terms of doctrines and positions may help promote goals that are conservative, antifeminist, homophobic or otherwise hostile to social liberal policies; and reversely, that the liberal politics of rights may be used to promote such policies. This apparent paradox is confirmed by the discussions, referred above, on homosexual rights in the US as well as Europe, in which the progressive positions are supported by explicitly liberal, as opposed to democratic or communitarian, arguments. It seems that egalitarian policies are hard to promote without appeals to both universalist and individualist arguments; and more often than not, when a political position in the democratic public sphere genuinely conflicts with the universalist politics of rights, it challenges liberal principles from a conservative rather than an egalitarian and deeply democratic perspective. Given that compromising the universality of rights inevitably implies compromising the inclusion of some members of the society, rights-based constraints on democratic procedures do not contradict the democratic values of equality and diversity the way that many critics argue. While liberal politics is not as averse toward conflict and disagreement as critics claim, democracy itself contains limits to the extent and quality of conflict that it is able to accommodate.

## 4.2. The politics of rights as democracy

I argued in the previous section that in spite of the emphasis on conflict and disagreement of some critics of liberal politics, some proponents of liberal constitutionalism appear to be more aware of the nature of political conflicts and less idealistic about the possibilities of consensus and harmony than their more consensus-oriented liberal counterparts as well as their radical democratic critics. To continue that discussion, I revisit some positions that see democracy and a universalist politics of rights, formulated as constitution or “the rule of law”, as mutually supportive and interdependent. Of these, Habermas’s view of the “internal relation between the rule of law and democracy” criticized by Mouffe as an apology for liberal imperialism, still remains abstract and idealist insofar as it makes the initial constitution of rights dependent on the will of all citizens to recognize each other’s equality and autonomy. Habermas describes the relationship between rights and democracy as strictly reciprocal: “one starts with the horizontal sociation of citizens who, recognizing *one another* as equals, mutually accord rights to one another” (Habermas 1996, 457). Defying conceptions of “natural rights” he argues:

“the liberal rights protecting the individual against the state apparatus [...] are by no means *originary* but rather emerge from a transformation of individual liberties that were at first *reciprocally* granted” (Ibid.).

Thus, the rights that grant citizens legal equality and political freedom to engage in democratic deliberations are not seen by Habermas as externally given but as mutually granted by citizens to one another. The mutual dependency of rights and democracy lies in the fact that while the founding of rights is seen as an inherently democratic act, equal rights institutionally enable the functioning of an egalitarian democracy:

“without the classical rights of liberty there is also no medium for legally institutionalizing those conditions under which citizens can first make use of their civic autonomy” (Ibid. 455).

This account, however, although not relying on a vision of rights as absolute moral norms as Mouffe implies, relies on an idealist vision of an original universal egalitarianism that is hard to find in historical records; and underestimates the reluctance of many citizens of emerging democracies to recognize each others’ equality and the role of political struggles in extending the reach of the rights initially granted only to a limited range of citizens.

Ontologically Habermas's account of rights as citizens' institutionalized commitment to mutual recognition of each others' equality resembles Arendt's view of rights as markers of legal status granted by people to each other. But Arendt is sharply aware of the formative role the constitution has for democracy:

“A legally unrestricted majority rule, that is, a democracy without constitution, can be very formidable in the suppression of the rights of minorities and very effective in the suffocation of dissent without any use of violence” (Arendt 1969, 42).

Habermas's vision of rights as an enactment of an initial reciprocal recognition of equality underestimates the extent to which an egalitarian politics of rights, enacted through constitution-making processes, enables the development of a democratic public sphere even without such universal recognition of equality. Thus Holmes's defense of constitutionalism as a politics that *enables* democracy, while confirming the Habermasian view that democracy and the politics of rights are mutually interdependent, is more realistic about the political nature of the politics of rights: it is seen not just as a neutral framework of democracy or a consensus-based cementation of an initial mutual recognition of universal equality; but as a way to actively create, occasionally *against* the political interests of some segments of society; rules and institutions that allow democracy, plurality and diversity to thrive.

In contrast to many other proponents of constitutionalism, Holmes does not create a hierarchical relation between rights and democracy so that the primary task of the constitution is the protection of individual civil rights and democracy has just the instrumental role of a public “watchdog” securing the enforcement of those rights. He defends the constitutional politics of rights as a foundation of democratic politics without which, in his view, democracy itself is unthinkable. Refusing to see democracy and rights in mutually contradictory terms, Holmes argues that “the basic principles of liberal theory provide a plausible foundation for democratic government” and that “[constitutional] restraints on temporary majorities are designed to *facilitate rather than to paralyze democracy*” (Holmes 1995, xii, my emphasis).

While Holmes's view is constitutionalist in the sense that he justifies the protection of constitutional rights from democratic decisions and the removal of certain issues from the political agenda; he does not oppose adding participatory inclusion or substantive depth to democracy. Following Mill, he is concerned with rules guarding the *content* of the decisions that a democracy can be allowed to make, not the range of participants or modes of participation (although Mill was primarily

wary of the public intervening with individual rights; Holmes of the capacity of democracy to undo itself). Holmes argues that support for democracy is perfectly compatible with uncontroversially liberal commitments; and that those who advocate a strengthening of democracy “do not have to be antiliberal in a way that many of them still apparently believe they must” (Holmes 1995, xii). *Pace* Schmitt’s claim, endorsed by Mouffe in her critique of the politics of human rights, that democratic sovereignty and individual rights are in insoluble tension, he claims that limited government and self-government are mutually supportive rather than subversive (Ibid. 136).

Conceiving of democracy in a deeper sense than mere majoritarian decision making, Holmes sees the right of all citizens to security from arbitrary intervention and coercion, as well as to participation and speech, as such an essential constituent of democracy that in order to protect that right it is justified to dismiss majority decisions if they fail to respect it. The constitutional constraints on democracy, thus theorized, appear to be not restrictions against “too much” democracy but rather gatekeepers of its *quality* – means to keep open the channels of dissent, disagreement, opposition and diversity of opinion even if a majority is willing to close them at certain moments. In this view, the constitutional constraints limiting the reach of democratic decisions appear *more* compatible with the feminist and radical visions of democracy emphasizing difference, diversity, plurality, conflict and struggle than with robust accounts of democracy as sheer majority rule. Holmes insists that the restrictive role of the liberal constitution is simultaneously democracy-enabling and democracy-preserving: its task is “to strike down all legislation, no matter how popular with electoral majorities, that *undermines the conditions of a well-functioning democracy*” (Holmes 1995, 136-7, my emphasis).

It can be questioned whether a “well-functioning democracy” can exist against the will of the majority of its citizens. In the long run – hardly: even constitutional democracy needs wide citizen endorsement in order to function in accordance with its own values. But the constitutional protections can prevent occasional antidemocratic forces that use democratic means to acquire legislative power from undermining democracy when the polity is otherwise capable of upholding it. In Holmes’s view constitutional constraints on democracy cannot be refuted as “antidemocratic” if their task is to guard such institutional arrangements that allow democratic discussions and decision making from being overthrown by a temporary

majority (Holmes 1995, 162-163). He emphasizes that no democracy, no matter how participatory its procedures, can work without some institutionalized “rules of the game” that all players are expected to follow – an insight that hardly any democratic theorist rejects. Holmes sees the liberal constitution as such a set of rules, a “legal framework that enables the electorate to express a coherent will” (Ibid. 167). Rejecting Schmitt’s “democratic mysticism” as “a utopia of a democracy without rules that regulate its functioning”, he argues: “In practice, liberal democracy is never simply the rule of the people but always the rule of the people within certain predetermined channels” (Ibid. 168). Emphasizing that the major task of constitutional constraints is to prevent elected rulers from silencing political dissent, Holmes raises democratic liberties above some other traditional liberal rights:

“The primary function of constitutionalism [...] is to protect the hazardous freedom of political discussion, not private property or liberty of contract. An open society can be preserved only if the government is prevented from silencing its critics and if diverse political opinions can be freely aired” (Ibid. 169).

Describing individual liberties and democracy as mutually interdependent, Holmes notes that while unaccountable rulers in a non-democratic regime are able to intimidate and harass individual citizens, a citizen lacking private independence could find a chance to participation in collective decision making essentially worthless (Ibid. 183). This is an important insight also considering gender-based hierarchies within families and “cultural rights” that enable communities to silence and intimidate their members. The lack of rules in certain spheres allows other modes of power to take their place. An unconditional defense of universal individual rights is thus a minimal condition when the goal is to encourage a horizontal division of social power between all individuals regardless of their gender, religion, ethnicity etc. Recognizing the inevitability of *some* restrictions helps to define which ones are more constitutive of democratic legitimacy. Holmes, arguing that the freedom of the sovereign people “actually presupposes some inflexible rules”, is willing to tie the hands of the majority, not to prevent them from making “wrong” decisions, but to prevent them from legislating rules that would end the free and open deliberations by silencing minorities or future majorities:

“In a liberal democracy, elected legislators must *make no laws* which interfere with voting rights, the free flow of information, freedom of assembly, and political access for protesting minorities” (Ibid. 176).

Holmes's defense of constitutional constraints on democracy combined with his emphasis on the democracy-preserving purpose of such constraints is based not on a traditional elitist view that majorities can be manipulable, ignorant and not aware of their own best interests, but on a sober recognition that it is possible that antidemocratic political forces can gain power through democratic procedures. He is concerned not with the majorities' capacity to recognize their "real" interests but with their willingness to grant the continuous right to voice and dissent to others who at the moment lack the political power to protect themselves. Thus he is less optimistic than many critics of constitutionalism about the capacity of democratic procedures to always produce democratic outcomes. Indeed this constitutionalist view is based on an awareness of the possibility of "serious disagreement"; that is, unlike many liberal as well as radical democratic theorists Holmes acknowledges that not all participants in a democratic politics necessarily subscribe to the liberal democratic values. The goal of restricting the access of such positions to legislative powers is not motivated by a dream of "closure", but on the contrary, a wish to avoid closure and perpetuate the free flow of exchange of ideas and criticism.

*Pace* those critics who accuse liberalism for pretending to represent a neutral framework while being engaged in enforcing rules and drawing division lines that are highly political, Holmes makes no claim that such choices are neutral and acknowledges that constitutionalism is an active political stance whose task is to enable democracy – itself, admittedly, a highly political value. While Benhabib, Shapiro and Waldron are right that as there is legitimate disagreement about the meaning, extent and content of rights, those issues should be subjected to democratic deliberations at least to an extent; Holmes is also right in recognizing that securing certain rights is indispensable for such deliberations to be able to take place in a democratic manner. Thus, while the objectivist justifications of liberal universalism such as Rawls's can easily be questioned on the basis of their rationalism, Holmes's view of constitutional rights as a precondition for open democracy is harder to refute on the same grounds. Admitting that there are disagreements about rights and that the politics of rights is a contingent political creation does not contradict the insight that a universal politics of rights is a precondition for democratic inclusiveness.

As I indicated in part II, Waldron also conceives (collective) self-government and (individual) rights as mutually supportive. But he is sceptical about the

constitutional constraints on democracy, because in his view individuals cannot be threatened by collective will-formation as the collective is constituted by those same individuals. Waldron argues that it would be absurd to fear that individuals, when acting collectively, would choose to infringe on their own rights; and that the respect for fellow citizens as autonomous beings that motivates the politics of rights in the first place implies an assumption about their reasonableness; thus to establish institutional protections against their collective will-formation would be arrogant and elitist: “It is precisely because I see each person as a potential moral agent, endowed with dignity and autonomy, that I am willing to entrust the people *en masse* with the burden of self-government” (Waldron 1999, 223).

However, Waldron makes no distinction between autonomy as a political norm and an empirical statement that once such norm is generally recognized, all people will act as responsible autonomous agents *and* respect the autonomy of all others. Holmes’s constitutional protection of rights from majoritarian decisions makes no such empirical assumptions. Respecting the norm of autonomy does not preclude that there may develop a political will in a democratic society that denies the autonomy of some or even most people. Likewise, the defense of democratic proceduralism by Isaac et al contains an optimistic assumption that the procedural rules regulate the outcomes so that neither democracy nor liberal values are threatened by participants who abide by the rules; precluding the possibility that antidemocratic movements can proceed in politics through non-violent means. It seems that the critics of the majority-constraining effects of constitutionalism rarely actually argue that a majority should be able to question the universal politics of equal rights; rather, they are confident that in a genuine democracy that will not happen. But if, as Holmes argues, the main task of liberal constitutions is to perpetuate the possibility of free and open deliberations and political struggles regardless of the moods of legislative majorities at particular historical moments, democratic-minded majorities can hardly feel significantly disempowered by such constraints.

While it is easy to argue against the constitutionalist view, as many feminist critics have done, that liberal rights are not *sufficient* to produce substantive equality and democratic inclusion; given the role of rights in creating the spaces for dissent to be voiced and political struggles to be acted out; and as Holmes emphasizes, the role of constitutionalism as a politics that prevents such political spaces from being closed;

the feminist and radical democratic critique of liberal universalism as potentially homogenizing, solipsist, exclusive and anti-democratic apparently underestimates the extent to which liberal rights have enabled not only a variety of emancipatory movements, but also that critique itself to unfold and develop. While a pursuit to theorize democracy in more inclusive and substantively egalitarian ways is justified, the failure to recognize the democracy-enabling and democracy-preserving dimensions of the liberal politics of rights eventually blurs the distinction between “radical democratic” and radically antidemocratic visions; a phenomenon that haunted Western political thought throughout the 20<sup>th</sup> century. If the measure of democratic legitimacy is the existence of political spaces where dissent and disagreement is not only tolerated but encouraged, then a liberal constitution that, in Holmes’s words, “can prevent the sovereign people from renouncing its capacity to learn from criticism and dissent” is indeed its essential constitutive component (Holmes 1995, 176).

### **4.3. Rights as enablers of inclusive democracy**

The fact, emphasized by Holmes, that constitutional rights *enable* democracy by regulating the power of legislative bodies to limit opposition and free speech, has been often ignored by deep democratic, communitarian and feminist critics of liberal theory. As the politics of rights necessarily forms a set of restrictions to what can be done in and through politics, the insight that it represents an active use of political power and not just a neutral framework for practicing politics, easily raises suspicions that the exclusions it creates are likely to be unfair to the already marginalized people and groups. Critics of the liberal politics of rights from conservative, communitarian and deep democratic perspectives have widely different views of what the politics of rights *does* to the political sphere and the subjects acting within it. The liberal politics of rights can be blamed for perpetuating the *status quo* regarding existing patterns of privilege and marginalization; or for breaking down “community values” or traditional hierarchies by granting equal status to gays, women and minorities and allowing subversive movements to gain political foothold.

As no theorist of inclusive democracy has proposed a viable alternative to individual rights as the foundational condition for democratic citizenship that is

equally open to all citizens regardless of their ascriptive identities or political allegiances, the anti-rights rhetoric prevalent in much of recent democratic theory is hard to explain on *democratic* grounds. If democracy is seen as a regime that offers its members a chance to challenge and contest existing power relations and struggle for justice; the lack of institutions that credibly enforce basic citizen rights is structurally likely to suffocate such open spaces. In a way, the politics of rights *does* create an “external” framework within which democracy can operate so that none of its members needs to fear for their life or liberty if pronouncing their political views. But that does not mean that such a framework is absolutely neutral and objective: it relies on certain values that it supports to ensure its own continuity; its necessarily imperfect objectivity consists mostly in its ability to allow universal participation and encourage creating open channels of public deliberations. To be able to fulfil such a function, it needs to be “biased” and restrictive against such political forces that would close such channels if allowed access to legislative power.

If the democracy-enabling moment of constitutionalism lies in the fact that it is restrictive in order to be creative, restraining those who refuse to recognize the equal citizenry of others; the role of the politics of rights in forming democratic *subjects* is also cast in a different light. It is interesting to compare Holmes’s view of “creative constitutionalism” with Brown’s and Halley’s view of “legalism” as subject-producing power. There is no significant disagreement between these views on whether the politics of rights *does* produce and form the subjects it formally regulates. When Brown and Halley recognize the creative force of the politics of rights: “Because law can take the shape of permissions rather than prohibitions, it can invisibly capacitate social and cultural actors to do particular kinds of social and cultural work” (Brown & Halley 2002, 13); they see it as a reason for caution and suspicion; quoting as dangerous the possibility that left and progressive rights claims may unknowingly accommodate to the *liberal* language of rights that has the normativizing effect of producing subjects as “individuals and choosers” (Ibid. 17). As I indicated above, they criticize “liberalism” for substantively constituting subjects while denying that it has such effects. Apart from the little convincing examples regarding the allegedly negative subject-producing effects of certain rights and laws (cf. 2.5. above), Brown and Halley fail to specify why the “grave rearrangements” that liberal rights have caused in the processes of forming social identities must be seen in negative terms. Holmes’s “creative constitutionalism” defies the claims that proponents of “legalism” deny the subject-producing capacities of rights. He indicates that already Mill, albeit

using a different rhetoric, emphasized the “subject-productive” role of the politics of rights; stating that institutional arrangements can have a “creative function” (Holmes 1995, 170).

Those liberal writers, like Mill, Holmes and Ignatieff, who recognize the political nature of rights and see it in positive terms as an enabler of democratic politics, focus on democratic citizenship rather than private identities when discussing the subject-producing power of liberal rights. Their view that constitutional rules and institutions enhance freedom and citizen involvement implies that those rules encourage the subjects to be politically creative. Holmes argues: “To say that constitutional rules are enabling, not disabling, is to reject the notion that constitutionalism is exclusively concerned with limitations of power”; he emphasizes that those rules are not just restrictive, but also “creative”, organizing new practices and generating new possibilities (Ibid. 163). In this interpretation, by encouraging citizens to act and speak freely, the liberal politics of rights produces subjects that are active, interested and engaged rather than passive, scared and obedient – a development not at all incompatible with the ideals of deep democracy.

Holmes also argues: “[limits] do not necessarily weaken; they can also strengthen” (Ibid.). As these “limits” are restrictions placed by constitutional rules upon coercive political power, it is the potential subjects of such power who are strengthened by the rules. Rights, thus, do not just “normalize” and discipline, they also encourage and empower. The capacity of the language of rights and of rights-based institutions to create democratic spaces of deliberations and contestations by restricting the arbitrary use of intimidation, force and coercion in both public and private spaces has been widely underestimated by the critics of liberalism who have attempted to shift the ground of democratic legitimacy from the politics of universal rights to agonistic or egalitarian concepts of participation, identity and inclusion. Although a politics of rights without its credible and transparent enforcement and effective channels of participation is hardly sufficient to grant democratic legitimacy to a regime; it remains the *sine qua non* of legitimacy because without the normative framework of universal rights there are no guarantees that either procedurally correct deliberations or free agonistic struggles will *not* lead to majoritarian decisions or “hegemony shifts” that end up discriminating, silencing or disenfranchising the least privileged and most vulnerable individuals or groups.

Although some critics of the liberal politics of rights have tried to envision “alternative conceptions of democracy” beyond the liberal democratic model, there is no empirical record of a democracy *not* based on a conception of universal rights and the institutions that enforce them (although the role of constitution in relation to democratic decision making varies in existing democracies). Thus, while many versions of the conventional liberal model can be rightly criticized for underestimating the legitimizing force of public participation, substantive equality, publicity and transparency of decision-making and official accountability; underestimating the way how an institutionalized politics of rights makes the promotion of all those ends possible is also delusive when theorizing legitimacy as inclusion. The deliberative model that derives democratic legitimacy from the capacity of affected parties to participate in making the decisions that affect them, with its view of rights and democracy as mutually interdependent, offers the most plausible vision of the conceptual position of rights in democracy. Unlike natural rights theorists and those constitutionalists who see any disagreements on rights as *legal* disputes to be solved in courts rather than *political* disputes to be discussed by the public and their elected representatives; deliberative theorists realize that the secular understanding of rights as outcomes of political decisions necessarily submits debates on rights to political processes. Nevertheless, the understanding of some proponents of deliberative democracy of the relation of rights and democracy as mechanically circular and necessarily mutually supportive; is vulnerable both to the radical democratic allegation that they underestimate conflict and power in politics, and to the constitutionalist critique that they fail to see the capacity of democracy, if not constrained by certain *external* restrictions, to undo itself.

Although the proponents of an agonistic conception of democracy tend to be more critical of constitutionalism than of deliberative democracy, it is exactly the realistic approach to serious disagreement and power struggles that motivates constitutionalists to bind the outcomes of democratic deliberations by external constraints. Ironically, strong egalitarian theories, skeptical of the capacity of formally equal rights to grant genuine inclusion of diversity and disagreement, appear particularly wary of the constitutionalist model that in fact protects the equality, rights and the continued possibility of inclusion of the individuals and groups that are *least* likely to succeed in promoting their interests through agonistic struggles or majoritarian votes. The political dimension of rights as not just a

component of deliberative processes but a structure *constitutive* of them is expressed more clearly by some theorists of rights than by many theorists of democracy. Ignatieff explicitly sees rights as a precondition of participation in democratic deliberations: “Rights language says: all human beings belong to the table, in the essential conversation about how we should treat each other” (Ignatieff 2001, 94). Holmes, speaking about the “creative rather than merely protective functions of liberal-democratic institutions” describes constitutionalism as a precondition of deliberative democracy, not its rival:

“the interdependence of constitutionalism and democracy presents a paradox, not a contradiction. Liberal restrictions on the powers of the majority [...] are designed not only to ward off majority tyranny, but also to organize popular decision making and put deliberative democracy into effect” (Holmes 1995, 178).

Emphasizing the protection of deliberative aspects of democracy as a major task of constitution-making, he argues that this “idea of ‘possibility-generating restraints’ helps explain the contribution of constitutionalism to democracy” (Ibid. 172-173).

When radical democrats call for open political spaces and political agency radically aware of existing power relations and willing to question them, they tend to dismiss the enabling role of the “individualist” politics of universal rights in creating such spaces and protecting them from reactionary backlashes. Brown describes “postmodern feminist” public spaces as more open and more deeply “democratic” than their liberal, Arendtian or Habermasian alternatives: they are bound neither by strict public-private divisions nor by “dreams of nondistorted communication”:

“Our spaces, *while requiring some definition and protection*, cannot be clean, sharply bounded, disembodied, or permanent; to engage postmodern modes of power and honor specifically feminist knowledges, they must be heterogeneous, roving, *relatively noninstitutionalized*, and *democratic to the point of exhaustion*” (Brown 1995, 50, my emphasis).

Brown does not specify what it means that those spaces require “some definition and protection”, but anything less than the constitutional protection of universal, equal individual rights can hardly secure that the “relatively noninstitutionalized” and radically democratic spaces can be used for promoting the feminist agenda and protecting it from, for example, conservative religious counterattacks possibly encouraged by the removal of the boundaries for publicly acceptable claims. The expressed “democratic” majoritarian positions in some states of the US in favor of criminalizing homosexuality and abortion or banning evolution theory in public schools – all refuted in courts by appeals to constitutional rights – offer some

empirical support to the assumption that occasionally, constitutional constraints may be needed to protect both particular feminist positions and the heterogeneous political spaces in which they can be freely articulated.

Given that there is no guarantee of natural “progress” of democratic publics that ensures that the citizens in all democracies grow gradually more egalitarian, fair, tolerant and mutually respectful; the democracy-enabling role of the politics of universal rights is not only relevant at a constitutive moment of *founding* the democratic institutions; but also for preserving those institutions and keeping the political spaces of deliberations and contestations free and open. Paradoxically, the more contested, conflictual and open the political spaces are, the stronger the need for the institutional protection of rights to keep such openness from being misused in order to silence or repress others. To celebrate the creative conflictuality of unconstrained democratic politics without recognizing the possibility that other than egalitarian, progressive and emancipatory movements can make use of it, is at best naïve and at worst self-destructive. The recognition of the constitutive role of the constitutional protection of rights in encouraging political agency contests the often expressed view that the liberal politics of rights is essentially “antipolitical”.

As I indicated above, the division between “liberal individualism” and “democratic collectivism” was challenged already by Arendt who described freedom not as “sovereignty” understood solipsistically as freedom *from* others, but as liberty to act *in concert with* others; and yet saw the liberal constitution as the necessary enabler of the realization of such essentially *political* freedom. Still, among proponents of participatory democracy, the view of the liberal politics of rights as antipolitical, individualist, abstract and indifferent if not hostile to democratic values, is strong, which is why they tend to underestimate the decisive role of the politics of individual rights, if not in guaranteeing democratic legitimacy by itself, then at least in constituting the necessary *conditions* for achieving it.

#### **4.4. A democratic politics of rights**

I have this far argued, following the comparison of the views of democratic theories on the relationship between rights and democratic participation as legitimating faculties, that the view of the proponents of deliberative democracy that rights and

democracy are mutually interdependent rather than contradicting is most convincing when the political and contingent nature of rights on the one hand, and the dependency of democratic inclusion itself on the protection of universal rights on the other hand is acknowledged. Recognizing, though, that the “deliberative conditions” cannot be assumed to be universally followed and thus inclusion cannot be guaranteed without a minimal legal framework that *externally* regulates democratic procedures, protecting their continuity from the possibility that they at certain moments may produce antidemocratic outcomes; I also supported a limited, explicitly political account of constitutionalism that recognizes that certain institutional protections of universal individual rights remain a precondition for democratic legitimacy, particularly if democracy is conceived as participatory and genuinely open to a diversity of social and political identities. Thus supporting the view that a universalist politics of rights is a crucial component of democratic legitimacy, I discuss in this final section some limitations of the discourse and politics of rights and the extent to which rights should be seen also as *objects* of democratic processes.

I also argued that the critique of the semi-metaphysical universalist narratives that have been connected with rights discourse, although empirically accurate, is sometimes misplaced as a critique of the liberal *politics* of rights, because that politics is not so dependent on such totalizing narratives as critics often assume. The insight that rights, as any normatively motivated rules, are historically contingent and essentially political does not in itself refute the normative and political arguments for the universality of rights: as an explicitly political ideal, the protection of universal individual rights is inseparable from democracy and especially from the deep democratic ideals of inclusion and equality. Still, the recognition that enforcing and interpreting rights necessarily happens through *political* decisions supports the view that democratic legitimacy requires that disputes on rights at least to an extent be subjected to public deliberations and democratic decision making procedures; although to establish the conditions for such procedures some rights must be protected *beyond* their eventual outcomes.

That constitutes the paradox of democracy recognized implicitly or explicitly by several conventional liberal as well as radical democratic theorists. Nevertheless, it is not a paradox between the values of “liberty” and “democracy” that according to Mouffe are in tension with each other; because democracy *presumes* the liberty of its citizens to be worth the name. Rather, it is a paradox based on the inescapably

contractual nature of democracy as a secular regime whose sources of legitimacy are necessarily human (as opposed to divine or metaphysical); and on the ever-present possibility that given the unpredictability of political action and the diversity of the ideologies and passions motivating it, it can never be taken for granted that all political actors respect the liberty, equality and autonomy of all their co-citizens and the constitutive values of democracy itself. The paradox between the negotiability of political norms and the need to fix some of them to create the conditions for the negotiations to be democratic, is complicated further by the fact that lacking absolute norms, drawing the line between the nonnegotiable and negotiable dimensions of rights is itself a political decision, as both Benhabib and Mouffe have argued (Benhabib 2002, 128-130; Mouffe 2005, 121). Obviously, a genuinely democratic polity must unconditionally protect the rights of all its members to life, liberty and equality; and to freedom of speech, conscience and political participation. At the same time, taking the politicalness of rights seriously; the meaning, extent, and interpretation of particular rights and the exact content of the bills of rights enforced in particular democracies, usually more extensive than the basics listed above; is legitimately on the agenda of open democratic deliberations and decision making processes. (Benhabib 1996, 79-80; Mouffe 2000, 2-3; Shapiro 1999, 6-10)

The endorsement of universal rights as a necessary condition of democratic legitimacy does not mean that the discourse and politics of rights are always unproblematic and unambiguous; or that there are easy answers in cases of conflicts of rights. It is fair to argue that democratic legitimacy presumes that such ambiguities be subjected to public deliberations, not only to courts as the strictest proponents of constitutionalism suggest. Even “human rights” discourses that are supposed to enforce the *most basic* rights that all subscribers of human rights treaties around the world can be expected to respect, contain mutually conflictual claims; often due to the tendency of rights talk to become “collectivist” that Ignatieff points out as problematic. For example, the “right” of religious groups to be not offended has been invoked to extend the scope of “hate speech” laws in many liberal democracies to protect religions from criticism, thus compromising the right of individuals to free speech. While inciting violence against any persons or groups is widely recognized as a legitimate restriction on the freedom of speech, a perceived “right” that places *doctrines* beyond criticism compromises not only the freedom of speech but also democratic inclusion, when the doctrines protected from criticism through rights discourse are used to support *political* arguments. In such cases the

importance for inclusive democracy of *individual* rights that facilitate unpunished nonviolent dissent is hard to overestimate: although group rights, as seen above, are sometimes promoted in the name of democratic inclusion, when collective rights are allowed to overrule important individual rights, democratic values are inevitably compromised.

While the universal politics of rights is *constitutive* of democracy, the “circular” conception of the *mutual* dependence of rights and democracy, envisioned in theories of deliberative democracy, is also confirmed by practice. Even when protected by constitutions, the enforcement of an egalitarian politics of rights depends on popular support, just as democratic inclusion depends on the universality of individual rights: if a majority permanently opposes an egalitarian and democratic order; which is empirically possible if it endorses a worldview or ideology that denies the democratic ideals of equality and autonomy or the human origin of law; then the politics of universal rights is indeed in conflict with popular rule. A society that widely rejects liberal egalitarian ideals cannot be seen as *democratically legitimate* in either case: when the political goals of the majority are systematically suppressed; or when they are imposed on minorities and dissenters who are thereby denied equal status. This is why *legitimate democracy* cannot be *imposed* on a people, although democratic developments can be encouraged and supported from the outside. While popular support alone does not make a regime democratic, any democratic regime is dependent on popular support. Democracy is vulnerable to antidemocratic movements as well as violent subversion within it *because* of its ideals of openness, inclusion and respect for individual autonomy. For example, the dynamic of the recently increased terrorist threat and the measures to confront it indicates that when actually attacked by organized violent movements, democracy is hardly able to defend itself *without compromising its own principles*. Democracy is thus empirically dependent on its citizens’ goodwill even if legally protected by a constitution; attacks against democracy are efficient even if violently resisted, because such resistance necessarily compromises democracy’s own values.

It is because the possibility of antidemocratic politics emerging within democracies that constitutional constraints are seen as the conditions for the continuity of democracy; but at the same time the conceptual incapacity of a non-violent regime to uphold itself by violent means implies that also the dependency of democracy on its citizens’ actual support must be acknowledged. In the light of this recognition the

deliberative democratic call for regular public revalidation of the values, norms and rules of democracy is not to be seen as a threat to democracy, but as a response to the necessarily fragile condition of democracy that those theorists who take the universal endorsement of its central values and principles for granted easily dismiss. Thus, Benhabib's simultaneous insistence that on the one hand, "[rights] and other principles on which the liberal democratic state rests [...] be periodically challenged and rearticulated [...] in order to retain and enrich their original meaning" (Benhabib 2002, 130); and on the other hand that "very clear lines" be drawn between "nonnegotiable constitutional essentials" and issues that can be subjected to democratic legislation (Ibid. 128); may not be seen as circular argumentation but rather as a suggestion that it is important that basic rights be subjected to *public discussions*, but *not* to democratic *decision making*. Benhabib explicitly states that it should not be possible to *change* constitutional rights without "extremely elaborate political and juridical procedures" (Benhabib 1996, 79).

In addition to subjecting the meaning, extent and interpretation of even basic rights to public scrutiny while the constitutional framework protects them from legislative decisions that would violate them; the range of protected rights can be limited even if a number of entitlements that cannot be counted among these democracy-enabling basic rights are also referred to as "rights". For example, the law in Finland recognizes a "right" of children to subsidized day care; a right that enjoys wide local democratic support, but that should be seen as a rule established by a particular society within a specific social context rather than a basic right necessary for democracy itself to function, like for example the freedom of speech. Likewise, while the universal right to education is crucial for a well-functioning democracy, it depends on resources and cultural factors what *kind* of education is established as a *right* in any given democracy.

Thus, a democratic politics of rights, while welcoming public discussions on the interpretation of *all* rights, needs to make a distinction between the non-negotiable basic rights without which democratic legitimacy would be compromised, and the more context-sensitive rights whose enforcement can be open not only to public discussions but also to regular democratic decision making procedures. Arguably, property rights, social rights and contract rights offer a wider range of legitimate interpretations than rights to equality, fair trial and freedom of speech; even though these rights also allow conflicting interpretations. Such distinction allows the relative stability of democracy to be combined with the open agenda of ongoing decision-

making; but it is part of the inherent insecurities of democracy that the distinction cannot be made in final and unquestionable terms. Thus Benhabib's argument about the constant need for revalidating democratic norms, even if unsettling from the point of view of continuity given that their reconfirmation is never fully guaranteed; works as a reminder of democracy's *de facto* dependency on its constituent citizens.

It is obvious that the rhetoric and politics of rights cannot cure all social grievances or solve all political problems. Thus the meaning and purpose of a democratic politics of rights should be explicit and limited: its task is to provide the framework for fair and egalitarian democracy to be feasible. The politics of rights cannot dictate the style of public deliberations and the degree of inclusion in ongoing decision making: those are defined by the institutional arrangements, procedures and local political cultures that can be pressured by local political action to become more agonistic, participatory and open. Dressing all political claims into a language of rights eventually leads to an "inflation" of rights that discursively weakens the rights claims that any legitimate democracy *should* take seriously. Also, discourses of rights offer limited tools for promoting feminist and other egalitarian and emancipatory goals unless legal equality itself is at stake. On the one hand, as feminists have argued, the politics of universal rights is relatively impotent in the face of the structural inequalities that tend to persist in spite of formal equality; on the other hand, as the discussions above indicate, the language of "special rights" is also a controversial tool for addressing such injustices. Because "group rights" potentially silence dissent within groups and create new division lines of exclusion and inclusion; and because giving up universal rights is more likely to aggravate structural injustices than to cure them; searching *additional* justice-enhancing policies within the framework of the politics of *equal* rights is a more constructive policy to promote substantive equality than challenging the universalist politics as if it were the *source* of the problem.

Democratic legitimacy, while dependent on a universal politics of basic rights as well as on credible channels of participation, requires neither that rights be removed from the democratic agenda altogether nor that all problems and grievances be presented as rights issues. Regarding the participatory inclusiveness of democratic institutions and procedures it is important to note that there is no correlation between the constitutional enforcement of a set of basic individual rights and limiting citizen participation in the public sphere: just as a representative democracy

may offer very limited channels for public participation and inclusion of different identity groups and at the same time promote illiberal policies through majority decisions if the representatives are not bound by constitutional constraints; a constitutionally restricted public sphere can allow relatively broad public participation in ongoing decision making and encourage agonistic styles of debate, as long as the constitutional barriers are respected. Constitutional constraints seen in Millian terms do not limit public participation or even the agenda of deliberations; only the reach and content of the *decisions* that can be made through those deliberations by either the representatives or the public at large. Although Rawls's and Habermas's view of "public reason" is indeed consensus-oriented, the politics of universal rights does not *have* to encourage a consensus-oriented politics or favor a particular conception of reason: the "interactive universalism" of Benhabib and the "creative constitutionalism" of Holmes are examples of rights universalism that is motivated not by a substantive conception of reason but by the commitment to equality and universal democratic inclusion.

Opening rights to public deliberations at least to some extent is a price constitutional democracy has to pay for refusing to rely on semi-metaphysical legitimizing narratives and for recognizing the contingency of its own constitutive norms and rules. This recognition, like democracy itself, is based on the premise that the sources of political rules, decisions and values are ultimately human and thus, no one can claim to have privileged access to moral, practical and political truth on the basis of a divine will, "naturally" superior rationality or historical necessity. Just as the idea of inclusive democracy is based on the insight that if there is no privileged access to truth, objectivity is to be searched through the interaction of existent perspectives; the norm of universal rights, when it is acknowledged that it does not stem from "nature", but from the normative ideal of human equality, is based on the insight that it is a precondition not just for "autonomous individuals" to make "free choices", but for creating the conditions under which *all* persons, including those not perceiving themselves as "sovereign" or "possessive individualists", can participate in the interactive procedures through which norms and rules are created that accommodate the interests and perspectives of them all.

The conception of a "participatory constitutionalist democracy" is hardly an oxymoron; it may seem such only when the right to participation is seen to imply an unconditional right to contest the constitutional norms and thus the equality and freedom of some fellow citizens; or when active public participation in politics is

seen as threatening in itself, regardless of its political content. This research indicates that neither view is represented in a pure form in recent democratic theory, although some particular arguments occasionally come close to such claims. To recognize that the arguments that justify both democratic values and the politics of rights are philosophically “thin” but politically closely connected to each other means on the one hand that liberal democracy as a normatively motivated egalitarian political order is dependent on *both* legal rules and popular support for its continuity and thus is not as obviously “hegemonic” as it is often seen to be; and on the other hand that in order to be more “democratic” in terms of inclusion, it does not need to become less “liberal” in terms of the universality of rights.

## **Conclusion**

In this comparative analysis of democratic theories, I focused on the questions whether a democratic political regime derives its legitimacy primarily from its capacity to protect its citizens’ individual rights or from its capacity to include citizens in political decision-making processes; and whether the establishment of rights and public participation in politics are seen as mutually contradictory or supportive. I take as my starting point the widely displayed assumption that conventional liberal theories see rights as the primary legitimacy-constituting faculty and ascribe democratic procedures just an instrumental value in order to protect the rights that are seen as given and undebatable; and theories of radical democracy regard liberal politics of rights essentially undemocratic and place the source of legitimacy in a public sphere that enables an inclusive public participation in politics. This research shows, however, that democratic theories are not as easily classifiable as “rights-based” and “participation-based” as it is often assumed; as theorists who support the liberal politics of universal individual rights do not always reject deep democratic values and proponents of deep democracy often take liberal democratic institutions for granted, while criticizing the liberal *discourse* of rights and enhancing the values of inclusion, diversity and participation. I endorse the view expressed in theories of deliberative democracy that universal rights and deep democracy conceptually and institutionally support rather than contradict each

other; although the paradox that rights enable democracy while they constrain the reach of its decisions is inescapable.

The first part of this research focused on how the sources of democratic legitimacy are conceptualized in the alternative theories that I categorize roughly as “conventional liberal”, “deliberative” and “agonistic” or “radical”. I outline the main features of first, those conventional liberal theories that represent a rationalist, objectivist and strongly universalist position that places legitimacy primarily on a constitutional politics of rights, featured in the work of John Rawls, Ronald Dworkin and Thomas Scanlon; second, the deliberative democratic theories that seek legitimacy in the possibility of all affected parties to equally participate in public deliberations on *all* political rules and decisions that concern them, introduced mainly through the work of Seyla Benhabib, as her interpretation of the model pays more attention to the inclusive and agonistic dimensions of deliberative democracy and is less consensus-oriented than some other accounts of deliberative democracy; and third, radical democratic theories that emphasize the aspects of identity, difference, diversity, conflict and subversion in democracy, see the legitimacy of democracy in its capacity to provide public spheres that accommodate those aspects and criticize the universalist models for their incapacity to conceptualize such public spheres. These theories, divided further as “agonistic”, “postmodern” or “identity political”, are introduced through the work of e.g. Chantal Mouffe, Wendy Brown and Iris Marion Young. At the end of part I, I raise the question whether democratic values and liberal rights are in conflict with each other.

In part II, I analyze how these alternative theories describe the conceptual relationship between democratic participation and individual rights. The study of alternative accounts of conventional liberal theory indicates that although some of them do display the features for which liberalism has been widely criticized, like rationalism, objectivism, strict separation of “public” from “private” spheres and “political” from “non-political” issues, and a sceptical view of democracy; not all liberal theorists are wary of public participation in political decision-making or unaware of the indeterminacy and contingency of the liberal politics of rights itself. I introduce some central critical arguments presented against liberal theories by feminist, postmodern and radical democratic theorists; mostly focusing on its allegedly elitist and “masculinist” nature and its incapacity to conceptualize the democratic inclusion of different social perspectives and to recognize genuine political disagreement, in spite of its formally egalitarian universalism. I indicate

that the theory of deliberative democracy, partly in response to that criticism, attempts to combine the ideals of participation and inclusion with the moral and legal universalism of liberalism; while the “agonistic democratic” model proposed by Mouffe explicitly emphasizes the *collective* aspect of “the political” in opposition to the “individualism” of liberal rights. An analysis of Mouffe’s arguments indicates, however, that it is not easy to envision democracy in separation from liberal values and institutions; *especially* if democracy is conceived in inclusive and participatory terms and not just as mechanical majoritarian rule.

In part III I revisit the feminist and radical democratic criticism of the discourse and politics of rights; and the postmodern critique of the universalist “grand narratives” that connects those narratives to liberal politics so that their deconstruction also allegedly delegitimizes liberalism’s central tenets and thus its political ideals. I support the critics’ view that the politics of rights cannot be legitimately founded on metaphysical or semi-metaphysical claims about rationality, “Truth” or “human nature” and that the ideals institutionalized through liberal bills of rights are historically contingent and explicitly *political* ideals. But I argue that such insights do not delegitimize the concept of rights as a marker of the normative and political ideal of human equality, or the politics of universal rights as a necessary albeit insufficient condition for inclusive democracy. Discussing the meaning of the concepts of “individuality” and “humanity” in rights discourses, I indicate that they need not be connected to metaphysical grand narratives and that it is indeed hard to justify visions of inclusive and radical democracy without invoking universal and “individualist” moral concepts. Endorsing the political goals of feminist and radical democratic politics of inclusion, plurality and diversity; I argue that a critique that denounces the “individualist” and universalist tenets of liberalism for the sake of such egalitarian goals is self-defeating, because without the norm of universal equality that emphasizes the equal worth of each individual person, the politics of inclusion is itself hard to defend; and without the institutional enforcement of universal equality through a politics of rights the least privileged groups and persons are likely to suffer most.

While some conventional liberal legitimizing models indeed rely on strong rationalist and objectivist arguments and envision democratic politics in too narrow and restrictive terms to generate legitimacy understood in deep democratic terms; a politics supportive of universal liberal rights does not *need* to rely on strong

rationalist arguments and is not threatened by participatory and active democratic spaces, as long as there are institutional safeguards to protect the “rules of the game”. The justification of a politics of universal rights, when rights are understood as an explicitly normative political creation, does not have to rely on superior rationality or absolute objectivity: in democratic discourses such politics can be supported “just” as a precondition of democratic equality and openness. Thus, I defend a vision of limited constitutionalism that presents the politics of universal rights as a politics *enabling* democracy by restricting the use of coercive power by elected political authorities: such account, unlike many more utopian theories, takes seriously the “agonistic” dimensions of democracy, including the possibility that not all participants in public deliberations favour progressive and egalitarian policies.

If the possibility of antidemocratic political forces emerging through democratic procedures is taken seriously, constitutional constraints on democratic decisions can be seen as safeguards not just of the “private” and “individualist” liberal rights but also of the continuity of democracy itself. However, when rights are seen as outcomes of *political* decisions, democratic legitimacy requires that they be subjected to public decisions to some extent. This paradox cannot be solved but needs to be perpetually balanced; eventually, as I suggest, by fixing the basic rights without which democracy is not conceivable through constitutional rules that are hard to change and that can be used to disqualify the illiberal political positions that fail to recognize other citizens’ equality; and allowing more debatable issues of justice and law to be established and eventually changed by democratic publics.

While moral and “private” issues cannot be excluded from political debates as strictly as some conventional liberal theorists have suggested; disqualifying some arguments or doctrines from the legislative arena, although sometimes seen as a potentially “undemocratic” act of exclusion, is not democratically illegitimate if they promote openly antiegalitarian policies or a regime change that could bring about extensive silencing of individuals, groups or whole peoples. Notably, not many critics of the moral, legal and political universalism of liberal and deliberative democratic theories explicitly defend *illiberal* or antiegalitarian positions. The interdependency of democracy and rights is confirmed by the fact that no models of democracy that do *not* presume some institutions of universal rights have been seriously envisioned: whenever political regimes are justified that are indeed *alternatives* to liberal democracy (not just its “improved” versions); those alternatives are not only illiberal,

they are also undemocratic; at least when democracy is characterized by the equal civil and political status of its citizens.

This research indicates thus that there is less variation between the alternative democratic models than the sometimes sharp tone of their mutual criticism allows to assume, when it comes to the actual institutional and procedural arrangements of democracy: the liberal, deliberative and agonistic models all presume, more or less explicitly, some implementation of citizen rights, democratic institutions and a public sphere of open political discussions. The differences between the alternative models concern not so much the actual democratic institutions promoted but the *legitimizing* arguments on the one hand; and *political styles* on the other: whether free and democratic political spheres are conceived as consensus-oriented, “reasonably” deliberative or “agonistic” and conflictual depends more on the attitudes and rhetorical styles of their actual participants than on their institutional and procedural organization. There is nothing that conceptually prevents the public spheres of a liberal democracy that is constrained by unconditional constitutional protection of individual rights from being participatory and openly confrontational; or a democracy that subjects basic rights to ongoing legislative procedures from being consensus-oriented or elitist in terms of public participation or leader accountability. Likewise, a collectivist, “community-oriented” political body can be more punitive of deviant identities and subversive action than an “individualist” liberal one. There is no automatic correlation between a liberal politics of rights, political elitism, patriarchy and aversion to democratic inclusion; or between participation, collectivism, feminist subversion, identity politics, diversity and egalitarianism: the politics of inclusion and diversity is neither conceptually opposed to the politics of universal individual rights nor conceptually connected to “anti-individualism”. Thus, when a conception of democratic legitimacy with an emphasis on equality, diversity and the inclusion of different identities aims at opening up, radicalizing, politicizing and widening the political spaces that some versions of conventional liberal theory conceive in rigid and exclusivist terms; it is more likely to succeed when proceeding on liberalism’s own premises, not in opposition to them.

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