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The Nature and Limits of the Majority Principle

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Constitutional courts are more and more important in our lives. But how can they be legitimate? Pasquale Pasquino shows that political theory cannot ignore the existence of these new bodies, any more than it can ignore the limitations of majority decisions.

The presence of constitutional courts in most European countries is the most obvious counterexample since the Second World War of the "fixation"[1] on elections that we are told is the unique and finishing keystone in the arch of governmental legitimacy in our political systems.

The Partiality of the Democracy of the Moderns

Analysis of the theory of modern representative systems (which in the twentieth century ended up being called "democracies"), whether it be Hans Kelsen's or Joseph Schumpeter's, makes it possible to say – simplifying a little – that what has been called *democracy of the moderns* consists of the following: in competitive and regular elections, citizens choose representatives who make laws that these citizens must obey. The electorate are free to dismiss these representatives at the next election. So we say that the representatives are accountable, or "politically responsible to the voters", and this continues, election after election. This is approximately what Abbé Sieyès wrote at the beginning of the French Revolution. With one important exception: Kelsen and Schumpeter both include in their theory the essential role of political parties, which were absent or rather frowned upon

[1] Pierre Rosanvallon, *La Légitimité démocratique. Impartialité, réflexivité, proximité*, Le Seuil, 2008; English translation by Arthur Goldhammer forthcoming: *Democratic Legitimacy*: *Impartiality, Reflexivity, Proximity*, Princeton University Press, 2011.

by the doctrines of the founding fathers of the representative system, in France as well as in the United States.

That will do as a very simple description of the parliamentary government of England today or of the Third and Fourth French Republics. Unfortunately, this theory describes only one part of the institutional reality characterizing countries such as the United States, Germany, Italy, India, South Africa, and (since the 1970s) France. This now standard view of democracy of the moderns is clearly very partial from the descriptive point of view, and also from the normative point of view – which is more awkward for political philosophy, including the most remarkable one on our continent, that of Jürgen Habermas.

This description, based on electoral legitimacy, is partial from the descriptive point of view, on which I concentrate here, because in practice laws approved by elected parliaments, either before (as in France up to 2010) or after being promulgated, can be wholly or partly overruled, or interpreted and therefore changed, by judicial bodies that are neither elected by the citizenry nor accountable to the electorate.

This reality continues to scandalize some jurists, undoubtedly strongly attached to the democratic theory of Kelsen, who paradoxically is the European inventor of the judicial review of constitutionality.[2] This reality has not been subject to adequate and satisfactory analysis, at least not in political theory.[3] Moreover, it seems resistant to investigations into changes in the representative system (also known as democracy), because the existence of constitutional courts defies the principle of electoral responsibility, the only democratic element of this "mixed regime", the term that is increasingly being applied to representative government.

[2] On this question see Olivier Beaud and Pasquale Pasquino (eds.), *La controverse sur "le gardien de la Constitution" et la justice constitutionnelle. Kelsen contre Schmitt – Der Weimarer Streit um den Hüter der Verfassung und die Verfassungsgerichtsbarkeit, Kelsen gegen Schmitt* (*The Controversy about "the Guardian of the Constitution" and Constitutional Justice*: *Kelsen* versus *Schmitt*), Paris, Éditions Panthéon Assas, 2007.

[3] For partial analyses see Alec Stone Sweet, *Governing with Judges*, Oxford University Press, 2000; Tom Ginsburg, *Judicial Review in New Democracies*, Cambridge University Press, 2003; David Robertson, *The Judge as Political Theorist*, Princeton University Press, 2010; and Allan Brewer-Carias, *Constitutional Courts as Positive Legislators,* Cambridge University Press (in press).

Mixed Regimes

We have fallen into the habit of calling our political systems "mixed regimes" without explaining exactly what is meant by this expression. In standard political theory at least from Aristotle to Machiavelli, a mixed government is a regime that is neither an *oligarchy* nor a *democracy* (two corrupt forms of government in the classification of constitutions presented by Aristotle in Book III of the *Politics*) but a system in which the city's government is exercised directly by the two essential parties in the city – *mere tes poleos* – namely the *gnorimoi* and the *demos*, or the *grandi* and the *popolo* as Machiavelli would say. This dichotomy could be translated as the wealthy and the notables, on one side, and the common people on the other. This does not have much to do with our current political systems, which in ancient political vocabulary would be elective oligarchies. In the first place, they are no longer regimes that have direct government, they have government by delegation. Furthermore, the mixture in question is not the one that Aristotle talks about, of the wealthy with the lower middle classes. It is quite another mixture; in fact it is the one spoken about in the Middle Ages by Thomas Aquinas who in his *Summa Theologiae* depicted the Kingdom of France as an example of a mosaic model, namely the mixed regime that God Himself gave to Moses to govern the Hebrew people.

The mixture described here has a completely different nature and structure. According to Thomas Aquinas, a regime is mixed if one part of the city (the citizens or the subjects) elects the aristocratic element (a senate) and the monarchic element (the king) of the system. Elections here become the democratic element of the regime, as long as senators as well as the king are chosen by *all* citizens, with neither exclusions nor special prerogatives. I draw attention to this point because in classical theory elections were regarded as an aristocratic device in the selection of governors. We should also note that the system that Thomas favoured in the thirteenth century greatly resembles the one that Americans adopted at the outset, and the French in 1962, which they call simply *democracy* – which in Thomas' language would be called a *polity* or mixed regime (*politia* is the calque that was chosen by William of Moerbeke to translate into Latin the Aristotelian term *politeia*).

In these mixed regimes that are our representative systems, we can no longer avoid asking why, how and whence arises the legitimacy of constitutional courts or councils that can say what the law is and impose it on the will of elected majorities.

The Characteristics and Properties of Majority Rule

If the will of the majority can be overruled or changed by a small group of judges – the French, out of a traditional and quaint distrust of judicial power, prefer to call them experts (*sages*) – we must assume that this majority will is not wholly satisfactory or that it is not general. But why, and on the basis of what criteria?

However, before examining what's wrong with majority rule – why we can no longer say that "we are judicially correct because we are politically in the majority" – and before seeing what's wrong with the principle that connects elections with majorities (the majority's decision is right or in any case should be obeyed because it is a majority of an elected assembly that is accountable to the electorate), we must ask ourselves where this idea comes from and why we are so fond of it.

So it is to this issue of majority rule, to its properties and its application limits, that I devote the bulk of this essay. In other words, the idea is to demonstrate the intrinsic limits of majoritarian democracy, a task that Ronald Dworkin (in *Freedom's Law*) set for the profession some years ago without pursuing this agenda very far.

To begin, we must differentiate between two ideas that we have a tendency to jumble together: that of majority rule as the *principle of collective decision-making* and that of its *connection to democracy*. Notice that this distinction is blurred not in Aristotle's political theory but in the institutional practice of Athenian democracy. In its most important public institutions, majority rule was systematically applied. In the *ekklesia* (the assembly of citizens) as well as in the *dikasteria* (the courts consisting of a large number of popular jurors chosen by lot before each trial), the rule was decision by absolute majority. It should also be noted that the voting procedures used in these two institutions were quite different.[4] In the *ekklesia*, business was conducted by *cheirotonia*, a show of hands; given the number of members of the assembly (around 6000), the result was not counted but simply gauged by ten public officials, the *proedroi*. In contrast, in the popular courts votes were taken by *psephophoria*, i.e. by jurors placing (without being seen) little bronze disks into a machine that Aristotle describes in his *Athenian Constitution*, which produced the numerically

[4] See my article "Democracy Ancient and Modern: Divided Power", in *Athenian Demokratia – Modern Democracy*: *Tradition and Inspiration*, Entretiens sur l'Antiquité classique de la Fondation Hardt, 2010, pp. 1-50.

accurate result of the voting. This crucial result was kept secret. The conclusion to draw from this discussion is that the principle that justified majority rule in Athens was clearly related to the idea of equality – in Greek, the concepts of *isegoria* and *isonomia*, i.e. the equal right of citizens to speak in the assembly and to participate in different ways in governing the city.

However, in modern democracies the majority principle is normally used in two different contexts. It is used in representative assemblies, as a rule of decision making (unless there is an executive veto that can obstruct the will of the majority, as in the United States), but also in the electoral rules (the arithmetic formula that transforms the large number of ballots into the smaller number of the seats that are to be filled). In fact, that is precisely the definition of an electoral law. It is a mechanism to transform numbers into numbers. In this latter context, it is actually a rule of authorization, a mechanism for selecting governors that must be analysed by being compared with other mechanisms of this kind, such as public contests, lot, and so on. It cannot be argued that by voting, citizens are choosing policies, for two reasons. First, all liberal-democratic constitutions forbid popular mandates. In addition, political science gives us no clear explanation as to why voters select the candidates and the parties that they vote for. So it would be unfair to equate a competitive election in our political systems with a popular referendum asking voters about a specific issue. Elections are chiefly a form of authorization "from below" that is characteristic of political regimes in which governors do not have *sui iuris* authority, such as, in contrast, is enjoyed by monarchies and aristocratic governments.

Authorization should not be confused with the majority decision rule which, as such, is unrelated either to democracy of the ancients or to that of the moderns. This rule of decision making – by either simple or absolute majority – can be adopted by any group of individuals, even a very small one, in order to make a decision that binds the whole group. An oligarchy might well use the majority rule to make political decisions. The American Supreme Court, like all lower American federal courts, decides by simple majority. That does not make it a democratic body.

So we must not lump together the majority principle as a rule of collective decision making, with democracy as a form of government or at least as a component of the mixed aristo-democratic regime of the democracy of the moderns.

The Distinction between the Majority Principle and Democracy

Midway through the seventeenth century, Samuel Pufendorf, in *Of the Law of Nature and of Nations*, drew attention to the fact that there arises in every non-monarchical regime the problem of securing recognition of a sovereign will – a will that binds all the members of the group, those who agree with the decision but also those who do not. In other words, it was necessary to find in these regimes some mechanism to aggregate individual wills to extricate a common will, a will binding on everyone. For Pufendorf, majority rule provided such a mechanism in all non-monarchic systems, especially in aristocracies. From this point of view, majority rule in itself is not connected with the democratic regime. For Pufendorf, democracy is simply a system in which the set of decision makers coincides with the set of those who are obliged to respect the collective decision. From this point of view, democracy as such is not a mechanism for decision making (because this is also found in aristocracies), but a principle or a rule of inclusion. And this inclusion can be direct, as in Athens and in the doctrine of Pufendorf, or indirect, where the inclusion is not in the practice of government but solely in the choice of governors *pro tempore*. In the case of modern representative government, inclusion takes the form defined by Sieyès when he connected it to the principle of election: since all citizens must in an equal way obey the law, they also have the right to collaborate in making it. However, because in a representative government this collaboration cannot be direct, they must all be able to choose those who will make the laws and to dismiss them at the end of their term.

It follows that one can ask what justifies the majority principle as a mechanism for decision making, whether in an aristocracy or in the American Supreme Court or in a parliamentary voting system. Pufendorf's theory and the work of Edoardo Ruffini concur: it is justified by a specific form of equality, which in itself implies neither economic equality nor equality of opportunity.[5] It is related to the above-mentioned Athenian isonomy: it consists of the equal weight of the decision makers in the collective decision. If voting takes place and the majority principle is used to count the votes, the preferences or opinions of each are weighed equally in the aggregation of the votes. Taken as they are, good or bad, thoughtful or irrational, the preferences have an equal weight. Thus, though the preferences differ in many respects, thanks to the majority principle they lose all their qualities except the most abstract: their equal impact on the final decision, which binds everyone. The members

[5] Edoardo Ruffini, *Il principio maggioritario*, Lecture, no. 23, Autumn 2006.

of the decision-making body, though not equal to each other in many respects, decide that their wills, choices and preferences are to be counted as having the same value, or, as I just said, they are to have an equal weight in the counting. This is what Sieyès called the metaphysical character of equality, and it is what John Stuart Mill opposed, with his wish to give two votes to every member of his country's intellectual elite. So actually the isonomy of the moderns translates into an "isobaricness" – an equal weight of the decision makers in a collective choice.

The Limits of Majority Rule

The characteristics of majority rule – its properties, which I have now extricated, and its limits, to which I would now like to devote this analysis – appear more clearly if we compare it to other decision-making mechanisms. First, by a rule of collective decision making I mean a rule that produces a decision that binds all the members of a group. In a given group of individuals, a rule of collective decision making produces a decision that obliges and binds everyone, even those opposed to the decision that has been made. Exit – abandoning the group – is generally not an option, or its costs are very high, as émigrés know. If the popular assembly of Athens votes for a military expedition against Syracuse, even those who are opposed to it must climb into the triremes, set off for Sicily, and be sunk to the bottom by the fierce Syracusans! In a different context, even Americans who oppose the military occupation of Iraq must pay the political and economic costs of this adventure. As we have seen, a rule of collective decision making makes the will of a part of the group into the will of all.

Let's start by listing the possible rules of collective decision making. Without claiming to be exhaustive, we can include acclamation; voting and its alternative principles of the *sanior pars* and the *major pars*; unanimity; plurality; and consensus (I shall return to this last one and to its forms). Voting and acclamation are two mechanisms for aggregating preferences: the first is numerical, the second is sonorous. In the second case, acclamation, we can also count the intensity of preferences: a hundred people with a strong preference count more, and make a louder sound, than two hundred with weak preferences. Equal votes for all can never take this strength into account.[6] It moderates and so to speak flattens the impact of preferences, which are thereby once again equalized.

[6] There are more complex voting systems that try to take into account the strength of preferences.

In the case of voting, there are in principle several rules of aggregation to choose from, ranging from unanimity to plurality (where the largest minority wins – as is the case in "triangular" elections in France and in the English majoritarian first-past-the-post electoral system).[7] In contrast, the *sanior pars* principle selects before the voting a certain number of individuals in the group, and this smaller group is defined from the outset as being able by its qualities to bind the whole group to its decision; this part is presumed to be better because of the intrinsic qualities of these special decision makers (wisdom, age, education, position in a hierarchy, and so on).

As for unanimity, although it does have blocking effects, we note that it can be used in cases involving a very small number of decision makers. For example in the United States, a bill is enacted only when there is unanimous agreement by the two houses of Congress and the President[8]; this was also the case with the King in Parliament in the former English constitution. Here, the unanimity principle has the traditional purpose of avoiding decisions that are precipitate, and motivated by passion or emotion. Admittedly, as the number of decision makers increases, the blocking effect blows up, so to speak, and leads to the impossibility of deciding anything other than to maintain the status quo, because the unanimity principle gives to each member of the group a right to veto the decision. However, since Montesquieu, it is often asked whether the power to do is the same thing as the right/power to prevent – a question that was to come into the heart of the debates about royal assent in France in 1789. Still, the unanimity principle, except with very small groups of decision makers, is rather a rule for preventing than a rule for doing.

A weak form of unanimity or a particular form of majority is the qualified majority rule, which interests us primarily because it presides in what are undoubtedly the most important decisions in constitutional democracies: those that amend a "rigid constitution". With few exceptions (the only important one being the United Kingdom) every country in the world now has a rigid constitution, i.e. a constitution that cannot be changed by a simple majority of the elected representatives. It is in this sense that it can be said that the primary

[7] Note that in this case, the largest minority is regarded as if equal to the majority: 35 = 50.
[8] According to Congressional Research Service data, from 1789 to 2004, only 106 out of 1484 ordinary presidential vetoes were overridden by a two-thirds majority vote in Congress.

anti-majoritarian mechanism in our political systems resides in the rigid constitutions themselves.

This is obviously a major problem, yet rarely has there been any explicit political discussion of it. Whence comes this idea of drastically limiting the power of elected and accountable majorities? A response that would be articulate and even just slightly satisfactory would require a very long argument. But we can undoubtedly get to a preliminary response by reflecting on a major limitation on the majority principle. If a majority decision must bind all members of the group, it seems likely that the majority cannot decide anything and everything. If the majority that decides tax rates, international policy, social policy, and so on, could also determine my beliefs and my political, religious, moral and sexual preferences, then majority rule would be nothing but a suicide pact. Choosing it would make me not simply equal to everyone else, but a being without qualities, without personality, without a name, subjected to the altogether arbitrary will of a certain number of other individuals who can decide everything. The fact is that, since Hobbes, and in spite of Rousseau, the modern liberal theory of the state has asserted and defended the idea that there cannot be total alienation at the base of the social pact. For Hobbes, not only is the right to life inalienable, and selling oneself in a contract of slavery forbidden, but the guarantee of this right to life is the very end of the state and the foundation of its legitimacy: no protection of life, no obedience to the ruler. The democratic sovereign, the simple majority, could not without contradiction be more powerful than the absolute sovereign. So some choices are exempt from majority decision and blocked, so to speak, by the rigid constitution.

The super-majority rule is a primary guarantee against the suicide pact of total alienation in favour of the majority. More precisely, qualified majority rule takes away from the simple majority the power of transforming the system of public institutions into a machine in the service of the majority itself, prevents it from abolishing the separation of powers, and tries to defend the idea that the constitution is a common good and not the property of those who have won the elections and who are destined, by the democratic principle of alternation, to be one day back in opposition. In sum, if the constitution is the rule of everyone, it cannot be at the disposition of one party. One could object that since a constitution was the product of one party in the society, we could ask why one party cannot change it. But, if this was the case – and in fact sometimes it was – the text that is called the constitution would not be what is meant by this word in liberal culture. It corresponds more

to an attempt by one party in the society to govern with a "constitutional coup". This inevitably leads to instability in the institutional system; consider Latin American countries where the party who somehow or other wins the elections normally convokes a new constituent assembly. This is another way of saying that, in these countries, there is not a constitution, but repeated attempts to freeze in the form of a rigid constitution the partisan policy program of the victors, which in its turn will be overturned and replaced by a different partisan constitution at the next change (pacific or violent) of the governing elite.

But beyond the qualified majority that should protect the communal rules of the art of governing, a second line of defense should be built against the possible tyranny of majorities, to take back this term from the liberals.

If one draws up, as is done in every constitution, a list of inviolable rights – the equivalent of the *jus sese praeservandi* (the right to life) that Thomas Hobbes talks about – there will inevitably be possible conflicts between the government and the citizens concerning the contents of these rights, especially since the contents of such rights as liberty and equality are not unequivocal. Who will be the judge of these conflicts between the citizens and the government? If it is the government, then it could become both party and judge in the case; if on the other hand it is the citizens, we are back in the context we have just analysed concerning unanimity, in which each individual would have a right to veto the decisions of the majority, ending either in blockage or anarchy. We know the answer that has become prominent especially since the Second World War and in countries that had experienced the defeat of parliamentary democracy and totalitarian regimes: a court of justice judges the interpretive conflicts between the citizens and the government concerning their protected rights. The French case is rather special, for up to March 2010, the court – the Constitutional Council – has had the difficult task of anticipating the anticonstitutional results of laws voted by the Parliament before they have been promulgated. But more generally in countries like Germany, the United States, Spain, and now France also, there is the possibility for citizens as litigants to go before the constitutional court in order to have their protected constitutional rights guaranteed against the power of elected majorities.

Of late, undoubtedly because of the malfunctioning of the American Supreme Court, there has appeared in the United States a current of thought, represented by authors as diverse as Larry Kramer, Mark Tushnet and Jeremy Waldron (also Michel Troper in France), who

question the legitimacy of the organs of constitutional review. I cannot discuss these authors here, but it is obvious that they seem to share the fixation about electoral legitimacy that Pierre Rosanvallon talks about in his latest book. It so happens that our constitutional law regimes (generally called democracies) are mixed regimes in a sense other than that of Aristotle. The legitimacy to govern comes from an authorization from below – repeated elections. But in every limited government the power of the sovereign, i.e. the elected majority, must be subject to a series of reviews that cannot be reduced to organized elections every four or five years. The constitutional courts are one of the most important forms of this review and of the mechanism of moderation that limited government is supposed to bring to the government of the living. Where does their legitimacy come from? From the very nature of the moderate government, but also from their position as third and independent judge vis-à-vis the parties in conflict: some citizens and the majority (present or past – that depends on the referral mechanism). Admittedly, one could object that the courts also tend to increase their power. But in principle the only way for them to entrench it is by more vigorously protecting the rights of citizens and by showing themselves to be impartial.

Although it is normal for citizens to participate equally in making the law because everyone has to obey it, we must remember that no system classified as democratic has ever conformed to an epistemically pure concept of democracy in which majority rule miraculously detects truth, wisdom and justice. After the failure of the military expedition to Sicily and after the oligarchic coups d'état that ensued at the end of the fifth century, the Athenians reorganized their institutional system by bringing in the *graphé paranomom* – the power of a court of justice to overturn a decision of the assembly. In constitutional law regimes, the most important demand by citizens is increasingly for the protection of their rights, which no political majority can define or abridge at will.

How Should Constitutional Courts Make Decisions?

One final point deserves to be touched upon: how constitutional courts make their decisions, and how they should make them. It is often objected that these courts – which I, by criticizing the majority principle, seem to be saying are superior – in fact base their decisions on this same majority principle. To which one must reply:

1. The same confusion is being reproduced here that I have just tried to dispel, the confusion of a rule of decision making – the simple majority – with a principle of authorization – elections in which the votes are equal.

2. Undoubtedly more importantly: in making that objection, the word "vote" is being used to refer to quite different things. When a preference is asserted without argument, as in a referendum or an election, a citizen is acting as a member of the sovereign body. Like the baroque sovereign that Walter Benjamin talks about in his *Deutsches Trauerspiel*, he can say: *sic volo sic jubeo stat pro ratione voluntas* (it is my will and there is no need to give any reasons or arguments). Such voting needs no justification other than the will. Moreover, it is perfectly possible to aggregate preferences, especially when they take the empty form of numbers. In contrast, members of courts, even when they "vote", which is not always the case, do not express simple "preferences". Not only is the court obliged to give reasons for its decision at the end of the deliberative process (opinions, decisions, *arrêts*, *Entscheidungen*, *sentenze*) but during the hearing, the judges are obliged to give arguments without which their votes do not count.

In the case of the Italian Constitutional Court, which is the one most familiar to me and which seems to me a good model from the normative point of view, the process of decision making is consensual and not majoritarian. This allows me finish by saying something about this mode of decision making – consensus – which I have referred to without discussing and which is beginning to interest those who are working on collective decisions[9]. We must differentiate two kinds of decision, to do with micro- and macro-constitutional issues. In the first case, after a preliminary discussion, the judge writing the opinion of the court presents a draft opinion. If there is no objection or if one of the judges suggests small amendments, the text is amended and approved without voting. Here it is a matter of consensus by the absence of opposition. In the case of macro-constitutional decisions, the deliberative process is much more complex. After a preliminary discussion in which each judge speaks and presents his arguments, the one writing the opinion draws up a draft. This draft is rather likely to be disagreed upon among the judges. A discussion is then begun, guided by the presiding judge, which tends to bring the positions together and to encourage compromises. It is possible for the disagreement to continue in spite of the discussion. Decision by consensus then implies that the position to be adopted, especially if it is a body that must speak with one voice and no dissenting opinions, will not be that of the majority, but the one that is most shared by the members of the court. In other words, the

[9] See my article, "Voter et délibérer", and that of Philippe Urfalino, "La décision par consensus apparent: Natures et propriétés", in *Revue Européenne des Sciences Sociales*, no. 136, 2007.

majority does not have the right to impose its will (and in any case must avoid doing so); the judges must rather reach a position that can be shared by the largest possible number of them.

These notes do not claim to present a conclusion; they are only an incitement to rethink constitutional democracy in the light of more recent developments. Theory takes off in the evening like the owl of Minerva, but dusk is now approaching; political theory cannot ignore the existence of these new “intermediate bodies”. They now exist in almost all of our political systems, in the form of courts of justice that have the task of judging conflicts between organs of the state and between citizens and their governments.

Since Hobbes and Locke, the modern concept of the state has based political obligation to government on the government’s ability to protect our rights. The new social contract requires the existence of a judge independent towards citizens and governments, to whom all litigants can turn to seek protection for their rights. Without the possibility of this remedy, all obedience to elected powers is transformed into a simple abdication of our fundamental rights. In France the constituent power has recently recognized this, in its reform of article 61 of the constitution.

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