

# Institutional Cures For Cognitive Ailments

By N. W. BARBER

*Review of* SECURITIES AGAINST MISRULE: JURIES, ASSEMBLIES, ELECTIONS, *by* Jon Elster

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Jon Elster's contribution to constitutional scholarship has been profound. Most of modern constitutional scholarship – or rather, most of the interesting part of modern constitutional scholarship – owes him a great debt. Over the course of many books, Elster's attention to the institutions of the constitution, and the ways in which rules can structure the decision-making within those institutions, has helped define the agenda for a discipline. Most of us who write on constitutions are influenced – directly or indirectly – by his work.

In *Securities Against Misrule* Elster reflects on the ways in which institutional design can remove obstacles to good decision-making. He draws inspiration from the work of Jeremy Bentham. Rather than setting rules designed to produce particular outcomes, the Benthamite strategy advocates the creation of structures through which actors can successfully identify the public interest, as they understand it, and adopt measures that will achieve the goals they seek. Elster puts the point strongly, perhaps more strongly than Bentham: his book is not concerned with the moral validity of ends, but with the removal of obstacles that would impede the achievement of the ends that actors wish to pursue (38). In light of this, the book seeks to show how various factors detrimental to successful decision-making – in particular, self-interest, prejudice, bias, and passion – can be mitigated through careful institutional design.

There are two important constraints on the ambitions of the book. Elster does not take a position on the proper ends of collective action, nor does he take a position on the causal connection between the design of an institution and the likelihood of it producing certain outcomes. In the introduction Elster provides a spirited defence of this analytical modesty: not only have moral philosophers failed to reach agreement

on what counts as a good outcome, social scientists have also failed to provide a definitive account of what type of institution will produce particular results. There is, in Elster's words, a 'double-indeterminacy' operating at both the normative and causal level (4). Elster attempts to chart a course around these twin storms: the book does not discuss constitutional mechanisms that aspire to produce good ends or effective laws: rather, it engages with mechanisms that prevent reasoning being distorted by factors that will inhibit successful decision-making, whatever the goals of that decision-making. Once these factors are removed Elster is content to let the 'chips fall where they may' (2).

As with any book by Elster, the volume is packed with ideas, distinctions, and examples. *Securities Against Misrule* is divided into five chapters. The first provides a broad account of the model of decision-making that animates the remainder of the book. Elster identifies three modes through which groups can make decisions: arguing, bargaining, and aggregation. Through arguing, individuals seek to persuade others to agree with them. The purest form of decision-making grounded in argumentation requires unanimity: for instance, some juries require all of their members to agree before convicting. Through bargaining, individuals make offers and counter-offers until agreement is reached. All parties consent to the product of the bargain, even if there were other outcomes that they might have preferred. Finally, through aggregation, decisions are made on the basis of a vote: the winning side carries the day. The outcome is one that some may have rejected in the vote - though presumably there must be some broad agreement within the group that the vote will settle the issue. Of course, as Elster notes, most decision-making systems combine elements of each of these three approaches. Elster considers the ways that these forms of decision-making can be structured, and the ways in which 'strategic' behaviour of actors within the systems can seek to influence their outcomes.

Chapters two and four examine the operation of distinctive types of decision-making institutions: juries and constituent assemblies. Elster categorizes the various ways in which these bodies can exercise their functions, and makes various recommendations for protecting them from the vices – as he sees it – of self-interest and irrationality. For example, the jury should be protected from bribes and threats, and its deliberations should be kept secret to avoid the 'chilling effects' of subsequent publicity (139), whilst those who establish constituent assemblies should avoid asking

them to decide issues on which representatives have a direct interest – an argument for keeping the constituent assembly distinct from the legislature. Chapter three is presented as a ‘dialogue’ with Bentham, in which Bentham’s views on institutional design are examined and, to an extent, critiqued. Chapter five considers ‘cross-voting’ systems; a group of voting structures that may prove attractive to divided communities. In cross-voting, members of one group get to pick the representatives from, and for, their rival group. The hope is that this will encourage each side to pick moderate candidates, candidates from the rival group who are most sympathetic towards the other section of the community, and, in so doing, encourage moderation in those seeking election. Perhaps unsurprisingly, it turns out that cross-voting is extremely vulnerable to subversion by political actors: amongst many other problems, groups may vote for the least competent of their rival’s candidates. Having ushered this rather odd form of electoral process onto the stage, Elster then steers it firmly back off into the wings.

As will be evident from the proceeding paragraphs, *Securities Against Misrule* is a collection of essays around a theme rather than a monograph. There is an episodic quality to the text: whilst the individual chapters are rigorous and tightly structured, the book, taken as a whole, leaves some notable gaps. Some of these concern the topics covered. Whilst the institutions of the jury and constituent assembly get their own chapters, the legislature is only discussed indirectly, through the medium of Bentham’s work on the topic. Indeed, in the final pages of the book, Elster turns to consider the proper role of judicial review, contending that judges have ‘no business overriding the decisions of a properly elected and properly organized legislature’ (282). This is a claim that develops naturally from the methodology of the book, with its focus on factors that distort reasoning and its reluctance to examine the attractiveness of outcomes, but it needs to be located in a wider discussion of the point and operation of legislatures – and, indeed, the operation of the courts.

The decision to place legislatures in the background of the book is, perhaps, a symptom of the stresses generated by the restrictions Elster has placed on his analysis. His decision not to critique decision-making processes by virtue of their outcomes – whether the morality of their outcomes or their practical effectiveness – is understandable: as he asserts, each of these criteria, or sets of criteria, is subject to endless dispute. But this apparent methodological modesty is problematic. Such

restraint may appear defensible in some contexts – such as the jury and constituent assemblies – where there is relatively little debate about the point of the institution. In these cases, discussion over the purpose of the institution might seem a little tedious: the important questions about these bodies relate to their operation, rather than their point. But the discussion tries our patience because it examines what we are happy to assume: there is relatively little controversy over the proper goals of these bodies. The jury – in normal circumstances – is tasked to convict the guilty and acquit the innocent. Constituent assemblies should create lasting constitutional structures that enable the state to work towards the benefit of its citizens. These are both moral claims about the aims of these institutions, but whilst they are sometimes contested and certainly need to be finessed, they are so widely accepted as to be almost truisms. Perhaps counter-intuitively, the plainness of these moral objectives makes it easy to set them aside when identifying factors that might impede the reasoning processes of these bodies. We can agree, for example, that self-interest will always impede the operation of the jury without needing to re-examine the moral point of that body; the moral assessment is there in the background, but it is so obvious and uncontested that we can overlook it. Similarly, once it is agreed that a constituent assembly should be established – an issue that raises a host of very hard moral questions - the broad aim of that body is relatively clear, if less so than that of the jury. Elster’s attempt to avoid engagement with the purpose of these bodies is problematic, but excusable: the reader and Elster share assumptions about the point of these bodies, and discussion about their optimal functioning can be undertaken without reopening the question. Matters become more difficult, though, when there are significant debates over the moral point of the institution. The proper aims of the legislature are frequently contested, and debates about process will often be tied up with debates about outcomes: people’s disagreement about what is or is not a flaw in the way decisions are made will track disagreements over the purpose of the institution. In short, Elster’s decision to avoid engaging with the proper ends of institutions appears attractive only where there is consensus over those ends. Rather than succeeding in isolating them from his analysis, this consensus acts as a collection of unacknowledged premises to Elster’s work. Where the consensus is absent, as it is often with the legislature, the need to address these premises is made more obvious.

The absence of a sustained discussion of the legislature may also have enabled Elster to leave his account of the vices that threaten good decision-making vague. As

we know what the jury and constituent assembly should be seeking to achieve, we can reverse-engineer an account of the vices: these are the flaws in reasoning that will prevent the institution from achieving its goals (87). Where we lack agreement about the proper ends of an institution, such as the legislature, more turns on the account of the vice: to be persuasive, it must be plain that this will impair decision-making. In the first chapter of the book, Elster identifies four vices that may afflict decision-making: passion, prejudice, bias, and interest. Although the nature and implications of these four are central to Elster's argument, he does not develop an account of their natures at any length. Often, this does not present a problem – the account of the vices he provides is clear enough for the analysis he undertakes – but sometimes it is less clear that these supposed vices really are all that vicious: it could be that some of these factors, on some occasions, are assets to the process, rather than liabilities.

Prejudices are defined by Elster as permanent attitudes of individuals – racism and misogyny, for example – whilst passions are triggered by circumstances and include all 'strong feelings' as well as intoxication (85). It is impossible to argue against Elster's claim that racist and misogynistic prejudices will harm decision-making processes; all decent people would agree with this assertion. But it is worth noting that all decent people would agree *because* they are decent. Whilst some prejudices may rest on false empirical beliefs, factual errors that can quickly be corrected, others – I suspect the majority - rest on false moral beliefs: a mistaken belief that members of one group are less entitled to our concern and respect than members of another group. As we can identify this type of prejudice only through a moral lens we cannot avoid the normative analysis Elster hopes to avoid. Furthermore, once we move beyond simple examples of plainly immoral prejudice, it will become increasingly hard to distinguish between improper prejudice and virtuous partiality. Many would argue that, in private life, showing partiality towards your friends and family is a good thing. Sometimes this moral partiality may carry over to the constitutional sphere. Some would contend that representatives in the legislature or the constituent assembly should be partial towards their national or ethnic group: they owe special duties towards these sections of the citizenry. Many more would argue that representatives should be partial towards the citizenry as a whole: the decisions of the state's constitutional institutions should be oriented towards the well-being of members of the state, not towards, or at least not primarily towards, the well-being of non-nationals. Indeed, we might want to construct constitutional assemblies

and legislatures that will be partial – or ‘prejudiced’ – towards the citizenry. The identification of improper ‘prejudice’ can only be achieved from within a moral framework and by reference to the moral point of the institution studied.

The role of passions within constitutional institutions is also contestable. Elster has discussed the role of emotion in public life in previous work, but has comparatively little to say about it in *Securities Against Misrule*. He allows that some types of emotion may, on some occasions, be beneficial. First, he concedes that enthusiasm may be a necessary ingredient for successful constitutional projects: without this passion, little may be accomplished (90). Secondly, shame may help to exclude certain unattractive or dishonest arguments and strategies from the public realm – at least when there is a chance that the agent will be caught out (96). But it could be argued that emotions, passions, have a positive role to play in our constitutional life that extends beyond these instances.

There is a long philosophical tradition that identifies emotions as forms of perception: they are physiological reactions to states of affairs, reactions that pick out, or purport to pick out, morally significant features of the world. So, when we see a cruel act we feel anger and outrage, when we see someone in need of help we feel pity and compassion. For Aristotle, a prerequisite of virtuous action is correct moral perception: if a person lacks these emotional capacities, no amount of formal reasoning will help them make a good decision. Perhaps surprisingly, this ancient understanding of emotions receives some oblique support from modern evolutionary psychology: our capacity to experience emotions may have developed in interaction with our capacity to flourish within social groups. It could be that there is an evolutionary argument to be made for the importance of emotions within group reasoning.

The two points raised about emotion in the previous paragraph – that emotions are necessary to moral cognition and, also, that such moral cognition may be vital to the success of group reasoning – are plainly contestable. But they go to the heart of Elster’s project. Even with the institution of the jury, emotions, passions, may be needed to pick out morally salient features of the defendant’s conduct: malice and dishonesty are sometimes elements of criminal offences that it falls to the jury to determine. But the role of emotions plays a larger role in constituent assemblies and a

larger role still in the legislature. When representatives feel anger at injustice or compassion for the disadvantaged, this may identify features of the world to which the institution ought to respond. Some of the devices that might be used to reduce the impacts of passion on decision-making – by, for instance, slowing down the process or by insulating representatives from the popular mood – might also serve to reduce the positive role that emotions can play in public decisions. It could be, for example, that a legislature might be stirred by a mix of anger and compassion to intervene in a foreign conflict in which a vulnerable community was at the mercy of cruel and vicious aggressors. And it could be that if this decision were delayed, if passions were given time to cool, the legislature would decide not to act, given the costs and risks involved: the sharpness of the initial emotional response has been blunted by time. Elster might rate the second, calmer, mode of reasoning above the first, emotionally informed, form, but there is no neutral point from which we can tell which of these two decisions is the correct one – and even if we ask what the community comes to believe the correct response was, the answer may not be clear for many years after the events.

In short, the interaction between passion and public decision-making is a complicated one. We cannot assume that passion is invariably detrimental to institutional decision-making. Frequently passion will have a positive role to play and sometimes, indeed, it may be essential if the institution is to reason successfully. The challenge for constitutional scholars is to identify when emotions have been correctly engaged and how we can ensure that the institutional response to these emotions is appropriate. This task requires a mix of institutional and moral analysis.

Elster's third and fourth hazards to rational decision-making are bias and interest. Elster defines bias as cognitive mechanisms that shape beliefs in 'normatively inappropriate ways' (85). There is, for example, the sunk cost fallacy, where actors continue to invest in failing projects because they fear the loss of their original investment, or, to take another example, the risk that when a group of people votes publically and sequentially the latter voters in the set will be swayed by the earlier votes. As with Elster's discussion of passions, his account of biases is, at least in this volume, left undeveloped. There is no systematic attempt to identify or expound the fallacies and forms of lazy thinking to which groups – in particular, the groups of people who form the institutions that are the focus of the study – might be

vulnerable. This restraint limits the reach of Elster's analysis in at least two respects. First, Elster's examination of the ways in which biases can play out within the institutions is limited. Though he discusses a number of mechanisms which may help guard against some types of bias – by, for example, requiring votes within the jury room to be conducted in secret, to avoid earlier voters influencing later voters (138) – he does not consider in any depth the ways in which groups process information. Indeed, he expressly excludes expert decision-making from his analysis (5), a constraint that may be problematic, given that the jury might be thought to be, or should aspire to become, a set of 'experts' in the matter placed before them, knowing far more about the evidence in that case than those not concerned with the trial. Secondly, whether any given cognitive device is mischievous – a flaw in the reasoning process – or virtuous – an asset to that process – may depend on the process being examined. A cognitive short-cut that sacrifices accuracy for ease, may be justifiable where the costs of accuracy are not warranted by the decision at hand – or, perhaps, when attempting the 'correct' reasoning process brings with it a greater risk of mistake, when contrasted with the intrinsically less accurate, but easier, mental short-cut. Furthermore, the point of an institution – the moral values or goals it exists to pursue – may determine whether a cognitive mechanism is a vice or a virtue. It is arguable, for example, that whilst pressures produced by sequential public voting are a vice in the jury room, they can prove a virtue in the legislature. If one of the purposes of a legislature is to foster consensus around state projects, a representative who weakly opposed a proposal might rightly shift their vote in the face of the emerging majority: deciding that the value in consensus outweighed the negative features of the proposal. Of course, this is a controversial claim - it is not obvious that consensus is a goal of the legislature – but it is only by considering the – moral – point of that institution that we can determine whether the cogitative mechanism is an undesirable 'bias' or an attractive inducement towards institutional success.

Elster's final hazard is interest. Sometimes self-interest will clearly be a bar to institutional success. A juror who has a financial interest in the outcome of the case has an incentive to act contrary to the guiding point of the jury: she is casting her vote to enrich herself, whilst the institution exists to determine the defendant's guilt. Outside of the jury, though, the role of self-interest becomes more contestable, as Elster acknowledges (89). Sometimes self-interest will animate valuable expertise: a disabled representative in the legislature may personally benefit from laws to combat

disability discrimination, but may also be well-placed to appreciate the value of such laws. Similarly, self-interest may sometimes be the corollary of group representation: the disabled representative may speak for many others outside of the chamber. Her self-interest is shared by others in a similar position, and helps motivate her to speak on their behalf. Once again, it will be hard to distinguish those situations in which self-interest is an asset from those in which it is a vice without examining the purpose of the institution and the ways in which self-interest affects its products.

The restrictions that Elster places on himself – his disinclination to consider the moral point of institutions and processes, and, connectedly, his reluctance to assess the products of institutions – are hard to defend, and restrict the conclusions that are reached. However, the modesty of *Securities Against Misrule* ensures that it will prove of value to a very wide range of scholars and policy-makers. The arguments Elster makes start from broad assumptions that almost all of us share, and the conclusions he reaches, though limited, are valuable, and will be widely accepted. The chapters on the jury and on constituent assemblies are especially strong, and should be required reading for anyone studying these institutions. Only the dullest of readers will leave *Securities Against Misrule* without having learned something – and the book will speed a renewed interest in institutional design, a discipline whose reinvigoration already owes much to Jon Elster. In this respect, the book is a significant achievement.

*NICK BARBER is an Associate Professor of Constitutional Law at Oxford University and a Fellow of Trinity College Oxford. His book, The Constitutional State, was published by Oxford University Press in 2011.*

<https://www.law.ox.ac.uk/profile/barbern>