FROM DEMOCRACY TO ACCOUNTABILITY

Pauline C. Westerman

According to John Stuart Mill, one of the reasons justifying the importance of democracy is ‘that the rights and interests of every or any person are only secure from being disregarded when the person interested is himself able, and habitually disposed, to stand up for them’. (J.S.Mill, 1861, Ch. III.) If someone wants to be sure that his interests are taken into account, he should better be where the decisions are made. Although this view does not strike us as very unusual or original, I want to maintain that Mill’s wisdom is far from shared in present day political discourse. The idea that democratic debate and decision-making should include a wide range of interests and rights and should be conducted by all those who are affected by the outcomes of such debates and decisions, seems on the decline. If we understand democracy as entailing inclusive participation of all involved, anti-democratic thought is not a phenomenon that surfaces only in exotic or extremist circles but characterizes much of present day thought on how society should be run. Much of it is however couched in democratically sounding language, which makes it hard to detect.

In this article I will try to reveal the anti-democratic elements in the current pleas in favor of accountability. I will do so by drawing examples from areas as diverse as legal theory, political theory and political studies and show that the notion of accountability is widespread even in circles that do not use the term explicitly. Accountability effectively postpones the moment of control. It is only after decisions have been reached and policies are devised or even carried out, that control is allowed to be exercised. Furthermore, this *post hoc* control is to be exercised on the basis of mainly substantive criteria, which cause control to be delegated to different kinds of experts. After having analyzed accountability as a form of ‘outcome-oriented’ legitimacy, the question arises what we exactly mean by ‘outcome’. For that reason I will distinguish three senses of ‘outcome’ and investigate the relation between outcome and procedures in each of these three senses. This analysis will enable me, finally, to explain the reasons for the current distrust in democratic procedures and the resultant pleas in favour of accountability.

1. Giving reasons

The cry for accountability is commonly heard in the context of discussions of governance, an umbrella-term for new forms of ‘governing without government’ (Rosenau and Czempiel 1992, Rhodes 1996) or ‘policy-making without politics’ (Kazancigil 1998). The term governance, whether ‘corporate’, ‘regional’ or ‘global’, indicates forms of governing that lack the formal structures provided by the nation-state and consequently lack formal procedures of democratic representation. It is claimed that this absence of democratic representation should be compensated for by alternative mechanisms of control. Institutions should account for what they are doing by other means. Governing without government should be accompanied by a system in which ‘no one controls an agency, [but in which] the agency is yet “under control”’ (Majone 1994, pp. 2-3).
This is also the reason why accountability is especially deemed important in the context of EU politics. In the EC White Paper on European Governance (2001) accountability is advocated as one of the five principles of good governance. It is claimed that by improving accountability, a form of democratic control is ensured even though a clear constituency is lacking. The fact that Europe has no demos does not necessarily lead to ‘no democracy’, as long as mechanisms of accountability are safeguarded and strengthened. The principle of accountability is not tied up with the nation-state, and not even reserved to public institutions. Not only governmental institutions should account for what they did, also private and semi-private institutions can and should rely on mechanisms of accountability.

The abundant literature on accountability (Davies 2001, Harlow 2002, Fisher 2004) reveals that the term in itself is rather uninformative. Accountability mainly refers to the obligation to give reasons for one’s doings. The term in itself does not stipulate to whom, why or how this should be done. An institution may account for its doings internally to its own members, or externally. It may do so only to those who provided them with budgets or to the public at large. The motives for accountability may also be different: it may be that an institution or firm poses as an accountable one because it thereby hopes to increase its credibility or respectability, or because it is the only way to attract funding. And finally the mechanisms used may be widely different. Accountability may require an elaborate and formal audit-system or may rely solely on peer-review and/or professional competition. Majone (1994) refers to mechanisms as diverse as professionalism, budgetary discipline, expertise, monitoring by interest groups, inter-agency rivalry, and judicial review.

But in all its forms and manifestations accountability is giving reasons after the fact. It is only after the decisions have been reached, the policies have been carried out and the results have or have not been obtained, that an institution accounts for what it did. The kind of transparency that is required by accountability is transparency of the steps that were taken and the results that have been obtained. These steps and results are then presented in a report, a tangible and visual proof of one’s past performance. In the report past performance is presented and justified at the same time.

If we define accountability as the requirement to give reasons for past performance, it is clear that such a requirement presupposes that there is an identifiable set of standards or criteria which serve as points of reference to those who give the account as well as for those to whom one accounts. This implies that accountability presupposes the existence of shared standards, at least shared by those who account and to whom is accounted. The necessity of developing shared criteria means that most of the time a specific audience (set of institutions, professionals, peers) is addressed that shares the standards that differentiate good outcomes from bad outcomes and good reasons from bad reasons. In the absence of such an specific audience (for instance if an institution professes to be accountable to the public at large by means of results published on the Internet) this means that such a wider public should be informed of the relevant standards and criteria. They should be ‘educated’ and taught to judge matters according to ‘the’ relevant criteria, established by expert groups.

A common way of developing, spreading and instilling the relevant values and standards is by clarifying one’s mission. The mission-statement is indispensible in a system of accountability. It may be written by the institution itself, or else dictated or prompted by
subsidy-givers who draw up a list of desirable goals and objectives that should be reached by the institution who has to account for its doings. These goals serve as the starting-point from which the standards and criteria are derived. (Westerman 2007a).

It is important to note that these criteria may be substantive as well as procedural. Hospitals may account for how they handled waiting-lists by referring to substantive criteria, either medical or moral, but may also refer to protocols and procedures: to the steps that were taken before arriving at decisions. That does not alter the fact that what is accounted for are not the procedures, but the outcomes. Procedures only figure in the arguments that are used in order to account for and to justify outcomes.

We may end this paragraph by proposing a somewhat more precise definition of accountability than we noted at the beginning. Accountability is more than just giving reasons for one’s doings. Diversity of forms and mechanisms notwithstanding, the principle of accountability requires a post hoc justification of past performance in accordance with shared criteria, derived from an identifiable goal or set of goals.

2.1 Consequences for thinking about democracy.

The assumptions underlying accountability recur in much contemporary theorizing about democracy. They lead to anti-majoritarianism, an emphasis on results, post hoc justification, and reliance on expertise. I will give three examples, borrowed from three completely different areas, each favoring a different kind of expertise as better suited to the task of control than bodies of democratically elected representatives.

2.1. Accountable to the technical expert.

Perhaps the best example of how accountability is linked to technocracy is furnished by Giandomenico Majone, a political economist and influential theorist of the EU. Majone is well-known for his advocacy of what he calls independent and non-majoritarian institutions. His favorite example is the European Central Bank. He argues that independent institutions are more efficient in pursuing policies that serve the common interests of European nation-states than any representative body of member-states is capable of. Moreover, since these institutions are not dependent on short term political gains such as re-election, they can afford to consistently pursue policies that may be unpopular but are beneficial in the long-run. (Majone 1994, 2001).

The independent agencies Majone has in mind are mostly single-purpose. They are organized around a single central aim e.g. environment, consumer regulation, etc. for which a lot of expertise is required and for which bureaucratic governmental institutions are ill-equipped. The agencies should engage in fact-finding, distributing information, rule-making as well as in adjudication, while ‘protecting the citizen from bureaucratic arrogance’. (Majone 1994, p.5). Confronted with the criticism that these non-majoritarian institutions are cut loose from control by (representatives) of member-states, Majone retorts that alternative forms of accountability are better instruments of control than traditional forms of representative democracy.
Legitimacy is gained here by judging results rather than procedures. It does not depend on the question whether decisions are taken according to well-defined procedures, but on such factors as expertise, problem-solving capacity and accountability by results. (..) In the final analysis the democratic legitimacy of non-majoritarian institutions depends on their capacity to engender and maintain the belief that they are the most appropriate ones for the function assigned to them. (Majone, 1994, p. 77).

In Majone’s writings, accountability is not only seen as a substitute for (procedural) democracy but also as a better alternative. We see here all the abovementioned characteristics recur: the idea that there are shared standards as well as the notion that these are derived from an identifiable institutional goal about which there is no disagreement. The sole criteria that count are the effectiveness and efficiency with which these goals are pursued and realized. They can best be applied by the experts who are trained in the field that is defined by the objectives and purposes of the institution at hand. Only they can know what the ‘appropriate function’ of these agencies and institutions is, only they have the criteria at their disposal to judge the results they obtained.

Leaving aside for the moment the question whether democratic institutions are suited to carry out the complex tasks of rulemaking and standardisation required in the modern European context, we might agree with Scharpf (1999) that there is a tendency towards what he called ‘output’-oriented legitimizing beliefs. In output-oriented legitimacy, political choices are legitimate if they effectively promote the common welfare of the constituency. In output-oriented legitimacy, democracy is seen as ‘government for the people’ rather than as government ‘by the people’. In such a view there is no room for Mill’s citizens. If citizens are allowed a say on the matter, they should do so as members of organised ‘interest-groups’. This is significant. Only these groups -and not the ordinary individual citizen- are capable of hiring the required (counter)expertise to speak in favour of their particular interests.

What is conspicuously missing from Majone’s account is the problem of enforcement. The question what happens if the institutions fail to perform adequately, or if they fail to give good reasons for their failure, is not addressed. This is not only the case in Majone’s work. Also the earlier mentioned White Paper of the EC, although advocating the virtue of accountability, fails to point out the consequences if accounts turn out to be unconvincing or unsatisfactory. Føllesdal criticises this omission by remarking: ‘Accountability must go beyond transparency, to ensure that citizens are able to hold the various agents accountable and if necessary to replace them’ (Føllesdal, 2003, p.79). We should, however, keep in mind that that extra step is usually not taken, because the requirement of accountability relies on experts rather than on the citizenry at large.

2.2. Accountable to the legal expert.

Majone is well acquainted with EU politics. He is a man of practice and has definite ideas about the direction Europe should take. In this sense, it is not amazing to find him elaborate on the main tenets of the European governance creed. It is more amazing to come across the same
ingredients in the work of those who do not mention the term ‘accountability’ at all, and who may not even be aware of the way this requirement is advocated and practiced in regulatory politics.

Far removed from European governance experiments a parallel version of accountability can be found in the work of what may be the most influential legal theorist of our time: Ronald Dworkin. Working in a different field, situated in a different context, Dworkin’s theory is clearly not meant to answer the question how we can compensate for the democratic deficit of the European Union. Yet, he struggles with a similar question: how to deal with the democratic deficit of judicial review.

A common objection against judicial review is that since courts are not democratically elected we should be cautious to allow judges to give a final verdict on matters that were decided by democratically elected representatives. The dominant viewpoint nowadays is in favor of judicial review and many of the arguments serving to minimize the dangers this might pose to democracy are influenced by the writings of Dworkin. According to Dworkin, the claim that judicial review is undemocratic cannot plausibly be defended. On the contrary, he maintains that judicial decision-making is often more democratic than decision-making by the legislature.

Dworkin defends this bold position by asking whether there are ‘institutional reasons why a legislative decision about rights is likely to be more accurate than a judicial decision’ (Ronald Dworkin, 1985, pp. 24). The answer is that there are no such reasons. According to Dworkin ‘legislators are subject to pressures that judges are not, and this must count as a reason for supposing that, at least in such cases, judges are more likely to reach sound conclusions about rights’. Moreover, given the inequalities of power between democratically elected representatives the judiciary is better equipped to preserve the rights of minorities than the legislature (p. 27-8). Judicial review will therefore promote rather than retard the ‘democratic ideal of equality of political power’ (p.28).

It is not my intention to rehearse the debate on judicial review here. I only want to point to the concept of democracy which underlies his position. The first element that catches the eye is then that legislation is identified with ‘decisions about rights’; secondly, that Dworkin seems to suppose that it is possible to arrive at ‘accurate answers’ about those rights and finally, that democracy is seen here mainly as an ideal.

I will briefly comment on these assumptions.

*Democracy as ideal. In Dworkin’s view, democracy is an ideal which is derived from the basic norm that requires ‘equality of concern and respect’. Throughout Dworkin’s writings, the adjective ‘democratic’ is used to indicate that a certain thing agrees with this norm of equal concern and respect. ‘Democratic’ is no longer an attribute of procedures here (like: ‘democratically elected’, or ‘democratically controlled’) but of outcomes: democratic institutions are institutions which embody the democratic norm of ‘equal concern and respect’ and democratic decisions are decisions that agree with the basic norm of ‘equal concern and respect’. Jeremy Waldron has criticized this view so eloquently, that I can confine myself to a mere quote:

Notice how it turns on a elision between a decision about democracy and a decision made by democratic means. Dworkin seems to be suggesting that if a political
decision is about democracy, or about the rights associated with democracy, then
there is no interesting or interestingly distinct question to be raised about the way
in which the decision is made. All that matters is that the decision be right, from a
democratic point of view. (Waldron, 1999, p.292).

* Legislation as decisions about rights. But what are these decisions ‘about democracy’? We have
seen that Dworkin formulates these issues as decisions about rights. This seems to me an
unnecessarily reduced idea of legislation. Legislation is about the sizes of meshes in fishermen’s
nets, about the permitted emission levels of toxics or the required temperature of cooling
systems at grocery stores. Although it is undoubtedly true that these decisions have profound
effects on the lives of fishermen and customers of grocery stores, these issues cannot be reduced
to rights-matters alone. They are not only about rights and obligations; they are also about how
we would like the world to become, and the goals we set ourselves. Whether we think of
reduction of emission levels as more important than economic innovation, is a political choice.
The political debate that should precede that choice is here reduced to a legal question.

* Accurate answers. Once the political domain is reduced to matters of rights, it is clear that the
ground is prepared for the final conclusion that these matters should be entrusted to those who
are trained to deal with those matters, legal experts. They are better suited to give ‘accurate
answers’ than the fishermen, grocers, and their representatives themselves. It is the legal expert
who is more democratic than democratically elected representatives because he is better trained
to deal with the rights that are derived from the basic norm of equal concern and respect.
Whereas Mill thought that rights are best defended by the rights-owners themselves, Dworkin
wants to delegate these issues to the legal expert.

One might be tempted to object to this that we should differentiate here between the rule
of law and democracy. Lawyers may be better trained to uphold the rule of law against the
majority of representatives who might be trampling upon the rights of minorities. But this is not
Dworkin’s view. He does not want to allow for any tension between the concept of the rule of
law and democracy. Both ideals, he says, ‘are rooted in a more fundamental ideal, that any
acceptable government must treat people as equals’. [ibid. p.32]. Both ideals are in the end
reducible to the basic norm of equal concern and respect and the rights that are derived from
this norm. In Dworkin’s view it is possible to consider the judge a true democrat if he defends
the rule of law and to deny that title to elected representatives who trespass the fundamental
norm of equal concern and respect.

All the ingredients that we discerned in the notion of accountability are present in
Dworkin’s notion of democracy. Here again we see anti-majoritarianism coupled with an
emphasis on outcomes which are judged in a post hoc manner (judges always come in after the
fact). These outcomes are evaluated by reference to criteria shared by experts. The only
difference is that for Dworkin the appropriate experts are not technical specialists but legal
experts. Only they have access to the right answers and criteria which are derived from the
fundamental goal (equality) of the institutions to be judged.

2.3 Accountable to the moral expert
Confronted with the abundant literature on the importance of experts, legal or otherwise, for democracy, it comes as a kind of relief to turn to the literature on deliberative democracy. There, it seems that an attempt is made to revitalize the notion of democracy as a forum for ongoing discussion: it is maintained that democracy is more than just voting according to fixed preferences and interests. Rather, the citizens are thought to shape their preferences in a consensus-seeking debate. In truly deliberative debates, everything revolves around the soundness of arguments. Here at last, there seems to be hope for the ordinary citizen, the rights-owners Mill had in mind to speak up for themselves and to deliberate on the priority of aims. Here at last there seems to be scope for a political, not only a technocratic debate.

But there is reason for doubt. Confining myself to the work of Gutmann and Thompson (2004), it seems that in the end deliberation boils down to a form of accountability: providing arguments that mainly serve to justify -in a post hoc manner- the outcomes / decisions that have been reached. The good arguments that are required by these deliberative theorists are not thought to be of any help to find compromises or optimal solutions, they are at best put forward to influence decisions and they are mainly invoked to justify. And what is justified are not opinions or preferences, but decisions. If we read Gutmann and Thompson carefully, we get the impression that deliberation is advocated not as a way to arrive at good decisions, but as a means to justify decisions already taken. Deliberation does not play a role in what philosophers of science call the “context of discovery” but in the “context of justification”. This analogy with science is noticed by the authors themselves when they compare their requirements to the requirement of replication in science. They write that just as ‘a finding of truth in science requires replicability, which calls for public demonstration’, ‘a finding of justice requires reciprocity, which calls for public deliberation’. (p. 101). They haste to add here that this is not needed all the time: just like established truths in science need not be replicated repeatedly, repeated deliberation is unnecessary with well-established moral principles.

In itself, this limitation might not seem shockingly novel. Since Mill, it is generally conceded that large assemblies do not lend themselves easily for doing things, let alone for drafting complex pieces of legislation. Parliaments are there mainly to control. Proponents of deliberative democracy seem to connect themselves to this tradition, and their only novelty is then that good arguments should be provided by the officials who took the decisions. But appearances mislead. Traditional theory (and practice) start from the assumption that whereas the preparatory work is done by committees of expert legislative jurists, it is the approbation of the representative body that turns the proposals into statutes. In Mill’s words: in Parliament the ‘element of will’ is attached to the ‘element of intelligence’ which is introduced by a commission of codification. If parliament withholds its consent, there are no decisions taken at all. This implies, furthermore, that in the traditional model, there is good reason for officials to justify their proposals, for if they don’t they are sanctioned by disapproval: their proposals remain void.

In the book of Gutmann and Thompson, this threat of withholding actual consent has disappeared. In line with the American political situation, in which the president can decide matters on his own, the authors write:
The participants (...) intend their discussion to influence a decision the government will make (...). At some point the deliberation temporarily ceases and the leaders make a decision. (...) Once he decided, deliberation about the question of whether to go to war ceased. Yet deliberation about a seemingly similar but significantly different question continued: was the original decision justified?

The entire book revolves around the quality of the arguments used by officials in their justification of decisions. Here, relations are reversed: ‘intelligence’ as a product of deliberation is joined to the ‘will’ of the executive. Just like in the European context sketched in the White Paper, there are no serious consequences attached to bad reasons or bad performance.

The fact that deliberation seems mainly to serve as justification of outcomes rather than guiding the heuristical process of finding solutions and compromises is, I think, the reason that the authors emphasize the importance of substantive criteria. According to the authors: ‘No decision-making method (...) should be able to justify a war of aggression’. (p. 19). We are on familiar ground here. Like Dworkin and Majone, these authors emphasize the rightness of outcomes rather than the soundness of procedures. To Gutmann and Thomson, only those outcomes which are morally just can count as democratic answers.

One might object that Gutmann and Thompson, despite their emphasis on outcomes, are nevertheless unwilling to delegate matters to experts. It is here that the citizen might play a role. But we should not be too optimistic here. Only preferences which are morally just count as good arguments. The citizen is only granted a platform if (s)he is reasonable. And the criteria for reasonableness are mainly identified by (moral) philosophers. Although the debate envisioned is not a technocratic one, it can still not be considered a political one. Deliberative theorists turn politics into a moral debate in which moral philosophers are the experts. It is to them to decide whether the decisions reached can survive the test of critical morality.

There seems to be only one aspect in which the theory on deliberative democracy differs from other attempts to reshape democracy into accountability: deliberative democracy does not seem to rely on the notion that there is an identifiable set of goals from which the basic standards and criteria are derived. But we should be cautious here. Underneath its apparent liberalism, we can feel the pressure of the ‘basic opportunities’ that must be fulfilled in order to count as morally defensible. We are but one step removed here from Finnis’s set of basic goods without which human nature cannot flourish. (Finnis, 1980). This is not surprising. In order to derive standards and criteria the supposition of one or more goals is simply indispensible. Normative statements cannot be developed out of the blue, they need to rest on an assumption about the goals that are served by institutions and societies. Developing substantive moral criteria, therefore, necessarily starts from the assumption that there are ‘proper’ goals to be distinguished from the goals that frame ordinary people’s preferences.

3. Three types of outcome
We have seen that in different areas people tend to reshape democracy into a form of accountability: the requirement to justify outcomes in a *post hoc* manner, according to criteria which are accessible to experts rather than to lay citizens. I have argued that these theories inevitably end up turning political debates into legal, technocratic or moral debates. But the question arises whether there is a viable alternative. Is it really possible and desirable *not* to stress the importance of good outcomes? What would be the advantage of procedural legitimacy? Luhmann described procedural legitimacy as the general willingness to abide by whatever outcome as long as procedures are followed. (Luhmann 1969). But what is the basis for this willingness? Is it sensible to rely on procedures alone, which, if followed by potentially wicked, passionate or downright silly people, may lead to very bad outcomes? *How can we make sense of procedural legitimacy in the first place?*

In order to answer this question and to understand the importance of procedures I think we should start from the other end and inquire first into what we should understand by “outcome”. Most theorists speak about procedures and outcomes without specifying the kind of outcomes they have in mind and I think that that leads to unnecessary confusion (the discussion between Arneson (1993) and Estlund (2003) is an example in point). Let me try to bring some order by distinguishing three possible candidates for what counts as ‘outcome’. In each of these senses I shall ask myself whether we might view the procedures that lead to this (sense of) outcome as being capable of generating legitimacy by their intrinsic value.

A) *Specific consequences in individual cases.*

We might view as outcome the result of any procedure or set of rules when applied to a concrete case. Outcome here is concrete outcome: the outcome of elections, the verdict of the judge in an individual case, but also the knee-operation conducted according to the strict rules of a medical protocol, or the gains and losses of the players who play according to the rules of the game. According to Rawls who analysed this kind of outcome (1971, p. 86) by means of the example of gambling, these outcomes cannot be evaluated independent from the rules of the game. He meant to say that in these cases there are no criteria for judging the fairness of outcomes other than those provided by the procedures themselves. The rules of the game give legitimacy to *any* outcome.

This may be true in the closed universe of games, although even there I can think of instances in which one may deplore an outcome and even judge it as unfair, despite the fact that procedures and rules were followed. But in most cases I believe that this kind of what Rawls called ‘pure proceduralism’ collapses into what he called ‘imperfect proceduralism’, which he defines as the situation that arises where procedures cannot be designed in such a way that they always generate the correct outcome. Despite having followed protocol, based on medical evidence, this particular patient dies. Despite fair and reasonably reliable rules concerning evidence in court, this particular innocent man is sentenced to prison. In all these cases there is a tension not between procedure and outcome, but between what is *generally* taken to be the outcome of the procedure (for which reason the procedure was adopted in the first place) and
the specific outcome in this particular case. Generally the protocols and procedures launch reasonably fair results but fail to do so in this particular instance.

There are then three possible sources for arguing that, adverse effects in particular cases notwithstanding, we should stick to the procedures. The first is the one already hinted at: that a certain set of rules in general lead to fairly adequate results. Just as it is no good to forsake the advantages of evidence-based medicine because of one dead patient, it would be unwise to give up general rules of procedure because of one mistrial. (See Schauer 1991). This argument does not commit us to the view that there is an intrinsic value to a specific kind of procedures. Procedures owe their raison d’être here to the fact that in general they generate good outcomes.

A second possible source of arguments in favour of sticking to the rules and procedures even where they fail to generate the right outcomes is by pointing at problems of coordination, and inefficiency which may arise if we don’t follow procedures and judge each case on its own merit. These are interesting arguments in favour of the use of rules and procedures, but they only point out that some rules and procedures are needed; not that a particular set of rules should be followed -despite adverse effects- because of its intrinsic quality. Arguments that point to the importance of legal certainty, reliability of judicial system and the protection rules can offer against arbitrary power are all arguments in favour of some form of the rule of law, but they do not argue in favour of democratic rules and procedures (and unlike Dworkin I would like to maintain the difference between the two).

A third possible argument is that democratic procedures have intrinsic value, not because they are rules, and not because as such rules they tend to produce good outcomes in general, but because they are agreed to by free and equal people in conditions that were fair. The problem with this answer is that it does not argue in favour of intrinsic value of democratic procedures. Rather, it shifts the burden of legitimacy from the procedures to the initial conditions in which agreement was reached. The procedures (rules of the game) owe their fairness to the fact that they were devised in conditions that were fair. Here, the procedures are not valued for the fact that they are procedures, but because they are outcomes of an previous process of fair deliberation. This argument brings us to the next possible meaning of outcome.

B) Institutional arrangements
A different concept of ‘outcome’ can be discerned if we focus our attention to the deliberations conducted in a fictional pre-contractual situation. For what is the ‘outcome’ of deliberation and consent in this stage? Not the individual losses and gains, but the very procedures, rules, rights and obligations the contracting parties consent to live by. That which figures under a) as ‘procedures’ is here the ‘outcome’ of the pre-contractual deliberations. Which testifies to the fact that procedures and outcomes are relative terms: it depends on one’s point of view what is to count as procedure or outcome.

By institutional arrangements I mean the arrangements that shape the way people relate to one another. It comprises what Rawls called the basic institutions of society; the main rules,
principles and practices, regulating the distribution of rights and duties, benefits and burdens. It also comprises the allocation of rights that Dworkin had in mind.

To what extent is the legitimacy of this kind of outcome safeguarded by the preceding procedures? It is here that contract theory comes in. For here, it might be expected that the fairness of institutional arrangements is at least furthered by procedures (the deliberations in the pre-contractual stage) that tend to include the weak and the poor as well, and which minimize differences in freedom and equality. This does not mean that fair procedures inevitably lead to just results, neither that unfair procedures inevitably lead to unjust outcomes, but at least there is a link between procedure and outcome to the extent that the chance of a fair institutional arrangement is maximized by initial conditions (including the freedom and equality of parties) that are fair.

This link should not be conceived of as another kind of invisible hand theory in which procedures automatically channel selfish interests into a fair distribution of rights and duties. (see Griffin 2003). They only do so if we suppose the consenting partners to act behind a Rawlsian veil of ignorance. But as far as this type of outcomes are concerned, we may say (with Rawls) that in order to maximize the chances of a fair distribution of rights, duties, burdens and benefits, we should try to design procedures that come as close as possible to this hypothetical situation of free and equal citizens. Mill’s inclusiveness of interests and rights is one way of approaching that hypothetical situation (but not the only one).

I believe that this is the closest we can get to defending the intrinsic value of democratic procedures. It is not immune to rejection. If some day we would find out that a fair distribution of rights and duties is better realized by, for instance, organizing a lottery, there is no way to escape the conclusion, on the basis of this very argument, that a lottery should be preferred.

C. Goals and enterprises
A third possible reading of ‘outcome’ is the enterprise or course of action on which a given society embarks. This calls for clarification and I can think of no better example than that furnished by Hugo Grotius who (for different reasons) adduces the example of the shipping companies who joined forces in 17th century Holland and formed an Admiralty in order to minimize the risks of piracy attached to the great voyages to the Indies. (Grotius 1625, Ch. XII)

One might call the enterprise of defending oneself against pirates (but also the “less worthy” goals to which Grotius alludes) ‘outcome’ of this third type. This example lends itself nicely to capture the three different senses of ‘outcome’ I discern here. The shipping companies, which were not equal but differed in size and strength, consented to an institutional arrangement (outcome type B) which rested on the principle that those who took greater risks should have a greater share in the revenues. They did so in order to defend themselves against pirates
(outcome type C). This resulted eventually in a distribution of gains and losses according to the rules (outcome type A).

It is important to see that the relation between procedure and outcome of type C is different from the relation between procedure and outcome of type B. Whereas there is a certain link between the reasonableness of an institutional arrangement and the initial situation in which the consenting partners find themselves, no such link can be discovered between procedures and enterprises. If for instance the Admiralty has to choose between fighting pirates or enslaving African inhabitants, they are not really helped in that choice by the fact that the participating associations are free and equal. The fairness or reasonableness of the outcome (type 3) is not in any direct way furthered by the fair and reasonable relations of consenting partners. In fact, terms like reasonableness and fairness do not apply here at all. These terms generally refer to how relations between participants are ordered. But here we are not dealing with how people relate to each other but what they are going to do.

However, what does help to further an informed choice between different enterprises is someone who has the required knowledge to sum up the pros and cons of enslaving Africans versus fighting the pirates. It is here that the expert is called for. Procedures which guarantee inclusiveness of rights and interests are important only in so far as a diversity of perspectives is instrumental in getting a better view of the enterprises and goals. (In fact, this is the argument Waldron (1999) supplies in favor of democracy). But this link is contingent upon the nature of the enterprises themselves. If they are complex enough, it is more useful to call in the expert than a multitude of equal but also equally ignorant people.

4. Boundaries between arrangements and enterprises

We are now able to locate the specific legitimacy generated by democratic procedures. It does not reside in the fact (mentioned under A) that they are procedures (for that would only be an argument in favor of the rule of law) nor does it reside in the fact (mentioned under C) that multiple perspectives generate better knowledge (Waldron’s argument is dependent upon the complexity of the subject matter). Democratic procedures are only a source of legitimacy insofar as they are likely to generate fairer institutional arrangements than non-democratic procedures.
If this is true, this might explain much of the current distrust in democratic procedures and its predilection for a post hoc justification of outcomes. It is not because the procedures themselves are felt to be worrisome and suboptimal (although there is also a trend to downplay the importance of the rule of law for this very reason, see Westerman 2007a) but because the subject-matter does not lend itself easily to democratic deliberation. The dominant issues of present day political debate are very much like the goals and enterprises of type C. Not pirates but terrorists should be fought, not loss of cargo should be prevented but unemployment, not bad winds and tempests but a polluted environment or global heating. The contemporary 'shipping companies' who have come together to form admiralties like GATT or the EU did so in order to be better able to cope with external risks and threats. Like the Dutch 17th century shipping companies they joined forces because of a keenly felt common interest, analyzable as type C outcomes. The institutional arrangements (type B) that deal with how the partners relate to one another are thought to be of secondary importance, or at best as merely instrumental in order to cope as efficiently as possible with these external dangers.

In this respect, Majone draws an interesting and revealing distinction between 'efficiency' and 'redistribution'. The former deals with positive sum games in which common interests are at stake, while the latter has to do with potentially conflict-ridden matters, which need the support of direct democratic legitimacy (Majone, 1994, p. 23). Majone uses this distinction to pave the way for anti-majoritarian independent institutions. The idea is that democratic procedures, although indispensible in matters where distribution of rights and duties, burdens and benefits is at stake, are not appropriate, and even cumbersome and inefficient in dealing with 'positive sum games' such as beating Asian competition or reducing emission of toxics.

However, having grasped the difference, it is time to immediately question the firmness of the boundaries demarcating B from C. We should trespass them from both sides. In the first place we should realize that type B outcomes cannot be reached without reference to desirable C outcomes. It is an illusion to think of institutional arrangements as being wholly determined by fair and reasonable procedures followed by free and equal persons without any regard for enterprises type C. This explains why various different arrangements are imaginable. If we think once again of Grotius's shipping companies, we see at once that although most of them were approximately equal to each other, they could have designed a different arrangement. Instead of
allocating gains on the basis of risk, they could have agreed to an institutional arrangement in which the greatest revenue was given to those who had invested most labor in the enterprise. Even where consenting parties are free and equal, or probably just because they are free and approximately equal, all kinds of institutional arrangements could have been designed, none of them totally just or unjust. The choice of 'risk' as the determining criterion rather than labor may be inspired but is not completely dictated by internal power-relations. It is also partly determined by the enterprise of fighting pirates for which the shipping companies had joined forces. It is possible that the allocation of benefits on the basis of risk turned out to be the institutional arrangement that was the most conducive to efficiently fighting the pirates, for instance because such an arrangement is better suited to attract the bigger, stronger and richer companies than allocation on the basis of labor. So considerations concerning type C outcomes enter into the deliberations. And that is precisely the reason why fair procedures do not guarantee fair institutional arrangements.

But the boundaries between B and C can also be crossed in a different direction. Grotius’s example of the shipping companies makes clear that underneath the boundary between ‘institutional arrangement’ and ‘enterprise’ there is another boundary which divides ‘us’ from ‘them’. Fighting pirates can count as an enterprise because we define piracy as an external threat: as outsiders pirates can figure as an enterprise ‘out there’. But as soon as we include pirates in our discourse (a possibility as remote to my 17th century ancestors as the inclusion of the Taliban in our contemporary moral discourse) they become part of the world to whom we should relate. Then, suddenly, the Taliban or pirates move from C to B. Our relations to them become part of our institutional arrangements. At that stage, they should take part in the deliberations that lead to the establishment of these institutional arrangements. One and the same issue can therefore figure either as ‘fighting terrorism’ or as a ‘human rights issue’ (Koskenniemi 2007). Where outsiders become insiders, outcomes type C become outcomes type B.

If we think of issues such as education or the improvement of infrastructure, it is clear that these issues can be regarded both as external states of affairs to be promoted and as issues that have to do with how we define our relations with other members of the community. They can be seen as common enterprises in the sense that everyone profits from good education and a
good infrastructure. But as soon as one has to decide which goal should gain priority and the (scarce) resources that should be allocated to these goals, these matters move clearly to B-type outcomes. As soon as the available and limited recourses should be distributed between students and teachers, or between both these groups and transport companies, C type outcomes turn into B type outcomes.

However, it is significant to note that issues are nowadays more easily defined in terms of external enterprises than in terms of relationships. There is a tendency to regard matters mainly as C-issues serving the common interest: as ‘positive sum games’. Such a representation ignores the fundamental political choices that have to be made between the different enterprises to embark upon. It is only by hiding from view the choices that have to be made between desirable goals and enterprises that outcomes B can be converted into outcomes of type C (see also Westerman 2007b).

5. Conclusion

It is time to put the threads together. I argued that in different areas we can witness a growing distrust of democratic procedures. Instead of attempting to improve procedures where they are found unreliable, critics instead try to reshape democracy into ‘accountability’, which I defined as the requirement to give a post hoc justification of past performance (outcomes) in accordance with shared criteria, derived from an identifiable goal or set of goals. I argued that in different areas this tendency entails a reliance on control by experts, whether technical, legal or moral. Debates are de-politicized. Government by the people is replaced by government for the people, mainly designed and implemented by experts.

In order to appreciate this change more fully, different senses of ‘outcome’ were distinguished: A) the gains and losses in individual cases, B) institutional arrangements and C) common goals or enterprises. Each of these senses of ‘outcome’ turned out to entertain a different relationship with preceding procedures. The possible problems pertaining to type A outcomes may be brought about by the fact that general procedures were followed but does not tell us anything about the kinds of procedures that should be adopted. Type B outcomes, on the other hand, are more directly linked to the kind of procedures by which they are generated. The
chance that the institutional arrangements that figure under B fairly distribute rights and duties as well as burdens and benefits, is enhanced or diminished by the possibilities for the citizens to defend their own interests. This link between procedures and outcomes is absent in outcomes of type C, the enterprises or shared goals of a society. The quality of this type of outcome is not directly linked to the degree of inclusiveness of preceding procedures and seems to be more dependent on expertise.

The current distrust of democratic institutions can now be understood more fully as a result of the reformulation of B type outcomes as C type outcomes. Problems tend to be interpreted as problems about which there is a shared understanding, the solution of which is in the common interest. This interpretation seems to be supported by the way these type C outcomes are presented. First, they are generally presented in highly abstract terms. E.g. many so-called framework-directives, issued by the EC, require the addressees to ‘further an innovative economy’, to ‘improve labor condition’ and ‘to aim at a reduction of emission of toxics’. Who would be against these noble aims? No one in his right mind should oppose such ‘positive-sum outcomes’! Shouldn’t any policy designed to further these universally shared goals be embraced and welcomed? Disagreement arises only if these abstract and noble aims are translated into more concrete measures and rules. But this very process of concretization takes place in largely expert circles. If there is a political debate conducted there, it is usually couched in technical language, accessible to the expert alone.

Second, these positive-sum results are generally represented in splendid isolation. In themselves the aims are all valuable. But they are not equally valuable. Preferences about whether we should give more attention (and spend more money) to an aim like the “improvement of mental health” (to mention just a recent EU target) or to a further “reduction of traffic accidents” may differ. And this problem how to prioritize aims is effectively hidden from view—and consequently from public debate—by the organization of the regulative landscape into many single-purposes agencies and committees (See Smisms 2004). Within these agencies and committees the choice between and the consequent coordination of different aims necessarily
plays a more modest role than in parliamentary debates and even if it arises, is again largely restricted to debates among experts. These mechanisms all contribute to the reduction of political debates into technical ones. This sets the stage for the major battle that according to Shapiro is to be fought in the coming years:

the battle between those who envision transnational regulation as properly placed in the hands of technically expert deliberations and those who seek a gate through which politics may enter”. (Shapiro, 2005, p. 354).

That Shapiro -and with him many others e.g., Koskenniemi) -try to open that gate by invoking legal expertise (judicial review!) is not a very reassuring sign to those who would rather see citizens stand up for themselves.

Pauline C. Westerman is Professor in the Philosophy of Law at the University of Groningen and at the Vrije Universiteit Amsterdam. She is also a member of staff of the Academy of Legislation in The Hague.

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