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"Constitutionalism and democracy: a critical analysis of the counter-epistemic argument"

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ABSTRACT

Democratic decision-making processes (as well as constitutional limits to majority rule) may be evaluated on the basis of their results, their intrinsic value or a combination of both. I will show that an in-depth analysis of these alternatives uncovers serious weaknesses in the usual models of justification for constitutionalism. The theoretical basis to describe the relationship between democracy and constitutionalism has remained stuck in a trap that I seek to break from. I conclude by showing the need to overcome epistemic and counter-epistemic arguments by proposing standards that I believe have been scarcely considered in the classical literature about this issue.

Key Words: Constitutionalism, Democracy, Political Epistemology.

INTRODUCTION

EPISTEMIC MODELS AND PROCEDURAL MODELS

Political theory has tended to justify democratic decision-making processes on the basis of two basic models: (*i*) what I will henceforth refer to as the model of epistemic democracy, and (*ii*) what I will hereafter call the model of procedural democracy. Epistemic democrats boast an instrumental and cognitive pretense[1]. In broad terms we can say that they value democracy to the extent that they see in it a useful *instrument* to adequately *determine* which are the true (or correct) and substantive results toward which public policy should strive. For them, certainly, democracy is justified by its ability to produce good results (i.e.

[1] I take the term from Jules Coleman and John Ferejohn (1986, 6-25) who were perhaps the first to use the name of "epistemic democracy" to refer to those attempts that link democracy and truth.

social justice, better wealth distribution, competitive development, protection of civil liberties, etc.).

For procedural democrats, in contrast, democracy is a formal decision-making process that has intrinsic value, that is, that has value independently of the results that it produces. Independently of the effects that this process generates, democracy is justified because it embodies certain procedural virtues. Such procedural virtues are weighted differently depending on the kind of procedural justification under consideration. Przeworski, for example, notes how difficult it is to justify democracy if we only consider its achievements in terms of equality or fair distribution of wealth. Data from Deininger and Squiere (1996) divides political regimes into democracies and autocracies.[2] They show that inequality does not differ much between democracies and autocracies for each income level (as measured by the ratio of the top 20% versus the lowest 20% of all income earners) (Przeworski 2000, 149). Along with Wallerstein, Przeworski himself (1980) and van Prijs (1996) have gone so far as to suggest that there exists a structural incompatibility between redistribution, justice and economic growth in democratic regimes.[3]

For Przeworski, however, the fact that democracy might produce results that are uncomfortable or unfair is not something that should make us regard it unfavorably because its value is not instrumental but intrinsic. It guarantees that decisions implemented by

[2]For the purposes of this measurement, Przeworski classifies as democratic those regimes where there are contested elections. Autocracies are simply defined as non-democracies.

[3] The argument that all three of them share may be briefly summarized as follows: Independently of their ideological bent, all governments must anticipate an Exchange between redistribution and income. High, positive and progressive tax rates tend to discourage investment and to reduce aggregate gross income. Therefore, the total amount of wealth to distribute decreases, affecting those who are the poorest and who are the ones who most stand to benefit from this distribution. This structural dependence of capital imposes a limit to redistribution, even for populist governments that might wish to favor the interests of the majority.

governments correspond (or have a proximal relationship) to the preferences of the citizens. This allows the achievement, to some degree, of the old ethical ideal of self-government. Other procedural democrats like Habermas have considered virtues that are different from the proximity metric such as the deliberative function involved in processes of democratic argumentation and decision-making. Some others, such as Waldron (1999), have emphasized the moral and intrinsically valuable quality that in general distinguishes decision-making processes that treat all preferences and persons involved equally.

As with intrinsic justifications (Dahl 1979; Waldron 1999; Young 1990), instrumental justifications can be quite diverse, depending on the variable by which the democratic process is judged (Arneson 2003; Dworkin 2000; Hayek 1960). Of course, there are ambiguous or borderline positions between the two models. This applies, for instance, to Rawls, to whom some authors ascribe a purely instrumental defense of democracy (since they think that Rawls subordinates the scope of political participation to the strengthening and respect of civil liberties and constitutional guarantees) (Gargarella 2006). Others, meanwhile, attribute an intrinsic defense to him (to the extent that they think Rawls assigns to the egalitarian value of political liberties an intrinsic character and, therefore, they understand that he does not subordinate them to the achievement of civil liberties) (Bayon 2010).

In this essay, the difference between epistemic/instrumentalist models of justification and those that are strictly procedural interests me for one reason. I aim to demonstrate that the most serious weaknesses inherent in the usual models of justification of constitutionalism can only be exposed on the basis of this approach. This is the only way we can confront some of the most powerful and lucid critiques that have been leveled against it. In particular, the one that has and has had the most radical consequences: that of

Jeremy Waldron. I shall prove that analyzing his argument (and critiquing it) is the only way to move forward within a new theoretical framework capable of supporting the link between democracy and constitutionalism. Doing this, of course, requires understanding what the position is against which Waldron himself argues. What shall be important here is understanding that critiquing his argument does not imply, as we shall see, accepting the position he questions. On the contrary, I shall argue that we are forced to repudiate both positions, that is, both Waldron's position as well as that against which he directs his critique. I shall demonstrate, nevertheless, that the only way we can rebuild the connection between democracy and constitutionalism is precisely on the basis of the rationale that requires us to set both options aside.

1. – Defining the problem: the procedural or substantive approach?

According to Waldron (1999), the most distinctive characteristic of politics, what differentiates it from justice, is that it is based on disagreement. Specifically, Waldron identifies two basic circumstances of politics: (*a*) the existence of disagreements and (*b*) the need accepted by all, despite disagreement, to choose a common course of action. What is fundamental here is, if we accept the inevitability of conflict, we must also accept the existence of dramatic disagreements over what should be the criteria and/or rules of collective decision-making that we will have to adopt in order to address and resolve such disagreements. We face, then, a problem of authority and collective choice. That is, we are obliged to find a way through which we may resolve our differences.

This is where the problem that I will discuss throughout this text arises. Should this approach be procedural or substantive? First things first. Choosing a procedural approach

involves privileging *how* decisions are to be made over *what* (substantively) should be decided. From this point of view, the problem of disagreement is addressed by choosing a process that allows us to determine the content of collective decisions. In principle, this means the process should not include any requirement or restriction as to the content that the decisions themselves should have. As we said earlier, the process shall be justified by its intrinsic value, independently of the result it yields. In the event of choosing majority rule as a mechanism of collective decision-making, its intrinsic value shall be that "the preferences of the citizens shall have some formal connection with the result wherein all preferences are treated equally" (Barry 1991, 25). The other alternative is to choose a substantive approach. For this kind of conception, what is decisive is not only determining how decisions are made (which process to use), but also and more importantly, what we can or cannot decide (or refrain from deciding).

From a strictly procedural perspective, democracy is equivalent to simple majority rule as a mechanism of collective decision-making. From a substantive perspective, democracy is not only a decision-making process, but also a series of restrictions that – through that process – seek to guarantee the achievement of certain substantive results that are considered valuable in their essence. One of the principal functions of a constitution is precisely to limit democratic majority rule to guarantee such results (Przeworski 2000). Constitutionalism involves limiting decision-making by the majority; more specifically, it sets limits primarily through mechanisms such as constitutional judicial review or the adoption of a bill of rights. The function of rights is to prevent majority decisions from neglecting, undermining, or subverting social interests that are considered too important to be jeopardized by majority decisions. In other words, interests that are too important for the just objectives and ideals they represent (such as, for instance,

respect for human dignity and autonomy) to be compromised by what an unstable majority could at a given point be capable of deciding.

The problem I shall address consists of the fact that constitutionalism assumes an epistemic and instrumental posture before democracy. That is, it assumes that it is possible to *know* and determine *ex ante* the democratic process an essential nucleus of a state of things (or of contents) that should be avoided (because it is incorrect) or achieved (because it is correct) independently of what the majority decides. In turn, it provides the necessary legal framework to implement the conditions under which majority rule must be limited in order to produce (or avoid) those substantive contents mentioned above. The difficulty, therefore, emerges on its own: if we already have standards that are independent from majority rule that are used to determine the content of our decisions (of what we wish to protect or ensure), then democracy – a process designed to overcome disagreements that entrusts decision-making authority to the majority – is made superfluous. The epistemic model assumes, thus, a series of precepts that we can condense into three steps. Estlund (2008) articulates them thusly in *Democratic Authority*: (*i*) there are genuine normative standards through which political decisions should be judged that are process-independent, (*ii*) a few people (for example, constitutional lawyers and judges) know said standards better than others, (*iii*) the normative political knowledge of those who possess such knowledge justifies that they should have political authority over those who do not. Therefore, elitism, a "government by experts," or an "epistemocracy" would be amply justified (Estlund 2008, 30).

The rejection of government or tyranny by experts has engendered the development of a lot of alternative theories that, despite everything, insist on an instrumental and

epistemic defense of democracy. Condorcet's jury theorem[4] and its arithmetic proof designed to instill confidence that democracy can arrive at correct decisions is well-known. Despite literature that strengthens the proof and extends it to scenarios with more than three options (List 2001), lines of thinking such as these ignore the central aspect I am interested in discussing. Specifically, I want to focus on what I consider the most attractive rebuttal to epistemic elitism (what I will call here the "counter-epistemic" or majority argument developed by Jeremy Waldron).

Waldron (1993, 1998, 1999) has opted for a pure proceduralism, one that – as I will show – can neither be truly pure nor correctly encapsulate the reasons that citizens attribute (or refuse to attribute) legitimacy to political decisions. His response, like that of Estlund (2008), is found on a plane that is too abstract and idealized and is one which at times betrays a rather ethnocentric reasoning (when the time comes I will explain why). I shall conclude by proving that in order to adequately understand the relationship between democracy and constitutionalism we are required to free ourselves from the dichotomous model of proceduralism on the one hand and epistemic instrumentalism on the other. To understand the type of argument I shall employ against this dichotomy, it is important to bear in mind how the conflict between the procedural and epistemic models results in a conflict between democracy and constitutionalism. As I will show, more important still will be the need to seriously consider the criticism that Waldron levels against the epistemic model and against those postures which in general do not believe that there is a great difficulty reconciling democracy and constitutionalism. Nevertheless, I will show why,

[4] As is well known, the theorem proves that as more people are added to a group, the more likely it is that this group will arrive at the correct response to a given question through majority vote than if the average person within this group were to respond on his own (provided that the individual average probability is greater than 0.5)

despite this, Waldron's critique remains unconvincing. I conclude by developing a proposal that recapitulates and resolves to some extent the conflicts posed earlier.

2. – Democracy and constitutionalism: the epistemic argument

The epistemic argument is the theoretical basis for constitutionalism. Its reasoning consists of pointing out that democracy cannot be conceived of in purely formal terms. That is, it cannot be identified as anything else other than a simple process of collective decision-making by the majority in order to decide disagreements. Quite to the contrary, this process must entail a number of formal requirements and/or substantial additions prior to the process itself, for without these requirements the majority decision might become so distorted that it could disappear altogether. To cite a typical example: through universal suffrage, a majority decision could be made to abolish universal suffrage. The argument does not stop there and continues, because it would not just involve ensuring the formal preconditions or prerequisites necessary to guarantee the possibility (and value) of democracy. Other material conditions that allow the affirmation that individual decisions added through the method of majority rule have been formed in a truly autonomous, free and informed manner would also have to be protected. This would require not only guaranteeing civil and political rights, but also (as is often argued) economic, social and cultural rights (Michelman 1979, 659-694), (Ferrajoli 2003, 236).

This not only prevents the process from being distorted and becoming nonsensical, but its effectiveness at achieving fair results is also guaranteed. I call this an epistemic argument because it assumes that before using the democratic method to resolve our disagreements, we do not know what will be decided, but nevertheless, we *know ex ante* –

while agreeing to them – what should the requirements and limits be that we want to impose upon those decisions. Thus we get certain results that we *know* are correct and avoid others that we know are not.

Fundamental rights would embody precisely those formal and substantive requirements. Without them – it is argued – the process of majority rule would not really differ from decision-making that is manipulated or imposed. Without the prior satisfaction of certain minimum conditions (i.e. a process for configuring interests that is open to all on an equitable basis and on equal footing in public decision-making), the democratic process would cease to be considered valuable. Rightly understood, constitutionalism would then allow the achievement of the democratic ideal itself: it would be a key enabler for achieving its intrinsic procedural value. The constitutional state, thus understood, would entail "the juridification of democracy." This juridification manifests itself in two ways: either by (*a*) constitutionally shielding only those rights that make up the democratic process (as, for example, the right of participation); or by (b) protecting rights that although not formally constitutive of democracy, represent necessary conditions for its legitimacy. Some of the best exponents of this strategy of argumentation designed to pave the way toward constitutionalism are, as is well-known, Ely (1980), Parker (1994, 104) and Gaus (1996, 284).[5] Being the legal form of democracy, the constitutional State would establish

[5] To the extent that it seeks to guarantee only formal conditions, Ely's theory may be considered more procedural than epistemic. This is because it assigns to constitutionalism the function of guaranteeing only those rights that are worth considering as preconditions for the democratic process. Nevertheless, as he progresses in his argument, Ely recognizes that courts not only intervene to *enable* the democratic process, but also to *improve* it (Ely 1980, 103). The courts, Ely asserts, are better positioned than legislatures to identify and correct the democratic process as "they are outside" and not "inside" the process itself. The courts generate a benefit that outweighs the counter-majoritarian cost of their decisions (which is an instrumental reason). And this only happens if their decisions are "correct"

the difference between majority rule (or unrestricted majoritarianism) and democracy. This has also been argued by authors such as Dworkin (1996, 15 ss.), Sunstein (2001, 6-7) and Eisgruber (2001, 18-20).

According to this reasoning, rights – as we have seen – set absolute limits to the decision-making process by majority rule. This idea is often summarized by saying that basic rights remove certain subjects from the ordinary political agenda in order to place them in an intangible realm that Ernesto Garzón has called "off limits" (Garzón 1989). Variants of this metaphor are Elster's (1988) "Ulysses" mechanisms or Holmes' (1988) "gag rules." In the same way that Ulysses ordered his men to tie him to the mast of his ship in order to maximize his results, we can find the basis of constitutionalism in a simple rational principle: citizens are myopic, because we have little control over ourselves and always tend to sacrifice enduring principles for the sake of immediate rewards. "A constitution," says Holmes, "is the institutionalized remedy against that chronic myopia: it takes away powers from momentary majorities in the name of obligatory norms. A constitution is like a break, while the electorate is like a runaway horse" (Holmes 1988, 196). We find an identical viewpoint in Sager (Sager 2004, p. 179). The reasoning behind all these images is the same: rights entrench certain values that are supposed to be made safe from utilitarian and/or aggregative considerations. Constitutionalism is configured thusly as a sort of meta-guarantee of the legal ordering of the whole. (Ferrajoli 2010, 33).

In recent decades, the history of constitutional theory is largely a reiteration of these arguments. While I will not summarize these reiterations (it is not the place to do so), I will only mention the threads of discussion that need to be kept in mind in order to understand

(which is an epistemic reason). A classic argument that aims to defend the functioning of courts may be found in: (Bickel, 1978)

what I shall later argue and defend. Here I will limit myself to only briefly point out the reasons why I consider the epistemic argument weak and too ambiguous. (*i*) First of all, it is ambiguous because, in order for it to make sense, the ideal implicit in the epistemic argument needs to be translated onto a specific institutional design. Institutionally, the "off limits," "gag order" and Ulysses mechanism" theses can be implemented through a rigid constitutional bill of basic rights. They can also be implemented through a mechanism of constitutional judicial review. And this is where the inaccuracies and difficulties arise since, after all, how rigid should these catalogues and controls be? Would they require a constitutionalism that is as strong as possible, a kind of Article 79.3 of the Basic German Law of 1943 that would stipulate the pure and simple inability to modify in any way the bill of basic rights? And in the case of constitutional checks and restrictions on what the majority can decide, what would be its scope? It may seem that I'm only asking for a technical solution, but that is not so. For any technical solution would leave unresolved normative issues that require a response, for example: why must a current generation be obligated to obey without recourse the constitutional restrictions set by its predecessors? What would legitimize, to put forth an extreme case, a unanimous parliamentary decision being vetoed on the basis of a body of controls or rights? Specifically, how legitimate is it for the courts, which are neither representative nor politically accountable, to be able to overrule the decisions of a democratic legislature?

The most persuasive of the responses given to these questions are well-known so I will not dwell on them here. Foremost among them is Ackerman's (1991) classic formulation, which insists that there is a qualitative difference between majority decisions taken in the course of constitutional determinations and majority decisions made in the context of ordinary politics. Ackerman argues, therefore, that when constitutional judges

overturn decisions of a democratic legislature, they are not placing their own judgment over and above that of the legislature itself. Rather, when faced with parliamentary decisions, these judges limit themselves to enforcing the (yet more fundamental) democratic will of a constitutional assembly.

Nevertheless and secondly (*ii*) the epistemic argument is weak, and the reasons that drive one to proclaim its weakness cannot be resolved through arguments like Ackerman's, because the weakness of the epistemic argument is derived precisely from its cognitive pretentions. Allow me to explain.

It is clear that the epistemic defense of constitutionalism is based on an objectivist conception of constitutional interpretation that is very difficult to support. It follows from what we saw earlier that constitutions may be viewed as a great exteriorization of that which we agree with while shrouding with silence that which challenges us. But these agreements can only be achieved at the expense of a high level of abstraction. Agreements reached though abstraction are highly controversial and therefore require determinative procedures, that is, forms of political action and legal interpretation that allow the settlement of that which the constitution silenced (Moreso 2000, 105-118). The idea that constitutional courts only impose limits on a legislature that are already known and preestablished ignores what Gargarella called the "interpretative gap" (Gargarella 1996, 59). It is a gap that ultimately prevents constitutional norms from resolving, *ex ante*, some of the problems and disagreements that may arise. This situation gets worse the more rigid a constitution is: because if the legislative reform process that can respond to a constitutional veto is so demanding that in practice it is not viable, then constitutional courts have the *de facto* final word regarding the scope and content of basic rights.

But there is more. The epistemic argument warns us about the risk of majority rule that is not subject to substantive restrictions. According to that reasoning, unrestricted majority rule would be risky because it could lead to decisions with indeterminate content. Therefore, it would seem necessary to resort to constitutionalism as a necessary means to avoid this danger. But his assumes too much. It assumes that we already know and agree on what rights we should consider preconditions for democracy, while also agreeing on what their scope should be and how we should resolve the conflicts that arise between them. However, it is not clear why those disputes that are so fundamental should not be resolved precisely through democratic deliberation and majority rule.

Perhaps we can gain a better understanding through what Nino has called "the paradox of the preconditions of democracy." This paradox can be formulated as follows: (*i*) to embody a valuable ideal, the majority decision-making process must satisfy certain preconditions. However, it happens that (*ii*) the more demanding the definition of these preconditions is, the greater the number of issues that, as prerequisites for democracy, must be taken from the majority decision-making process. Therefore, (*iii*) the majority decision-making process will reach its full potential when hardly any substantive issues remain to be decided by majority rule. In other words: the more perfect the conditions for exercising the right to participation are, the fewer opportunities there are to actually exercise it (Nino 1997, 193, 271, 275-276, 301-302).

All this puts us in a position to judge the true significance regarding whether we should maintain an openly substantive conception of democracy or rather an essentially procedural one. To answer this, we have already seen the reasons that support (and also

weaken) the former. Let us now consider the arguments that aim to defend (and also question) the latter.

3. – Democracy and constitutionalism: the counter-epistemic argument

If the epistemic argument is the theoretical basis for constitutionalism, the counter-epistemic argument is the theoretical basis for strict or pure procedural democracy. The counter-epistemic argument relies on a premise that, in light of the foregoing, may seem very counter-intuitive. Namely: the mere and simple judgment of the majority (without prerequisites or preconditions nor formal nor substantive restrictions) is a collective decision-making rule that has unconditional and intrinsic value, which means that its moral merit cannot be conditioned on its material correctness (Waldron 1994, 36). The argument that supports this thesis begins by showing how the epistemic model is self-defeating because it lacks an adequate normative theory of authority. We can show, step by step, how the epistemic model (EM) cancels itself out. Thus, according to the premises of the EM model:

(EM1) A decision-making process is legitimate if and only if it produces results *R* whose value is independent of the process that produces them – where *R* yields greater benefits than any that could be produced by any other process.

From the above it follows, *ex hipotesi*:

(EM2) R can be defined and known independently of the decision-making process.

Nevertheless, it just so happens that the disagreements about which results should be defined and achieved is what makes it necessary to resort to some kind of decision-making process. *Argumentum a contrario*, if all citizens agreed on what should be done in all cases, no decision-making process would be necessary (except as regards logistical coordination). In sum:

(EM3) Decision-making processes are only necessary if there are disagreements regarding desired results.

Now, if (EM2) and (EM3) apply, then it follows that:

(EM4) No decision-making process whatsoever is required.

Jeremy Waldron has summarized it in the following terms: "Any theory that makes authority depend on the goodness of political outcomes is self-defeating, for it is precisely because people disagree about the goodness of outcomes that they need to set up and recognize an authority" (Waldron 1999, 253).

Viewed from this perspective, the usual way of conceiving of constitutionalism is based on a fundamental error: the failure to realize that all process-based collective decision-making must be strictly procedural (Waldron 1993, 32-33; 1994, 32-34). If it were not (i.e., if it included substantive restrictions about what can be decided), it would reproduce within itself the same disagreement that made it necessary to resort to it. Because uncertainty is precisely what makes it difficult to reach consensus on our substantive conceptions of the good (or what is correct or just) making it necessary to resort to a principle of authority such as participatory majoritarianism. Principles of authority such as participatory majoritarianism are needed to guide social decision-making under

circumstances wherein disagreement prevails, a disagreement precisely about how broad the universe of rights should be and what concept of justice should prevail.[6]

Another way of articulating the critique against the epistemic model is to point out that it is based on an incorrect theory of authority. The epistemic argument that constitutionalism is based on assumes that agreement on correct principles is what endows them with authority. But in fact rather the opposite happens. Authority emerges and is necessary precisely due to the absence of agreement and because of the need, in spite of that, to find a common course of action (in this regard I follow not only Waldron (1999) but also Raz's (1994, 202-215; 1979) theory of authority). This theory also has the advantage of being able to adequately answer the well-known Wollheim Paradox (1969).[7]

[6] Obviously, this statement is an implicit critique of Rawls. According to Rawls, whenever we try to agree on matters regarding our conception of the good, we are faced with very difficult barriers to overcome (the so-called burdens of judgment). Some of these burdens are, for example, the complexity of the evidence to be evaluated, the vagueness and imprecision of our concepts, the absence of an objective epistemology that would allow for a neutral evaluation, among others. For Rawls, nevertheless, these disagreements do not extend to our conception of justice, a realm where we can reach agreement. The counter-epistemic argument disagrees with Rawls, arguing that the same uncertainty that makes it very difficult for us reach agreement on our conceptions of the good are also present when we must discuss and reach agreement about our ideas of justice. There is no reason to expect greater agreement in this area than in the other.

[7] The paradox, as is well know, recreates a typical situation in democratic societies wherein citizen *X* is convinced both that the policy *A* should be approved (because *A* is, in his opinion, the correct choice) and that policy *B* (which is incompatible with *A*) should be approved as well (since *X* is a democrat and *B* is the option supported by the majority). As Wollheim himself states at the end of his essay, on the basis of a correct theory of authority this paradox does not really involve a contradiction, because a person who thinks that *A* is the correct decision and that *B* is the decision that should be made is really answering two different questions (although complementary). That *B* should be implemented answers a question of authority: what should the community do given that we disagree about the relative merits of *A* and *B*? That *A* is for him the correct answer responds to an epistemic question: what is the best option?

According to Raz's theory of authority, what allows us to recognize a rule or authority principle *A* as it relates to a particular practice *P* is that we accept that *A* represents a superior alternative to achieving *P* as opposed to having each of us discover what should be done about *P* on our own (Raz 1986, 53). This assumes, then, that any rule or authority principle must be strictly procedural, that is, it must provide reasons for achieving *P* apart from any individual substantive consideration. In other words, if all the ultimate rules of collective decision-making must be strictly procedural, then decisions with any kind of content can be validly made through any of said rules. This implies two things: (*a*) that all are fallible (none guarantee achieving the correct result), and (*b*) that the results we achieve through them do not count as a reason or an argument when assessing which process we should choose.[8]

These reasons, it seems to me, are more than persuasive. Now, it is noteworthy that even if we have let ourselves be persuaded up to this point by the arguments that support a pure proceduralism, there is still something important to resolve, namely: why should we opt for democratic majoritarianism as a method of collective decision-making if we could

[8] Apart from the strictly procedural arguments we have seen, one could outline here epistemic and instrumental arguments of the kind Tetlock proposes in his very interesting work, *Expert Political Judgment* (2005). Tetlock conducts an impressive study to prove that the qualified points of view presented by the so-called "political experts" are at least questionable. His data show that our ability to know and predict substantive results is very limited. It would be a bad idea, then, to make of expected results a criterion for choosing processes. In his book, he analyzes a total of 82,361 predictions made by 284 professional political experts over 20 years on issues like the end of Apartheid in South Africa, Gorbachev's political future or American military actions in the Persian Gulf, among many others. The results are striking: the experts studied by Tetlock fared worse than if they had simply assigned equal probability to all events.

arbitrarily choose any other procedural decision-making mechanism such as, for example, lotteries or drawings? [9]

According to Waldron (1999), there is a compelling reason to opt for procedural democracy over other strictly procedural alternatives such as drawings: in a community where there are disagreements about rights (their definition, what their scope should be and how they ought to be considered), a participatory exercise "seems particularly appropriate in situations where reasonable rights holders disagree on what rights they have" (Waldron 1999, 277). In this respect, the right of participation may be considered "the right of rights" (*ibid*), the only one that recognizes and takes the equal capacity of people for self-government seriously. That is, the right of each and every single person, when there is a disagreement, for his or her voice to be considered on equal footing with everybody else's in the public decision-making process. This, according to pure proceduralists, is what gives the decision-making process by majority rule a special moral quality, a quality that every other collective decision-making process lacks. [10]

[9] A great deal has been written about the role that drawings and lotteries have had in the political processes of collective decision-making. For a specific analysis about their procedural use and limits see Elster (1989) and Stone (2007).

[10] Of course, a strict procedural posture can rely on many other features that make the democratic process a process with intrinsic value. To mention a couple of well-known examples: Douglas Rae (1969, 40-56) and Michael Taylor (1969, 228-231) showed that majority rule maximizes consistency between individual preferences and the collective decisions that society makes. For decisions between two alternatives, May's (1952, 680-684) theorem shows that only majority rule satisfies four valuable properties. That is because it is: (*i*) decisive (the rule always produces a single decision), (*ii*) monotonous (the rule is sensitive to a change in preferences in favor of one of the alternatives), (*iii*) neutral (it does not favor any of the options under consideration), and, (*iv*) anonymous (only the number of those in favor of each alternative is taken into account regardless of the identity of the voters).

4. – Weaknesses in the counter-epistemic argument

I reject the counter-epistemic argument for two reasons. Nevertheless, neither of these reasons, which I will shortly articulate, makes me want to throw myself into the arms of the epistemic model. I assume that the proceduralist critiques of the epistemic model that underlies constitutionalism are essentially correct and, therefore, cannot be overlooked. Any theoretical model designed to articulate the relationship between constitutionalism and democracy must therefore take them into account. Taking them into account, however, does not dictate becoming stuck there, because the counter-epistemic model also suffers from serious weaknesses that must be overcome in order to move to a broader perspective that to some extent transcends (and resolves) the problems of the models we have considered here. Allow me, then, to explain what those two reasons are which cast doubt on the counter-epistemic argument and then explore some clues about how we might think about overcoming them.

3.1. – *Majority rule: open or closed?* – Let us suppose as a hypothesis that the counter-epistemic argument we just analyzed effectively proves that the epistemic model is self-defeating. Let us also accept as sound the moral reasons to opt for majority rule as an adequate and strictly procedural rule for collective decision-making. In that case, how we should interpret the dynamic operation of majority rule would remain unresolved. Should we accept majority rule as self-embracing and open to change or, conversely, as a decision-making rule that is both continuous and closed? (Bayon, 2009) To accept that the rule is self-embracing and open to change would imply accepting that one of the decisions that may be made by using it is to stop using it and to adopt in its place a different rule or decision-making process. On the other hand, to accept it as a decision-making rule that is

continuous or closed would imply that that kind of decision should be excluded from the set of decisions that can be made (which is to say that majority rule cannot be annulled by a majority) (I borrow this reasoning from Bayon 2009).

I have no doubt that if we are to take Waldron's arguments seriously, we have no choice but to interpret majority rule in its closed version. This is due to the fact that, as we saw earlier, the reason to opt for majority rule as opposed to alternative processes is because majority rule is the only one that embodies a valuable moral ideal. Therefore, if Waldron adopted a version of majority rule open to change, that would mean that in the end, the moral ideal that served as the basis for the adoption of majority rule could yield to other considerations. In that case, it would lose importance. That would mean that it was never actually that important and that the reasons that Waldron himself used in the first place to choose majority rule were not good reasons. As such, his argument would collapse. Majority rule must therefore be interpreted in its closed version. But in that case, what we have is a proposal for a political system in which rights are not conceived as a limit that is external to and preceding the majority process, but rather as a product of its own operation: a closed scheme that protects the conditions of possibility that the democratic system requires. Thus, the democratic objection to constitutionalism and the epistemic model is ultimately self-defeating, because even if we consider the ultimate foundation of majority rule as merely hypothetical, we would still have to accept that the formal preconditions that enable its exercise would have to be constitutionally protected. This is a position that someone like Ely could accept, but not a strict proceduralist like Waldron.

3.2. – *The problem of contesting the process.* – There is another problem beyond the one outlined above. The core problem that every strict procedural model has such as the

one we have analyzed is that it cannot withstand the application of its own clauses upon itself, because the starting point in its argument begins by recognizing that in a real political community there is no agreement regarding substantive matters (or about the type of substantive restrictions that we should apply to process-based decision-making). But the problem that then arises is that once we accept this, there is nothing to prevent our objections from extending further and further until arriving to the point where we will also probably not agree on which process we should base our decision-making.

Obviously, I have not been the only one to point out this problem. Thomas Christiano, for example, maintains that the argument based on the notion of disagreement undermines itself (Christiano 2000, 520) because "disagreement about the legitimacy of the decision-making processes themselves will emerge along with the disagreement that necessitates the use of those same processes." We find something very similar in Kavanagh (2003) and Cecile Fabre (2000). Fabre sums it up even more clearly: "[If] citizens disagree about important issues, then there is no reason to doubt that they will also disagree about the same processes that they are supposed to use to settle disputes about substantive issues" (Fabre 2000, 275). This leads to a problem of begging the question. If disagreements arise about the decision-making process being used (and this process is majority rule), such disagreements cannot be resolved through the process being contested. If in order not to beg the question we decide to choose a new guiding principle, we cannot do so on the basis of the process currently in force. Under such circumstances, two options are available to the strict proceduralist. Namely, either he recognizes that the adoption of a new process is entirely arbitrary (which would lead to a reproduction *ad infinitum* of the problems already mentioned), or he is forced to recognize that the adoption of a decision-making rule can

only be done on the basis of some kind of substantive reason. In both cases the proceduralist fares very badly indeed. I doubt that he would choose the former. Therefore, he is forced to choose the latter.

In that case, the inevitable conclusion is that choosing a process always involves –and necessarily– already having a certain preconceived idea about the result we expect to achieve through it. Certainly, the specter of disagreement does not prevent Waldron from defending a particular process among many against the others. His defense, nonetheless, inevitably ponders the virtues of the process he proposes in the name of a *substantive* ethical ideal. If democracy has intrinsic moral value and is chosen over other alternative decision-making processes, that is because it assumes equality and equal respect for everyone are intrinsically valuable. This is just one example of the fact that all ethico-procedural theories are not based solely on a proceduralist commitment (however much they may claim to do so), but on a clear moral and substantive commitment. Because when we ask why we should follow a certain process, the answers always arise out of a certain positive explanation about the human condition. In the final analysis, therefore, they are always based on substantive visions or strong valuations such as an appeal to dignity (see, Gutmann, A, & Thompson, D. 1995, 87-110).

At this point I think it is time to do a brief recap. So far we have analyzed two ways of conceiving of the democratic ideal and its relationship to constitutionalism. The first (the epistemic model) turns its attention to substantive results and understands that it is important to choose collective decision-making processes and institutional structures that produce and protect the necessary rights to reach those outcomes. The second viewpoint, however (the strict procedural model), proposes that the answer to the question of which

decision-making process we should choose cannot depend on (even in part) which of them would best protect rights and engender the best results. The procedural model launches a severe criticism against the epistemic model: since we disagree regarding rights, it is useless to ask ourselves which process is most likely to produce a result about which we do not agree. For that reason, choosing a decision-making process should be motivated by the evaluation of purely intrinsic values. This second viewpoint, however, in turn commits an error, for these reasons are motivated by what are supposed to be intrinsic valuations that in fact are nothing of the sort. They maintain an external relationship with certain ethical ideals and substantive valuations that have not been decided through the process itself. In sum, this presents a severe dilemma that may be summarized as follows: disagreements can only be discussed on the basis of substantive parameters, but these, in turn, can only be determined through some kind of process.

We have here the beginnings of an infinite regress between procedural and substantive values, a type of paradox which I call "the paradox of simple models" (since it is derived from the error of wanting to conceive of procedural issues in the total absence of substantive considerations and vice versa). This result, I think, forces us to think of things from an alternative viewpoint where both models are not excluded, and that is what I intend to do next.

5. – Escaping the trap: beyond the epistemic and procedural models

Charles Beitz already provided the key to resolving this paradox some time ago by suggesting the most appropriate way to assess the various institutional designs a society can adopt. One way is by adopting criteria independent of the process to assess its results. At

the same time, however, we also have criteria to evaluate the process itself independently of the value of its results (Beitz 1989, 118).

To begin with, this does justice to the intuitions we seem to have as citizens. For example, Przeworski (2010, 147) refers to polling that clearly reflects the instrumental and epistemic importance that people assign to democracy in countries that were in the process of or close to implementing it. In the 1990s, 59% of those polled in Chile hoped that democracy would ameliorate social inequalities. In Eastern Europe, that percentage ranged from 61% in Czechoslovakia (before its split on January 1st 1993) to 88% in Bulgaria. On the other hand, the idea that an institutional design could only be justified by the quality of its results cannot be supported at face value since it has implications that do not seem easy to accept. It assumes, for instance, that there would be no objection in principle nor anything offensive about a plural voting scheme like that proposed by Mill (that is, granting better educated individuals two or more votes instead of one). Doing justice to both intuitions involves, therefore, an approach that addresses both the value of the processes involved as well as that of the results. More importantly: it should answer what I have referred to as "the paradox of simple models."

In what non-trivial terms can we conceive of a political model that not only focuses on results but also considers the characteristics of the process itself? I think the first step is to note something we have already said: no process can be evaluated without regard to the results that it produces. This means, then, that the results that should be evaluated must be of a different sort than those produced by the search for substantive results that guides the epistemic model rejected earlier. And, prior to examining what kind of results these will be, we should bear in mind that although universal and equal participation doubtlessly enjoys

great intuitive force, it is not enough to justify the presumed intrinsic value of the democratic process. The reason, as we have seen, is that under such circumstances, the process of majority rule will only be valuable to the extent that it achieves a higher and more abstract principle of political equality. If so, then, its value would be derivative and instrumental but not intrinsic, because it would be valuable only insofar as it serves as a condition to reach that ideal of political equality. By the same logic, if constitutional mechanisms reflected a greater ability to carry out the principle of equality, their implementation would be fully justified, even with the countermajoritarian costs involved. According to this line of thinking, then, neither democracy nor constitutionalism can refrain from adopting, to some degree, some kind of instrumental reasoning.

I think that Waldron himself cannot escape this reasoning because even if he insists on the intrinsic value of participation (1999, 236-239), he does not think at all that the only valuable ideal for a political community is self-government. That is why he cannot fail to admit that his critique of constitutionalism is based on an ideal of rights. Proof of this can be seen in the fact that Waldron has ended up accepting in later works that the real object of his critique is a strong judicial control, that is, a system of judicial review where the courts "have the authority to refrain from enforcing the law in a particular case […] or to modify its effects" (Waldron 2006, 1353). On the other hand, he admits to not being opposed to a kind of weak judicial review where the courts "can scrutinize legislation in order to assess its respect of individual rights but without failing to apply it" (*ibid*). For similar reasons, he shows himself open to the idea of a diffuse constitutional judicial review as it opens the door to social demands with judicial authority at lower levels (in contrast to centralized

control, which limits the internal independence of the courts while transferring decisions to higher levels that are further removed from the citizenry).

But then – and this is surprising – the system of constitutional and political engineering that Waldron ends up proposing is not one that is limited to pondering the intrinsic value of democracy. Quite the contrary: he winds up suggesting an institutional design that respects the moral value of the democratic process while taking advantage of the possible instrumental advantages conferred by a weak constitutional judicial review. This means, then, that the theoretical apparatus that Walrdon deploys in his early work (designed to defend strict proceduralism) is not adequate for the purposes of supporting the constitutional engineering that Waldron argues for in his later work (designed to examine legislation in order to determine whether it respects fundamental rights).

This diluted constitutional engineering that Walrdon ends up defending has been institutionally applied in various ways in several countries. The most notorious and controversial example may be Canada's "notwithstanding clause." Through it, a law can take effect even if the country's Supreme Court were to declare it unconstitutional provided that Parliament or provincial legislatures vote in favor of the law and renew it every five years. This way, the necessities of transient ordinary politics are privileged over constitutional order, even while the latter operates as a permanent mechanism of review over legislation. In Sweden, a similar result is achieved by different means: to amend the bill of rights which enjoys constitutional protection, a simple majority obtained through the ordinary legislative process is enough. Nevertheless, this must be achieved through two different votes held at least nine months apart during which time a general election must be held. New Zealand itself has a bill of rights, but with a flexible constitutional regime. There

is also the Netherlands, which has a bill of rights grafted onto a rigid constitution but without the constitutionality of its laws being subject to judicial review.

These designs give rights a fundamental role as guarantees and safeguards of conditions and public interests that are considered essential. Similarly, they assign them a role as parameters and evaluation criteria of the various democratic processes. At the same time, however, they entrust the democratic process itself with the final word about decisions regarding the interpretation and scope of those rights.

And yet, to defend these types of institutional designs that consider the intrinsic value of voting rights along with the instrumental value of constitutional judicial review, it seems to me that neither Waldron nor strictly procedural theories are very helpful.

What is really needed is a theory that expands on and gives a broader sense to the notion of "results." Let us see what I mean.

A process can produce at least two types of results. It is generally understood that, in a strict sense, the results of a process refer exclusively to the decisions that are made through its application. Following Amartya Sen, I will refer to these kinds of results as "culminating effects," that is, the simple outputs considered separately from the process itself that produced them. Now, another type of effect produced by a process is often overlooked. Sen calls these other types of effects "comprehensive effects" (Sen, 1997). In this case, it is no longer about analyzing the results separately from the process. It involves judging them in a comprehensive manner that takes into account not only *what* was generated but *how* it was generated. More specifically, culminating effects refer only to rights, duties and distributed resources once the democratic process is concluded.

Comprehensive effects, on the other hand, highlight all of the results that the process leads to, including the mode and manner in which those results were obtained. A central comprehensive effect, then, is the effect that the use of the process generates in the perception that individuals have of themselves and the kind of relationships within which they find themselves immersed with others (what Rawls also called the bases of self-respect). Thus, the assessment of decision-making by majority rule would consist not in focusing exclusively on only one type of consequence, but in looking at both.

From this perspective, it is very difficult to accept that equality and the fact that each vote counts equally when tabulating a collective decision is a *sufficient* criterion for choosing between processes, if only because the formal equality of the vote before the law loses much of its intrinsic importance and moral value in the absence of basic freedoms, or under conditions where some enjoy them and others do not. And that is without even taking into account circumstances where miserable conditions lead to the selling and buying of votes or what happens when vast sectors of the population lack any access whatsoever to information. Thus, equality may not be a *sufficient* value to take into account when choosing between alternative processes of collective decision-making. That does not mean, however, that we cannot consider it a *necessary* condition, that is, one of the conditions that must be considered along with many others as one of the indispensible elements required in order to justify an institutional design. Formal equality may even no longer be considered a necessary condition if, for instance, giving greater weight to the voters of a certain district over those of other districts would help in the adoption of measures that are more just, so long as it did not have negative participatory consequences on the perception and self-

respect of any of the voters. Taking stock of the comprehensive effects (and not merely those that have an impact) requires us to consider all these elements.

This assumes, of course, that intrinsic procedural values can *on occasion* yield to considerations relating to the greater instrumental value of an alternative process. With that I want to emphasize again that the right of participation, however important it may be, cannot be the only value that is taken into account when justifying an institutional design. Strict instrumentalism, which only ponders the production of good results, also cannot be the only value that is considered. A form of broadened institutionalism such as the one I propose here shows, on the other hand, that comprehensive effects, as I have noted, must also be among the results that a process takes into account.

Conclusions

The need to weigh the intrinsic value of voting rights against the instrumental value of constitutionalism does not imply that my conclusion is a defense of weak constitutional judicial review. That would be wrong and would commit the same mistake I have been trying to prevent. My argument has aimed to prove that in the constitutional argument about democracy there are neither principles nor values that are invulnerable. Arguments in favor or against a particular theoretical model are vulnerable if it is in their nature to often have to yield to alternative considerations. One of the results we have reached is precisely that: neither the epistemic model nor the strict procedural model provides an adequate basis though which to articulate the relationship between democracy and constitutionalism. The justification of an institutional model requires a balanced approach that incorporates not

only culminating effects but also comprehensive. This kind of broadened instrumentalism shows that the global justification of a process depends on the balance between its intrinsic value and its instrumental value. If we have reached the need for a broadened instrumentalism, then that means that for different social conditions we will surely have to consider different decision-making processes. Under certain conditions, weak constitutional judicial review will be the best available option. In some others, it will not be.

This is a fact ignored by much of the literature on the subject and I want to emphasize it here. I find that this is explained, at least in part, because the reasons we find to defend a model of unconditional parliamentary primacy or of constitutionalism (strong or weak) often obey motives that are strongly ethnocentric. I understand that someone like Waldron, who comes from a democratically advanced society, would advocate a model of unconditional parliamentary primacy. But I think it is time to begin to understand that legislative primacy or weak constitutional judicial review can work quite well in societies where it is expected that a certain majority makeup will not be systematically repeated. However, this may not be the case in societies with weak or flawed democracies, where the vices of the political regime or its structural configuration make it very difficult to trust that there will be alternating majorities. This is very important and leads to the main conclusion that I intend to reach. Allow me, then, to explain it clearly.

Democratic participation in public decision-making is certainly intrinsically valuable. Because all counter-majoritarian constitutional mechanisms threaten this intrinsic value, their intervention must be justified to the extent that they guarantees a greater instrumental value (at least to the minimum extent that they offset the costs in democratic terms). It is very difficult to generalize solely on this basis. But in light of everything we

have analyzed, there is at least one conclusion that we can doubtlessly establish: in countries where social circumstances allow a process of majority rule to achieve its intrinsic value more effectively, the cost that counter-majoritarian constitutional review necessarily implies will be more difficult to justify. Conversely, in countries where there is not much hope regarding the intrinsic achievement of democratic ideals, counter-majoritarian constitutional review may be called upon to play a much more legitimate role in procedural terms. Such is the case in political cultures that have institutionalized the direct violation of rights and the law, or where systematic abuses of parliamentary majorities are rife. In such societies, the intervention of constitutional courts within a constitutional model may give rise to forms of institutional dialogue that necessarily enhance the deliberative quality of decision-making processes, not necessarily by imposing criteria upon an ordinary legislature that subvert its authority, but by forcing otherwise overlooked points of view out into the light, or by showing legal errors or contradictions in the way parliamentary decisions are formulated. Judicial activism, therefore, is not the same as judicial despotism, especially when judicial review comes into play only when there is no other effective remedy acting on behalf of the population. This is especially noticeable in developing countries where the courts have played a fundamental role in the correction of legislative or governmental omissions. The role played by the courts in Colombia and South Africa is especially noteworthy in this regard.[11]

[11] Colombian courts, for instance, as they have developed what Colombian jurisprudence has come to refer to as "the clause of elimination of present injustices," have held that deference to representative bodies does not justify legislative abuses. Specifically, it does not allow ignorance of the law or dilatory measures to prevent the enforcement of constitutional mandates that protect the rights and dignity of the people (SU-225/98, p.23, reiterated in T-840/99 de la CCC, p.5). South African courts, meanwhile, have had the ability to decide cases where there are reasons to believe that the government (or local

I understand that this is difficult for authors who, like Walrdon, come from democratic regimes with a highly evolved political culture. But, what happens in situations or countries where the legislative system has become dysfunctional?[12] In that case, judicial activism has to compensate for legislative impotence. Its activity becomes legitimized to the extent that it contributes to overcoming the inertia (instead of defending it), the forcefulness with which it defends the rule of constitutional rights and the efficiency with which it rescues from their helpless lot those who seek justice.

Such reasoning, however, should be entered into carefully to avoid falling into what I call the "fallacy of asymmetry," which consists of comparing the worst features (or the worst possible description) of one of the institutional actors who is being compared with the most idealized description of the other. When I say this I have in mind arguments like those of Ely (1980), designed to show that the courts have a better institutional position than legislative bodies when it comes to guaranteeing the impartiality of the political process. Ely has often been accused of idealizing the role and disposition of the courts. In the end, constitutional courts also make decisions guided by majority principles such that any difficulty that may be identified in majority rule (such as intransitive preferences or the manipulation of Concorcet cycles) can also be imputed to the decision-making process in legal disputes. Likewise, it is at least questionable whether constitutional courts are not subject to being as affected as legislative bodies are by the way the political system is organized and power is distributed.

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governments) have failed to apply the principle of the progressive realization of rights when it comes to improving responsiveness to demands for justice (see, for instance: *Soobramoney vs Minister of Health* (CCT32/97) 1998 (1) SA 765 (CC)

[12] This is something that can occur due both to the loss of a judicial legal culture (under circumstances of generalized corruption), or because of reasons related to the number of players (or institutional actors) with veto power, as analyzed by Tsebelis (2002).

I am aware of all these difficulties. But I have also wanted to show that if in recent years authors like Sunstein have been able to say that "constitutional theory is in a surprisingly primitive state" (2001, 97), this should be attributed to the reductionism that much of the literature about this issue has been subjected to by the positions we have analyzed here. Specifically, I am referring to the absence of balance that has prevailed between the rival arguments we have discussed. As we have seen, epistemic and strictly proceduralist arguments are insufficient by themselves to debate and accurately determine, within a strong theoretical framework, the set of issues that must be extracted from ordinary politics and transferred onto non-elected bodies. The road we have traveled has helped us analyze the reasons that make it necessary to go beyond the epistemic and counter-epistemic arguments. Through a broadened instrumentalism and the contextual guidelines I have proposed, I think we are moving in the right direction in order to begin addressing this need.

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