

# The Epistemological Moral Relevance of Democracy\*

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*Abstract.* The author deals with one aspect of the justification of governmental action and its product (the law). He focuses on the authoritative character of legal rule, analyzing the apparent capacity of governments to produce reasons for action not grounded on substantive moral considerations. The assumption of that capacity seems necessary in order to establish a general moral obligation to obey a government irrespective of the actions required. This question is faced in connection with the thesis that only a particular form of government, democracy, is morally justified insofar as it rests on legal rules issued by a legitimate source.\*\*

## 1. The Moral Superfluosity of Government

The purpose of this paper is to try to show that there could be a justification of democracy, understood as the majoritarian decision-making procedure, and in doing so I present that procedure as a solution to some problems which arise in connection with the foundation of political obligation.

In the midst of the hard controversy about whether to enact a law allowing divorce, which dominated Argentina's political scene some time ago, quite recently a man who leads an extremely conservative group argued in a T.V. interview that since divorce is wrong according to the moral law, he did not see any reason for abiding by a possible contrary result of some plebiscite (which he was, nevertheless, recommending in order to convince those who do believe in democracy that the majority opposes divorce).

Although this person is not a philosopher, I think that his stand illustrates the tension between philosophy – or more precisely, moral truth – and democracy, to which some authors, like Michael Walzer (1981) have alluded.

\* This article owes a great deal to many people, but especially to Owen Fiss and Thomas Nagel.

\*\* Abstract by M. La Torre.

While the theory of democracy rests on the view that the people have a right to make laws even if they make them wrongly, the philosopher that Walzer deems "heroic" argues that it can never be right to do wrong, and that anybody who knows the truth about rightness should step in when the democratic decision is wrong. The way out of this problem which is suggested is "philosophical restraint," a deference to the decisions reached by citizens that, unlike the philosopher as such, are immersed in the particularism of a certain community and enriched by its pluralism (Walzer 1981, 393ff.) But, unless this sort of immersion had some connection with a kind of higher moral truth, it is not clear why the philosopher should respect it, disregarding principles of conduct which he deems right and which constitute consequently and by definition, sufficient reasons for *justifying actions* (and not merely opinions).<sup>1</sup>

Moreover, the recommendation of philosophical restraint does not seem to take into account that it is not only the philosopher, but also the common citizen committed to moral truth, fully immersed in his community, who faces the dilemma between the dictates of that truth and democratic decisions (as is illustrated by the example I mentioned earlier). The problem does not consist only in a clash between a supposed "universal" moral truth (represented by philosophy) and democracy, but consists in a broader opposition between any moral truth (whether "particular" or "universal") and democracy. Why should we obey a democratic decision when it is wrong? I might also note that the problem Walzer speaks of can be generalized in connection with the other term of the opposition, since it does not only appear when we focus our attention on the democratic decision-making procedure but it is a manifestation of a much wider and deeper puzzle which arises in relation to government in general. Why should we obey any law that is wrong? The problem I am grappling with is not just one of justifying civil obedience, but, pushed far enough, it may relate to one of the superfluousness of law to the person who is in possession of moral truth.

The rules that a government enacts do not provide by themselves sufficient reasons for actions since they are reducible to complexes of facts – behaviours, expectations and attitudes – and no fact constitutes by itself an

<sup>1</sup> In discussing this problem as presented by Wollheim 1967, 71ff., Walzer argues that there is no potential contradiction between thinking that some principle or policy is right and thinking that it is also right to implement the (possibly contrary) principle or policy voted by the people. His argument is that the rightness of a policy may be a reason for choosing or recommending it through the democratic procedure but it is not necessarily a reason for implementing it. But if the concept of moral rightness had not the pragmatical dimension of justifying actions which accord with the corresponding principle or policy, surely there must be another concept which carries the implication and which Walzer, implicitly, applies to the policies favoured through the democratic procedures. He should have shown why this concept applies only to the democratically chosen policies and how this could be so without relying on principles (like those which justify democracy) from which moral conclusions are derived which may go against the substantive results of the democratic decision-making procedure.

operative reason for justifying an action.<sup>2</sup> Legal rules are relevant to practical reasoning when some moral principles establish the obligation or at least the permission to comply with them. This may be, in some cases, only because the enactment and enforcement of the rules constitute circumstances which alter the factual setting on which some moral normative consequences depend. Or it may be the case that that enactment and enforcement solves a problem of coordination which needed a collective decision which is, with regard to its content, morally indifferent.<sup>3</sup> But law seems to be capable of having a deeper impact on moral reasoning by generating obligations which depend on the fact that the enactment of *a certain rule* was morally required. Yet, when we attempt to morally justify rules like many of the criminal laws or those which impose family duties, in order to ground our obligation to act upon them, we come upon moral principles which prescribe us how to act independently of those legal rules. So, what is the use of these legal rules for a moral man and what is the moral relevance of the government which enacts them? The puzzling aspects of these questions lie in the fact that for legal rules to be operative, for them to complete reasons for action, it is necessary to resort to moral principles which establish the obligation or the permission to obey them; but in many cases these principles indicate by themselves how we should act, thus making the corresponding legal rules superfluous for the moral man.<sup>4</sup>

<sup>2</sup> For the problem of whether legal rules constitute justificatory reasons for action, see Nino 1984b, 1985.

<sup>3</sup> For an account of the relevance of the function of law in solving coordination problems, see Regan 1986, 15ff.

<sup>4</sup> The presentation of this problem of the superfluousness of law for the moral man seems to rely on a series of assumptions which may be contested: (i) that the moral man lives in a society in which the rest of the people are also "saints"; (ii) that the moral man knows what morality prescribes; (iii) that the moral principles to which he resorts contain substantive standards of behaviour which superimpose themselves on the content of the law. Unfortunately, an adequate examination of each of these supposed assumptions will take us very far away from the main topic of the paper. So, I am only able to say a few words about each of them in this footnote in a very sketchy and dogmatic way:

(i) For the problem of superfluousness to appear, it is not necessary that the moral man live surrounded by people who are like him. If the others are immoral, of course the moral man would accept that the law is necessary to influence their behaviour. But the question is what impact these laws would have on his own practical reasoning. The answer is very little, since the most that the moral man would admit is that since the government is necessary for inducing immoral people to comply with the principles he deems right, some unavoidable minor deviations from those principles by the legal rules should be tolerated and complied with in order to secure general obedience to what are by and large morally justified prescriptions. He himself should sometimes act upon the rules which are slightly unjust, if his conduct could serve as a general example, but only in so far as the deviation is not so significant as to weigh against the value of giving an example which may be taken into account in relation to just laws.

(ii) The statement of the problem of superfluousness actually assumes that the moral man *knows* what moral principles prescribe. The question is whether if this assumption were not made the relevance of law and government for the moral man would emerge. *In principle* (later on we will revise this assertion), the answer is negative: Why would a government have a better knowledge of moral principles than, say, philosophers, priests or simply common-sensical people? It may be that some laws are indicative reasons, in Regan's terminology (see note 5), but

Thinking of this type is, I believe, what underlies the moral attractiveness of anarchism (see, for instance, Wolff 1970).<sup>5</sup> In the end, the problem in

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this seems to apply to technical and not to moral issues, and even so it depends on the contingent fact that governmental agencies have more resources than private people for getting relevant knowledge.

(iii) The statement of the problem of the moral superfluousness of law also assumes that the moral system to which the honest man resorts to justify the law contains substantive solutions about how to act in the situations covered by those laws. How can it be otherwise? Here there are some possibilities and brief statements of why they can be dismissed:

(1) The moral principles in question could be of purely *procedural* character. Some of those principles are involved in well-known justifications of democracy and – as such – they do not seem to fulfill their role correctly; this is the case of the principle which takes into account the *consent* of the subjects of government and law: It is obvious that consent cannot justify the assumption of an obligation when one would not be free from that obligation if he did not consent. Other pure procedural principles which purport to justify government and law seem to be wildly implausible or protected from all rational appraisal; this is for example the case of those which justify government on the basis of the divine right of some people to govern.

(2) The moral principles which justify the law could not contain substantive standards of behaviour for the reason that they take into account only “formal” values, like those of order, peace, security, etc. Of course this is the Hobbesian justification of the need for a government. But if this is put forward as a moral justification of government and not as a prudential one, the avoidance of substantive standards of behaviour is an illusion: Those values would be grounded on the need not to frustrate some interests – like the interest in not being killed. However, it is obvious that the non frustration of interests is not in itself a sufficient ground of the values of peace, order, etc. and, consequently of the need for a government, since the mere existence of this latter implies satisfying certain interests and frustrating others. Therefore, when we resort to those values we do not take into account the need not to frustrate “brute” interests, but only those that should be protected. And this presupposes some principles which determine which interests are legitimate and from which substantive standards of behaviour may be inferred.

(3) The moral principle to which the honest man resorts to justify a law may be a rule-utilitarian principle which does not apply directly to actions but only to some rules which in their turn refer to them. But, as it is well-known (see, for example, Lyons 1970), this position offers a series of difficulties: If the rules to which the rule utilitarian principle refers were *ideal* ones, it is difficult to distinguish this principle from the act-utilitarian principle combined with the requirement of universalization of moral judgments; if, on the other hand, the rules were *social* rules, it is hard to justify why the utilitarian principle refers only to them – which are in the end mere complexes of behaviour and expectations – and not to other sorts of actions.

(4) The moral principles which the moral man accepts may not contain a normative solution for the case at hand since it could be a case of moral indifference or of a moral “tie,” so that the relevance of law for that man may be grounded on the need to obtain solutions when morality is silent. This is, of course, what happens in situations in which, though it is morally required to solve some problem of coordination it is morally neutral to the way in which it is solved (this is usually illustrated with the case of the direction of the traffic). But except for these cases in which law alters the factual setting of the situation (and, as Regan 1986, 18, says, may contribute only *casually* to the generation of reasons for action), it is not clear how a law can produce justificatory standards of behaviour when there are no reasons for enacting that particular law.

<sup>5</sup> The inference of anarchism from the need of autonomous acceptance of moral principles is illustrated when it is affirmed that the defining mark of the state is authority, the right to rule. So the primary obligation of man is autonomy, the refusal to be ruled; if all men have a continuing obligation to achieve the highest degree of autonomy possible, then there would appear to be no state whose subjects have a moral obligation to obey its commands. Hence, the concept of a *de iure* legitimate state is held to be vacuous, and philosophical anarchism is seen as the only reasonable political belief for an enlightened man (Wolff 1970).

These passages do not take, however, into account the following fact: It is true that there does not seem to be a moral obligation to obey an unjust law, and that when the law is just it is superfluous for the moral man. But a just law is not superfluous for the immoral man and he has

question consists in the difficulty of justifying the passage from the autonomy of morals to the heteronomy of law. The mere fact that the government prescribes us to do something does not morally justify that we do it (though it may prudentially justify it, and therefore, in some cases it may morally excuse it): The decision to obey a government must be an autonomous one, that, like any other which can affect other people, we should justify on the basis of a freely accepted moral principle. But, if this is so, to what extent are we really obeying the government and not self-governing ourselves? And if the moral man always self-governs himself, what is, for him, the moral relevance of having a government (besides solving some coordination problems or altering the factual setting).

Of course, this apparent problem has direct implications for the justification of some particular modality of government, like the democratic one, to the exclusion of others. If no government is necessary for the moral man to reach the right conclusions in his practical reasoning about fields like that covered by the criminal law, it is morally the same for him whether the government is, for instance, democratic or not. If a legal rule has a morally required content it should be obeyed regardless of its origin, since what we are in fact obeying is the moral principle which endorses that content. If, on the other hand, the content of the rule is morally abhorrent, the moral principles to which we resort to decide whether to abide by it or not would prescribe us to ignore it with independence of its origin.

## 2. The Relation Between Moral Truth and Moral Discussion

I think, however, that there is a way of overcoming these apparent problems which comes into view once we realize that they have two presuppositions of meta-ethical character which can be reasonably questioned; the first is that there is a moral system which is wholly independent of the social practices which are involved in the constitution, recognition and exercise of

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a moral obligation to obey it even when he does not recognize that obligation. It could be replied, however, that this would be all right if the only mission of the law were to tell people how they should act. But the "right to rule" also includes the right to *coerce* people into doing what is deemed to be right, and this obviously affects people's autonomy. However, coercion could be justified on the basis of moral principles that somebody autonomously accepts; even if those moral principles themselves took autonomy as a value, coercion could be justified as a way of discouraging acts that adversely affect, in a greater degree than that coercion does, the autonomy of other people (it is obvious that a man killed or maimed has a lesser capacity to choose and act upon moral principles!). See an expansion of this argument in Nino 1984a. So, a moral man seems to have a right to enact and enforce prescriptions addressed to the immoral people. The problem is, of course, that as the only requirement seems to be the rightness of the laws, an enlightened autocracy appears to be justified. *De facto* anarchism would only ensue if people differ as to their basic moral views and dispose of enough strength as to try to enforce them. But this is different to the philosophical anarchism which Wolff defends.

government, so that the moral citizen, who has to resort to it, in order to justify his obedience to the government and its laws, can reach conclusions about what he should do without taking into account those practices. The second assumption is similar to the foregoing but refers to the epistemological and not to the ontological sphere: It implies that we can have cognitive access to that moral order, which is independent of the practices involved in government and law, in a way which is also independent of those practices.

If there were no moral order independent of law, this latter would not be superfluous for the configuration of reasons for actions.

Of course this independence of the moral order is what the social variety of subjectivism, that is, conventionalism denies. But, the shortcomings of this outlook are well known: For instance, it implies that the minoritarian position in a moral debate is false by definition and, therefore, it is unable to explain how there can be a moral progress (which is given when the majority adopts what was before a minoritarian stand), thus giving place to an absolute moral conservatism.

There is another position which also denies the presupposition of an independent moral order and which might be seen as a more subtle and complex variety of social subjectivism: I am referring to the thesis which is sometimes identified as a type of ethical *constructivism* and which maintains that moral reasons are constituted through the practice of moral discussion. Valid moral principles would be those which are reached through a process of discussion which is subject to certain formal restrictions;<sup>6</sup> obviously these restrictions cannot themselves be moral if an independent moral order is not to be presupposed.

However, it is necessary to ask ourselves whether this account of the relation between moral truth and moral discussion is really sound. The conception in question sees valid moral principles as the end-result of the practice of discussion when it achieves consensus. But, what is the subject-matter of the discussion? It cannot be the moral principles themselves because that is the process of constituting moral principles. It might be alleged that the discussion is about the interests of the participants. But what aspect of those interests is being discussed? It cannot be the fact that person A has the interest in the degree 1 and person B has another interest in another degree since this is hardly a matter of discussion and, at any rate, it is hard to see how the discussion could progress if it is carried out in those terms. In fact, what is the object of discussion is the legitimacy of certain interests. Now, to speak of the legitimacy of interests implies that there are some moral principles which are valid independently of the result of the discussion. And, as a matter of fact, it is obvious that in a moral

<sup>6</sup> Moral discussion would be, under this view, a form of pure procedural justice, in Rawls's (1971) terminology since the validity of moral principles would be determined solely by the results of following its rules.

discussion we refer in a direct or indirect way to moral principles. Sometimes, the parties directly defend different moral principles, and some other times they defend different solutions which presuppose them. Therefore, a deep and enlightened moral discussion will end up referring to what the valid moral principles are which would solve the issue which originated it.

What is the criterion of validity of moral principles which is presupposed in the practice of moral discussion? I have suggested elsewhere that that criterion, which is embedded in the social practice of moral discussion is based on, besides some well-known formal features of moral principles (like universality, generality, finality, supervenience, etc.), the hypothetical acceptability of those principles, by all those who might be affected by them, under ideal conditions of impartiality, rationality and full knowledge of the relevant facts. When, in the context of a moral discussion, somebody alleges that his interest *x* is legitimate, what he means is, I think, that *x* is endorsed by a principle which everybody would accept if they were fully impartial, rational and aware of the relevant facts (probably these conditions logically warrant the achievement of unanimity which would explain why we seek their satisfaction in real moral discussion).

But, if this is so, it is necessary to reject the foregoing ethical outlook which conceives of moral principles as the result of the real practice of moral discussion. In any case, those principles would be the result of an ideal consensus to which we allude in the real moral discussion.

Does this criticism of constructivism mean that this way out of our problems – which would show the relevance that the moral discussion and, hence, the democratic procedure has for moral reasoning – fails? Not necessarily. What does fail is a form of *ontological* constructivism which conceives of moral discussion as a way of constituting moral reasons. Still we can defend a form of *epistemological* constructivism which conceives of moral discussion as a privileged way to achieve knowledge of moral reasons. This would imply overcoming our problems by way of denying not the assumption that a moral order exists which is independent of all social practice but the presupposition that we have an *independent and isolated access* to that moral order which is independent of any social practice.<sup>7</sup> The central thesis

<sup>7</sup> At any rate, there seems to be something true in ontological constructivism: Even when valid moral principles are not those which result from the real practice of moral discussion, they are, nevertheless, constituted by that practice in the sense that their validity is determined by its implicit rules (like the one about the acceptability of the principles under ideal conditions). This provokes the question about the justifiability of the practice of moral discussion itself. The short answer is that the question is meaningless. There cannot be a *moral* justification of that practice without presupposing its very rules and there cannot be either a prudential justification of it, since its rules establish that the moral principles which they define are superior to any other kind of reason, including prudential ones. What perhaps may be done is to explain the emergency of this practice in such a variety of social settings and our spontaneous tendency to participate in it. See Nino 1984a, ch. 3.

of an epistemological constructivism would be that the practice of discussion favours the *access* to moral truth.

What might be the ground for this position? It is, in my opinion, that in the practice of moral discussion we try to reproduce the conditions for reaching an ideal consensus and that the agreement we arrive at at the end of the discussion tends to reflect that consensus. The rules of the discussion which must be followed by the participants obliges them to try to detect the principles which impartial, rational and knowledgeable beings, whichever their interests, inclinations and idiosyncracies, would accept in order to solve a conflict like that which they face. In so far as many of the people involved in the conflict participate in the discussion, and in so far as they represent the divergent interests, plans of life and inclinations which could have generated the conflict, and in so far as there has been a broad debate in which the relevant information was set forth, and the people have argued in a rational way, the unanimous consensus reached in the real discussion enjoys a strong presumption that it coincides with the consensus which all those involved in those and other similar conflicts would have reached under ideal conditions. The participation in the discussion of all those who may be affected is the best guarantee that, if the rules of the discussion have been accepted, the real consensus obtained comes close to the ideal consensus. There is no such guarantee when individuals in isolation reflect about moral issues nor when discussion is limited to a few people with similar idiosyncracies. In a discussion so limited, no matter how enlightened the participants may be, impartiality is sacrificed, since the absence of many of those affected makes it probable that their interests are not given their due weight. Nobody is, in general, a better judge of one's own interest than oneself.

This view of moral knowledge does not, of course, coincide with the conclusions of ethical conventionalism: In the first place, not every unanimous consensus is valid, but only the one which is reached after a discussion in which the satisfaction of the conditions of broad and heterogenous debate, rational argumentation, full information, etc., is maximized. In the second place, in so far as it is actually impossible to satisfy completely these conditions the consensus obtained enjoys only a presumption of validity, which will be as strong as the degree to which the requirements of the discussion are met and it can always be revoked if it is shown that the result would have been different under ideal conditions.

### **3. The Relation Between Moral Discussion and Democracy**

The aim of this article is to connect moral truth with democracy through the bridge of moral discussion. In the foregoing section, I have said something about the relation between moral truth and moral discussion. Now, I must deal with the relation between moral discussion and democracy.

If the discussion through which we have a privileged access to moral principles were made part of the origin and working of the government, this government would be relevant to the assessment of moral reasons for action. And, in so far as democracy is characterized as the government of discussion *par excellence*, this view would provide a justification of democracy. In other words, we would conclude that democracy is the only legitimate form of government since only when the government is democratic is it not superfluous to those who wish to act autonomously according to morality; only democracy makes the discussions through which that morality is known an essential part of government.

But what exactly is the relation between democracy and moral discussion? A possible explanation may be this: Moral discussion is not only a method of moral knowledge but also a practical procedure for solving conflicts by means of a shared access to that knowledge; it is a social practice which is oriented to achieve unanimous consensus on certain principles which provide the ultimate justification of actions and institutions. In many cases, this consensus among those who may be affected by a measure or course of action is achieved; when this happens, the practice of moral discussion facilitates moral knowledge but also fulfills its latent social function of avoiding conflicts and facilitating cooperation between individuals with competitive interests. However, there are also cases in which moral discussion is ineffective, since there is a critical occasion on which the measure or course of action must be adopted and a unanimous consensus has not been achieved on that occasion. In such a situation, to insist on the need to reach that consensus implies favouring the individuals, who may well form the minority group, who are for preserving the *status quo*, i.e., for not adopting any decision. Therefore, in these cases a moment for adopting one or the other decision must be established and the decision procedure which is closest to unanimous consensus is the one that should be preferred, for it is closest to the ideal, that turns out to be a decision by simple majority, since the requirement of a qualified majority grants veto power to a minority. In this way, democracy as majority rule would be a substitute for ordinary moral discussion, that is, it would be a regimented form of that discussion to which we must resort when we cannot achieve consensus by the required time.

This conclusion rests on the hypothesis, intuitively attractive but not easy to argue for, that the majoritarian decision-making procedure tends to produce results which are closer to the requirement of impartiality than those produced by any other procedure.

Compare the working of the democratic process with the judicial one. Here impartiality is introduced through the qualities of one or several people who are supposed to have the moral and the intellectual capacities which lead to a fair weighing of all the interests involved regardless of who their bearers are, capacities which are reinforced by the fact that there are certain

mechanisms for preventing that there are interests of the judge himself involved in the conflicts. Some may argue that from the value of free and open discussion for achieving impartiality, the value of the majoritarian process cannot be inferred, since the former value could lead to an extension of the judicial process to the political sphere with a benefic dictator acting as a judge. But there are two obvious obstacles to this extension. First, it is supposed that impartial people tend to be appointed as judges because the procedure of selection, a democratic one, is in itself impartial. There is no guarantee that the process by which a dictator emerges promotes his impartiality. Second, unlike what happens in judicial processes, it is almost impossible to isolate the interests of the person who decides in global and large scale political issues which concern almost everyone.

So we have a procedure in which everyone is party and everyone is judge. Let us comment on this "everyone." Of course, the greatest threat to impartiality in the democratic procedure is that a stable majoritarian coalition is formed against a minority whose interests are systematically disregarded. This is a real danger, and to prevent its worst effects it is that basic rights are taken away from the democratic process so as to protect vital interests or minorities. But the danger should not be exaggerated; the great merit of a procedure of decision by simple majority is that, unlike that by a single person or by a minoritarian group, those who are interested in a certain decision try to get the adhesion of as many people as possible even when the simple majority is apparently surpassed. This is so because as a minority is left aside, its offers to some groups forming the majoritarian coalition increases and this coalition may break at the last moment. This is also the reason why, except for irrational motives like racist ones, it is difficult that there be a stable minority which the groups that are trying to form possible majoritarian coalitions do not try to entice. The more marginalized a minority is, the smaller is its price for forming part of an alternative majoritarian coalition.

Therefore, the majoritarian decision-making procedure, when it works without distortion, contains a strong incentive for each citizen trying to convince as many fellow citizens as possible of the rightness of his proposal. In these encounters, each participant is at the same time an advocate and a judge: He puts forward his own interests if he believes that they have not been taken into account in the position of his adversary; he advances his own proposal trying to convince the other that it takes into account his interests; he receives the complaint of the other if this latter thinks that his concerns have been disregarded and he must judge and argue against the proposal of the adversary. As, ideally, all this must be done publicly, or at least there must be sufficient communication between citizens, the offer that someone makes to another cannot be so centered in the interests of the two of them and so indifferent to those of others as to prejudice the reliability of the person who makes it in his negotiation with those others.

What the procedure requires of each participant is that she put forward her interests so that everyone may know whether they have been taken into account in each proposal, as well as her view about what would be the principle which strikes an impartial balance between her interests and those of the rest of the people. The need to enlist as many people as possible for her cause, together with the way in which, as we just saw, each one must negotiate that support, constitutes a strong incentive for each one to approach positions of impartiality. The collective result of this individual tendency towards impartiality promoted by the procedure of discussion and negotiation is the probability that the solutions reached be impartial. This is supported by theorems like those of Condorcet (1985) and Grofman et al. (1983) to the effect that as more people who are individually more likely than not to adopt the correct decision, adopt the same decision, under a majoritarian rule, the more likely it is that that decision be correct and that the decision of the majority is more likely to be correct than the decision of the most competent member of the group.

The procedural requirements of justifying the vote before everyone on grounds that would be accepted or not rejected by impartial, rational and relevantly informed voters, plus the need of enlisting as many adherents as possible, generates an individual tendency towards impartiality. This tendency may acquire a psychological dimension through the educational impact of the exposure to the practice of democratic discussion and decision (and the persuasion that the best way of seeming just and reliable by the rest is by being so; see Nelson 1980), but it is not necessary for the value of the procedure that the participants come to desire to act justly. It is enough that they must defend their vote before each other and that they must try to align with them as many other votes as possible.

It is not that in each individual case the solution that the majority favours be necessarily more impartial, and consequently more correct, than that of the minority. The thesis is that the requirement of simple majority promotes a process of negotiation which pushes towards impartiality and this makes the results of the collective procedure be, in general, probably more impartial than the decision which would have been reached through a procedure which gave prominence to the opinions of a person or a group.

However when the solution which triumphs has been supported by a wide majority – say 70% of the votes against 30% and not merely 51% against 49% – there are reasons to think that the majoritarian proposal is probably more impartial than the minoritarian one, since it would be difficult to enlist such a vast majority, with the risk of collapse of the coalition because of enticements from the minority, if the proposal did not take into account as many interests as possible. This is not, of course, a reason for requiring a qualified majority, since this would give veto power to a minority in favour of the *status quo*. Precisely the way of promoting the formation of great majorities is by allowing a simple majority to win. At any rate, the epistemological value

of the decision taken through a majoritarian procedure is not based on the fact that it is more impartial and thus more correct than the one which lost the contest – though in many cases there are reasons to think that this is so – but on the fact that it is probably more impartial and consequently more correct than the decision which an individual or a minority would have taken outside the democratic process.

This grounds the conclusion that the moral validity of the decisions which are taken through a democratic procedure would be of greater or lesser degree according to the degree by which the democratic procedure departs from the rules of the practice of moral discussion. From this we infer that that procedure should maximize the possibility of free, open and reflective debate prior to the decision, and the participation in it of all those concerned. (Of course, actual democracies depart a good deal from these requirements, which explains why the presumption of the validity of their results tends to be slight. This justification of democracy not only purports to give account of its value, but also to indicate how it should work in order to maximize it). The presumption will be stronger as more people concur in the same conclusion in comparison to those who back alternative solutions.

On the other hand, the obligatory quality of a decision which was backed by a slim majority is not based on its presumption of moral truth. It is grounded instead on the fact that, if we did not recognize the obligatory quality of a decision adopted by a slight majority, greater majorities would never be formed and yet it is to be presumed that they come close to the conclusion that would be reached from the moral point of view.

This view implies that democracy has epistemological value. It is a sound method of arriving at moral knowledge since it includes, as an essential component both the discussion and the majoritarian agreement, and thus brings us closer to moral truth. On the other hand, an individual who reaches moral judgments in an unreflective way or even through an isolated reflection without confrontation with individuals with different traits and interests, may not presume that such a conclusion would have been unanimously accepted by all the people involved under ideal conditions. Although it is not impossible, it is quite improbable that someone would give due weight to all the interests of everyone affected by a course of action without a previous confrontation with them. Discussion with others has also the advantage of helping us to notice the deficiencies in reasoning which lead to certain moral stands.

Even if in a particular case we are sure that the solution reached through individual reflection is right and the one democratically decided is wrong, we have reasons for following this latter since, otherwise, our last court of appeal of moral judgment would be individual reflection, contradicting our assumption that the democratic procedure of discussion and decision is, *in general*, a more reliable guide to moral truth.

This means that the moral person is generally in a situation in which, though he wishes to act on the basis of moral reasons, he does not know for sure which these are. The process of democratic discussion and decision may guide the moral person towards valid moral principles though that guidance has different degrees of certainty and is never absolutely reliable, and the possibility always remains of revising the decision reached on the basis of reflection about what the ideal consensus would have been. In many cases the reason for obeying the democratic authorities is rather weak and should be complemented with other kinds of reasons, probably of a consequentialist character. But it is also the other way around: The kind of reason we are analyzing is based on intrinsic features of democratic procedure, which give some ground to the obligation to abide by the results of that process when the arguments based on its consequences are uncertain or diffuse.

#### 4. Autonomy and Rights

How does this view give account of the apparent problem about the impossibility of moving from the autonomy of morals to the heteronomy of law, and the subsequent superfluosity of government? It seems that it overcomes that difficulty since the acceptance of democratic decisions does not imply submitting oneself to an imperative or a prescription but to admitting to be guided by an epistemic presumption. It also means that democracy is the only form of government which makes it morally relevant and compatible with the autonomy of moral reasons.<sup>8</sup>

But here another source of tension which affects the concept of moral autonomy appears: the tension between moral knowledge and moral decision. As some authors have alleged, if we reach some moral principles through some epistemic method – for example through discussion and agreement – what space is left for the decision to adopt moral principles? In other words, if morality is a matter of knowledge it seems that it cannot also be the product of autonomous decision. Perhaps the way out of this other

<sup>8</sup> Of course, this only takes into account one aspect of the right to rule, that is the right to tell other people what they should do. It does not take into account the other essential aspect, that is the right to coerce people into doing it. As I suggest in note (5) this may be justified on the basis of maximizing the aggregative autonomy of people, taking into account that wrongful acts are more deleterious to that autonomy than a certain degree of coercion which may be necessary to deter them (see Nino 1984a). Still, there is the problem of justifying the distribution of autonomy which results from the application of penalties. This justification I think is provided by the consent implied in the wilful commission of a wrongful act knowing that a penalty is attached to it (see Nino 1983).

problem would require revising the concept of moral autonomy. Autonomy would not be achieved by the mere unreflective and isolated decision to adopt a moral principle, but by the free participation in a discussion which is as broad and reflective as possible and which tends to reach a unanimous consensus or its substitute (majority agreement), without precluding the possibility of revising that result any time it can be shown that it does not coincide with the hypothetical result of an ideal consensus. The unreflective adoption of a principle outside a discussion with others would not be thus a manifestation of moral autonomy but of fanaticism and arrogance. Moral autonomy would be a faculty that must be, in part, practiced together with others.

This does not preclude, however, that the individual preserves the capacity of judging by himself the extent to which the conditions for genuine moral discussion are satisfied and whether the implications of the presuppositions of that discussion are acknowledged. This constitutes the content of a priori basic rights, which are inferred – in the fashion of the Kantian “transcendental method” – from the conditions for the knowledge of other moral issues including other rights which may be deemed a posteriori since they are established through the process of moral discussion itself and are not inferred from its conditions and its presuppositions.

Certain a priori basic rights – like the right to freedom of expression – can be inferred from the conditions of moral discussion and the democratic procedure, since they are essential for those procedures to claim a privileged access to moral truth. Other a priori basic rights may perhaps be inferred, in a more complicated way from some presuppositions of the practice of moral discussion and its substitute, the democratic procedure: For instance, if we agree that the implicit goal of honest participation in moral discussion is to convince the other participants to freely accept a certain principle of behaviour, that participation implies that we adhere to the value of moral autonomy from which a more restricted principle of personal autonomy may be derived (Nino 1984a, ch. 4).

I think, quite tentatively, that the domain of a posteriori moral knowledge is not only constituted by policies, as opposed to rights (Dworkin 1977, 90–100), but also by the *scope* of these latter, that is by the range of acts which violate them (whether they must be commissive or they may also be omissions) and by the types of duties which protect them (whether they must be exclusively passive or they can also be positive duties); the question of the scope of rights is decisive for another fundamental moral question which probably is also the object of a posteriori knowledge: the question of how to solve *conflicts* of rights (like those exemplified in traditional moral dilemmas).

So what is presupposed by this approach is a sort of two-level meta-ethical theory, which postulates a first layer of a priori moral knowledge, which

proceeds from the conditions and presuppositions of the second layer, which is in turn a posteriori to the results of moral discussion and democratic procedure. This mixed meta-ethical theory leads to a mixed form of government: a democratic decision-making system for resolving all those issues which require the adoption of an impartial perspective, and some procedure of review, in order to control whether the conditions and presuppositions of the first layer are acknowledged.<sup>9</sup>

The two different layers of moral knowledge involve different degrees of certainty: One may be more confident (though one should not be too confident if he lacks the proper intellectual training and has not reflected enough about the issue) regarding the conclusions about the conditions and presuppositions of moral deliberation than with regard to the conclusions one reaches in isolation about what would be acceptable to impartial, rational and knowledgeable people, since it is likely that, without due confrontation with others, one would overlook some of their interests.

The different degrees of certainty in our moral knowledge are, in their turn, connected with the extent to which we are justified in acting in defense of the moral views we deem right (this also applies to international relations and to the possibility of foreign interventions in defense of moral principles). When there is not a fair procedure of review in protection of a priori rights against a majority decision which affects them, there may be no other recourse for the moral man than to ignore that decision or to resist it (for instance, through conscientious objection or even civil disobedience (cf. Nino 1984a, ch. 7). But, if he reaches a conclusion which goes against that supported by the majority in matters of a posteriori moral knowledge, very seldom would he be justified in adopting any course of action other than pressing for the continuation of public discussion and the revision of the former collective decision. In that case, the moral man exerts his autonomy by participating in that process and by abiding by its results as presumptive expression of the moral truth.

The fact that democratic decisions enjoy a presumption of moral validity explains why we have moral reasons to observe prescriptions which indicate behaviour that, in the absence of those prescriptions, we would not have, according to our individual judgment, reasons to perform or even we would have reasons not to perform. The democratic origin of a legal rule provides us with reasons to believe that we have reasons to perform the content of the

<sup>9</sup> My position is – to state it in a nutshell – that it is not justified to displace from the democratic process to a non-elected judiciary fundamental decisions about the scope of rights, except in any of these three kinds of situations: i. when the well functioning of the democratic process is questioned; ii. when the law which is disqualified is based on ideals of personal excellence with regard to which democracy lacks epistemic value (since their validity does not depend on their impartiality among competing interests); iii. when the continuity of the constitutional practice which renders democratic decisions efficacious is at risk.

rule. The moral superiority of democracy lies in providing us with those reasons since we have reasons to do what we have reasons to believe that we have reasons to do.

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