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Two Faces of Decisionism: Common-good Constitutionalism and Illiberal Democracy*

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Abstract: It could be said that the values and ideals of modernity lead to the establishment of the institutions of the democratic rule of law. It concerns a long and intricate manufacturing process whose outcome can be traced back to a complex set of theoretical insights and institutional commitments: principles of political and philosophical liberalism, constitutionalism, and deliberative democracy. Such a path is turbulent, although there is a constant presence among the critics of modernity. It refers to the anti-liberal perspective of some conservative approaches. Contemporarily, the democratic framework allows us to trace the dimensions of this criticism both as regards representative institutions and the interpretation of the role and scope of the Law in the control of Executive acts. Both approaches are linked to the movements initiated by plebiscitary populists in defense of illiberal democracy. In this article, we seek to trace the bases of both arms of the critique of the liberal arrangement of constitutional democracies in the Schmittian influences on the reflections of *illiberal democracy*, a partner of the *common-good constitutionalism*.

Keywords: Crisis of democracy; legality and legitimacy; plebiscitarism of audience; common-good constitutionalism; Reason of State.

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On me reprochera de m'attacher trop à des minuties: je souhaite que l'on sache que je le fais, non pour croire que ces choses sont importantes en elles-mêmes, mais afin d'insinuer par des exemples sensibles qu'il faut s'armer de défiance contre ce qu'on lit et employer son génie au discernement des faits. Cette application étend et multiplie les forces de l'âme.

Pierre Bayle, Cappadoce, rem. K in fine.

Dictionnaire Historique et Critique

Inseparable assaults [and crises] on democracy and the rule of law

In a recent meeting of the Cabinet of the Presidency of the Republic, whose contents were made public in Inquiry (INQ) 4.8311 by decision of the Supreme Court Justice Celso de Mello, one attendee stated the following:

> This country is not [...] I hate the term "indigenous peoples", I hate this term. Hate it. The "gypsy people". There is only one people in this country. Like it or not. If you don't like it, bugger off. Brazilian people means that ***there is only one people.*** May it be black, white, Japanese, or of indian descent, but people have to be Brazilian, goddamned! Let us get rid of all this talk about peoples and privileges. ***It can only have one people, no judge can think he is better than the people*** (BRASIL, STF 2020, p. 44, emphasis added).[1]

The content of these passages, among others, led the dean of the Supreme Court of the Brazilian Judiciary to highlight in his decision the "degree of incivility and unacceptable rudeness" (BRASIL, STF 2020, p. 45) in speeches of representatives of the executive branch and, in this specific case, in that of the Minister of Education. However, this paper does not intend to examine moral traits, occasional discursive idiosyncrasies, nor to assess the nature and the legal content of the decision presented by the Supreme Court Justice, nor even to present an analysis of the national political conjuncture. Rather, we would like to take this passage as a kind of sign of the times or, more precisely, as a symbol of the challenges which have been contemporarily imposed on the institutions of the democratic rule of law in its two axes, namely, democracy and law. Our concern is to examine how certain rhetorical mutations bring about theoretical reflections in democratic theory and legal philosophy or theory and, more specifically, in the interlocution between the two fields.

Given this framework, our objective will be to scrutinize certain patterns and common roots of antiliberal critiques of deliberative democracy, on the one hand, and of constitutionalism typical of the rule of law tradition, on the other. We will try to trace the basis of an illiberal plebiscitary democratic model and an understanding of common-good constitutionalism in theses that are found in the tradition or legacy of Carl Schmidt in the fields of democratic theory and philosophy of right. Both conceptions would work as partners in a critical enterprise directed against the institutions and procedures of the democratic rule of law. Thus, Schmittian work offers itself as a kind of privileged interlocutor as it dialogues with the two mentioned fields, thereby presenting itself as a pendulum that allows us to swing between one and the

[1] Brazilian Supreme Court (STF), Inquiry 4.831, Federal District. Rapporteur: Justice Celso de Mello. Author(s): Federal Public Prosecutor's Office. The full decision issued on May 22, 2020 may be found at the following address http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/decisao4831.pdf and concerns the cabinet meeting held on April 22, 2020. The speech of the Minister of Education is transcribed in item 8 of the decision in which it is identified "apparent act [...] of possible crime against the honor of the Supreme Court Justices" (p. 2). This excerpt does not concern, therefore, the core of the complaint, based on an immediately preceding excerpt when the Minister states, after a brief excursus about the corrupt and corruptible character of Brasília, that the solution would be to put "all these bums in jail. Starting with the Supreme Court" (p. 44). Nevertheless, we believe that both passages match and, in doing so, symbolize the underlying thesis that we will defend below. Regarding, specifically, the expression of hatred for indigenous and gypsies peoples, the Chamber of Indigenous Populations and Traditional Communities of the Federal Public Ministry requested, days after the release of the transcript and videos of the meeting, in a official letter, clarification from the Minister of Education based on Articles 215 and 216 of the Federal Constitution.

other. We warn the reader, however, that this is not an exhaustive scrutiny, but rather the presentation of an outline, a mapping presented in the form of a letter of intent for a broader and more complex research program to be accomplished at a future opportunity.

In this horizon, rather than reading the passage above as a mere incivility trait, we would like to uncover it in light of a political theory tradition critical of the nature of the rule of law, representative democracy, and, in the extreme, of liberalism as accomplishment of the principles of modernity to the highest degree. To do so, it is necessary, first of all, to identify what is the central thesis of the passage, what it brings with it, and to what consequences it leads. We will maintain that the discourse rests on the central presupposition of the uniqueness of the people. Moreover, we could glimpse that the unicity or homogeneity of the people would rest on a kind of natural basis of the political community. From this homogeneous and natural essence, the constitutively excluding feature of this political project would be deduced: those who are not part of the natural identity—or are not recognized by a so-called majority as belonging to the whole—must be excluded or, simply, "bugger off". Finally, one could conclude that the basis or correction pattern of political and/or legal decisions—if such a distinction still makes sense—is no longer the institutions established by the rule of law, a constitutionalism based on the rule of law tradition, but rather the natural political community. In the latter, therefore, the people precede and override liberal institutions. The meaning of institutions such as political parties, traditional media, the legislative, and judiciary is dissolved, for their task would be to promote a mediation which becomes unnecessary once the people are immediately present or have their will vocalized, expressed, or presented by the political leader. What remains covered in this very partial exposition is that there is no natural identity between the leader and the followers. In a lesson that goes back to Chapter XVI of Thomas Hobbes' *Leviathan*, political representation in modernity is built in the political domain, which means that the purported identity of the community is not prior, but rather constituted within the political process itself. This process is not limited to decisions made by the political leader or to the decisionism which would be constitutive of the executive power, but results from and unfolds in the institutional mediation procedures and in the game between the branches of the republic.

Translated in more direct terms, the content of the Education Minister's speech would express a belief in the will of the people as a revelation that occurs solely and exclusively in electoral processes guided by the majoritarian principle. However, since these people cannot express themselves permanently in a direct way, their will would be revealed through the leader that would vocalize it and, therefore, should not be controlled by the other powers. And here appears what Nadia Urbinati had been calling the archaic character of the notion of representation with which conservative populist leaders operate, more recently called by her—aware of the possible contradiction—as direct representation (URBINATI, 2019). Following the Italian politologist, one could suggest that the progressive internal deformation of the diarchic principles of representative democracy, especially populist and plebiscitary ones (URBINATI. 2014), would lead to an illiberal democratic project or a *democrature*.[2]

In light of this interpretation and tracing back to the background of this context, we would like to identify seven theses pointed out by Jan-Werner Muller (2016, pp. 101-3) in his characterization of the

[2] The terms *populism*, *audience plebiscitarism*, *illiberal democracy* should not be taken as synonyms, nor used interchangeably. The first two are not synonymous or interchangeable with each other and not even reducible to the last. However, the way conservative populist leaders are leading countries such as Hungary, Poland, and others make the lines of continuity between these characteristics explicit. While the frequency of contemporary use of the term *illiberal democracy* is tied to Viktor Orban's statements, the expression can be recovered in Zakaria (2003). In the second part of this text we will elaborate on the positions of Viktor Orban. On the topic of a democracy without rights, see especially Mounk (2019). On the neologism *democratura*, see the dossier of the journal *Pouvoirs* (2019), in particular, for the two axes of our argument, the articles by Bavarez (2019) and Philippe (2019), whose titles let us glimpse our structuring axes: "*Democratures against democracies*" and "*The constitutional legitimation of democratures*".

populist phenomenon. This is a controversial, because partial, presentation of a topic that has been the center of attention in the human sciences debates and, therefore, widely discussed as well as disputed. Even though a necessary connection between the two conceptual schemes does not exist, we want to unfold the characteristics of an illiberal democracy through the central theses of populism, given that, due to the lack of a better term, it has been the expression used to refer to political phenomena which, while having common features, are distinct among themselves. Moreover, such theses would reveal the following ongoing transformations:[3]

1. Monopoly of representation. Although populist leaders claim the use of plebiscites and referendums as expressions of the will of the people as mechanisms of direct democracy, representation is not eliminated, but re-signified;

2. Anti-elite movement. Not every movement critical of elites turns out to be populist, but populist anti-elite movements are necessarily anti-pluralist, because, as stated in (1), there is a monopoly of representation of the people. Such a monopoly is based on the moral argument that other competitors are corrupt and therefore illegitimate competitors in the political process. Only the populist leader who truly embodies the people expresses the morality of his fellow citizens;

3. Symbolic representation of the people. Although populists often claim to represent the common good desired by the people, this is not an effective representation, since there is no genuine political process of will formation, but rather, the political leader undertakes a deduction of what he takes as a model of public policy that is correct and harmonious with the symbolic representation "of the real people" (in accordance with the monopoly of representation (1), there is only one model of public policy to be implemented);

4. False democratism. Although authors such as Taguieff (2002) maintain that populism oscillates between a principle of radical democracy and authoritarianism, in light of its other characteristics, populism genuinely would prove to be authoritarian with a false attachment to the will of the citizens, if not to those ideological, moral, and cultural orientations shared by it. It concerns, therefore, a so-called democratic attachment based on a rhetoric of popular appeal. Therefore, what becomes effective in the long run is the authoritarian character of the leader who holds the monopoly of representation (1) and (3)[4];

5. Suppression of diversity in civil society. Populist movements govern implementing their belief that they are the only real representation of the people's aspirations; they corrupt themselves, adopt clientelist strategies, and suppress all critical movements originating in civil society;

6. Risk to democracy. Populists should be criticized because they reveal themselves to be a risk not only to liberalism but to any minimal scheme of effective democratic participation. The combination of theses (1) and (4) reveals how participation is undermined by the monopoly of representation by the leader;

[3] It remains open whether the equivocality of the concept of *populism* should not lead us to abandon it, in particular because we sometimes employ it as a descriptive concept in the field of history, at other times in the field of sociology, as well as a normative concept in the field of political theory and philosophy. See Colliot-Thélène (2019).

[4] It is worth remembering that Taguieff (2002) is a staunch critic of populism, even though he interprets the phenomenon as swinging between one principle and another. As indicated above, one finds in the historical and/or sociological versus normative category distinction the best example of the difficulty faced by the concept of populism, since several authors claim that, normatively, a populist project, in addition to making the nature *of the political* explicit, would be able to deepen democracy and reclaim popular sovereignty (MOUFFE, 2000; 2018; LACLAU, 2013).

7. In conclusion, populism does not operate as a corrective to liberal democracy by fostering a politics closer to the people or even oriented toward popular sovereignty. At most, populism can illuminate the deficits of representation.

Bluntly put, populism could be characterized by 1) adherence to a charismatic leader; 2) appeal to the people, i.e., to the people's emotions rather than their reasonable arguments. In their rhetoric, populist movements show themselves to be 3) hostile to political elites, perceived as the expression of widespread corruption. Political mediations would only serve to produce corruption, which would end up explaining the 4) generalized distrust in the institutions of mediation (legal procedures, parties and their performance in the legislature, the effort of traditional media to reproduce an impartial view of events), which brings with it 4.1) the demand for frequent popular consultations in the form of plebiscites, specifically on issues that the leader identifies as capable of resulting in public policies that would fit the image of the symbolic people projected by him from his ideological project. Finally, 5) rejection of cosmopolitanism (COLLIOT-THÉLÈNE, 2014, p. 8)[5]. However one articulates the list of characteristics, the central point of the phenomenon seems to rest on the criticism of the institutional mediation system of the rule of law, on the abstractions underlying the justification of such procedures (individual rights, for example), which results in a position that articulates anti-elitism and anti-pluralism through a form of exclusionary political identity that finds in the leader the authentic expression, presentation, or representation of a homogeneous people. Dissenting minorities, characteristic of a typically liberal plural society, who express their disagreement are taken as enemies of the nation and morally corrupt. The appeal to legality, formal institutions, and instruments of law as mechanisms to protect heterogeneity is seen as vicious actions aimed at corrupting the political body. Any political mediation promoted by institutions such as parliaments, political parties, and constitutional courts is nothing but simple bargaining or horse-trading by men and women who aim to corrupt the mores to satisfy private vested interests (MUELLER, 2016, p. 3).

At this point of the argument, it is worth asking: since there are different styles and natures of anti-establishment and anti-politics discourses, are they all equivalent? On the one hand, we could say that we are acquainted with anti-establishment discourses and, to some extent, we feel contemplated by the criticism leveled against the establishment, one of the hallmarks of populist movements (MUELLER, 2016; URBINATI, 2019). Nevertheless, as we cautioned, could we not try to trace a clearer political position behind the populist and plebiscite discourse or, at least, a pattern in the critiques of the mediating institutions characteristic of the democratic rule of law? For example, consider how the following criticism resembles terms that we might well find in a traditional media editorial or even in comments on social media networks:

> The situation of parliamentarism is critical today because the development of modem mass democracy ***has made argumentative public discussion an empty formality. Many norms of contemporary parliamentary law, above all provisions concerning the independence of representatives and the openness of sessions, function as a result like a superfluous decoration, useless and even embarrassing***, as though someone had painted the radiator of a modem central heating system with red flames in order to give the appearance of a blazing fire. The parties [...] do not face each other today discussing opinions, but as social or economic power groups calculating their mutual interests and opportunities for power, and they actually agree compromises and coalitions on this basis. [...] Argument in the real sense that is characteristic for genuine discussion ceases**. *In its place there appears a conscious reckoning of interests and chances for power in the parties' negotiations*** (SCHMITT, 1988a [1926]: p. 6, emphasis added).

And, shortly before, in the same spirit, it is further stated that

> numerous parliaments in various European and non-European states have produced in the way of a political elite of hundreds of successive ministers justifies no great optimism. But worse and destroying almost every hope,

[5] Colliot-Thélène (2014: p. 8) considers that the rejection of cosmopolitanism would come along with the rejection of liberal economics. However, this characteristic, especially in peripheral capitalism, does not seem so evident to us.

> in a few states, ***parliamentarism has already produced a situation in which all public business has become an object of spoils and compromise for the parties*** and their followers, and ***politics***, far from being the concern of an elite, ***has become the despised business of a rather dubious class of persons*** (SCHMITT, 1988a [1926]: p. 4, emphasis added).

Despite the current tone of the argument presented here, as noted, it is a critique addressed by Carl Schmitt to the model of party democracy in consolidation at the passage from the 19th to the 20th century. The then parliamentary democracy, or democracy of the notables, which had in the parliament's deliberations the center of the decision-making process, started to incorporate political parties as entities of political mediation, operating the transition to a democracy of parties (SARTORI, 1982). The central principles remain the same as those identified as shaping the representative government: 1) free elections to choose representatives; 2) constitution of free mandates as opposed to binding mandates; 3) free public opinion and 4) decision-making from public deliberation, in other words, the principle of public judgment (MANIN, 1996). Such principles can well be accommodated in what Carl Schmitt (1996 [1923, 1926]) identified as the foundations of discussion and publicity that underlie government by discussion. We are progressively approaching the principles of the democratic rule of law, a peculiar combination of principles of philosophical and political liberalism with a complex institutional arrangement based on the system of checks and balances, a constitutionalism that places legality as the basis of legitimacy (POSNER; VERMEULE, 2011, p. 4).

One could, in this case, simply allude to a basic cyclical nature of critiques of the way partisan bargaining progressively spreads through the institutions of liberal democracy. However, we will try to demonstrate how there could be a deeper trace of continuity between certain contemporary discourses in the field of legal theory, democratic theory, and even in the terrain of public discourses such as the one presented in the opening of this article. By taking the analysis presented by Carl Schmitt in *The Intellectual Situation of the Parliamentary System*[6], we can explore to what extent we are not facing a common trait that would reveal the long lineage of anti-liberal theses. Such theses recurrently metamorphose and rise against representative democracy or, more precisely, against liberal democracy as a political aspect, or expression in the field of politics, of modern ideals whose manifestation and counterpart in the field of law is made in the principles and the complex institutional arrangement of the rule of law.

It is nothing new that the idea of objective, impersonal, universally valid norms, anchored in an abstract notion of person and right, typical of liberalism, is under fire in Schmittian work. In their place, Carl Schmitt sustains the

> need for an ultimate instance of personal decision, capable of determining the conditions of validity of a normative order. Since these conditions cannot be established normatively, the transposition of a legal principle into reality is never a mere derivation of a content (FERREIRA, 2004a: p. 44)

This is the source of Schmittian decisionism, since the derivation of a content brings with it "the conflict and the necessity of definition of a competent instance, [of] a politically constituted subject that assumes the responsibility of personal decision" (idem). Although a more detailed reconstruction of Schmitt's critiques of liberalism would be required of us, his anti-liberalism is not disputable and has been highlighted, in particular, by the Anglo-Saxon reception of his work (DYZENHAUS, 2003). Roughly speaking, in the

[6] We opted for the Brazilian translation of the title *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*. As the translators note, the greatest difficulty seems to be the one of translating the term *geistesgeschichtliche*, usually translated by "intellectual" or "intellectual history", not forgetting, however, that the term *Geist* has a complex meaning in German, and may refer to *spiritual, moral, intellectual, and rational*. Moreover, we chose to avoid the version of *Parlamentarismus* for *Parlamentarism* in view of the fact that this is not an examination of this specific system of government, but of parliamentary democracies as a whole, whether parliamentarian or presidential (SCHMITT, 1996: p.1, translators' note). The English translation has chosen to translate the title as *The crisis of parliamentary democracy*.

field of politics, the free exchange of arguments would mirror the liberal bet on the free market principle as capable of self-organizing, horizontally, the economic domain, perhaps even society, based on recurrent bargaining. Therefore, just as there would be an immanent inability of shaping society to the technical-instrumental rationality characteristic of the economic process and thought, the simple exchange of arguments in Parliament would be incapable to produce a political decision. The emergence of political parties would make it even more flagrant that instead of producing decisions, the public discussion turns into a process of self-interested bargaining and negotiation detached from the public spotlight and carried out in the dim light of offices or in the back rooms of legislative chambers.

In this framework, authors from the liberal tradition who thought of democracy as a political market or electoral market would prove to be an easy target for authors linked to the Schmittian tradition. For example, it is not fortuitous that Adrian Vermeule (2019) turns against the definition offered by Joseph Schumpeter in *Capitalism, Socialism, and Democracy*. Vermeule's (2019: p. 4) critique is not explicit, nevertheless, the target is clear for a latter-day supporter of Carl Schmitt's legacy: an electoral market conception would take to its ultimate consequences the wager of a social arrangement whose ordering is spontaneous, immanent to individual exchanges, and foregoes a transcendent instance necessary to endow it with political form and unity. It is interesting to note that the critique of the market nature of Schumpeterian democratic theory comes from different theoretical perspectives.[7] However, what cannot be ignored is that at least three movements are operating in J. Schumpeter's argument: 1) the defense of a procedural model of democracy opposed to a substantive model that connects 2) to the proposition of a minimalist, competitive model of the 3) vote market organized isomorphically to the mode of competition in the economic market. Thus, the picture could not seem more favorable to Schmittian attacks. If Kelsen was a target because of his democratic proceduralism and his legal formalism, J. Schumpeter would allow Schmittians to attack the two dimensions of liberalism—the political and the economic—at once. A fair electoral contest would suppose the provision of a bill of rights based on individual liberties and, therefore, would reinforce the procedural character of the democratic method, which would submit the will of majorities to respect the rights of minorities formally guaranteed by the constitutionalism of the rule of law and, ultimately, ensured by constitutional courts.

However, proceduralism, formalism, and constitutional control organized in this way make explicit the liberal logic that, as said before, does not need a transcendent instance able to give it political form and unity. For this reason, authors such as Posner and Vermeule (2011) cling to the Schmittian tradition to identify in crises the ordinary way in which political institutions function. In other words, they miss the decision-making power that endows societies with political unity and the norm with content. If this is not enough, the social conformations and their mirroring in democratic institutions have, by growing complexification, progressively increased and strengthened the functions of executive power in a logic of presidentialization of regimes (ROSANVALLON, 2014; POGUNTKE; WEBB, 2005). If, on the one hand, the presidentialization of regimes makes the character of decisionism explicit, on the other hand it imposes a question precisely about the limits of a power legitimized by an electoral majority in face of the controls of proportional representation of the legislature and the control of constitutionality. So here comes the question posed by Posner and Vermeule (2011, p. 4) in the opening sentence of *Executive Unbound*: What, if anything, can restrict the power of the executive, whether in its dimension of presidential decisions or those expressed by administrative agencies? In liberal democracies the answer would be relatively simple: the supreme courts are a counter-majoritarian power, since they are legitimized by constitutional principles anchored in the defense of individual liberties and subjective rights. In an illiberal democracy

[7] Although there is a variation in the nature of critical arguments, we can trace them, with due consideration for nuances, in communitarian (TAYLOR, 1985; 2000; WALZER, 2004), republican (BELLAH, 1985), participatory (PATEMAN, 1972; BARBER, 1984), deliberative (COHEN, 2008, ELSTER, 2008; HABERMAS, 1996), and agonic (MOUFFE, 2000) theories.

model, the answer is not quite so simple. The populist leader mobilizes passive masses in order to form majorities that impose the accomplishment of his will and his conception of the good life. In this case, the constitutionalism of the rule of law is replaced by the constitutionalism of the common good, and those who do not like it, bugger off.

II. Adrian Vermeule and the journey of a counter-revolutionary

As we have already warned, the battle against modernity is not new.[8] So far, we have sought to demonstrate, albeit partially and superficially, how this battle has taken place in the political field, with developments in the theoretical reflection on democracy. This scenario, however, is partial if we do not complete it with an analysis in the field of law: an approach to how this battle against modernity can unfold in the legal field. It involves fighting ideals such as universalism, the centrality of the individual and freedom, the democratic idea of equality, the primacy of reason, and the ideal of the reign of law and peace. In this last case, perhaps the greatest difficulty is even realizing that one is on the battlefield. Especially in the legal world, the concepts and theories about legal institutes are offered to the student and legal professionals on a balcony available to the customer, where one can choose a certain product, but also its opposite. In a law school, it is almost always by chance that one learns, as Michel Villey taught, that the "Right of Man [is] the great heresy of the 20th century. Based on this absurdity, the deification of Man, that is, of an abstract universal, deification of a non-existent and non-personal being" (VILLEY, 1995); or, conversely, that one is introduced to the thought of Herbert Hart and develops sympathy for his views when he states the following: "[if there is a natural right], [t]his right is one which all men have if they are capable of choice; they have it *qua* men and not only if they are members of some society or stand in some special relation to each other." (HART, 1955, p. 175). Villey to Hart, Hart to Villey, so what? The trunk of legal concepts is at the disposal of future operators of law. It is often said that legal theory is an art. Yes, we agree: it is a *prêt-à-porter* art. As an art, its dignity is certified by the strength of the academic community and the legal professionals who make use of it.

In this sense, a recent article published by the American jurist and Harvard Law School professor Adrian Vermeule (VERMEULE, 2020) caused some perplexity in legal circles in general. He revealed himself to be a researcher imbued with the messianic task of restoring to the law its dignity lost by the liberal lure whose roots lie in the Enlightenment. What was the reason for the astonishment of many? The sky of concepts was unveiled by the reality of the reasons that nourish it. To the anodyne of the Acacian discussions was revealed the political project of art. Then, many will reply: ah, but you cannot throw the baby out with the bathwater! Keep the conceptual instruments, purify the ideology! However, as we will try to show, in normative theories it is almost always impossible to separate the two. And this baby, which is about to be born and blossom soon, is inseparable from the bathwater that nourishes it.

Let us retrace, then, in the first moment, the path of the sky of Vermeule's concepts and their idiosyncrasies.

In *Law and the limits of reason,* published in 2008, Adrian Vermeule (2008) investigates what institutional arrangements would maximize the epistemic quality of law. Or, in other words, what would constitutional law look like if the authority to make constitutional norms were reallocated based on the epistemic capacities of institutions and if institutions themselves were redesigned to enhance epistemic performance? Briefly, his answer points to what he calls the Benthamian project, which consists in betting on the codification of constitutional law itself. According to Vermeule, a great deal of the American constitutional law is found not in the constitution itself, but in the United States Reports, i.e. the reports containing the constitutional

[8] There is, of course, a long discussion about the differences and shadings between the nature of the modern and Enlightenment project that we cannot comment on here. On the intersection of this project with liberalism, in a response to its critics, see Holmes (1996).

decisions of the Supreme Court. Contrary to common opinion, the American constitutional system is not an unwritten constitutional law in the form of constitutional conventions or customs. A judge-made law, as is the case in the United States, does not entwine with assumed and shared normative social practices. This new version proposed by Vermeule of a "Constitutional Code" would move constitutional law from the penumbra of United States Reports, or a Constitution grounded in the common law tradition, into the realm of positive legal instruments, in particular. Vermeule argues that Hart's argument about the inability of legislators[9] to be able to unambiguously anticipate, through general normative standards, the complexity of future facts and our relative ignorance of the purposes of such standards, must also be extended to the activity of judges, unless they are not human (VERMEULE, 2008, p. 190). The limits of reason, and our inability to "anticipate the future" in an environment of constant and accelerating change, reveal the advantage of legislation over the common law.

When it comes to the solidity of a constitution, the same argument follows. Constitutions work best when they are more like ordinary laws, i.e. relatively detailed and easy to be modified. Here are combined non-epistemic reasons—the durability of a constitutional text—and epistemic reasons—constitutional law becomes more like a code, more flexible due to the lower relative costs of changing laws over time.[10]

The 2011 book already mentioned, written together with Eric A. Posner, *The Executive Unbound*: *After the Madisonian Republic*, establishes the argument that strong presidentialism is inevitable in the modern world. As the authors remind us—and this point is crucial—, besides devoting special attention to moments of crisis, their theses are not limited to these periods, hence crises merely represent the borderline case of extremely rapid changes in the political environment that exacerbate law's inability to constrain the executive. This inability dynamic is equally present in normal times. Paraphrasing at this point Carl Schmitt[11], they assert that legality, more than legitimacy, is the key factor of authority and power in an administrative state.

"The last and greatest triumph of legalism was that law deposed itself", Vermeule states in the introduction to his book *Law's Abnegation: From Law's Empire to the Administrative State* (VERMEULE, 2016, p. 2). This means that the reasons of law, understood through correction and justification, have pointed to the abnegation of law in the face of the administrative state.

We have seen above Vermeule's (not always) gradual conceptual progression: the inability of a theory based on a conception of the rule of law to account for the complexity of the contemporary administrative state. One expression spearheads the whole process, namely that of exception. Before we proceed, we shall try to follow the lesson of Thomas Hobbes, who in chapter XLVII of *Leviathan* states:

[9] There is a lack of clarity here in Vermeule's text about the exact understanding of the origin of legislative acts. They are often attributed not only to the legislature, but also to the actions of the executive and agencies of public administration. As we shall see, this ambiguity dissolves throughout Vermeule's work to converge almost exclusively, or precipitously, on the head of the executive. An indication for this successive concentration of the production of law in the executive sphere can be found already in his 2007 book *Terror in the Balance: Security, Liberty, and the Courts* in which he states: "In modern terms, Schmitt has a few useful points—most important, that emergencies are hard or even conceptually impossible to define *ex ante*, that emergencies must be governed by *ex post* standards, rather than by *ex ante* rules, and that liberal legalists are addicted to process but tend to ignore or to underestimate the costs of process, including the opportunity costs of forgone government action in emergencies." (VERMEULE, 2007, p. 38-9)

[10] Here another line of inquiry is offered: to determine the exact content and meaning of the *epistemic* character of law. Although not sufficient, such scrutiny could unfold into investigations on the meaning of the concept in its political and juridical dimension. It is not fortuitous that Condorcet's theorem—and work—is a point on which both Vermeule and democratic theorists devote attention.

[11] Chapter 3 of the book contains a section entitled "Why a Schmittian administrative law is inevitable" (POSNER; VERMEULE, 2011, p. 103).

> Cicero maketh honorable mention of one of the Cassii, a severe judge amongst the Romans, for a custom he had, in criminal causes, (when the testimony of the witnesses was not sufficient,) to ask the accusers, *cui bono*; that is to say, what profit, honour, or other contentment, the accused obtained, or expected by the fact. For amongst presumptions, there is none that so evidently declareth the author, as doth the benefit of the action. (HOBBES, 1996, p. 457)

Thus, the leitmotif of our following analyses of Vermeule's more contemporary texts is the question: *Cui Bono*?

What defines Vermeule's position toward modernity and the Enlightenment, real or imagined, consists of hostility, despite an unacknowledged seduction. Let us begin with his article "Beyond Originalism", published in 2020 on the legal texts website *The Atlantic* (VERMEULE, 2020a). According to Vermeule, going beyond originalism means abandoning a conservative strategy of interpreting legal texts, especially constitutional ones; in short, it consists of claiming that the meaning of the American Constitution was fixed at the time of the Constitution's enactment. According to him, this strategy—correct in times adverse to conservatives—now constitutes an obstacle to the development of a more robust and substantive conception of constitutional approach and interpretation. As he states, this strategy can be called the "common-good constitutionalism". And such a strategy would already prove victorious, for the reconstruction of judicial power has advanced far enough that legal conservatism remains a potent force, rather than an eccentric vision. And it is victorious whether or not President Trump is re-elected (idem).

Common-good constitutionalism is radically distinguished from legal liberalism or libertarianism insofar as its main goal is not to maximize individual autonomy or minimize the abuse of power (an incoherent purpose, according to Vermeule), but to ensure that rulers have the power necessary to govern well.

The vast bureaucracy created by liberalism for the illusory purpose of depoliticizing the exercise of the acts of government now turns to new purposes, becoming a valuable instrument for restoring a substantive politics of the good (Cf. VERMEULE, 2018). Liberalism, having relentlessly atomized the intermediate institutions of civil society—churches, clubs and institutions, neighborhoods, families—, no longer has a stable substrate on which to stand. It is necessary, then, to reintegrate the state from within, through the efforts of agents who occupy strategic positions within the shell of the liberal order.[12]

And who would these "insiders" be? They would be, for example, St. Cecilia and St. Peter. The first one because, forced to marry against her vows, she converted her pagan husband; their martyrdom helped trigger the explosive growth of the early church. The second because, at the end of the Acts of the Apostles, he preached the advent of a new order from the very urban heart of the empire.

Such integration establishes from within a new order, the order of the common good, in which the emphasis is not on freedom as an abstract object of quasi-religious devotion, but on particular human liberties whose protection is a duty of justice or prudence on the part of the ruler (VERMEULE, 2020).

[12] This is one of the points that runs parallel to the already anticipated communitarian, participatory, or even republican critiques of liberalism (perhaps it would be more appropriate to say a *certain dimension of a certain liberal tradition*). In this sense, it is worth noting how here there would be a certain symmetry of vocabulary between conservatives and communitarians, participatory or republicans in their critiques of the relationship between liberalism, subjective rights, and the bureaucratic dimension. For example, Bellah (1985) suggests to us that reducing society to an enterprise aimed only at securing individual rights may result in a kind of mere "huddle" of privatized people whose risk is to be swallowed up by an "administrative despotism" or, in MacIntyre's (2004) terms, a "bureaucratic individualism." See the underlying similarities that can be glimpsed with the terms expressed in the following note. Obviously, although we cannot do so in the scope of this text, it is necessary to investigate to what extent and in which direction the sequence of the argument distances the positions.

The fair authority implemented by rulers may be exercised for the good of the subjects, if necessary, even against the subjects' own perception of what is best for them. Now, since it is legitimate for rulers to pursue the common good, constitutional law must elaborate subsidiary principles that make this rule effective.

Finally, the fair authority that implements fair rules does so through the principles of solidarity and subsidiarity. In other words, authority is not vested in and exercised for the benefit of individuals taken one by one but on behalf of the community and the subsidiary groups that comprise it (churches, clubs, institutions, neighborhoods, and families—the traditional family, of course). Rights, therefore, are subject to the restriction that government may prescribe fair rules based on the common good for the general good of the whole. Solidarity and subsidiarity, taken as a trump card of individual rights and as instances of the common good, are recurrent themes in the doctrine of the Catholic Church. We can find their description in the Compendium of the Social Doctrine of the Church (VATICAN, 2004). Solidarity is defined as the commitment to the positive contribution of seeing that nothing is lacking in the common cause, and also of seeking points of possible agreement where attitudes of separation and fragmentation prevail. It translates into the will to give oneself for the good of others, beyond any individual or private interest. Subsidiarity, in turn, is understood positively as economic, institutional, or legal assistance offered to smaller social entities, implying a corresponding series of negative repercussions that require the state to refrain from anything that would actually restrict the existential space of the smaller essential cells of society. Their initiatives, freedom and responsibility must not be supplanted.

Vermeule (2020) argues that one could imagine a world in which agencies of public administration had discretionary power to appeal to religious values as justification for their action, where laws were silent or ambiguous. If it is legitimate for agencies to appeal to the "political philosophy" of the incumbent administration, why should religious values be on a different basis? After all, Vermeule concludes, all political conflicts are ultimately theological.[13]

In common-good constitutionalism, the authority of a powerful presidency would replace a powerful bureaucracy. As we have seen, such authority has the legitimacy, rather than the legality, to convey such values. Now here's the icing on the cake: the common-good constitutionalism is inspired by the *ragion di stato* (reason of state) theory of early modernity. Despite the connotations that have remained attached to its name, Vermeule claims, this theory is by no means a tradition of unscrupulous scheming. Let us then turn to the analysis of how our author sees the contemporary administrative state as legitimated by the reason of state, that is, what substantive values guide it.[14]

The state, according to Vermeule, must enjoy the authority to curb the social and economic pretensions of urban-gentry liberals who so often place their own satisfactions (financial and sexual) and the good of their class or social milieu above the common good. His common-good constitutionalism rejects liberalism as a political philosophy, preferring hierarchy to egalitarianism and autocracy to individual rights.[15] The modern secular nation-state is preempted in favor of something more akin perhaps to confessional states.

[13] To put it concisely, the idea of a Political Theology embodies the denunciation of the weakening or even annihilation of the properly political sphere carried out by modernity. The Modern State, realizing the ideal of the rule of law intrinsically linked to positivism, legalism, normativism, parliamentarianism, and liberalism, depoliticizes the State. The Enlightenment condemns and destroys politics. Political liberalism consists only of an economic or administrative liberalism. Faced with it, says Carl Schmitt, quoting Donoso Cortés, "[...] the hour of the last combat had come. In the face of radical evil there is only dictatorship." (SCHMITT, C. 1988, p. 74). Reinvested from the theological sphere, politics finds its legitimacy again and becomes the place of absolute good and radical evil, of pure and impure.

[14] We will return to the subject of the reason of state later on.

[15] Here is another inflection point between different approaches facing the nature of individual rights in relation to liberalism, capitalism, and their consequences for the democratic project. For an approach to the dissociation and tension

The liberal economic-technical state then turns out to be self-defective, as it would rest on defective psychology and anthropology. The role of the Church in the establishment of this illiberal society would be similar to that of an ark: "My suggestion, which is consistent with Schmitt's vision, but goes beyond what he articulates, is that the Church serves as a kind of ark, whose vocation is to preserve the living tradition of the Verbum Dei amidst the universal deluge of economic-technical decadence, and the eventual self-undermining of the regime" (VERMEULE, 2017). Also according to Vermeule, liberalism insists on the claim that the only political alternatives to liberalism are sectarian strife, communism, or fascism—but especially fascism—even though we realize that there are stable, peaceful, non-tyrannical political regimes around the world that are not liberal. Non-liberal parties have achieved electoral success by winning parliamentary majorities and referendums or at least changing the terms of debate in Germany, Austria, Poland, Hungary, France, the United Kingdom, and the United States.[16]

Evidently, the critique that underlies the intended illiberalism of the common-good constitutionalism is addressed to a supposed oligarchy formed by technocrats supported by a globalist and multiculturalist ideology.[17] The values of this constitutionalism sustained by the legitimacy of governmental action should be given free rein, i.e., it should be freed from the constraints of the legality of the liberal rule of law.

On July 28, 2018, on the occasion of the twenty-ninth Bálványos Summer Open University and Student Camp, Viktor Orban, Hungarian Prime Minister, spelled out his model of "Christian democracy" as opposed to "liberal democracy". He said:

> Let us confidently declare that Christian democracy is not liberal. Liberal democracy is liberal, while Christian democracy is, by definition, not liberal: it is, if you like, illiberal. And we can specifically say this in connection with a few important issues—say, three great issues. Liberal democracy is in favour of multiculturalism, while Christian democracy gives priority to Christian culture; this is an illiberal concept. Liberal democracy is pro-immigration, while Christian democracy is anti-immigration; this is again a genuinely illiberal concept. And liberal democracy sides with adaptable family models, while Christian democracy rests on the foundations of the Christian family model; once more, this is an illiberal concept. (ORBÁN, 2018)[18]

between democracy and individual rights and its impacts for debates on the crisis of democracy and the promotion of an illiberal democracy framework, see Mounk (2018).

[16] There is a vast literature in political science linking the growth of small parties to presidentialization. Beyond the problems exogenous to the political system, such as the growing complexity of social relations as we have already pointed out, as well as the nature of proportional representation, the proliferation of small parties with very diverse agendas makes it difficult to conduct majoritarian governments, which reinforces the need for strong presidents. A second task concerns understanding the relationships between party fragmentation and the growth of extremist and anti-establishment parties on the right and left. A good entry to this debate can be found in Poguntke and Webb (2005), but especially in Chapter 15: *The Presidentialization of Contemporary Democratic Politics: Evidence, Causes, and Consequences*.

[17] As we highlighted above (see footnote 5), one of the ways to characterize populism is its nationalist character, on the right and left, accompanied by a critique of liberal economics. To some extent, such positions could be associated with changes within capitalism and the implications for national economies. In an expression that has come to be employed, populists would speak to the hearts of *the losers of globalization*, generally white men who worked in industry positions that were eliminated by automation and/or migration of industries to peripheral markets, with the adoption by progressive sectors of a liberalizing economic agenda not being enough, see Fraser (2019), Streeck (2018, 2019). Moreover, although the thesis is disputable, we should also consider a progressive distancing between the grassroots of labor parties of pro-worker agendas and their party summits that have urbanized as they start to advocate no longer a redistributivist agenda, but an identitarian one (LILLA, 2018).

[18] Ivan Krastev (in GEISELBERG, 2019, pp. 123 et seq) explores Orban's discourse vis-à-vis the challenges posed on liberal constitutionalism by principles of a majoritarian politics, taking into consideration the unfolding of the migration crisis for the discourse of populist leaders.

In this scheme of "rights", the so-called fundamental rights or basic freedoms have only an instrumental value. They are only viable in view of the preservation of national identity. Political life is then ordered by a tradition-inherited conception of the good and has preservation as its common purpose.

Then, as we followed the unfolding of Vermeule's juridical-political thought, we saw how an initial investigation on the epistemic uncertainty about the privileged institutional place able to "produce" the right gave way, gradually, to a substantive/comprehensive conception of good that, denouncing the subliminal liberal theology, intends to occupy with legitimacy not only the public space but the preference in the fight for the good. At this point, we find the apex of Vermeule's thought, namely his recovery and improvement of the notion of Reason of State, as developed by Giovanni Botero (1544-1617) at the end of the 16th century (BOTERO, 2009). The purpose of such rescue is to justify the supremacy of legitimacy over legality, of decision over the slowness and excessive political cost of parliamentary deliberation; in short, of the common good over liberal theology.[19] Therefore, this concerns the fair exercise of authority through the promotion of an objective conception of the good. Thus, since it is legitimate for rulers to pursue the common good, constitutional law must elaborate subsidiary principles that make this rule effective. We have already seen such principles: fair authority, hierarchy, solidarity, and subsidiarity. The general clauses of a constitution, such as those, for example, that state that it is the task of the political order to guarantee the general welfare and tranquility, are in turn an excellent opportunity to establish the principles of the common-good constitutionalism.

Now, if the reason of state is conceived as referring to a law superior to those that ordinarily govern the state, because its objective is its conservation or survival (peace, justice, abundance, health, and safety, in Vermeule's own words), the difficulty consists in knowing what the interest of the state is. Who has the authority to determine it? Does this authority possess a political foreknowledge that remains inaccessible to common reason? Is this rationality above the deliberative capacity of a parliament? To speak of state reason means to suppose that there is a dimension of reality and politics that escapes common reason. Therefore, the practices of state reason imply a suspension of the rule of law, which, of course, is not a problem for Vermeule. His thesis of exceptionality, as we noted above, is not limited to moments of crisis, urgency, and unforeseeable circumstances that require recourse to the reason of the state and imply an occasional, partial, and provisional suspension of the normal procedures related to the rule of law. The superiority of legitimacy over legality implies the superiority and emancipation of the logic of power over that of right. Indeed, the very idea of common-good constitutionalism is in dispute in democratic societies. Thus, to want to invoke the uniqueness of a conception of good seems to have the function of imposing a private interest of a few, even if they correspond to a considerable portion of society. A new caste of masters of the state thus emerges.

III. Concluding remarks: Unveiling a research landscape.

As we anticipated, more than a finished result, this article aimed to propose the script of an investigative journey by identifying key concepts, illuminating difficulties, and, above all, tracing what seems or could be the common root of two complementary projects: that of illiberal democracy and that of common-good constitutionalism. This is the centrality of Schmittian thought for the argument outlined here, even though we did not propose to develop a careful and systematic exegetical analysis of his writings. Recognized by his reflections on the philosophy of law, Carl Schmitt has been increasingly reclaimed by democratic theory, aiming to offer theoretical categories that allow us to understand ongoing developments in contemporary democracies. Moreover, more than the isolated analyses in one field or another, Schmittian concepts

[19] The set of theses and arguments, for the sole title, makes evident the Schmittian legacy for the structure of Vermeule's argument.

offer us a key that allows us to switch between one dimension and another of the theoretical pillars and principles of a rule of law and a democratic state. Such a picture is drawn even if the authors examined have not been producing an intentional intellectual debate, as well as the theoretical arrangement that harnesses the projects of the political actors that have been implementing them, whether they are aware of such agency or not. In any case, the following challenges for future conceptual analysis are on the horizon:

1. Close examination of the distinctions between the concepts and empirical characteristics of populism and illiberal democracies;

2. A thorough exegesis of the course and influence of Schmittian thought on the conception of illiberal democracy guided by decisionism and majoritarian principle, on the one hand, and, on the other, on the conception of common-good constitutionalism;

3. Careful reconstruction of the anti-liberal and anti-modern tradition that, in the course of this article, found its symbolic expression in excerpts from Schmitt's work;

4. Investigation of the ambiguity that characterizes the vocabulary and theses shared by a so-called progressive agenda in the 1990s, which also announced the crisis of democracy, and is currently revitalized by conservatives critical of democracy and the rule of law.[20]

Although, for now, the presentation of what we call a letter of intentions or map for future research is, to a certain extent, partial, it is an important outline of a dense forest we must enter. This initial approach, if not revealing everything, at least lets us glimpse the paths to be explored in the effort required to diagnose the possible theoretical roots, sometimes common, to apparently disconnected discourses in the contemporary public scene. Discourses whose rhetoric has the power not only to propose but also to promote severe deformations in the architecture of liberal democracy and constitutionalism. The unveiling of this dense forest will lead us to pay attention to simple details. These are details of a reality that, although it may appear chaotic, should awaken our mistrust, so that we can discern the facts in their minutiae and expand the strength of our souls, because, otherwise, we may become one of those invited to "bugger off".

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[20] Catherine Colliot-Thélène draws attention to this point in the afterword to the Spanish translation, published in 2020, of her book *Democracy and Subjective Rights: Democracy Without Demos.*

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