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Law, Community, and the Problem of Self-Government

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Introduction

For a community to identify itself with the law -I assume- that community must be able to recognize that it is, in a relevant sense, the author of that law. And for that community to consider itself the author of the law -I also assume- that community must have been meaningfully involved, either directly or through its representatives, in the drafting of the law. When the community finds reasons to see itself reflected in the laws that organize life in common, we can speak of a self-governing community. However, this is not the situation we usually encounter when we look around us: quite the opposite. This is why much of contemporary doctrine refers to the existence of a situation of "democratic crisis" (Ginsburg & Huq 2018; Levitsky & Ziblatt 2018, 2023; Loughlin 2022; Przeworski 2019). In this paper, I shall suggest that the situation of "democratic crisis" that we recognize today should not be seen as a new phenomenon but, rather, as one that finds its roots in the very origins of constitutionalism.

Herein, I shall examine the above-mentioned situation, which I shall present as *the problem of self-government*. My main claim shall be that, to the extent that the community cannot identify the norms that govern it as its own norms, that community has reason to consider that it is not a self-governing community (but rather a community that is "dominated").[1] The hypothesis that I am going to explore, through my argument, is that the problem of self-government is not new, but goes back to the very origins of constitutionalism, and has to do, in a very special way, with the form adopted by our constitutional organization, since its origins. To state this -I mean, to establish a close link between the problem of self-government and the structure of our Constitutions- does not mean to affirm that there, in the Constitution, lies the only or privileged source of our present problems. However, the existence of that a link would imply challenging other alternative explanations, like those that suggest that a democratic crisis such as the one we are currently experiencing has to do with more conjunctural situations, related to (what part of the doctrine has called) situations of "democratic erosion" (Gisnburg & Huq 2018; Graber et al 2018; Landau 2013; Levitsky & Ziblatt 2018; Luo & Przeworski 2018); or those that attribute the current problems of self-government to a succession of inefficient governments, corrupt politicians, or populist leaders, etc. The problem of self-government

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[1] I shall also say that in these cases we can speak of situations of *legal alienation*, insofar as the normative instrument that we employ to gain collective freedom and make self-government possible -the law- becomes the instrument through which we are deprived of freedom and of our possibility of self-government. The idea of "legal alienation" is obviously related to the Marxian notion of alienation (Marx [1843], 1983, 136).

does not refer us to a well-designed constitutional system that, over time, deteriorated or became denatured, but rather to a constitutional system whose design was inspired by a philosophy of "democratic distrust", which naturally contributed to discouraging developments in self-government. In sum, our constitutional organization, from its beginnings, contributed to the construction of the "problem of self-government" that we still suffer from today.

In the next section, I shall refer to (what I call) the "imperfect political sociology" and the "elitist political philosophy" that lie behind our prevailing constitutional organization. In following sections, I shall examine the main components of that constitutional organization (i.e., how the judicial and legislative powers were organized, how the system of "checks and balances" was designed; etc.), and I shall show the ways in which those components are an expression of a "discomfort with democracy" (Unger 1996). Towards the end of this work, I shall examine some of the implications that follow from the adoption of this institutional system, and will suggest - tentatively - some possible continuities between those initial design problems and the current "crisis of democracy".

The political sociology and political philosophy of a decayed institutional system

Reflection on the current democratic crisis, and its links with the "original" constitutional structure, takes us back to the old debate between constitutionalism and democracy. (Elster & Slagstad 1988; Holmes 1988). In fact, for more than two hundred years there has been a dispute within our constitutional democracies as to how to resolve the struggle between two impulses that push in opposite directions. On the one hand, we find a "democratic impulse", which demands that the citizens themselves be in charge of the most important decisions about how to carry out life in common -typically, based on majoritarian mechanisms. On the other hand, we find a "constitutional impulse" that resists the former, and calls for prioritizing the protection of minority rights over the risks (supposedly, assumedly) inherent in majoritarian decision-making processes.

In my view, this persistent tension between constitutionalism and democracy has been decided in favor of constitutionalism, that is, to the detriment of the more "democratic" aspects associated with institutional organization. As I will say, a majority of constitutions defined, from the outset, an institutional scheme based on "democratic distrust", this is to say more prone to discourage than to favor majority decision-making processes, or -in more general terms- the intervention of majorities in politics. As I will argue now, these Constitutions reflected - in many cases, until today - being based on two implausible assumptions (what I will call) "an imperfect political sociology" and an "elitist political philosophy". Let me briefly refer to each of these assumptions, which will allow us to better understand the profile adopted by our Constitutions, and the raison d'être of the different institutions that -in most cases, still today- define their structure.[2]

An imperfect political sociology. First, constitutionalism as we know it (particularly but not exclusively in the United States) originated with the purpose of "institutionally redressing" a society that conceived of itself as "simple," divided into few groups with an

[2] In what follows, I will be mainly (but not exclusively) referring to Constitutions written in the Americas -beginning with the US Constitution, and them mentioning different Latin American Constitutions. I assume, however, that the basic structure of the US Constitution has been enormously influential in the constitutional design of many other (mainly European) countries.

internally homogenous composition and composed of self-interested individuals. In the words of James Madison, in *Federalist Papers* No. 10, society was seen as fundamentally divided in two groups: "majority" and "minority"; "debtors" and "creditors"; those without property and those with.[3] These groups were recognized as internally homogenous, and their members were taken to be mainly self-interested subjects (fundamentally motivated by passion or by self-interest, as taught by David Hume). From there, they could conclude that all of society could be fully represented by ensuring the presence of some representatives of each group in the institutional scheme.[4] The whole system of checks and balances appears to have been constructed on the basis of this reasoning, that is, of ensuring the power of each group in order to avoid "mutual oppressions." As Alexander Hamilton said in one of his main presentations at the Federal Convention: "[G]ive all the power to the many, they will oppress the few. Give all the power to the few, they will oppress the many. Both therefore ought to have power, that each may defend itself against the other" (Farrand, 1937, vol. 3, 288).[5]

Clearly, those original assumptions do not describe modern-day society -even more strongly, I would say that they were not obviously correct even in the moment when they were adopted. Unlike the picture painted by the U.S. Founding Fathers, we find ourselves in multicultural societies defined (as John Rawls said) by the fact of pluralism (Rawls 1991); with hundreds of internally heterogeneous groups, and made up of extremely diverse people (individuals who are "many people at the same time": in fact, no one can currently be described purely or exclusively by the fact of being a worker, landholder, homosexual, vegetarian, or rightsholder). In conclusion, it is currently not at all probable that the old institutional system will be able to accommodate the entire society, as it was expected to do in the past.

An elitist political philosophy. The second fundamental assumption underpinning the current institutional system has to do with a principle of "democratic distrust." As Montesquieu himself observed in *The Spirit of the Laws* (1748, 2002), our constitutional systems were conceived and organized according to an "aristocratic" as opposed to "democratic" premise from the very outset. That same approach - more aristocratic than democratic - inspired the "Founding Fathers" of American constitutionalism "to erect a political system" within which "majorities had to be constitutionally inhibited" (Dahl 2006, 31). The fear of majority rule (democratic distrust) still runs through the constitutional bases of our representative democracies.

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[3] Of course, the political sociology presumed by Madison was already disputed in his time, when many thought that the range of points of view that was intended to be represented in parliament was too narrow. Hence, the critics of his constitutional project—the anti-federalists—spoke of turning Congress into a "mirror of society", capable of reproducing the same interests, feelings, opinions, and points of view existing within the people.

[4] This aim for "full representation" was conceivable, above all, through use of methods like direct and indirect elections; or the demand for certain requirements for representation, in terms of property, wealth, or education.

[5] To be clear: the project did not simply consist of avoiding possible majoritarian excesses, through the institutional system (which would in principle be a reasonable claim). Rather, the dominant proposal consisted in ensuring equivalent institutional powers to both minority and majority groups, which represented a clearly non-democratic solution.

In fact, and to a large extent, "democratic distrust" explains the undemocratic features that began to fill our constitutional texts. In his book, *How Democratic is the American Constitution?* (2001), Robert Dahl identified numerous "undemocratic elements in the framers' Constitution" (similarly, see Sanford Levinson's 2008 *Our Undemocratic Constitution).* They include not only the institution of slavery, but also severe limitations on the right to vote; a Congress with limited powers to regulate or control the economy; an executive power insulated from both popular majorities and congressional control, etc. In fact, many of the undemocratic elements identified by Dahl in his references to the 1787 United States Constitution are still found in most constitutional systems. Thus, we find constitutions that include, among other curbs, "aristocratic" legislative chambers such as the Senate or House of Lords whose role remains providing a counterweight to the "more democratic" chamber of the legislature; indirect elections for the selection of powerful public officials (e.g., ambassadors and judges); Central Banks that enjoy enormous autonomy and discretion in defining the bases of the national economic organization; and (international and national) courts endowed with the controversial capacity to control the validity of laws "not on behalf of the prevailing majority, but against it," as Alexander Bickel put it in 1962 (Bickel 1962, 17). With Roberto Mangabeira Unger, one could claim that the institutional system was built out of a situation of "discomfort with democracy": that is, for him, the "dirty little secret" of constitutionalism -a "secret" that goes far beyond the problem of "strong courts" or the most extreme forms of judicial review (Unger 1996, 72).[6]

Let me first list and then examine, in what follows, some of the main features that came to characterize our constitutional systems since the end of the 17th Century, in line with that original "democratic distrust". Many of those features, as we shall see, continued to influence our institutional life ever since.

Representation as separation

The way in which, from its origins, the system of political representation was organized, expresses well the course of the democratic principle: its gradual weakening. Although there are many possible ways of understanding political representation, I am interested here in distinguishing between two opposing approaches to it (Pitkin 1972). The first one, more akin to the democratic ideal, emphasizes the "connection" that must exist (and be maintained) between citizens and representatives, throughout the representative process - we may call it "representation as connection". The second alternative, meanwhile, is the one more closely linked to the traditional ideal of constitutionalism, and emphasizes the "separation" between representatives and represented -what Bernard Manin called "representation as distinction" (Manin 1997).

Discussions between these two opposite approaches to political representation find a first and crucial point of reference in the Bristol debates of 1774, which involved the

[6] Unger describes this discomfort with democracy as manifest in: "the ceaseless identification of restraints on majority rule … as the overriding responsibility of … jurists; … in the effort to obtain from judges … the advances popular politics fail to deliver; in the abandonment of institutional reconstruction to rare and magical moments of national refoundation; in an ideal of deliberative democracy as most acceptable when closest in style to a polite conversation among gentlemen in an eighteenth-century drawing room … [and] in the … treatment of party government as a subsidiary, last-ditch source of legal evolution, to be tolerated when none of the more refined modes of legal resolution applies" (ibid.).

conservative Edmund Burke and the radical Henry Cruger. The two argued, on that occasion, over the relationship that should exist between electors and elected once the election was over. Was it the case that representatives should strictly follow the "mandate" of their constituents; or should they rather become independent from the electors, in order to serve the general interests of the Nation? So it was the second such perspective - the one presented by Burke - that tended to prevail.

In the US, too, the view that came to prevail during the "founding period" was the one that conceived of the representative system as an alternative that was superior to the democratic system. That option was manifest in *Federalist Papers* n. 10, for example, where Madison distinguished between democracy and republican (representative) government. For him, the main difference between the two resided in the fact that, in republican systems, government was delegated. Also, and more significantly, he claimed that delegation implied "to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations." In this way, Madison not only advocated for a representative system, as an alternative to democracy, but also defended a particular kind of representative government, where representation was not seen as a "second best" option, or a "necessary evil" (as the radical-democratic opposition understood it), but rather as a first, preferable option: Under such a regulation-Madison claimed-"it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose." [7] As a consequence, while the radical-democratic tradition was prepared to defer to direct appeals to the people, whenever possible, the prevailing view suggested the opposite, assuming that the voice of the representatives tended to be "more consonant to the public good than if pronounced by the people themselves."[8]

"Endogenous", rather than "exogenous" or popular controls

Another fundamental issue where the deterioration of the democratic component can be noticed is related to the instruments of popular control of the representatives. In the

[7] In Latin America, like in other regions of the world, the prevailing view was the one that Edmund Burke presented in Bristol and that then gained its place in US constitutionalism. The Chilean Constitution of 1823, for example, made it clear that sovereignty did not reside in the people, but exclusively in their representatives. In its article 3 it expressed: “The sovereignty resides essentially in the Nation, and the exercise of it in its representatives.” Even more extreme, article 22 of the Argentine Constitution, in force since 1853, maintained that “The people do not deliberate nor govern, but through its representatives and authorities created by this Constitution. Any armed force or meeting of persons that claims the rights of the people and petition on behalf of the latter, commits a crime of sedition.”

[8] It should be noted that the point of the critics of the notion of "representation as separation" was not to deny the difficulties inherent in collective self-government, nor to be blind to the obvious risks derived from the establishment of very close ties between representatives and represented. Such risks had been well described by Burke in his Bristol debate: representatives who do not think more on their own; representatives who are subject to the will of a faction and unwilling to change for better ideas exposed in the name of the general interest; representatives that become mere "talking puppets" of their represented. What most interested these critics, above all, was to expose the foreseeable risks derived from the dominant conservative positions in representation: that the representatives would be inclined, more and more, to act according to their own interests, thus disregarding the interests of the electors.

famous *Federalist Papers* n. 51, Madison referred to the importance of having both "internal" or "endogenous" and "external" or "exogenous" (popular) controls. He emphasized the value of popular controls, and then stressed the need to resort to "auxiliary precautions", by which he meant a strong system of "internal" controls: what we came to know as the system of "checks and balances". In his terms, "dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions" (Wood 1969; Brown 1955).

The fact is, however, that from the outset (American) constitutionalism emphasized and eventually consolidated a system of fundamentally "internal" controls. This came hand in hand with the loss of centrality of the old system of "external controls" –"external controls" that had marked the early history of constitutionalism. I will briefly mention some of these popular controls (which played a decisive role in the early experiments of American constitutionalism), and also some mentions of the reasons that were then invoked to gradually displace these instruments from the institutional scene.[9]

i) *Mandatory instructions* and the *right to recall* were two of the main instruments demanded by democratic activists, at the end of the 17th Century, in order to ensure a proper control of the representatives. "Mandatory instructions" required those to be elected to promote certain political initiatives during their mandate. These "instructions" were usually accompanied by the "right to recall", which provided for the removal of representatives who did not comply with the instructions that they received. Those types of mechanisms generated enthusiasm for their capacity to ensure that representatives remained attentive to and respectful of the interests of their constituents. However, many resisted such instruments because they were seen as leaving no space for the representatives' free discernment and prevented them from changing their minds.

ii) *Town meetings*. The institution of town meetings was a key element in American constitutionalism, from pre-independence times. There, in these public assembly meetings, the citizenry discussed and decided many of the fundamental issues related to their life in common -related, in short, to their self-government. The institution would also move, in other formats - the famous *cabildos* - to Latin America, although in the latter context they would acquire a less habitual character and would have a more select composition. After the independence revolution, in the United States (but also, to a large extent, in Latin America), the practice of town meetings would be discouraged by the newly constituted authorities.

iii) *Annual elections* represented another way to ensure steady popular control over the representatives. A repeated saying at the "founding period" was "when annual elections end, there slavery begins" (a quote attributed to future United States President John Adams). Annual elections were seen as a means to maintain strict control over the representatives, and prevent them from acting on their own accord. However, many attacked these initiatives under the belief that frequent elections would impede any public policy from reaching consolidation. Rather, it was thought, annual elections put in place incentives that would result in "permanent change," dramatically undermining the stability and respectability of any government program.

[9] I examine many of these tools, with a certain detail, in Gargarella (2000).

iv) *Mandatory rotation* was yet another tool typically favored by the most radical activists. It was meant to favor the political participation of ordinary citizens in public offices, prevent the formation of political oligarchies, and "oxygenate" governing bodies. However, many denounced the proposal, feeling that permanent rotation would amount to too much waste, both in terms of the experience gained by sitting representatives and the time "newcomers" would be forced to spend trying to familiarize themselves with the mechanisms of public administration.

For those of us who value the political participation of ordinary citizens and place special emphasis on the importance of establishing controls on government power, the objections mentioned simply call for greater refinement of the tools chosen. The criticisms leveled against them do not put in question the principles that organize them and give them meaning. [10] The fact is, however, that for good or bad reasons, such instruments intended to favor citizen power of "decision and control" were abandoned along the way (Jefferson 1999).

In the end, the political debate between those who promoted such participatory initiatives and those who rejected them, expresses a deeper dispute, between two political philosophies, about the principles that should organize the institutional design (Wood 1969, Baylin 1992). An interesting manifestation of this theoretical debate can be seen in the quarrel between James Madison and Thomas Jefferson concerning the role of "popular control" over representatives. Thus, in *Federalist Papers* n. 49, Madison responded to some comments that his colleague Thomas Jefferson had offered in his "Notes on the State of Virginia." In those "Notes, Jefferson had presented a defense of popular controls or "exogenous controls," in situations of conflicts between the branches. As a way to prevent constitutional crises ("correct [breaches] of the constitution"), Jefferson proposed calling a popular convention whenever it became necessary to solve a serious institutional conflict. Madison was very emphatically against such a provision. For him, the

[10] These tools and others like them were not simply abstract mental exercises. On the contrary, they were incorporated into the constitutional texts and practices of many American states. Among the institutional tools effectively adopted at the state level, I would point out in particular the unicameral design (that is, by the original state constitutions) of the legislatures in Pennsylvania, Georgia and Vermont; the election of the head of the executive branch by the legislature in 9 of the 18 state constitutions adopted after independence; the lack of executive veto power, a councils directly elected by citizens that evaluated compliance with the constitution (Pennsylvania, Vermont), direct election of most government positions, direct elections for the Senate (in all state constitutions except Maryland), mandatory rotation of senators (in New York, Delaware, and Virginia), and rotation in the highest government posts (in Delaware, Georgia, Pennsylvania, Maryland, North Carolina, and Virginia) (Lutz 1988, 104-5). In Latin America, the proposals and practices related to "exogenous controls" had also been common: the *cabildos* (councils) born with the purpose of bringing the people closer to the government; instructions to the representatives, which were so common in the first years after independence; etc. However, and in line with the above, the rule was the option for endogenous rather than exogenous controls: the former were gradually but systematically eliminated.[10] The early rejection of the right to instruct representatives became, at the time and since then, a conflict of extraordinary symbolic impact. This episode was followed by the slow agony of the *cabildos*; the disappearance of the idea of the revocation of mandates; the extension of the permanence of representatives in their positions; disdain for the idea of "mandatory rotation", and more. Throughout the region, suffrage ended up being subject to cuts of all kinds: from indirect elections, aimed at ensuring the "selection of the best" (Palti 2007, 206), to limitations related to age, income, property, and capacity, aimed at ensuring the election of the "notables" (see, for example, Sábato 2010; Sábato and Lettieri 2003).

Jeffersonian proposal faced at least three problems: i) it promised to disturb the public tranquility, making a call to the passions; ii) it tended to deprive the government of the "veneration" that it needed; and iii) it ended up suggesting a biased solution, given that the legislative body-the closest to the people-would tend to be favored in the face of such consultations.

In sum, the American constitutional model privileged "internal controls" (between the branches of government) over "popular controls", which gradually lost ground and strength after the entry into force of the new Constitution (of 1787). This model, based on the system of "checks and balances" would later expand to several other countries - first to Latin America, and later to Europe.

Periodic vote

The adoption of the North American Constitution of 1787 largely signified the death of the alternative model, based on "external controls", which had prevailed for more than a decade (from 1776 -the year the United States became independent from England- until the consecration of the 1787 Constitution). With the implementation of the national constitution, the emphasis on "popular controls" came to an end. This does not mean to say that the new constitutional organization lacked any "popular controls", nor does it imply that it only involved the novel scheme of "checks and balances." But the fact is that the only institutional channel to ensure democratic oversight of the government boiled down to the periodic vote.

Notably, this decision implied leaving in the hands of the "periodic vote" an enormous responsibility (to ensure a proper relationship between the electors and the elected), which was a task that was previously distributed among various institutional tools. For example, in the origins of constitutionalism, a citizen could decide to vote for a candidate, knowing that if that candidate severely breached his mandate (i.e., the instructions imposed on him), it was perfectly possible to revoke his mandate (i.e., through the right of recall): if necessary, the next day after the election. Otherwise, it was possible to wait for a short term (given the prevalence of the principle of "annual elections") with the certainty that another citizen would occupy that position (i.e., given the prevalence of the principle of "mandatory rotation").

Later on, all those "electoral supplements" were suppressed, which implied that the periodic vote took on enormous weight: periodic elections were now required to perform all the tasks that were previously carried out through a variety of tools. In short, the vote was now required to fulfill multiple tasks, which were in many occasions contradictory or in tension with each other. Under these conditions -it seems natural- periodic elections will always disappoint the expectations put in them. Given its limited power and influence, the vote is simply unable to satisfy all what is expected from it. In order to understand the gravity of the situation that is being created in relation to periodic voting, let me refer, in what follows, to some of the many tasks that the single, isolated, periodic vote, is supposed to fulfill.

i) *Past and future.* Elections are supposed, simultaneously, to provide voters with a means of addressing past complaints and stake out their position regarding decisions that must be taken in the near or distant future (Przeworski et al 1999). These are different tasks

that often involve demands that are contradictory or simply in tension, yet for which we only have one response: periodic elections. By voting we are expected to provide representatives with criteria for future action; but at the same time we are expected to evaluate the representatives in power on the basis of their past actions. Present and future, with the same vote.

ii) *Multiple policies.* A problem similar to the one described arises in relation to the multiple policies that governments -any government- must adopt. Through our periodic vote we are expected to give signals about the policies we want the government to maintain (say, social policies), and also signals about the policies we want the government to drop (say, repressive policies): always with the same, single vote.

iii) *Choosing among candidates*. We already know that voting places us in dilemmatic situations, both in terms of how to convey our position regarding past and future decisions and how to convey it regarding different policies (or different features of the same policy). What to say then, regarding the actual candidates who appear on the ballot? Here we clearly confront another dilemma very similar in structure to those already mentioned. The problem is: the vote should allow us to discern between the different candidates offered by the different parties, in a given electoral list - say, for deputies. But, what should a voter do to indicate that she intensely values a certain candidate, but actively rejects another that appears on the same list? Again: these are serious problems arising from having a single instrument to convey different or even opposite messages, about different issues.

In this way, voters become locked in a situation that we could call "electoral extortion" (or "democratic extortion"). This would be so because, very commonly, and in order to favor a measure that she prefers the most, the voter has to commit herself to the measures that she fundamentally rejects. Thus, in order to promote a measure that we like, we may end up endorsing past errors; by choosing a particular policy that we prefer, we may end up supporting another policy that we repudiate; by voting in favor of a candidate that interests us, we may end up supporting others that are unacceptable to us. Obviously, this situation appears to be largely favorable to those in positions of power: they can force (extort) us in this way, offering us some “prize” we seek, in order to commit us to endorse policies or candidates we reject. Thus, the sole institutional tool that we have -the one that promises us power and freedom- in reality begins to work against our power and freedom: the periodic vote opens up the possibility not only that our message is misunderstood but also that our message end up implying the opposite of what we demand.

"Checks and balances”or “strict separation” of powers

In the origins of constitutionalism, both the idea of bicameralism and the principle of "checks and balances" were challenged by thinkers and activists more akin to the democratic ideal. Some of them -as was the famous case of Thomas Paine, the intellectual author of the Pennsylvania Constitution of 1776- proposed the adoption of unicameral legislatures, and defended systems of organization of power based on the "strict separation" between the different branches of government. This idea of "strict separation" proved decisive at that foundational moment, in reaction to early suggestions favoring the alternative system of "checks and balances," which implied "mutual interference" between the branches of government (Vile 1967). If the radical activists defended "strict

separation", it was on the basis of a series of purely democratic considerations, which included the following three: i) the "sovereign will" of the people is only one, and must not be divided (an idea that would be distinctive of the early days and the first Constitutions of the French Revolution); ii) the proposed alternatives to "strict separation" would generate "confusion" in the exercise of power and, above all, iii) the primacy of the popular or legislative branch must be guaranteed (Paine 1989).

The "checks and balances" model, however, resoundingly won out over its alternative, under the controversial assumption that "strict separation" systems (such as those that had been known in Pennsylvania, Vermont, or Rhode Island) led to majoritarian overreach and excesses (Forner 194, Brunhouse 1942). The system of "checks and balances" that still today governs the relationship between the different branches of power appeared, then, as a perfect resultant of the elitist political philosophy and the obsolete political sociology that were prevalent, during the origins of constitutionalism.

In *Federalist Papers* n. 10, Madison offers us good clues about the political sociology that the ruling elite had in mind, at the time of writing the Constitution. There, Madison argued that:

> Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of the government.

In paragraphs like this, one encounters the basis of what would later be the organization of the legislature: the way of incorporating the whole society into the government. Madison, like many within his generation, considered it possible to reach a situation of "full representation" based on the assumption that society was divided into few social groups, in conflict with each other (fundamentally, between owners and non-owners). creditors and debtors) -groups that were, at the same time, internally homogeneous (Gargarella 1998). For those who adopted this perspective, it was enough to incorporate a few members of each group, within the institutional system, in order to reach the “full representation” of society.

As anticipated, such an imperfect political sociology was accompanied by a controversial political philosophy. It is possible to find clear traces of that philosophy in the elitist idea of a society composed of different "estates" that were in charge of participating, on an equal footing, in the government of society. This approach to the Constitution -it seems clear- played a decisive role in the development of the influential model of the "Mixed Constitution". The goal of the “Mixed Constitution” was that of achieving a "social equilibrium" through the institutional system -whether, as in Ancient Greece, through the representation of "aristocratic," "democratic," and "monarchical" interests; whether, as in the British system, through a "House of Lords" and a "House of Commons" (Vile 1967). In the American context, the idea (derived from the “Mixed Constitution”) that became prevalent was the following: the "will of the majority", which would be mainly expressed by the House of Commons, had to be counter-balanced by the "will of the minority", which would also find expression in the Constitution (i.e., through the Senate, the

judiciary, etc.). This meant - remarkably - deciding on a non-democratic institutional alternative: the idea was no longer to ensure majority rule, but rather to ensure a balance between the two main "sections" of society: the majority and the minority (or, in Hamilton's terms, to prevent "mutual oppressions" between "the few" and "the many").

In sum, what we have today is a constitutional system mounted on a political sociology that was already imperfect in its time, and a very narrow and elitist understanding of democracy. Not surprisingly, society has flooded the representative system from all sides, like a "straight jacket" that is becoming smaller and smaller, and that is unable to contain all the diversity it seeks to accommodate.

Finally, I want to call the attention about the fact that the system of checks and balances was designed in order to channel social conflicts and prevent civil war.[11] This fact, I believe, explains why the system is not well prepared and equipped to ensure collective deliberation over time. It can do so, but only as a result of the occasional, informal and discretional will of certain public officers.[12]

The judiciary: impartiality, rights and legal interpretation

No other branch of the constitutional system expresses the tension with democratic ideals better than the judiciary. Since its origins, the judiciary has been identified with the established powers, the defense of traditions, and the protection of the existing distribution of property and power. As a consequence, the Judiciary was questioned during the initial period of the French Revolution; and democrats considered it an anti-republican anomaly within the American context. As we all know, the democratic critique of judicial review continued to hold influence during all these years, and the debate on the matter re-gained some strength, particularly, after the emergence of the "Regulatory State" (Bickel 1962).

[11] Its main object-an object that the institutional system achieved with relative success-was to redirect social warfare by providing defensive tools (presidential veto; judicial review; bicameralism) to representatives of different sections of society. This was what Madison masterfully expressed in *Federalist Papers* n. 51, that is, the need to grant "to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others...Ambition must be made to counteract ambition".

[12] I understand that some scholars believe that the system of checks and balances was designed in order to favour—or developed in ways that are compatible with—democratic deliberation. According to Cass Sunstein, for example, the 'Founding Fathers' of American constitutionalism created an ambitious system of 'government by discussion,' which does not reward authority or privilege, but rather the arguments presented and solved through a general discussion (Sunstein 1993, n. 58, xvi). Stephen Holmes has advanced similar considerations in other well-known writings (Holmes 1993). But I would dispute those claims both at the historical and theoretical level. I have argued against their historical basis elsewhere (Gargarella 2013), so just let me add something about the theory behind them. First of all, as I have said already, the institutional tools offered to the different branches are not designed to promote public dialogue—they seem more prepared to put an end to, rather than to trigger collective public conversations (i.e., through instruments such as judicial invalidation of laws; impeachment, veto powers; etc.). Second, the intricacies of the system (based on public agents with very different democratic credentials, different legitimacy different interests, elected in different times and through different processes), make it more adequate for the creation of a *patchwork of views* than for expressing, in any way, the democratic 'will of society'. As Carlos Nino put it: "there is no guarantee whatsoever that the result of this awkward mix of different decisions, which can ultimately respond to a combination of findings from different debates, carried out by different groups of people at different times, have some resemblance to the majority consensus that obtained after an open and free debate" (Nino 1991, 578; Nino1997).

Among the numerous issues that may deserve attention in this regard, I would like to briefly refer to three of them, because of the special connection they have with the democratic issue. In the first place, I want to mention that the way we understand, compose and organize the Judiciary seems to be grounded on a particular (and particularly elitist) approach to *judicial impartiality.* To make a difficult discussion simple, I would mainly distinguish between two main understandings of impartiality. The first view connects the achievement of impartiality with a process of collective reflection. This view holds that the content of public policies should be defined by the political branches; it favors (in a Tocquevillian manner) the intervention of the citizenry in the decision of conflicts over the application of the law (i.e., through the institution of the jury); and it proposes a restrictive view of judicial review (in line, for example, with the "Jeffersonian" or "departmentalist" approach to the control of the constitutionality of laws, see for example Kramer 2005).[13] The alternative view, in contrast, assumes that impartiality depends on processes of individual reflection, where one or a few well-prepared individuals (experts) deliberate and decide in isolation, and far away from the public debate. The latter view became prevalent in America and is the one that still defines the ways in which judges are selected and the judicial system modeled.[14] It is important to note that, according to the view that became dominant, the decisive character assigned to the judicial decision, regarding substantive matters, was not due to a "division of labor" between different branches but, fundamentally, to a particular epistemic conception -an epistemic conception based on the certainty that the judicial "experts" would be able to decide better or more justly on public matters, than the affected citizens themselves.

The second point I would mention concerns the conception of *fundamental rights* that still today, despite the passage of centuries, seems to prevail when we think about the relationship between the Constitution, courts and democracy. As I understand it, the prevailing approach to rights still appears rooted in the old "natural law" tradition, which gained particular force with John Locke, where rights were understood as self-evident, natural entities. This view is the one that pervaded the American Declaration of Independence, from its very first lines ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights..."); the one that became manifest in the *Federalist Papers;* and the one that lies behind the Bill of Rights that are still present in most Constitutions in the Americas. This approach sees fundamental rights neither as a product of human creation, nor as the result of a process of collective reflection. [15] For this view, rights are only cognizable through reason (reason of the few, in fact, as Alexander Hamilton would claim in *Federalist*

[13]Jefferson himself succinctly depicted the democratic approach to judicial independence when he maintained: "a judiciary independent of a king or executive alone is a good thing, but Independence of the will of the nation is a solecism, at least in a republican government". Letter from Jefferson to Thomas Ritchie, December 25th, 1830, in Jefferson 1984, 1446.

[14] This alternative approach to the Judiciary and judicial independence conceives of the independence of the judges mainly as independence from the citizenry. As Madison put it, in The Federalist n. 49, judges would be "too far removed from the people", to "share much in their prepossessions."

[15] The latter was, for instance, the way in which Carlos Nino presented human rights, in the very first line of his book *Ethics of Human Rights* ("Undoubtedly, human rights are one of the greatest inventions of our civilization", Nino 1991, 1).

Papers n. 5): rights belong to a sphere that is independent and separated from democracy; which also explains why they have to remain under the custody of expert judges, who are supposedly prepared (intellectually) and ready (motivationally) to protect them from the threats coming from majority rule. [16] The alternative view to the one that still seems predominant today sees constitutionalized rights as a human creation: a product of history, of social conflicts, of popular mobilization and, finally, of democratic agreements (Scanlon 1984). In this sense, Cass Sunstein claimed that: "rights should be understood as instruments protecting important human interests" (Sunstein 2006, 203). [17]

The last problem I want to mention has to do with the question of *constitutional interpretation.* Unfortunately -we could hope and wish it were not so- the Constitution must always be subject to "interpretation" (Dworkin 1985, 2006, 2011): the law is not clear; it is imprecise, ambiguous, full of "gaps"; and the Constitution is not transparent (it is not reducible to numbers and pure logic). These problems are typical of "natural language": they appear when we read a book, try to understand a novel, listen to a speech or go to the movies. The problem is more serious in the case of constitutional law if the Constitution-as any constitution does, as it must do-expresses commitment to general values and principles ("life," "freedom," "equality," "dignity"). Serious difficulties then arise. On the one hand, we have very deep disagreements about how to interpret those fundamental values, particularly in the context of pluralistic societies (Waldron 1999, 199b). On the other hand, we have no shared "formulas" (i.e., parameters or theories to which we all resort when resolving these differences) on how to resolve these interpretative disagreements, and there are - on the contrary - dozens of diverse and sometimes opposing interpretative conceptions in competition with each other. There are "originalist" theories, which propose to solve our interpretative problems by looking back to the past (either, in some cases, to what was said or written by our "founding fathers"; or to their "original intentions;" or to the ways in which the term in question today was understood, among them or within their community; and so on, Scalia 1996, Balkin 1014). There are "textualist" theories, which require us to focus on the "plain meaning" of constitutional terms. More significantly, we also find "evolutionary" or "living tree" theories, which propose that we resolve interpretive disagreements by looking forward (and not backward) and seeing the ways in which the terms in question ("freedom of the press"; "nondiscrimination"; etc.) have changed over time (Strauss 2010); and in addition proceduralist theories, which propose that we read the Constitution as "devoid of substantive content", and as a mere "procedural manual" that organizes the rules of the game (Ely 1980); among many other possible theories. Thus, finally, the problem of legal

[16] In Latin American law, too, this non-democratic conception of rights is the one that prevails. It became strengthened after World War II and the experiences of Nazism and Fascism; and is still widely accepted, thanks to the contribution of a large group of judges, activists and well-known academics who conceive of the law in such ways (i.e., Luigi Ferrajoli and his view of rights as belonging to the "sphere of the undecidable"; Ernesto Garzón Valdés and his notion of the *coto vedado*; or even before them Norberto Bobbio and his references to the "inviolable territory" of rights). This view continues to exert an enormous influence even at the highest legal levels (such as the Inter American Court of Human Rights), and has helped generate some of the most controversial decisions of recent years, where rights are read as entities alien to the collective debate; democracy mainly appears as a threat to fundamental values; and judges are seen as custodians of values that democracy can only put at risk.

[17] Similarly, according to Carlos Nino maintained, in the very first line of his book *Ethics of Human Rights,* "Undoubtedly, human rights are one of the greatest inventions of our civilization" (Nino 1991, 1)

interpretation also refers us to the problem of authority in law, in the face of profound disagreements (Waldron 1999). And the question of authority reopens - above all - to two alternatives in tension with each other: one more democratic (constitutional interpretation must ultimately remain in the hands of public discussion); and the other more elitist (constitutional interpretation must ultimately remain in the hands of legal experts).

Conclusions, balances and perspectives

At this point, I would like to present some initial considerations derived from what has been said so far, and then evaluate some possibilities that can be derived from my previous analysis. One initial suggestion would be the following: the “democratic crisis” that we are witnessing today must be related to causes that go beyond the current situation, or the well-known political problems of the last decades. Much of the literature in the social sciences speaks of the problem of "democratic erosion"; refers to the degradation of a dishonest and inefficient political leadership; and points, with concern, to the emergence of "populist" leaders who propose to govern without major institutional mediations. In my work, I did not intend to deny such problems, or to ignore their importance. On the contrary, I am certain not only that such problems exist (i.e., the attempt by abusive leaders to undermine the institutions of "checks and balances"), but also that they are serious, and therefore deserve to be fought and defeated as a matter of priority. However, throughout my previous analysis I was interested in suggesting something else, namely, the existence of a relevant link between the current democratic crisis - to a large extent, in my terms, an expression of the "problem of self-government" - and the basic foundations of modern constitutionalism. In this sense, I was interested in pointing out that, from its very beginnings, constitutionalism put the democratic ideal in trouble, on the basis of improper or erroneous assumptions. The fact is that, from those early origins, our constitutional organization was committed to an institutional design that was not favorable, if not directly hostile, to the aspiration for self-government so present and so strong at the time. This, through a representative system prepared to "separate" rather than to "connect" representatives and represented; a system of "checks and balances" based on "internal" rather than "popular" controls; a strongly counter-majoritarian judiciary; or the gradual weakening of the periodical vote.

Let me now present some initial conclusions, also derived from the previous reflections. First of all, I would like to underline that the problems we face, regarding the tension constitutionalism and democracy, have a structural character. With this reference to the “structural character” of our difficulties, I mainly want to say two things. First, they are not conjunctural or current problems, but problems of another type (difficulties that are rooted in the origins of our constitutional history). Second, they should not be considered to be (merely) personal or attitudinal problems (these are problems that refer us, in a special way, to the norms through which we organize our life in common.).

The structural character of the difficulties we face allows us to better understand -I hope- the "problem of self-government" to which I referred at the beginning of this article. It is indeed the case that, in the light of the seriousness of the difficulties we are facing, citizens have no reason to consider themselves the authors and owners of their own destiny. On the contrary, citizens have reason to denounce the seriousness of the problems they face (I mentioned above the problems of "domination" and "legal alienation"), and to claim

for themselves the democratic power that constitutionalism always promised them, from the very beginning ("We the People..."). In other words, what we face today are structural problems, of a democratic nature.

In this sense, part of the doctrine seems mistaken when it conflates the problems of democracy with the problems of constitutionalism, that is, when it treats those democratic problems (political domination; lack of institutional conditions for self-government; discouragement of participation; etc.) as if they were constitutional problems (erosion of the mechanisms of "checks and balances", etc.). The structural problems that we face today have to do - in a very special way - with the undue restrictions imposed by constitutionalism on democracy (Loughlin 2022).[18] That old constitutional "straight jacket" -designed to restrict democracy- in a context of social distress and strong social demands (a citizenry that, in fact, aspires to take control over their own affairs), explain the sense of democratic frustration that prevails today, and also help us explain many of the social and political phenomena that we see all around: the repeated protests against authorities and constituted governments; the distrust of representatives; the loss of credibility of the courts; etc.

Moreover, I would also like to suggest that the type of structural problems we face are of such magnitude that they cannot be remedied -predictably- by just “re-adjusting” the “nuts and bolts” of the old institutions. Let me illustrate my claim through a few examples. For instance, the kind of representation deficit faced by our political institutions (typically the Congress) cannot be repaired by expanding the number of Deputies or Senators; or by shortening their mandates a little: the representation of large and multicultural societies, divided into an infinite number of internally heterogeneous groups, represents an impossible challenge for the old institutional framework to solve. As we said, this institutional scheme was prepared, in the best of cases, to deal with smaller and much more homogeneous societies. For the same reason, the "problem of self-government" will not be solved by -say- updating the old systems of "imperative mandates" and "the right to recall", or similar. Perhaps those were good institutional tools, perhaps -in some way- they deserve to be revived, but it would be illusory to think that such tools (today, "minor", if you will) can help to repair such enormous problems of political representation as the ones we are facing. In the same way: it may be healthy and more than necessary to have more independent, more progressive, and much more active judges, committed to the protect rights and prevent the abuses of concentrated power. However, in a democratic society, it is (still) a problem that a non-representative (or, worse, elite) power arrogates to itself the decisive or “last word” in relation to the most relevant substantive issues. Finally, it is also clear that the serious "problem of self-government" that we face cannot and does not deserve to be solved by concentrating power in the Executive (once again, still more). That would be just a way of pouring fuel on a burning problem. The "problem of self-government" requires more democracy, and not less; more horizontality in decision-making, and not more hierarchy; more public discussion, and not more

[18] Unlike Loughlin, however, I believe that constitutionalism is part of the problem, but it can and should also be part of the solution to the democratic problem (in this sense, I do not think there is any reason to advance a plea "against constitutionalism").

discretion on the hands of a few; more inclusiveness in the public debates, and not decisions adopted "quickly, secretly and by surprise".[19]

The point we have reached is certainly discouraging, because it refers not only to the presence of a long-standing democratic crisis, but also to a crisis aggravated in recent times (by serious social inequalities, by the concentration of power, and -above all- by the growing -and yet reasonable- democratic demands of the citizenry).

The question before us, then, is the following: Is there any prospect of a way out, in such circumstances - any room for a certain democratic optimism? I am not sure. At the same time, however, I would point out that in recent decades, experiments in "inclusive deliberation" have begun to be tried, typically through Citizens' Assemblies, which seek to respond precisely to some of the institutional ills we have pointed out in the preceding pages, in ways that hark back to the deliberative democracy school of thought (Nino 1997, Habermas 1996). I am thinking about the emergence of vital, horizontal, robust public debates (i.e., in Ireland, around abortion and same-sex marriage); the new and numerous "citizen assemblies" (assemblies composed, in some cases, exclusively of citizens, sometimes chosen at random) designed to discuss and propose solutions to issues of primary public interest: Australia in 1998; British Columbia and Ontario (both Canadian states), since 2005; Holland in 2006; Iceland in 2009; Ireland in 2012 and 2016; etc. (see, for example, Farrell et al 2019; Ferejohn 2008; Landemore 2014, 2020; Suteu & Tierney 2018).[20]

These experiences of "inclusive deliberation" show, from the start, some very interesting characteristics. All of them: i) begin with the recognition of the existence of serious

[19] I quote, in this way, a famous president of my country, Argentina, in the 1990s, who proudly claimed to decide according to such three premises.

[20] It is easy to understand how many of these experiences might seem exotic or too distant for those of us who live in Latin America. For that very reason, I would draw special attention to the many recent experiments in Latin America that fit within the parameters outlined above (recognition of the democratic problem; "inclusive" forms of response; etc.). They range from the *participatory budget* implemented in Porto Alegre (Río Grande do Sul, Brazil); to the *public hearings* organized by high courts (Colombia, Brazil) and legislatures (Argentina); to the experiments with the tool of *prior consultation* of indigenous communities (born out of the implementation of ILO Convention 169); to the *cabildos* or *constitutional assemblies* in Chile to begin discussion of the constitutional reform process now underway. The initiative gained momentum towards the end of the second Bachelet administration, following the 2011 student protests and as a result of the "mark your vote" initiative that accompanied the 2013 election, which ended up having more than 200,000 people participate in different deliberative forums. In the case of Argentina, which is the one I know best, I want particularly to highlight the debates on abortion that took place in 2018. Those debates followed an election (in October 2017) in which no party (except the Socialist Workers' Party) had even mentioned the issue of abortion. A few weeks later, however (and set in motion first by the international *Me Too* movement, against sexual assault; and then by the *Ni una menos* movement in Argentina, against gender-based violence), the debate about abortion seemed to take center stage in the public discourse. The debates on abortion – and the demand for the immediate approval of "liberal" bill on abortion – gained extraordinary force in a matter of days, involving experts and ordinary people; children and adults; lawyers and young people who had had traumatic experiences related to abortion. After a short while, and following more than a decade of favorable initiatives for legislation on this topic, the Voluntary Termination of Pregnancy Bill began to be debated by the Chamber of Deputies in April 2017. The legislative chambers then organized extensive debates that lasted more than two months and involved thousands of diverse voices. In the end, the Congress, by a margin of only a few votes, voted against the bill. Notwithstanding, on December 30, 2020, the Voluntary Termination of Pregnancy Bill (or IVE) was passed and became law.

political-institutional problems; ii) recognize the essentially "democratic" nature of those problems; iii) call for responses that attack the "democratic" (as opposed to constitutional) root of the problem that they face; and iv) approach the democratic problem from a perspective that is concerned with the two distinct pillars of "deliberative" approaches to democracy: "social inclusion" and "public debate." This is a history that is just beginning to be written and that already shows - it must be admitted - certain traits of "fatigue". In any case, these new events suggest that we are facing active and open disputes, and that the citizenry is far from giving up its arms in its struggle for more democratic horizons.

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