

A DEATH BLOW TO PURE PROCEDURALISM IN DELIBERATIVE SYSTEMS: THE PROBLEM OF PREREQUISITES

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RESUMO: A democracia deliberativa contém uma teoria da legitimidade. Uma das suas versões é o procedimentalismo puro, segundo o qual os princípios que estabelecem os termos da cooperação política em sistemas deliberativos devem conter sobretudo o processo de deliberação e nenhuns outros elementos substantivos, salvo se estes forem necessários para assegurar que o processo seja equitativo. Este artigo mostra que o procedimentalismo puro sujeita-se ao “problema dos pré-requisitos”: mesmo que o procedimentalismo puro seja um critério de legitimidade, a legitimidade do procedimentalismo puro enquanto fonte de legitimidade subsequente não pode basear-se em procedimentos deliberativos. O problema contém dois argumentos: o argumento do pré-requisito da pertença procedimental (o estabelecimento de direitos de pertença aos procedimentos deve estar imune à deliberação); e o argumento do pré-requisito do governo procedimental (a regra estabelecendo o limiar quantitativo a partir do qual uma decisão é atingida deve estar imune à deliberação).

Palavras-chave: Democracia Deliberativa; Legitimidade; Pertença; Pré-Requisitos; Procedimentalismo Puro;

ABSTRACT: Deliberative democracy contains a theory of legitimacy. One of its versions is pure proceduralism, according to which the principles establishing terms of political cooperation in deliberative systems should inform mainly the process of deliberation and no additional substantive elements, except to the extent that they are necessary for a fair process. This paper shows that pure proceduralism faces the ‘problem of prerequisites’. It consists in the fact that, even if pure proceduralism may be a criterion of legitimacy, the legitimacy of pure proceduralism as a source of subsequent legitimacy is not grounded in deliberative procedures. The problem comprises two arguments: the argument from the prerequisite of procedural membership (the establishment of membership rights to procedures must be immune to deliberation); and the argument from the prerequisite of procedural ruling (the rule establishing the quantitative threshold from which a decision is reached must be immune to deliberation).

Keywords: Deliberative Democracy; Legitimacy; Membership; Prerequisites; Pure Proceduralism;

Deliberative democracy contains a theory of legitimacy, especially when it comes to accounting for the justification of authority in a democracy. One of its most notorious versions is pure proceduralism, which claims that the principles establishing terms of political cooperation in deliberative systems should inform chiefly the process of actual deliberation and no additional substantive elements, except only to

the extent that they are necessary for an effective and fair process to occur. The following arguments will try to show that pure proceduralist theories of political legitimacy face the challenge that is to be called ‘the problem of prerequisites’. It consists in the fact that, even if pure proceduralism may be a criterion of legitimacy, the legitimacy of pure proceduralism as a source of subsequent legitimacy is not grounded in deliberative procedures.

The paper comprises four sections. The first will present a standard characterization of proceduralism with regard to democratic legitimacy, with a special emphasis on the nature of pure proceduralism. The second will establish three criteria without which there can be no viable proceduralist theory of legitimacy: action; individual membership; and quantitative decision ruling.

The remaining sections will present two arguments that constitute the problem of prerequisites. The first is the argument from the prerequisite of procedural membership, according to which participation in a decision-making procedure cannot be established by the procedure since it will always have to trace the source of its legitimacy to a prior rule (immune to deliberation) conferring membership rights; otherwise, the procedural deliberation establishing membership criteria would have the same problem of identifying the rule conferring membership rights to such a deliberative procedure, which in turn would also have the same problem, and so on. The second is the argument from the prerequisite of procedural ruling, according to which the definitive threshold creating a decision cannot be established by a deliberative procedure since it does not permit the possibility of theoretical disagreement about its nature and contents; otherwise, the inexistence of unanimous consensus about decision rules would require the application of a prior decision rule in order to explain the decision rules in force, which in turn would have the same problem, and so on.

The point of the arguments is to underline the fact that the problem of prerequisites undermines the potential of pure proceduralist theories to become self-sufficient theories of political legitimacy, insofar as procedures are not the source of legitimacy per se but rather the instruments for assessing and actualizing prior sources of legitimacy.

THE STANDARD CHARACTERIZATION OF PROCEDURALISM

Deliberative democracy emphasizes rational dialogue and consensus formation among individuals. By definition, it is very demanding. Many of those demands are

institutional, involving rules, procedures, and resources that support, condition and require nearly-universal discussion and greatly constrain whether and how group-formation occurs and collective decisions emerge. Their purpose is to establish effective means of decision making through a set of legitimacy principles that make up the core of deliberative democracy. Ultimately, deliberative democracy is not simply a form of democracy in which deliberation is central to decision making; it is also a frame of reference to political legitimacy in democratic experiences.

The demanding requirements of deliberation can be substantive morally-charged determinants, such as sameness and equality, or mere procedural conditions of equal participation.

Proceduralist versions of deliberative democracy claim that the principles establishing terms of political cooperation in deliberative systems should inform mainly the process of actual deliberation. The standard account of proceduralism has its origins in John Rawls' distinction between perfect, imperfect and pure proceduralism (Rawls 1971, pp. 85-86). Perfect and imperfect versions of proceduralism state that the property qualifying outcomes as legitimate is established before the construction and application of the procedures – if procedures are capable of leading to the desired outcome with certainty, they are 'perfect'; if there is no guarantee that certain procedures will reach a legitimate outcome, they are 'imperfect'. In pure proceduralism, however, the qualities of the outcome cannot be known before a legitimate procedure is actually carried out; procedures have a central role in the articulation of a concept of legitimacy as they are capable, if correctly carried out, of transferring their properties to their outcomes – the legitimacy of outcomes depends entirely on the legitimacy of procedures leading to them.

In the case of *imperfect proceduralism* – which Peter (2008) calls 'rational proceduralism' – mere procedures cannot justify outcomes that are unjust according to substantive principles. These versions of proceduralism assume that there is often a combination of conditions that refer to the quality of outcomes of decision making with conditions that apply to procedural features (Gutmann and Thompson 1996; 2004, pp. 96-138). According to this version, the justification of decisions is paramount to democratic legitimacy; public deliberation must somehow lead to a decision that all those affected can endorse, or at least that no one can reject with good reasons. Political legitimacy, thus, focuses not only on the conditions under which a decision is reached, but also on the rational quality of the outcomes chosen. The structure of this kind of deliberative democracy includes an independently defined desirable outcome – a decision

everyone has reasons to endorse – that is brought about by a particular procedure. An ideally fair deliberative process is necessary and sufficient to generate a rationally justified political decision. This conception can be found, for instance, in Cohen (1989, pp. 17-34), Benhabib (1994), and in Postema (1995). It also constitutes the grounds for epistemic defences of democracy, often known as ‘epistemic proceduralism’ (Estlund 2008, p. 98).

According to *pure proceduralism*, however, legitimacy is ensured as long as the requirements of procedural fairness are satisfied; outcomes as such do not matter; what is important is that collective decision making proceeds through public deliberation between all those affected under some conditions of political fairness or equality. Decisions are legitimate as long as they are the result of an appropriately constrained process of democratic decision making. By assuming that the deliberative process tends to produce disagreements which can hardly be reconciled, pure proceduralism considers that there is no other justification for a particular decision other than it being the result of a fair process – the legitimacy of the outcomes only depends on the fairness of the decision-making process and not necessarily on the quality of the outcomes it produces. This view can be found in authors such as Christiano (1996, p. 36), Gaus (1997, pp. 205-242), Young (1993, p. 130), and Sunstein (1999, pp. 147–148).¹

Limiting our focus to deliberative democracy (whether epistemic or not), the following argument will try to show that pure proceduralist theories of legitimacy face a potential death blow in the ‘the problem of prerequisites’. There are at least two methodological prerequisites to any deliberative procedure without which there can be no (fair or unfair) procedure at all; both prerequisites legitimize procedures without being subject to a deliberative procedure. Even though pure proceduralism intends to be a criterion of legitimacy, the legitimacy of proceduralism as a source of subsequent legitimacy is grounded on prerequisites that are immune to proceduralism. In order to illustrate this point, the argument will have to present firstly the three criteria of participation in deliberative processes: action; individual membership; and quantitative decision ruling. The relations between these elements will comprise the problem of prerequisites.

¹ Even though they are scarce, there are also epistemic accounts of deliberative democracy that can be qualified as pure proceduralist. Pure epistemic proceduralism rejects the idea that a procedure-independent standard for the correctness of political decisions can provide a normative yardstick for legitimacy; rather, it incorporates epistemic values in procedural fashion by making the epistemic value of deliberative decision making depend on its procedural features (on how inclusive it is, for instance) (Peter 2013).

THE THREE CRITERIA OF PARTICIPATION IN DELIBERATIVE PROCESSES

Participation in deliberative processes includes at least three criteria without which it cannot be conceived.

(1) *Action*. Democratic participation occurs inside a dynamic procedure in which a certain activity takes place that aims at bringing about something new. This requires an action, an agent and a final result to be produced. The action is the individual instance in the series of a reason-giving process; the agent is each and every individual participant; and the final result to be produced is a specific (definitive or provisional) political decision (the reason-giving process leads to a decision that is to be enforced for some period of time; participants do not deliberate just for the sake of deliberation or for individual enlightenment).²

(2) *Individual membership*. The term *participation* entails literally that the action is performed by the *parts* rather than the whole. In fact, what sets the whole in motion seems to be the prior motions of those entities that are not only covered by the conceptual framework of the whole, but that actually compose the whole. And in deliberative democracy, the whole is composed of individuals rather than groups.

(3) *Quantitative decision rule*. Even though the production of a result is expressed through unity (the decision-making process aims at producing *one* decision that can be imputed to *one* political whole), the actions of individual members are plural. Hence, there must be a methodological way of connecting the category of plurality with the category of unity, that is, of transforming a mere coexistence of individual and isolated actions by different agents into an actual collective decision. This operation consists mainly in the mathematical procedure of adding a plurality of units into an overall larger unit. In deliberative democracy, deliberation aims at achieving consensus, that is, at finding reasons acceptable to

² Simple passive acquiescence with established decisions can be called participation in democracy, but it fails to produce a deliberative democracy. The existence of the latter depends upon individual actions by participants in decision-making processes. A participant in a deliberative democracy must necessarily be what Thomas Jefferson called a ‘participator in the government of affairs’ (Jefferson 1944, p. 661).

all who are committed to such a system of decision making. However, since actions are not always the same between individuals, majoritarian decision making applies when consensus is not possible. If the addition that produces the end result does not achieve unanimity, that is, the absolute coincidence between the total sum of the parts' actions and the whole's political decision, what emerges is a majoritarian outcome. Participation involves thus *a quantitative decision rule* (that is, a rule establishing the level of agreement necessary to finalize a decision) expressing unanimous consensus or majoritarian settings as a procedural way of achieving the desired outcome.

These criteria³ are not instantaneous. The fact that two of the criteria are met does not necessarily imply that the third must be met also, whatever the order in which they appear. For instance, from the fact that there is an active decision-making process in play producing a given result by means of a quantitative decision rule does not necessarily imply full membership to the political community in which those decisions are taking place.⁴ Also, the fact that individual members of a political community are acting in a decision-making process does not necessarily imply that the outcomes of such processes are inferred by means of a democratically-supported decision rule.⁵

Consequently, these criteria cannot be determined inside the democratic process itself; rather, each one of them must be presupposed before the actual deliberative process begins. The connection between them denotes that there are at least two prerequisites in deliberative democracy that cannot be ascertained by means of democratic participation at all. In other words, procedures determining specific political decisions can be sources of legitimacy only if they fulfil two methodological prerequisites whose legitimacy is

³ Some scholars claim that non-resident non-citizens – that is, non-members – should be entitled to political participation (Fine, 2011), whereas others say that decisions in democracy do not involve citizens who either disagreed or did not attend and must then be distinguished from majority rule (Rogers, 2008, p. 118). Such views, however, are to be regarded mostly as exceptions to the most common perception of participation in deliberative systems.

⁴ For instance, in ancient Greek politics, laws were generally made and issued by non-natives (Gagarin, 2008, pp. 44-6). The legislating activity was regarded as the construction of the space in which public affairs were to be discussed. Laws functioned as a sort of wall built around a city, inside which political participation would take place. The legislative activity was like the foundation of the political space; it was not the political space by itself. That is why it could be performed and issued by non-natives, who gained no right to participation afterwards. Hence, the legislative activity involved the rule of the majority without ever requiring individual membership.

⁵ One can easily think of a decision-making process in which a single individual member manifests a power – based on charisma or on violence, for instance – to determine the final decisions through whatever quantitative means he desires, including the rule of the majority or the rule of any given minority.

somehow non-procedural. Both will constitute what can be termed the problem of prerequisites.

THE ARGUMENT FROM THE PREREQUISITE OF PROCEDURAL MEMBERSHIP

The first prerequisite emerges from the connection between the first and the second criteria (*action* and *individual membership*). Throughout the history of democratic theory, there has always been the implicit assumption that there is a disparity between the *demos*-ruler and the *demos*-ruled, inasmuch as democracy expresses a vision of politics presenting decision-making as a relationship between rulers and ruled. The quantification of individual members when what is at stake is the efficacy of political decisions always differs from the quantification of those individual *members* who are deemed capable enough to *act* when what is at stake is the political decision-making process. Simply put: the class of individual members who are the addressees of political rules is always different from the class of individual members who, besides being addressees of political rules, are also active in the sense that they are actual participants in some stage of the making of rules.

The history of constitutional experiences can be termed evolutionary from the viewpoint of quantifiable participation in government insofar as it unveils an increasing effort to narrow down the disparity between the two classes. When elections occur, for instance, there are at least three different classes of *demos* in play. The *demos*-addressee-of-decisions, which includes all individual members of the community recognized by the decisional entity as being bound by its decisions; the *demos*-rightful-participant (also called ‘the electorate’), which includes all individual members of the community recognized as having the possibility to engage actively in the decision-making process of the decisional entity; and the *demos*-active-participant, which includes all individual members of the community who are recognized with the right to participate in the voting process and who actually exercise it. Typically, an evolutionary participatory democracy will tend to equate the first two classes; and the most effective participatory democracy will be the one in which all three classes coincide. Hence, the claim for voting rights to women and the struggles for civil rights to certain minorities have represented increasing attempts to equate the first two classes.

In deliberative democracy, consensus-based procedures of decision making require that the members of the deliberative community are able to communicate effectively and offer reasons for their positions, are open to the reasoning of others and capable of investing time in the procedures. Quite often, however, these procedures require the need to produce decisions whose range of application extends beyond the deliberative community, in order to include members that, for one reason or another, provisionally fail to meet the necessary requirements for participating in discursive proceedings. In such cases, there is an ontological difference between the deliberative community and the entire political community that mirrors the difference between the *demos*-participant-in-decisions and the *demos*-addressee-of-decisions, much like what occurs in liberal and aggregative democracies.

The problem is that there is no possibility of ever fully equating the *demos*-addressee-of-decisions with the *demos*-participant-in-decisions in any political decision-making process, since the characteristics of membership to both classes are always determined differently. It is one thing to determine what it means to be an addressee of political decisions, something that can be done inside the actual deliberative procedure. The decision-making process will eventually include the determination of who is to be bound by the decisions in the making. But it is something else entirely to determine what it means to be a participant in decision making, since that cannot be determined by the actual process. Otherwise, only those who actually exercised the possibility of participating could be recognized as rightful participants, which would open room for active tyranny if only one individual member decided to show up.

Moreover, participation includes *active membership* – the criterion of action and the criterion of individual membership combined – and action (or rather the possibility of political action) is not a necessary characteristic of those who are members of the *demos*-addressee-of-decisions. In order to know who can become a political participant, there must be a determination of those who are equal from some particular point of view, namely, the possession of one same characteristic. This characteristic is *essential* in order to make a potential addressee of decisions into an active participant in decisions. If the possession of any characteristic whatever always makes it possible to group people in a category defined by the fact that its members possess the characteristic in question, then those having an essential characteristic in common will form part of one and the same essential category.

However, it is never easy to find a single criterion determining which and how many of the potential addressees of government are sufficiently competent to decide who and how many addressees shall have the competence to participate in decision making.⁶ The characteristic that includes someone in the essential category of the *demos*-participant-in-decisions always seems to be determined arbitrarily. Some tend to think that only the smartest men should meet such qualities; others will give preference to rich men and proprietors; others only to men; others only to women; others only to members of a specific race; others only to men and women with at least one masculine child; others only to people over 16 years of age; others only to people over 18 years of age; others only to people over 21 years of age; and others, still, to everybody who qualifies as human; etc.

How does this affect pure proceduralism as a viable account of legitimacy? In order to know who can participate in the discursive deliberative procedure that will eventually determine those who are the decisions' addressees, there must be a prior rule determining the substantive characteristics of those who are to be admitted into the participative process. This is especially important in epistemic accounts of deliberative democracy, since the epistemic requirements for being an addressee of decisions are not generally as strong as the epistemic requirements for being a participant in deliberation. The idea that there can be a total coincidence between both classes is always refuted by the very presentation of membership as individual action and communication. Ultimately, there will always be some boundaries to the ability of communicative intervention included in the determination of the essential category of the *demos*-participant-in-government. Age is probably the most notorious of such boundaries. The determination of which age is more proper to turn a potential addressee of government into an actual participant in government cannot be made in a case-by-case basis, since that would imply actual participative decisions already in play (decisions that would necessarily be reached

⁶ This problem is usually known in the philosophical literature as 'the problem of scope' or 'the democratic boundary problem', which concerns the legitimate demarcation of the political units within which democracy will be practiced: How to decide who legitimately make up the group of individuals who are bound together as a people for the purpose of collective self-government (Song 2012)? One of the most celebrated ways of overcoming the problem is, for instance, the 'All Affected Interests Principle' (AAIP), which is non-procedural by definition, and according to which the justification of political authority is owed to all persons whose interests are affected by its exercise (Shapiro 1999; Young 2000; Goodin 2007). Another is the principle of coercion, according to which those subject to an institutional coercive power should have an equal say in how that power is exercised (López-Guerra 2005; Abizadeh 2008). One of the greatest challenges faced by deliberative democratic theory is the need to offer an account – in the line of the AAIP or of the principle of coercion – of why outsiders should confer legitimacy on the decisions reached inside the participative forum (Parkinson, 2005, p. 5).

by excluding from their making process the one who is chosen as participant, thus turning that particular decision into a non-fully-participative one), and it cannot have a scientific precision. The choice between this age and that seems rather arbitrary, but it must be presupposed in order for participation to take place at all.

The problem of prerequisites in this connection between the first two criteria lies in the fact that the essential category of active individual membership, which constitutes the very heart of deliberative participation, cannot be achieved by means of actual deliberative procedures. Rather, it depends upon a prior rule specifying certain characteristics that must be met in order to accept someone as a potential participant. Such a rule cannot emerge from the actual participative process, since then it would remain problematic who could participate in such a procedure, which would require another prior rule determining the participation requirements for the very first participative process, which in turn would require another rule of the same sort, and so on, to infinity. An infinite series of remissions never really determines unequivocally who can have access to participation; also, the circularity of the argument (procedural outcomes determine who can participate in the procedures in the first place) makes deliberative procedures utterly incapable of self-justification.

The only way to overcome the perpetuity of remissive determinations and the circular argument is by setting a basic prior rule establishing the characteristics that must be met in order for someone to be admitted into the decision-making process. Such a rule can only emerge from outside the actual participative moment and be set beforehand, that is, immune to pure proceduralism's legitimacy tests. But the existence of such a rule constitutes a form of im/perfect proceduralism, in Rawls' terminology.

That is why it must be imputed to some absolute that, even though it exists prior to the decision-making process, claims to express the *demos*-addressee-of-decisions to be found at the end of the decision-making process. The history of democratic theory has determined this absolute in many different ways – God, justice, the people, the constituent power, the *Volksgeist*, the founding fathers, the spirit of the constitution, the individual rights of man, the constituent assembly, the proletariat, the party, etc. –, but not one of those ways is democratically procedural as such. The ultimate groundwork of the legitimacy of deliberative procedures is hence non-procedural by nature. The problem of prerequisites reveals itself in the need for a non-democratically-procedural methodological prerequisite for assessing fair procedures that function as legitimacy yardsticks. This is sufficient to imperil the reasoning of pure proceduralism.

THE ARGUMENT FROM THE PREREQUISITE OF PROCEDURAL RULING

There is another non-deliberative prerequisite of deliberation emerging from the connection between the second and the third criteria (*individual membership* and the *quantitative decision rule*). Deliberative decisions are reached by applying the quantitative decision rule in force within the procedure. Deliberation aims at achieving consensus by following and establishing reasons acceptable to all who are committed to the procedures; but when consensus (or something resembling it) is not possible, decisions can be reached by applying the rule of the majority to individual members.

Several problems arise from the use of majoritarian decisions whenever pressing matters require a swift decision that suspends the deliberative process provisionally. A substantive problem is how to find normative justification in majoritarian procedures, and how to protect minorities and individual differences against being overridden in such cases of majority rule. Or, rather, how to ensure that some rights are guaranteed in such a strong way that they may not be violated even by majorities (Christiano, 1990, p. 167). The most obvious answer ensures that rights of participation are always consensual to democratic proceedings. Consensus-based rights entail that they are protected against majoritarian violations as long as the deliberative community equates democracy to the absolute need for participation rights (with no possibility of contesting them). However, this makes it logically impossible to have violations of rights in democracy (if rights are violated, there is no democracy at all), and also to have individual participation rights in political regimes other than deliberative democracy. In addition, rights to equal participation are trapped inside a circular argument of justification, for they would be presupposed data (in the consensus-making procedure establishing the contents of participation rights) rather than the outcome of a procedure that in turn would have to presuppose them in order to legitimate them (Gould, 1996).

But the problem of consensus building and consensus-based majoritarian decisions does not present only a substantive challenge. It also presents a methodological problem in the development of deliberative procedures. Two methodological problems arise that endanger the viability of pure proceduralism.

Firstly, majoritarian decisions will always have to follow procedural rules that are necessarily consensual. Otherwise, the actual participative process cannot determine whether one measured quantity corresponds to a majority or not whenever consensus

cannot be reached with regard to the specific procedural rules in force. On the one hand, majorities presuppose that there will be, in a plurality of opinions, at least two that will coincide. But what if the process produces absolute dissension between members and each holds an entirely different and incompatible opinion when compared to others? On the other hand, when the decision-making process deals with absolute concerns that can be resolved through a yes-or-no answer and all participants exercise their yes-or-no stand, majorities can be easy to measure. But what happens when there is more than two alternatives to choose from, or even when some participants openly reject to choose from the set of yes-or-no alternatives in discussion? Should the majority be measured in such instances simply in a relative way? Does active participative abstention from a given set of alternatives imply a momentary suspension of individual membership for purposes of accounting for majorities?

These procedural problems cannot be solved by the actual procedure, since such solutions would be affected by the exact same (quantitative) accountability problems. So, typically, decision-making processes presuppose a certain unanimous way of measuring majorities in the moment of accounting for definitive decisions: they presuppose a consensual decision rule establishing the level of agreement necessary to finalize a decision. Some decisions will require unanimous consensus, others absolute majorities, others mere relative majorities, and others still strong majorities of individual members. Possible decision rules vary within the following range:

- Unanimous consensus:
 - Unanimous agreement (all participants agree in accepting a certain decision as their first choice)
 - Unanimous consent (all participants consent to accepting a certain decision, even if it does not express their direct and favourite personal view)
- Near-unanimous consensus:
 - Unanimous agreement minus one (or minus a specific small number, like two or three)
 - Unanimous consent minus one (or minus a specific small number, like two or three)

- Super majority thresholds (90%, 80%, 75%, two-thirds, 60%, etc.)
- Simple Majority (50% plus 1)
- A specific committee decides
- A specific person decides
- Lottery decisions (all participants cast votes for their preferred options but, instead of these being counted, one is randomly selected and that vote determines the outcome) (Saunders, 2010)

The determination of a definitive threshold beyond which deliberation ends and a decision is reached requires a prior unanimous and consensual understanding about what specific quantity constitutes the deciding threshold for that specific decision-making process – a unanimous and consensual understanding that must be determined before the actual deliberative stage. Moreover, accounting for majorities presupposes the ability of knowing what to count, which means the process must already include beforehand the general recognition of active participative abstention with regard to measurements of decisive thresholds.

Secondly, decisions can be reached by measuring reason-giving attitudes in the class of individual members. But what constitutes individual membership for each and every given decision-making process? Democratic decisions arise from some form of quantitative measurement, such as majorities, for instance. But the majority of what? Deliberative democrats tend to accept the absolute equality between people who show up for deliberation with the required skills for communication. However, that presupposes a prior substantive (rather than merely procedural) decision about what constitutes a ‘person who shows up for deliberation’ and about what specific skills and characteristics such a person must have in order to be recognized both as a person and as a participant. There always seems to be the need for a sort of prior *theoretical consensus* concerning the determination of the conceptual framework around which the processes of identifying and counting opinions can occur. Even if the system is as simple as ‘counting heads’, there is always the need to ascertain what counts as a head in that particular situation. Since the *demos*-participant can always be divided into several uneven parts, usually in order to facilitate the counting process, the rule of the majority can be applied to universal individual membership of the *demos*-participant in such a way that the majority of a given

set of different partial majorities might not correspond to the actual absolute majority of the *demos*-participant as a whole.⁷ Since partition can be presupposed by the process itself, there is always the need for a prior methodological determination of how the counting procedures can actually take place. And since such a determination will have the same problems of (quantitative) accountability, it will have to occur by means that are not intrinsically deliberative.

These problems represent a new argument in the problem of prerequisites. According to the methodological prerequisite of procedural ruling, the structure of deliberative proceedings depends on a convention (or a set of conventions) or on any other way of recognizing the methodological preferences for deliberation (including decision rules and categorical membership requirements) that members (whoever they might be) of the deliberative community share unanimously. But if members of the deliberative community share a way of recognizing their proceedings, how can they engage in the disputes about the very nature of those proceedings? How can people disagree about what procedures should be followed, if they share a unanimous conventional way of recognizing the proceedings? Pure proceduralism cannot explain the possibility of disagreement with regard to the very formal requirements of deliberative proceedings, since it bases its legitimacy claims on the supposition that deliberative members share uncontroversial criteria provided by the conventional meaning of procedural ruling for the legitimacy of deliberative decisions.⁸

Pure proceduralism sustains that deliberative proceedings can be meaningful and legitimate only if members share such criteria unanimously. This is troublesome to a theory of political legitimacy because it leads the theorist to think that people cannot have any deep disagreement about deliberative proceedings (Ceva 2012). They can only disagree about substantive questions that conform to the proceedings; or, with regard to the very structure of the proceedings, they can only disagree about empirical questions (such as what words were used to establish the quantitative decision rule), or about how penumbral cases involving the application of procedural rules should be resolved, or about whether the methodological prerequisites in force should be changed. Disagreeing

⁷ This is what happens, for instance, with the U.S. election for presidential office, for instance, in which the majority of the ‘popular vote’ does not necessarily coincide with the majority of votes in the U.S. Electoral College.

⁸ In this sense, pure proceduralism is subject to the same problems that Ronald Dworkin identifies in certain legal positivist conceptions of law under the general heading of the ‘semantic sting’ (Dworkin, 1986).

about the criteria for application of the deliberative proceedings would entail self-contradiction.

If methodological prerequisites must be set necessarily in accordance with a unanimous consensus, then disagreement about the formal requirements of certain deliberative proceedings are inescapably self-contradictory. According to pure proceduralism, theoretical disagreement about the grounds of procedures must be a pretence because the very meaning of the word ‘procedure’ makes any deliberative procedure depend on certain specific criteria, and any member who rejected or challenged those criteria would be speaking self-contradictory nonsense. Any attempt to differ from those prerequisites entails a transgression of procedural rules – a violation of normative requirements (about quantitative decision rules or about membership) for deliberative procedures is self-contradictory since it implies the general acceptance of exceptions to unanimously pre-established rules.

The only way to justify disagreement without endangering the legitimacy of deliberative procedures would be to unanimously pre-establish the possibility of dissent within the ongoing procedures. But even such a possibility would fail to become a viable decision rule. Conscientious objection is a good example of this: it is a procedural institution allowing dissent and disobedience (a sort of licit transgression) not only about what decisions or policies are to be made in a fair procedure, but also about what constitutes a fair procedure for certain morally-charged political matters. However, even though the possibility of its existence can be unanimously agreed upon before deliberative proceedings, it can never function as a procedural rule but only as an exception to procedural rules, since methodological prerequisites cannot allow the possibility of each and every member to engage in conscientious objection simultaneously without endangering the viability of the deliberative proceedings. Thus, conscientious objection is never really procedural objection, not even when it purports to dissent about the structure and limits of certain deliberative proceedings. It is rather the actualization of procedural agreement concerning substantive disagreement.

The problem of prerequisites does seem to be a gruesome fate for a pure proceduralist, because those who suffer from it have to say that no one really disagrees with anyone about the nature of methodological prerequisites for deliberative procedures. Whenever people think they disagree about how to identify procedures on any point, that fact in itself demonstrates that there is nothing to disagree about: there *is* no procedure on the point at issue, if the agreed ways of identifying procedures do not decide the point.

So, when an apparent disagreement arises about the nature of procedural prerequisites, pure proceduralists will tend to believe that there is no deliberative procedure on the point – they will think that at least one party to any dispute over the content of the methodological prerequisites is both legally inept and philosophically misguided, or is just a liar.

The problem of prerequisites poses the challenge to pure proceduralism of explaining disagreement about the nature and content of methodological prerequisites for deliberative procedures. Pure proceduralists might claim that such prerequisites need not be very complete; like other rules, they can be vague. But this is no answer: if the task of a methodological prerequisite for a fair deliberative procedure is to provide a way of identifying legitimate proceedings for the production of valid political decisions, the tests provided need to be complete and uncontroversial, or there is no shared way of identifying the procedures in the first place.

In the end, the impossibility of theoretical disagreement is precisely the opposite of what methodological rules for fair proceedings aim to achieve. The purpose of a fair deliberative system is to provide the possibility that every member may participate actively, freely and equally in political decision-making processes, even if it entails communicating an individual reason that conflicts with the reasons subscribed by every remaining member of the deliberative community. Once again, methodological prerequisites for deliberative procedures seem to be somewhat immune to the legitimacy claims of deliberative procedures.

CONCLUDING REMARKS

One of the main features of pure proceduralism in deliberative democracy implies that citizens consider *procedures as the source of legitimacy*, and prefer the causal history of legitimation for each law to be transparent and easily traceable to the deliberative process. The problem of procedural prerequisites lies in the fact that, inasmuch as discursive proceduralism is the main criterion of legitimacy, the legitimacy of discursive proceduralism *as a source of subsequent legitimacy* is grounded neither in discourse nor in deliberative procedures. On the one hand, the methodological prerequisite of procedural membership cannot be established by a procedure, since it will always have to trace the source of its legitimacy to a prior rule (immune to deliberation) conferring membership rights. Otherwise, the procedural deliberation establishing membership

criteria would have the same problem of identifying the rule conferring membership rights to such a deliberative procedure, which in turn would also have the same problem, and so on. On the other hand, the methodological prerequisite of procedural ruling cannot be established by a deliberative procedure, since it does not permit the possibility of theoretical disagreement about its nature and contents. Otherwise, the inexistence of unanimous consensus about decision rules, for instance, would require the application of a prior decision rule in order to explain the decision rules in force, which in turn would have the same problem, and so on.

Notwithstanding, the problem of prerequisites is not by itself sufficient to undermine the viability of deliberative processes of decision making. What the problem does undermine in deliberative democracy is the viability of pure proceduralism as a theory of legitimacy, insofar as procedures are not the source of legitimacy per se, but rather the instruments for assessing and actualizing prior sources of legitimacy. If deliberative procedures were the source of legitimacy, they would have to be either self-referential or immune to further legitimacy criteria. Since they are not, they seem more like channels of legitimacy rather than sources. Within such a frame of reference, pure proceduralist theories can be effective assessments of legitimacy claims in political decisions and laws; but they are insufficient to render the legitimacy of the very procedures. Hence the need to look again beyond the procedures to what lies behind them: that is the main philosophical challenge posed to consensus-oriented theses such as the ones sustaining deliberative systems of political participation.

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