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Historical Arguments to Distend the Relationship between Constitutionalism and Democracy

Argumentos históricos para distender la relación entre el constitucionalismo y la democracia

Leonardo García Jaramillo

PhD in Law, Pompeu Fabra University (Barcelona). His latest book: Ronald Dworkin. Una biografía intellectual (Madrid, Trotta). Professor of the Policy and Development Area, School of Finance, Economics and Government, Universidad EAFIT (Medellín). lgarciaj@eafit.edu.co
https://orcid.org/0000-0002-8721-2342

Abstract

In the past, there seemed to be no more important mission to philosophers of law than taking a stand in the debate between law and morality. Nowadays, constitutionalists are required to take a position in the conflict between constitutionalism and democracy. Specifically, judicial review at the level of normative theory that best corresponds to adopted institutional arrangements that, in turn, allow it to be instrumentally justified. It would even be an anachronism to ask whether judicial actions motivated by an activist decision-making philosophy have brought (in a stable and democratically responsible manner) benefits in terms, for example, of eradicating or reducing culturally rooted forms of discrimination. Latin American constitutionalists have neglected in general contributions from authors of liberal political thought, such as Benjamin Constant, to contribute to the defense of these theses. This article is headed in that direction.

Keywords

Constant, constitutionalism and democracy, popular sovereignty, judicial review.

Resumen

Entre los filósofos del derecho de hace algunas décadas parecía no haber tarea más importante que adoptar una posición en el debate entre el derecho y la moral. Entre los constitucionalistas de la actualidad ha resultado forzoso, a su turno, posicionarse en la tensión entre el constitucionalismo y la democracia, en particular, en su materialización más conspicua, como es el control judicial de constitucionalidad sobre leyes y políticas. Este posicionamiento obliga a adoptar y defender una teoría normativa que mejor se corresponda con los diseños institucionales implementados que, a su vez, permitan justificar de manera instrumental dicho control. Los constitucionalistas latinoamericanos han acudido, en el ámbito pedagógico, doctrinario y jurisprudencial, a fuentes primarias bien conocidas para defender la tesis favorable sobre el control judicial. Han descuidado quizá aportes que podrían realizar autores históricos del pensamiento político liberal, como Benjamin Constant, para contribuir a defender dicha tesis.

Palabras clave

Constant, constitucionalismo y democracia, soberanía popular, control judicial.

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I. NON-IDEAL POLITICAL THEORY AND RATIONALE FOR A JUDICIAL REVIEW

Latin American political philosophers and constitutional theorists have been increasingly concerned with questions of "non-ideal" political theory, especially the institutional implications of the tension between constitutionalism and democracy.[1] The most relevant expression of this tension is the favorable and skeptical positions regarding judicial review, both at the level of the normative theory that best corresponds to adapted institutional arrangements that, in turn, allow it to be instrumentally justified. They share the concern expressed by Waldron in Political Political Theory (Waldron, 2016), according to which political theory should pay more attention to structural, constitutional, and institutional questions of politics, instead of continuing to be dazzled by the attractive gloss reflected by normative arguments and conceptual analysis. The work of several political philosophers has been paying closer attention to local yields of political and constitutional theoretical paradigms, considering that, especially the latter, have assumptions and conditions of possibility deeply anchored in their own institutional and cultural origin contexts. Based on a hermeneutic method, and primary sources, in particular the contributions of Benjamin Constant, this paper aims to sustain a strong version of judicial review of laws, policies, and administrative practices[2].

In times of the constitutional state, the court's powers have acquired an additional dimension to "negative legislation", of Kelsenian roots.[3] The possibility of invalidating laws, policies, and administrative practices for disproportionately abusing constitutional rights is a necessary condition to justify and defend the validity of the Constitutional State. By a positive, or activist, dimension[4], a more proactive, although exceptional, intervention of the court is required, prompting or ordering remedies to the legislature and government agencies in the development of a mandate arising from the constitution axiological project, the ideological model of the rule of

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1 On the growing interaction between empirical studies and normative theories within deliberative democracy, see (Thompson, 2019).

2 Since there is no subject matter (laws, decrees, or other norms) on which to carry out judicial review over *absolute* legislative omissions, the proactive judicial function can only proceed in cases of *relative* legislative omissions where laws or decrees on a specific matter present problems of effectiveness in the achievement of their own objectives or coordination among executing State agencies.

3 The Court is a negative legislator when it annuls a law, its judgment has the same general nature as the enactment of a law by the legislator. "The annulment is, in effect, only an enactment with a somewhat negative sign." (Kelsen, 2011, pp. 275 and 22).

4 The negative function of a reactive nature -ruling as a direct reaction to an unconstitutional piece of legislation- is not, in general, an expression of an activist judicial philosophy but of the ordinary fulfillment of the function of safeguarding constitutional superiority and integrity.

law with social provisions, and the material normative density of basic rights. The expressions of authoritative judicial activism, by the positive dimension of judicial review, have been, fundamentally: the constitutionalization of the legal system and the social and cultural subsystems; the judicialization of politics (Hirschl, 2011); and the development of the material constitution normative density, extending the binding content of rights, using precedent, or creating basic rights based on a constitution systematic interpretation. Two generations of scholars already, not only in the global north but throughout Latin America, have been inspired by Rawls' work on the substantive issues of justice, and, in particular, on the aims, objectives, and ideals that a good society should seek to promote[5]. At present, however, less attention has been paid to issues related to the political process, as well as to political institutions and structures[6].

This neglect is particularly relevant in Latin America, due to the current state of its democratic systems, in general. Populism, corruption, and clientelism, as well as widespread poverty, inequalities, violence, discrimination, and poor economic performance, have meant that the traditional political classes, and the new ones that have come to power, are too weak and enjoy very little credibility. Latin American political pathologies facilitate the approval of biased measures, and the most powerful interest groups exert a pernicious influence on the political process.

In well-ordered societies, in relative terms, legal problems with deep moral undertones have usually been resolved by parliament. There is no evidence of systematic legislative omission or neglect (as in Latin American democracies). The courts in these societies do not intervene, as a rule, to *bestow* a right, but to *shape it* regarding its constitutional conformity. Abortion and egalitarian marriage in Spain, for example, were part of political platforms and then adopted as laws of parliament. To properly address the problem of judicial review foundations, it is necessary to adopt a philosophical-political perspective with historical roots. To understand the relationship between constitutionalism and democracy, it is necessary to consider its substantive and material aspects, and not only its formal, descriptive, and procedural ones.

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5 Subsequently, Sen focused his theory of social justice, in opposition to Rawls', not on the *ideal* of a just society (questioning what just institutions would consist of and identifying perfectly just social arrangements), but on investigating, comparatively, how the conditions of justice are effectively promoted in different societies, and how real advances and setbacks in terms of justice occur (Sen, 2009).

6 Waldron says in the introduction: "I hope that the chapters that make up the book will encourage young people engaged in political theory to understand that there is life after Rawls, that there is life beyond the abstract elaborations of freedom, justice, and egalitarianism", but he introduces a necessary precision in chapter 1: "I do not want anything I say here to be understood as disparaging the study of justice and equality. I have contributed to that project, in fact [...]. But I worry nonetheless that this emphasis on justice, as the central theme of political theory, is a bit biased." (Waldron, 2016).

Is it acceptable that the basic function of a constitution limits the decision-making power of citizens in the democratic process? Is liberal constitutionalism fundamentally undemocratic? Can a democratic system that hinders the will of the majority be justified? (Cortés Rodas, 2014)[7]. In Benjamin Constant's work, somewhat unexplored in this aspect, relevant arguments are wielded that contribute to the adoption of a position according to which the existence of constitutional courts in our institutional life is justified despite their cost in democratic terms.

II. IN THE BEGINNING, LIBERALS CREATED THE DIVISION OF POWERS AND SOVEREIGN POPULAR WILL

In the genesis of constitutionalism, politics is made, first, by the people when they constitute themselves as a constituent power. "The people alone can appoint the form of the commonwealth" (Locke, 1991, p. 141), and, holding that constituent power, it is the only one that can give itself a constitution and replace it with another (Sieyès, 1989). The constitution is born from the branches of public power, so it cannot be their own work, i.e. none of the branches can create it or repeal it. "No type of delegated power can modify the conditions of its delegation" (Sieyès, 1989, p. 144). The policy is made, secondly, by the three branches that represent the sovereign will of the people. The policy of the legislature consists in making the law, that of the executive in following it or applying it to particular actions or persons, and that of the judiciary in sentencing what is right in each case (Montesquieu, 1972, p. 151).

Along the lines of Locke and Montesquieu, the French Revolution and the American Independence process established that political power could no longer substantiate its legitimacy on a sovereign authority external to the people, but on one that was constituted through the free participation of the citizens.[8] According to the idea of the people as constituent power, the source of power legitimacy lies in the fact that decisions are adopted, directly or indirectly, by those to whom they are addressed, so that they are an expression of popular will and sovereignty. Two centuries later, the constitutional movements that took place in Europe, first in the second post-war period (Germany in particular, in 1949), and then with the fall of the Iberian dictatorships (Spain in particular, in 1978), established, in turn, that the legitimacy of political power could not be based exclusively on majority decisions. The change in the notion and nature of the constitution, which, to express it with Ferrajoli, gained more and more strength:

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7 I rely on the unpublished version kindly provided by the author.

8 For the influence of Locke, in particular, of his two most enduring works: A Letter Concerning Toleration and Second Treatise of Government, on the Declaration of Independence (especially by one of its five drafters: Thomas Jefferson), see: (Stern, 1966), (Maier, 1998), (Bailyn, 1992).

> [Political Constitution] It does not serve to represent the common will of a people but to guarantee the rights of all, even in defiance of the will of the people [...] The basis of its legitimacy, unlike what happens with ordinary laws and government choices, does not lie in the majoritarian consensus, but in a much more important and prior value: the equality of all in basic freedoms and social rights". (Ferrajoli, 2002, p. 203).

It is fundamental to conceive political legitimacy beyond the Weberian idea of popular acceptance, and democracy as something more than the aggregation of preferences, even if discursively shaped. Defining democracy exclusively as majority self-government implies conceiving it as the expression of a certain form of political freedom. The problematic consequences of the constitutional principle of exclusive popular and majoritarian roots, derived from an absolute way of conceiving the sovereign popular will and the legitimacy of public decisions, were manifested in the fascist dictatorships of Italy and Germany (Cortés Rodas, 2014). The liberal rule of law, without substantive limits (i.e., basic rights) that incorporated a populist constitutionalist model, was unable to prevent the access to power of totalitarianism that did not violate the strict legality of many of its acts. The conception of the negative legislator, as the constitutional justice system emerged, has progressively lost its validity in the face of the prolonged historical evidence of rights violations, by action, but also by insufficient action and inaction, protected by the general will and legitimacy understood as popular acceptance and Weberian legitimacy.

The institutional failure of conceiving law only from its real or factual nature, ignoring its ideal or critical nature (Alexy, 2004; 2008), led to a profound questioning of the theories and ideologies that underpinned constitutionalism since its genesis. It did not have to wait until fascism pushed this idea of the sovereign nature of the popular will to its limits. Constant and Tocqueville had warned that the "tyranny of the majority" and despotic government[9] represented serious threats to political freedom and democracy. They proposed, as an alternative, to articulate three fundamental ideas: the defense of political freedom required the establishment of a constitutional political order based on the systematic nexus between popular sovereignty, political democracy, and basic rights (Cortés Rodas, 2014). Freedom for Constant is "nothing more than that which individuals have the right to do and that which society does not have the right to prevent" (1988a).

Politics takes precedence over law, and the notions of popular sovereignty and legitimacy as popular acceptance have no limitations other than those that they establish, and they are, therefore, not weighed against anything: law takes precedence over politics and the limits and links that basic rights represent for the organs of the State are recognized. The theorists of ma-

9 They were thinking, respectively, of "the Terror" and Napoleonic despotism.

joritarian, aggregative, or populist democracy defend the supremacy of politics and its priority over law. On the other hand, constitutions are characterized not only by their superiority and rigidity concerning laws but also by the fact that they must be able to restrict any decisions adopted by State bodies.

III. THEN, THE CONSTITUTIONALISTS SAID: THAT VALIDITY BE SEPARATED FROM LEGITIMACY

The concept of law in the constitutional State has these two natures, real or factual and ideal and critical, which implies that State institutions must safeguard, both, the principle of legal certainty and an ideal of justice arising from the development of the material normative density of the constitution. The core element of the thesis on the dual nature of law is that, while it must express authoritative positivity and social efficacy, it must also incorporate an ideal dimension relating to its moral, substantive, and procedural correctness.

What makes a constitution democratic is not necessarily its correspondence with the sovereign popular will, nor that it is desired by specific majorities, nor the form or degree of consensus of the constituent act. What gives the democratic attribute to a constitution is that it "represents a guarantee for all" due to the set of formal and substantial conditions of democracy that have been agreed upon (Ferrajoli, 2011). Cfr. with (García Jaramillo, 2016b). The type of legitimacy inherent to the constitutional state shares a fundamental characteristic with the concepts of democracy and constitutionalism, namely its dual dimension: *descriptive, formal, and procedural*, but also *normative, material, and substantive*. The political legitimacy of judicial adjudication depends as much on procedural aspects as on the values it safeguards and the justification that can be given to the type of decision that results. Compliance with procedural rules is not justified in itself, but by the principles they safeguard. Legal science in the constitutional state acquires a double dimension - descriptive of the law as it is, and prescriptive of the law as it ought to be. The "object of theory, in systems based on the constitutional paradigm, is not only the law in force, but also, precisely, a model, or if you will, a project of law - designed by the Constitution - and therefore not only the being but also how the law itself ought to be" (Ferrajoli, 2001, pp. 60 and 62).

By the idea of legitimacy in the constitutional state, the neutrality of the jurist is renounced in favor of an attitude "committed" to the development of the values proper to contemporary constitutionalism. It is not possible to identify law in a morally uncommitted way, as the legal positivists dreamed of (in the *École de L' Exégèse* in France and the *Begriffsjurisprudenz* in Germany). An internal point of view must be adopted, with value commitments, because subscribing to the thesis of value neutrality makes it impossible to understand legal reasoning articulated with

moral reasoning. The rules of law are not like the rules of chess that can be understood without any value-based reasoning (Moreso, 2020). When law, although valid, is illegitimate because it infringes disproportionally on liberties and morality, Constant lucidly sustains that the general duty to obey it is not absolute but relative (Constant, 1988, p. 401). At specific moments, it is a moral duty to rebel against certain laws.

IV. BENJAMIN CONSTANT: POPULAR WILL AND SPHERES OF INDIVIDUAL FREEDOM

> "Majority approval is not always enough
> to make their actions lawful".
> Constant, ***Principles of Politics*** (1806)

Isaiah Berlin called Constant "the most eloquent of all the defenders of freedom and privacy", and to him, in his opinion, we owe the notion of negative liberty. This excerpt from his explanation of the freedom of moderns sums up his conceptualization well: freedom consists of:

- The right to be subjected only to the laws, and not to be arrested, imprisoned, put to death or maltreated in any way by decision of one or more individuals;
- The right of each person to express his opinion, choose a profession and practise it, dispose of his own property and even to misuse it;
- The right to come and go without permission, and without explaining what one is doing or why;
- The right of each person to associate with other individuals—whether to discuss their interests, or to join in worship, or simply to fill the time in any way that suits his fancy; (Constant, 1988b).

The political and social context of post-revolutionary France explains why Constant considered that popular sovereignty should have limits to prevent the harm to liberty caused by the unlimited exercise of power by the tyrannical inclinations of the Jacobins and the despotism of Napoleon[10]. This is the root of his liberal constitutionalist thought based on a pluralist conception of political sovereignty. Constant, for Todorov, although not invented neither the democratic principle of sovereignty nor the liberal principle of the limitation of power, had nevertheless the originality to articulate them and to do so in such a way that they could be confronted with real-life experience, and, thus, he "*gives flesh to abstractions*" (Todorov, 1999, p. 41). Constant

10 For a historical-political context of Constant's articles on constitutional matters, see Vincent (2015).

reveals their consequences and sometimes their dangers as he is one of the first and most brilliant, authors who opted for popular sovereignty respecting personal freedoms. "*In this, he is the first French theorist of liberal democracy*" (Todorov, 1999, p. 41).

When describing and analyzing the elements of popular sovereignty, Constant, above all, refines definitions, i.e., establishes what *it does not* mean. And the first thing he emphasizes is that popular sovereignty does not mean "unlimited power". To establish that the sovereignty of the people has no limits other than those it imposes on itself implies creating such a degree of uncertain power among society that it is bound to constitute an evil, regardless of on whom it is disposed. "Entrust it to one person, to several, or to all, and in any case, you will find that it is equally evil. There are burdens too heavy for human hands" (Constant, 1988a).

To a society founded on the sovereignty of the people, no person has the right to subject it to his particular will, but society as a whole does not have unlimited authority over its members. The universality of the citizens is sovereign, in the sense that no individual or group can arrogate sovereignty to itself unless it has been delegated to it. It does not follow, however, that those whom sovereignty invests with some authority can dispose of the existence of individuals (Constant, 1988a: pp. 176-177; 2019). The members of a society do not transfer, much less alienate, any of their rights to the collective entity.

Constant associates the "principle of popular sovereignty" (by which the government derives its legitimacy and authority from the people) with the "supremacy of the general will over any individual will", which must be understood in light of the statement that "there are only two kinds of power in the world: the first, illegitimate, force; and the other, legitimate, the general will" (Constant, 1988a, p. 175). If power serves a particular will, it will always be illegitimate because it will have to be based on force (Constant, 1988a). Only legitimate governmental power can generate a juridical obligation, and this power can only be legitimate if it is mediated by consent expressed in political participation. For Constant, this consent is a necessary but not sufficient condition for power to be considered legitimate, since the legitimacy of political power also depends on its limited extension. The extension of political power is not determined by it but by the protection and guarantee of basic freedoms.

Fanaticism represented for Constant one of the main risks that could undermine rights, liberties, and the division of sovereignty. Fanatics seek to impose tyranny: "They reduce the complexity of reality to a single truth, regardless of the circumstances of time and place, and they impose such a simple truth on the complex and diverse world of human reality" (Vincent, 2015). The danger of fanaticism has been best neutralized by a stable constitutional order, with rights duly guaranteed, the rule of law, and the division and balance of political sovereignty (Constant, 1988a).

One of the core elements of Constant's liberal constitutionalism is its critique of Rousseau's theory of popular sovereignty. He imposes restrictions on the thesis of sovereignty as an expression of the popular will, since, although power must arise from the will of the people, popular sovereignty is restricted by justice and rights. The exercise of power emanating from the "representative popular will" would become illegitimate if it violates individual rights and liberties. An omnipotent nation is as dangerous as a tyrant, and, in fact, more dangerous (Constant, 1988a, pp. 20-21). "No authority on Earth is unlimited," neither that of the people, their representatives, nor the law, which is simply an expression of the will of the people (Constant, 1988a), as is the constitution, which has a higher hierarchy. A significant part of human existence must remain free, independent, "*and by right remains beyond all political jurisdiction*" (Constant, 1988a, p. 31). The remaining question for our days is what course of action is legitimate when the State fails by inaction to fulfill its functions of enforcing rights, or when it directly violates them with certain laws or administrative practices. Constant follows Rousseau's ideas on the legitimacy of power arising from the general will of the people but departs from the more fundamental one -following Montesquieu- which is to submit this will to certain limits defined by justice and individual rights.

A core element of Constant's liberal constitutionalism is therefore his defense of individual rights and liberties. The law must result from popular sovereignty, that is, from the participation in its construction of all those who might be affected by it. This is a necessary condition for its validity. The restraint that, enforcing rights, judges impose on democracy, as conceived by the majority, is justified from this position because the priority of popular sovereignty over the principles of liberal and civil autonomy can lead to equating "democracy" with " majority omnipotence" (Cortés Rodas, 2014). The legal system must be able to restrain laws and politics, that is, the constitution must restrict popular sovereignty. Each of the five epicenters of public power that Constant distinguishes can review the authority of the others[11].

The latent risk of those who govern pursuing their own interests and obstructing the governed from participating in decision-making processes is reduced by enforcing measures that protect individual liberties. These include protecting access to the processes of representation and preventing a single person or body from concentrating too much power (*various types of bodies vested with different types of powers should be created*) (Constant, 1988, p. 387); and ensuring and promoting citizen involvement in public affairs by controlling the actions of representatives, the opening of public discussions, and the exercise of freedom of the press (Constant, 1988, p.

11 In addition to courts power: the "neutral" powers (monarch), executive, hereditary assembly, and elected assembly.

239). Although sovereign actions and decisions resulting from the will of the majority are affected, Constant's fundamental concern is to protect individual freedom, for which the division of powers, the control between them, and the ability for review are among the most effective instruments available to the government of a country.

In Constant's pioneering proposal to articulate popular sovereignty, democracy, and individual rights, we already find what will be called later the "inviolable frontier" (Bobbio, 1997), "the banner preserve" (Garzón Valdés, 1989), or the "undecidable sphere" (Ferrajoli, 2001b)[12]. The sphere subtracted from majority power is shaped by legislative and judicial rights interpretation and construction: "individual freedom, religious freedom, freedom of opinion, which includes the right to its free dissemination, the enjoyment of property, the ***guarantee against any arbitrary act***" (Constant, 1988, p. 14. Emphasis added). Any exercise of political authority carried out by the majoritarian popular will that violates the spheres of individual freedom is illegitimate.

The restriction to the sovereign popular will is constitutionally enshrined in the respect for individual life and autonomy, that is, not only in the guarantee of avoiding coercion but also in being able to govern oneself[13]. In the sense of the tension between constitutionalism and democracy, ***already at the beginning of the 19th century***, Constant had pointed out the problems that could result from implementing populist constitutionalism, according to which the constituent power can modify any constitutional principle. According to Constant, it is a necessary, but not a sufficient condition for the proper functioning of liberal democratic regimes, that power be legitimate ***in its origins*** since it must also be legitimate ***in its exercise.***

For the enjoyment of individual freedom, the free and habitual exercise of political freedom must be protected, which reinforces the capacity and will of citizens to protect their freedoms, in general, and the institutions that guarantee them. The free and habitual exercise of liberties is the surest means for the moral improvement of individuals (Constant, 1988b).

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12 Although these are conceptualizations that fundamentally converge, Ferrajoli himself argues some differences (Ferrajoli, 2008). See also (Bovero, 2008).

13 Berlin's theorizing on positive liberty contributed to the dogmatic construction of autonomy as a fundamental right by the Colombian Constitutional Court. Berlin stated, as quoted in C-355/06: "I wish my life and decisions to depend on myself, not on external forces of whatever kind. I wish to be the instrument of my own, not of other men's, acts of will. I wish to be a subject, not an object; to be moved by reasons, by conscious purposes, which are my own, not by causes which affect me, as it were, from outside. I wish to be somebody, not nobody; a doer - deciding, not being decided for, self-directed and not acted upon by external nature or by other men as if I were a thing, or an animal, or a slave incapable of playing a human role, that is, of conceiving goals and policies of my own and realizing them. (...) I feel free to the degree that I believe this to be true, and enslaved to the degree that I am made to realize that it is not". (Berlin, 1993).

Several prominent authors, such as Gargarella, Alterio, and Linares, following the Western constitutional canon, so revered in the region (Waldron, Ely, Tushnet, Rosenberg), consider that democratic constitutionalism with strong judicial review is essentially anti-democratic. For Linares, for instance, if the constitution is rigid and a strong model of judicial review is enshrined, i.e., one that empowers the court to repeal laws issued by parliament (as the vast majority of countries except those that have adopted the *Notwithstanding* clause), such control implies an affront to the values that give meaning to democratic government and the values of equal dignity and personal autonomy (Linares, 2008).

Three vertexes structure the model of contemporary constitutional democracy, each of which represents an ideal: the honoring and protection of human rights, the substantive notion of the rule of law, and democratic self-government (Moreso, 2020). This model displaced, in theory and practice, the justification of the State centered on the idea of formal democracy, that is, it rejected the thesis of the omnipotence of majorities, even after deliberative processes. Those who defend a formal conception of democracy tend to identify it only with the power of the people, with the will of their representatives, and therefore oppose any instrument that restricts it. The theorists of majoritarian or aggregative democracy support the omnipotence of parliament, which implies the supremacy of politics and its priority over law. This trivializes the dimension of law as a means of guaranteeing basic rights (Ferrajoli, 2011, Vol. I).

Contemporary constitutional democracy embraces the thesis of the priority of law over politics, of basic rights over majoritarian rule, which implies that constitutional courts can annul acts of the legislative branch of government that violate essential constitutional norms. To guarantee democracy it is necessary not to take the constitution away from courts (Tushnet, 2000), but to take the constitution away from majoritarian power to shape the legal order and determine policy reasons. Approaches such as Constant's contributed to sustaining a conception of constitutional democracy incapable of being identified only, or even essentially, with majority will.

Politics is an expression of the will of the people. The ideal of politics is to fulfill the principle of collective self-government. There is no other foundation and reason for democracy as a form of government than to guarantee it to the greatest extent possible. This principle justifies the existence of institutions that create binding norms that must reflect individual preferences, and general perspectives on the type and extent of the rights and freedoms enshrined in the constitution to make us as free as possible. This idea implies a certain type of legitimacy of this principle and justification of the power to impose norms, demand their compliance, and sanction their non-compliance. The principle of the guarantee of basic rights works in this scheme as a necessary condition for its existence, stability, and legitimacy, jointly with the ideals of the rule of law in a formal and procedural sense, and democratic self-government. The rule of law, thus

understood, as a legal form of constitutional democracy, implies that constitutional courts must annul legislative or political pieces whose means intensely and unjustifiably affect the essential core of basic rights, are ineffective in achieving the stated constitutional end, are unnecessary due to the existence of alternative means less harmful or are disproportionate due to the slight importance of the end that the law sets out about the serious interference that it supposes on other constitutional principles or assets.

The validity of the law is subject, both to compliance with constitutional principles protected by rules of legislative procedure -which seek to organize and ensure the manifestation of the will of the majority-, and to the respect of basic rights. From this premise, procedural and substantive limits and links are formulated (Ferrajoli, 2011. Vol. 2, pp. 10 et seq.). If we accept this premise, we will be forced to recognize that there must be *some degree* of judicial review of the constitutionality of laws, since, unfortunately, not only laws that violate the rights of political expression and participation are issued, but also laws that, for example, violate social rights progressiveness, rights to equality. On the other hand, as well, laws very often fall short of dismantling discriminatory structures of a legal, social, or administrative nature. The purpose of the constitutional State is to guarantee the effective enjoyment of rights, which constitute the core of the constitutional order. Laws but also lack of action in the face of historical, social, and cultural inertia, straightly violate constitutional norms.

To guarantee genuine democracy, it seems mandatory to incorporate a robust, but also proactive, system of judicial review[14]. That is, where the courts have the power not only to invalidate laws or some executive decrees ("legislation of the first order", according to Waldron [2022]) for infringing constitutional norms, but also to issue complex orders, to declare unconstitutional states of affairs, and to take an activist role.[15]

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14 As critics understand it. In his opinion on *Dobbs* decision, Waldron (2022) defined the strong model of judicial review of legislation as a system where a court may determine that a piece of legislation (law or article) should be struck down or, even if it remains included in the codes, should not be implemented, because of its incompatibility with constitutional provisions. This strong system can be contrasted with a system of weak judicial review of constitutionality, such as review by British courts under the Human Rights Act 1998, by which a court may determine that a piece of legislation is incompatible with the provisions of that Act (issuing a Declaration of Incompatibility), but without any effect on its application or enforceability. In a similar sense, for Tushnet, courts exercise strong judicial review when their interpretative rulings are definitive, and no other body has the power to review them. Cf.: (Tushnet, 2009, p. 21).

15 In the sense of proactive, following law institutional and authoritative nature. Vid., (García Jaramillo, 2016a).

This system establishes that majorities, directly or through their representatives, lack the power to suppress or limit those fundamental principles, also by popular sovereignty, enshrined in the constitution. A proactive judicial review -a necessary evil, if you will- is justified, from Constant, by the importance of containing and channeling towards the constitutional project the expressions of popular sovereignty. From no point of view is the superiority of the judiciary over the legislature being advocated. "It only means that the power of the people is superior to both and that where the will of the legislature, declared in its laws, is opposed to that of the people, declared in the constitution, the judges must be governed by the latter" (Hamilton, Jay & Madison, § 78). Honoring the popular will expressed in a constitution implies recognizing that it must be guaranteed by a court to balance, in certain cases, abuses by action, insufficient action, or inaction on the part of state agencies.

V. CONCLUSION

Democracy is a political system that establishes principles and rules to materialize, as much as possible, the ideal of collective self-government. In the constitutional State, the thesis of the omnipotence of majorities, and the absolute priority of politics over law, has given way to the relativization of this omnipotence to recognize the tension between constitutionalism and democracy as a constitutive element of this form of State. Despite the cost in democratic terms, constitutional courts are justified in our institutional life by guaranteeing the enforcement of rights as the constitutional State's ultimate goal. Not only are theoretical issues related to safeguarding the best form of the democratic system of government, but also institutional issues of legislative omission or negligence that generate rights violations, due to insufficient action or inaction, continue to make it urgent to develop theoretically sound approaches to defuse the relationship between constitutionalism and democracy.

In times as current, of new skepticism towards the law-creating function of the judiciary, in general, and towards social rights justiciability and adjudication, for example, in particular,[16] and after the canonical works of Rosenberg, Bickel, Sunstein, and Waldron, it is relevant and urgent to revitalize historical paradigms that articulate popular sovereignty, democracy, and individual rights, as well as a rule of law substantive notion. Protecting constitutional democracy implies opposing absolute limits to majoritarian democracy, such as those defined by basic rights, which cannot be restricted by the will of any majority, plebiscite, or legislative, however deliberative, if basic rights are violated. In concrete cases of rights violations due to legislative action or inaction, in constitutional democracies, there should not be a majority objection to the institution

16 Prominently represented by the works of (Gargarella, 2021), (Atria, 2016) and (Loughlin, 2022).

that seeks to remedy it. The sovereign will of the people, expressed by a majority, must be able to be limited by rights judicially enforced mandates. The lively interest and validity of Constant's work, in part because of the current crisis of democracy and the consensus erosion about judicial review, requires that we theorize and practice alternative forms of power with a constituent dimension, less tied to the institutional status quo.[17]

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17 As Nora Timmermans (2021) states.

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