Democracy as the Legitimating Condition in the UK Constitution

Jo Eric Khushal Murkens

LSE Law, Society and Economy Working Papers 8/2017
London School of Economics and Political Science
Law Department

Democracy as the Legitimating Condition in the UK Constitution

Jo Eric Khushal Murkens *

Abstract: The UK constitution is either theorised as a political constitution that is premised on the Westminster model of government or as a legal constitution that rests on moral principles, which the common law is said to protect. Both models conceive of democracy in procedural terms, and not in substantive terms. However, the democratic legitimacy of laws stems from a complex constellation of conditions that no longer involves popular or parliamentary sovereignty alone. This article explores three questions. First, in what situation does the absence of a concrete understanding of democracy become an inescapable problem for constitutional law? Second, to what extent are the existing constitutional models democratically deficient? Third, what precisely must democracy prescribe as the indispensable condition for political legitimacy?

* Associate Professor, Department of Law, London School of Economics and Political Science. I am grateful to Eric Heinze and Gavin Phillipson for their comments. This paper is forthcoming in *Legal Studies*.

INTRODUCTION

The doctrine of parliamentary sovereignty is the invariable starting point for UK constitutional theory. It is also the inevitable stumbling block when it comes to civil liberties and individual rights. Although the Human Rights Act 1998 has had a significant impact on administrative law, by altering the balance of power between public bodies and the courts, it has not significantly strengthened the constitutional protection of rights and liberties in the UK. Its lack of legal entrenchment renders it vulnerable to future change. Moreover, the UK courts interpret neither the common law nor the ECHR to protect freedom of speech as 'the matrix, the indispensable condition of nearly every other form of freedom'.[1] This reluctance creates a normative space for another concept, like democratic legitimacy, to take root.

Democracy is, of course, a multifarious concept. It 'lacks a clear narrative line and conspicuously fails to carry its own meaning clearly on the surface'.[2] It also loses its value if it is reduced to its literal meaning. Conversely, the temptation to open the concept up to endless contestation or to over-burden it with substantive goals must also be resisted. The added value of democracy as a concept in constitutional discourse only becomes apparent if it can be presented as the conceptual starting point or the 'indispensable condition' on which the viability of all other constitutional concepts, including parliamentary sovereignty, depend. As Sartori notes:

> Up until the 1940s people knew what democracy was and either liked it or rejected it; since then we all claim to like democracy but no longer know (understand, agree) what it is. We characteristically live, then, in an age of *confused democracy*. That "democracy" obtains several meanings is something we can live with. But if "democracy" can mean just anything, that is too much.[3]

If democracy cannot mean anything, it must still mean something. I will use this article to explore three questions. First, in what situation does the absence of a concrete understanding of democracy become an inescapable problem for constitutional law? Second, to what extent are the existing constitutional models democratically deficient? Third, what precisely must democracy prescribe as the indispensable condition for political legitimacy?

---

[1] *Palko v Connecticut*, 302 U.S. 319 at 327 (1937), per Cardozo J.
[2] J Dunne, Setting the People Free: The Story of Democracy (London: Atlantic Books, 2005) p 137.
[3] G Sartori, The Theory of Democracy Revisited I (Chatham N.J.: Chatham House, 1987) p 6.

THE INESCAPABLE PROBLEM

In this section I will identify three categories that illustrate the problems that stem from an absolutist conception of parliamentary sovereignty. The normative gap that a legal conception of democracy could close becomes apparent only in the final category. The first category consists of largely hypothetical and absurd examples. They imagine legislation that condemns all red-haired males to death,[4] requires the killing of 'all blue eyed babies',[5] or disenfranchises or discriminates against a particular group on arbitrary grounds.[6] Lord Hope summarily dismissed these examples as unhelpful: 'Parliamentary sovereignty is an empty principle if legislation is passed which is so absurd or so unacceptable that the populace at large refuses to recognise it as law'.[7]

Most scholars prefer to dismiss such examples as 'unlikely, immoral or undesirable things which no one wishes it to do'.[8] In truth, a state that mandated the killing of blue-eyed babies would not be a legitimate state, let alone a democratic one. It would, in common parlance, be a rogue or a failed state. For that reason, these examples do not even begin to address substantive questions of democracy.

The second category involves violations of civil liberties with a national security or public safety dimension. Within this category are high-profile speech cases, such as *Tisdall*,[9] *Ponting*,[10] *Spycatcher*,[11] and *Shayler*,[12] which involve criminal proceedings in the context of secrets, spies, and whistleblowers.[13] Other examples within this category involve indefinite detention, arbitrary arrests, broad police powers, data retention and surveillance powers. These examples challenge a state committed to civil liberties and the rule of law, i.e. the technical administrative law language of rationality, proportionality, and ECHR-compliancy. They clearly also have implications for the democratic quality of a state. The House of Lords Constitution Committee, for instance, recognised that the erosion of privacy 'weakens the

---

[4] AW Bradley, KD Ewing & CJS Knight, Constitutional and Administrative Law (London: Pearson, 16th edn, 2015) p 73.

[5] This particular favourite has been around since the days of L Stephen, The Science of Ethics (London: Smith, Elder & Co., 1882) p 132, and AV Dicey, Introduction to the Study of the Law of the Constitution (Macmillan, London, 10th edn, 1959) p 79. See now: M Elliott, 'Legislative Supremacy in a Multidimensional Constitution', in M Elliott and D Feldman (eds) The Cambridge Companion to Public Law (Cambridge: Cambridge University Press, 2015) p 74; A Young, Parliamentary Sovereignty and the Human Rights Act (Oxford: Hart, 2009) pp 2-15, 32-33; M Gordon, Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy (Oxford: Hart, 2015) p 145; TRS Allan, The Sovereignty of Law: Freedom, Constitution, and Common Law (Oxford: Oxford University Press, 2013) pp 18, 120, 141–43, 296.

[6] See examples in *(R)Jackson v Her Majesty's Attorney General* [2005] UKHL 56, Lord Steyn at [102]; Baroness Hale at [159]; and D Oliver, 'Parliament and the Courts: A Pragmatic (or Principled) Defence of the Sovereignty of Parliament' in A. Horne et al (eds) Parliament and the Law (Oxford: Hart, 2013) pp 314-315.

[7] *Jackson v Attorney General,* above n 6, at [120].

[8] Bradley, Ewing & Knight, above n 4, p 73.

[9] *Secretary of State for Defence v Guardian Newspapers Ltd* [1984] Ch 156, CA.

[10] *R v Ponting* [1985] Crim LR 318.

[11] *Attorney General v Guardian Newspapers Ltd (No.1)* [1987] UKHL 13 [1987] 3 All E.R. 316.

[12] *R.v Shayler* [2002] UKHL 11 [2003] 1 AC 247.

[13] 'Secrets, Spies, and Whistleblowers: Freedom of Expression and National Security in the United Kingdom' Article 19 and Liberty (London: The Guardian, November 2000).

constitutional foundations on which democracy and good governance have traditionally been based in this country'.[14] But these examples do not determine the democratic quality of a state: even a non-democratic state can desist from torture, respect due process, and protect privacy.[15]

The third and final category involves violations of civil liberties without a security or safety dimension. The first few years after the HRA came into force saw the cases of *Percy*,[16] *Norwood*,[17] and *Hammond*.[18] These cases were picked up by civil liberties scholars because in each of these cases the individual's right to free expression had been restricted on ground of a pressing social need.[19] *Hammond* involved a street preacher in Bournemouth who held up a sign bearing the words 'Stop Immorality', 'Stop Homosexuality', and 'Stop Lesbianism', but who did not incite violence. Mr Hammond was arrested, charged, and fined (upheld on appeal) for an offence under s 5 Public Order Act 1986. The court found that the link between homosexuality, lesbianism, and immorality was capable of being insulting and of causing harassment, alarm, or distress to a person standing nearby.

To be sure, the law has changed since the triplet of *Percy*, *Norwood*, and *Hammond* were decided. The wording of s 5 at the time made it an offence to use 'threatening, abusive or insulting words or behaviour, or disorderly behaviour' or to display 'any writing, sign or other visible representation which is threatening, abusive or insulting' within the hearing or sight of a person 'likely to be caused harassment, alarm or distress thereby'. After a high profile campaign and a governmental defeat in the House of Lords, s 57 of the Crime and Courts Act 2013 removed the word 'insulting' in ss 5(1) and 6(4) of the Public Order Act 1986: the crime now requires 'threatening or abusive' words or behaviour. According to the CPS, 'the amendment is intended to enhance the protection of the right to freedom of expression under Art 10 of the European Convention on Human Rights (ECHR)'.[20] It might therefore be claimed that cases like *Hammond* would not be decided the same way today. However, three notes of caution need to be inserted.

First, both s 4(1) (fear or provocation of violence) and s 4A(1) (intentional harassment, alarm or distress) of the Public Order Act 1986 continue to proscribe

---

[14] House of Lords Constitution Committee, Surveillance: Citizens and the State, HL 18-I (report), citation at [14], and HL 18-II (evidence), 6 February 2009.
[15] E Heinze, Hate Speech and Democratic Citizenship (Oxford: Oxford University Press, 2016) pp 45-46, 88-89, 95.
[16] *Percy v DPP* [2001] EWHC 1125 (Admin).
[17] *Norwood v DPP* [2003] EWHC 1564 (Admin).
[18] *Hammond v DPP* [2004] EWHC 69 (Admin).
[19] J Weinstein, 'Extreme Speech, Public Order, and Democracy: Lessons from *The Masses*', in I Hare and J Weinstein (eds) Extreme Speech and Democracy (Oxford: Oxford University Press, 2009); A Bailin, 'Criminalising free speech?' (2011) 9 Crim L R pp 705-711; A Geddis, 'Free Speech Martyrs or Unreasonable Threats to Social Peace? - "Insulting" Expression and Section 5 of the Public Order Act 1986' [2003] PL 853- 874; D Mead, The New Law of Peaceful Protest: Rights and Regulation in the Human Rights Act Era (Oxford: Hart, 2010) pp 224-230.
[20] http://www.cps.gov.uk/legal/p_to_r/public_order_offences/#Section_5 [last accessed: May 2017].

'insulting' behaviour. In other words, where the insulting words or behaviour are planned and malicious, a person could still be guilty of a criminal offence.

Second, a court can still punish identical conduct as 'abusive'. After the government agreed to amend s 5, the then Home Secretary Theresa May told MPs:

> Looking at past cases, the Director of Public Prosecutions could not identify any where the behaviour leading to a conviction could not be described as "abusive" as well as "insulting". He has stated that "the word 'insulting' could safely be removed without the risk of undermining the ability of the CPS to bring prosecutions.[21]

To illustrate this point, in *Abdul v DPP*[22] the Crown Court had convicted the defendants of a s 5 Public Order Act 1986 offence. The protesters in question had shouted 'burn in hell', 'murderers', and 'baby killers' at soldiers returning home from Iraq. On appeal to the High Court, the question was whether their conviction for these utterances was compatible with Art 10 ECHR. It is of interest that the soldiers themselves were not bothered 'one jot' by the protesters,[23] and that the police made their arrests not during the demonstration but only months later after having reviewed film footage of the events. Nonetheless, the High Court found that 'the words shouted by the defendants were both abusive *and* insulting'.[24] The first instance judge had, according to Gross LJ, carefully balanced freedom of expression against 'a very clear threat to public order',[25] and reached the right conclusion that prosecution was a proportionate response.[26] Davis J added the freedoms of expression and assembly are subject to 'duties and responsibilities'.[27] Both judges agree that the defendants' actions had gone 'well beyond legitimate expressions of protest'.[28]

Third, even without s 5 POA, prosecutors have access to ample legislative provisions to deal with 'public order' and 'communication' offences.[29] Section 127(1)(a) Communications Act 2003 creates an offence if three conditions are met: i) a message; ii) that is grossly offensive; iii) is sent by means of a public electronic communications network. Lord Bingham helpfully sets out the legislative history of the provision in *DPP v Collins*.[30] The purpose of the provision is to prohibit the sending of a grossly offensive communication via a public communications service. A letter that was personally delivered through a letterbox would, accordingly, not

---

[21] House of Commons, Hansard debates, 14 January 2013, column 642.
[22] *Abdul v DPP* [2011] EWHC 247 (Admin).
[23] Ibid. at [19].
[24] Ibid. at [29] per Gross LJ (emphasis added).
[25] Ibid. at [52].
[26] Ibid. at [50].
[27] Ibid. at [55].
[28] Ibid. at [52] and [60].
[29] http://www.cps.gov.uk/legal/p_to_r/public_order_offences/, and http://www.cps.gov.uk/legal/a_to_c/communications_offences/#an11/ [last accessed: May 2017].
[30] *DPP v Collins* [2006] UKHL 40; (2006) 4 All ER 602 at [6].

fall within this legislation – although it may be covered by s.1 Malicious Communications Act 1988.

The majority of cases dealing with bullies, trolls, and stalkers on social media websites involve s 127.[31] In an attempt to stem the rise of s 127 prosecutions, the then DPP Keir Starmer issued guidelines in 2012, which sought to establish a high threshold for launching criminal action against spontaneously written digital communications. Most notably, he made the following statement on the nature of offence:

> The distinction [between offensive and grossly offensive] is an important one and not easily made. Context and circumstances are highly relevant and as the European Court of Human Rights observed in the case of *Handyside v UK* (1976), the right to freedom of expression includes the right to say things or express opinions "that offend, shock or disturb the state or any sector of the population".[32]

But mere guidelines do not resolve the issue, especially when the issue relates to the clarity, certainty, and predictability of the fundamental right of freedom of expression. How strong is the protection of speech in the UK? Is it possible to identify 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials'?[33]

The notion that free speech is 'bred in the bone of common law',[34] or that 'people are free to say and print what they like' at common law,[35] is disputable. It clearly did not apply to Mr Lemon, who was prosecuted for blasphemy at English common law in the 1970s,[36] or Mr Hammond.[37] In any event, trial courts usually refer to Art 10 ECHR (freedom of expression). The potency of Art 10 ECHR, however, is destabilised by a number of qualifications, including interests of national security, territorial integrity, public safety, the prevention of disorder or crime, the protection of health or morals, and the protection of the reputation or rights of others. Legal stability is further undermined when trial courts invert the operation of Art 10 ECHR, as happened in *Hammond* and *Abdul*. Instead of recognising the

---

[31] L Edwards, 'Section 127 of the Communications Act 2003: Threat or Menace?' LSE Media Policy Project blog, 19 October 2012.
[32] DPP statement on Tom Daley case and social media prosecutions, 20 September 2012.
[33] *New York Times v Sullivan*, 376 U.S. 254 (1964), 270, per Justice Black.
[34] *R v Criminal Central Court, ex parte Bright* [2000] EWHC 560 (QB), [2001] 2 All ER 244 at [87], per Judge LJ.
[35] K Ewing, The Bonfire of the Liberties (Oxford: Oxford University Press, 2010) at 138.
[36] *R v Lemon* [1979] QB 10, CA; upheld on appeal [1979] AC 617, HL.
[37] See generally E Barendt, 'Freedom of Expression in the United Kingdom under the Human Rights Act 1998' (2009) 84(3) Indiana LJ 851-866, 851: 'English law has traditionally taken little or no notice of freedom of speech. A right to free speech (or expression) was not generally recognized by the common law …'.

individual's right to expression, which ought to persist unless and until the state can justify a limitation, the courts began by asking whether the defendant's conduct was insulting and likely to harass, annoy or distress bystanders. If that was the case, the courts asked a second question, namely whether the conduct might nonetheless have been 'reasonable' or 'legitimate' under Art 10 ECHR. By erroneously privileging public peacefulness over freedom of expression, criminal convictions have been presented as a necessary limit on the right to speak under Art 10(2) ECHR. Davis J casual remark in *Abdul v DPP*, that s 5 Public Order Act 1986 is 'obviously… compatible with the Convention',[38] is symptomatic of that approach. However, the more important question is whether the criminalisation of behaviour that is not of itself violent, but is threatening, abusive, insulting or disorderly, is also necessary in a democratic society.

Freedom of expression is not only vital as an individual right, but as a constitutive element of democratic society. According to Weale, the values of democracy values are 'best understood in terms of the protection and promotion of common interests constrained by political equality and in conditions of human fallibility'.[39] In that context, the common interest commands possibilities for dissent and difference: 'dissent does not undermine a society but underpins it'.[40] A legal concept democracy must, therefore, guarantee free speech – not as a constitutionally-guaranteed individual right, but as a political or public right, and as a condition of democratic legitimacy.

Unfortunately, as we have seen, UK courts have tended not to approach freedom of expression of individual dissenters with the same degree of principle and conviction as, say, First Amendment jurisprudence in the USA. Domestic courts view deeply inflammatory speech as pernicious, and as promoting distrust, suspicion, and violence between different social groups. They have indiscriminately constrained or criminalised the articulation of offensive and extremist ideas that fall short of criminal incitement. The cases discussed above are not isolated ones. Philip Johnston's opening chapter starts with the striking claim that 'more people are being jailed or arrested in Britain today for what they think, believe and say than at any time since the eighteenth century'.[41] Brice Dickson claims that the attitude of the House of Lords and UK Supreme Court towards freedom of expression 'cannot be regarded as particularly fervent'. He attributes this to the absence of constitutional guarantees as well as to 'a strain of conservatism on the part of judges in our top court, most of whom do not seem to view free speech as deserving of extra-special protection.'[42] Eric Barendt finds no evidence that the HRA has radically altered the legal protection of free speech, and little evidence that UK courts treat freedom of expression 'as the starting point; they have not always asked whether the restrictions

[38] *Abdul v DPP* at [55].
[39] A Weale, Democracy (Basingstoke: Palgrave Macmillan, 2nd edn, 2007) pp xviii-xix.
[40] N Bobbio, The Future of Democracy (Cambridge: Polity Press, 1987) p 60.
[41] P Johnston, Feel Free to Say It: Threats to Freedom of Speech in Britain Today (London: Civitas, 2013) p 7.
[42] B Dickson, Human Rights and the United Kingdom Supreme Court (Oxford: Oxford University Press, 2013) p 280.

on its exercise were necessary to safeguard public order or the other end for which they were imposed'.[43] James Weinstein concludes that the English right to free speech 'is both too weak and too indeterminate to adequately protect the public expression of ideas that "offend, shock or disturb" dominant opinion'.[44] This state of affairs should be of concern not only to anyone with an interest in constitutional law, but also to anyone with an interest in democracy and legitimacy.

The next two sections will reveal the democracy deficit in the two rival constitutional models. The UK's constitutional traditions, concepts, and vocabulary developed to describe a functioning, balanced, and liberal constitution. Ideas of democracy and universal freedom were 'invariably not forged afresh but rather tentatively grafted onto a pre-existing society that had been designed for the few'.[45] Although the origin of nineteenth century concepts, such as 'sovereignty', 'constitution', 'rule of law', 'judicial review', and 'separation of powers', is pre-democratic, they complement our understanding of democracy today: an Act of Parliament is the highest source of law, and everyone is subject to the same laws that are interpreted by an independent judiciary. But that still leaves a gap in relation to the recognition of basic rights in terms of 'democratic legitimacy', the common good, or 'political' and 'public' rights. The literature on UK constitutional law does not usually assess legitimacy with reference to such specifically democratic criteria. The two main models are both culpable for not adapting constitutional theory to fit the requirements of a modern democratic state.

DEMOCRATIC DEFICIENCY I: THE POLITICAL CONSTITUTION

The Westminster model of government encapsulates the so-called political constitution.[46] This model conceives of democracy as electoral representation, which is ordinarily deemed to legitimise all parliamentary legislation. The political constitution is rooted in the nineteenth-century concept of representative or parliamentary government. Its central presuppositions, such as the continuing sovereignty of Parliament, a procedural conception of the rule of law, and basic civil liberties pre-date the arrival of mass democracy. They reached their high point during the late Victorian constitution. Ultimate legal authority was still divided amongst the three estates of Parliament, and the franchise, although extended, was

[43] Barendt, above n 37, p 866.
[44] Weinstein, above n 19, p 37.
[45] C Gearty, Liberty and Security (Cambridge: Polity Press, 2013) p 4.
[46] JAG Griffith, 'The Political Constitution' (1979) 42 MLR 1; A Tomkins, 'In Defence of the Political Constitution' (2002) 22(1) OJLS 157-175; R Bellamy, Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy (Cambridge: Cambridge University Press, 2007); G Webber and G Gee, 'What Is a Political Constitution?' (2010) 30 OJLS 273; Special Issue in (2013) 14 German LJ No. 12.

not yet universal. Although civil liberties expanded *ratione personae*, they remained fragile *ratione materiae* due to their lack of constitutional entrenchment.[47] 'There are not, under English domestic law, any fundamental constitutional rights that are immune from legislative change'.[48]

Anthony Bradley noted accurately in 2011 that the debates based on the model of the political constitution still revolve around a static and immutable understanding of parliamentary sovereignty and a subordinate role for the courts.[49] The conceptual starting point remains strikingly absolutist and gives rise to a legitimate concern about potentially oppressive and undemocratic outcomes: the legal principle of sovereignty by which Parliament provides unconstrained legal authority for governmental policy choices[50] is connected to the 'political principle that in a democracy there should be no legal limit to the wishes of the people'.[51]

This absolutist premise requires scrutiny. The legal principle of parliamentary sovereignty was born in the seventeenth century prior to the advent of mass democracy. As Bernard Manin notes, universal suffrage expanded the body of the electorate without transforming the undemocratic nature of the constitution: 'there has been no significant change in the institutions regulating the selection of representatives and the influence of the popular will on their decisions once in office'.[52] The purpose of the Reform Acts of 1832, 1867, and 1884 was to resist the kinds of democracy sought by Radicals and Chartists by focussing reform on parliamentary procedure and electoral districts.[53] Ironically, parliamentary sovereignty received a boost by the growth in franchise to the surprise of many observers who were sceptical as to its operation under universal suffrage.[54] Popular sovereignty was effectively absorbed by and channelled through Parliament. This had two consequences. First, the entire reform process from 1832 onwards occurred in the name of parliamentary government, which 'fostered the conviction or delusion that the will of the nation could be expressed only through elected representatives'.[55] Second, with a more inclusive franchise, democracy became a

---

[47] KD Ewing and CA Gearty, Freedom under Thatcher: Civil Liberties in Modern Britain (Clarendon Press, Oxford, 1990); and The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain 1914-1945 (Oxford: Oxford University Press, 1999).

[48] *R (Hooper) v Secretary of State for Work and Pensions* [2005] UKHL 29, [2005] 1 WLR 1681 at [92], per Lord Scott.

[49] A Bradley, 'The Sovereignty of Parliament – Form or Substance?' in J Jowell and D Oliver (eds) The Changing Constitution (Oxford: Oxford University Press, 7th edn, 2011) pp 67-68.

[50] G Marshall, Constitutional Theory (Oxford: Clarendon Press, 1971) p 41.

[51] K.D. Ewing, 'The Resilience of the Political Constitution' [2013] 14(12) *German Law Journal* 2111-2136, p 2118; Gordon, above n 5, pp 42, 46.

[52] B Manin, The Principles of Representative Government (Cambridge: Cambridge University Press, 1997) p 236.

[53] N Gash, 'The Social and Political Background to the Three British Nineteenth Century Reform Acts' in AM Birke and K Kluxen (eds) British and German Parliamentarism (München: K.G. Saur, 1985).

[54] See MJ Horwitz, 'Why is Anglo-American Jurisprudence Unhistorical?' (1997) 17 OJLS 551-586, p 561: 'if the central question for Blackstone is how to reconcile the rule of law with parliamentary supremacy, the central question for all legal thinkers after the French Revolution is how a theory of parliamentary supremacy will work under a regime of universal suffrage'.

[55] AV Dicey Lectures on the Relation between Law and Public Opinion in England During the Nineteenth Century (London: Macmillan, 1905) p 42.

convenient concept for the ruling elites who appropriated and contained the concept in order to 'counteract the illusion that any random act was now possible'.[56] But it was too late. In the UK at least, parliamentary sovereignty was now so powerful that it became associated with a variant of absolute power that gave rise to concerns about 'elective despotism', a 'plebiscitary dictatorship',[57] and Parliament '*legibus solutum*'.[58]

The absence of normative benchmarks to constrain the omnipotent Parliament is also 'unfortunately absolutely characteristic of English writing on constitutional law'.[59] Constitutional law, in spite of its common usage, is 'not a technical phrase of English law'.[60] It is silent on governing principles underlying the constitution,[61] it does not address questions regarding the social foundations of law's legitimacy,[62] and it lacks the higher law quality of modern constitutional documents. The core of the political constitution has not changed since De Lolme wrote that 'the legislature can change the constitution, as God created the light'.[63] To this premise were added the nineteenth century desiderata of representative and parliamentary government. This was followed by the twentieth century view that a constitution should foster political opportunities for individuals on formally equal terms through the processes of representation and effective participation with the purpose of promoting sound governmental decisions.[64] The democratic process, narrowly conceived, allows the

---

[56] N Luhmann, Die Politik der Gesellschaft (Frankfurt: Suhrkamp, 2000) p 97.

[57] A Hamilton, J Jay, and J Madison, The Federalist (Cambridge, MA: The Belknap Press of Harvard University Press, 4th ed, 1974) No. 48; Lord Hailsham, The Dilemma of Democracy: Diagnosis and Prescription (London: Collins, 1978) pp 9-11, 20-1; F Hayek, Law, Legislation and Liberty (London: Routledge, 1982) 348.

[58] CH McIlwain, The High Court of Parliament and its Supremacy (New Haven: Yale University Press, 1910) p 375.

[59] E Barendt, An Introduction to Constitutional Law (Oxford: Oxford University Press, 1998) p 5.

[60] FW Maitland, The Constitutional History of England (Cambridge: Cambridge University Press, 1908) p 527.

[61] S Sedley, 'The Sound of Silence: Constitutional Law Without a Constitution' (1994) 110 LQR 270-291, 270.

[62] R Cotterell, Law's Community: Legal Theory in Sociological Perspective (Oxford: Clarendon Press, 1995) p 243.

[63] JL De Lolme, The Constitution of England, or, An Account of the English Government in which it is Compared both with the Republican Form of Government and the other Monarchies in Europe (London: G.G.J. & J. Robinson, 1784), Book II, Ch.3.

[64] See C Turpin and A Tomkins, British Government and the Constitution (Cambridge; Cambridge University Press, 7th edn, 2011) pp 49-58; A Tomkins, Public Law (Oxford: Clarendon Law, 2003) p 6; CR Munro, Studies in Constitutional Law (Oxford: Oxford University Press, 2nd edn, 2005) pp 89-90; E Wicks, The Evolution of a Constitution (Oxford: Hart, 2006) pp 76-81; P Leyland, The Constitution of the United Kingdom (Oxford: Hart, 2012) pp 3-4; J Goldsworthy, Parliamentary Sovereignty: Contemporary Debates (Cambridge: Cambridge University Press, 2010) pp 9-13; S Gardbaum, The New Commonwealth Model of Constitutionalism: Theory and Practice (Cambridge; Cambridge University Press, 2013) p 21; J Raz 'Liberalism, Scepticism, and Democracy' in Ethics in the Public Domain (Oxford: Clarendon Press, 1994) p 117. *For exceptions see* Barendt, above n 61, pp 21-25; I Loveland, Constitutional Law, Administrative Law, and Human Rights (Oxford: Oxford University Press, 7th edn, 2015) pp 4-9; J Morison, 'Models of Democracy: From Representation to Participation' in J Jowell and D Oliver (eds) The Changing Constitution (Oxford: Oxford University Press, 5th edn, 2004); PP Craig, Public Law and Democracy in the United Kingdom and the United States of America (Oxford: Clarendon Press, 1990).

electorate 'to turn out any government that it does not like'.[65] For Bellamy, that 'democratic process *is* the constitution'.[66] In other words, the constitutional view of democracy is purely procedural. But as Ewing acknowledges, the democratic process is not the same as a democratic constitution.[67]

The political constitution and the Westminster model of government prioritise the source of the decision and presume the legitimacy of majoritarian decision-making. Contrary to the central tenets of Western constitutional theory nothing is protected from the ordinary legislative processes, and everything is 'up for grabs'.[68] Jeffrey Goldsworthy looks favourably upon the unlimited nature of the political constitution: '[procedurally] democratic decision-making is facilitated, and reasonably just statutes are enacted'.[69] Richard Bellamy takes the same view on democratic rule: 'the demos should be free to redefine the nature of their democracy whenever they want and not be tied to any given definition.'[70] Intricate questions about justice and human rights are, therefore, not to be resolved by recourse to first principles, but by the 'opinion of a majority of the people of those elected to represent them'.[71] The principal remedy lies in ministerial responsibility to Parliament, which in the late Victorian age still conformed to the Burkean ideal of a lower house with independently-minded MPs, but which today has been transformed by party discipline and the whip system.[72]

Even Stephen Gardbaum's synthetic account of a 'third model' of constitutionalism ultimately rests on a purely procedural conception of democracy that assigns ultimate decision-making power to ordinary majority vote in the legislature.[73] He views as 'compelling' the argument that a legislative majority should 'trump' the views of a judicial majority. The political constitution regards the enactment of oppressive and undemocratic legislation as repugnant only to 'moral principle'.[74] The legitimacy question has always been brushed off as a non-issue. Extreme cases have been kept at bay by 'the sweet reasonableness of MPs and their

[65] Griffith, above n 46, pp 1-21, 3, 16: 'political decisions should be taken by politicians. In a society like ours this means by people who are removable'. I. Jennings, The Law and the Constitution (London: University of London Press, 1959) p 173; Bellamy, above n 46, p 90.
[66] Bellamy, above n 46, p 5.
[67] Ewing, above n 53, p 2116.
[68] J Waldron, Law and Disagreement (Oxford: Oxford University Press, 1999) pp 302-312; Tomkins, above n 66, p 23.
[69] Goldsworthy, The Sovereignty of Parliament: History and Philosophy (Oxford: Oxford University Press, 2001) p 269.
[70] Bellamy, above n 46, p 90.
[71] Goldsworthy, above n 64, p 10.
[72] A Tomkins, Public Law (Oxford: Oxford University Press, 2003) Ch.5.
[73] S Gardbaum, The New Commonwealth Model of Constitutionalism: Theory and Practice (Cambridge; Cambridge University Press, 2013) pp 36, 67.
[74] See e.g. Bradley, Ewing, and Knight, Constitutional and Administrative Law, 55; M Elliott and R Thomas, Public Law 2nd ed. (Oxford: Oxford University Press, 2014) p 7: 'within the democratic tradition, the purpose of a constitution is… to allocate power *in a manner that is regarded as morally acceptable*' (original emphasis).

constituents',[75] 'because Parliament has not been extreme',[76] and because Acts of Parliament 'are rarely obviously and egregiously unjust'.[77] In short, the UK constitution assumes that 'the worst will not happen in the first place'.[78]

The cases discussed in the third category above are clearly not 'the worst' that can happen. For reasons mentioned at the start I have chosen not to discuss the UK's attempts to allow the government to gag a newspaper[79] and a former spy;[80] to ban all homosexuals from serving in the military;[81] to indefinitely detain foreign terrorist suspects;[82] to criminalise speech that 'encourages' terrorism, even if the person making the statement does not intend to encourage terrorism';[83] to ban non-violent political organisations;[84] to sanction some of the most sweeping surveillance powers in the Western world.[85] And even these examples stop short of a particular Rubicon that some of the most senior judges think Parliament should not cross, namely a legislative attempt to remove government action affecting individual rights from judicial scrutiny.[86] But *Hammond* and *Abdul* do reveal some home truths about the UK constitution. Although free speech is routinely hailed as a hallmark of

[75] R Rawlings, 'Introduction: Sovereignty in Question', in R Rawlings, P Leyland, and AL Young, Sovereignty and the Law: Domestic, European, and International Perspectives (Oxford: Oxford University Press, 2013) p 1.

[76] I Jennings, The Law and the Constitution (London: University of London Press, 1959) p 160; see also G Marshall, Constitutional Conventions: the rules and forms of political accountability (Oxford: Clarendon, 1984) p 9.

[77] Goldsworthy, above n 71, p 69.

[78] M Elliott, 'The Principle of Parliamentary Sovereignty in Legal, Constitutional, and Political Perspective' in J Jowell, D Oliver, and C O'Cinneide, The Changing Constitution (Oxford: Oxford University Press, 8th edn, 2015) p 65; Lord Hoffmann, 'Human Rights and the House of Lords' (1999) 62 MLR 159, p 161: 'we have entrusted our most fundamental liberties to the will of a sovereign Parliament and, taken all in all, Parliament has not betrayed this trust'.

[79] *Attorney General v Times Newspapers Ltd* [1974] AC 274; but overturned by *Sunday Times v United Kingdom*, Judgment, App No 6538/74, A/30, [1979] ECHR 1 (the first time the Strasbourg Court found a decision of the highest UK court to be in breach of the European Convention on Human Rights).

[80] *Attorney General v Guardian Newspapers Ltd (No.1)* [1987] UKHL 13, [1987] 3 All ER 316; and *Attorney General v Guardian Newspapers Ltd (No.2)* [1988] UKHL 6 [1988] 3 All E.R. 545; these decisions were deemed to be in breach of the ECHR by *Observer and Guardian v United Kingdom*, App No 13585/88, [1991] ECHR 49.

[81] *R v Ministry of Defence, ex p Smith* [1996] QB 517; case found to have violated the ECHR in *Smith and Grady v United Kingdom* (1999) 29 EHRR 493.

[82] *A and X v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 A.C. 68.

[83] Ss.1 and 2 Terrorism Act 2006.

[84] S.3 Terrorism Act 2000.

[85] Investigatory Powers Act 2016, s.87, for instance, authorises the Secretary of State to order the retention of communications data for the purpose of preventing or detecting any crime, not just serious crime. According to the CJEU, however, only the objective of combating of serious crime is capable of justifying data retention: Joined Cases C-203/15 and C-698/15 *Secretary of State for the Home Department v Watson* at [102].

[86] *Jackson v Attorney General,* above n 6, Lord Steyn at [102]; Baroness Hale at [159].

democratic society,[87] it is 'residual' to the common law,[88] and far from being recognised as an indispensable condition of legitimacy.

In the end, the political constitution explains nothing more than the Westminster way of doing politics.[89] John Austin's legal positivism, H.L.A. Hart's analytical jurisprudence, A.V. Dicey's conservative normativism, and John Griffith's functionalism all define law and legality in purely formal terms. Their normative blindness is self-serving. They perpetuate the political constitution by focussing only on the source of power. They favour representative and responsible government over substantive democratic government. They define arbitrariness narrowly as the absence of procedure. They equate legitimacy with legality. Their failure to grasp political questions as constitutional questions, and questions of legality as questions of legitimacy, baffles continental commentators, yet is venerated domestically as reflecting the flexible and living constitution.

UK constitutional law has not produced an account of democracy beyond practical decision-making. Without limits on popular sovereignty, without ground rules, with 'everything up for grabs', democracy becomes wholly incidental to the political constitution. Democracy collapses into the recapitulation of the *status quo*: whatever happens in a democracy is democratic. On this account, Lord Sumption's statement that 'Parliament may do many things which undermine the democratic element of our constitution',[90] and Lord Steyn's concern in *Jackson* regarding the enactment of 'oppressive and wholly undemocratic legislation',[91] are contradictions in terms. Such a relativistic account views the procedural conditions of periodic and competitive elections and effective, equal, and universal participation as the necessary *and* sufficient conditions of democracy, which leaves the account of democracy under-determined, under-theorised, and under-valued.

DEMOCRATIC DEFICIENCY II: THE COMMON LAW CONSTITUTION

The artifice of the common law constitution has been developed in opposition to the political constitution. It is animated by similar questions that form the backdrop of the present article: what are the limits of legislative supremacy and what are the limits of the practice of judicial obedience to statute? In an attempt to counter

[87] C Gearty, Civil Liberties (Oxford: Clarendon Press, 2007); D Feldman, Civil Liberties and Human Rights in England and Wales (Oxford: Oxford University Press, 2nd edn, 2002) p 32; Weale, above n 39, p 6.
[88] H Fenwick, Civil Liberties and Human Rights (London: Routledge-Cavendish, 5th edn, 2017) pp 12, 104; E Barendt, Freedom of Speech (Oxford: Oxford University Press, 2nd edn 2005) pp 40-41; S Bailey et al (eds) Civil Liberties Cases, Materials, & Commentary (Oxford: Oxford University Press, 6th edn, 2009) p 2.
[89] M Foley, The Politics of the British Constitution (Manchester: Manchester University Press, 1999) p 1; Munro, above n 64, p 338.
[90] J Sumption, 'Judicial and political decision-making: the uncertain boundary - the FA Mann Lecture' (2011) 16(4) JR 301-315, p 314.
[91] *Jackson v Attorney General,* above n 6, at [102].

orthodoxy with orthodoxy, this model rejects the doctrine of legislative supremacy in favour of the ancient common law tradition, which is re-imagined as a higher-order *ersatz* constitution.[92] The common law, it is claimed, contains a set of moral principles, which are transformed into law through the exercise of 'artificial reason'.[93] Unformalised and undeclared, the moral principles are said to unite all common law jurisdictions and are said to be immune from judicial and parliamentary abrogation.[94] However, the invocation of mere morality to limit Parliament has meant that common lawyers since Coke and Hale have had to accept that Parliament retains the formal legal power to limit freedom and act oppressively. In the final analysis, the common law advances no more than a moral argument about what Parliament ought not to do, and not a constitutional argument about what Parliament cannot do.

Trevor Allan argues that an extensive conception of the rule of law acts as 'a constitutional principle of real importance, capable of moderating the influence of majoritarian politics, especially in times of emergency or stress'.[95] The claims of the common law offer an alternative account of UK constitutional law. Formal equality is replaced with a substantive account that includes moral-turned-legal principles of the common law, such as equality, rationality, proportionality, fairness, and basic rights.[96] Judges are elevated from their previously subordinate role to guardians of the common law constitution and of democracy, who assess the content of individual rights with reference to moral and ethical principles.[97] And the common law constitution creates a space for liberal rights and limits on legislative authority – in other words, the kind of constitutional debate which the finality of sovereignty in the political constitution forecloses by treating it as irrelevant, unnecessary, and a waste of political resources.[98]

However, the common law constitution continues to adhere to a pre-democratic and constitutional form that accepts Parliament's ability to limit freedom by legislation. Allan undoubtedly advances constitutional discourse by connecting parliamentary sovereignty, the rule of law, and separation of powers to the world of politics and morality, which he regards as the pillars of liberty, justice, democracy, and legality.[99] In so doing, he replaces the political constitution with a moral

---

[92] O Dixon, 'The Common Law as an Ultimate Constitutional Foundation' (1957) 31 Australian LJ 240; J Laws, 'Law and Democracy' [1995] PL 72; TRS Allan, Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism (Oxford: Clarendon Press, 1993); Constitutional Justice: A Liberal Theory of the Rule of Law (Oxford: Oxford University Press, 2001); above n 5.
[93] E Coke, The First Part of the Institutes of the Laws of England (London: J. & W.T. Clarke, 1628).
[94] JW Harris, 'The Privy Council and the Common Law' (1990) 106 LQR 574; TRS Allan, 'In Defence of the Common Law Constitution: Unwritten Rights as Fundamental Law' (2009) 22 CLJ 187.
[95] Allan, above n 5, p 2.
[96] Ibid, pp 116, 185, 244.
[97] See also J Steyn, Democracy Through Law: Selected Speeches and Judgements (Aldershot: Ashgate, 2004) pp 24-6; 130.
[98] Observation by Foley, above 89, p 4.
[99] Allan, above n 5, p 9.

constitution.[100] The claim that the common law is the judicially-recognised source of parliamentary sovereignty becomes not only factually correct (courts, public authorities, and private individuals obey Acts of Parliament) but also morally desirable: sovereignty ought to reflect democratic notions of equality as well as a constitution 'rooted in fundamental moral values'.[101]

Drawing on Lon L. Fuller's theory of moral law that respects the demands of human dignity, Allan co-opts liberty and justice to infuse law with moral legitimacy and appeals to the reader's 'moral and political judgement'.[102] The law does not command obedience because of its source, e.g. parliamentary sovereignty, but because of its substance, which derives from i) the moral integrity of legislation and ii) personal responsibility and judgement.[103] In shifting the rule of recognition from a source-based to a content-based conception, Allan concludes that 'the sovereignty of Parliament is only a manifestation of the *sovereignty of law*'.[104] Statute law is a composition of a 'present tense' interpretation[105] of both the text *and* of the principles of the common law, which makes it in part '*a product of our moral judgement*'.[106]

It is an unfortunate but inevitable consequence of analysing the constitution through the prism of analytical jurisprudence, and in particular the relationship between law and morality, that the key concepts of rule of law, legitimacy, democracy, liberty, and free speech all remain under-developed. Although Allan asserts the rule of law as a 'constitutional principle of real importance' that preserves individual autonomy and independence, on closer reading it amounts to no more than a guarantee against arbitrary interference.[107] As a reviewer of the book notes, Allan's conception of 'legitimacy is thicker than mere legality, but is nevertheless a thin legitimacy'.[108] The objections in the previous section notwithstanding, the idea of democracy is 'clearly related' to parliamentary sovereignty,[109] which aligns Allan with the dominant tradition. Three presuppositions contribute to the weakness of the common law model. First, Allan accepts the principle that 'a political majority may legitimately impose its will on a dissenting minority' – he questions only the extent.[110] Second, with the political constitutionalists, he accepts that parliamentary democracy and majoritarianism 'are the appropriate means for settling the content of law'.[111] Third, he defines liberty in negative terms as that which protects 'a private sphere of thought, deliberation, and action consonant with his dignity as a free and

[100] Ibid, p 32.
[101] Allan, above n 5, pp 17, 135; Dixon, above n 92, p 240.
[102] Allan, above n 5, pp 20, 31.
[103] Ibid, pp 39-40.
[104] Ibid, p 33.
[105] Steyn, above n 97, pp 62-3.
[106] Allan, above n 5, p 40.
[107] Ibid, pp 89, 93.
[108] P Scott, 'Review of: The Sovereignty of Law: Freedom, Constitution, and Common Law' (2014) 130 LQR 162-165, p 164.
[109] Allan, above n 5, pp 17, 120.
[110] Ibid, p 19.
[111] Ibid, p 33.

independent citizen'.[112] This allows Allan to endorse 'draconian restrictions on personal liberty' on grounds of overriding interests of public safety[113] and with the aid of 'appropriately rigorous requirements of due process or procedural fairness'.[114] Even on a key question, whether Parliament could expressly curtail freedom of expression at election time, Allan offers only a weak response, saying it would be 'a matter of opinion'.[115] Such subjectivism and relativism hardly amount to a principled defence of 'uninhibited, robust, and wide-open' speech as an essential feature of a liberal democratic state.[116]

Allan concludes that egregious legislation (such as bills of attainder or statutes permitting the killing of all blue eyed babies) would not qualify as 'law' due to the absence of 'generality': This response provides further evidence of Allan's thin conception of legitimacy: 'generality', 'due process', and 'procedural fairness' are criteria of the procedural rule of law conception. Allan invokes standard administrative law terminology when he declares that such legislation would be 'wholly unreasonable or irrational [and] cannot qualify as a valid law'.[117] Contrary to Allan's argument, this technical objection does not suffice to 'elucidate the features of what (in common with most of our fellow citizens) we take to be a legitimate scheme of government, worthy of our attention and loyalty'.[118]

To the contrary, the fixation on providing legalistic responses to political problems inadvertently plays into the hands of, say, the US Supreme Court in its disreputable *Dred Scott* decision. In that case the Court ruled that the Missouri Compromise (1820), which had declared free all territories acquired after the creation of the United States, was unconstitutional. The US Supreme Court reached this conclusion on the ground that Congress's prohibition of slave-holding in the Western territories deprived Mr Sandford of his slave property without due process of law.[119] Constitutionally, the decision is problematic for the absence of judicial deference and the failure to presume statutory validity. From a democratic standpoint, however, the decision stands out for its violations of substantive principles, such as liberty and equality.

The common lawyers' equation of the legal constitution with a moral constitution is premised on an understanding of public law as 'rationalist metaphysics' that reveals itself as an 'aesthetic preference, not an epistemological

---

[112] Allan, above n 5, p 89.
[113] Allan cites *R (Corner House Research) v The Serious Fraud Office* [2008] UKHL 60; [2009] AC 756, per Baroness Hale at [53].
[114] Allan, above n 5, pp 89, 142.
[115] Ibid, p 7. Any account of constitutional law rests on 'our *own* opinion, based on a view of constitutional practice that we find defensible…' (at p 19; original emphasis).
[116] See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), 270.
[117] Allan, above n 5, p 141.
[118] Ibid, p 19.
[119] '[An] act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law'. *Scott v. Sandford,* 60 U.S. (19 How.) 393, 450 (1857).

advance'.[120] This approach fails to understand the constitution as a site of political contestation. Instead of justifying claims about parliamentary sovereignty on grounds of history or principles of morality, they ought instead to be 'rooted in an appreciation of the nature of the contemporary political condition'.[121] For Loughlin it means appreciating the autonomy of the political sphere and of *droit politique*. In the next section, I argue that it means appreciating the requirements of democracy.

DEMOCRACY AS THE LEGITIMATING CONDITION

The existing constitutional models based on parliamentary sovereignty and the common law fail in their accounts of democracy. The political constitution simultaneously under-theorizes democracy, by reducing it to an electoral condition or majoritarian procedure, and overextends it by treating popular and parliamentary sovereignty as legally limitless. Without democratic guarantees, freedom includes the freedom to change or abolish the social and legal order. The constitution does not contain pre-determined rules, but simply facilitates the process of making new rules or keeping existing ones. Democracy's key index is fairness of procedure, which too is subordinated to Parliament's overriding legislative authority.

The common law constitution at least recognises that democracy contains biases in favour of individual freedoms and against arbitrary government and, insofar as its form is republican, against political domination. These biases potentially clash with the prevailing conceptions of sovereignty as absolute, of the constitution as political, and of democracy as purely procedural. The common law's account today is distinctly liberal and moral, but it is not distinctly democratic.

By contrast, I propose an assessment that enquires into the extent to which statutes, policy, and case law support an ideal of politically active citizenship. In a seminal speech marking the bicentennial of the US Constitution in 1987, Thurgood Marshall, the first African American member of the US Supreme Court, gave credit not to the 'defective' vision of the founding fathers, but 'to those who refused to acquiesce in outdated notions of "liberty," "justice," and "equality," and who strived to better them'.[122] In the same mould, UK constitutional scholars need to supplement their established criteria of legal validity with different conditions of political legitimacy. Those who seek to justify the decisions in *Hammond, Abdul* and similar cases by virtue of their legal consistency with the Public Order Act 1986 fail to notice that these decisions are unjust, wrong-headed, and not just unnecessary in but incompatible with a democratic society.

Without the connection between formal legality and substantive legitimacy, the absolutist conceptions of parliamentary sovereignty and popular democracy become

[120] M Loughlin, The Idea of Public Law (Oxford: Oxford University Press, 2003) pp 147-148.
[121] M Loughlin, Foundations of Public Law (Oxford: Oxford University Press, 2010) p 272.
[122] Remarks of Thurgood Marshall at the Annual Seminar of the San Francisco Patent and Trademark Law Association in Maui, Hawaii, May 6, 1987.

indistinguishable from Franz Neumann's definition of dictatorship as 'the rule of a person or a group of persons who arrogate to themselves and monopolize power in the state, exercising it without restraint'.[123] The Westminster model ironically ends up sharing the same starting point of legally unlimited power as dictatorship. It is this coupling of absolute parliamentary sovereignty with a minimalist conception of democracy as electoral and majoritarian that gives rise to the tension between legality and legitimacy that underpins oppressive law and policy.

Three steps need to be made in order for the UK to embrace a concept of democracy that transcends its electoral-representative starting point. First, democracy must not be relativized as a 'complex' and 'contested' concept. The claim that democracy defies definition and is susceptible to wholly open-ended interpretations is a widely-accepted truism that ought to be rejected as false.[124] The rule of law is a similarly complex and contested concept. Without agreement on its meaning, it is perfectly possible, and indeed is a current trend, for authoritarian regimes to proffer formal acceptance of the baselines of the rule of law (legal certainty and stability over economic rights) and basic democracy (elections, representation, and majoritarianism) but to reject openly the requirements of civil rights and political freedoms.[125]

In a second step, democracy needs to be distinguished from precepts held in common with liberalism, principally equality and freedom. First, can equality be shown to be distinctly democratic? Its negative and formal sense privileges a purely abstract and civic conception to the detriment of material (social and economic) interests. Material equality, however, could also be realised in non-democratic states. For Nadia Urbinati, therefore, formal political equality is *the* reference point in relation to which citizens assess the political process of democratic representation.[126] She distinguishes two kinds of formal equality, already present in Athens. *Isonomia* relates to strict equality before the law, which is satisfied through representation and the rule of law, and may also be found in non-democracies.[127] *Isegoria*, on the other hand, concerns an equal right to access the political assemblies and to support or oppose laws or policies. This conception concerns judgement and interpretation in complex and plural societies.[128] It relies on participation and active citizenship. As a result, 'this equality is exquisitely political and democratic; in fact, it exists only in a democracy'.[129] For Urbinati, therefore, democratic equality is

[123] F Neumann, The Democratic and the Authoritarian State (New York: Free Press, 1957) p 233.
[124] Heinze, above n 15, pp 43-44.
[125] T Ginsburg and A Simpser (eds) Constitutions in Authoritarian Regimes (Cambridge University Press, 2014); T Ginsburg and T Moustafa (eds) Rule By Law: The Politics of Courts in Authoritarian Regimes (Cambridge University Press, 2008).
[126] N Urbinati, Representative Democracy: Principles and Genealogy (Chicago: The University of Chicago Press, 2006), p 6.
[127] Ibid, p 43.
[128] Urbinati, above n 126, pp 40-42.
[129] Ibid, p 43.

political equality, i.e. participation and active citizenship, which provides the link with freedom.

Second, is 'freedom' a distinctly democratic concept? The neo-Kantian ideal manifests itself, according to Hans Kelsen, in the historical 'struggle for democracy', which he interprets as a 'struggle for political *freedom*; that is, for popular participation in the legislature and executive'.[130] Franz Neumann also places 'the activist element of political freedom' at the heart of the democratic political system, the essence of which does not lie in majoritarian decision-making, 'but in the making of politically responsible decisions' and in 'large-scale social changes maximising the freedom of man'.[131] According to Giovanni Sartori, freedom is the constitutive element of liberal democracy, although not necessarily of democracy as such.[132] In other words, these theorists collapse a democratic conception of freedom into a liberal conception. Unlike Urbinati, who privileges equality over liberty, Sartori claims that liberal democracies strive to achieve 'equality through liberty':[133] 'From liberty we are free to go on to equality; from equality, we are not free to get back to liberty'.[134] But both Urbinati and Sartori reduce democracy to the liberal values of political equality and individual freedom, neither of which are, however, distinctly democratic.

The final liberal account of democracy stems from Ronald Dworkin, who argues that legitimate majority rule must necessarily require the existence of structural conditions above and beyond the principle of majority. A majority cannot, using democratic means, abolish future elections or disenfranchise a minority.[135] Dworkin endorses a constitutional conception of democracy that consists of three conditions: i) 'a majority or plurality of people'; ii) 'all citizens have the moral independence necessary to participate in the political decision as free moral agents'; iii) 'the political process is such as to treat all citizens with equal concern'.[136] The problem is that these structural conditions correspond to basic liberal principles of popular sovereignty, political participation, and citizen equality. None of the criteria is manifestly democratic. Moreover, Dworkin does not distinguish between different types of democracies (e.g. Western, transitional, authoritarian etc.). Instead, Dworkin's 'naïve universalism' lies in inducing absolute principles of democracy from US constitutional principles.[137]

The third and final step is to theorise democracy on its own terms. Jürgen Habermas rejects Dworkin's liberal-individual, and its rival republican-

---

[130] H Kelsen, 'On the Essence and Value of Democracy' in AJ Jacobson and B Schlink (eds) Weimar: A Jurisprudence of Crisis (Berkeley: University of California Press, 2000) p 104.
[131] Neumann, above n 123, pp 186, 192-3.
[132] G Sartori, The Theory of Democracy Revisited II (Chatham N.J.: Chatham House, 1987) p 387.
[133] Ibid, p 388.
[134] Ibid, p 389.
[135] R Dworkin, 'Constitutionalism and Democracy' (1995) 3(1) European Journal of Philosophy 2-11, p 2; Freedom's Law: A Moral Reading of the American Constitution (Cambridge, Mass.: Harvard University Press, 1996) pp 17-18.
[136] Dworkin, 'Constitutionalism and Democracy', above n 135, pp 4-5; see also Freedom's Law, above n 135, p 17.
[137] See Heinze, above n 15, pp 11-12.

communitarian,[138] model of democracy in favour of a 'procedural' one. Sovereignty is generally conceived, with Jean-Jacques Rousseau, as harnessing the general will of a collective subject. However, in Habermas' terms popular sovereignty becomes 'desubstantialised', anonymised, and realised 'through the communicative presuppositions and procedures of an institutionally differentiated opinion- and will-formation'.[139] By forcing popular sovereignty into 'subjectless forms of communication' and democratic procedures[140] Habermas wrestles the concept from Rousseau and secures it as 'the hinge between the system of rights and the construction of a constitutional democracy'.[141] 'The *democratic process* bears the entire burden of legitimation' by securing the private autonomy of legal subjects through individual rights and their public autonomy through communicative freedoms.[142]

Habermas' subjectless forms of communication have a liberal as well as a democratic component. On the one hand, they form the legal foundation for a free and open process of participation for constructing political will and opinion, which is indispensable for democratic freedom. On the other hand, they form the agreement on which to disagree by cutting short the infinite search for validity and justification criteria. The rights of communication determine the democratic character of the state and its laws and practices, but are themselves immune from democratic deliberation.

Both Dworkin and Habermas reject the simplistic maxim of the political constitution that any law properly enacted by the legislature is presumptively democratic. Instead of Dworkin's structural conditions, Habermas inserts his discourse principle according to which 'the only law that counts as legitimate is one that could be rationally accepted by all citizens in a discursive process of opinion- and will-formation.'[143] This axiom bears a striking resemblance to Rawls' 'justice as fairness', which 'may be shared by citizens as a basis of a reasoned, informed, and willing political agreement'.[144] But where does this leave the expression of viewpoints that are not subject to rational acceptance or reasoned and informed political participation? What implications do these positions have, for instance, for the government's definition of extremism as 'the vocal or active opposition to fundamental British values, including democracy, the rule of law, individual liberty and the mutual respect and tolerance of different faiths and beliefs'?[145]

---

[138] See e.g. the Symposium on Republicanism in a special issue of (1989) 41 Florida LR; C Sunstein, 'Beyond Republican Revival' (1988) 97 Yale LJ 1539.
[139] J Habermas, Between Facts and Norms (Cambridge: Polity Press, 1996) p 134.
[140] Habermas, above n 139, p 486; see also J Habermas, 'Three Normative Models of Democracy' in S Benhabib (ed) Democracy and Difference: Contesting the Boundaries of the Political (Princeton N.J.: Princeton University Press, 1996) pp 28, 29.
[141] Habermas, above n 139, p 169.
[142] Ibid, Postscript, p 450.
[143] Ibid, p 135.
[144] J Rawls, Political Liberalism (New York: Columbia University Press, 1993) p 9. See generally H Brunkhorst, 'Rawls and Habermas' in R von Schomberg and K Baynes (eds) Discourse and Democracy (Albany, N.Y.: State University of New York Press, 2002).
[145] *Prevent* Strategy, Cm 8092, June 2011.

What makes these 'British' values fundamental is, presumably, that they are susceptible to rational acceptance by all (current and future) citizens as a basis for reasoned and informed political agreement, in accordance with Habermas and Rawls. But what about those advocates who are vocally and actively opposed to such values? Is there not a danger that, as one newspaper headline put it, 'laws against "extremism" risk criminalising us all'?[146]

Eric Heinze's claims are more targeted. He does not refer to all democracies, but only to longstanding, stable, and prosperous democracies (LSPDs). He does not argue for an absolute freedom of speech, and he accepts many familiar limits on expression.[147] His argument is limited to the expression of 'viewpoints' aired within open, public discourse, including irrational, obnoxious, and even dangerous worldviews. Crucially, the expression of such views ought to be protected as the *prerogative* of every citizen, rather than as a liberal right or as an individual freedom. He proposes elements of citizenship, which, unlike standard corpuses of individual rights or freedoms, can never legitimately be subject to legislative or judicial balancing of interests on specifically democratic grounds. Governments may legitimately impose certain viewpoint-neutral restraints, for instance regarding commercial fraud, courtroom perjury, or official secrets, and 'time, manner, and place restrictions'.[148] However, Heinze's central thesis is that 'the most distinctly *democratic*' manifestation of free expression is viewpoint absolutism within public discourse,[149] and that 'no conceivable abridgement of that citizen prerogative could ever be deemed to promote democracy'.[150]

If Heinze's argument is correct then the real threat to the specifically democratic element of a state—as opposed to threats to any state simply *as* a state, such as war, famine, or environmental pollution—stems from laws seeking to gag the citizens' prerogative to speak – which is precisely the issue in *Hammond*, *Abdul*, and related cases. Similarly, from a civil liberties perspective, retaining the more standard constructs of higher-order rights, David Feldman rejects any suggestion that democracy assumes an unhindered power on the part of lawmakers to abridge such rights 'it would be perverse to argue that there is anything undemocratic about a restriction on the capacity of decision-makers to interfere with the rights which are fundamental to democracy itself'.[151]

It does not follow from the above that any limitation of the expression of a viewpoint, for instance through hate speech bans, would wholly diminish the legitimacy of that democracy. Although bans are illegitimate within LSPDs, they delegitimise democracy only *pro tanto*. 'The legitimacy of the entire democracy is not overcome by one defect. Nor, however, does a democracy's overall legitimacy suffice to overcome the defect'.[152]

---

[146] P Johnston, 'Laws against "extremism" risk criminalising us all', *Daily Telegraph,* 28 September 2015.
[147] Heinze, above n 15, p 41.
[148] Ibid, pp 45, 208-9.
[149] Ibid, pp 45-55; 81-83.
[150] Ibid, p 77.
[151] Feldman, above n 87, pp 32-33.
[152] Heinze, above n 15, pp 87-88.

All three theories of democracy, by Dworkin, Habermas, and Heinze, serve as a better vantage point for the discussion of UK constitutional law than the 'political' and 'common law' models. All three argue in unison that certain norms must be presupposed in any account of contemporary democratic authority and must lie beyond majoritarian politics. However, the three accounts ultimately differ. Dworkin's account of democracy is congruent with the liberal tradition that regards the constitution is a corset for those who wield power, and which conceives rights negatively, individually, and instrumentally. More abstractly, Habermas rests democracy in the communicative conditions necessary for political participation and will-formation. More concretely, Heinze argues for the expression of all viewpoints as a prerogative of citizens in LSPDs. Neither Habermas nor Heinze view the constitutive norms of democracy as 'corsets' on a free political discourse. Instead, such norms substantiate 'the necessary condition for having any discourse at all about how purposes are to be fulfilled in that society'.[153]

CONCLUSION

Not all violations of constitutional principles or fundamental rights need to be assessed with reference to democracy. Some incursions in the area of human rights and civil liberties (blanket discrimination or indefinite detention, or deportation which compromises the absolute prohibition on torture, and broad police powers) may be analysed in relation to the rule of law and liberal constitutionalism. But article cannot draw boundary lines that identify the precise conditions when specific issues such as electronic surveillance, extreme speech, or indefinite detention cease to be compatible with the principle of democracy. In addition. compliance with devolution, and membership of the European Union and Council of Europe may be scrutinised with respect to Elliott's useful concept of constitutionality.[154]

However, the prevention or criminalisation of offensive, obnoxious, or dangerous speech, without any security implications, raises separate and conspicuous issues for the UK as a contemporary democracy. The cases of *Hammond* and *Abdul* are paradigmatic. The defendants were arrested and fined for airing their personal views on same-sex relationships and the actions of UK soldiers in Iraq. The problem was not with how they said it; it was with what they said. If 'there simply is no way that the speaker can express this core belief without risking such offence', then the message is very clear 'that society will not tolerate the public expression of his core beliefs'.[155] Viewpoint absolutism is, according to Heinze, the

[153] N Johnson, In Search of the Constitution: Reflections on State and Society in Britain (Oxford: Pergamon, 1977) pp 147-8.
[154] Elliott, above n 78, p 39.
[155] Geddis, above n 19, pp 865-866.

irreducible core of democratic legitimacy.[156] Criminalising the expression of viewpoints, therefore, resonates throughout the legal and political system as a general challenge to parliamentary sovereignty and the common law, and as a particular challenge to democratic legitimacy.

Asking what democracy requires in *Hammond, Abdul*, and similar cases, is more principled than trading-off freedom of expression against the need to maintain public order within the framework of liberal constitutionalism. Criminalising non-violent free speech may not be against UK law. But it ought to contravene Art 10 ECHR, and it most certainly contravenes the criteria of democratic legitimacy. *Hammond* and *Abdul* illustrate not only damage done to individual rights and freedoms, but to the democratic credentials of the *polis* itself.[157]

The legality of legislation will always depend on sovereign authority and formal procedure (highest might), but its legitimacy ought to derive from persuasion and social generality (highest right). The democratic legitimacy of laws stems from a complex constellation of requirements and conditions that no longer involves popular sovereignty alone, but also basic rights and liberties; not an overriding concern with public order, but an overriding concern with freedom; not just formal participatory rights, but an inclusive process of opinion- and will-formation; and not just the negative, individualist, and liberal view of freedom as non-interference guaranteed by the rule of law, but the social and public conception of non-domination in a free, civic, and democratic society. All of this is known. The untechnical phrase 'constitutional law' does not reflect it; Parliament's unqualified right to enact whatever law it thinks fit undermines it.

[156] Heinze, above n 15, p 46.

[157] H Kelsen 'Foundations of Democracy' (1955) LXVI Ethics 1-101, p 4: 'If in a concrete case the social order…. does not contain the guaranties [sic] of freedom, it is not democracy… because democracy has been abandoned'.