"Popular Constitutionalism and Democracy: An Agonistic Turn of the Constitution"

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Abstract

In the judicial review of legislation arena, Popular Constitutionalism has strongly criticized judicial supremacy and has defended instead the idea of recovering the place of "the people themselves" in constitutional decision-making processes. In this paper, I place Popular Constitutionalism within democratic theory. By drawing on the work of Chantall Mouffe, I will explain the problems derived from the depoliticization of Constitutional law. Next, I will argue that Popular Constitutionalism is not a danger to democracy but that it actually reinforces democracy from an agonistic approach, which becomes particularly important once technocratic and moral readings of the Constitutional order have proven unsuccessful for the safeguarding of rights and social cohesion.

Key words: judicial review, popular constitutionalism, agonistic democracy

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1. Introduction

Popular Constitutionalism is not one theory. It is a body of constitutional literature that emerged a-theoretically in several American Law Schools –as such, in the late 90's- based in historical analysis of the country's constitutional history and inspired by the aim of recovering the place of "[We] the people" in constitutional decision-making processes. The target of Popular Constitutionalism critique is judicial supremacy in constitutional review of legislation processes: namely, the idea that a small group of judges who have not been elected can, and indeed must, strike down decisions that democratically elected political representatives have taken when exercising their legislative functions.

Larry Kramer, one of the founders of Popular Constitutionalism, defines it as the broad idea that the "final authority to control the interpretation and implementation of constitutional law resides at all times in the community in an active sense."[1] Popular Constitutionalism offers two dimensions: one descriptive and one normative.[2] In the first sense, popular constitutionalism studies the effects of social movements and other social agents in the interpretation of the constitution and, eventually, in the updating of the

[1] Kramer L. The Interest of the Man: James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy 41 Val. U. L. Rev. 697 (2007) 702.
[2] Tushnet M., "Popular Constitutionalism and Political Organization", Roger Williams University Law Review 18, 2013, 1-9.

[3]meaning of the rights included in it.[4] In the second sense, popular constitutionalism defends the idea of "taking the Constitution away from the courts". In this sense, the main concern for popular constitutionalists is "judicial supremacy": the idea that judges have the last say in constitutional review of legislation. But not only, some authors are also critique with the idea of judicial review itself –including to weak judicial review like that in the United Kingdom in which judges can issue an act of incompatibility but the last word remains in the Parliament[5]- conversely to those close to "departamentalism" that uphold an equally shared competency of the three branches of government to interpret the Constitution.

Popular constitutionalism focuses on a "bottom-up" interpretation of the Constitution.[6] Although popular constitutionalists are interested in the effect and legitimacy of courts, legislators and executives in constitutional interpretation, they particularly highlight the work of social movements and the general public opinion in the definition of constitutional meanings. In contrast to legal or moral readings of the Constitution that would promote "top-down" approaches[7], popular constitutionalism advocates a *political* reading of Constitutions. Popular constitutionalists maintain that constitutional law is a distinctive kind of law, one that is prominently political and will thus question the argument that it should only or mainly be interpreted by legal expert bodies such as courts.[8] Mark Tushnet, a more radical founder of popular constitutionalism, asserts that

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[4] Eg Post and Siegel

[5] Reference to weak v strong. This is the case of the most radical of the popular constitutionalists, Mark Tushnet, See his opinion on the cases of Canad'a and New Zeland at Tribe, Laurence H; Waldron, Jeremy; Tushnet, Mark On Judicial Review Dissent; Summer 2005; 52, 3; ProQuest, 81, 85.

[6] Tushnet M Social Movements and the US Constitution in The Oxford Handbook of the U.S. Constitution 2015.

[7] i.e. dworkin: a moral Reading of the consti.

[8] Tushnet, "Popular Constitutionalism as Political Law", p. 992.

"we all ought to participate in creating constitutional law through our actions in politics".[9] However, it is worth noting that no popular constitutionalist affirms that "the populist interpretation is the only, or even the best, interpretation of the Constitution".[10] It is true that sometimes judicial interpretations of the Constitution will be our preferred ones but, as Kramer upholds, "even if lawyers and judges are in some sense "better" at constitutional interpretation, that alone cannot justify anything so extreme as judicial supremacy"[11].

Hence, Popular Constitutionalism as I've said advocates recovering the place of "[We] the People" in constitutional decision-making and is particularly concerned with strong judicial review of legislation. There are many arguments for and against judicial supremacy, all of which have defenders and detractors in both sides. Think for example of what I shall call the "empirical argument", in reference to the pragmatic question of whether judicial review actually *works* better for the protection and development of human rights or it doesn't. One will easily find extended arguments in the literature for and against judicial review in this realm.[12] Think for example of what I shall call the "interpretative argument", in reference to the possibility or not that judges can find the one correct answer using infallible interpretative rules. One will again equally find arguments for and against the usefulness of interpretative rules and even for and against the sheer existence on one correct answer in constitutional law at all.[13] Think also in the argument of the "independence of courts vs representativeness of legislatures", in reference to the goods and evils of the institutional design of each branch on the fight

[9] Tushnet taking away p. 157.
[10] Mark Tushnet, Taking the Constitution Away from the Courts, p. xi.
[11] Kramer L. The Interest of the Man: James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy 41 Val. U. L. Rev. 697 (2007) 697, 701.
[12] See
[13] See

over the control of the Constitution. Again, one will find both defenders and detractors on each side. But the main argument against Popular Constitutionalism is that it jeopardizes democracy.[14] In this chapter I will challenge this idea and argue that contrariwise, Popular Constitutionalism, both in its broad and particular sense, actually reinforces democracy. In doing so, I will focus on what I personally think is the most subtle but deep-rooted question: the "argument of majorities". I believe this argument constitutes the common and distinguishing element of Popular Constitutionalism: a radical critique of anti-popular sensibilities and its defence of democratic popular sovereignty.

2. A Populist Sensibility

In *The People Themselves. Popular Constitutionalism and Judicial Review,* Larry Kramer argues, following Richard Parker that the root of the matter in judicial review "has nothing to do with logic or evidence or history or law. It is "a matter of sensibility.""[15] By "a matter of sensibility", Parker refers to two faced views in political and legal discourse about what ordinary people are like when they act in politics, namely the Anti-Populist sensibility and the Populist sensibility.[16]

On the Anti-Populist side, people energized to act in politics are presumed to be "defective" (i.e. emotional and ignorant vs reasonable and informed), "irresponsible" (i.e short-sighted and arbitrary vs far-sighted and principled), "unfiltered and unchecked" (i.e. impulsive and close-minded vs deliberate and open-minded), "vulnerable to influence and manipulation" (i.e. conformist and suggestible vs independent and critical) and "volatile

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[15] Kramer p.

[16] R. Parker, "Here the People Rule": A Constitutional Populist Manifesto, Valparaiso ULR Vol 27 n 3 1993, 531-584.

and insecure" (i.e. anxious and resentful vs composed and magnanimous). Of course, imagined this way, ordinary people "makes for a politic that is not just low in quality, but dangerous as well".[17] Consequently, the Anti-Populists response is either to withdraw ordinary people from politics by the "celebration and cultivation of privacy and peace" or either to transcend them by the "insulation of a more "refined", higher-minded mode of political participation".[18]

Undoubtedly, this description might seem a mere parody of what is a liberal caution or mistrust towards democratic majorities on behalf of the protection of minorities' rights but, as we will see, it certainly lays the ground for of the justification of judicial review systems. As Mark Tushnet has affirmed, there is a "deep-rooted fear of voting" amid constitutional scholars, an attitude that seems to be grounded more in stereotypes than in empirical or logical arguments.[19] This "Anti-Populist sensibility" has been identified as one of the "dirty little secrets of contemporary jurisprudence" by Critical Legal Scholar Roberto Unger, for whom such a "discomfort with democracy" shows up:

> "[I]n the ceaseless identification of restraints upon majority rule, rather than of restraints upon the power of dominant minorities, as the overriding responsibility of judges and jurists; in the consequent hypertrophy of countermajoritarian practices and arrangements; in the opposition to all institutional reforms, particularly those designed to heighten the level of popular political engagement, as threats to a regime of rights; in the equation of the rights of property with the rights of dissent; in the effort to obtain from judges, under the cover of improving interpretation, the advances popular politics fail to deliver; in the abandonment of

[17] Parker 554.
[18] parker 555.
[19] Tushnet taking away … p. 177.

> institutional reconstruction to rare and magical moments of national refoundation; in the single-minded focus upon the higher judges and their selection as the most important part of democratic politics; 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, occasionally, in the explicit 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."[20]

On the Populist side, Parker mantains, one could easily succumb to the "romance of the ordinary" - or even worse, to the romanticization of "a "vanguard", which sometimes accompanies, as well as contradicts" the former.[21] But the point of the matter, in his opinion, is actually a different one: is inverting the hierarchy of the qualities we attribute to the ordinary people. In this sense, a reorientation of sensibility occurs when we assume that the manifestation of "ordinary political energy" is preferable than passivity or insulation; and not because it is refined but because it is better for the vitality of government. This way, people's passivity or insulation in politics is envisaged as unhealthy (i.e. meek and isolated vs courageous and connected), repressive (i.e. other-directed and diffident vs inner-directed and self-confident) and tyrannical (submissive, conformist and suggestable vs vigilant, independent and critical). "Thus," Parker sustains "political passivity and/or insulation don't just erode political liberty - they actually pose a threat to it."[22] The Populist sensibility also recalls negative emotions such as anger or self-righteousness that can even lead to violence but "to the extent they *are* part and parcel of an expression of ordinary political energy, they do not render it worthy of disdain."[23]

[20] Unger R. M. , What Should Legal Analysis Become? Verso 1996 p 72-73.
[21] parker 555 ligar con populism section
[22] parker 557.
[23] Parker 557.

Contrariwise, disdain towards the politics of ordinary people is imagined as dangerous and defective since it restricts political emancipatory potential, it can promote political disaffection and what's even worse: "it may embolden elites to claim transcendence, securing an elevated position from which to contain, control, or manipulate ordinary political energy".

In constitutional law in particular, Parker continues, the Anti-Populist sensibility –which has been predominant for many decades in this realm– explains much of the objectification of the constitution as having one correct meaning (or answer) as well as the sacralisation of it in a way that establishes a protective wall around it: a legalistic or, at best, judicial wall that keeps the constitution safe from ordinary people or, at best, from the people's representatives. Undoubtedly, the alleged danger of majorities is the founding assumption of the main argument in favour of judicial review: the protection of minorities.

But, of *what protection from what majorities for what minorities* are we actually speaking about? In order to answer to this question, I must say that the fear to majorities in constitutional literature is a little exaggerated. As Parker rightly points out, "[M]ajorities rarely rule at all".[24] Contrariwise, representative democracy systems are governed by powerful minorities that tend to come from what Anti-Populists most value for office: reasoned and informed members of well-educated circles. In my opinion thus, blaming majorities, *per se* and *a priori*, of liberal democracy´s errors seems not very appropriate.[25] Moreover, it actually risks incurring a double condemnation: disempowered majorities

[24] Parker 570.

[25] And doing it *ad hoc* using clichéd examples like Nazism is not only the worst tribute to the principles of justice and democracy; it is also a repeated but uninformed argument: the Nazis never won democratic free elections.

who hardly struggle for the acknowledgement of their fundamental rights – think of the sum of the working class, women, LGTB people, immigrants, black people, etc. - end up being identified as potentially dangerous to their own empowerment. Or at minimum, this constitutional mistrust towards majorities is in contradiction with the basic notion that, as Jeremy Waldron has noted "the attribution of any right (…) is typically an act of faith in the agency and capacity for moral thinking of each of the individuals concerned".[26]

In this vein, one would affirm that, *a priori*, there is no real tension between voting majorities *as such* and fundamental rights. Consequently, there might not be as strong compelling reasons for judicial supremacy as it is thought. Especially, when there is an arguable tension between majorities –at least legislative majorities- and strong judicial review of legislation. At the end of the day, it seems clear that the problem with judicial review is not majority rule, but *which* majority rules. As Tushnet has observed, defenders of judicial supremacy trust a majority of nine more than they trust a majority in Parliament or, I would add, more than they trust a majority in the streets.[27]

So, why is this fear to popular rule so extended between both the conservative and the progressive constitutional scholarship? On the right, the arguments are old: empowered majorities can pose a threat to the so convenient legal certainty of a market-decentralized law system. On the left "deliberative democracy", Kramer charges, "turns out to be mostly about deliberation and hardly at all about democracy".[28] "Popular rule is legitimate," he continues, "only if certain stringent prerequisites are satisfied: prerequisites that it just so happens can be met only by small bodies far removed from

[26] Waldron Law and Disagreement 250 and see also Waldron 'A Right-Based Critique of Constitutional Rights'.
[27] Tushnet, Taking the constitution away from courts p. 42 Since we have to agree to follow a rule, one would initially think that "The Constitution means what 50% plus one of Congress says it means". Although in the American context rather the rule is "The Constitution means what 50% plus one of the Supreme Court says it means". See also Waldron Five to Four: Why Do Bare Majorities Rule on Courts?
[28] Kramer the people themselves

direct popular control"[29] and consequently, as Jack Balkin notes, this dominant "progressive sensibility" tends to confuse "factual and moral expertise".[30] Furthermore, popular constitutionalism is criticized as naïve on the opinion of majorities, but in my opinion, it is more naïve to think that the judicial elite will categorically defend better the interests of majorities than majorities themselves.[31]

For the sake of the argument, let us take the hypothetical case that there was a real majoritarian danger: How could we ever guarantee the court will not partake of the majority view? Even if this were the case, how could the court effectively enforce a decision against a convinced majority? Moreover, would we actually care about judicial review theories under such circumstances? It does not seem appropriate to theorize on constitutional law by using as central models exceptional or extreme cases, because then probably "all bets are off".[32] Certainly, problems of enforcement do not make normative theory redundant. The fact that cigarettes health disclaimers are not effective in helping people to quit smoking does not mean that there are no normative reasons for the government to include them in cigarettes boxes. However, it is true that many defenders of judicial review use a questionable favourable empirical argument towards the legitimacy of judicial review of legislation.[33] But even a strong defender of judicial review as Dworkin acknowledges that amid courts and legislatures "[T]he possibility of error is symmetrical".[34]

[29] ibid
[30] Jack M. Balkin, "Populism and Progressivism as Constitutional Categories", Yale Law Journal, vol. 104, 1995, pp. 1944-1981.
[31]
[32] Kramer citing Ely. 212.
[33] Link to section on the empirical question.
[34] Freedom's 33. Dworkin uses this argument to favour courts. If courts strike down an unfair law, they are improving democracy and not acting undemocratically.

Finally, a large amount of literature has been produced in order to reconcile judicial review with different conceptions of democracy but as Parker reminds "it is usual to claim that judicial power is tolerable if judges use it to improve the "quality" of democracy. That is true. It fails, though, to face up to the fact that "democracy" –and its "quality"- are fundamentally contested values."[35] Popular Constitutionalism, as I have explained, criticizes judicial review while supporting a Populist approach to democracy.[36] However, not much work has been done in order to reconcile Popular Constitutionalism with a particular theory of democracy. The reason might be that for Popular Constitutionalists "a concept like "democracy" is capacious enough to include all sorts of qualifications and limitations", including of course judicial review.[37] Although I agree with the previous affirmation, I do not think that the debate over democracy should be left abandoned by a radical current like Popular Constitutionalism. Contrarily, the commitment of this current would be reinforced if reconciled with some particular approach to democracy. In the next section, I will try to show that in terms of democratic theory, an agonistic approach is reconcilable with the anti-elitist, pro-popular, anti-rationalistic and the tendency to the re-politization of legal and economic issues advocated from Popular Constitutionalism. I will apply Chantal Mouffe´s work[38], in order to explain the many problems in depoliticizing constitutional law and demonizing majorities while sacralising counter-majoritarian institutions and show that, conversely, there are good reasons for shifting to a popular reading of the constitution.

3. *The Constitutional Paradox and the problems of depolitizing constitutional law*

[35] Refer to ch 2 section on constitutional indeterminacy.
[36] Populist sensibility is far from today's debates on populism. A populist sensibility does not amount to a populist ideology, strategy or style. See section on populism v popular constitutionalism.
[37] (Kramer 2006) p 701 n 6.
[38] See …

The term "counter-majoritarian difficulty" was first described by Alexander Bickel as the tension between the parliament´s democratic mandate to legislate in the name of the people and the constitutional court´s power to strike down legislation in the name of the basic rule of the people, namely the Constitution[39]. In my opinion, the counter-majoritarian objection of judicial review is one of the many expressions in constitutional systems of what Chantal Mouffe calls the Democratic Paradox.[40]

The Democratic Paradox is the tension in modern societies produced by the contingent historical articulation of two traditions: liberalism and democracy. The former is identified with the rule of law, human rights and individual liberty while the latter is identified with equity, identity between government and the governed and popular sovereignty. In this sense, Mouffe argues that "liberal democracy results from the articulation of two logics which are incompatible in the last instance and that there is no way in which they could be perfectly reconciled".[41] The lack of absolute understanding of the two core political principles in modern societies is no reason to panic. The existence of this inherent tension in liberal democracies, far from being a problem, is the guarantee against total liberty or total equality. I agree with Mouffe thus that such contradiction should be envisaged precisely as the "very condition of possibility for a pluralist form of human coexistence in which rights can exist and be exercised, in which freedom and equality can somehow manage to coexist".[42] However, the rationalist tradition has made efforts to try to eliminate this tension, as we will see next, usually by way of technocratic or moralistic appeals. Alternatively, agonism favours an approach that actually renounces the goal of achieving rational consensus for the articulation between liberty and

[39] Alexander M Bickel, *The Least Dangerous Branch* (Yale University Press 1986).
[40] (Mouffe 2009)
[41] Chantal Mouffe, *The Democratic Paradox* (2nd edn, Verso 2009) 5. Similarly, CLS in relation to the principles in law, see ch. 2.
[42] ibid 10.

democracy, and accepts and envisages pluralist democratic politics as contested and unstable forms of accommodating this implicit and ineradicable constitutive paradox of liberal democracy.[43]

In judicial review, which as I have argued before is an eminently political institution,[44] a similar paradox is evident: the tension between liberty and democracy manifests in the tension between individual rights and democratic majorities. I will argue that, similarly to Mouffe´s proposal on how to envisage the democratic paradox, constitutional theory should relinquish the ideal of eliminating the tension between rights and majorities through law and morality approaches and instead work towards institutional designs that allow constitutional conflicts to flourish and be solved in the political arena through political processes. It is precisely within the tension between constitutional consensus –on the principles- and constitutional dissent –over its interpretation- where the agonistic dynamic of pluralistic democracies is inscribed.

For this reason, agonism is concerned with two requirements that are vital to liberal democracies: first, the way to gain allegiance to the ethical-political values that define the liberal democracy and second the dispute over the different interpretations that each of those values may include, namely, the different understandings of citizenship and the possible ways of cultural and political hegemony. [45] The displacement of "the political" by the juridical and the moral is, also in the constitutional arena, a symptom of the current state of the retaining walls against majorities conceived for the sustainment of weak liberal democracies.

[43] ibid 11.
[44] Ch 2
[45] Chantal Mouffe, *El Retorno de Lo Político* (2012) intro 21.

a. The problems of a Politics of Law or the Legalistic Approach. The problem of a Legal reading of a Constitution

In a different place, I have argued that constitutions are essentially indeterminate, and that due to its highly political nature, constitutional law do not have "one correct answer". For this reason, and following legal scepticism I have rejected interpretivist solutions to constitutional questions.[46] In this paper, my aim is to develop this critique one step further by defending the view that there are no institutional guarantees of moral or political impartiality that can justify judicial review of legislation. Conversely, I will argue that the kind of arguments that stands for "political independence" are –again- a liberal veil for what by nature belongs to the political arena.

So, what are the problems of "depoliticizing" the constitution? By depoliticizing constitutions through law I refer to the use of interpretative or technical rules, allegedly politically neutral institutions or intersubjective consensus-based approaches to constitutional conflicts. As Chantal Mouffe has stated, "political questions are not mere technical issues to be solved by experts".[47] In this sense, it is important to distinguish between "politics" and the "political". "Politics" refers to the daily routine of negotiations and struggles between political actors - such as parties, social movements, trade unions, lobbies, media, etc. The "political", differently, signifies the symbolic sphere of authority that in liberal democracies is said to be empty and thus always contestable since modernity societies emerged, as Claude Lefort explained, through the "the dissolution of the markers of certainty".[48] In this line, Lefort continues, in the absence of a king and in the absence of a god, legitimacy necessarily remains open, socially constructed and thus

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[47] (Mouffe 2009) 10-11

[48] See (Claude n.d.) 19 See also Mouffe, *The Democratic Paradox 101*.

essentially contestable. Of course, although the fact of reasonable disagreement might be commonly accepted, it is still an unresolved normative question how to envisage the "political" and it can be understood as a place of freedom and public deliberation, like deliberative democracy theories endorse or as a space of power, conflict and antagonism like agonistic models of democracy uphold.

Agonism "emphasizes the potentially positive aspects of certain (but not all) forms of political conflict. It accepts a permanent place for such conflict, but seeks to show how we might accept and channel this positively".[49] The reason for putting the ineradicable character of conflict in the centre of democratic theory is the belief that setting conflict aside poses real threats to democracy. The so-called consensus or deliberative model, which aims to achieve universally correct answers to political conflicts appealing merely to rationality, has showed dangerous to allegiance to liberal institutions.[50]

The reason, put forward by Chantal Mouffe, is that such a rationalist approach is "bound to remain blind to 'the political' in its conflictual dimension"[51] and such an omission has consequences in citizenship disaffection towards political and, consequently, also towards constitutional institutions. Further to the "Populist Sensibility" that I developed previously, disdain towards the politics of ordinary people is envisaged as dangerous and defective from an agonistic approach, since not only it can promote political disaffection but also restrict truly emancipatory political potential, and, what's even worse, as Parker has noted, "it may embolden elites to claim transcendence, securing an elevated position from which to contain, control, or manipulate ordinary political" manifestations.[52] In a more subtle way, to substitute a culture of active democratic politization for a culture of

[49] William E Connolly, *Identity and Difference* 211.
[50] Problems of third way, uprise of populism, etc…
[51] (Mouffe 2009)
[52] (Parker 1993)

neutrality, impartiality or rational consensus "can lead to violence being unrecognized and hidden behind appeals to rationality, as is often the case in liberal thinking which disguises the forms of social exclusion behind pretences of neutrality."[53]

The image of constitutional courts as neutral and impartial adjudicators and as politically independent institutions is a good example of such disguise.[54] Recently we have witnessed reactionary and rights-restrictive rulings through judicial review reasoning based on the alleged neutrality of interpretative rules and techniques.[55] Mouffe specifically criticizes Rawl's idea of the US Supreme Court as the best example of what he calls the 'free exercise of public reason' in a deliberative model of democracy as well as Dworkin's account of judges' interpretation of the common political morality in reference to the principle of political equality.[56] The danger of the democratic deficit produced by this displacement of the political is something important to understand by constitutional lawyers in order to approach better constitutional review questions and its institutional design. In order to pose an alternative perspective, we should start putting "emphasis on the types of *practices* and not the forms of *argumentation*".[57]In my opinion, in order to strengthen democracy and allegiance to basic liberal institutions, legal theorists should promote practices of empowering control and participation of the citizenship in constitutional processes, instead of isolation and fear of people's political opinion and motivation and trying to substitute it through the juridical dimension. In this sense, acknowledging the conflictual nature of political law implies not only "relinquishing the ideal of a democratic society as the realization of a perfect harmony or transparency"[58]

[53] (Mouffe 2009)
[54] I have argued in a different place that the lack of moral and political neutrality in ordinary judicial adjudication is not as problematic as it is for constitutional review, or at least it is easier to justify in terms of functionality of the law. See
[55] I.e. the Spanish TC in the last decade... And still to see Trump´s SCOTUS.
[56] Chantal Mouffe, 'Politics and Passions. The Stakes of Democracy' (2002) 3-4.
[57] Mouffe, *The Democratic Paradox* 96.
[58] ibid 100.

but also attenuating the normative aim implied in this ideal that gives sense to some of our most elitist institutions, such as strong judicial review. Actually, "[T]he democratic character of a society can only be given by the fact that no limited social actor can attribute to herself or himself the representation of the totality and claim to have the 'mastery' of the foundation"[59] - this certainly including unelected elitists legal institutions that discover constitutional one right answers.

Agonistic democracy, by unveiling the problems of a politics of law, also allows a space in democratic theory for the affective dimension of politics. As we will see in the following section, it is highly dangerous to social cohesion and democracy to ignore political passions, instead of mobilizing them through truly democratic channels. In this sense, when traditional parties across Europe (and as we have recently witnessed also in the USA) have lost the capacity to appeal to political values and principles, and primarily limit to care for the free functioning of economical markets, then this void is later occupied by reactionary forces that appeal to "give back the people the power" – and, as we know, from these approaches "the people" are typically white national straight males.[60] So, why are populist right wing parties so successful? In Mouffe's opinion, the answer is that "[B]ecause blurring the frontiers between left and right, and the absence of confrontation of ideas between different political projects leave voters without a differentiated range of democratic political identities."[61] In my opinion, when politics is based in the alleged neutrality, impartiality and correctness of a limited instrument as the judicial system, we risk creating a deep void in the politics of democratic identification with a common, emancipatory and civilized project of values for sustainable cohabitation.

[59] (Mouffe 2009)
[60] As an example: Brexit, Trump, Le Pen, etc.
[61] (Mouffe 2009) Her critiques to the "third way" are also important in this sense.

In Connolly's words, "[A] democracy infused with a spirit of agonism is one in which divergent orientations to the mysteries of existence find overt expression in public life. Spaces for difference to be are established through the play of political contestation".[62] And not through judicial appeals to rational interpretation of our basic principles and values, which act as much as judicial accountability mechanisms, but rarely as mechanism that can take us to one correct answers since, as we know, fairness and unfairness are everyday rationalized in courts in opposite directions.

b. *The problems of a Politics of Moral or the Moral Approach. The problem of a Moral reading of the Constitution*

Besides the problems of the legal or technical reading of our political values and principles, I will now criticize the problems of the moral reading of same. One of the best known proposals of a moral reading of the constitution is the one offered by Ronald Dworkin.[63] As I have elaborated in a different place, Dworkin defends the idea of the existence of moral correct answers in law that judges are particularly well equipped to find.[64] In his opinion, in constitutional interpretation judges ought to balance constitutional principles and moral values to finally follow the strongest moral argument they believe in. I have previously criticized the ontological and epistemological problems of this approach. But there are additional problems and questions of democracy of a Politics of Morality that I will now analyse from an agonistic approach.

The first of the problems is, again, one of avoiding crucial political contestation and thus one of potential political disaffection with basic liberal principles. In Mouffe's opinion,

[62] Connolly 211.
[63] See (Dworkin 1996)
[64] see

"[W]hen politics is played out in the register of morality, antagonisms cannot take an agonistic form. Indeed, when opponents are defined not in political, but in moral terms, they cannot be envisaged as an "adversary" but only as an "enemy." With the "evil them" no agonistic debate is possible, they must be eradicated. Moreover, as they are often considered as the expression of some kind of "moral disease", one should not even try to provide an explanation for their emergence and success. This is why, as we have seen in the case of right-wing populism, moral condemnation replaces a proper political analysis and the answer is limited to the building of a "cordon sanitaire" to quarantine the affected sectors".[65]

As we have seen recently with the emergence of right-wing populist parties, treating this political choices merely as if they were alien to the liberal democracy system while they are actually winning elections is not working. So, the heart of the matter is again that: "the absence of confrontation of ideas between different political projects that leave voters without a differentiated range of democratic political identities". Unfortunately -but foreseeably too- "this void is later occupied by other forms of identification that are truly antidemocratic".[66]

If constitutional values and principles such as freedom, equality or human rights themselves are not envisaged as politically charged principles –with all the consequences- then defenders of these values and principles are left out without the strongest tools in democracy to face those reactionaries who contest them, namely political victory. Conversely, they are abandoned with the fruitless and questionable character of "moral superiority" dyed sometimes in appeals of "moral impartiality". Today, in my opinion, "moral superiority" of courts –or of any other unelected institution- is not an argument

[65] Chantal Mouffe, On the Political, p.76
[66] (Mouffe 2009)

serious enough to guarantee social cohesion and the reinforcement and development of rights. The reason is that, in a society in which everybody is supposed to be equal, subjects of rights do not show allegiance to institutions on a "moral inferiority" basis but for political reasons. In this sense, for example, Donald Trump or other candidates that are not at all moral references in their countries (think of the case of Silvio Berlusconi in Italy too) have received people´s votes not on the conviction that they are morally superior but on the convincement that they are a better political option for their interests, showing that morality in liberal democracies is today belonging to the private sphere. I find very illustrative of this tension between politics and morality in the different reactions to Trump's election in the press. While some suddenly stated that most Americans are like Trump[67], many others hit the target:

"Still, a response to Trump that begins and ends with horror is not a political response — it is a form of paralysis, a politics of hiding under the bed. And a response to American bigotry that begins and ends with moral denunciation is not a politics at all — it is the opposite of politics. It is surrender."[68]

Moreover, reading different constitutional options morally has a deep ethical problem too. In my opinion, it dehumanizes –which is particularly dangerous at times when people need rights and constitutional guarantees more than ever. Also it is profoundly counterintuitive, the same demands and same voters are envisaged as morally capable or incapable at different moments without any logical argument. For example, American voters were assumed as morally capable when they voted for Obama and not a few years later when the same people voted for Trump. But also, feminist associations and demands

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68 Editorial Board, 'Politics is the Solution', (Jacobin Magazine, 9 November 2016) <https://www.jacobinmag.com/2016/11/trump-victory-clinton-sanders-democratic-party> accessed 6 December 2016.

were treated as morally inferior decades ago and today, due to a feminist accumulation of political and cultural power same are envisaged as conditions sine qua non of democracy.

The agonistic approach, of course, does not defend the view of moral relativism and thus does not include the defence of all moral and political differences. Certainly, immoral demands must be fought, confronted – and when criminal law allows it also prosecuted. But in the constitutional arena, exclusions should be envisaged in political and not in moral terms. In Mouffe´s words:

"Some demands are excluded, not because they are declared to be 'evil', but because they challenge the institutions constitutive of the democratic political association. To be sure, the very nature of those institutions is also part of the agonistic debate, but, for such a debate to take place, the existence of a shared symbolic space is necessary."[69]

In this regard, Mouffe defends that "[A] democratic society cannot treat those who put its basic institutions into question as legitimate adversaries. (…) A line should therefore be drawn between those who reject those values outright and those who, while accepting them, fight for conflicting interpretations."[70] But the place to draw that line at different moments and contexts between constitutional legitimate and non-legitimate options is not a moral or rational decision but a political decision. For that reason, in my opinion, *ideally* this line should always be kept open for contestation rather than *ideally* be sentenced and sealed by our judicial elites. Similarly, Parker states that "[I]ndeed, in an ideal regimen of majority rule, every issue ought to be a political issue, open to political controversy".[71] So, if when we debate over constitutional conflicts we refer to the idea that if it is not morally legitimate for majorities to say that LGTBI people cannot marry, why would it

[69] Chantal Mouffe, *On The Political* (2005) 120-121.
[70] (Mouffe 2005)
[71] Parker 579.

be morally legitimate for courts to say the same? All in all, a moral reading of the constitution is a beautiful ideal but offers more problems than solutions for reinforcing rights and democracy.

4. An Agonistic Turn or a Popular-Political reading of the Constitution

The agonistic model of democracy put forward by Chantal Mouffe is named a "radical and pluralist democracy"[72]. A radical pluralist democracy acknowledges "the existence of relations of power and the need to transform them, while renouncing the illusion that we could free ourselves completely from power" and recognizes its specificity not "in the absence of domination and of violence but in the establishment of a set of institutions through which they can be limited and contested".[73]

An agonistic approach to constitutional review would uphold that instead of trying to design institutions like judicial review which, "through supposedly impartial procedures, would reconcile all conflicting interests and values, the task for democratic theorists is to create a vibrant agonistic public sphere of contestation where different political projects can be confronted, in a way that will not destroy the political association"[74]. In this sense, political conflict or political antagonism is better solved through the radicalization of democracy and not through its lessening. Instead of appealing to correct answers through law and/or moral, agonism endorses more democracy, more popular politization and, probably, more voting.

However, it is important to notice that Mouffe insists that democracy indeed needs minimum consensus over its 'ethico-political principles', consisting in values of liberty and equality for all, but it also needs, and it becomes unavoidable in plural societies,

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[73] Mouffe, *The Democratic Paradox* 22.
[74] Mouffe, *On The Political* 3-4.

different interpretations around those basic principles and values. As constitutional lawyers know, these political or constitutional principles always have conflicting interpretations and thus, such a consensus is limited to be merely a 'conflictual consensus'. In this sense,

"[T]his is indeed the privileged terrain of agonistic confrontation. Ideally such a confrontation should be staged around the diverse conceptions of citizenship which correspond to the different interpretations of the ethico-political principles: liberal-conservative, social-democratic, neo-liberal, radical-democratic, and so on. Each of them proposes its own interpretation of the 'common good', and tries to implement a different form of hegemony. To foster allegiance to its institutions, a democratic system requires the availability of those contending forms of citizenship identification. They provide the terrain in which passion can be mobilized around democratic objectives and antagonism transformed into agonism."[75]

These so-called ethico-political principles are difficult to define and there is no clear-cut solution that allows us to perfectly distinguish illegitimate and legitimate interpretations of same. Mouffe seems to limit this to formal equality or negative rights in order to "establish a rough distinction between a set of demands whose satisfaction can be granted without jeopardizing the basic liberal democratic framework and those which would lead to its destruction."[76]

One thing clear from my point of view is that political motivation guarantees allegiance to liberal democracy and its institutions better than legal or moral motivations. In this sense, it is essential to democracy that societies are politicized in favour of rights because

[75] Mouffe, *The Democratic Paradox* 103-104.
[76] ibid 122.

as we have recently witnessed, passions and not just reasons are mobilized through politics. Using Wittgenstein's famous quote, "after reasons, comes persuasion". It goes without saying that this does not mean that any constitutional interpretation design has to override the "give legal and moral reasons" part and go straight to empty persuasion! Any political process, and thus any constitutional interpretation process, has to include reasoning and deliberation, even if we are conscious that constitutional decisions are most of the time about sensibilities and identification. Dialogue, reasoning, law and morality are undoubtedly superior tools and sources of constitutional interpretation but, given legal and moral indeterminacy in our constitutions a democratic institutional design has to give preference to one interpretation above others. In my opinion, this means to give preference to one sovereignty above another –judicial, parliamentarian, state, popular- and, in principle, since the most legitimate is popular sovereignty, it is in this realm where the battle for rights has to enjoy preference in our constitutional theories. Constitutional interpretation, if any, is a powerful instrument and should be charged from popular politics and not from reactionary technocracy or moral approaches because "[N]o amount of dialogue or moral preaching will ever convince the ruling class to give up its power."[77] Politics work –and still is full of problems- only because of the strength of the legitimacy and power of the idea of "the people themselves". Moral condemnation is not strong enough to fight reactionary interpretations of our ethico-political principles because there is no powerful threat behind it –unless one affirms that being immoral or going to hell is something that changes people's political preferences. A moral paradigm in democracy is certainly complicated, and, what's more important it is not useful enough to balance fairly the distribution of power. A dialogical or technical paradigm is also complicated

[77] ibid 15.

because behind dialog there is nothing and one can dialog per infinitum and achieve no political improvement of rights.

So, to conclude and going back to the idea that courts should decide ultimately over the interpretation of our "ethico-political principles" in order to protect ourselves from ourselves, at the end of the day, when it comes to the constitutional arena: "[T]here are no supra-political *guarantees* of anything. All there is is politics".[78] And that is why popular constitutionalists aim to hand the constitution again to the people themselves. Some might say that it is not a good moment for defending popular sovereignty and popular political engagement, but I think it is the best moment: we now have enough symptoms and signs to get the message that people get angry when they realize they are set aside of the decisions making processes that govern their lives. We shouldn´t forget that democracy, the democratic principle and the ideal of self-govern, is what made us civilized.[79]

[78] Parker

[79] It actually seems, after trump's victory that many acholars and authors accept that third way, socioldemocracy, consensus based approach and tecnocracies are a problem. references