

The Constitutional Protection of Rights in Dworkin's and Habermas' Theories of Democracy

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Introduction

'Elections, open, free and fair, are the essence of democracy, the inescapable sine qua non. Governments produced by elections may be inefficient, corrupt, shortsighted, irresponsible, dominated by special interests, and incapable of adopting policies demanded by the public good. These qualities make such governments undesirable but they do not make them undemocratic. Democracy is one public virtue, not the only one.'

Samuel P. Huntington¹

The concept of democracy is generally understood to mean, first and foremost, the 'rule by the people'. Beyond this fairly uncontroversial basic definition, however, different conceptions of democracy abound. Huntington's school of thought, for example, proposes a minimalist procedural understanding of democracy. That understanding identifies democracy exclusively with a system established through majority voting, and the struggle for democracy with the establishment of rules of electoral procedure. It is contended that this conception is fundamentally flawed, as democracy means much more than rule of the many. In this paper, I propose an alternative conception of democracy based on the constitutional protection of rights. By this I mean that truly democratic systems must have established individual legal rights that the dominant legislature - the majority - does not have the power to override or compromise. A constitution in this sense is not necessarily a written instrument, but some mechanism that grants extra protection to certain fundamental rights.

The problem with this conception of democracy is that many commentators think it 'undemocratic'. They continue to regard democracy as being the 'rule by the people' in the sense of rule of the majority. Thus,

¹ S. P. Huntington, *The Third Wave - Democratisation in the late Twentieth Century* (Oklahoma, 1991).

in their view, a constitution that protects individual rights runs counter to the most fundamental democratic assumption of popular sovereignty. It limits the power of the majority to implement the majority's will. A legislator passes laws that reflect the will of the people. Yet a constitutional court can often declare those laws unconstitutional and thus expressly counteract the will of the people. Rights and popular sovereignty seem in irreconcilable competition, because maintaining the priority of rights often requires the setting aside of widely supported policies (e.g. the right not to be discriminated against because of sexual orientation might upset the feelings of a majority which believes that homosexuality is indecent).

The fact that most Western states have nonetheless adopted a constitutional structure has been recognised as a flaw in their democratic attire, but accepted as the lesser of two evils. The constitutional protection of an individual's autonomy and dignity against coercion has been regarded preferable to a 'tyranny of the majority', and this approach is reflected in a liberal constitutional tradition deeply rooted in Western history.² Any acknowledgement that this prioritisation of rights might sacrifice some aspects of so-called 'democracy', has been accompanied by the defiant observation that 'democracy is not everything'.³ Along with Huntington, many commentators are thus of the opinion that 'liberal constitutionalism', so to speak, is only another public virtue that has no connection to democracy. On the contrary, they regard it as subversive of what they believe to be 'democracy'. It is only recently that academics have picked up on the thought that constitutionalism and democracy, or its manifestations, rights and popular sovereignty, are not really contradictory concepts. What is more, they could be called complementary and as such *both* constitutive of true democracy.

I will explore this thought with reference to the writings of two academics who have established themselves at the forefront of constitutional democratic thinking, Ronald Dworkin and Jürgen Habermas. The constitutional protection of rights is a theme common to their works, although they adopt slightly different approaches. Dworkin has so far dismissed Habermas' theory.⁴ In this paper, I argue that there are more affinities between the two theories than Dworkin would possibly like to acknowledge. I outline Dworkin's and Habermas' respective democratic

² F. Zakaria, 'The Rise of Illiberal Democracy', 76 (1997) *Foreign Affairs* 6, 22, p. 26.

³ R. Dworkin, 'Equality, Democracy, and Constitution', (1990) 28 *Alberta Law Review* 2, 324, p. 326.

⁴ R. Dworkin, 'Constitutionalism and Democracy', (1995) 3 *European Journal of Philosophy* 1, 2, p. 8.

theories in turn, pointing out similarities where appropriate. This will serve the purpose of identifying a core constitutional theory that is common to both writers. On the issue of protection of rights, however, I find Habermas' approach more convincing. By sharing certain constitutive elements with Dworkin's constitutional model, whilst overcoming certain flawed aspects of Dworkin's theory, Habermas has managed to offer a persuasive redefinition of the concept of democracy at the beginning of the 21st century.

A Constitutional Conception of Democracy

Democracy has often been misunderstood and misinterpreted. In its simplest form, it is taken to be 'government by the people'. One must be careful, though, not to equate this with majoritarianism. Democracy does not mean mere majority rule, but *legitimate* majority rule. This entails that the will of the majority must be subject to the constraints of some kind of constitutional structure which cannot be changed. The argument that constitutionalism subverts democracy through limiting the democratic right of the majority to pass the laws it wants is thus based on a false understanding of what democracy means, and must be rejected. The most fundamental aim of genuine democracy is not to pass laws in accordance with certain procedural requirements, but to treat 'all members of the community, as individuals, with equal concern and respect'.⁵ As such, no arrangement that serves to further this fundamental aim - such as the protection of rights by a constitution, or the interpretation of the constitution through an unelected judiciary - can be classed as counter-democratic *per se*. On the contrary, many constitutional provisions that seem aimed at limiting democracy, actually enhance it. Such an approach reflects that of Ronald Dworkin and it is his theory which will be advanced as an aspiring model of true democracy.

It is a theory of great importance because it combines the fundamental aspects of two theories of democracy, liberalism and civic republicanism, that were formerly seen to be in fierce and mutually exclusive competition. On the standard reading of classical moderns, liberal theorists such as John Locke have been pitted in this debate against republicans such as Jean-Jacques Rousseau. Liberals regard the protection of individual rights against the encroachment of the sovereign will as paramount. Thus, personal rights that guarantee individuals the freedom to pursue their own goals and happiness are more important than democratic process. Civic republicans, on the other hand, prefer the legitimacy accorded to their political system by fully acting in accordance with the will of the majority. On this view, human freedom has its summit not in the pursuit of private preferences but in self-

⁵ R. Dworkin, *Freedom's Law* (Cambridge, MA, 1996), p. 17.

governance through political participation. Accordingly, liberal views tend to define legitimate government in relation to the protection of individual liberty, often specified in terms of human rights, whereas republican views tend to ground the legitimacy of laws and policies in notions of popular sovereignty. Dworkin's constitutional conception of democracy builds a bridge between these two principles. To understand why his constitutional model is preferable to either straight-forward liberalism or civic republicanism requires us to appreciate its foundations.

Government of the people, by the people, for the people

Dworkin is generally in agreement with the definition of democracy as 'government by the people', but rejects the majoritarian reading that has been given to it. His most fundamental premise is that democracy is government by the people as *equals*. It is from this starting point that he develops his constitutional conception of democracy. He has adopted a tripartite vision of democracy that, to a certain extent, reminds of Abraham Lincoln's definition of democracy as 'government of the people, by the people, for the people'⁶ (although Dworkin places greater emphasis on the protection of rights). Whereas Lincoln saw governance in a democracy as stemming from the people (of), as being practised by the people, and as being practised in the people's interests (for), Dworkin regards it as essential that citizens be given a *part* in a collective community which governs, a *stake* in it, and *independence* from it.⁷ The two concepts are not wholly analogous, but affinities can certainly be detected.

Dworkin's *principle of participation* corresponds to Lincoln's government *by* the people. It is, so to say, the starting point of a democratic system as such, because it demands that every citizen be given an equal vote, and thus an equal role to play in the establishment and development of the democratic framework. It is the principle of participation which makes possible the setting-up of the most fundamental institutional structures of a democracy: it requires the provision of a system of universal suffrage, and structures of representation that make political offices open in principle to everyone.⁸ At this point, an important argument can be advanced in favour of constitutionalism, and against basic majoritarianism. Elementary democratic structures, such as a system of universal suffrage, are brought about by structural rules that allocate the right to vote, outline electoral guidelines, assign powers to the designated players, in short: which determine the set-up of a democratic system. These structural provisions

⁶ A. Lincoln, *Gettysburg Address* (Gettysburg National Cemetery, 19 Nov. 1863).

⁷ Dworkin, fn. 3 above, p. 337; fn. 5 above, p. 24.

⁸ Dworkin, fn. 3 above, p. 338; fn. 5 above, p. 24.

must be constitutional, i.e. immune to change, because if they were ever changed, a political system would no longer *be* a democracy. If a black majority in South Africa decided to change the electoral system so as to deny the white South African population a vote in the next elections (which, under a strict majoritarian reading, they would be allowed to do), South Africa would cease to be democratic under even the crudest definition of democracy. Even though their system would initially be democratic on the majoritarian conception, majority proportions are liable to change at any point in the future, e.g., if the majority of the black population decided to emigrate to Mozambique, or if South Africa annexed a territory with a white majority population exceeding the original South African black population. In such a case, the 'rule by the people' could no longer be guaranteed under the altered electoral rules. It follows that even majoritarians must, to a limited extent, support a political system that provides safeguards for the most fundamental structures of democracy. The best way to achieve this result is, as hinted at above, the implementation of a constitution that protects the most elementary structures of democracy through what Dworkin calls 'structural constitutional' or 'enabling' provisions.⁹

Going further than this limited majoritarian view, however, Dworkin suggests that the principle of participation not only explains the democratic necessity of 'structural constitutional provisions', but also of what he calls 'disabling constitutional provisions' which protect political liberties, such as freedom of speech, freedom of assembly, etc. In a system where constitutional provisions accord individuals the right to speak freely, a ruling majority cannot silence an individual who voices his unfavourable opinion about a system's regime. They are thus 'disabled' from exercising their will to stop the individual from delivering his speech. Majoritarians regard such disabling rules as fundamentally undemocratic, as they curtail the power of (with the help of 'enabling rules') elected officials. Dworkin counters this view, once again, with an argument based on the fundamental premise of equality. If everyone is to be afforded the same genuine opportunity to make a difference to their political system (by casting their vote, or having their say in a decision), then they must be allowed political liberties. When somebody wants to make an informed choice, they need access to the same information that others have. When somebody owns important information, they must have the right to share it with others. Citizens who participate in the democratic process must have individual rights that help them to participate as best as they can. Otherwise, the outcome of elections will not really reflect the will of the majority, but the will of individuals that were

⁹ Dworkin, fn. 4 above, p. 2.

able to most widely disseminate their views - at the expense of other views that might have yielded more popular support had they been allowed to make themselves heard. According to Dworkin's theory, disabling provisions do not really 'disable' democracy, rather they enhance it (it could thus be argued that 'disabling' provisions is a misleading term, and that they would best be referred to as a sub-form of 'structural' provisions, or maybe 'less expressly' structural provisions).

At this point it is important to alert the reader to the similarity between the principle of participation and Jürgen Habermas' theory of communicative action. It would at this stage go too far to explain Habermas' model in detail. However, the reader needs to keep in mind certain affinities between the two models, in order to be able to appreciate Habermas' contributions to, and indeed furtherance of, Dworkin's theory at a later point. Dworkin sees political liberties as a prerequisite to genuine democracy, a constitutional structure as the best way to protect them. Citizens are to be encouraged to share their information, to engage in discussion, so that the democratic process will always be democratic, and *equal*. Habermas puts yet more emphasis on discourse than Dworkin. The analogous theme in his theory is that the protection of rights, that help citizens to develop more fully, to build their individual opinions, to engage in discourse, are necessary for the establishment of true democracy. This will be discussed more fully below.

To return to Dworkin's tripartite vision of democracy, it can be observed that his second *principle of stake* roughly equates to Lincoln's perception of government *for* the people. Lincoln meant that legitimate government should be practised in the interest of the people. Democracy is more than a mere system of collective decision-making, but is there for a purpose. Similarly, Dworkin insists that a society must not merely implement the will of the majority, but must display concern for the needs and prospects of its minorities. An individual cannot be a member of a collective unit as envisaged by the first principle of participation, unless he is treated as a member by others; this, in turn, involves that others 'treat the consequences of any collective decision for [the individual's] life as equally significant a reason for or against that decision as are comparable consequences for the life of anyone else'.¹⁰ For Dworkin, the principle of stake makes possible a communal conception of democracy - which is preferable to a merely statistical conception.

Under a statistical conception of democracy, 'the people' are looked upon as a mere figure of speech; a result or decision brought about by 'the people' is merely due to the coincidence of many individual actions.

¹⁰ Dworkin, fn. 5 above, p. 25.

Dworkin refers to the example of a foreign exchange market. We can regard it as a collective entity that has effects on the currency market ('the foreign exchange market drove up the price of the yen'). At the same time we know that the foreign exchange market is no actual entity as such. Its effects are not due to the action of one single body, but to the coincidence of many individual actions ('the combined effects of the very large number of individual currency transactions was responsible for the higher price of the yen').¹¹ A statistical conception of democracy is majoritarian, insisting, as Dworkin says, that political decisions be made 'in accordance with some function of the votes or decisions or wishes of the individual citizens one by one'.¹² Its emphasis is on procedure. It should have become apparent that on a statistical conception of democracy only expressly structural provisions - those that determine the procedure and organisation of a democratic system - can be regarded as democratic. As such, a statistical conception cannot reconcile the supposed conflict between democracy and a constitution that protects individual rights.

This is why Dworkin contends that a communal conception of democracy offers a better account of democracy. It regards 'the people' not as a more or less arbitrary amalgamation of individual actions, but as a group that is able to take political decisions as a distinct entity. Dworkin here borrows from John Rawls in order to explain: if a statistical conception of democracy could be likened to the foreign exchange market, then a communal conception can best be elaborated by drawing an analogy to an orchestra. Individual musicians are unable to play a symphony by themselves, they have to perform together. Yet it is not enough that they each play their own piece of music as they deem appropriate, but that they play *as* an orchestra, that they feel as part of a group where everyone is equally important.¹³ Dworkin argues that his communal conception bears similarities to Rousseau's notion of a '*volonté générale*', because in both models political decisions are taken by a distinct entity - the people *as such* - rather than any set of individuals one by one.¹⁴ It is interesting that Dworkin should adopt Rousseau out of all people to have been the inspirational force behind the communal conception. After all, Rousseau is generally regarded as a republican with little sympathy for liberal concerns. I think that Dworkin emphasises the supposed affinities between his own and Rousseau's

¹¹ Dworkin, fn. 3 above, p. 329.

¹² Dworkin, fn. 3 above, p. 330.

¹³ J. Rawls, *A Theory of Justice* (Cambridge, MA, 1971), pp. 523-524.

¹⁴ Dworkin, fn. 3 above, p. 330; fn. 4 above, p. 4; fn. 5 above, p. 20; e.g. J.-J. Rousseau, *The Social Contract*, edited by R. Grimsley (Oxford, 1972).

conception of democracy in order to give even more weight to his thesis that democracy and constitutionalism are not irreconcilable - even on a Rousseauian view. Once again, his argument focuses on the way we should conceive of structural provisions. On a communal conception of democracy, structural provisions should not be limited to matters of procedure and organisation as is the case on a statistical conception. The principle of stake demands that individuals, united in a group, display the same concern for minorities in the group that they would for themselves. Positive liberties that help individuals to adopt or develop an attitude in line with the principle of stake, and that help a group to maintain a common set of ideals, thus enhance democracy rather than disable it. Constraints on majority decisions in order to further those liberties would not be undemocratic. On the contrary, a system in which a majority is not restrained from discriminating against minority members of their community, is undemocratic.¹⁵

Dworkin's *principle of independence* is the last element of his vision of democracy. To a limited extent, similarities can be detected to Lincoln's notion of government *of the people*. Lincoln merely meant that political power originates in the people; a democratic government is legitimated by this genesis. Dworkin's principle, on the other hand, means that for there to be a democracy, we must have a community of 'independent moral agents' - i.e. a community's government is prohibited from dictating what its members think about matters of political or moral or ethical judgment, whilst it has an obligation to encourage its members to form their own views on these matters through their own reflective and individual conviction.¹⁶ At first sight, the principle of independence seems like just another principle that serves to explain the superiority of a communal, and constitutional, conception of democracy. Naturally, it provides even better reasons than the first two principles mentioned above, for treating political liberties as themselves structural to democracy. Some sort of constitutional guarantees of freedom of speech, association and religion (and following from that, liberal tolerance of unpopular sexual and personal morality) become conditions for true democracy. The protection of these liberties is necessary to allow and encourage individuals to take responsibility for their own personalities and convictions, which, in turn, is essential to arrive at an efficient democratic structure.¹⁷ Looked at more closely, however, the similarity of the principle of independence with Lincoln's government of the people becomes more obvious.

¹⁵ Dworkin, fn. 3 above, p. 339.

¹⁶ Dworkin, fn. 5 above, p. 26.

¹⁷ Dworkin, fn. 3 above, p. 341.

Essentially, the principle of independence states nothing but the already familiar claim that for political power to be legitimate, it must originate from the people. The argument proceeds along those lines: for a democratic system to be legitimate, the people must be able to regard themselves as the authors of decisions taken by the system. In order to be able to regard themselves as the authors, they must identify with the political community - understand themselves as its 'moral agents'. But they can understand themselves as moral agents only if they preserve independent judgment about the values that will govern their own individual lives and about the quality of the community's decisions. (And, of course, personal liberties are essential to make this independence possible.)¹⁸ A member of a group can best identify with the group - and more easily feel bound by its decisions - if he knows that he has had his own, independent, impact on the decision. A musician who plays the triangle in John Rawls' orchestra knows that he is important and irreplaceable in his own right, even if he is not the first violin. He will, as a member of the group, feel just as exhilarated as any other member of the orchestra if the concert is a success. A footballer who sat on the substitutes bench during the whole game will nonetheless feel responsible for the loss of a game. Thus, in order to be a genuine member of a political community, an individual must be satisfied that the act taken by the community,

'is in some pertinent sense [his] act, even when [he] argued and voted against it, just as the victory or defeat of a team of which [he is] a member is [his] victory or defeat even if [his] own individual contribution made no difference either way'.¹⁹

Maybe even more striking than the principle of independence's similarity to Lincoln's vision of government of the people, is its similarity to Habermas' concept of co-originality of public and private autonomy. Habermas argues even more eloquently than Dworkin that democracy will only work if the addressees of laws feel like the authors of those laws. Roughly, his argument is that individuals will only participate in democratic procedure (for which they need public autonomy), if they have been granted individual liberties to develop their own personalities and convictions (private autonomy). They will then be willing to accept laws passed through the democratic process, because they have had their say in it. Each form of autonomy is required to

¹⁸ J. Cohen, 'Habermas on Democracy', (1999) 12 *Ratio Juris* 4, 385, p. 391.

¹⁹ Dworkin, fn. 5 above, p. 22.

explain the other; they are 'co-original'.²⁰ Again, however, this will be explored more fully in the next section.

Dworkin's constitutional conception of democracy seems to be a commendable effort to close the conceptual gap between constitutional and majoritarian readings of democracy. Indeed, if we switch to a communal interpretation of democracy as developed by Dworkin and as outlined above, we will notice that many constitutional provisions that have been regarded as limiting democracy actually enhance it. One critical comment remains to be made about Dworkin's theory, however. What he has done is to structure a model that reflects political reality and democratic institutions prevalent in the USA today. He has looked at the US system in order to make 'pre-interpretive assumptions about what good democracy is like in practice' and to develop a model of democracy that justifies 'these familiar institutions and assumptions'.²¹ Hence, his principle of participation explains why a good democracy must have a system of (near) universal suffrage, and structures of representation that make political offices open in principle to everyone. His principle of stake explains the existence of provisions for a welfare state, and guarantees of non-discrimination. His principle of independence, lastly, makes evident the need for constitutional guarantees of freedom of speech, association and religion, as well as for liberal tolerance of unpopular views. The danger with his approach is that, trying to build a model of an ideal political system by justifying existing structures runs the risk of ending up with a model that institutionalises the shortcomings of present systems.

Indeed it seems that the existing Anglo-American liberal democratic model might already have led Dworkin to conclusions that do not necessarily follow from his theory. He supports certain institutions without examining too closely their *raison d'être*; justifying their existence by reference to some ultimate right to equality - although the right to equality might just as well call for different institutions. Thus, a welfare state system on which Dworkin insists might not be as essential to universal democracy as he thinks. Worse still, faced with the strains of 21st century reality, it might even fail to deliver the equality that it was meant to achieve. Similarly, his emphasis on judicial review and other institutional practices in the USA might make his model too restricted to be of universal validity.

The skeleton argument of Dworkin's theory is intuitively appealing. Interpreting the constitutional protection of rights as enhancing democracy rather than disabling it, makes possible a comprehensive conception of

²⁰ J. Habermas, *Between Facts and Norms* (Cambridge, MA, 1996), pp. 104, 118 - 130.

²¹ Dworkin, fn. 3 above, p. 337.

democracy that was formerly impossible. But the angle that Dworkin has chosen to build his model fails to provide answers of universal validity. I will thus turn to the theory of Jürgen Habermas which manages to overcome many of the shortcomings of Dworkin's democratic model. Habermas has developed a theoretical constitutional model applicable to *any* political system.

A Discursive Conception of Democracy

Jürgen Habermas' conception of democracy is founded on the abstract ideal of 'a self-organising community of free and equal citizens', co-ordinating their collective affairs through their common reason.²² In brief, Habermas finds the basis of democracy in a general, 'post-metaphysical' theory of human reason, which he presents in the theory of communicative action.²³ Habermas calls his theory 'post-metaphysical' because it adapts the Kantian metaphysical principle of universal reason which, he claims, can no longer be defended in its original form because of 'conditions of social and ideological pluralism'.²⁴ This classical idealist conception of the principle of unity of reason insisted on the existence of a unitary common consciousness, so that individuality was curtailed.²⁵ Due to the complexity of the modern world, this view can no longer be upheld. Members of a pluralistic society naturally embrace competing philosophies of life, hold widely diverging conceptions of the good, and find themselves in significant disagreement over fundamental values. A unitary common consciousness no longer exists and, universal reason is dead, according to this view. Instead, Habermas proposes the concept of communicative reason, where individuals engage in practices of free, open-ended, and reflective discussion. Whereas the concept of universal reason presupposed that every citizen would be in agreement over some fundamental values which were based on a system of natural,

²² Habermas, fn. 20 above, p. 7.

²³ Cohen, fn. 18 above, p. 386.

²⁴ J. Habermas, 'Reconciliation through the Public Use of Reason - Remarks on John Rawls' Political Liberalism', (1995) *Journal of Philosophy*, 109, p. 117. See also K.-H. Ladeur, 'Can Habermas' Discursive Ethics Support a Theory of the Constitution?', *European University Institute Working Paper LAW* No. 99/4 (available at <http://www.iue.it/PUB/Wpapers/LWonline.html>), p. 3.

²⁵ E.g., for I. Kant on unity of reason see J. Simon, *Philosophie des Zeichens* (Berlin, 1989), p. 278; for J.-J. Rousseau see A. Seligman, *Innerworldly Individualism, Charismatic Community and its Institutionalisation* (New Brunswick 1994), p. 187.

‘higher’, rights of divine providence,²⁶ Habermas’ approach finds reason in the *procedure* of argumentation itself. At the end of the argumentation process we might no longer be blessed with a ‘universally valid view of the world’, but instead we will have achieved a ‘we-perspective from which all can test in common whether they wish to make a controversial norm the basis of their shared practice’.²⁷ To put it bluntly: Even though one might, on an individual level, disagree with a collective body on the value, or the ‘rightness’, of certain legal or moral norms, the inclination to abide those norms will be great - as long as the decision was taken in accordance with discursive action, and is thus based on ‘common reason’. This, of course, is a question about the legitimacy, or validity, of norms.

Legitimacy, in Habermas’ definition, means ‘worthiness to be recognised’. Or, in other words, it means that there are ‘good arguments for a [norm’s] claim to be recognised as right and just’ - a legitimate norm deserves recognition.²⁸ When applied to a political system, legitimacy thus could mean two things: (i) that legitimate norms will be observed by members of the political system out of respect for them and because they are considered as right and just, or (ii) that legitimate norms give a state the power to coerce members into submission precisely *because* of their legitimacy.²⁹ Habermas has developed a principle of legitimacy which he labels ‘D’.

“D”: just those action norms are valid to which all possibly affected persons could agree as participants in rational discourse.³⁰

The important thing to bear in mind is that ‘D’ is meant to be a hypothetical test under ideal conditions. We are not really expected to gain ‘valid’ norms through universal agreement, because, as we have established above, in a

²⁶ I. Kant, ‘On the Proverb: That may be true in theory, but is of no practical use’. In Kant, *Perpetual Peace and Other Essays*, transl. by T. Humphrey (Indianapolis, 1983), pp. 81-92, here p. 82. Regarding the imminent question of whether the protection of rights subverts pure democracy, it must be observed that Kant would not have seen the existence of such a problem. He assumed that no individual could ever agree in the first place to laws infringing on their own private autonomy as warranted by natural laws.

²⁷ Habermas, fn. 24 above, p. 117.

²⁸ Habermas, ‘Legitimation Problems in the Modern State’, in W. Outhwaite, *The Habermas Reader* (Oxford, 1996), p. 248.

²⁹ Cohen, fn. 18 above, p. 392.

³⁰ Habermas, fn. 20 above, p. 107.

modern pluralistic society, universal agreement is impossible. Thus, we have to distinguish between what would hypothetically be agreed by all under ideal conditions, and what is actually agreed by most under adequate procedural conditions.³¹ Whereas 'D', presuming ideal conditions, demands universal acceptance, in reality a norm would be valid if most people agreed under procedurally adequate conditions that it was right. In reality, we will never find 'the truth', thus a norm may not be ultimately 'right' only because a majority has decided that it is. Nonetheless it will be valid, i.e. citizens will observe it out of respect for it, and the state may legitimately (with moral justification) impose it by force of law.³² A word of caution: just because a norm may not be 'right' in the metaphysical sense of the word, does not mean that Habermas does not believe in the concept of 'one right answer'.³³ There is a right answer, and the principle of 'D' shows us how to arrive at it. The difference is that discourse is an ongoing process,³⁴ and that validity, or truth, claims change with it over time. Reason is subject to a 'fallibilist proviso' that assumes that majority decisions can be revised at any time when found to be wrong.³⁵ A norm that was 'right' 30 years ago might no longer be 'right' today. Nevertheless, that norm was valid at its time, validated through 'D'.

It is interesting to note, at this point, the similarities between Habermas' idea of an eternal discourse, and Dworkin's approach to judicial interpretation.³⁶ Dworkin proposes that there is in relation to every dispute always a 'right answer' which provides the best solution. A judge's task, when faced with a dispute, is to find that answer. Although Dworkin has never himself suggested this, the meaning of his concept of 'one right answer' becomes much clearer when it is revised in the light of Habermas' eternal discourse. When a judge delivers his judgment, this can well be regarded as if it were 'the right answer' - the fact that the 'truth' is subject to change does not make it less 'true' at the time. However, this does not mean to imply that once a judge has spoken, interpreted the law, and set

³¹ F. Michelman, 'Democracy and Positive Liberty', (1996) 21 *Boston Review* 5, 1 at IV (available at <http://www.polisci.mit.edu/BostonReview/BR21.5/michelman.html>).

³² Michelman, fn. 31 above, at IV.

³³ W. Rehg, in Habermas, fn. 20 above, p. xiii.

³⁴ Habermas, fn. 20 above, p. 129; K. Günther, 'Legal Adjudication and Democracy', (1995) 3 *EJP* 1, 36, p. 47; C. Larmore, 'The Foundations of Modern Democracy', (1995) 3 *EJP* 1, 55, p. 59.

³⁵ Habermas, fn. 20 above, p. 186.

³⁶ I am grateful to Charlie Grapski for pointing this out to me.

forward what it means, it is the law for eternity. It only remains valid until the process of truth-finding (or validation or legitimation) comes up with a contrary result. Until that moment, however, we can treat it as if it were the truth.³⁷ What is interesting about this process is further that Dworkin, like Habermas, believes citizens to have a direct influence on it through engaging in argumentation:

‘[judicial review] provides a forum of politics in which citizens may *participate, argumentatively*, if they wish, and therefore *in a manner more directly connected to their moral lives than voting almost ever is*.’³⁸

To return to the question about the legitimacy of norms, it can thus be concluded that norms can be regarded as valid under ‘D’ if they are universally rationale and acceptable (i.e. that under ideal conditions, every affected person would agree to it). To a certain extent, ‘D’ can thus be equated with what other commentators have called ‘popular sovereignty’. Democratic systems (compared to autocratic or totalitarian systems) gain their legitimacy from the fact that they represent the will of the people. Free elections establish the wishes of the majority; this process in turn accords validity or legitimacy to the political system. This is what commentators like Huntington have called popular sovereignty. Habermas similarly expresses the legitimacy of a political system in his principle ‘D’. However, whereas Huntington equates popular sovereignty with democracy, Habermas sees ‘D’ as only one element of it. On Habermas’ conception, the concept of law or of a legal code, and the system of rights, are just as important as ‘D’ to bring about democracy. All of these concepts are interrelated; and Habermas’ model of democracy is thus a highly complex one which warrants an understanding of each of its constitutive elements. In the following, an explanation of the other elements of democracy will be given.

It has been ascertained that norms can be validated through ‘D’ if they can be approved by all affected parties. However, approval by all affected parties will only be forthcoming (even in theory) if the political system of which they are members provides the appropriate institutions that gives them the opportunity to do so. It is at this point that the concept of law comes into play. In Habermas’ model, ‘legality’ or a ‘legal code’ are necessary to create

³⁷ C. Grapski, ‘Dworkin and Habermas: the Discursive Intuitions in Dworkin’s Theory of Law and Democracy’, *M.A. Thesis in Legal and Political Theory*, UCL 1998, pp. 14-16.

³⁸ R. Dworkin, ‘What is Equality? Part 4: Political Equality’, (1987) 22 *University of San Francisco Law Review* 1, p. 29. (emphasis added)

the conditions in which citizens can engage in discourse in order to produce legitimate law.³⁹ The principle 'D' can thus not exist without a legal code. But similarly, the legal code is dependent on 'D', because law is only validated through democratic process. The legal code and 'D' thus mutually presuppose each other.⁴⁰

To take this one step further, the idea of political and civil rights is introduced. Habermas claims that the institutions provided for by the legal code must assign equal liberties to each person. Only if every person has the same right to participate in the practice of legitimate lawmaking can citizens as *addressees* of law obtain a correct understanding of the legal order as created by themselves as its *authors*.⁴¹ It was noted before that individuals will accept norms decided upon by a collective body adhering to correct procedure. The real importance of this correct procedure then is that citizens feel that they have had their say in the process of lawmaking. They can accept a collective value judgment even if disagreeing with it, if they can identify with the collective body that passed such judgment and can attribute their actions to it as parts of a whole.⁴² (You will remember that Dworkin already emphasised the importance of the principle of stake which granted every citizen an equal opportunity to play a role, and the principle of independence which assured every citizen that it was their own independent opinion that influenced collective value judgments.) Habermas refers to this as the 'co-originality' of private and public autonomy,⁴³ which was already hinted on in the first section of this paper. It is an important concept which warrants careful explanation, especially as it will finally provide an overview of Habermas' conception of the constitutional protection of rights in a democratic system.

Private and Public Autonomy of Citizens in a System of Rights

It was said in the introduction to this paper that to many theorists 'rights and popular sovereignty seem in irreconcilable competition'. This statement had to be qualified, as even most majoritarians would have to agree that certain 'political liberties' (regarded as a prerequisite for *public* autonomy) are necessary to ensure popular sovereignty, i.e. the democratic process, and

³⁹ J. Habermas, 'On the Internal Relation between the Rule of Law and Democracy', (1995) 3 *EJP* 1, 12, p. 16; Habermas, fn. 20 above, pp. 111, 136 ff.; Ladeur, fn. 24 above, p. 12.

⁴⁰ Habermas, fn. 20 above, p. 122.

⁴¹ Habermas, fn. 20 above, pp. 120 - 121.

⁴² Habermas, fn. 20 above, p. 133.

⁴³ Habermas, fn. 20 above, pp. 104, 118 - 130.

therefore, in its widest sense, democracy itself. As we have seen, ‘personal liberties’ (a prerequisite for *private* autonomy or personal development), on the other hand, are still widely regarded as subverting the principle of pure democracy. According to Habermas, ‘[t]hus far no one has succeeded in satisfactorily reconciling private and public autonomy at a fundamental conceptual level’, as is ‘evident’ if we consider the tensions between ideas of ‘human rights and popular sovereignty’.⁴⁴ As shown above, Ronald Dworkin has already attempted to bridge this conceptual gap between the notions of rights and popular sovereignty, by declaring certain rights necessary to enhance ‘democracy’ (i.e. only the protection of rights will enable citizens to participate in popular government). Dworkin, however, does not envisage all conceivable personal liberties to be deserving of special protection, as he does not intend ‘the absurd claim that every constraint on majoritarian power [i.e. personal liberties] improves democracy’.⁴⁵

Habermas’ model is thus wider than Dworkin’s as he regards a ground category of basic rights as a prerequisite condition constitutive of democracy. We have stated above that, on Habermas’ conception, democracy is dependent on a legal code that provides the institutions for legitimate law-making. Legitimate law-making, in turn, will only be possible if a variety of equal liberties is provided, a ‘system of rights’. This includes both participatory, ‘political’ liberties, as well as ‘personal’ liberties.⁴⁶ Put very simply, individuals need political liberties to participate in democratic procedure (which will grant them public autonomy), but they will only be willing to participate if they have been granted individual liberties to develop their own personalities and convictions (i.e. if they have private autonomy).⁴⁷ Each form of autonomy is required to explain the other; they are ‘co-original’.⁴⁸

Habermas’ model contains political and personal liberties on a very abstract level, not specific fundamental rights - such as rights to conscience, bodily integrity, non-discrimination etc. - as Dworkin’s model did.⁴⁹ Those familiar liberal basic rights of our modern societies which Dworkin mentions can be fitted into Habermas’ model of highly abstract basic rights only at a later stage. There are two reasons for Habermas’ insistence on rights ‘*in abstracto*’. First of all, his theory is modelled on a highly theoretical world

⁴⁴ Habermas, fn. 20 above, p. 84.

⁴⁵ Dworkin, fn. 3 above, p. 341.

⁴⁶ Cohen, fn. 18 above, p. 391.

⁴⁷ Habermas, fn. 20 above, p. 122; Ladeur, fn. 24 above, p. 12; Habermas, fn. 39 above, p. 17.

⁴⁸ Habermas, fn. 20 above, pp. 104, 118 - 130.

⁴⁹ See text regarding fn. 21 above.

in which there is not yet an organised state authority against which specific rights, such as freedom of speech, would have to protect. Secondly, and more importantly, Habermas refrains from offering a catalogue of specific rights to avoid precisely what we have criticised in Dworkin's theory - to become overly focused on a certain model that could not be of universal validity. Habermas suggests that the basic rights he proposes remain 'unsaturated'.⁵⁰ This means that political systems can interpret them and give them concrete shape in the way which is most appropriate for their individual circumstances. Habermas is not concerned with proposing a set catalogue of rights that every 'true' democracy will have to provide for its citizens, just as he is not concerned with finding a specific type of political organisation that will serve as a once-and-for-all model of democracy. Concerning *democracy* as the overall principle, he is aiming to provide a template of democratic organisation that must be applied separately to individual political systems. Concerning *rights* that are essential to this overall principle of democracy, he proposes general rights that must be interpreted, adapted, and specified by each society in its own way.

But which are these categories of rights? Habermas generates, first of all, three categories of civil rights that guarantee the '*private* autonomy of legal subjects so that they can recognise each other in their role of addresses of law'.⁵¹ These rights are to guarantee (i) the greatest possible measure of equal subjective liberties or freedom of action, based on (ii) membership in a free association of citizens and (iii) individual legal protection in exercising one's rights.⁵² A fourth category of rights warrants *political* autonomy through which citizens enact legitimate law: (iv) the right to equal participation in the democratic opinion- and will-formation process.

The similarity between Habermas' and Dworkin's models of democracy gains even greater clarity when one recognises the resemblance between 'political rights' and 'enabling rules', and 'personal rights' and 'disabling rules'. Habermas is in agreement with Dworkin that 'political rights' safeguard the exercise of public autonomy and *make possible* public participation in the first place (although, contrary to Dworkin, he refuses to name what these rights should entail other than a basic right of equal participation). It is clear that those rights deserve protection because without them, 'democracy', in its widest sense, must fail. One step further, however, Habermas rejects the view that personal liberties, which guarantee citizens' private autonomy, should be worth less than political rights. They are as

⁵⁰ Habermas, fn. 20 above, p. 125.

⁵¹ Habermas, fn. 20 above, p. 123 (emphasis added).

⁵² Habermas, fn. 20 above, p. 122.

fundamentally important as political rights. This is justified by claiming that personal liberties (or ‘human rights’) ‘legally enable the citizen’s practice of self-determination’.⁵³ In other words, citizens will only be able to participate fully in the democratic process if they can develop sufficient personal autonomy. This they can only gain if their fundamental human rights are protected. Dworkin agrees with Habermas to the extent that he regards ‘democracy and constitutional constraint...not [as] antagonists, but [as] partners in principle’.⁵⁴ Dworkin cannot envisage, however, all personal liberties that guarantee private autonomy and freedom of action to enhance democracy,⁵⁵ whereas Habermas can. This slight difference in emphasis might be explained by the fact that Habermas is firmly based in a German constitutional tradition which affords citizens a ‘right to personality’ (i.e. to full and unrestrained development of one’s personal abilities) as one of its most fundamental rights enshrined in Article 2 of its basic law (*Grundgesetz*).

In conclusion, it must be observed that Habermas’ emphasis on the importance of both political and personal rights perhaps paradoxically serves to emphasise the ideal of popular sovereignty. In his words, the principle of sovereignty ‘forms the hinge between the system of rights and the construction of a constitutional democracy.’⁵⁶ Fundamental rights have their proper basis in the principle of popular sovereignty, so that citizens will understand their collective will as the source of all the norms which bind them. On Habermas’ conception, the essentially protective function of such rights does not lie primarily in restricting the power of the state, but instead at the deeper level of empowering individuals to participate in this democratic self-rule. (Notice again the similarity to Dworkin’s distinction between ‘disabling’ and ‘enabling’ rules!) As Larmore has observed, ‘[i]ndividual rights serve, not to protect us against the collective will, but rather to protect the means necessary for creating a collective will.’⁵⁷ Democracy in Habermas’ eyes thus is a form of self-rule, made possible through the system of rights that ensures the co-originality of public and private autonomy.

⁵³ Ladeur, fn. 24 above, p.12.

⁵⁴ Dworkin, fn. 3 above, p. 346.

⁵⁵ See text regarding fn. 45 above.

⁵⁶ Habermas, fn. 20 above, p. 169.

⁵⁷ Larmore, fn. 34 above, p. 65.

Conclusion

In this paper I have attempted to show that the concept of democracy as 'rule by the people' entails more than mere majority rule. Free elections alone by no means suffice to bring about a democratic system. The two theories under review have both illustrated that a political system can only achieve true democracy if it provides some sort of constitutional protection of rights from encroachment of the sovereign will. I have further attempted to show the similarities between the two approaches, as well as their most significant differences.

Both writers seem to base their democratic models on some ultimate right to equality. Dworkin does not fundamentally oppose the structures of government as proposed by a majoritarian reading of democracy (i.e. popular elections), but he redefines the *aim* of democracy to be the taking of decisions in accordance with structures, compositions, and practices of *equal concern and respect* for all citizens. Habermas' theory of democracy is similarly grounded on the ideal of self-rule in which every individual has an *equal part*. Taking a slightly different approach to Dworkin, however, he suggests that self-rule can only be brought about in the first place, if personal liberties (*equal* subjective liberties or freedom of action), and political liberties (the right to *equal* participation in the democratic opinion- and will-formation process) are protected. On both accounts, fundamental rights are in need of protection in order to preserve every citizen's equal status. Rights are thus not subverting democracy, but enhancing it.

More defined differences between the two academics can be detected when testing their theories on real political systems. Dworkin argues that many constitutional provisions that protect rights, can be interpreted as enhancing democracy rather than subverting it. His constitutional model of democracy thus affords those provisions more democratic legitimacy than previous models used to do. However, the criticism that his model is too focused on the American constitutional system, and therefore fails to provide a model of universal validity, is a powerful one. I am inclined to favour Habermas' principle of 'unsaturated' basic rights. Political systems can shape and interpret Habermas' categories of basic rights in their own ways, and build constitutional models that suit their specific needs. Overall, Habermas proposes a certain basic pattern of democracy (which includes the protection of rights), but does not insist on specific manifestations of it. An analysis of the concrete social and political conditions of each particular society, of its specific disposition, of general information about it is necessary before a society can decide which types of organisation, which mechanisms of political association, and especially, which fundamental rights, are best

suiting for its very particular circumstances. Therefore, true democracy cannot mean an '*a priori* preference' for any particular type of democracy,⁵⁸ but means something different in each case. The only known variables are principles of self-rule, a system of (unsaturated) rights, and a legal form to institutionalise the democratic system.

I find Habermas' approach to offer a very promising re-definition of the concept of democracy, capable of living up to the challenges of the modern world. It is to be hoped that his theory will start a process of re-evaluation among the existing 'democracies' of this world, which might finally guarantee what the apparent existence of democracy has been promising for so long: equal rights for all citizens.

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