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# POLITICS, PRACTICAL REASON AND THE AUTHORITY OF LEGISLATION

Claudio Michelon\*

## Abstract

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## Keywords

Practical Reason

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Much of the contemporary debate on the authority of legislatures and constitutional courts has been premised on the apparent need to choose whether to assign priority to outputs or to assign priority to the fairness of the procedure through which decisions are taken<sup>1</sup>. Moreover, the choice seems to cut across opposing conceptions of constitutional supremacy. Indeed, proponents of the supremacy of constitutional courts (at least on certain issues), such as Ronald Dworkin, rely as much on the need to guarantee appropriate outputs as does Jeremy Waldron, who argues for the supremacy of legislatures. However Waldron's defence of legislation on the grounds that it is more likely to generate the best substantive output is not the more traditional way to defend the authority

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<sup>1</sup> This debate mirrors the debate between procedural and constitutional conceptions of democracy, but is not identical to it. As Amy Gutman and Denis Thompson rightly point out, conclusions on the best conception of democracy only have a bearing on institutional design if further argument is provided to prove that particular institutions are better at furthering the favoured conception of democracy (see Amy Gutman and Denis Thompson *Democracy and Disagreement* (Harvard University Press, Cambridge/MS 1996, p. 34). Hence, to conclude from a preference for outputs that judicial review of legislation by a constitutional court is the best political arrangement one needs evidence that courts are better at providing correct outputs than legislatures (at least in some situations).

of legislation against arguments that seek to grant greater authority to constitutional courts and indeed Waldron himself does not rely solely on that argument. The most common way to argue for legislative decision's superior authority (as contrasted with court decisions) is to point out that legislative decisions assign the same amount of power to each participant on the decision-making process (assuming either a sort of direct democracy or else ideal conditions of representation) and that court decisions simply lack that feature and, as a result, preferring them to legislation passed by the people or by their representatives alienates citizens from the decision-making that is done in their name.

I find neither of those canonical arguments satisfactory in explaining the unique authority of legislation. On the one hand, I do not believe that legislation's authority could possibly be justified by the quality of outputs or even on the greatest probability that legislation passed by assemblies of representatives would get it right. On the other hand, the reduction of the value of majoritarian decision-making to the claim that the alternatives to it alienate big chunks of the population from decision making (and, hence, that it does not respect the need to distribute power equally) does not get the point that politics is not about the total sum of individual projects and the need to treat them equally (although that is of course a politically relevant consideration). Politics is a common endeavour and legislation's authority, in my view, can only spring from that communality and, ultimately, from the recognition of that communality. Another way to put the same point is to say that respect to majority decisions (and hence to equality in the deliberative process) might not be the ultimate justifying feature of decision-making by representative legislatures or by direct democratic institutions. The authority of those institutions, I submit, stems from the fact that representation and direct participation better translate the communal aspect of practical reason. Gutman and Thompson are right to emphasize the moral aspect of political reasoning against the conceptions of politics that emphasize conflicts of interest but, if I am right, what is politically important is the commonality inbuilt in the idea of practical reasoning.

I want to argue in the following that the best way to understand the authority of legislation passed by an assembly of representatives (and a fortiori by direct democratic institutions) is the fact that obeying such legislation is a form of recognition of a certain sort of value in each citizen while we are carrying on that collective enterprise. In particular, because that enterprise is one of collectively deciding how the community will move on, that recognition is to be shown in the way institutions embody certain features of practical reason. In short my argument will be: legislatures are by and large designed to allow and foster the blossoming of communality between the parties in their argumentative exchange and that in doing so, they embody the sort of recognition that (I will argue) is pivotal in politics. Courts do not allow and foster that communality in the same

way and, as a result, legislation is to be assigned more value than constitutional courts decisions, *ceteris paribus*.

Now, that is a very rough sketch of both the argument and the thesis. In the process of presenting my argument I will have to explain why I believe that arguments like Waldron's "Doctrine of the Wisdom of the Multitude", which are based on the quality of substantive outputs, are not successful in grounding the authority of legislation. Also, I will try to show that the value of legislation passed by the community (or by its representatives) is not simply derived from the need to distribute political power equally. Rather, the latter is an upshot of understanding politics as a communal project of practical reasoning and legislation's authority as springing from the legitimacy of an institution designed to carry out that communal project. Inevitably, my argument will have to branch out, however briefly, to consider which conceptions of representation and agreement would be implied by the core theses.

At this point it is only fair to warn that my argument depends on a particular conception of practical reason which I take to be Aristotelian. Needless to say, I believe that this conception is fundamentally sound. It also depends on a particular conception of politics as a vital locus of practical reason and of practical reason as an essential feature of politics. Indeed I believe that political institutions and their outputs should be justified in the context of a division of reasoning labour between them. On those grounds, which shall be further developed below, I want to claim that respect for legislation is an integral part of the social relationship of recognition between citizens.

What I aim to provide is the core of a theory of the authority of legislation. I shall not deal with all the further conditions that have to obtain for that core to be able to justify actual legislation. In particular, I will not deal with all political institutions that, in spite of being central for the sustenance of the political community or for the healing of political wounds, are not institutions of collective decision-making in a proper sense (such as truth and reconciliation commissions). Neither will I deal with the conditions of justice which are necessary to avoid the all too common alienation of human beings from practical reason which might result, for instance, from extreme poverty or social discrimination. Although I shall deal with none of those conditions in what follows, I believe that the core argument for the authority of legislation is strictly connected to them in that it finds its limits in them but also helps to clarify in which sense precisely those conditions are necessary in a political community.

## A. TWO CONCEPTIONS OF POLITICS: COMMUNAL PRACTICAL REASONING OR LIMITED POWER STRUGGLE.

The first (and primary) thesis argued for in the present article is that the social relationship between members of a particular community who recognise each other as competent mature practical reasoners is the ultimate ground of legislation's authority. That sort of recognition is fundamentally behavioural, and not simply a matter of theoretical belief. In other words, it is both a particular way in which practical agents conceive of each other and the accompanying actions that express that sort of mutual conception. In this view, assigning authority to democratically enacted legislation is not so much an independent phenomenon that springs from that sort of recognition, as it is a constitutive part of the act of recognition itself.

That sort of recognition would only produce the justificatory framework for the authority of legislation under one assumption, namely: that politics is seen as a form of communal practical reasoning, instead of being conceived merely as a cost-efficient means to strive for the prevalence of one's interests against those of other people<sup>2</sup>. Call those rival conceptions respectively the "communal practical reason" and the "power-struggle" conceptions of politics. Hobbes provides a clear case of the "power-struggle" conception of politics, but some of the most important contemporary liberal theories of justice accept just the same idea of what politics is. One of the most important conceptions of justice that departs from it is the one that sees justice in political participation is tantamount to assigning the same amount of power to everyone (which seems to be, for instance, Dworkin's take on it<sup>3</sup>). In that conception of politics the basic political currency would not be argument, but interest, and, correspondingly, the conception of justice just mentioned proposes that an equal allocation of power would be the most important criterion by which representative political institutions should be evaluated. What precisely constitutes an equal allocation of power is the space which remains for argument and it operates by setting boundaries to the pursuit of personal interests. In that view, justice is not necessarily best served by representative institutions and indeed it might be wise

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<sup>2</sup> The power-struggle conception is not to be conceived necessarily as an egotistic pursuit of one's private benefit and it is perfectly compatible with the fact that the parties conceive their interest to be to uphold a set of universal values.

<sup>3</sup> In the context of discussing majoritarian decisions, Dworkin states that, in democracies "[m]embers of entrenched minorities have, as individuals, less power than individual members of other groups that are, as groups, more powerful. These defects in the egalitarian character of democracy are well known and perhaps partly irremedial. We must take them into account in judging how much individual citizens lose in political power whenever an issue about individual rights is taken from the legislature and given to courts". See Ronald Dworkin *A Matter of Principle* (Clarendon Press, Oxford 1986, p. 27) and Ronald Dworkin *Sovereign Virtue* (Harvard University Press, Cambridge 2000, p. 184 ff).

to set up institutions in charge of second-guessing the decisions made collectively, since the latter might be in a better position to evaluate arguments about equality. An instance of a normative political theory that accepts the “communal practical reason” conception of politics is Jeremy Waldron’s, which will be discussed in more detail in the next section (but of course that tradition was not inaugurated by Waldron, and stretches back to Plato and Aristotle)<sup>4</sup>.

If we take the “communal practical reason” and the “power-struggle” conceptions as rival “ideal types” that account for how politics actually operates in contemporary western communities, neither conception of politics holds sway<sup>5</sup>. Indeed, in everyday political practice it seems that both conceptions of politics are part of both actual political decision-making and, tellingly, the rhetoric of political actors (be it at the representatives level, be it at the grass roots level). Which conception is a better account of politics at a justificatory level is a very different question and I shall not present a complete argument against the power-struggle conception of politics for it seems to me *prima facie* reasonable to, at the very least, assign some value to the “communal practical reason” conception and that is all I need for the sake of my argument.

Even so, it is interesting to notice that the power-struggle conception of politics departs from an *ad hoc* reduction of practical reason in the realm of politics, reducing collective decision-making to a bunch of competing means-end calculations, and excluding from the realm of politics and political institutions decisions on ends (let alone ultimate ends), which would not be decided politically (but presumably should be worked out by each participant). Practical reason, however, is more than merely a set of means-end calculations; it also deals with the discussion of ultimate ends and with the relation of those more general standards (means and ends) to particular actions in particular contexts. I see no reason why those sorts of questions should not also be subject to collective political argument and decision-making<sup>6</sup>.

I shall, in what follows, place my argument inside the tradition that considers politics primarily as a locus where this more expansive practice of reasoning is to be carried out, a practice which cannot be reduced to means-end calculation coupled with a study of equalitarian limits to the actions springing from that sort

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<sup>4</sup> I believe that to be the ultimate reason why law-making entails a claim to correctness, in the way suggested by MacCormick. See Neil MacCormick, ‘Why Law makes no Claims’ in George Pavlakos (ed) *Law, Rights and Discourse* Hart, Oxford 2007, 66-7.

<sup>5</sup> There are other conceptions of politics that do not fall in either category, v.g. Giorgio Agamben’s thesis that politics is constituted by the possibility of excluding certain individuals or even entire groups from the political community (Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* Stanford University Press, Stanford 1998). Interesting as they may be, they do not concern my argument directly here.

<sup>6</sup> Neutralist public liberals, such as Rawls, try to justify precisely those sorts of decisions from the political realm. In my view they fail to do so. See Claudio Michelon, *Being Apart from Reasons* (Springer, Dordrecht 2006) 78-107.

of reasoning. In other words, politics will be assumed to be about (or at least, also about) collective decision-making guided by reason.

In the following, I shall try to explain precisely how certain sorts of institutional design (paradigmatically parliaments) might embody the recognition of others as competent mature practical reasoners and how granting authority to the results reached by institutions so designed (paradigmatically, legislation) can be said to embody precisely that sort of recognition.

The reason why our attitudes towards results achieved by institutions designed in a particular way is a demonstration (and in a relevant sense is a part) of our recognition of other people as competent mature practical reasoners is tightly related to, first, the very structure of practical reason and, second, a particular conception of the division of labour in reasoning performed in political institutions.

But before I present my accounts of practical reason and of that political division of reasoning labour, I shall try to show, in the next section, the mistakes that one might fall into if one argues for the political implications of practical reasoning departing from an incomplete conception of practical reasoning's constitutive features. I believe that to be the most important mistake of those conceptions of legislative authority and of democracy that are grounded on claims about the deliberative efficiency of parliaments (or of the citizenry they represent) in searching for the truth. The most important instance of that argument is, doubtlessly, Jeremy Waldron's. My objection to one of his central arguments (and by implication to all arguments of the same kind) is important for my own argument on two accounts. First, because it works as a warning about the need for a more expansive conception of practical reasoning in the investigation of the political implications of practical reason's fundamental features; second, and more importantly, because for my argument to hold it must necessarily be the case that Waldron's Doctrine of the Wisdom of the Multitude is false.

With Waldron's Doctrine of the Wisdom of the Multitude out of the way, I shall move on to present a thicker conception of practical reason in which a certain sort of agreement between the parties plays a central role and I shall argue that agreement thus conceived is a necessary condition for politics. With that in place, I must clarify how precisely that thicker conception of practical reason might be embodied in political institutions and in particular in parliamentary decision-making.

## B. THE SHORTCOMINGS OF DELIBERATIVE EFFICIENCY

In Waldron's view, the subject of the relation between practical reason and political disagreement is directly related to the authority of legislation enacted by an assembly of representatives. Waldron sets off to investigate that relation after

he presents an essentially sound diagnosis of current legal theory as not paying enough attention to the philosophical implications of the ways in which decision-making happens in assemblies of representatives.

I believe that looking for a connection between political authority and the particular way in which social agents relate through practical reason is a promising strategy and indeed my argument in the following sections could be seen as an attempt to clarify one such connection. Furthermore, I believe that the key to understanding the political implications of practical reasoning between social agents to a general conception of political authority is to be found in a particular feature of political deliberation which is stressed by Waldron himself, namely, the fact that deliberating in common expresses a deep sort of recognition of other participants in the process<sup>7</sup>, a form of recognition that I believe to be constitutive of politics. The argument in the next sections will aim precisely at clarifying how precisely legislative bodies might be said to embody that sort of recognition.

Yet, one of Waldron's arguments to justify his thesis that legislation's authority is grounded on practical reasoning performed under particular conditions (i.e. the argument based on the better deliberative efficiency of the larger groups) does not hold. Indeed, the feature of decision-making by an assembly of representatives which, according to Waldron, justifies the authority of its decisions is the fact that if a group deliberates and decides on a particular matter, they are more likely to get it right than any subset of that particular group deliberating on the same matter. That is in substance the Doctrine of the Wisdom of the Multitude, which in its simplest form, reads:

“DWM: The people acting as a body are capable of making better decisions by pooling their knowledge, experience, and insight, than any individual member of the body, however excellent, is capable of making his own.”<sup>8</sup>

The more ambitious version of the doctrine is reached if one substitutes the comparison between the competences of the multitude and the individual by the comparison between the competences of the multitude and any subset of individuals<sup>9</sup>.

As I pointed out elsewhere, this argument is part of a family of arguments which could be qualified as epistemic, as opposed to substantive, justifications for authority<sup>10</sup>. Epistemic and substantive arguments are two rather different ways to

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<sup>7</sup> Jeremy Waldron *The Dignity of Legislation* (CUP, Cambridge/UK 1999) Chapter 6, in fine.

<sup>8</sup> *Ibid.*, 93-4.

<sup>9</sup> *Ibid.*, 94.

<sup>10</sup> Claudio Michelon, *Being Apart from Reasons* (Springer, Dordrecht 2006) 150.



justify authority<sup>11</sup>. Each of those two justificatory strategies has their champions. Philosophers such as Joseph Raz argue for an epistemic conception of authority<sup>12</sup>, while philosophers such as John Rawls or Ronald Dworkin subscribe to the substantive justificatory strategy.

Part of the epistemic strategy's appeal is directly related to the progressively declining faith in the possibility of any substantive agreement between members of modern western societies<sup>13</sup>. Its promise is that we might have reasons to accept the majority view as substantively best, even in cases in which we are outvoted. That would mean that substantive disagreement is not politically paralysing, for we might still agree on the sorts of argument which make a proposition more likely to be true. Arguments on the likelihood of a particular person or group of persons actually reaching the right practical conclusion become arguments that settle who should have authority. At the point of breakdown of moral value one shifts gears to a discussion of the probability that a proposition is true and, as a result, the moral discussion becomes an epistemological discussion<sup>14</sup>. In that way many puzzling features of political authority are explained away, such as the tension between autonomy and heteronomy. Wherever authority is present, it is rationally imperative that I autonomously accept and guide my action by decisions taken by someone else. The insufficiency of democracy to preserve autonomy identified by Wolff<sup>15</sup> (whose argument is radicalised by Zenon Bankowski as part of his own argument against the all-or-nothing distinction

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<sup>11</sup> It is important to notice that Waldron's justification is in fact "epistemic" rather than simply "procedural". For Waldron (and also for Habermas and others) the procedural value of legislation by assembly is itself grounded on a source of value that goes beyond the procedure. Procedure is not simply the expression of a value; it is rather a means to achieve something which lies beyond it, namely, truth.

<sup>12</sup> Although Raz's "normal justification thesis" is clearly an epistemic account of authority, his conception of authority is not aimed at justifying any particular institutional design (see Joseph Raz *The Morality of Freedom* (OUP, Oxford 1986) 3; I am thankful to Paul Yowell for reminding me of that passage). Raz's conception of authority is part of a conceptual framework which ultimately aims at explaining the relationship between law and morality, rather than a theory of which institutions deserve to be assigned authority.

<sup>13</sup> Jeremy Waldron (*Law and Disagreement* OUP, Oxford 1999) 73.

<sup>14</sup> Let me briefly account for Waldron's claim that moral truth should not be the ground of political authority (e.g. Jeremy Waldron *Law and Disagreement* (OUP, Oxford 1999) 1-4 and 10. What Waldron is saying is simply that the truth-value of a proposition should not be considered an appropriate ground to political authority. That is not in contradiction with the claim that truth probability might be a ground to political authority, which is what I take the DWM to mean.

<sup>15</sup> Robert Paul Wolff *In Defense of Anarchism* (Harper and Row, New York, 1970) 21-66.

between autonomy and heteronomy<sup>16</sup>) is eliminated by epistemological conceptions of authority<sup>17</sup>.

It is not surprising, therefore, that Waldron, the proponent of one of the most interesting versions of the epistemic strategy, considers that substantive relevant disagreement is one of the “circumstances of politics”<sup>18</sup>. Indeed, in Waldron’s understanding, disagreement is not only a circumstance of politics but, in a relevant sense, an integral part of political reasoning.

Let us return to the Doctrine of the Wisdom of the Multitude. I believe that there are two main reasons why Waldron’s take on the connection between legislative authority and practical deliberation does not hold, namely: (a) it implies that the practical agent can be put into an untenable position (b) it relies on an incorrect conception of practical reasoning. Since I have written about it elsewhere<sup>19</sup>, I shall deal very briefly with objection (a). It is necessary, however, to expand objection (b) in such a way that the contrast between Waldron’s simplified conception of practical reason and the more complete account presented in the next section becomes clear.

In brief, objection (a) focuses on the existential position of a member of a defeated minority under the assumption that authority is granted to legislation on the strength of the Doctrine of the Wisdom of the Multitude. If the Doctrine of the Wisdom of the Multitude is the reason why the member of the minority grants authority to legislation, then he is compelled not only to obey the legislation’s standards, but he also must change his mind as to what the correct course of action is. Indeed, if the majority is more likely to be right it would be irrational to campaign for a change in the law (unless the opposition is able to demonstrate that some relevant new fact happened that might change the balance of reasons)<sup>20</sup>.

The best way to present objection (b) is to ask which reasons might justify the Doctrine of the Wisdom of the Multitude. By far the most common justification for that doctrine is the fact that most issues facing our political institutions are multi-faceted; no one person would be able to see the whole picture<sup>21</sup>. The

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<sup>16</sup> Zenon Bańkowski *Living Lawfully: Love in Law and Law in Love* (Kluwer, Dordrecht 2001) 15 ff.

<sup>17</sup> Although I believe that my own account of legislative authority provides a better way of tackling the need to respect the constituent’s autonomy in representative democratic decision-making (see section IV below), it is not designed to eliminate all the tensions between autonomy and heteronomy with which Zenon Bańkowski deals. See *Living Lawfully* (Kluwer, Dordrecht 2001) 15 and 137 ff.

<sup>18</sup> Jeremy Waldron *Law and Disagreement* (OUP, Oxford 1999) 101-106.

<sup>19</sup> Claudio Michelon, *Being Apart from Reasons* (Springer, Dordrecht 2006) 148-153.

<sup>20</sup> A very similar point was made, in another context, by Frederick Schauer before I published my own arguments. See Frederick Schauer ‘Talking as a Decision Procedure’ in Stephen Macedo (ed.) *Deliberative Politics: Essays on democracy and Disagreement* (OUP, Oxford 1999) 19-20.

<sup>21</sup> Jeremy Waldron *The Dignity of Legislation* (CUP, Cambridge/UK 1999) 102; the same idea is referred to in Jeremy Waldron *Law and Disagreement* (OUP, Oxford 1999) 72.

aggregation of all the points of view would provide fuller information than an individual or even a subset of the group would be able to gather. That seems to be Aristotle's suggestion in the famous banquet metaphor<sup>22</sup>. That sort of justification has certainly some appeal and in a recent (and very entertaining) book, journalist James Surowiecki argues that crowds get it better most of the time precisely for those reasons<sup>23</sup>. There is no denying that that is an advantage of collective decision-making and Surowiecki's book presents an impressive number of examples of how that sort of aggregation of information might be very useful.

However that might be, aggregation of information is not all there is to practical reasoning. Moreover, other features of practical reason, when brought to the context of collective decision-making might cancel out the advantages of aggregation. But which would those features be?

Let's start with Waldron's own dissatisfaction with the tendency to consider the aggregation of points of view a sufficient ground for the Doctrine of the Wisdom of Multitude. Waldron argues that the term traditionally used to designate Aristotle's argument for the wisdom of the multitude (the "summation argument") is misleading.

"It is misleading because it suggests a merely mechanical ordering, whereas I think Aristotle has in mind something more synthetic or even dialectical. As I see it, his view is that deliberation among the many is a way of bringing each citizen's ethical views and insights – such as they are – to bear on the views and insights of each of the others, so that they cast light on each other, providing the basis for reciprocal questioning and criticism and enabling a view to emerge which is better than any of the inputs and much more than a mere aggregation of function of those inputs."<sup>24</sup>

Waldron seems to believe that crowds (or at least assemblies of their representatives) are better also in that sort of dialectical interplay than any of their subsets and that is precisely what I believe not to be the case.

The fact that a multitude is able to aggregate a plurality of points of view says nothing about its ability to deepen the insights through argumentation. The capacity to produce articulated arguments or even theories departing from that whole wealth of information brought forward by the aggregated knowledge of the crowd is not innate. The success of dialectical reasoning is dependent on the fact that the parties engaging in argument possess a certain number of developed skills as well as a particular sort of acquired sensibility and those skills and sensibility might be (and if we are to believe Aristotle all the way, they indeed are) more developed in certain individuals or groups.

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<sup>22</sup> Politics, III, 1286a25-31.

<sup>23</sup> James Surowiecki *The Wisdom of Crowds* Little Brown, London 2004.

<sup>24</sup> Jeremy Waldron *The Dignity of Legislation* (CUP, Cambridge/UK 1999) 106.

Practical Reason is a very complex ability<sup>25</sup>, which comprehends (i) active skills such as the capacity to imagine contexts in which theses and theories might be tested as well as (ii) passive skills such as a trained perception to certain features of particular cases. Moreover, (iii) a successful practical reasoner must also possess certain traits of character. Those skills and attributes, by and large, are not innate (or at least are not innate in act) and are acquired by the right kind of experience. Of course not all forms of experience will develop practical reason's skills in a particular agent but particular sorts of contingent experience might.

A non-moral example of how perception might be trained will help to make the point. Think, for instance about the sort of trained perception that reading becomes in experienced readers. Phonetic alphabets are often taught by the practice of training pupils to relate certain symbols with certain sounds. Those early stages of learning, if successful, culminate in a form of trained perception in which readers do not have to reproduce the sounds of each symbol while reading or even to recite the sounds mentally. For all practical purposes, people who are advanced users of alphabetic symbols do not think of sounds at all (in normal circumstances, of course), but see the symbols as ideograms. That sort of training of perception is a highly complex form of learning and, if the majority of the population develops them, it is due to the widespread use of methods of training that are very particular and very controlled. In the absence of training, it is not possible to develop the skill of perceiving certain symbols as representing certain concepts.

The sort of experience that allows for moral perception to flourish in an individual is also contingent. Indeed certain communities are (and were) keenly aware of that contingency and ended up recognizing the highest political (and legal) skills as being possessed by those whose lives bore the marks of that

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<sup>25</sup> I use the term practical reason to encompass three complementary parts of a decision-making process that leads to action, namely, dialectical argumentation aiming at establishing the ends which guide the rest of practical reason, deliberation and phronesis, which chooses the appropriate means to the ends established by dialectic argumentation and perception of particular situations in the way described in the Aristotelian practical syllogism. In relation to the latter I follow Cooper's thesis that the practical syllogism is not a syllogism at all but instead a metaphorical way to explain the relation between perception and the decisions which are part of practical reasoning and connect it to action (see John C. Cooper *Reason and Human Good in Aristotle* (Hackett, Indianapolis/Cambridge 1975) 46-58). Those three parts of decision-making leading to action are rather different and indeed the subjective skills and the objective conditions for success in each of the three parts of practical reasoning are not entirely coincident. Providing a full account of each as well as of the interconnections between them is too important an issue to be discussed laterally in a paper whose main concern is the authority of legislation. However, some of the particular features of dialectical reasoning will be further developed in the next section as I believe that it is the key to understand how the output of parliamentary practice could be said to come from the people in a way in which judicial decisions or executive decrees could not.

experience in decision-making. A Roman Jurist, even during the republic<sup>26</sup>, would normally have held public office both civil and military and, consequently, being exposed to precisely that sort of experience in decision-making that, together with certain moral virtues, would make a practically wise person<sup>27</sup>. That is the practical structure that corresponds to Aristotle's well-known claim that ethics, differently from mathematics, cannot be properly understood by the young<sup>28</sup>.

Those features of practical reason point to the fact that the degree to which it can develop in an individual varies considerably. That is to say that some in the crowd (and possibly the majority of the individuals) might not even be able fully to understand the more complex arguments presented by those whose rational skills are considerably more developed.

Furthermore, practical reasonableness is an intellectual virtue whose development in a particular person seems to presuppose the possession of certain moral virtues. That is to say: even if it were possible for people with lesser skills at least to recognise the rationality in the arguments provided by those who possess practical reasons skills in a more developed form (as sometimes one can perceive the genius of a musician without being herself able to create such music), some people might fail to understand the reach of the argument and its deepest meaning because they might not possess certain moral virtues which are also constitutive parts of practical reason. Let me give an example.

Both dialectical reasoning on the ultimate ends of human action and deliberation on the appropriate means to achieve those ends suppose that the practical reasoner possess a certain degree of humility (perhaps Aquinas would prefer "docility"), at least enough to recognise the need to find common ground with others (endoxa), escaping thus from the trap of solipsism and entering dialectical reasoning. If we believe Aquinas, Prudentia or Phronesis, which is a pivotal part of practical reason, would also be partially constituted by certain virtues that are effectively moral (or at least part of other moral virtues)<sup>29</sup>.

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<sup>26</sup> From the beginning of the empire onwards Roman jurists started to relate even more closely to political power in a way that, arguably, compromised their independence. See Richard A. Bauman *Lawyers and Politics in the Early Roman Empire* (Verlag C.H. Beck, Munique 1989) 8-10 and, more generally, 1-22.

<sup>27</sup> F de Zulueta, 'The Science of Law' in: C. Bailey (ed.) *The Legacy of Rome* Clarendon Press, Oxford 1923) 192-196. For an explicit comparison between the role of practical experience in the Roman *Prudens* and the Aristotelian *Phronimos* see L. F. Barzotto 'Prudência e Jurisprudência' (2001) 23(1) *Direito & Justiça*, 238-239 and 247.

<sup>28</sup> Nichomachean Ethics, 1094b29-1095a12.

<sup>29</sup> Some of the integral parts of prudence, such as circumspection and caution seem to be more general traits of character that do not show only in contexts of decision-making (*Summa Theologica*, IIaIIae, 49.1-8). Indeed those two integral parts of Prudence seem perfectly to fit the definition of part of temperance: "whatever virtues restrain or eliminate, as well as the actions which moderate the impetuosity of the passions, are considered parts of temperance" (in *Summa Theologica* IIaIIae 161.4).

In the preceding paragraphs, the objective was not to provide a complete description of practical reason. The objective was simply to provide evidence for the claim that the Doctrine of the Wisdom of the Multitude relies on an idealization of the citizen's rational skills and attributes. That idealization does not resist to a more detailed account of the phenomenology of practical reason in concrete agents. That is the reason why it is by no means certain (and not even more likely) that the multitude will get it right if compared to any subset of its members. Even if one has one's sight set in providing a rosy picture of legislation, it is necessary not to fall into the trap of false idealizations. That is not to say that ideals are not relevant to seeing legislation on its best light. Indeed, as it will become clear in the next section, I heavily rely on an ideal of agreement.

But if deliberative efficiency is not an appropriate ground for legislation's authority, could a conception of politics as collective practical reasoning help to ground legislative authority? I believe that that is indeed possible and the key to understanding depends on a more complex conception of practical reason, which I now begin to present.

### C. IN SEARCH OF AGREEMENT

Let me start by putting forward the theses I will be defending in relation to practical reason. Unfashionable as it might sound I shall defend the very simple Aristotelian thesis that all practical reasoning supposes a certain type of agreement. I will also start to argue that from that thesis, a series of political implications follow at the level of institutional design (some of which will be spelled out in the following sections). The first thesis seems to be in stark contrast with the image of political deliberation portrayed by Waldron in *Law and Disagreement*. There Waldron pictures an assembly of diverse people coming from radically different backgrounds, not even speaking the same language, and pressed by the need of deciding urgent matters<sup>30</sup>. How could one rely on any agreement between these radically diverse individuals in order to justify the authority of legislation passed by them as a group?

In short, I believe that Waldron's focus on actual disagreement leads him to underestimate the political importance of agreement or, to be more precise, the political importance of the ideal of agreement (which does not necessarily entail the existence of any factual agreement) to the constitution of politics and, consequently, to institutional design. This mistake, in turn, is at the roots of a mistake in Waldron's interpretation of Aristotle: Waldron mistakes *endoxa* for *doxa* (as we shall see below).

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<sup>30</sup> Jeremy Waldron *Law and Disagreement* (OUP, Oxford 1999) 73.

Let me start by presenting what I believe to be a necessary condition of practical reasoning, which stems directly from Aristotle. According to Aristotle, not only political reasoning, but all sorts of reasoning about first principles (even arguments about the first principles of science)<sup>31</sup> must suppose some level of agreement. In the *Topics* Aristotle famously states that:

Now reasoning is an argument in which, certain things being laid down, something other than these necessarily comes about through them. (a) It is a 'demonstration', when the premisses from which the reasoning starts are true and primary, or are such that our knowledge of them has originally come through premisses which are primary and true: (b) reasoning, on the other hand, is 'dialectical', if it reasons from opinions that are generally accepted (endoxa). (...) On the other hand, those opinions are 'generally accepted' which are accepted by every one or by the majority or by the philosophers-i.e. by all, or by the majority, or by the most notable and illustrious of them.<sup>32</sup>

The word used by Aristotle there is *endoxa*. Although a few secondary meanings of the word are a matter of dispute among philosophers, it is widely accepted that *endoxon* refers to "opinion that is generally accepted", as in the translation above, and not merely to probable premises (as it is translated by Tricot)<sup>33</sup>. Regardless of the correct interpretation of the word, the idea which I would like to explore here is that reasoning in general depends on a certain degree of agreement (to be understood in a particular way, which I shall clarify later).

Now, in Waldron's interpretation *endoxa* comprehend "fragments of popular wisdom and diverse and opposed philosophical conceptions"<sup>34</sup>. Undoubtedly, fragments of popular wisdom are part of the notion of *endoxon*. However, "opposed philosophical conceptions" could hardly be considered to be *endoxa*. *Endoxa* are not only *doxa* (opinions or beliefs), but shared opinions or beliefs.

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<sup>31</sup> *Endoxa* plays a central part in dialectical reasoning. Dialectical reasoning, in turn, is the way in which one discusses first principles that will guide moral deliberation (see John C. Cooper *Reason and Human Good in Aristotle* (Hackett, Indianapolis/Cambridge 1975) 58 ff.) as well as the first principles of science. On the latter, see G.E.L. Owen 'Tithenai ta Phainomena' in J.M.E. Moravcsik (ed) *Aristotle: a Collection of Critical Essays* (Garden Books, Garden City 1967), especially on the relation between *endoxa* and *phainomena* discussed in 167-177, which illuminates the famous passage of the *Prior Analytics* concerning the relationship between scientific reasoning and *phainomena* (46a17-22).

<sup>32</sup> The first passage is in 100a25-30, while the second is in 100b20-25.

<sup>33</sup> That is the meaning preferred by the Pickard-Cambridge translation, and most contemporary commentators would agree on that element of communality as part of the Aristotelian concept of *endoxa*. That is assumed by Owen (see GEL Owen 'Tithenai ta Phainomena' in J.M.E. Moravcsik (ed) *Aristotle: a Collection of Critical Essays* (Garden Books, Garden City 1967) 170 and later 174). Evans avails attempts to combine both meanings, but also shows how central the idea of communality is to the concept of *endoxon*. Not even the distinction between qualified and unqualified *endoxa* eliminates that idea of communality. For the discussion of the two senses of *endoxa*, see JDG Evans *Aristotle's concept of dialectic* CUP, Cambridge 1977) 77-85.

<sup>34</sup> Jeremy Waldron *Law and Disagreement* (OUP, Oxford 1999) 72.

The fact that we share them is constitutive of the possibility of discussing the matter in hand. That is not only a structural part of politics, but rather a structural part of reasoning. We must be able to refer to some common ground in order to be able to convince one another of each other's mistakes.

The first reason why endoxa should be considered a central feature of dialectic reasoning is the fact that the parties in the dialogue would simply be talking past one another if they cannot find a common ground from which to build their arguments. It would be impossible to appropriately persuade someone about anything if it is not possible to find common ground from which to start<sup>35</sup>. The only possibility of persuading others in this situation arises if I, in order to convince the interlocutor, build my arguments on the strength of my interlocutor's beliefs, which I do not share. In that case, I will have to justify why I should try to convince someone of a belief I hold to be true by tricking him into accepting arguments which I believe are grounded on false premises. The sort of well-intentioned manipulation involved in that sort of argument seems to be wrong precisely because it does not take the interlocutor to be a mature competent practical reasoner, and that is so even if the proposition of which truth the manipulator is trying to convince his interlocutor turns out to be true. In short: what is lacking in this situation is precisely that sort of recognition of the other as a practical reasoner. Recognizing someone as a practical competent mature practical reasoner excludes certain sorts of behaviour. One such behaviour is arguing from premises that one believes to be false even if the intention of the interlocutor is ultimately to convince the other of what the former believes to be the truth.

Of course there might be situations in which manipulating someone in that manner might be justifiable. In his reading of Plato's *Crito*, Weinrib points out that the Laws of Athens' arguments for Socrates to submit to the court's decision contradict the very principles laid down by Socrates in the middle section of the dialogue. According to Weinrib, that is a sign that those arguments do not depart from Socrates' own opinions and beliefs but from *Crito's* notoriously false beliefs<sup>36</sup>. Socrates adapted the arguments to *Crito* because his interlocutor was not himself a trained philosopher and seemed to be in deep distress with Socrates' imminent execution. There Socrates acted as a doctor of the soul appeasing *Crito's* mind through argument, in an anticipation of the ancient sceptical view of

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<sup>35</sup> In his commentary to *Topics I* (specifically 100a27-b23) Robin Smith makes precisely that point. Agreement is necessary in argumentation, if for no other reason, because it would be pointless to argue a point from premises which are not accepted by my interlocutor (Aristotle *Topics books I and VIII*, with excerpts from related texts (translated with a commentary by Robin Smith) Oxford : Clarendon Press, 1997, commentary in pages 44-45.

<sup>36</sup> Ernest J Weinrib 'Obedience to the Law in Plato's *Crito*' [1982] *American Journal of Jurisprudence* 85, 102.



argument as a medicine for the soul<sup>37</sup>. In Weinrib's reading, the arguments presented by the Laws of Athens' speaking through Socrates, are not aimed at discovering the truth or even at convincing Socrates of the need to accept the outcome of the trial; its objective was to help Crito cope with his own distress.

Notice that in order to justify that sort of manipulation it is necessary to assume that the interlocutor (Crito) does not have the same capacity for rational judgement that Socrates has. That sort of manipulation has to assume asymmetry between the interlocutors. Now it seems that the sort of asymmetry which allows someone not to argue from endoxa cannot be the ground on which to build a democratic theory of politics as practical reasoning. In fact, that sort of asymmetry is precisely what a theory of democracy cannot allow. Democratic institutional design must be oriented, as Aristotle pointed out<sup>38</sup> (and every theory of democracy ever since) by the idea of equality and, as an upshot of that, it cannot design institutions that do not depart from the assumption of symmetry<sup>39</sup>. That is the reason why designing institutions in such a way that the parties (or their representatives) are allowed space and are given incentive to identify endoxa (and to build arguments from them) is constitutive of politics.

Here it is possible to notice the crucial difference between what I called epistemic justifications for authority and substantive justifications. Epistemic justifications for legislative authority simply cannot succeed in the face of

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<sup>37</sup> That is, of course, thoroughly described in Sextus Empiricus' *Outlines of Pyrrhonism*. Martha Nussbaum has argued convincingly that Hellenistic philosophy in general developed that idea of philosophy as medicine, which was already in Aristotle. See Martha C Nussbaum *The Therapy of Desire* Princeton (University Press, Princeton 1994). If Weinrib is right the medical analogy to philosophy is also to be found in Plato's *Crito*.

<sup>38</sup> Aristotle, *Politics*, IV, 1291b31-2.

<sup>39</sup> Where that assumption of symmetry does not hold, paternalism is generally accepted as justifiable. Both children and the mentally ill are not allowed a right to vote because symmetry does not hold. But I believe that democratic symmetry in practical reason is the right starting point for arguments on more contentious matters regarding political participation. Think of the recent row in Scotland concerning whether convicted criminals serving jail sentences should be allowed to register to vote in the elections for the Scottish Parliament. The issue arose because there is a conflict between the UK legislation and the European Court of Human Rights ruling that prisoners in general should not be denied the right to vote [see *Hirst v United Kingdom* (2006) 42 E.H.R.R. 41]. In the opinions given in that case, a review of how different countries handle the problem showed that a number of countries, including members of the European Union, refuse prisoners the right to vote. The justification for that practice is that excluding from voting is a form of punishment. That argument departs from the premise that the right to vote is a form of power-sharing among individuals. Hence, taking away that power is a sort of punishment that is not significantly different from other restrictions on the other prisoners' rights. In that view, the only question left is whether or not that punishment is too harsh. However, if rights to political participation are thought of as the result of the recognition of symmetry in practical reason between citizens, withdrawing a right to vote would demand either an argument to the effect that this symmetry does not obtain or, more radically, an argument to the effect no criminal should be considered part of the political community.

asymmetric reasoning capabilities. Substantive political justifications would typically admit into the collective deliberation anyone who displays a modicum of rationality. Young children would be excluded, as would the severely mentally impaired, but by and large all who are capable of practical reason would be admitted<sup>40</sup>. The reason for that is that equality seems to be constitutive of politics in the proper sense of the word. While dictatorships and totalitarian regimes are political in a derivative sense, the political regime by antonomasia are regimes of government between the equal (what Aristotle named a *Politeia*). For that reason, the conditions under which a practical reasoner counts as equal to other practical reasoners in politics are less demanding than the conditions under which someone counts as equally rational in epistemology.

Let me now pause to spell out the connection between a normative conception of social relations and the authority of legislation: assigning authority to legislation enacted by an assembly of representatives is an attitude (to be accompanied by the relevant social actions) that consists in relating to other members of the community as those who recognise each other as competent practical reasoners do. The underlying social relation of recognition is a solid ground for the authority of legislation. Of course a more or less widespread social practice of recognition might happen in a context in which that sort of recognition is denied to certain parts of society. As Axel Honneth has shown, the tension between the normative content of the principle of recognition and the actual practice of recognition is the key to understand the struggles for recognition that inform certain claims from social movements and even from individual actors<sup>41</sup>. But it is important to notice here that even an imperfect practice of recognition of other members of the community as competent mature practical reasoners might give rise to institutional structures that have those features that allow and give incentive to building arguments from *endoxa*. Of course, the justification of the outputs of those institutions (legislation, etc) would not be possible if certain groups whose members stand in a politically symmetrical relation to other competent practical reasoners in the group are excluded from taking part of the decision-making. In that case, no real group *endoxa* will be aimed at by the institution in charge of the decision.

Now what follows in relation to institutional design? First of all it is important to bear in mind that I am not claiming that all decisions will have to be agreed upon in politics. Moreover, I am not even claiming that consensus is necessary in relation to the procedure through which that agreement is achieved. Both forms of

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<sup>40</sup> I believe that Aristotle is right to claim that practical reason is only present in a fully developed form in a virtuous person. Virtue, however, is a matter of degree and in politics the justificatory assumption must not be of a citizenry of highly virtuous (and hence highly rational) men and women. It is enough to recognise in them the capacity of contribute to the debate actively.

<sup>41</sup> Axel Honneth *The Struggle for Recognition* (MIT Press, Cambridge/MS 1995) 160 ff.

agreement are contingent and they might or might not happen. Moreover, I am not even claiming that only legislation which could be referred back to common grounds of justification (endoxa) is really authoritative. Indeed, sometimes legislation is a result of compromise (or of sheer confrontation) because the parties failed to reach any agreement not only on the reasoning stemming from endoxa, but because they failed even to find some relevant common ground. Political practice must always face political dissolution as a serious possibility. Agreement on any substantive distribution of goods, on procedural fairness or even in some common grounds of justification (endoxa) cannot be guaranteed by political structures and, at the bottom line, it depends on the parties. But would such compromise solutions (or indeed some situations of sheer majority supremacy) in which no common ground was found, still be authoritative?

Plainly yes. My claim is not that only arguments departing from endoxa can be politically justified. What I am claiming is that political institutions which better allow the parties to have an opportunity to build a common ground from which to argue, even if the discussion might come to a halt (through compromise or voting or other decision-making method) for any reason, are more legitimate than institutions that do not allow room for that to happen (or that allow for that to happen to a lesser degree). As an upshot of that greater legitimacy, the institutional outputs would also, *ceteris paribus*, be more legitimate.

Institutions that both allow and give incentives to the parties to search for common ground are able to turn a decision that was taken by a vote in which a minority was defeated into a decision that was taken (and should be respected) by the community. In fact, one of the most striking facts about politics in a democratic regime is that a particular event is able to change a rule that is pushed by a majority against the minority's best judgement into a rule that was created by the whole community (and which should be upheld as such by everyone). Fernando Atria, in one of the many arguments we have had over the years, called my attention to the fact that parliamentary voting (assuming certain conditions of representation and procedure) has the power to enlarge the scope of the "we" with which the members of each faction identified themselves. After the vote, the identity as member of a faction yields to the identity as part of the larger societal group.

That is one reason why parliamentary legislation is more authoritative than highly general executive decrees or court decisions, at least in principle. Well built parliaments institutionalize the conditions for practical reason to unfold in politics and, by doing so, engage the voices of minorities as partners in argumentation and not simply as a sort of power that has to be reckoned with (or simply defeated) by the majority. That leads to a way to conceive the division of labour in political reasoning between the different political institutions and, as a result, to a conception of parliamentary representation. I turn now to the discussion of that division of labour.

## D. DESIGNING RESPECTFUL INSTITUTIONS

There is a long distance between finding common ground from which to build arguments and making a particular decision. That distance is filled with different sorts of argument that belong to all stages of practical reason (dialectics, deliberation) as well as with a particular sort of moral perception (Aristotle's Practical Syllogism). The sheer wealth of arguments and forms of perception makes it possible that, even if we agree on certain common grounds, we end up deciding differently. That distance is crucial in my argument, because from that it follows that it is possible to recognize someone else as a competent mature practical reasoner by attempting to build arguments grounded on departure points which are commonly accepted, while still disagreeing on our conclusion. That is why parliament's authority does not stem from unanimity, but from the institutional features that allow and foster the construction of endoxa between the different members of the community (often through their representatives).

For that reason, the distance between finding common ground and making decisions enables me to answer Robert Paul Wolff's anarchist challenge to political authority<sup>42</sup>. Wolff famously asks under which conditions someone who opposes a political decision might be morally obliged to abide by that political decision. He argues against representative democracy, for representatives make up their own minds on particular issues not necessarily sheepishly following their constituents<sup>43</sup>. In this respect, abiding by majority decisions (or even unanimous decisions) of representatives is a violence to one's own autonomy.

However, my contention is that a good reason to conform to the demands of the political decision taken by representatives might be the fact that the decision making was taken by an institution that allows and fosters the use of arguments built on shared premises. Even if, at the end of the day, the decision does not command general agreement, the fact that it was taken by an institution designed in that particular way, expressing respect to those who are subject to the decision might be a good reason to conform to its demands.

Awareness of that distance is also relevant to understand why assigning political importance to institutions that foster endoxa is not an inherently conservative view (as sometimes Aristotle's own reliance on endoxa was said to

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<sup>42</sup> The argument goes even further, for Wolff also argues against majority decisions taken in direct democracies. In the latter, the outvoted minority submits to the majority, in violation of each minority member's autonomy (pp. 38-67). Furthermore, as Bańkowski has shown, even unanimous direct democratic decisions would not necessarily be binding if one accepts that there is no reason why the voter might not change his mind. If I can change my mind when deciding issues individually, why would I not be allowed to change my mind in collective decision-making? Any explanation for that question would be an explanation of how the collectivity curbs my own decision-making. For a developed version of that argument, see Bańkowski, *Z. Living Lawfully*, p. 15-22.

<sup>43</sup> Wolff, R. P. In *Defense of Anarchism*, p. 29

lead). Irwin makes the very good point that the fact that arguments are grounded on endoxa does not mean that the conclusion of the dialectic process would not be that one or more of the beliefs from which discussion started proves in the end unacceptable (e.g. on the lights of other commonly held beliefs or as a result of a deeper understanding of what that very endoxon really means)<sup>44</sup>. Indeed, there are a number of dialectically acceptable means to do that.

Moreover, the choice of means to further the ends selected dialectically, which is what deliberation consists in, also poses a whole wealth of problems which might be central to politics. Dialectics might show that one should distribute certain sorts of goods according to merits, but what is to be considered merit in any community at any given time might be a matter of deliberation or even, in some circumstances, of practical perception.

Although I do not expect to come even close to exhaust the ways in which dialectical arguments, deliberation and moral perception might move away from an endoxon, I shall discuss a few possibilities in the next section when I discuss the kind of (not particularly demanding) agreement that dialectical reasoning needs to get going.

Before I do that I would like to exemplify the sort of political division of labour in practical reasoning which that more complex view of practical reasoning makes possible. Moreover, I believe that that division of labour is inherent in various aspects of representative democracies. If one perceives how that division of labour is inbuilt in representative democracies, it is also easy to see how certain objections raised against Waldron's claim that judicial review shows disrespect for the electorate, although sound against Waldron's Doctrine of the Wisdom of the Multitude, would cut no ground against my conception of legislation as practical reasons (which in turn is compatible with Waldron's other argument for the authority of legislation, mentioned in section II). As a result, I expect to show in which sense judicial review of legislation might be said effectively to embody a disrespectful attitude towards citizens, at least in principle.

Dimitrios Kyritsis<sup>45</sup> has put forward an argument that purports to show that Waldron's argument for the superior authority of legislation (when compared to the outputs of judicial bodies) would have to suppose a conception of representation (representation by proxy) which does not reflect central aspects of our institutional practices<sup>46</sup>. Those practices, according to Kyritsis, would be better understood if they were instantiations of a conception of representatives as trustees. In the former, representatives are seen as simple conveyors of their

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<sup>44</sup> Irwin, Terence Aristotle's First Principles Oxford: OUP, 1989, p. 344-5. The two examples of arguments in brackets are not in Irwin's but my own.

<sup>45</sup> Kyritsis, Dimitrios Representation and Waldron's objection to Judicial Review Oxford Journal of Legal Studies 2006, vol. 26, issue 4, p. 733 ff.

<sup>46</sup> Kyritsis, Dimitrios Representation... cit. p. 743-744

constituent's will<sup>47</sup>. That, Kyritsis believes, might be able to justify why the striking down of legislation by a judicial body would show disrespect towards the citizenry<sup>48</sup>. Legislative bodies could indeed claim to be more authoritative: they would be the people in a significant sense. As it happens, our practices show that representatives are conceived as being independently minded in relation to their constituents. They are not bound by their opinions and they might learn with each other and discard parts of their initial opinions. For that reason awareness of the electorate's opinions in all its diversity is "the result of the set-up of legislatures rather than part of the job-description of the legislators"<sup>49</sup>.

Now, I have no doubt that the second model of representation is closer to our practices and I shall not dispute that point. I would only like to point out that that conception of representation only works as an objection to the idea that legislation is more respectful to the citizenry (than judicial decision) if one assumes that the only way in which legislators could claim to be talking for the citizenry is as an immediate reflex of their currently held opinions. But the We of "We the people" is not a sum of the unreflected opinions of each individual. That fails to take into consideration (a) that politics is not simply a matter of power, but instead it is a matter of reasoning together about the best way to move forward and (b) that practical reason's structure allows for a subtle, but sound division of labour between represented and the representatives. Let me briefly explain that division of labour.

Representatives are neither simply bearers of their electorate's opinions nor are they necessarily an elite better suited for judgement than the electorate that chooses them. They should be conceived as people in an institutional structure in which different problems facing the social group are dealt with by practical reason, that is to say, by attempting to find some common ground and to build on that common ground. It follows that, on the one hand, representatives should not abide slavishly by the whims of perceived public opinion, which might be (and normally is) formed by simple aggregation of many independent factious opinions, in such a way that there is no politically institutionalized forum for practical reason to be performed; and, on the other hand, representatives should not put themselves above their constituents, since they are there to reason about the beliefs held by the electorate (which they shall treat as important in the sense that departing from them calls for justification).

Although representatives are not bound by the opinions of the citizens they represent, they must bring to their reasoning the opinions of their constituents, as far as it is possible for them. Now, the fact of whether or not the representatives have taken into account their opinions is not easily ascertained, but it is enough to say that: (a) it is perfectly reasonable to believe that the best representatives

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<sup>47</sup> Kyritsis, Dimitrios Representation... cit. p. 742

<sup>48</sup> Kyritsis, Dimitrios Representation... idem, ibidem.

<sup>49</sup> Kyritsis, Dimitrios Representation... cit. p. 745.

should account for their constituents' views, even if they disagree with them and that (b) there are institutions such as periodical elections that aim at helping to keep that sort of obligation very much alive in the heads of politicians. Moreover, that is the best way to conceive of the principles underlying periodical elections: representatives do have an obligation to account for the distance between their decisions and the opinions of those who elected them. The fact that the way in which their success in their job is assessed is by periodical checks with the electorate (instead of a legal action to sack them during their term if they fail to account for the distance between their decisions and their electors' opinions) is no ground to think less of their obligation. Justiciable legal controls are only one (and not necessarily the best) way to assess the politicians' success in their roles; there is no reason why purely political means of assessment should not in certain circumstances be preferred to judicially enforceable law. Indeed the former must be often preferred in politics.

So after all, if we take seriously the division of labour in practical reasoning between the electorate, bringing about the elements that might constitute the endoxa, and the representatives, dialectically arguing different theses taking into account those doxa, it is possible to see how accounting for their electors' opinions is indeed part of a democratically elected representative's job-description.

If that is so, preferring a judicial decision to a parliamentary one might indeed show a particular sort of disrespect to the citizenry. Institutions designed to take into account citizen's opinions reflectively (and not slavishly) embody the particular sort of respect to citizens as competent mature practical reasoners. Courts might or might not ground their decisions in endoxa, but if they do so it is not because there are structured in such a way that the search for endoxa is fostered.

Nothing in judicial procedure or practice would uphold that conclusion and, rather, the discourse of rights seems to be inherently limited as a form of expression of that communality of practical reason present in legislatures' main features. Indeed arguing rights seems to be inimical to the idea of reasoning together with all the parties involved (let alone to the idea of finding a common ground between rival factions). Simone Weil has called attention to the fact that the invocation of a right is a way of denying commonality between the parties. As she put it:

If you say to someone who has ears to hear 'What you are doing to me is not just', you may touch and awaken at its source the spirit of attention and love. But it is not the same with words like 'I have the right...' or 'you have no right to...' They evoke a latent war and awaken the spirit of contention.<sup>50</sup>

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<sup>50</sup> Weil, Simone *On Human Personality* in. McLellan, David *Simone Weil: Utopian Pessimist* London, MacMillan, p.280.

Raising a right against an interlocutor is a way to break up the relationship with the other by effectively declaring that he cannot seriously discuss why you are asking to be treated in a given way. In the realm of social interaction (and not of pure conceptual analysis) claiming to have a right is to adopt the perspective of the rupture of the communication between the parties.

That concludes the presentation of the bulk of the argument. But before I rest my pen, I must account for a powerful objection that is waiting just around the corner. Many (including Waldron) seem to believe that the idea of agreement is not a promising starting point for any justification of political arrangements. That objection would urge me to take disagreement seriously when thinking political institutions.

## E. AGREEMENT IN PLURAL SOCIETIES

Does my argument have a claim to have taken disagreement seriously enough? I believe so. And I believe so on two related (and complementary) grounds. First of all, I do not defend the claim that political decisions (even decisions about the very structure of political arrangements) should be justified by the fact that the parties affected by those decisions actually agree with the decision. What I am defending (as I hope to have made clear above) is the thesis according to which political institutions should be designed in such a way as to foster and allow for the construction of agreement between the parties on common grounds from which they might argue their points. Whether or not any actual agreement on a starting point from which to argue a case obtains is a contingent fact and, in a sense, independent of the truth of my thesis about the most appropriate institutional design.

In another sense, though, the possibility that a particular social group agrees on a few acceptable starting points is indeed relevant for my thesis on institutional design. For if actual agreement was not a real possibility in a particular society, the institutional arrangement I am defending would be, if not unjustifiable, at least somehow inappropriate. It would be grounded on the dream of something that simply cannot happen in fact. So, at the end of the day, if my thesis is to be useful at all to understand and justify political institutions, I must make plausible the belief that agreement is not such a far fetched ideal in contemporary political societies. I don't expect to derive that plausibility from hard core sociological investigation on the actual beliefs held by members of any particular society, but I believe that an appropriate conception of the kind of agreement which is needed in order for my institutional model to work will make claim plausible.

Here comes the second ground for my belief: one reason why agreement seems to be such an elusive condition in contemporary political communities is



the fact that we tend to ask a lot from the parties to say that they actually agree. The common starting points that we seek tend to be located at a very abstract level and persistent disagreement on that level overshadows the immense area of agreement in particular judgements from which we can build arguments by induction and analogy. Here it is useful to bear in mind MacIntyre's claim that disagreement happens at different levels of abstraction<sup>51</sup>. At the very least we might disagree at three levels: on not so general judgements of particular sorts of human actions (e.g. on whether or not buying goods manufactured by children under poor conditions of labour in sweatshops is wrong); on the reasons why those actions are wrong (I might ground my judgement that the action described above is wrong in analytical Marxist premises, or else in Utilitarian premises, or perhaps on neo-Kantian premises, etc.); or on what makes any of those theories more rational or, more generally, better than the others. We might add that we might or might not agree in particular judgements as to whether one specific action already performed, or still to be performed, is right or wrong.

If one believes that the starting point of political argument needs to be located either at the more abstract level of the reasons why certain kinds of actions are wrong or at the level of the conceptions of rationality that help us choose between the theories of right and wrong, it is very unlikely that we would find any common ground from which to argue. However, we should not underestimate the level of agreement that exists in any given society on less general or even on particular judgements about particular actions. That is obviously not to say that we do have agreement on all or even in the most important matters<sup>52</sup>. Widespread disagreement on issues such as abortion and the possibility of forcing adoption agencies not to discriminate among heterosexual and gay couples well illustrate that point. Indeed if such widespread agreement obtained, the importance of the political process would be diminished, for the opinion of any person or group of persons would stand for the opinion of the whole group and there would be little need for debating and arguing matters collectively, unless most of the group were in a state of doubt or confusion. Collective reasoning is more clearly needed in situations in which we have to tackle disagreement.

But neither political institutions nor scholars can argue in the void. We reason from what we have in common. Sometimes a more widespread agreement might be reached at a more abstract level, but that sort of agreement is not always (and indeed not often) available. We might, however, start from a number of particular (or at least less universal) judgements and proceed by epagoge (i.e. induction

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<sup>51</sup> MacIntyre, A. *Whose Justice? Which Rationality?* London: Duckworth, 1988, p. 1-3.

<sup>52</sup> My claim is therefore not to be confused with claims that our areas of agreement are much more important than our areas of disagreement and that all the disagreement left in society is friendly and not particularly worrying, given that we agree in what is most fundamental (an opinion that Frederick Shauer rightly dismisses as not paying enough attention to the reality of disagreement in his *Talking as a decision Procedure*, cit., p. 18.

guided towards finding more general truths) to more abstract principles in order to find a way to decide (and to convince others to decide in that particular way) the problem in hand. Induction, as Aristotle himself pointed out, is not as precise as deduction, and there are more ways in which an inductive argument might fail than there are ways in which a deductive argument fails. But practical reason is simply not as precise as deductive reasoning and certainty is not readily available. In practical reasoning, and particularly in politics, we need to try to settle our disagreement using principles that we might share at an intermediate level of generality<sup>53</sup>.

In short, we need common starting points, but those starting points do not need to be articulated theories on the good or articulated theories of justice let alone articulated theories of what makes a theory about the right or the good correct. What we need to share in order to accept a “practical reasoning” conception of politics and the institutional design that goes with it (which I partially sketched above) is nothing like Rawls’s theory of justice, or a Marxist understanding of equality. We might only share less general (or even particular) judgements as, for instance, considering wrong the hurting of innocent children and even then we might only agree on core cases of what count as hurting and what counts as children and on what cannot be considered an excuse that forfeit the action’s wrongness.

It is from those less general judgements that we proceed by epagoge up the ladder of abstraction. No doubt our theories will be different when we reach very high levels of abstraction, so it is no wonder that Rawls and analytical Marxists would disagree on that level. The result depends on which particular judgements we depart from and on how many different judgements we can hold constantly in mind as we move up the ladder. But in trying to find common ground and in designing our political institutions in ways that allow and foster those attempts we are reasserting that sort of communality and, in doing so we are, in turn, denying that politics needs not to be primarily thought of as pure (albeit sometimes limited) power struggle.

That is why an “ideal of agreement” is determinant to matters of institutional design. One central way in which political institutions might be thought of as being justified is the fact that they are better than alternative arrangements at fostering the pursuit of that agreement that makes it possible for us to reason together. It is obvious that this is not the only good justification for political institutions and I think Aristotle is right in believing that different societies might

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<sup>53</sup> In the context of presenting their theory of deliberative democracy, Amy Gutman and Dennis Thompson write about principles that “operate in the middle range of abstraction, between foundational principles and institutional rules”. (Democracy and Disagreement, p. 5). That intermediate level is where most political arguments are situated and I would only add that those principles are checked against each other and also against our particular judgements in less controversial cases.

call for different sorts of political arrangements. However, I also believe that, *ceteris paribus*, legislative institutions which allow and foster the parties to find *endoxa* from which to argue their political points are the primary political institutions and curbing their authority, be it in favour of the executive branch, be it in favour of the judiciary, demands very strong arguments in favour of paternalist politics.

## F. WHAT IS LEFT?

What I intended to provide in the preceding argument is the core argument for the authority of legislation. The argument can be said to be core in two related ways. In the first place it provides the background argument for the authority of legislation which aims at being valid under some conditions. In other words it is not a complete theory of legislative authority. Secondly, it provides a framework in which to theorize those conditions. In the first place it sees the authority of legislation as springing from citizen's practical reason and that points to the fact that social and political conditions in which the practical agent is alienated from his or her own practical rationality have a direct impact on legislation's authority<sup>54</sup>. What is called for here is a philosophical anthropology that is able to distinguish situations in which the undeveloped practical rationality in the agents is a result of adverse social and political conditions and other situations (such as childhood and certain sorts of severe mental handicap) in which it is not<sup>55</sup>.

Also, because legislative authority derives from the use of practical reason directed towards communal decision-making, we will have to think of the external political limits to that sort of decision-making. There are aspects of politics that might not be able to be tackled by means of rational decision-making as such. Political community needs to be nourished, and though collective decision-making might help its sustenance, it is not the only necessary

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<sup>54</sup> That suggestion resembles Amy Gutman's and Denis Thompson's suggestion that deliberative democracy depends on substantive principles that govern the content of democratic deliberation (though they have another focus and are not directly concerned with the authority of legislation). It brings to mind the arguments in chapters 8 and 9 of *Democracy and Disagreement*, though I would favour an account of that which is more centred in an anthropological philosophy.

<sup>55</sup> I hope it is clear that I am not claiming that children and people who are severely handicapped are not politically relevant. Nothing could be further from the truth. Extremely vulnerable people as well as all the people Raymond Gaita, following Simone Weil, would call the afflicted (*A Common Humanity* London: Routledge, 2002) are not only politically relevant as subjects that concern all members of the community but their very existence contributes to the political process revealing aspects of our humanity that we all too often fight to conceal. A relation with them goes a long way to help build a more accurate perception of humanity in all of us and indeed that might be a good reason to justify compulsory civil service as part of the political formation of young adults.

nourishment it needs. That becomes more apparent in societies which are so deeply divided that talking of political communities might be an expression of hope. South Africa under the apartheid and the social division which caused (and was reinforced by) certain South American military dictatorships are instances of political communities that clearly needed more from politics and political institutions than collective decision-making. But all political communities need that sort of nourishment and the institutional space in which that could happen.

It follows from what was just said that the argument presented is not all there is to legislation's authority. Rather, the argument provides a core for a practical reason theory of legislation and legislative authority which does not have to be hopeful that legislative outcomes will be necessarily better, but which does not have to ground legislative authority on the equal distribution of political power. But in doing so, it opens the door to a conception of legislation that builds on the intrinsic communality of both politics and practical reason and that, in turn, might help to bring together under the same justificatory structure ideas about law and politics such as MacCormick's thesis that law-makers must claim correctness and Gutman and Thompson's principles of deliberative democracy.