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**COMMENTARY ON JAMES ALLAN’S “INFORMAL
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**COMENTÁRIO AO ARTIGO DE JAMES ALLAN
“CONSTITUCIONALISMO INFORMAL E O PAPEL DA POLÍTICA”**

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Abstract: This commentary questions whether Allan’s defense of informal constitutionalism can be replied with success outside Britain and her scions and also whether it is adequate to reduce democracy to majoritarianism.

Sumário: Este comentário questiona se a defesa de Allan do constitucionalismo informal pode ser replicada com sucesso fora da Grã-Bretanha e se é adequado reduzir a democracia à ideia ao elemento maioritário.

Keywords: Informal constitutionalism, democracy, judicial review

Palavras-chave: Constitucionalismo informal, democracia, fiscalização judicial

1. Professor Auxiliar da Faculdade de Direito da Universidade de Lisboa.

Professor James Allan paper about informal constitutionalism and the role of politics deals, with the flair and wit that we can find in his writings, with a set of themes whose study he has been pursuing for a long time: the setting aside of judicial review on right-related grounds in face of parliamentary sovereignty; the preference for a society regulated by elections and democratic process and the conventions that it produces, rather than a written constitution, a text written in a more or less remote past; the adequacy of a political enforcement of this rules, preferable to a legal enforcement by judges; above all, the paramount importance of democracy as the process through which the fundamental choices within a society are made, not through the decisions of an unelected judicial elite.

I must say that it is a tempting vision for the organization of a political community, a model that Professor Allan exemplifies with New Zealand and also with Britain, and, to a lesser extent, with Australia and Canada. But I would like to ask if that model can be replied, with success, outside Britain and her scions. For instance, would it be possible to establish it on continental Europe, or even in the United States?

Would it be right to assume that this model's operation needs a consensus-based society, at least on several important premises regarding social and political relations, which are increasingly hard to find in the diverse, multicultural, globalized states of today?

To cast aside judicial review, Jeremy Waldron states four assumptions, the third one being "[the] commitment on the part of most members of society and most of its officials to the idea of individual and minority rights" («The Core of the Case against Judicial Review», *Yale Law Journal*, 115/6 (2006), 1346 ff. (1360); I guess that assumption must be made also for the dispensation of a bill of rights and the concomitant judicial review. But wouldn't that assumption be unrealistically optimistic? Are this near arcadian conditions likely to be established or to last anywhere, even in the places Professor Allan referred to – I exempt New Zealand from this doubting? Today or tomorrow's England can realistically be deemed a place where the idea of minority rights (aliens, for instance) as majoritarian commitment is a safe bet?

If that's the case, if the consensus on the protection of individual or minority rights – especially the so-called "discrete and insulated minorities" – is breached or shattered, what are the remedies that an unwritten, bill of rights and judicial review free, system could provide?

Couldn't it be that the package bill of rights plus judicial review would provide a better solution for that situation?

Judicial review is controversial from its inception, as the discussion between Carl Schmitt and Hans Kelsen in the late twenties of last century shows, and the argumentation used today hasn't evolved that much. But judicial review can be organized in different ways, to obtain a better outcome: for instance, to curtail the Constitutional Courts ability to fix or manipulate the effects of their normative decisions (which is a real problem in continental Europe), or

to establish a supermajority rule for the higher courts decisions that invalidate parliamentary statutes.

Adapting a known Winston Churchill's quote to this, we could be tempted to say that judicial review is the worst form of protecting rights, except for all others.

On the other hand, Professor Allan's distaste for judicial review on rights issues doesn't seem to extend to judicial review of checks and balances issues or federalism. The same dangers that lurk in the path of judicial review for rights issues doesn't apply to this other issue – checks and balances, federalism?

Democracy is viewed by Professor Allan, I think, as the main value of a legal order, both as a process and as an outcome. It's a view that is shared by almost all.

However, the concept of democracy is not a clear or precise one, it's not "locked in", and there isn't here an unelected judge to force on us his or her conception of democracy.

To circumscribe the idea of democracy to majority democracy wouldn't narrow excessively its scope? If the working of democracy implies that the opinion of each member of the community has an equal standing in the decision-making process, doesn't it have to guarantee the individual rights needed for the formation and expression of that opinion – suffrage, freedom of speech, etc.? How could those rights to participate in the democratic process be protected from an undemocratic outcome – for instance, the arbitrary denegation of suffrage to some people - coming from the majority - although through a democratic process? It seems quite a paradox: the democratic process can get you an undemocratic outcome, so, to avoid that and get a democratic outcome it's needed an undemocratic process (the judicial review).

Some would prefer the first option - democratic process plus undemocratic outcome -, placing heavier weight on the procedural aspect, more visible and easily accessible, rather than the more disputable outcome parcel. But we can't really have or retain the democratic process of decision-making if the basis of that process – the equal standing of everyone's opinion – is undermined through a majority decision. So, it would seem correct to say that democracy can't exist and work without individual rights and strong forms for safeguarding them, which seems difficult, or more difficult, in an informal, unwritten only, constitutional system.
