

Constitutional precommitment and collective autonomy: Can they be reconciled?¹

Pré-compromisso constitucional e autonomia coletiva: uma conciliação possível?

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Abstract

One of the central goals in contemporary constitutional theory is the search for a democratic process that protects individual rights and guarantees from risk, while also defending its own integrity. There is an inherent tension between the concepts of constitution (understood as a mechanism that safeguards individual rights and liberties) and democracy (taken as collective autonomy). Some scholars have tried to reconcile these ideals using the notion of *constitutional precommitment* that defines a constitution as a self-imposed constraint put into effect by and for the people in order to ensure the fundamental values and conditions of democracy. This paper analyzes the precommitment model in constitutional theory especially according to the current U.S. debate. In the final analysis, adding new elements to this discussion, this work defends that the relationship between precommitment and collective autonomy may be better understood with the redefinition of the concepts of constitution and democracy.

Keywords: constitutional precommitment, collective autonomy, democracy, people.

Resumo

Um dos temas que tem gerado amplo debate na filosofia e teoria constitucional contemporânea é a tentativa de impulsionar a prática da democracia e da soberania popular, consideradas fonte de legitimidade do poder político e do direito, sem deixar que os direitos e garantias individuais, assim como o próprio processo democrático, sejam violados. Essa questão aponta para uma tensão inerente aos conceitos de constituição (mecanismo de salvaguarda dos direitos individuais) e democracia (autonomia coletiva). Hodiernamente alguns autores têm entendido ser possível conciliar os

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ideais em questão a partir da ideia de *pré-compromisso constitucional*, segundo a qual a constituição é compreendida como uma limitação autoimposta, a qual o povo coloca a si mesmo a fim de assegurar as condições e valores fundamentais à própria democracia. Neste trabalho, são apresentados os principais argumentos a favor e contra uma teoria constitucional pautada no modelo do pré-compromisso, sobretudo a partir do debate norte-americano atual. Ao final, acrescentando novos elementos ao debate, defende-se que a relação entre pré-compromisso constitucional e autonomia coletiva pode ser melhor delineada a partir da redefinição dos conceitos de constituição e de democracia.

Palavras-chave: pré-compromisso constitucional, autonomia coletiva, democracia, povo.

Introduction

Popular sovereignty is generally considered to be the source of the legitimacy of political power and law. The search for a democratic process that protects individual rights and guarantees from risk, while also defending its own integrity, is one of the central goals in the contemporary debate on constitutional philosophy and theory. There is an inherent tension between the concepts of constitution (understood as a mechanism that safeguards individual rights and liberties) and democracy (taken as collective autonomy).

Some scholars have tried to reconcile these ideals using the notion of *constitutional precommitment* that defines a constitution as a self-imposed constraint. In other words, the constitution, by removing individual rights from political discussion, works as a self-imposed constraint put into effect by and for the people in order to ensure the fundamental values and conditions of democracy.

This paper analyzes the precommitment model in constitutional theory especially according to the current U.S. debate. In the final analysis, adding new elements to this debate, this work defends that the relationship between precommitment and collective autonomy may be better understood with the redefinition of the concepts of constitution and democracy.

I propose to study the relationship between constitution and collective autonomy starting from the debate between Stephen Holmes and Jeremy Waldron about the constitutional precommitment. The methodological criteria of these choices can be justified because the debate between these two authors about

constitutional precommitment exposes the most clear and distinct positions in the discussion about the relationship between constitution and democracy.

Stephen Holmes's theory is an example of the "constitutional thesis" of the relationship between democracy and constitution. It holds that collective autonomy should be limited in order to protect fundamental rights. Stephen Holmes' theory is taken as an example because it shows quite clearly the constitutionalist thesis on the relationship between constitution and democracy, namely that democracy and popular sovereignty should be limited in order to protect fundamental rights. And Holmes does this by using the precommitment thesis.³

Jeremy Waldron's theory, on the other hand, seeks to shift the discussion of fundamental rights into the political realm and his theory sheds light on the role of the constitution in safeguarding collective autonomy. In the framework of Philosophy of Law and Legal Theory, Waldron is nowadays one of the leading thinkers who are proposing to analyze the relationship between democracy and fundamental rights in political terms, namely, placing the focus of discussion in the democratic practices instead of relying on the constitutional and judicial protection of fundamental rights.

The contrasts between these two approaches are accentuated when analyzed from the perspective of three concepts: constitution, democracy, and people. It is important to emphasize that this article analyzes the relationship between precommitment and collective autonomy from the perspective of Constitutional Philosophy. This choice has implications concerning the methodology, which is normative, not merely descrip-

³ Many other scholars share this understanding. See, e.g., Luigi Ferrajoli, Gustavo Zagrebelsky, Carlos Santiago Nino, Robert Alexy and Ronald Dworkin.

tive. In this way, the philosophical approach focuses on the analysis of arguments and concepts rather than on practical applications of the theories studied.

Stephen Holmes and reconciliation between constitutional precommitment and collective autonomy

Since the 1960s, when Hayek argued that the constitution is a mechanism that allows for the “appeal from the people drunk to the people sober” (Hayek, 2011, p. 268), the concept of constitutional precommitment has served to bring the two ideals into harmony. In the late 1970s and during the next two decades, the notion returned to the center of the debate of constitutional philosophy due to the relationship established between precommitment and the myth of Ulysses, taken up from Spinoza (2002)⁴ by Elster (1979) and more recently by Holmes (1988b).

As the myth was told by Homer, on his journey home to Ithaca, Ulysses wanted to hear the song of the sirens, but he was aware of his inability to listen to the melody. So, he gave precise orders to his crew to tie him to the mast of his ship and not to release him until the danger had ceased. Similarly, we use the figure of a sober person who before drinking gives her car keys to a friend because she knows that at the end of the night she will not be able to judge her capacity or not to drive.

The examples of Ulysses and the drunk person are closer to the ideal advocated by constitutionalism when it states that the constitutional rules that protect rights, having been established through rational decisions, should be kept out of political discussions in times of social commotion or a lack of rationality. Holmes, explaining these metaphors, reminds that they assimilate the constitution to rational agent as follows:

A constitution is Peter sober while the electorate is Peter drunk. Citizens need a constitution, just as Ulysses needed to be bound to his mast. If voters were allowed to get what they wanted, they would inevitably shipwreck themselves. By binding themselves to rigid rules, they can avoid tripping over their own feet (Holmes, 1988b, p. 196).

Holmes, however, defends a model of constitutional precommitment that departs from both the Ulysses and the drunkenness metaphor. He argues that

constitutional precommitment is, instead, similar to autopaternalism, in which “people may voluntarily relinquish their ability to choose (in some matters) in order to accomplish their will (in other matters). Collective self-binding can be an instrument of collective self-rule” (Holmes, 1988b, p. 236). In other words: we put things out of sight or out of reach for the moment of temptation. For instance, we place the alarm clock across the room so we cannot turn it off without getting out of bed or, in the same way, laws which prevent employees from voluntarily consenting to work for an amount below the minimum wage may increase an individual's capacity to get what he wants by restricting what he can freely choose.

Constitutional autopaternalism should be observed from three viewpoints. Firstly, it does not equate to self-incapacitation, since constitutions have mechanisms that encourage discussion, establish deadlines for decision-making and ultimately improve the quality of choices (cf. Holmes, 1988b, p. 238). Secondly, constitutional provisions, such as checks and balances, are designed to be superior to the virtue of the citizens and strength of character. Thirdly, constitutional autopaternalism “is intentionally designed to subserve future aims currently unknown” (Holmes, 1988b, p. 238). Based on this definition of constitutional precommitment as autopaternalism, we obtain the following concepts of *constitution*, *democracy* and the *people*.

The *constitution* is not just a mechanism that limits power; it also creates the power and sets up its procedural rules. However, the restrictive aspect prevails over the creative one. According to Holmes, “constitutions are giant restraining orders motivated by a passion for avoidance. They are inevitably propelled by the desire to escape specific dangerous and unpleasant political outcomes” (Holmes, 1999, p. x).

The concept of *democracy* is drawn from two complementary aspects, namely the admission of gag rules and self-binding (cf. Holmes, 1988a, p. 24). In this sense, there are benefits that may accrue to public life as a result of excluding certain issues, especially extremely controversial ones, from political discussion. Thus, it would be the negative concept of freedom, namely the lack of interference in some fields, that would set the tone for democracy. Then, the main feature is that, for democracy to exist, democratic action itself needs to be limited. According to Holmes, “democracy is never simply the rule of the people but always the rule of the people within certain predetermined channels, accord-

⁴ Spinoza's work referred to is *Tractatus Theologico-Politicus*, VII/1.

ing to certain prearranged procedures [...]” (Holmes, 1988b, p. 231). The need to impose limits relates to the conception of individual and people.

The definition of the concept of *people* is very important to the discussion about constitution and democracy. To examine this concept in the constitutional theories studied here, I adopt Alessandro Pinzani’s distinction between *people in a diachronic sense* (people understood abstractly, comprising present, past and future generations) and *people in a synchronic sense* (concrete individuals who form at this moment the body of citizens) (cf. Pinzani, 2013, p. 138-139).⁵

Pinzani equates *people in a diachronic sense* to Rousseau’s general will, that which transcends the particular will of individuals, and *people in a synchronic sense* is compared to the will of all concrete individuals that form the body of citizens at a given historical moment. According to Pinzani, the danger of the diachronic perspective of the people is to be unable to arrive at a definition of the general will, because it becomes difficult even to establish *who the people are*. On the other hand, the risk from the perspective of the synchronic people would be the tyranny of the majority. So, in order to prevent the tyranny of the majority, fundamental rights are removed from the debate, leading to a conflict between the constitution and democracy.

In theories that see the constitution as a precommitment, there is a *diachronic view of people*, defining the people starting from the rights guaranteed by past generations and that should be preserved for the present as well as future generations. In these theories, a pessimistic conception of human nature predominates, operating based on dichotomies such as lucidity/drunkenness, strength and weakness of will, so that the lucidity and rational will are always present in those who erect constitutional restrictions and abandon those who attempt to carry out changes.

That is to say, a rare rationality must regulate the lives of those who, most of the time, are not rational. Holmes departs from the argument of the irrationality of the people as a political agent, but his defense of precommitment as autopaternalism maintains a certain distrust of collective autonomy since, although autopaternalism is not based on the irrationality of the agent, instead he sees it stemming from a sort of weakness of will, which also compromises the idea of autonomy. In the end, constitutional precommitment is consistent

with self-government to the extent that constitutional constraints are seen as self-imposed restrictions.

The strength of a theory like that of Holmes is that it seeks to find alternatives in order to avoid either democracy’s self-destruction or undemocratic events for individuals, minorities and society in general. This is ensured insofar as certain issues are removed from popular appreciation by majority decision.⁶

However, one way to test the limits of a theory is to ascertain what would be your answers to certain limiting cases. A theory like that of Holmes, whose essential criterion for the definition of democracy and its legitimacy is based on the evaluation of the result, would have to recognize as democratic even a technocracy or a monarchy, since it would ensure fundamental rights for individuals and minorities as well as the welfare of society in general.

In this case it is clear that the central criterion of such a theory disregards one of the most commonly accepted characteristics of democracy, namely, popular sovereignty and collective autonomy linked with the notion of popular participation in the decision-making process.

Jeremy Waldron and the incompatibility between constitutional precommitment and collective autonomy

Unlike Holmes, Waldron argues that the constitution (understood as a precommitment that sets limits to popular participation) and collective autonomy are incompatible. Analyzing constitutional precommitment, particularly the concept of self-limitation, Waldron notes that an agent limiting itself, at least temporarily, delegates its will to an external structure, as the crew in the Ulysses metaphor or even a national constitutional court (cf. Waldron, 1999, p. 261-266). In this way, if the instructions initially given are accurate, the decision of the external judge becomes just a means to accomplish the rational will of those who introduced it and thus, in theory, there can be no incompatibility between autonomy and precommitment.

However, Waldron emphasizes that the problems referring to external judgment must be faced taking into consideration that the principles and values embedded

⁵ For further discussion on people in a diachronic sense and people in a synchronic sense, see Pinzani and Consani (2013, p. 111-132).

⁶ The practical applications of this kind of theory can be seen in most Western democratic countries that adhere to the constitutional model, that is to say, in countries in which rights are protected by constitutional rules from changes promoted by democratically elected assemblies.

in a constitution will be interpreted before the “circumstances of politics”, i.e., in situations in which there is political disagreement, not only in respect of issues of law, but also regarding those of justice and politics (cf. Waldron, 1999, p. 101-102). Thus, in contemporary societies, the necessary accuracy of the initial instruction will rarely be present in order to guarantee that constitutional precommitment and collective autonomy may be reconciled. For this reason, Waldron believes that the only way to avoid societies departing from the ideal of self-government is to allow both rights and procedures to be subject to political debate. This assumption results in concepts of constitution, democracy and the people very different from those of Holmes.

The concept of *constitution* is defined more by the creative and directive aspect than the restrictive one. According to Waldron, written constitutions play an important role in politics, as they serve as a basis for deliberations. Thus, their role is more to strengthen politics and the government than restrict them. The word *direction* here is used in the sense in which the people have the right to control politics by way of the constitution. He explains this in the following excerpt:

[...] The idea of controlling the state is not necessarily a negative or constraining idea. If I control a vehicle, I determine not only where it does not go, but also where it does go. And if government is controlled, one might think that the important question is who is in the driving seat. [...] We may say instead that it is important for the government as a whole to be controlled *by the people* and, again, we may understand this control as not something purely negative, but as a matter of articulate response to the people's will (Waldron, 2009, p. 271, italics from the original text).

This definition of constitution is closely related to Waldron's understanding of democracy. The concept of *democracy* is linked to opening up all controversial issues for discussion. For Waldron, democracy has to assume disagreement. The author accepts that “everything is up for grabs in a democracy, including the rights associated with democracy itself. Or, certainly, everything is up for grabs which is subject of good faith disagreement” (Waldron, 1999, p. 303).

This implies the assumption of a synchronic conception of *people*, i.e., it is accepted that all the rights,

values and principles subject to disagreement must be submitted to the political debate conducted among individuals of the current generation. Thus, individuals are considered autonomous and responsible agents, capable of moral thought and, consequently, able to participate in the debate and in the decision-making process.

Waldron's proposal embraces the ideal of popular sovereignty and legislative supremacy and can handle the problems of dealing with disagreements about the interpretation and weighing of rights, mainly because it is able to encompass and accommodate social change. In other words, this theory allows political disagreements to be evaluated and reconsidered by the political process itself, carried out by democratically elected representatives.⁷

However, also for Waldron's theory we can present an extreme situation that exposes its weaknesses. While admitting that everything is open to debate and that democratic legitimacy is essentially guaranteed by the broad popular participation, and since such decisions do not prevent future popular decisions, Waldron must admit that even a decision that withdraws the rights of minorities should still be considered democratic. There seems to be in Waldron's theory an implicit normative base that is not reasoned, because the question is always about the meaning of a reasonable or good-faith disagreement and how much this notion has normative force to restrict certain positions. If this notion can be the object of a majority decision, then any decision of the majority can be considered guided by reasonable disagreement.⁸

Moreover, as Waldron recognizes, his theory lacks an adequate discussion of political representation (see Waldron, 1999, p. 110, footnote 60). Without rethinking representative democracy, it becomes problematic to confer such power to the legislature, because the design of the legislature needs to ensure not only the popular control over the representatives but also ways to develop and qualify the political debate. This is because the political will of the people cannot be taken simply as something given *a priori*: it must be the result of a process which, in turn, creates a democratic political culture. The proper functioning of a theory of constitutional democracy must presuppose a democratic political culture, which should be encouraged by its own democratic institutions.⁹

⁷ The practical applications of this kind of theory can be seen in countries like England or New Zealand, where the legislative power has a strong role in protecting rights, mainly because these countries have a different judicial review system. As pointed out by Waldron, in these countries “courts may scrutinize legislation for its conformity to individual rights but they may not decline to apply it (or moderate its application) simply because rights would otherwise be violated” (Waldron, 2006, p. 1355).

⁸ This limitation is also pointed out by Christiano (2000, p. 513-543).

⁹ János Kis (2009, p. 570-594) also criticizes Waldron in this sense.

Final considerations

A way to escape the problems pointed out in the theories of Holmes and Waldron is to outline a theory of constitutional democracy derived from the redefinition of the concepts of constitution and democracy. On the one hand, the constitution must be understood as a political framework which includes mechanisms for the protection and accomplishment of rights and not as a normative legal framework within which politics operates. In the former view, the protection and realization of rights fall inside rather than outside politics.¹⁰

On the other hand, it is necessary to rethink democratic practices reshaping the political-institutional arrangement in contemporary democratic societies, complementing representative democracy with formal channels for direct popular participation in which citizens can exercise more control over the elected representatives and also more influence over political decisions. Moreover, it is argued that this new political-institutional arrangement is directly related to a change in how one understands central elements within the very concept of democracy, such as *people* and *will*. My purpose then is to build an association between the concepts of people and will that confers more credibility to popular participation in political decisions than is given it in our times.

Returning to Pinzani's concepts of diachronic and synchronic people, the problems pointed out can be avoided by separating the concept of people from the concept of will. Thus, the most appropriate category would be one that can be called *synchronic people with diachronic will*. In this category, the synchronism related to the concept of people allows the constitution to be considered a living document, open to change. On the other hand, the diachronic element of will ensures that opening the constitution to the people need not imply the loss or suppression of fundamental rights nor the destruction of democracy itself. I consider this to be the most appropriate concept for a society that neither wants to subjugate democratic aspects to the legal ones nor wants to expose itself to the tyranny of the majority.

This synthesis between synchronism and diachronism stems from the work of the Enlightenment philosopher Condorcet. The underpinning for the following analysis is found in Condorcet's "Outline for the French Constitution of 1793". This text is a compila-

tion of the constitutional ideas of this thinker. The major theoretical contribution of Condorcet to this debate is what we might call *institutional thought* (cf. Condorcet, 1994, p. 228-234).

Condorcet builds a constitutional theory carefully outlining a set of institutions, i.e., he sets up many channels for the expression of popular sovereignty, for the limitation of power, for the resolution of conflicts and concomitantly for the protection of rights. His proposal was the establishment of an intermediate model between the positions favorable to the removal of fundamental rights from the political debate or the exercise of popular sovereignty with no protection for these rights.

The powers in Condorcet's constitutional theory are not divided merely into constituent and constituted power, but they can be classified as *powers retained* (with the people), *common powers* (exercised both by the people as well as by representatives) and *delegated power* (basically, constituted powers: legislative, executive and judicial).¹¹ In this theory, all these powers derive from the constituent power, but what is unique is precisely the existence of *retained* and *common powers*, otherwise called *positive* and *negative powers*.¹²

The *retained powers* are exercised directly by the people and consist of the enjoyment of four rights: censorship and popular initiative in legislative matters (always exercised *ex post facto*, i.e., subsequent to the enactment of a law by the legislature); consultative referendum (through which the legislature requests the people's opinion about an issue of general interest), the right of petition, and lastly the right to demand the trial of public officials in case of abuse of power and violation of the law. The *common powers* exercised by the people and the representatives are those related to constitutional review. Condorcet argues that the constitution must undergo review with a certain frequency, and this is taken as a condition for the improvement of political and legal institutions established and safeguarded by it.

These powers give the people the permanent right of decision and direct interference in the direction of politics. In this way, popular action can occur not only as a result of the action of the people's representatives but also by the people themselves when necessary, i.e., the direct participation of the people can occur concomitantly with its indirect action. In other words, the formal channels of popular participation created constitutionally confer a synchronic character upon the people.

¹⁰ For further discussion on the political form of constitutions, see Bellamy (1996, p. 436-456; 2007).

¹¹ This classification is made by Alengry (1904, p. 476).

¹² For further discussion on positive and negative powers in Condorcet's theory, see Urbinati (2006, p. 213ff.).

The concept of *synchronic people*, as already seen, also has limitations that may be associated with the tyranny of the majority. However, with the synchronic character the people's actions may have their weaknesses remedied by the diachronic nature of will as guided by deliberation. Condorcet pointed out that the deliberation process can produce not only the will but also the judgment of the citizens.¹³ This is mainly possible due to the wide range of places of deliberation and decision-making (the primary assemblies of each municipal section, municipalities and departments) in combination with the time delay between resolutions.

Such mechanisms filter the level of public interest in the particular draft of a proposed law, in an act of legislative censorship, or even in the trial of a public official. These mechanisms also prevent overly hasty decisions from being taken and avoid any chaos caused by a specific situation, i.e., they maximize the diachronic element of will that should be formed through the process of deliberation.

The democratic institutions shaping the synchronic people are of central importance to the democratic ideal. This is especially true because they contribute to the political education of citizens by producing democratic habits.¹⁴ However, the democratic constitution is not sufficiently adequate to deal with the problems arising from a merely synchronic act of the people, as pointed out earlier. In turn, the diachronic element alone is similarly unable to produce results, since it is, in fact, mere content and therefore requires a form in which to express the will. Thus, it is useless to develop an excellent method of deliberation and to have a highly enlightened people in a state whose constitution does not provide adequate institutions for popular participation. For that reason, synchronic and diachronic elements must complement each other.

Based on these categories (*synchronic people with diachronic will*) I suppose it is possible to draw a more circular relationship between the constituent elements of the concept of constitution and those of the concept of democracy. The people, thought synchronously, is defined (in the sense of created, constituted) by democratic institutions founded by the constitution. In other words, the synchronism of the people is de-

finied by the shape of the democratic constitution. The diachronic will, in turn, is a content built using a method of voting and deliberation. This content needs to be built within the democratic institutions which involve the process of discussion and deliberation. It is also important that these democratic institutions cooperate with the formation of citizens. Here lies the circularity: the democratic ideal, put into practice through the synchronic people, finds limits in the diachronic will, which works simultaneously protecting the rights and the democratic process.

Thereby, considering the debate between Holmes and Waldron and also the relationship between constitutional precommitment and collective autonomy, this approach can be considered a third way. Like in Holmes' theory, it seeks to protect rights and democratic practices against the irresponsible action of the people. On the other hand, like in Waldron's theory, this protection does not imply any sort of reduction in popular participation in very important and divergent political decisions. We can find, of course, this attempt to reconcile the ideals of fundamental rights and popular sovereignty in the work of great theorists, such as Jürgen Habermas.¹⁵ However, Habermas' model of deliberative politics does not institutionalize citizen control of the process of democratic decision-making and such institutionalization seems to be a very important contribution in the context of this debate.

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¹³ This point is currently raised by the theorists of deliberative democracy. See, for instance, the essays that compose the books edited by Bohman and Rehg (1997) and by Macedo (1999).

¹⁴ About the role of the constitution in the education of citizens, see Pinzani (2009, p. 472-495).

¹⁵ About deliberative politics in his work, see Habermas (1996, p. 287-387). Notwithstanding the importance of Habermas' work on this matter, it is not the purpose of this article to explore his theory because this would require the drafting of a new and different article. The work of Habermas is mentioned only as a model of theory of deliberative democracy that does not institutionalize the emerging demands of a broader public sphere. The lack of institutionalization is seen here as a problem and that is exactly why Condorcet's model of deliberative democracy seems to be more interesting to promote the accommodation of the tension between fundamental rights and popular sovereignty.

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