

**DEMOCRACY, CONSTITUTIONALISM AND WAY OF LIFE:
A DEWEYAN READING OF R. DWORKIN**

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ABSTRACT: The relationship between the Deweyan characterization of democracy as “a way of life” and constitutional democracy using the Spanish constitution of 1978 as a reference will lead this article. Such a relationship will be established via the analysis of some of the ideas developed by R. Dworkin. The connections between “a moral reading of democracy” and pragmatic attitudes, understanding legal and constitutional principles as weapons favoring a deepening in the democratic way of life, are defended. It also offers a reinterpretation of the Dworkin critics to Posner and Rorty considering the way Dewey thought the role of the principles and theory in the moral judgments and stressing the relevance of civic virtues.

Dewey defined democracy as a way of life rather than as a set of procedures, more as practice than as theory, and more like habits than rules. He understood that democracy had to do with how political systems establish conditions for the growth and development of individuality. The present study aims to consider the relationship between this characterization of democracy and constitutional democracy, using the Spanish constitution of 1978 as a reference.

This relationship will be established via the analysis of some of the ideas developed by R. Dworkin, mainly in *Sovereign Virtue* and *Is Democracy Possible Here?*, interpreting them from what I consider a pragmatic perspective.

1.

R. Dworkin distinguishes between the majority and the partnership conceptions of democracy. The first, which we could classify as strictly procedural, understands democracy as majority rule, government by the greatest number of people. “The democratic ideal lies in a match between political decision and the will of the majority.”¹ This way of understanding democracy, according to

Dworkin, does not include the evaluative dimension of democracy. We think, in general terms, that democracy is good and valuable, a social aspiration. And majority rule is not fair or valuable in itself, “it is fair and valuable only when some conditions are met, including requirements of equality among participants in the political process through which the majority will is determined.”² Dworkin calls this conception the partnership conception. According to this, “government by “the people” means government *by all* the people, acting together as full and equal partners in a collective enterprise of self government”.³

Dworkin’s distinction runs parallel to that regarding the elements that characterize liberal order. He believes that liberal political order is not based on the satisfaction of what he calls “volitional interests” - what people actually want - but on achieving “critical interests”, those that make people’s lives better. “Critical interests” are not a question of fact, but what people should desire. “I shall from this point assume that any attempt to find ethical foundations for liberalism must concentrate on critical as distinct from volitional well-being”⁴ This means there is continuity between ethical and political order, establishing that at the core of liberal order there is a normative commitment. “Political principles are normative in the way critical interests are: the former define a political community we should have; the latter, how we should live in it.”⁵

The discussion so far is entirely consistent with the Deweyan perspective democracy. Then, on the one hand, the Deweyan conception of democracy shares the normative perspective with Dworkin. For Dewey, democracy has a transformative aspect so that democratic experiences imply a change in the individual, developing a certain ethos that permeates all areas of life. Furthermore, Dewey distinguished in different circumstances, paralleling Dworkin’s distinction, between esteem and estimation, prizing and appraising, the latter referring to those preferences, tastes and

² Ibidem, 363.

³ Ibidem, 358.

⁴ Ibidem, 245.

⁵ Ibidem, 245.

¹ Dworkin, R. *Sovereign Virtue. The Theory and Practice of Equality*. P. 357. Harvard University Press.

desires that have been subjected to the evaluative analysis of intelligence. (Dewey, LW 7: 264). Finally, Dworkin's definition of partnership democracy is very similar to Dewey's conception of democracy in *The Public and Its Problems*: "Regarded as an idea, democracy is not an alternative to other principles of associated life. It is the idea of community life itself. It is an ideal in the only intelligible sense of an ideal: namely, the tendency and movement of some thing which exists carried to its final limit, viewed as completed, perfected." (PP, LW 2: 328)

2.

It is particularly relevant for our purpose that, at the beginning of *The Possible Democracy*, Dworkin maintains that the principle of responsibility, in his interpretation, that individuals are responsible for leading their own lives successfully, a life of developing their own possibilities, is one of the basic pillars of democracy. "Most of us think that people who do not care what their lives are like, who are only marking time to their graves, are not just different from us but not in the unimportant way that people are who happen not to care whether the Red Sox win. We think that people who do not care about the character of their lives are defective in a particular and demeaning way: they lack dignity."⁶ So much so that, for Dworkin, beyond the ideological differences that exist at the core of a democratic society, individuals living in this society must accept their own responsibility as a basic principle on which they must agree. Dworkin believes that this is not a subjective principle but an objective one, that is, something that is beyond one's personal desires. It ultimately implies that, for Dworkin, democracy is committed to the idea that individuals lead lives of self-realization of their potential and/or capabilities.

The proximity to Dewey's perspective could not be clearer at this point, given that Dewey understood that

democracy should be measured by its ability to provide individuals with the possibility of their own development and growth. It is individual growth which is the true test of the quality and depth of democracy. "Democracy has many meanings, but if it has a moral meaning, it is found in resolving that the supreme test of all political institutions and industrial arrangements shall be the contribution they make to the all-around growth of every member of society." (RP, MW 12:186)

In both cases we are faced with a liberal interpretation of democracy in the sense that it is related to individuality and its development and represents a rejection of communitarian perspectives that put communities and groups at the heart of political interpretation. Both perspectives converge in maintaining that democracy has a commitment to the moral development of individuals, stressing continuity between ethics and politics.

3.

For Dworkin, this life of self-realization is interpreted in the context of the ethics of challenge. Unlike the ethics of impact that states that "impact of a person's life is the difference his life makes to the objective value in the world,"⁷ the ethics of challenge "adopts Aristotle's view that a good life has the inherent value of a skillful performance. So it holds that events, achievements and experiences can have ethical value even when they have no impact beyond the life in which they occur. The idea that a skillful performance has an inherent value is perfectly familiar as a kind of value within lives .. The model of challenge holds that living a life is itself a performance that demands skill, that is the most comprehensive and important challenge we face, and that our critical interests consist in the achievements, events, and experiences that mean that we have met the challenge well."⁸

What I want to stress is there is not, therefore, a

⁶ Dworkin, R. *Is democracy possible here? Principles for a new political debate*. P 14. 2008.

⁷ Dworkin, *Sovereign Virtue*, 251.

⁸ *Ibidem*, 253.

standard ethic with which to measure the value of events, lifestyles, etc. Ethical value is not related to independent events, but has to do with the development of capacities and opportunities relevant to the circumstances in each case. Contextualism and internalism are two features of Dewey's ethics. Dewey's ethics is contextual given that he believes that rules and principles are not sufficient criteria to assess and establish moral judgments. They require, in line with Aristotelian inspiration, dispositions and habits, abilities that allow ethical perception and wisdom. Dewey's ethics share with contextualist ethics and the ethics of virtue what MacDowell called the theory of uncodifiability.⁹ Thus, following the latter suggestion, a successful life means, as Aristotle already stated, making the best of the circumstances you are in.

The challenge model assumes, like the ethics of individual growth, a rejection of rationalist conceptions of morals which seek to determine right and wrong regardless of the specific circumstances where individuals operate. The task of growth, like the ethics of challenge, implies the application of intelligence to specific circumstances in an attempt to increase their significance. Both challenge and growth are in essence ameliorative ethics.

4.

For Dewey, the adoption of contextual ethics does not mean the rejection of norms, values and rules. Dewey sought the integration of rules, duties, etc., from the perspective of the agent who has to take decisions and act. All of this is the framework the individual has to deal with and use as a starting point for creative action. The subject does not invent the rules but learns to interpret and mediate them in the situation. In morals and politics we do not ever start from zero. The values and principles that we find in a specific context delimit the field of action and moral judgment.

⁹ This thesis on Dewey's ethics was further developed by me in CEPF 2008, "Moral Virtues and Social Transformation".

For Dworkin, this indicates that the ethics of challenge involves the acceptance of certain generalized intuitions such as, for example, that acquiring a state of knowledge of our age or relieving suffering in the world are ways of self-realization and/or components of a good life. From the perspective of the ethics of challenge, the circumstances of life are not limitations but parameters "that help define what a good performance of living would be for him."¹⁰ Thus, Dworkin himself points out that being a member of a specific political community does not constitute a limitation in one's ability to lead a good life, but is a constituent element that sets out the conditions under which one can lead a good life.

5.

The conception of democracy that Dworkin calls partnership, and links with a commitment to the idea of individual self-realization, is the basis for a reading of the constitutional principles in such a way that they can be interpreted as setting the generic conditions that provide the framework for good lifestyles. It is what Dworkin himself calls "a moral conception of democracy." The idea is to interpret constitutional requirements not as limitations on what a community can do, not as formal principles far removed from the democratic way of life, but as the structural conditions that enable this way of life. As such, a moral reading of democracy is opposed to formalism and judicial positivism, or to the pure theory of law such as Kelsen's in which the legal system is a pure expression of the will of the subject of power, highlighting that constitutional principles are not only the mere expression of the will of a collective, but contain an appeal to a moral order which, although historically constituted and produced, aims to positivize values with pretensions of universality.

Dworkin's thesis is that constitutional restrictions serve to stem majoritarian mechanisms and the

¹⁰ Sovereign Virtue, 260.

understanding of democracy as the simple imposition of the criterion of the majority. These restrictions, far from being seen as the limits of democracy, constitute part of it.

This can be interpreted, although probably going further than Dworkin himself would admit, that the "moral reading of the constitution" provides a normative pattern¹¹ that, in addition to stemming majority impositions and thus guaranteeing individual rights, gives guidance on individual lifestyles that should be encouraged. This moral reading of the role of the Constitution is not a conservative point of view, since, in addition, constitutions can and should be modified, but they are the constitutional mechanisms themselves which ensure that the transformations of a constitution obey the same widely-held principles, whilst also being subject to public deliberation. In my view, this is consistent with the ameliorist and transforming spirit of pragmatism that recommends basing ourselves on existing practices whilst transforming them as the product of reflexive analysis. It is not that we should think that the law is enough, or that it can generate a democratic way of life by itself. A way of life depends on habits and beliefs that only customs and practice can generate. The aim is to highlight the possibility that the Constitution, as a means of inspiring rights, is open to creating new habits, customs and beliefs that are based on intelligent social cooperation as a mechanism for solving social problems. The law, when observed, creates habits and these in turn strengthen convictions and create attitudes and beliefs which are consistent with the principles underlying those laws.

We have already noted that, for Dewey, legal and institutional mechanisms are not enough, and democratic convictions, beliefs and customs are required. Therefore, what I want to emphasize is that the propagation of such things requires the strength and support that an exemplary interpretation of constitutional values provides. The point is to stress the pedagogical mission of an appropriate interpretation of

the constitution, identifying social demands and providing social norms and models of desirable behavior. The defense of democracy as a way of life cannot ignore the educational dimension of laws and constitutional interpretation. The thesis is that the commitment of democracy to the development of individuality affects constitutional practice because this development of individuality is the basis of democratic logic. This logic is a consequence of attempting to harmonize different basic values that constitute democracy. R. Dworkin calls this "normative integrity" and relates it to a holistic understanding of the constitution. Of course, constitutional principles can be and often are understood by judges and courts in a conservative manner and sometimes even in the opposite way to the moral conviction from which this position is written, but the interpretive battle over meaning is important in the extension of the moral significance of democracy.

Therefore, the constitution, the principles that inspire it, and the laws derived from them do not prescribe how individuals should live their lives but set out the general conditions, and foster the circumstances that make it possible for individuals to lead valuable lives, worthy of being lived, or lives of personal growth. The claim on which all this is founded is that the development and growth of individuality, a valuable way of life, is not possible if an environment conducive to individual possibilities is not provided, and if constitutions do not contain "in nuce" the principles that allow such development.

6.

In this sense, for example, the Spanish Constitution has added social and participatory rights to the classical liberal rights to increase and deepen the meaning of democracy. However, the moral reading I want to make does not stop here, but aims to go further, to find those elements that cannot only broaden the scope of choice, but also bring the individual closer to the possibilities of

¹¹ The idea of the Constitution as a normative pattern is inspired by R. Vargas-Machuca.

a genuine exercise of autonomy, that which arises from the exercise of reason, from the understanding of the mechanisms of social cooperation as the basis of social interaction and from sensitivity towards objective and historically situated goods. Referring to the Spanish constitution, it has been stated that "a constitution is not only a legal instrument of identification, legitimation and justification of power, but it is also a lifestyle – constitution here has an affinity with the strongest sense of biological structure – with its own ethos which reflects the beliefs and values prevailing in a society, essential to the development of a plan for coexistence."¹²

Inspired by Deweyan ethics that sought to go beyond formal mechanisms to have a repercussion on lifestyles, leads us to understand the constitution not exclusively from the point of view of negative law placing limits on what others can do - and especially what the majority can do according to Dworkin's concerns - but as orientations or normative guidelines. Thus, constitutional guarantees against racial discrimination would not only have to be viewed as the right one has to not be discriminated against on racial grounds, but also as a guideline for creating rules, laws and institutions that make inclusion and integration a reality which is experienced and incorporated into the lifestyles of individuals. The same applies to freedom of expression according to which in a democratic society citizens not only have a right to freely express their opinions, but also to access accurate information - registered in the Spanish constitution (Article 20.1 d)¹³ - and plural¹⁴, that allows an adequate representation of reality, that abides by democratic values, and encourages habits of rational deliberation among citizens. Hence, it is understood that information is not nor may be considered as simply a commodity that can be left to market forces. Democratic

logic demands intervention as a means of protecting democratic goods, in this case, for example by requiring regulatory bodies for information and communication, whether written, audiovisual or on the Internet. This also applies to the control of advertising and marketing strategies affecting the most important moral values.

One relevant aspect of such a perspective is the promotion of civic virtue through one of the main tools that the state has to hand: the education system and the educational institutions; schools, colleges and vocational training centers, universities, etc. through which the extension of consciousness civic and democratic values and habits should be encouraged as a primary objective. The advantage of the approach advocated is evident from the Opposition Party and the Catholic Church's opposition to the introduction of the subject "Education for citizenship" intended to promote knowledge, attitudes and dispositions consistent with democratic values and principles. Those who opposed the law claimed that the state was invading an area of private concern, that is to say, ideological and moral education. They even argued in favor of conscientious objection against a state that they considered to be indoctrinating and imposing its will on citizens. After a long legal process, the case was closed with a Supreme Court ruling stating that Article 27.2 of the Spanish constitution¹⁵ gives the state responsibility for training citizens in basic values. Moreover, the Supreme Court, in the closing comments stated that "the educational activity of the State, with regard to common ethical values, not only involves their distribution and transmission, but also the promotion of feelings and attitudes that encourage their practical implementation"¹⁶

In the same vein one might argue for the establishment of the objective conditions among citizens to promote habits related to a healthy life, - sporting

¹² P. Cerezo. "Una lectura moral de la Constitución". *Papeles y memorias de la real Academia de la Ciencia y de las Artes*. nº 2. 1998. pags. 112-125, p 113.

¹³ "The right to freely communicate or receive truthful information by any means of dissemination whatsoever" (CE, 20.1 d)

¹⁴ There are interesting comments in this regard by C. R. Sunstein, in *Republica.com*, ed. Paidós, 2003.

¹⁵ "Education should aim to develop the human personality with regard to democratic principles of coexistence, rights and fundamental freedom". (CE, 27, 2)

¹⁶ Supreme Court. Administrative Litigious Court. Date of sentence: 11/02/2009

activity and the right to quality leisure time (Art. 43, 3)¹⁷ – to the development of knowledge, art, and, in general terms, culture (Art. 44)¹⁸, or to the appropriate enjoyment of the natural and urban environment (Articles 45¹⁹ and 46²⁰).

It would be relevant at this point to show how the development of these attitudes, skills and dispositions, in turn, affects the strictly political dimension of citizenship. At this point the reference to Dewey is uniquely illuminating as he showed how the quality of democracy depended on the development of creative individuality. Thus, art contributes to the construction of mechanisms of alternative thinking; philosophy, and literary and artistic criticism cultivate critical thinking; science contributes through familiarity with the experimental method and the contrast with empirical reality and through promoting a realistic and constructive approach to truth and knowledge; and environmental awareness contributes to avoiding absolutist and dogmatic attitudes, teaching respect for difference and expanding a holistic conception of man's position in nature. In general, the collective search for truth, goodness and beauty allows us to appreciate cooperative social intelligence that, as Dewey stressed, is essential to the very idea of democracy.²¹

¹⁷ The public authorities shall foster health education, physical education and sports. Likewise, they shall encourage the proper use of leisure time. (CE, 43.3)

¹⁸ 1. The public authorities shall promote and watch over access to culture, to which all are entitled. 2. The public authorities shall promote science and scientific and technical research for the benefit of the general interest. (CE, 44)

¹⁹ 1. Everyone has the right to enjoy an environment suitable for the development of the person, as well as the duty to preserve it. 2. The public authorities shall watch over a rational use of all natural resources with a view to protecting and improving the quality of life and preserving and restoring the environment, by relying on an indispensable collective solidarity. (CE, 45)

²⁰ The public authorities shall guarantee the preservation and promote the enrichment of the historical, cultural and artistic heritage of the peoples of Spain and of the property of which it consists, regardless of their legal status and their ownership. (CE, 46)

²¹ For reasons of space I have omitted the discussion regarding the usefulness or otherwise of cultural

7.

It is important to clarify the relationship between "a moral reading of democracy", as presented here, and pragmatic attitudes in two ways. Firstly, most interpretations of the political philosophy of pragmatism have stressed the relevance of mechanisms external to the institutional and legal ones as a means of deepening democracy, by appealing to social movements or sources on the margins of political activity as it is traditionally considered. The interpretation I offer requires politics to defend basic democratic values more strongly and sees legal and constitutional principles as weapons for the development of political and social order, favoring a deepening in the democratic way of life. Thus, constitutional principles become abstract tools for specific policy. And this explanatory power demands a development of the corresponding cognitive abilities, sensitivity towards the goods these principles represent and dialogical and argumentative skill that make them effective.

Challenging those who argue that the appropriate setting for the deepening of democracy as a way of life takes place outside the legal and institutional fields, there is this other promising position in which the legal and institutional route supports the generation of customs and habits through which we establish, in accordance with the pragmatist ideal, true democracy, one that is based on individual dispositions towards a free game of cooperation and the application of intelligence for social purposes. The law is not enough for democracy, but it is a necessary element and a valuable tool for the deepening of freedom and equality.

Secondly, in *Justice in Robes* Dworkin devotes a large part of the book to a critique of pragmatic positions in the philosophy of law and focuses on R. Posner and R. Rorty. In general, Dworkin wants to defend the need for theory in the face of relativism, subjectivism,

paternalism. However, this is included in my book *Democracia como estilo de vida*. Seoane, Mougán y Lago. Ed. Siglo XXI. 2009.

consequentialism and utilitarianism that share the idea of the dispensability of philosophical reflection and recommend being guided by existing practices. Posner argues that judges should ignore philosophical and theoretical issues which, according to Dworkin, is nothing but another version of the pragmatist movement that holds that "the truth in general, and questions of political morality specifically, is created by our practices, and that on these issues there is no truth that is independent of a culture or a specific language."²²

I maintain that Posner misrepresents the positions of pragmatism and, in considering his reading and his interpretation of the positions of Rorty, it should be remembered that in his *Ethics* Dewey did not consider that principles or theory do not have a role in the development of moral judgments. He understood that they were only one of the elements of moral life, - although essential - that had to be integrated with others. Pragmatism is closer, in my view, to Dworkin's position, although I differ in the fact that, while Dworkin gives an important role to the judiciary, - what he called "Herculean judges" -, from a Deweyan point of view we would give more importance to civic virtue and citizenship education as a tool for social transformation. From this perspective, citizens need to press the authorities for the development of policies that transform principles and values into reality. The development of an interpretation of the constitutional principles and values in line with a deeper sense of democracy is not only a task for judges, but for all citizens. In emphasizing the role of judges that, in carrying out their work, must transcend the causality of the case to refer to constitutional principles and values, Dworkin helps to underline an extremely fruitful way of deepening democratic values, a way that we pragmatists should not ignore. The Constitution is also not a point of arrival, but a highly valuable instrument in the practical implementation of Deweyan faith in the democratic way of life.

²² Dworkin, *Justice in Robes*, p. 87.