

Majority Rules in Constitutional Democracies.

Some remarks about theory and practice

early draft

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Constitutional democracies – I'll soon offer a definition of this expression – use a variety of rules in order to enact collective decisions. Here I'll focus essentially on *legal rules* and limit myself to public and constitutional law. By collective decisions I mean those that bind all members of the political community (and the violation of which is/can be the object of a legal or political sanction).

By constitutional democracies (and I'll mostly be discussing parliamentary regimes where the executive is politically accountable to the Parliament) I have in mind political systems characterized:

1. by a representative government based on universal suffrage (women included), where there are regular, repeated and competitive elections;
2. by a rigid constitution, encompassing fundamental rights and the separation of powers;
3. by an independent judicial organ in charge of the guardianship of the constitution that we call in Europe a constitutional court, council or tribunal.

Constitutional democracies as defined here use a variety of legal rules to produce collective decisions. In theory two are paramount: simple or absolute majority and qualified majority. I will discuss them in four contexts:

- a) the choice of representatives by voters through elections;
- b) popular referendums, by which citizens can enact or abrogate statute laws;
- c) representatives passing statutes in legislative bodies;
- d) representatives passing constitutional amendments.

In the second case, b) = referendums, usually the rule used in the countries I know is simple majority, conditional upon achieving a given *quorum*. In Italy, for example, the abrogative referendums are valid only if and only if the 50% plus one of the voters turn out at the polling stations (in Italy all citizens older than 18 years are voters and automatically registered on the electoral lists).

The same rule, without the quorum requirement, is used in principle for the election of representatives, a), but the different algorithms used by electoral laws introduce more or less significant distortions between the number of popular votes and the seats attributed in the representative assemblies; in general a plurality or relative majority of votes is enough in order to guarantee to a single party (like in UK and US) or to a coalition of parties (like in France, Germany or Italy now) the majority of the parliamentary seats¹. In this case MR is another name for *relative majority*: $51 = \text{number } X < 50$. It is well known that even in the American presidential elections the Electoral College can choose a president who received fewer popular votes than the challenger.

If we move from the rules for elections and referendums to those regulating the collective decision making of legislative assemblies, we discover a much more complex and comparatively much less charted/explored landscape. As Adam Przeworski noted in a recent presentation (I do not know if there is a paper from it) very often the rules used for passing statutes are super-majoritarian as a result of legislative regulations. Bicameralism and presidential vetoes are as old as modern constitutionalism and are

¹ ¹ Data relative to the proportional numbers of voter and seats in 5 European countries (I owe this data to Roberto D'Alimonte):

Country	year of election of the Lower House	winning party or coalition	% of votes to the winning party	% seats to the winning party	No. of parties in the cabinet
France	2007	UMP	40	54	1
Germany	2005	CDU/CSU	35 =	37	2 (<i>Gr. Koalition</i>)
UK	2004	Labour	35 =	55	1
Spain	2004	PSOE	43	47	1
Italy	2008	PdL+Lega	46,8	54	2

Notice that Italy, Spain and Germany have PR electoral systems with thresholds.

In Germany there was no political alternative after the election except a *grosse Koalition* between Christian Democrats and Social Democrats. In Italy the two parties controlling the majority of the seats in parliament entered in the electoral race as a governmental coalition. [See also G. Lloyd].

explicitly counter-majoritarian devices born at the same time in the US (1788, presidential veto) and in France (1791, king's suspending veto). The Ancient English constitution required the unanimous agreement of the Crown, and the two Houses of the Parliament in order to pass what English call an act.

Moreover, and very importantly, Standing Orders of parliaments are often significantly different from one country to another. Filibustering, for instance, exists in various forms in numerous constitutional regimes, considerably reducing the power of parliamentary political majority. Other provisions, moreover, may associate the parliamentary opposition with the agenda setting of the Assembly. All these counter-majoritarian rules show that, since its inception, the worry of an abuse of power (even) by (elected) majorities was a major preoccupation of the Founding Fathers of the transatlantic constitutionalism, which is essentially the modern form of the limited government in a society "without qualities". By this expression I mean that in a post-Hobbesian political culture the anti-despotic strategy ceases to be based on the institutionalized checks rooted in societal forces: grandee/people (in the Italian Renaissance), orders, ranks and estate (in France and England) or *Landesstände* (in German speaking territories) and, because of the egalitarian foundation of the political rhetoric, the anti-despotic device has to be "endogenized" via constitutional engineering in the structure itself of the governmental machine (something that inevitably becomes very problematic in presence of organized political parties – see Pildes and Levinson).

All that must induce us to relativize/discount the supposed role of Majority Rule as the paramount decision making rule of our democratic regimes. At the end of the institutional exploration based on empirical research, it might emerge as less significant that the large debate concerning its qualities and properties may induce us to believe. I will come back to this last point later on. Now I want to draw your attention to the 4th rule constitutional democracies use for collective decision making.

Notwithstanding what I just said concerning the super-majoritarian mechanisms often utilized by legislative bodies in order to pass statute laws, rigid constitutions impose/generally require a mechanism to amend the constitution that is *more difficult to operate* than the one used for enacting statutes. It is important to draw attention to the

fact that strict super-majoritarian rules exist in only one “family” of rigid constitutions. This claim deserves some comment and clarification. I tend to believe that we have to distinguish a double genealogy of rigid constitutions: let me call them the American and the French ones. Here is why. The Philadelphia constitution not only introduced a mechanism which is famously the most rigid we know for amending a constitution in its fifth article, but it also excluded entirely the citizens-voters from that process, following possibly Madison’s suggestion vs. Jefferson’s [*Federalist Papers*, ## 48-49]. The American family of rigid constitutions is characterized by a super-majoritarian requirement for the modification of constitutional norms (we find the same mechanism in countries like Germany, *Grundgesetz* 1949, and partially in France, 1958, and Italy, 1948). Here the rule makes it impossible for an absolute majority (the 50% + 1) of the member of the Parliament to modify the constitution. The alternative mechanism can be called French by reference to the first French constitution (1791), which made it impossible for the representatives in general to pass constitutional amendments. In no case could the *Assemblée Nationale* alone alter the basic law, even unanimously. The cooperation of a special political actor is needed in this system: the citizen-voters (and normally the simple majority of them) have to directly or indirectly (in federal systems) approve the constitutional amendment. So, in the first case the majority of the representatives is deprived of the amending power, in the second one the representatives as such are deprived of this power. This second mechanism of amendments is still used in some Scandinavian countries that have constitutions written originally under the direct influence of the French Revolution (notably of the first one of 1791, which organized a constitutional monarchy).

In my presentation I’ll focus on the American family or model; and ask two questions: 1. why passing a constitutional amendment needs a qualified majority larger than the simple or qualified majority required for passing statute laws? and 2. how it is possible to guarantee the constitutional rigidity, since the rigid constitution in itself, like any written text, is just a “parchment barrier” or, more simply, a piece of paper?

The constitutional stability that the super-majoritarian rule wants and hopes to protect, is rooted in two dimensions of the modern constitutionalism and its anti-despotic

character. I do not need to go back to Montesquieu to specify what is wrong with despotism – even though it would be useful to reread and quote the author of the *Spirit of Laws*, who is at the origin of the transatlantic constitutionalism. It is enough to be reminded here that, on one side the stability of a constitution (I am now using the Kelsenian concept of constitution as “rule to enact rules” [statute laws], that he defines as “material concept”) is rational since it would be absolutely dysfunctional to decide, each time we, as a collective body, have to make a decision, which rules to use in order to take the decision we need to take. The waste of time would be absurd and that is why we tend to establish stable rules to make collective decisions. But this is just a rational procedure; even Pinochet enacted a constitution giving him some sort of stable power, and at least an instrument of government. Modern constitutionalism, though, as defined by the art. 16 of the French Declaration of the Rights of Man and the Citizen, requires the establishment of substantive *limits* (and not of simply procedural rules) to the legislative paramount power, limits that go usually under the name of fundamental or constitutional rights. The rigidity of the constitution in this perspective implies not only the stability of the rules to make rules, but also and primarily the existence of these limits or barriers to the power of the legislature i.e. of its majority or even its relative supermajority (produced by bicameralism, veto and the Standing orders of the Parliament).

The modern state, since its Hobbesian foundation, has no other rationale than the protection and the guarantee of citizens’ rights. The so called classical contractualism or contractarianism on which it is based is a metaphor for a doctrine of *political obligation* based on the principle which demands obedience in exchange for the guarantee of *inalienable* rights (life and limbs with Hobbes, life and property with Locke, and many others later on in the development of the contemporary constitutional state [see for instance, as to the early beginning of these new genealogy of rights the Weimar constitution and the declaration of rights of the French constitution of 1946]).

This all is pretty clear; but a point that cannot be underestimated is that the fundamental inalienable rights are, on one side, not absolute, so their exercise has to be compatible not only with the exercise of the same right by other citizens (French declaration of 1789) but also with the enforcement of other rights; on the other side, they are surrounded, as to their content, by a sort of *grey area* – with other words they may be

interpreted in different ways. Now, a government, meaning the political majority supporting it, or the majority in a Congress (if the system is not a parliamentary one) normally claims that the statute laws that it enacted do not violate citizens' fundamental rights – to admit the contrary would be surprising and to my knowledge never happens in democratic regimes. *De facto*, the existence, I mean the constitutional declaration of these rights, *inevitably* results in a *conflict of interpretation* concerning their content (and compatibility). This conflict arises between the citizens and the government or the majority. If the citizen were the judge of such a conflict the political system would soon turn into anarchy (Hobbes would speak of *state of nature*), but if the government/majority were the only judge, the same system would look more or less like the People's Republic of China, where there is no protection for citizens right since the government has a monopoly on authoritative constitutional interpretation. It is inevitable that the only possible actor interpreting the grey area surrounding the fundamental right in the numerous cases of conflicts between the citizens and the governing majority has to be a third actor independent from both of them – similar in this perspective to the *iudex* of the Roman Republic's formulary trial. In a small society with a simple set of legal norms (Athens might be considered perhaps a case in point), this umpire could be a popular jury; but in a large society characterized by a complex legal system the *iudex* can only be a qualified (made up by law specialists) Court of justice (according to the objection made by Coke to the incompetent sovereign – in his case James the first, who wanted to exercise judicial power – the same objection could be made to the Maoist popular tribunals). What we cannot imagine are millions people getting together quasi full time to discuss the innumerable cases and controversies arising under a constitutional order – hence the question, which I cannot discuss here, of the rule that this *court* will utilize to settle down the dispute.

On this last question let me only add a short remark. The most articulate enemy of the Constitutional Courts wrote in the 1920ties, under the Weimar Republic – when the European debate started to develop – Carl Schmitt. In a very important book: *Der Hüter der Verfassung* (the Guardian of the Constitution) (1931), the German constitutional theorist put forward a battery of arguments to dispose of Kelsen's theory of judicial review. Some of them are specious, some less so. [see the book I edited with O. Beaud,

Kelsen contra Schmitt]. The main objection against Kelsen (the same that is constantly repeated almost by any critic of constitutional justice, who mostly do not know Schmitt's criticisms, notably after the Second World War by the Communist Parties in the Constituent assemblies of many European countries) was the absence of democratic, elective pedigree of the members of such a court. Kelsen was never really able to answer Schmitt's challenge (see his *Wer soll der Hueter der Verfassung sein?*). Here is worth remembering that Schmitt was not denying the need of the constitutional guardianship; he supported an alternative hypothesis. The guardian of the constitutional order (what was actually for Schmitt something different from constitutional rights!) had to be, according to him, the President of the German republic, because the president was popularly elected, and thus had the democratic pedigree absent from the members of the judiciary, and was, moreover, representative of a "*pouvoir neutre et régulateur*" (the expression was used by Benjamin Constant speaking of his constitutional king). Now, it seems to me that Schmitt's suggestion, though democratic in the standard majoritarian meaning of that term, is seriously objectionable and somehow self-defeating. I do not want to discuss Constant's important doctrine of the *pouvoir neutre* (on that see footnotes in my book on Sieyes) but the crucial point is that the king's neutrality is predicated and is possibly credible up to a point since the king is NOT an elected official; he has tenure and no obligation to please to any specific majority of the public opinion. The president of the Weimar Republic was not a credible neutral actor *because of* his democratic pedigree. He was electable indefinitely, and was himself the expression, through the popular vote, of the will of specific political majority. So neutrality and elections seem to exclude each other and make Schmitt's argument unacceptable. On top of this, a President is a monocratic authority, where the Courts in charge of judicial review of the statute laws are always collegial bodies. That for evident reasons: it would be too dangerous to abandon in the hands of a single individual the capital role of authorized interpreter of the content and the limits of citizens' rights and of the legislative power. And since the Court is made up of multiple judges we need to explore from a descriptive and normative standpoint the rules for decision-making inside panel-courts, elsewhere. [see my book: *How Constitutional Courts Make Decisions*, Giuffrè, 2009].

I want to come back now to the specific properties and justifications offered for the different types of majority rules used in constitutional democracy.

MR, the prestige and attraction of which is still great, notwithstanding the double circumstance of its empirical institutional rarity and its lack of a clear justification, may owe that prestige to the circumstance that it was used as almost the unique mechanism for collective decision making in the mother of all democratic regimes: Athens. Independently from that fact that using the same word to qualify the Athenian *demokratia* as well as the contemporary governments born out of the American and French constitutionalism of the 18th century shows that people often do not know exactly what they are speaking of, I would like to consider briefly some of the prominent attempts to justify MR in western intellectual history. I believe that the three major arguments can be presented under the names of three important political and constitutional theorists: Condorcet, Kelsen, and Pufendorf. The order, as you see, is neither lexical nor chronologic. At least in my opinion, it follows their degree of persuasiveness. These three arguments can be presented as three versions of the very polysemic term of equality: 1. equal contribution to the ascertainment of the truth, 2. equal liberty as autonomy, and 3. equal dignity of the members of the collective decision-making body.

Condorcet claims famously in his jury theorem that under specific conditions (notably if the members of the decision making body are equally able to discern the truth, or with other words have an equal probability, > 0.5 , of being right) MR will produce the *true* or *right* decision. In fact, Condorcet doctrine is much more complex and elsewhere (actually here at the *Collège de France* in a previous meeting) I tried to defend the less simplistic view that the Marquis presented in 1785. For my purpose today I will restrain myself to asking a few questions. First: In which cases is there a true political answer? A legislative assembly is not the same as a criminal jury that has to declare if X is guilty or innocent. Many questions that a political assembly has to decide are connected with expertise, so they may have a right or wrong answer (that is not exactly the same as the true one). But 1. experts very often disagree; 2. the final decision is made by politicians and not by experts; since democracy is based on election and not on competitive exams where specialists judge young people who suppose to be competent enough to join the specialists (that would be a technocracy, perhaps a university, not a democratic regime).

Second: Condorcet is a theorist of representative government and shared the 18th century opinion that elections are a good mechanism to select the elite of a country. So those who are members of his deliberative assemblies where MR is used as the decision making rule are not the voters but a small selected elite.² So we have to suppose that MR is not valid in general but only in cases in which the decision is made by an elite (at its best the election would be a mechanism not to discern the truth but to select the natural aristocracy in a given country!). Third: it would be interesting to explore how Condorcet justified the idea of a rigid constitution, meaning a constitution that the majority of the representatives cannot modify, a point qualifying his entire constitutional doctrine.

Kelsen's version of MR is even more complex and either almost unknown, as in the English speaking world, or misunderstood. The doctrine he presents at the beginning of his book on democracy (1929) and that he clearly *rejects*, as most of the readers tend to ignore, is based on the hypothesis that in order to preserve the maximum of chance of freedom as autonomy, given the immense drawbacks of the rule of unanimity, we have to accept MR. Why? Kelsen offers two arguments: a) if we use MR the probability of being unfree is lower than the probability of being free: since $49 < 51$, under MR I have a smaller chance to be unfree than free (autonomous); b) since decisions in a legal system (*Rechtsordnung* = for Kelsen with the state's political order) always fall somewhere between the (legal) *status quo ante* and a modification/alteration of it, MR is the only rule giving no veto power to a minority. Indeed, if we use qualified majority, as I said earlier, we stabilize a legal/constitutional order, and this by giving to a minority – say 35% – the possibility of making impossible for the majority the transformation of the constitutional status quo; so in this perspective 35 would be $>$ than 65. Let me specify that, according to Kelsen, MR has the property of minimizing the chance of being unfree IF and ONLY IF the members of the decision making group want/decide to have an equal impact on the final decision (so rules like *sanior pars* and supermajority are both excluded!). Kelsen was actually deeply unsatisfied with this doctrine, but I do not need to prolong here the analysis of his theory.

² Here there is a small conundrum. If elections select the elite, democracy would be the same of a technocracy – or to use the Greek language an aristocracy. So Condorcet would be a technocrat, claiming that the voters are the best judge of the best experts in governance. It seems less elitist and a bit more realistic to claim that voters pick people in competitive elections because they support voters' ideologies and interests.

Samuel Pufendorf presented a different justification for MR in his extremely influential (during the 18th century) compendium of the natural law theory, *De jure naturae et gentium* (1672). I can sum it up under the formula: *equal dignity* of the decision-makers. This point, also repeated implicitly by Kelsen, is explicitly put forward by the Saxon legal theorists [see also the last book by the classicist G. Lloyd, *Ancient Worlds, Modern Reflections*, chapter 12 about MR in the ancient Greece]. He rejects both the idea that the principle is rooted in natural law and that it ought to be used to ascertain the truth! It combines, instead, two properties: 1. gives to each member of the decision-making body an equal say, no opinion or will is more important than another; all the wills have (whatever their quality or argumentative strength) the same impact; 2. the rule is expedient since it allows to escape the impossibility of making decision that goes with the principle of real equal liberty: the unanimity rule. Pufendorf touches briefly upon the rule of supermajority exemplified by the norm for the papal elections for many centuries, but he doesn't develop that point.

With the exception of the Condorcet's doctrine that might end in the principle that it is possible to force the minority to be free or to accept the "truth", the two best versions of the justificatory approach to MR have to confront the objection that in order to guarantee the equal dignity of all or the respect of the majoritarian will we will pay inevitably the exorbitant price of the unfreedom of all the other members of the group, possibly the 49% (indeed, because the electoral algorithm, if we are speaking of elected representatives, the large majority of the citizens).

The traditional answer to that worry has been the rigidity of the constitution, which takes away the ability to oppress minorities from the majoritarian will. This answer produces in turn three new questions: 1. what is a constitution? and since as I argued it seems impossible to guarantee the rigidity of the constitution without giving to an electorally unaccountable body too large a power, 2. should we not start to think that the remedy is worse than the sickness it is presumed to heal?³ 3. supermajority and rigid constitution only protect significant and organized minorities, not the insular ones and even less the isolated individuals.

³ I'll not offer here a full account of the arguments to reject this objection. That would imply among other to discuss the answer given by Alexander Hamilton to the same challenge in *Federalist* #78, that I find only partially persuasive.

Here some preliminary remarks about the first question. Constitutions, one should say rigid constitutions, have been presented – using a metaphor drawn from individual psychology – as a sort of pre-commitment. Metaphors sometimes help, sometimes even are at the origin of the success of a book, but are also inevitably imprecise and somehow misleading. Surely it is strictly impossible to jump from the individual psychology to something difficult (at least for me) to conceptualize like the “psychology of groups”. Nonetheless the metaphor of sober Peter binding drunk Peter taken *cum grano salis* can help us to introduce an answer to our point. Ulysses needs a crew to enforce his pre-commitment, Peter when he is drunk needs Paul who doesn’t drink at parties, and is always sober – you can imagine that for me Paul, if we want to stay inside the metaphor, is the Constitutional court. It has been objected a) that the constituent assembly establishing a rigid constitution doesn’t bind itself but the future legislatures – so it doesn’t tie itself but another subject or actor; b) that a constituent simple majority (arbitrarily) imposes a bias in favor of its choices rigidifying the constitution.

As to a) either we suppose that there is no political continuity between the political parties present in the constituent assembly and the parties competing for the legislative election – which is not true most of the time; or we use a concept of identity so strict that makes impossible to speak of pre-commitment in general, since under such a conception (a sort of radical Parfitian doctrine of personal identity!) Sober Peter is not the same person as drunk Peter. In the long run political parties transform, some disappear and some others emerge, but if these changes are deep the constitution normally cannot survive (that is possibly the case in the next few years in Italy).

As to b) I need to introduce a distinction between two concepts of constitution. I shall oppose a “consensual” constitution of a liberal democratic society to a “*coup de constitution*”. Nowadays political scientists trying for instance to measure why constitutions last (T. Ginsburg) tend to put in the box “constitution” any text having that name – independently from its content and from the way it was produced and ratified (so they ignore what seems to me paramount: the constitution making process). I tentatively suggest a different approach. Let me start by clarifying the unusual expression “*coup de constitution*”. Imagine a country where a political party wins a majority in a constituent

assembly (the SPD in Germany 1919) or creates a convention after winning a civil war (many Latin American examples). If the majority imposes its values and its political program in the constitution, ignoring the values and the aspirations of the minority (I'm speaking here of significant, not insular minorities, hence of minorities able to win an election in the future), I think that we can say that rigidifying the constitution is a coup that has the consequence – if the country allows free elections⁴ – that at some point in the future, when the opposition will win the electoral competition, the latter will be obliged to write a new constitution since its political program would be unconstitutional under the previous rigid constitution. Notice that I'm considering here only democratic systems characterized by free elections. Dictatorships have constitutions, but I want to remind you that the topic of my talk is Majority Rules in Constitutional Democracies.

A constitution, as I define the word, is a text that has to be able to accommodate different policies and must be accepted in its foundations by all the political actors able to win an election after the constitution-making moment. What I'm trying to say is that the rigidity = the super-majoritarian requirement for constitutional amendments = the bias in favor of the constitutional *status quo* cannot be imposed by a party over another party since this imposition will inevitably fragilize either the democratic regime (no more elections) or the constitution (a new constitution when the challenger wins the electoral competition)! The Italian and the German constitutions written after the Second World War are example of this type of consensual constitution. The French constitution of 1958 *became* a common constitution, notwithstanding the original opposition of the leftist parties, after 1981 when François Mitterrand accepted it.

The rigidity has to protect the constitution but also to integrate the political minority. But what of insular minorities and of the rights of simple isolated individuals – those who can't win the election? It seems to me that the Constitutional Courts, to come back to a previous topic, have in the new democracies a double task: on one side they have to protect the constitutional structure that allows a real alternation in power of incumbent and challenger political actors; on the other side the Court has also the function of protecting individual citizens' rights vis-à-vis the state/government.

⁴ If there are no competitive elections, the regime is not a democracy and outside the consideration of this paper.

In the last century we experienced a major shift in our language and in our preoccupations as citizens concerning our rights. The first half of the 20th century saw the full accomplishment of political rights for most representative governments. Franchise was extended from all the adult men to the entire body of adult nationals. In the second half, notably in Europe starting from the Second World War, the protection of civil rights of the citizens, *omnes et singulatim*, was increasingly demanded inside constitutional democracies (nowadays this is also the case in China, though for the moment demands are quite unsuccessful). It is of these new demands that the political-constitutional theory of the 21st century has to make sense.