

DRAFT, NOT FOR PUBLICATION

THE COURT SYSTEM AND DEMOCRACY

By Aulis Aarnio
University of Tampere, Finland

1. Preface

In a brief article like this, it is too difficult to approach exhaustively the concept pair “court system and democracy” due to the vague and even wavering content of the latter. Democracy is “an essentially contestable concept”, as *W. B. Gallies* puts it. Another problem is to associate the concepts “court system” and “democracy” in some meaningful way.

Dictionaries give democracy exactly the same meaning as the words “demos” and “kratos” indicate, that is power of the people. Democracy is a political system where the will of people (*Volkswille*) has a decisive role when decisions on society are made. However, the concept “will of people” is controversial and ambiguous. Here it is sufficient only to note that in democracy this will is neither psychological nor social psychological of its nature but a political concept. As *Aleksander Peczenik* has pointed out, it is the end result of a democratic process that is influenced by the opinion of many individuals and groups (Peczenik p. 65).

As a supplement to the above, it is said that democracy is implementing certain democratic values. Democracy enables reflection of people’s preferences and thus makes a peaceful and rational settlement of political conflicts possible. Furthermore, to justify a democratic decision-making model, it has been indicated that democracy best promotes freedom, equality, solidarity, and safety. Thereby, democracy is also an instrument for producing social justice.

Among others, *Karl Popper* has rejected attempts to define the essence of democracy resting on the will of people or other such criteria. He, like *Joseph Schumpeter*, has defended the notion that the definition of democracy must base on its normative characteristics. No form of government is democratic, for instance, without free elections. The demand of free elections is a normative precondition of a true democratic system.

This characterisation likewise the references to the will of people or democratic values are rather uninteresting as regards the title of this article. To put it very strongly, law is a too serious matter to be handed over to the people, even though (in Scandinavia) already *Olaus Petri* following the Roman thinkers said in the 1550s that law has been given for the sake of common people. It does not look very promising either to ponder here whether the judges should be elected in free elections or on other political bases. It is even less promising to ponder how the will of people is realised in the court decisions. As regards the latter one, the will of people seems to be more often realised in the headlines of the yellow press than in the court decisions. Hence, my point lies elsewhere.

Trying to find out this point, let us turn to the additional criteria used by *Peczenik* in specifying the concept of democracy as well as in comparison different models of democracy. Following *Peczenik* they are called here the adequate criteria of democracy (*Peczenik* p. 71). For further analysis I will, however, make a distinction between the *form* and *content* of democracy.

2. Democracy as a Form

Among others, the following characteristics have been listed as adequate features of democracy.

- (1) The doctrine of the division of the state power into legislative, executive and judicial power, which is also valid in the constitution of Finland.
- (2) The majority principle in political decision-making and the supplementary mechanism for the protection of minorities. Realisation of the majority principle presupposes freedom of opinion, free access of information, and political equality between the citizens. In that case we can say that some form of government is more democratic
 - the more of the political decision making bodies are elected;
 - the freer the elections are;
 - the less there is difference in the weight of (individual) votes; and
 - the more of the decisions are made following the majority principle.

Roughly speaking, democracy as a *form* is realised when the above mentioned characteristics are valid, decision-making follows the majority principle, and at the same time the system respects the statutory protection of minorities. However, in the formal definition of democracy, the protection of minorities often turns out to be a stumbling stone because, inter alia, we can always ask: Who belongs to a protected minority? What is just as regards a minority? Which regions could have autonomy? Should a minority be confronted with a 'take or leave situation', that is either you accept the system or you leave the country (as has been the case in several quite recent situations, e.g. in the Balkans or in Africa)?

3. Democracy as a Content

Considering the title of this article, it is more interesting to approach democracy from the viewpoint of its content than of its form. Among other things, the following can be considered contentually sufficient features of democracy:

- (1) Realisation of certain fundamental rights and freedom;
- (2) Realisation of legal protection;
- (3) Contents of the decisions can be controlled;
- (4) Decision-maker's responsibility for their solutions.

All criteria of this nature are, in one way or another, interlinked with the political system, or to be more accurate, with the legitimacy of the decisions produced by the political system. Specifically this seems to offer a good point of reference to answer, at least with some preciseness, the dilemma outlined in the title. Following *Kaarlo Tuori* and partly adapting his writings, the following distinction among the different dimensions of legitimacy or variations of it will be made in the same spirit as *Georg Henrik von Wright* once distinguished different variations of goodness from one another. After that I turn back to the sufficient criteria of democracy as a content.

- (a) Let us begin with *system confidence*, as *Niklas Luhmann* called it. In case that the system confidence prevails, the citizens reckon the system and its output legitimate if the system as such is functioning: Elections are in due time and due form, political decisions are made in accordance with the legal forms. That is to say: Democracy as a form is realised. In that case, the contents of the decisions are not relevant, such as realising of fundamental rights. Of course, the citizens can criticise the decisions but sooner or later the decisions are accepted because, nevertheless, they are "products of the system".

Concerning both the political system and law, system confidence involves great problems. In its extreme this kind of notion neglects the contents of politics. Democracy would become a mere form. Then legitimacy based on system confidence would stand on feet of clay.

(b) *Interest-based legitimacy* is another form of legitimacy and it comes true, as Tuori has proved, especially in corporative measures. A decision or solution is legitimate when it fulfils, maximises, or promotes the interests of a certain group. The interests may be directly or indirectly economic by their nature.

Incomes policy settlements are interest-based in character and, for example, in Finland they were taken to extremes in the incomes policy negotiations during the so-called consensus era, especially in the 1970s and 1980s. In these incomes policy negotiations the fate of many welfare state benefits was agreed on and the role of the Parliament was either to accept or reject them as such.

Even though democracy is a system where the primacy of interests can be peacefully agreed on, yet as a *general* principle the interest-based legitimacy does not seem to be an appropriate ground of justification of a political system. It shatters the community, often divides people into the strong and the weak, and pushes aside those who have no representation mechanism of their interests. In Finland, for instance, it happened like this during the mass employment in the 1990s. Labour organisations said that they promote the interests of the unemployed but in fact they cared for the realisation of their own interests alone.

When the relationship between the courts (of law) and democracy is discussed, interest-based legitimacy actually offers even a thinner point of reference than system confidence does. Problems in the courts of law are elsewhere than in corporatist control of interests.

(c) As far as the courts are concerned, the most adequate notion of legitimacy can be named *acceptability*. There are several possibilities to analyse acceptability from this point of view. One way is to compare typical features of the constitutional state with the characteristics of the welfare state.

4. The Constitutional State vs. the Welfare State

Here I will neither give any historical view, for example, of how the constitutional state has become the welfare state, nor will I try to define what type of states they are. I would only like to find such features in societal reality through which, for example, the contemporary reality and especially legal praxis could be conceptually apprehended. For this purpose I have listed among other things the following characteristics of the constitutional state (the rule of law ideology):

- Tripartition doctrine of the state power;
- Legal protection in formal sense, especially the legality of procedure;
- Individual's legal protection against the public power as well as his/her protection against the other members of society;
- Concept of judicial discretion as a syllogistic form combined with a certain degree of legalism as a general policy (the letter of the law overcomes other arguments)
- Formal justice together with the notion of formal equality before the law.

While the welfare state ideology is dominant, many of these features get a new content or at least a novel mode. I list these new features as follows.

- The tripartition doctrine of the state power becomes vague as regards the borderlines of each three elements (in the budget procedure the traditional power of the Parliament is shifting to the government apparatus, political problems are made problems of the courts of law, and the strengthened status of the higher courts as precedential instances also in the countries of statutory law);
- Along with formal legal protection content-based legal protection has made space for itself:

- This development can be seen in the appearance of various kinds of social points, for example in arrangements to protect the weaker party in private law.
- Understanding of judicial discretion more as argumentation, discourse and reasoning proceedings than as a logical form (Aarnio 1987 and 1997, passim.).

To sum up, one could say that the challenge to the modern law is to combine these two ways of thinking or ideologies: The form and the content. The constitutional state has not died yet, far from it, its best features belong to every democratic system that realises legal protection. Yet, measures taken for the quality of life, equality among people, and against the increase of drop-outs, concern the courts as well - at least for the time being.

The phenomenon indicated above becomes evident in an interesting way when the norm structure of modern law is studied. Various kinds of *weighting norms* have come alongside with the traditional regulative norms (orders, prohibitions, and permissions) and competence norms. As an indication of these new norms, open constituent elements have existed already for a long time in the law texts of the Scandinavian countries but now it is adequate also to talk about weighting norms in connection with the so-called arbitration norms and different kind of legal principles. Like the Finnish High Justices have in several occasions reminded, the problematics of the fundamental rights and specifically human rights have taken an essential position among the applied norms. This is explicitly a matter of weighting and not so much of classical interpretation in the usual sense of the word.

One could say that rules are interpreted and principles are weighted. It is typical of principles that they are not either/or norms by their nature but they are “more or less” applied. When the principles fall into a collision with each another, one tries to find an optimal solution to realise as much as possible of the both principles. *Robert Alexy*

would say that principles are orders to optimise. Therefore very often the term “optimalisation norm” is used.

Both jurisprudence and the judges must acknowledge this situation. The times have changed. Nowadays the challenges to the study and application of law are different from say 30 years ago. The development has been fast. When I began my career, principles were almost like forbidden fruits, syllogistic model of deduction was in its prime, law mainly acknowledged formal equality alone, and procedure was honoured. Today life is different and precisely this entitles us to set a question about the courts of law and democracy in a new light.

In this respect the challenge is connected with the above discussed legitimacy of the modern law. Only by associating elements of the constitutional state and the welfare state ideologies in an optimal way, the system is capable to produce *acceptable* decisions. In that case, legitimacy and democracy as contents will be intertwined with each other. At the end of this paper I will try to prove that connection, though I am afraid, that even some most serious problem are left open. In order to prepare my final questions (and answers) let me to return to three of the four above mentioned criteria of democracy as a content. These three are contentual legal protection, controllability of decisions, and decision-makers’ responsibility.

5. The Basis for the Legitimacy of Court Decisions

In some other contexts I have illustrated these three criteria by a right-angled triangle, the top apex of which is *legal uncertainty* that characterises every decision of discretion. It may concern either the norm to be applied (the legal question) or the facts (evidence) of the case (factual question). Here the presentation is limited only to doubtfulness of the applied norm that can be, as mentioned above, either a rule or a

principle. Whether we are interpreting or weighting depends on the type of the norm to be applied, i.e. on the fact whether we are applying a rule or a principle. This distinction is not significant from my present point of view.

Down in the left angle are located two of the main features of the adjudication: *power of decision* and *obligation to decide*. Law is a compulsory system. Yet, we can say that law is not solely that. Even in complex circumstances, when legal uncertainty is prevailing and obligation to decide is pressing, the court of law is to produce maximal legal protection. This is a basic demand for the judicial mechanism of each state that has declared itself a constitutional state or alike.

In the right corner of the triangle one can find citizens' *expectation of legal protection* as one of the core elements of the constitutional state. What does this expectation of legal protection mean? In this regard, one can refer again to Olaus Petri's Judge's Rules from 1550. They mirror in a significant way the Scandinavian idea of law and of a good judge. In these rules, still pointed in the introduction of the official law book of Finland, avoiding of *arbitrariness* is a corner stone. Avoiding of arbitrariness is a line running through the rules. This theme was originally connected with the hard-handed regime of the then King Gustav Wasa but it has a deep soundboard in the entire tradition of European thought. Olaus Petri's rules were not too original and not even home-made. Their core was extracted from the Roman law, *jus gentium*, and Judaic-Christian tradition. This time the origin of the rules is not essential but the fact that they still have, as I referred to, a stable position as *describers of the Nordic legal ideology*.

The avoiding of arbitrariness could be translated into more familiar contemporary language as a demand for predictability, which is the basis of all planned social activity. Without a plan (*modus operandi*) civic society will disintegrate into a chaos of contingencies. Moreover, there is only a short step from predictability to the theory

of modern argumentation. This step can easily be seen in case that the expectation of legal protection is written in the form of principle *P*:

P: Citizens have a right to expect that legal conflicts are settled by following the principles of rational discretion.

Thus this part of the expectation of legal protection is focused on the discretion process. Moreover, here it is not a question about syllogistic or any other deductive reasoning but about a *communicative process* that takes into consideration general and specific standards of practical reasoning.

The European idea of legal protection suffered a serious blow shortly before and during the Second World War. The Nazi misrule forced lawyers to ask whether rational discretion is or is not the only guarantee to realise the legal ideal, according to which all violations of human dignity are to be condemned. It is obvious that if we define rationality, for example, as it is done in the natural law theory, i.e. that rational is only what expresses the true being of man, then this type of rationality as such is interpreted as an adequate guarantee against arbitrariness. Shortly after the war it was also thought like this, for instance in the sphere of German neo-natural law. *Helmut Goings* can be mentioned as a prominent representative of this line of thinking.

The representatives of the so-called modern natural law are, as far as I can see, on the same line. As *Quentin Skinner* points out this kind of thinking is based on the idea of positive freedom defined by *Isaiah Berlin* (Skinner, *passim*. See also Pettit e.g. p.51) with all its problems.

Modern theory of argumentation has not extended the concept of rationality this far. On the contrary, for instance my own proposal is more based on the notion of negative freedom, in a special sense of the term. The modern argumentation theory is connected to the Habermasian idea of communicative rationality. The core in this

idea is that legal thinking is discursive as to its nature. In some other context I have called this kind of rationality simply D-rationality in distinction from L-rationality (deductive or logical rationality). Already *Chaim Perelman* was on the same line when he emphasized the importance of new rhetorics. D-rationality concerns the rational communicative procedure essential to all legal decision-making. From the point of view of legal interpretation or of the weighing and balancing procedure one can also speak of procedural rationality.

However, it is essential that also the *final result* of the discretion procedure (the decision itself) is contentually *acceptable*. This means that the decision must naturally be *according to law* (legal statutes) in such a way as the legalistic tradition generally presumes. Taking into account those demands that the modern welfare state presupposes as far as the legal decision-making is concerned, the lawfulness is not enough. Every hard case decision has also to fulfil certain *contentual* demands regardless whether they come from the basic human rights, protection of a weaker party in civil law or from some other factor effecting the quality of life.

In this way we can reformulate the challenges to the modern law. If the relations between doubtfulness, power, and communication will be analysed in the way I have suggested, on the one hand legal decisions must be D-rational and on the other hand acceptable. Law is rational acceptability, or – as the title of one of my books says – Rational as Reasonable (1987).

6. The Courts of Law and Democracy

I have not yet answered the question set, or hidden, in this title: The courts of law and democracy. For the further analysis it is necessary to set an additional question: In

what way is a judge capable to fulfil the assigned social *responsibility* in the triangle of doubtfulness, power, and communication?

In modern society, this can not solely base on authority. Authority based purely on dominating position does not exist any more. Each individual, every institution has to earn their authority. That is why one can not take responsibility by withdrawing behind the back of some dominance or formal power to decide. People will bypass all this and ask: Why is the decision like this? They demand contentual acceptability of the decisions and not only that the system functions formally right. Instead of system confidence people demand legitimacy and here legitimacy must be understood as rational acceptability in such a special sense as Alexy, Peczenik and the undersigned have been using it. Anyway, here we deal not so much with theoretical reasoning but with practical discretion or, according to Aristotelian terminology with the sphere of practical reason.

What could be, against this background, a judge's reaction to the challenge set to him/her by civic society demanding social responsibility? In order to answer to this question one cannot avoid the relation between the courts of law and democracy. In this very respect, the threads can be tied together as follows.

The courts of law are a part of the instrument to exercise social power. They belong to democracy as one of its parts in the case that a strict tripartition doctrine of the state power is adopted and accordingly the principle of the autonomy of the courts of law. As mentioned above, democracy as a content presumes *controllability* of decisions. If democracy as a content is taken seriously, each decision of which we are unable to perceive how and why it are made, is not in accordance with democracy. Controllability can exist only in a system that acknowledges *openness*. A closed system prevents all kinds of control over itself and thus also becomes beyond the reach of criticism. The worst is that a closed system includes a seed of arbitrariness

or, if not that, at least a seed of doubt about it. Consequently, if even a single seed of doubt is planted, the system begins to disintegrate. Its credibility will be weighted and when this happens, damages are always worse than in a system realising openness.

Gunnar Bergholtz has proved in his dissertation “Ratio et Auctoritas” (1987), based on European data, that whenever the demand for strengthening of democracy is brought up, also the voices calling for reasoning of the court decisions have been stronger. This Bergholtz has interpreted as an emphasis of the demand for controllability, which simply means that courts have to reason their decisions publicly. In this respect, the criteria of sound legal reasoning are the core of all modern and democratic adjudication.

In this way a net of concepts and social demands is spinned, a net in which doubtfulness, power, communication, responsibility, controllability – and legitimacy – are intertwined. Each era has to give its answer about the relation between these factors. The answer can be like the above presented, or something different, or maybe something more qualified. Yet, the court system can not escape the actual challenge itself. The challenge is constant as long as democracy is comprehended in accordance with the features set to democracy by the traditions of the western civilisation. Let us accept the challenge. It does not make justice only interesting but it also anchors it firmly to the time.

So far the Finnish court system has succeeded fairly well in responding to the challenge. During the past thirty years the development has been remarkable. It is almost impossible to compare with one another the court decisions made in the beginning of the 1960s and around the turn of the century. This does not concern the supreme courts alone. Also the work carried out by the courts of appeal and local courts is worth mentioning.

However, everything is not that good yet. Still today only too often even the reasons of important decisions are laconic, open to various interpretations, sometimes even empty. This is an underestimation of the citizens' legal protection. I believe that rooting out of such flaws from the otherwise well functioning system should not be too overwhelming.

As Tuori has aptly pointed out in various connections, *media* has an important role in realising legal protection and developing of the system. A sound democracy keeps watch on the decision-makers especially through publicity. Unfortunately, for the time being actually media is the weakest link in the chain. It seeks its way to individual cases, scandals, readability, and by no means to the basics of the system.

This phenomenon has double faces. The other side of the faces are connected to the notion of independence. Taking democracy seriously the courts must be independent not only of the other state powers and political influence but of the mass media as well. It will be, as far as I can see, one of the real but at the same time extremely difficult challenges to the modern democratic court system. All over the world.

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