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Democracy and Tensions
Representation, Majority Principle, Fundamental Rights

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English translation by Iain L. Fraser

1. Values and Methods

Recently, a heated discussion with some friends came round to the "universality" of the democratic method and to its validity for constructing a society of free and equal human beings. We asked ourselves first and foremost whether a universal validity could be attributed to particular values. (We gave "universality" the sense not so much of validity "for all times and all places" as of "universalizability" or "universal acceptability"). And since we all answered yes, someone posited as chief among those "universal" values the democratic method; which, it was said, gave us, among other things, a reliable yardstick for any political or social system. This is the point on which I wish to start by concentrating my readers' attention.

"Universality" can be attributed to values. These are "strong ideas": freedom is a value; so is equality. I call "value" everything aimed at guiding man's behaviour and statable in universalizable rules, where universalizability should be interpreted as the possibility of finding consensus among *all* those involved in an ideal discursive situation (characterized by equal dignity, impartiality and freedom of the subjects). The democratic method - if understood as a mechanism for representing wills and interests and as a means for reaching binding decisions - is more a *tool for applying and realizing* values and principles, among which an important place must go to *freedom*. Freedom (an ethical principle, or "value") would thus be achieved through using the democratic method. The democratic method may thus be conceived as the outcome of adherence to universalizable principles, not as one of those principles. One might even say that the democratic method represents a "technique of

freedom" in the same terms as that has been said of constitutionalism, or of the constitutional political system.

There seems to be the same separation between freedom and democratic method as between ethics and politics[1]. This distinction was noted by the liberal theorists themselves, who did not call their State "moral" or "ethical", but a "State based on the rule of law". While the so-called "ethical State" embodies in itself justice and the highest moral values, so that the State's activity becomes intrinsically *just* (the State becomes an end in itself, indeed, the end *par excellence)*, in the State based on the rule of law the two spheres of ethics and politics remain quite distinct, and the State becomes one of the means for realizing those values that have their natural locus (for expression and realization) in civil society, and in the last instance in the consciousness of each individual. Adopting a distinction recently proposed by John Rawls, we might perhaps add that the democratic method is the expression of a "political conception", but not of a "comprehensive theory" bound up with a substantive conception of the good and of morality[2].

Using the democratic method as a criterion, two political regimes can be defined as either "democratic" or "illiberal" merely by analysing their legislative mechanisms. One cannot do the same with this sort of criterion in relation to other areas of the social fabric: economic structure, primary groups, phenomena like economic alienation and sexual repression. How could one, using the yardstick of compliance with the will of the majority,

[1] On the relation between ethics and politics, see N. BOBBIO, *Etica e politica,* in *Etica e politica*, ed. by W. Tega, Pratiche, Parma 984.

[2] See J. RAWLS, *Political Liberalism*, Columbia University Press, New York 1993, p. 12.

cope with the issues of family organization? Does repression within some sort of primary group perhaps depend on the application of the democratic method, or otherwise? How can one thereby establish the nature of the dependency between wages and capital? If instead we replace that method by *freedom*, accordingly replacing the political/legal method by the *value*, our ability to judge and analyse extends considerably. Is the wage worker *free*? Is woman *free*?[3] Certainly one must start by agreeing on the meaning to assign to such an abused term as freedom. The difference remains, however, between the legal instrument and the value, between the particular and the universal.

From that premise, I wish to draw the following conclusion. The (modern) notion of freedom as a universal or universalizable[4] value is potentially expansive; the democratic method instead constitutes, in

[3] Liberal thought has difficulty even asking such questions, since it remains attached to an "institutional" conception of power for which it is eminently *political* power, conceived of chiefly as control over the *State* apparatus. In this theoretical framework - as Michel Foucault noted - "the problem of power tends to be reduced to the problem of sovereignty" (M. FOUCAULT, *I rapporti di potere passano all'interno dei corpi*, in *idem.*, *Dalle torture alle celle*, ed. by G. Perni, Lerici, Cosenza 1979, p. 123), negating what Foucault calls the "microphysics" of power. In reality - as our French scholar wrote - "between man and woman, in the family, between master and pupil, between one who knows and one who does not, there are power relations that are not the pure and simple projection of overall sovereign power over individuals" (*ibid.*).

[4] It is the formal nature of universalizability rather than any other substantive feature that contains the criterion for distinguishing between "ancient" and "modern" freedom. As Moses Finley writes, the Greek concept of 'freedom' did not go beyond the restrictive limits of the community; the freedom of its members did not involve either legal (civil) freedom for all the other residents within the area of the community itself, nor political freedom for the members of other dominated communities See M.I. FINLEY, *Democracy Ancient and Modern*, Chatto & Windus, London 1973, p. 53.

relation to the value "freedom", a bottleneck, a suit two sizes too small. Otherwise the method, or better *this* method, may betray the energy, the potentiality, the universality, of the value. This happens in both *practical* terms, where the democratic method is a reduction of the possibilities of freedom, and in *theoretical* terms, where the democratic method is a narrower, meaner, criterion for analysis than freedom. This thesis is partly supported by the historicity of the democratic method: its practical application is only to societies between the seventeenth and the twentieth century. This statement does not, however, bind us to any form of historicism: while the political instrument sticks totally to the history and is a reflection of it (it is *for* history), the value, the ethical principle, acts dynamically in relation to it (it is in some way *against* history).

In fact the distinction between "value" and "method" seems sketchy and rather vague, if not downright obscure. It would perhaps, then, be better to speak of two dinstinct types of "value": *moral* and *epistemic*. Moral values are principles that directly guide action. (They may nonetheless, in order to be operative in a particular case, and guide actual conduct, need further specification). "Epistemic" values are the principles that guide us not so much in action as in the process of ascertaining moral values, specifying them and deciding in relation to them. We might then say that democracy, rather than being a "moral value", is an "epistemic value": that is, a value subordinate to the foregoing and instrumental in relation to it, functional in terms of its "knowledge"[5]. We might instead

[5] On the "epistemic" value of democracy see C.S. NINO, *The Epistemic Value of Democracy*, in "Ratio Juris", 1991, pp. 36-51. Cf. also C.S. NINO, *Positivism and Communitarianism: Between Human Rights and Democracy*, in "Ratio Juris", 1994, especially pp. 36-37.

maintain that freedom, or still better *autonomy*, represents a genuine moral value.

At this point, one cannot ignore one rather important opposition for our initial discussion: between formal and material democracy[6]. The first stops at procedural criteria for producing norms (legality principle, majority principle, representation), ignoring their content; the second, as well as introducing the requisite criteria for formal democracy, also binds the content of legislation, through constitutional principles and rules concerning essentially fundamental rights and the citizens' basic needs. For this distinction does not alter the terms of our discussion, since formal democracy broadly coincides with what we have called "method", to which "epistemic" value can be attributed; whereas material democracy goes beyond the formal variety just by appealing to what we earlier called "value", that is, *moral* principles like liberty, autonomy, equality and solidarity.

This last opposition is an eloquent pointer to the problems that arise from a "pure" democratic conception centred round collective decisional procedures, "epistemic" assumptions rather than *moral* values and therefore *contents*. The distinction between "formal democracy" and "material democracy" again raises the one between two concepts of the "rule of law": one of them "formal", based on conformity with law (understood as an act meeting certain forms and produced through certain procedures), where accordingly "right" equals "law"; the other, "material"

6 On this distinction, see e.g. L. FERRAJOLI, *Il diritto come sistema di garanzie*, in "Ragion pratica", 1993, pp. 143 ff.

one is obviously also based on correspondence with the law, but interprets this not as a formal act or just as a formal act, but above all as "right", as an act of justice. In the one case the law is "law in the formal sense"; in the other "law in the material sense"[7].

2. The Democratic Method

First one should recall one obvious point, that "democracy is essentially a form of government"[8], and that the democratic method assumes the concept of "law" or of binding collective decisions. That is, it consists of a set of procedural rules whose main outcome, going back to Norberto Bobbio's definition, is law[9], that is, a procedure endowed with binding force for the group that laid it down. But what shape do these rules take? The answer seems fairly simple. The procedural rules that constitute the democratic method number essentially two: delegation of power (political representation) and the majority principle.

Delegation of power (political representation) is embodied in the transfer of the will of the subject (the one represented, or active

[7] For a distinction in these terms between "law in the formal sense" and "law in the material sense", see F. NEUMANN, *The Rule of Law. Political Theory and the Legal System in Modern Society*, Berg, Leamington Spa 1986.

[8] A. ROSS, *Why Democracy?*, English translation by D. Gatley-Philip, Harvard University Press, Cambridge, Mass., 1952, p. 91.

[9] For Norberto Bobbio the "predominant" significance of democracy is that of a "set of procedural rules aimed at securing certain results, of which the most important is approval of decisions affecting the whole collectivity (which then are, in technical terms, the "laws")" (N. BOBBIO, *Quale socialismo?*, Einaudi, Turin 1976, p. 44).

electorate) towards another subject (the representative, or passive electorate). Thus the terminology of constitutionalist doctrine, with its classification into passive electorate versus active electorate, in some sense obscures the true power relationship between the two subjects: the "passivity" of the cession and the "passive" of the diminution of powers become "activity", and the "activity" of acquisition and the "active" of increase of powers become "passivity".

The principle of popular sovereignty also has a strong libertarian aspect. The idea of *national* sovereignty (whereby the legislative power, *even at the outset*, lies not with the electorate but with the Assembly of Deputies, not in the people but in the Nation) converts this principle into a formula for organizing the State[10]. Political representation, on this view, ensures the indipendence of representatives and converts them into rulers. The concern here is not so much to link elected and elector as to make any *legal* relation between them impossible (political representation, from the legal viewpoint, *is not* representation), "since it is only in the absence of a specific, explicit and formal legal bond that the relationship of political representation can retain the structure [...] that allows it to go through the whole trajectory that converts the superiors (the electors) into subordinates (subjects), and those who ought to be commanded (the representatives) into commanders (legislators)"[11].

One line of constitutionalist doctrine accordingly elaborated the distinction between two forms of representation, *Vertretung* and

10 See a now "classic" study by G. SARTORI, *La rappresentanza politica*, in "Studi Politici", 1957, p. 539.

11 *Ibid.*, p. 542.

Repräsentation. One is held to be a conventional relation between two subjects, in which the representative more or less faithfully represents the actual will of the one represented. The second is held to be an ontological relationship of "representation"; the point being not to "represent", to give voice to, a will, but existentially to express, to bring out, to give presence to, an absence[12]. In this second case, the representative is not held to be bound to the one represented by a conventional or "constitutional" relation, but by an "existential", ontological, or organic relation: for instance, by belonging to the same class, the same interest group or the same race. It is certainly no coincidence that the theory of *Repräsentation* has also been used to justify the relation between *Führer* and *Gefolgschaft*, between "leader" and "followers", in national-socialist doctrines.

For a democratic thought, it is certainly desirable for the basis of representation in a given political sphere to be extended as broadly as possible (but the liberal State arose from an extremely reduced active and passive electorate, so that one may deduce that the extent of the electorate is not an essential feature), and for the minority to have the possibility, though it must bow to the will of the majority, nonetheless to uphold its positions and even reverse the relationship with the majority by replacing it in the consent of the voters and consequently in possession of the Executive. It is on this last point, it may be recalled, that the difference becomes clear between the "democratic centralism" of Marxism-Leninism and liberal-democratic pratice, where the former eliminates the very

[12] See, for instance, C. SCHMITT, *Verfassungslehre*, III ed., Duncker & Humblot, Berlin 1957, pp. 205 ff., and G. LEIBHOLZ, *Das Wesen der Repräsentation unter besonderer Berücksichtigung des Repräsentativsystems. Ein Beitrag zur allgemeinen Staats- und Verfassungslehre*, de Gruyter, Berlin 1929, passim.

political existence of the minority (and its ideological expression) by barring it from continuing to uphold its own theses. The essential difference between "democratic centralism" and the democratic method lies in the fact that in the former the minority politically and ideologically (ethically) succumbs, in actions and in ideas, whereas in the latter it succumbs only politically, only in actions. To make it clearer: in democratic centralism the minority not only has to obey the majority but even *intimately* embrace its positions, since the majority, as a closer approximation to the totality, is scientifically and ethically superior, is right and just, so that it is no longer possible once the majority decision is adopted to present oneself publicly as a *minority*.

In the liberal-democratic system a fundamental condition (one of the "rules of the game") is for the minority, which must nonetheless bow to the will of the majority, to be able freely to uphold and disseminate its own theses, which, if subsequently supported by the popular vote, may in turn become the majority. It is on this possibility for the minority later to become the majority that some of the most widespread definitions of democracy are based: for instance, the following, offered by Hans Kelsen, who stresses more than anything else the fact that the majority, to be such, must acknowledge the minority's political dignity. "Democracy, as such, is specifically only a formal principle, which gives control to the majority view from time to time, without thereby giving a guarantee that just that majority should reach what is absolutely good or right. But majority control is dinstinguished from any other control by the fact that, in its most intimate essence, it not only conceptually *presupposes* a *minority*, but even politically *recognizes* it and, by consistently pursuing the democratic

concept, *defends* it"[13]. This conception of democracy is, however, deceptive, since even an authoritarian regime could in principle tolerate the possibility for today's majority in its decision-making bodies to become tomorrow its minority, without having to accept that the minority should continue to manifest its own opinion once the collective decision has been adopted, nor to acknowledge any particular political dignity to it.

The possibility for the minority to become the majority is essentially and intimately connected with the adoption of the majority principle as such, without further additions or specifications, and has no especially democratic value. The possibility does not have the consequence, either conceptually or practically, of giving minorities any political status of "recognition": being allowed, say, to present themselves publicly as *minorities* the day after the majority's vote. Adopting the majority principle implies only recognition of a collective sphere of decision, that is, a space common to both the majority and the minority. Thus, as Otto Kirchheimer writes, "when there no longer exists any common value, it is by no means clear why it should be the majority to decide"[14].

The majority principle involves a strong constraint regarding the will of the minority: for the latter must bow to the majority decision, and in the final text of the law there will be no trace of the minority position,

[13] H. KELSEN, *Sozialismus und Staat. Eine Untersuchung der politischen Theorie des Marxismus*, ed. by N. Leser, III ed., Verlag der Wiener Volksbuchhandlung, Wien 1965, p. 161, emphasis in original.

[14] O. KIRCHHEIMER, *Zur Staatslehre des Sozialismus und Bolschewismus*, now in *idem*, *Von der Weimarer Republik zum Faschismus. Die Auflösung der demokratischen Rechtsordnung*, Suhrkamp, Frankfurt am Main 1976, pp. 34-35.

unless that text is the outcome of a compromise between majority and minority positions. Such a compromise may however not be necessary, and it is not conceptually implied by the majority principle[15]. This makes possible a further divergence between the actions of the representative and the will, the desires and the interests of those represented.

The essential requirement that binds a subject to a certain action is that it can be treated as *his* act. Given an eclipse of the element of will in the subject's conduct, we have a lack of "suitas", that is, a conduct that cannot be called the subject's *own*. But if freedom is equivalent to will, saying "I am free" is like saying "I act freely", that is "*I want* what I do". Consequently, transferring will can amount to transferring freedom (and power, if freedom is power over oneself), and an unconditioned and indiscriminate transfer of will to an unconditioned and indiscriminate transfer of freedom.

It is hard to maintain that the majority principle is a feature of democratic systems only. Historically and theoretically, the majority principle is found connected with institutions of both public law and

15 Quite obviously the majority principle is not equivalent nor implies it a "majority" electoral system rather than a "proportional" one. One might even think that a majority principle meant as a principle of representation according to which majorities are given more representatives than those who could be obtained by a strictly proportional representation even violates a fundamental principle of democracy ("one man, one vote"), since some "men" (those of the majority) are counted as bearers of more than *one* vote. Cf. G.U. RESCIGNO, *Democrazia e principio maggiorativo*, in "Quaderni costituzionali", 1994, especially pp. 221 ff.

private law[16], and with the most disparate political regimes, including dictatorial or despotic ones. (The decisions of the so-called Grand Council of Fascism, for instance, were taken in respect for the majority principle). The majority may then be either of *number*, or else of *interest*, depending on whether it is calculated on a "one man one vote" principle or on some criterion of unit interests that may vary (like condominium quotas or share holdings in private law, or else the "estates" of a feudal parlamentary assembly). Thus the conceptual independence of the majority principle from the values of democracy has repeatedly been maintained.

What is fundamental, in fact, to define a regime as "democratic" is not so much the mere adoption of the majority principle as: (i) the way that relevant votes are counted (assuring equal dignity and equal electoral weight to the voters), (ii) the extent of the class of will to which the majority principle applies. Thus, it is *universal suffrage*, as Bobbio tells us that characterizes democracy, not the majority principle[17]. "The rules for forming collective decisions in a democratic group," writes Bobbio, "are more complex, even if the main rule remains that of majority. But the majority rule alone is not enough. Other rules are needed to establish who constitutes the body that is to decide by majority, how the majority is to be counted, and what are its limits of validity, application and efficacy"[18].

16 In this connection see F. GALGANO, *Il principio di maggioranza nelle società personali*, CEDAM, Padova 1960.

17 See N. BOBBIO, *La regola di maggioranza: limiti e aporie*, in N. BOBBIO, C. OFFE, S. LOMBARDINI, *Democrazia, maggioranza e minoranze*, Il Mulino, Bologna 1981, p. 62. See also N. BOBBIO, *Democrazia rappresentativa e democrazia diretta*, now in *idem, Il futuro della democrazia*, Einaudi, Turin 1984, p. 33.

18 N. BOBBIO, *Decisioni individuali e collettive*, in *Ricerche politiche due. Identità, interessi e scelte politiche*, ed. by M. Bovero, Il Saggiatore, Milan 1983, p. 24. Cf. also On the

In short, isolatedly considered, the majority principle reveals its nature as a technical expedient for the formation, or ascription, of the will of collective bodies[19]. In reality, the majority principle as such is anything but intrinsically democratic. If it is not to lead to domination by the majority and to authoritarian and even violent forms of organization, it must, in a sociological perspective, presume (i) strong social cohesion in the group it is to be applied to and (ii) widespread acceptance of an attitude of tolerance of the "dissident", the "other", "minorities" in general[20]. Indeed, in a normative perspective, the majority principle is relevant for a democratic style of political deliberation only if it presupposes a procedure based on public discussion among participants seen as holder of inviolable equal rights. The majority principle is never merely a majority rule[21].

Furthermore, in the democratic method, it is not only the instruments (delegation of power and majority principle that can be authoritarian); the purpose inhering in this method of politically regulating society may also

N. BOBBIO, *Rappresentanza e interessi*, in *Rappresentanza e democrazia*, ed. by G. Pasquino, Laterza, Bari 1988.

19 Cf. N. BOBBIO, *La regola di maggioranza: limiti e aporie*, cit., p. 43. This is also the thesis of E. RUFFINI, *La ragione dei più. Ricerche sulla storia del principio maggioritario*, Il Mulino, Bologna 1977. According to Ruffini the majority principle is not a legal institution, "but an empirical formula to resolve particular situations within the "sphere of collectivity" (ibid., p. 19). Nonetheless, he believes that "in the most disparate historical situations, the majority principle has always been opposed by the same adversary: the authority principle, the intolerance of those who hold power" (*ibid.*, pp. 18-19).

20 See A, PIZZORUSSO, *Minoranze e maggioranze*, Einaudi, Turin 1993, p. 43.

21 Cf. J. HABERMAS, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaates*, Suhrkamp, Frankfurt am Main 1992, p. 369.

be. For, as we have said, the democratic method is also a method of making *laws*. These, understood as prescriptions associated with a sanction in the event of breach, can be issued by those holding power through various procedures; the democratic method is only one of these. The making of law could do without either political representation or the majority principle, as happens, for instance, in absolute monarchy, where the figure of the monarch is not representative of anyone else save maybe God, and the monarch, being an individual organ, does not need the majority principle to issue his provisions. In this acceptance the law, as positive State law, is the formalization of the "power" that legitimizes itself and becomes "authority"[22]. In fact, to judge the extent to which a democratic political organization adheres to a condition of freedom of the citizens, one must have regard not just to the instruments (procedures), but also to the outcomes, to the ends (the measures considered in themselves). Anyway it is controversial whether the adoption of a democratic style of

[22] As we know, Alessandro Passerin d'Entrèves, reformulating an idea of Max Weber's, identifies three basic forms of manifestation of the phenomenon of power: *force*, *power* (understood here in a more specific sense) and *authority*. Passerin d'Entrèves explains the concept of "force" by comparing it to the power wielded by a bandit, the concept of "power" by comparing it to the power a policeman has, and finally the concept of "authority" by citing the power exercised by "experts". In the first case ("force", the bandit) we are in the presence of "a situation of pure force, of naked power: a situation in which, in the current expression, 'might beats right'. In the second case ("power", the policeman) we are in the presence of "an 'institutionalized' force exercised in conformity with law". Finally, in the case of authority (the "expert", or wise man), this concept implies a mark of recognition by others of the *legitimacy* (not to be confused with *legality*) of the power exercised (see A. PASSERIN D'ENTREVES, *La dottrina dello Stato. Elementi di analisi e di interpretazione*, Giappichelli, Turin 1967, pp. 9-10, A. PASSERIN D'ENTREVES, *Obbedienza e resistenza di una società democratica*, Comunità, Milan, 1970, especially chapter II, and A. PASSERIN D'ENTREVES, *Il palchetto assegnato agli statisti e altri scritti di varia politica*, Angeli, Milan 1979, pp. 91-93).

deliberation is sufficient to change the natiure of an act which has a strong coercive character. Coercion even if democratic is still coercion.

The assumption of a popular sovereignty and its inclusion in the process of law-making, with the resulting equation of law with popular will, seems to solve the problem of the legitimacy of the State, which accordingly becomes democratic. Here legitimacy is equivalent to legality, and justice is conformity with the law[23]. We might thus overturn the assertion that the democratic method constitutes a means of expression of dissent into the position that the democratic method is the formal intermediary allowing, using Alessandro Passerin d'Entrèves's terminology, the passage from "power" to "authority", that is, one of the possible ways to form the social consensus regarding constituted power. Here the special feature of the democratic method would seem to be indifference to the contents around which the consensus forms.

3. Institutions and Civil Society

Parliament is one of the three traditional powers into which the liberal State is structured: it is the seat of legislative power, the locus for issuing the law. This structuring of political power (in the broad sense) into Government (executive power, or political power in the strict sense), Parliament (legislative power) and Magistracy (judiciary power) is one of the major differences between the State based on the rule of law and the

23 Cf. A. PASSERIN D'ENTREVES, *Obbedienza e resistenza in una società democratica*, cit., pp. 58-59.

absolutist State. This tripartite division turns around the concept of law (general and abstract) and would not be possible without it. In turn, however, the modern concept of law is possible only within the sphere of distinction of three aspects more or less independent of each other: promulgation (legislation), application (administration) and ascertainment (jurisdiction).

Here the difference between the State based on the rule of law and the democratic State may be grasped. In the first, *law* is the key concept in the political order. The legislature (the Parliament) expresses only *one* aspect of a complex action oriented towards a principle higher than the three aspects considered individually: the law. In the democratic State, the fundamental concept is that of *popular sovereignty*, for which the aspect of promulgation of the law (through which that sovereignty is directly expressed) seems to have primacy in relation to the subsequent aspects of application and ascertainment, which are no longer subordinate to the law as the State's organizational principle (the law as such) but to the expression of popular sovereignty handed down in the law.

While in the State based on the rule of lawthe law is relevant for its formal characteristics, in the democratic State the law applies because through it the process of popular decision-making is expressed. In the first case the law is a value in itself; in the second it has more of an instrumental value in relation to the end of popular sovereignty. The State based on rule of law is accordingly entirely included within the sphere of the political and legal order, is all inside the horizon of political society; the democratic State, instead, refers to a meta-legal principle (popular sovereignty), finding its foundation in the area of civil society. While in

the former the guarantee of freedom is the separation of political power (in the broad sense) into three subpowers and their subjection to law, in the latter that guarantee lies in entry by the bodies of civil society into the political dimension, and hence in subjection of political power (in the broad sense) to the needs and rights of civil society.

The division of powers, as has often been pointed out, is never completely sharp, and is in fact full of mutual overlaps (administrative competences of the Magistracy, judiciary powers of Parliament, and so on). Still less is it perfect: the relationship among the three powers is often unequal, frequently weighted in favour of the executive power, which keeps greater weight to itself than the other two, and possibilities of determining their attitudes. Nor should one forget the novelty brought by the institution of a Constitutional Court to the traditional pattern of division of powers. Democratic States since the Second World War have been marked, by comparison with the previous model of liberal State, in particular by adoption of "rigid" constitutions and of organs deputed specifically to the exercise of "constitutional justice", that is, verification of the constitutionality of ordinary laws. Now there is no doubt that Constitutional Courts, in the shape they take in, say, Federal Germany, democratic Spain and republican Italy, represent a type of authority that cannot be brought within the framework of the traditional division of powers. Constitutional courts are at one and the same time judiciary and legislative organs, that is, organs endowed with a certain power of legislation (albeit sometimes only abrogative) higher than that enjoyed and

exercised by the respective Parliaments[24]. Nor can it be said that the institution of a Constitutional Court or judicial review of constitutionality derives *logically* from the existence of a written Constitution, even a rigid one[25].

Parliament is thus one sector in the structure of State power, that is increasingly less endowed with effective power in the development of contemporary States. The freedoms guaranteed to citizens are rooted at the base of the institutional pyramid and do not constitute a real political institution proper. In these rights we can nonetheless distinguish an *authoritarian aspect* inherent in the legal decision that lays them down, and a *libertarian aspect*, one of autonomy of the citizens who thus have a formal sphere of movement of their own: these two aspects might qite obviously conflict with each other.

When their source of legitimation and production lies not with the citizens but in Parliament (a part of political society), rights may escape the control and the creativity of those who are assumed to be their bearers. But to the extent that these rights correspond to practical action by citizens freely developing their own sphere of autonomy, they constitute, whatever be their "source", a substantial area of freedom. Equally, the real guarantee of their maintenance is their full exercise by the individuals and

24 A court having the power of declaring statutes as null or void of legal effects - says Kelsen - is an authority holding a legislative competence. See H. KELSEN, *La garantie juridictionelle de la Constitution (La Justice constitutionelle)*, in "Annuaire de l'Institut international de droit public'", 1929, pp. 129 ff.

25 On this point see the interesting considerations by C.S.NINO, *Derecho, moral y política*, Ariel, Barcelona 1994, pp. 68-71.

the pressure the latter manage to exercise over "political society", by tirelessly seeking to control its expansionist aims. Freedom, therefore, in a democratic system, lies in this pressure to make formal rights into substantive positions of autonomy of the subjects.

Civic freedoms, even if formally granted (conceded from above) and constantly exposed to the work of erosion by political power, which by its own internal dynamics tends to expand till it covers with its normative web the whole social fabric, determining the stages in their subjects' lives, nonetheless make life livable. And if actually applied in the daily practice of collective behaviour, then they constitute barriers to the invasiveness of political power.

This dynamics of conflict between civic freedoms and public powers reveals the contradiction and the compromise that lie at the basis of the creation of liberal regimes. The contradiction and compromise lie between the further reproduction of authority and the assertion that it is the emanation no longer of Providence but of the "general will", between the reproduction of the social hierarchy and the assertion that it is the emanation of the subordinate social group, between sovereignty (for which the sole source of law is the State) and legal subjectivity (for which the individual seems to have a legal dignity of its own that the order *recognizes* but does not *attribute*). The possibility of mediating between civil freedoms and political power, between the need to establish the new State and the citizens' need for autonomy, runs through just this theorization of the "general will", that is, an abstract will not anchored in the multiple individual and group wills (and interests), but the expression of an entity that is idealistic in its derivation: the Nation.

The new power (the rising liberal State) legitimizes itself through an entity that is just as abstract as Providence, namely the Nation. The theorization of the "general will", a will that *de facto* does not exist, that is constructed through a purely rationalist procedure ("a fiction of jurists", said Proudhon) allows what is often only the *ceding* of will to be converted into representation, and the acts of the legislative assembly to be ideologically superimposed on the will of the Nation. Nonetheless, one should not underestimate the "universalizing" function played by this category. The category of Nation can be used as a tangible symbol of a general interest that cannot be reduced to the mere sum of individual interests without falling prey to particularist egoism. There remain, however, the problems connected on the one hand with its recurrent antireflexive foundation (objectivist, naturalistic, or historicist)[26] and on the other its limited "universalizing" scope (it applies only to the Nation, and is turned round into a particularist weapon against everything that cannot be included in the Nation itself).

In democratic systems, citizens' political action might be reduced to an operation of choosing their own sovereigns (or more frequently, *one third* of the sovereigns, that is, the sovereigns enthroned in *one third* of the whole space of Power). The elector does not determine his representative's action, but simply confers on him the capacity to will in his name and in

[26] There is, however, as we know, a conventional or constitutionalist foundation of the Nation, which finds its most classic formulation in the words of Sieyès: "Qu'est-ce qu'une nation? un corps d'associés vivant sous une loi *commune* et représentés par la même *législature*" (E. SIEYES, *Qu'est-ce que le Tiers Etat*?, Presses Universitaires de France, Paris 1989, p. 31, emphasis in original).

his interest[27]. Elimination of the binding mandate and of corporate representation - "each member of Parliament represents the Nation and exercises his functions without being bound by a mandate", says article 67 of the Constitution of the Italian Republic - is the revolutionary innovation of the bourgeois electoral mechanism by comparison with what prevailed in the previous feudal assemblies (Parliaments, States general, etc.). It is the outcome of a combination of "universalizing" pressures and of merely centralizing, statist tendencies.

"It is today clear", writes Biscaretti di Ruffia, an influential Italian public lawyer, "that the collectivity of the people (what Art. 67 of the Italian Constitution calls Nation) has no autonomous will of its own that can be represented, nor does the Chamber when deciding manifest a will that can be attributed to the people, nor can it be stated that the Chamber, in deliberating, gives consistency to that will of the popular collectivity, which, not being itself a subject of law, would not be capable of manifesting specific volitions [...]: since the Chamber brings into being decisions that are indisputably its own, or better, since in general the Chamber is merely an organ of the State, decisions of the State itself. And the Chamber decides in full freedom, since each of its members can act without any specific bond to his voters, but only bearing in mind, *in conscience*, the aspirations, tendencies and generic interests the latter

[27] An authoritative part of Continental constitutionalist doctrine, denying that elections give origin to a relation of representation and therefore that Parliament has any representative character, speaks of election as a "designation of capacity", or as the best way to choose the subjects to constitute the State's legislative power (cf. what is written by the "father" of modern Italian public law, V.E. ORLANDO, *Del fondamento giuridico della rappresentanza politica*, in *idem*, *Diritto pubblico generale. Scritti varii*, Giuffrè, Milan 1940).

have"[28]. This author defines political representation, from the viewpoint of its legal basis, as *legal and necessary representation*, since "the representative nature of the elected Chamber does not have to be [...] legally founded upon election, considered in and for itself (which seems more to constitute in this connection a *condition* or *requirement* laid down by the positive order), but must instead be related to the enactments contained in the legislative provisions concerning it (for Italy, for instance, Art. 67 of the Constitution)"[29].

Elections, from this viewpoint, are not the foundation of the representative nature of the elective assembly's decisions (since this foundation is to be found inside the State legal order in the norms of positive law), but only a *condition* for the efficacy of that representativity, for it to become concrete, that is, a de facto *requirement* in relation to the legal norm. This interpretation is based on another thesis by Biscaretti di Ruffia, who after distinguishing sovereignty (understood as "highest power of government") into (a) political source of governing power and (b) legal entitlement of governing power, asserts that only sovereignty as in (a) can be attributed to the people, while sovereignty as in (b) is to be attributed to the State[30]. The people is accordingly not *legally* sovereign, is not the original holder of governing power; all that can be found in it is the source of *political* legitimation of that power. In different words, the problem of consensus remains extralegal, and is solved through an *ideological* connection (this is the meaning of the adjective "political" as

[28] P. BISCARETTI DI RUFFIA, *Diritto Costituzionale*, Jovene, Naples 1972, p. 269, my emphasis.

[29] *Ibid.*, p. 271.

[30] Cf. *Ibid.*, pp. 61-62.

used by Biscaretti) between people and elective assembly. This ideological (and not legal) connection is inplemented through the mechanism of elections.

Faced with the difficulties of democratically justifying (in reference to the will of *all* the subjects who are members of a political community) political representation, some even base it on the functional differentiation of social roles. Representation is then held to be the outcome of a sort of "division of labour" whereby in a given society there are supposed to be some individuals whose role is that of acting on behalf of the whole social group to pursue its purposes, and then individuals whose "role" is that of accepting (but why not just say "undergoing") the decisions taken on their behalf[31]. The "representation" is thus conceived of as a form of political leadership, differentiated only by the fact that the subjects "competent" to exercise that leadership are chosen through a special mechanism, namely elections. In other respects there would be no difference between a "representative" (or democratic) political system and, let us say, an aristocratic political organization. On this view, speaking of "popular sovereignty" or "government of the people" would have a merely ideological or persuasive function.

31 This is, I believe, the central idea in F.J. LAPORTA, *Sobre la teoría de la democracía y el concepto de representación política; algunas propuestas para debate* in "Doxa", n. 6, 1989, pp. 121 ff., who essentially reformulates one of Kelsen's theses. The same line is taken, developing ideas of Schumpeter's, by Niklas Luhmann, and in Italy by Danilo Zolo. (See e.g. the latter's *La democrazia difficile*, Editori Riuniti, Rome 1989). This amounts to a rehash in different words of the "realistic" critique of democracy of which Italian political thought, with its traditional insensitivity to the normative viewpoint, has given repeated, familiar examples.

The growing complexity of industrial societies would compel us to abandon the normative ideals of a collective administration of public affairs, consigning us, with the inexorability characteristic of the laws of history, to the "democratic principate", a regime which, Luhmann maintains, would be democratic only to the extent that its highest level is split into a "government" and an "opposition". For this theoretical approach, of course, there is a no bridging between direct democracy and representative democracy: these are seen as two radically distinct political forms[32]. But this is the point at which this "functionalist" foundation of political representation shows its limit: that of having to abandon the "guiding idea" of democracy, its foundational myth, *government by the people*.

The "realist" abandonment of this normative horizon is sometimes compensated for by a sprinkling of "rights". "Possible democracy" would then consist in a "principate" more or less split in two (government and opposition, say) accompanied by a court of rights that attenuates its authoritarian grip over civil society. A "principate", however, even if "democratic", is no longer democracy as a political form that universalizes (even if only in a historically and geographically determined political space) the principle of individual autonomy. On the other hand, this "realistic" revision of democracy is (unrealistically) constrained to neglect one fundamental aspect of contemporary democratic States: that they have "rigid" constitutions loaded with metalegal values directly applicable (with greater or lesser force) by the various judiciary organs.

32 For this argument see, for instance, E. FORSTHOFF, *Democrazia e rappresentanza*, in "Quaderni costituzionali", 1985, pp. 227 ff.

In reality, even supposing (though not conceding) that there is an evolutionary movement in modern societies from less to more "complexity", this finding still tells us almost nothing about the possibilities of implementing a democratic system. That complexity must be given a description in value terms so as to arrive at an assessment of the congruency between the complex social situation and democratic ideals. Luhmann and his followers ultimately have a *negative* image of complexity, as something that untowardly increases the risks of social coexistence, so that reassuring authoritarian intervention becomes necessary, a different evaluation of the fact of complexity can be given; one might, nonetheless, regard it as a *positive* factor for the realization of a democratic model, if the complexity is interpreted as an aspect that instead of jeopardizing the security of social relations and thus requiring *more* authority and less freedom, increases the wealth and strength of civil society and allows government pressure on it to be loosened[33].

4. The Division of Powers

A fundamental of liberal political and constitutional theory is the structuring of institutional power (or political power in the broad sense) into three subsystems: the executive (the Government, or political power in the narrow sense), the legislature (the Chambers) and the judiciary (the Magistracy). This is the theory of the division of powers that passes the

[33] For a position of this sort see J.S. MILL, *Considerations on Representative Government*, in *idem*, *Utilitarianism, On Liberty, and Considerations on Representative Government*, ed. by H.B. Acton, Dent (Everyman's Library), London 1977, p. 185.

aristocratic critique of the Monarch's absolutism down into the organization of the contemporary democratic State.

But what is meant in this theory by "powers": an institution, an *order*, or a *function*[34]? Or do the three traditional powers constitute separate "orders", or rather distinct "functions"? The difference is not a minor one, since in the first case the separation is radical and there will come to be three "states" within the State, while in the second the State retains its unitary nature, unravelling for distinct functions, in some cases even attributable to one and the same body. There can be no doubt of the unitary nature of modern State power, and the concern not to attack this unity has made all liberal and democratic constitutions provide mechanisms for merging the three powers, coordinating organs, overlaps of spheres that ought to have remained rigidly separate once the theory had been accepted. Thus in the 1948 Italian Constitution the President of the Republic is a sort of coordinator and supervisor, through the various constitutional functions he covers, of the three divided powers. On the other hand, each power (or "function") handles cases which ought not to be within its province were the division rigorously consistent. One may, then, conclude, that "no positive order can be seen as rigorously and consistently applying the principle of separation of powers"[35].

[34] Cfr. Piero Calamandrei's intervention at the Italian Constituent Assembly preparing the new Republican Constitution in *La Costituzione della Repubblica nei lavori preparatori della Assemblea Costituente*, vol. 8, Camera dei deputati, Roma 1971, p. 1913.

[35] G. SILVESTRI, *La separazione dei poteri*, vol. 2, Giuffrè, Milan 1984, p. 280.

Executive, legislature, and judiciary, understood in the "classical" sense, are nothing but the distinct activity of various organs of the State, *functions* of one and the same political power, or even *aspects* of one and the same practical reasoning (on the well-known portrayal by Kant in the *Metaphysics of Morals*[36]), and not distinct powers the sum of which would give us a constitutional organization of the State. The State founds and organizes the three powers, it is not the three powers that organize and found the State; otherwise the orders and corporations of feudalism, abhorred by the new bourgeois law, would have been transferred from civil society to political society, no less. Nor should one forget that in the liberal division of powers, these are not ascribed the same dignity and that there is one power which is superior to the other two and from which these derive their legitimacy[37].

De facto, however, since the "function" tends to become power and to be identified with the organ that exercises it, in the evolution of the liberal

[36] But before Kant it was Condorcet: "Entre la loi et la chose qui doit être faite d'après elle, on l'individu qui doit s'y soumettre, se trouve la fonction de déclarer que telle est, dans telle circostance, l'application de la loi, c'est-à-dire, la fonction de faire un syllogisme dont la loi est la majeure un fait plus ou moins générale, la mineure, et la conclusion, l'application de la loi" (CONDORCET, *De la nature des pouvoirs politiques dans une nation libre*, in *idem.*, *Oeuvres*, ed. by A. Condorcet O'Connor and M.F. Arago, vol. 10, Firmin Didot, Paris 1847, p. 595). An see now Habermas' reconstruction of the division of powers as running along the line which marks the difference between a "discourse of justification" an a "discourse of application" both pertaining to the domain of "legal discourse", and taking place respectively in legislation and adjudication, whereas the administrative power is considered as lying within the sphere of a "pragmatical discourse" ruled no longer by rules and principles but rather policies and prudential considerations (see J. HABERMAS, *op. ult. cit.*, pp. 212-213, pp. 229 ss.).

[37] Cf. J. HABERMAS, *Faktizität und Geltung*, cit., p. 230.

State that is what we see: the rise of powerful "separate bodies", proud and jealous of their constitutional autonomy, and hence not responsible towards each other. This, far from shaping the State in accordance with a more flexible, open structure, has rigidified it into opposing blocks, now devoid of awareness of their original, "ideological" role: "exercising public functions", "being at the service of", "representing and faithfully interpreting the will of the Nation". However, on several quarters people think they can see in this greater distance, this separateness of the three powers (but the process of corporatization is much broader and more diffuse, operating well beyond the traditional division and well beyond the institutional plane), a separateness that has taken shape also and especially in relation to the rest of society (that is, not just between the powers constituting "political society" but also between "political society" and "civil society"), a guarantee of further democracy and freedom.

The Judiciary in Italy is a case in point: its power, and its separateness, have increased in proportion to the progressive maturation, in a democratic sense, of the institutions. In the umbertine State and more in the fascist regime, the judge was subject to severe conditioning by the executive. The Albertine Statute (the first constitution of the Italian State) read in article 68: as follows "Justice emanates from the King, and is administered in His name by the judges that He creates." In this way, there came into being a relation of direct hierarchical subordination between Magistrate and constitutional monarch[38].

[38] On this point, F.S. MERLINO, *Politica e magistratura in Italia dal 1860 ad oggi*, Gobetti, Turin 1925, has lost none of its freshness and power. Cf. also M. D'ADDIO, *Politica e magistratura (1848-1876)*, Giuffrè, Milan 1966, and the more recent contribution by C. GUARNIERI, *Magistratura e politica in Italia*, Il Mulino, Bologna 1993, pp. 83 ff.

Marco Minghetti, an Italian liberal politician of the second half of Nineteenth century, following Locke, held that the Judiciary did not constitute an autonomous power distinct from the executive. He identified only two powers within the State's organization: legislation and administration. The juridical function was thus conceived of as a specific mode of execution of the law, of administration: *the administration of justice*. "The Juciciary ought not be set in a separate sphere from administration as such; for both are branches into which the execution of the law is divided. Thus there can be only two powers, the one that makes the law and the one that executes it, the latter of which, according to its differing object and different mode of action, can be distinguished into judicial and administrative"[39]. However, the fact that the Judiciary is not a *conceptually autonomous* power in relation to the executive does not prevent it taking the shape of an *institutionally independent* power: "Justice is indeed a branch of the executive power, but a branch that operates independently"[40].

[39] M. MINGHETTI, *I partiti politici e la ingerenza loro nella giustizia e nell'amministrazione*, ed. by B. Widmar, Cappelli, Bologna 1969, p. 96. In this connection cf. G.M. CHIODI, *La giustizia amministrativa nel pensiero politico di Silvio Spaventa*, Laterza, Bari 1969, p. 66. On the position of dependency of the judicial power in relation to the executive in the post-unification period, one may usefully consult pp. 63-70 of Giulio M. Chiodi's work cited. In general theory of law, a conception that reduces the judicial function to the executive (administrative) one is offered us by Hans Kelsen's "pure theory", when it sees both the judge and the administrative official as producers of *individual norms* (see e.g. H. KELSEN, *Allgemeine Staatslehre*, Springer, Berlin 1925, pp. 229 ff).

[40] M. MINGHETTI, *op.ult.cit.*, p. 39.

In republican Italy, after a period of settling down and "constitutional freeze"[41], the birth of the *Consiglio Superiore della Magistratura*, a constitutional authority with exclusive competence on the internal organization of the Judiciary, give the judge greater independence. The independence of the "judicial function" was very quickly confused with the autonomy of the "judicial order", which became very powerful because it was no longer in any way accountable towards the executive power, the Government in charge, and jealous of that non-responsibility as an essential feature of the democratic State[42]. It is from this too that the politicization of judges and movements like Magistratura Democratica arise, attributing a progressive value to acts in themselves often indeed authoritarian, issued under the logic of the "order", which are however, it is now asserted, oriented towards the "public good", or the interest of the lower classes, or the implementation of constitutional principles[43]. This

41 Cf. E. CHELI, *Costituzione e sviluppo delle istituzioni in Italia*, Il Mulino, Bologna 1978, especially pp. 56-59, 158-161, and 169-173.

42 One who is in favour of introducing the political responsibility of judges as an application of the constitutional principle of popular sovereignty (Art. 1 of the republican Constitution) is Cheli, whose observations I would refer to: cf. E. CHELI, *op.cit.*, pp. 143-149. In this connection see M. CAPPELLETTI, *Giudici irresponsabili? Studio comparativo sulla responsabilità dei giudici*, Giuffrè, Milan 1988.

43 It is curious that the sectors of the Judiciary most committed in a democratic sense, who proclaim themselves as interpreters, as vehicles, of popular sovereignty, are (or have been) convinced asserters of the separateness of their own "order", excluding any form of political responsibility of the judge (or of the public prosecutor). Being an "interpreter" of popular sovereignty (already in the heading on top of verdicts, "in the name of the people"), thus remains bound up exclusively with the individual magistrate's commitment, his ideological convictions, and not with any institutional mechanism introducing direct contact between the function of judging, the magistracy and civil society. The need for this connection between the judicial institution and civil society was noted, among others, by the Secretary of Magistratura Democratica in his report to the 4th On the

attitude may however be seen close to paternalism or to a sort of enlightened despotism to which the maxim "everything for the people, nothing thanks to the people" applies, since be he called "people", "lower classes", "proletariat" or "civil society", the citizen as such has only slight possibilities of participating in the judicial function. Nor can this opinion be modified by citing the case of the so-called *giudici popolari* ("lay" judges) that contribute to the formation of the Courts of Assizes[44], nor by the argument of the "passivity" and "impartiality" that characterize the judicial activity. The argument of the judge's "passivity", or better of the possibility granted to the citizen to set a judicial action going, clashes with the fact that the judge has almost exclusive power of assessment in relation to the demands and information reaching him from the citizen. The argument of "impartiality" should be better clarified. It is not that judges are a race apart, somehow genetically endowed with the virtue of impartiality. The impartiality spoken of in connection with legal action

Congress of the Association (see "Magistratura Democratica", March-June 1979), but the link is reduced to portraying Magistratura Democratica as an "articulation of civil society". M.D. is defined as "articulation of civil society" insofar as that association claims the *independence* and specificity of the judge's own role: "We have defined MD as an articulation of civil society just because it places itself not on the ground of general policies but more on that of associations operating for sectors of general ends".

44 "The lively criticism against the present composition of the Courts of Assizes," wrote Girolamo Bellavista more than twenty years ago, "deserves full support. The popular judges often ressemble, in relation to the President's initiatives and opinions, the last two invitees to Don Rodrigo's table in Manzoni's novel. The collegiate judge in this case becomes *bicratic*, if not indeed *monocratic*. The system is an outcome of compromise between Fascist legislation and the constitution (Art. 102, last clause) which calls for popular involvement in the administration of justice; but the compromise reduces the *involvement* to a sort of deplorable *stick-on involvement*, through the practical subjection of the popular judges to the President's *opinio delicti*, or otherwise" (G. BELLAVISTA, *Lezioni di diritto processuale penale*, Giuffrè, Milan 1975, p. 168, my emphasis).

refers not to the qualities of the man who carries out the action, but to the qualities of the procedures that regulate the action itself. It is the judicial procedure that is (or ought to be) impartial. For that to be the case, it is not enough for it to be conducted by a gentleman in gown (and posibly a wig), the winner of a public competition.

The democratic method, representation and the majority principle apply only to the legislature. They do not apply to the executive or the judiciary. The deputy is elected; but who elects the judge or the general? Here - at least in most systems of Continental Europe - it is criteria of career and subordination that apply, criteria of merit and seniority, if not clientship. The judge is separate from civil society to the same extent as is the general. He is not elected, he is a civil servant. His accession to the post, as for the bureaucrat, comes about through a mechanism that is more a process of cooptation[45]. No control, no possibility of influence over his decisions can be exercised by the citizens as a collective body[46]. This, indeed, partly meets the need for impartiality that is a central and

[45] Cf.G. U. RESCIGNO, *Divisione dei poteri*, in *Dizionario critico del diritto*, ed. by C. Donati, Savelli, Rome 1980, p. 97.

[46] The *independence* (independence of the executive power) of the judge has often been confused with *separateness* (independence from civil society). As far as separateness goes, we cannot see that any State legal order, except in very limited forms in English-speaking countries (where the law is still largely customary) has ever been concerned to reduce or overcome it. As far as independence from the executive power is concerned, it is a general need to distinguish the two branches of the magistracy, examining magistrates and judges. In Italy, as we know, until the Consiglio Superiore della Magistratura was set up, while formally the examining magistracy was independent, the same could not be said of the office of public prosecutor. For the present Italian position in this connection cf. A. PIZZORUSSO, *L'organizzazione della giustizia in Italia*, Revised ed., Einaudi, Turin 1988, pp. 135 ff.

justificatory feature of the judicial function. The ascertainment of a fact, of the truthfulness of a declaration or of breach of the law cannot depend on majority criteria.

One cannot but agree with Professor Ferrajoli when he writes that "no majority can make true what is false, or false what is true, nor, therefore, legitimize through its consensus a sentence that is unfounded for lack of proof"[47]. The same concern is at the basis of the criticisms of theories, like Habermas's philosophy, that tend to make truth and justice a question of consensus, and hence ultimately of majorities[48]. Nonetheless, in a political system that calls itself democratic the judicial activity cannot do without more than formal reference to the popular will, for instance as regards the composition of the judicial organs or through introduction of real responsibility of the judge for decisions taken contrary to law, constitutional principles or more general principles of equity.

Nor is the law enough to give legitimacy to the judicial function. In a democratic, constitutional system this function cannot be justified by mere reference to the validity of the law to be applied. While in the State based on the rule of law, the *Rechtsstaat* of German doctrine, the judge derives his legitimacy solely from the law, that is, from his role as "subsumption automat"[49], this source of legitimacy is insufficient in the democratic

47 L. FERRAJOLI, *op. cit.*, p. 155.

48 This is the direction taken by Ota Weinberger's critique of both Habermas and Alexy. See e.g. O. WEINBERGER, *Conflicting Views on Practical Reason. Against Pseudo-Arguments in Practical Philosophy*, in "Ratio Juris", 1992, pp. 251-268.

49 Cf. R. OGOREK, *Richterkönig oder Subsumtionsautomat? Zur Justiztheorie im 19. Jahrhundert*, Vittorio Klostermann, Frankfurt am Main 1986.

constitutional State. For in it legality is a quality subordinate to the other one of "constitutionality", and can thus continue to be subjected to an assessment of adequacy or correspondence in relation to this second, higher quality. "Legitimation cannot, for any organ, for any institution, and therefore not even for the judge," it has recently been said, "be entirely resolved [...] into pure legality; on the simple ground that legality is no longer 'simple' or enough by itself, given the emergence of new value horizons which, with the constitution, are deployed in positions that may even be antagonistic to the law and to legality"[50]. But what does it mean that the judge has to be legitimated before the Constitution? That he has to apply its principles and values, is the answer. This answer, however, refers to a broader discretionary power of the judge, which, in the absence of criteria and mechanisms for democratic control over the judicial activity, ends by increasing its irresponsibility.

The executive power, the public administration, are organized and perform their specific function not according to the democratic method (irrespective of whether they derive from the people), but according to the *hierarchical* method. Nor need they respect any principle of impartiality or equity. The permanence of the institution of the Army, structured according to a graduated scale of authority that is greatest at the top and zero at the base, the survival within the fabric of the democratic State of this unreformed institution that often erodes the dignity of the citizen who becomes a soldier, points to the problems of the democratic regime as a

[50] C. MEZZANOTTE, *Sulla nozione di indipendenza del giudice*, in *Magistratura, CSM e principi costituzionali*, ed. by B. Caravita, Laterza, Bari 1994, p. 5.

mere organizational formula[51]. The army, the whole public administration, the executive, function according to the principle of hierarchy[52]. And this principle is hard to limit. "In any case", writes Bobbio, "one thing is certain: that the two great blocks of topdown, hierarchical power in every complex society, the giant corporation and the public administration, have not yet been even nibbled at by the process of democratization. And for as long as these two blocks resist attack by the forces pressing from below, the democratic transformation of society cannot be said to have happened"[53].

If transparency, publicity, is one of the requirements of the democratic system[54], and this publicity is the outcome of certain procedures for forming the collective will based on confronting and openly discussing the alternatives in question, and checking on the name and activity of whoever has to implement the collective decisions, then at least as far as the executive power is concerned such publicity is largely absent. Things are different as regards the judiciary power, distinguished from the executive, just because it is subject to certain forms that determine its decisions, foremost among them the obligation to give

[51] On the incompatibility between the traditional organization of an army and democratic principles, see the fine pages by C. LEVI, *Paura della libertà*, III ed., Einaudi, Turin 1975, pp. 95 ff.

[52] On the principle of hierarchy in the activity of the public administration, cf. G. ZANOBINI, *Corso di Diritto Amministrativo*, vol. 1 (*Principi generali*), Giuffrè, Milan 1958, C. MORTATI, *Istituzioni di Diritto Pubblico*, vol. 1, Cedam, Padua 1975, pp. 608-610.

[53] N. BOBBIO, *Democrazia rappresentativa e democrazia diretta*, cit., p. 47.

[54] In this connection see the considerations by N. BOBBIO, *La democrazia e il potere invisibile*, in *idem*, *Il futuro della democrazia*, cit., pp. 75 ff.

grounds for verdicts, sanctioned for instance in article 111 of the Italian republican constitution.

5. Social Transformation and Civil Liberties

There are those who hold that the democratic method is a means for transforming society in an antiauthoritarian direction. In fact the democratic method, which as we have seen can also be one of the possible methods for establishing *who* is to issue the command and be at the top of society's hierarchical scale, does not necessarily query the principle of hierarchy (it may at most temper it). That is why it may be maintained that it is a method for organizing, structuring, political power and social hierarchy. Accordingly, it is stretching things to say it can by itself, as some sort of internal logic, be a means for social transformation.

Not only is the democratic method a method of organizing political power; it may be so also for *this* power, the power in place, since it may not call into discussion the overall structure of the State and the general running of the system, of which it is a mechanism. Only the *identity* of the élites may be shaken by the outcome of a general election, not the *system* of political élites[55]. Thus, the democratic method may be (i) conservative,

[55] By "political élite" I mean what Gaetano Mosca means by "political class" (or "ruling class"). For Mosca, in every society "there are two classes of people: the rulers and the ruled. The first, always the less numerous, carries out all the political functions, monopolizes power and enjoys the advantages associated with it; while the second, more numerous, is directed and regulated by the former in more or less legal, or else more or less arbitrary and violent fashion, and supplies it, at least apparently, with the material On the

because it organizes *this* power (the power in place), because it is respect for the rules of the game where the game is the circulation of political élites; (ii) authoritarian, insofar as it organizes *the* power, that is, is a method for making up a hierarchial scale.

The democratic method, especially the principle of representative government, according to which representatives are not bound by any instruction of their electors but only by the general interest, can be one of the ways of forming the political class (the rulers, the Power). Kelsen is explicit on this; for him representation government is pure ideology. "The function of this ideology -- he adds -- is to conceal the real situation, to maintain the illusion that the legislator is the people, in spite of the fact that, in reality, the functions of the people -- or, more correctly formulated, of the electorate -- is limited to the creation of the legislative organ"[56] Sartori criticizes Kelsen's position, though agreeing that "the elections are a way, or rather one of the ways, used for the purpose of designating the rulers"[57]. He rejects the radicality of Kelsen's critique, since the fact that in representative governments the rulers are chosen through the democratic method has, in his view, decisive effects on what they do (on "how" they rule). Accordingly, for Sartori the elections should not be seen as an "act of appointment" but as a "power": "The error [...] has been to look at elections as an *act* of nomination, whereas instead they

means of subsistence and those needed for the vitality of the political organism" (G. MOSCA, *Elementi di scienza politica*, vol. 1, Laterza, Bari 1953, p. 78).

56 H. KELSEN, *General Theory of Law and State*, English translation by A. Wedber, III ed., Russell & Russell, New York 1973, p. 291. According to the Austrian scholar it is direct democracy that "represents the comparatively highest degree" of the ideal type of democracy (*ibid.*, p. 288).

57 G. SARTORI, *La rappresentanza politica*, cit., p. 573.

are a *power*, and a *recurrent* power, of nomination. This makes all the difference, for whoever holds the power to confirm a leader or not at definite dates maintains *continuous* power over him"[58]. More recently, by contrast, Professor Pizzorno has denounced the illusion that democracy guarantees "freedom of choice of policies", seeing its merit instead in the fact of allowing the "freedom of collective identifications"[59].

Recapitulating, the democratic political system is basically made up of three elements: (i) the democratic method (political representation and majority principle) for the formation and functioning of the institution intended to produce the laws; (ii) the division of the State's constitutional powers; (iii) the civic freedoms guaranteed to the citizens. As we have said, the democratic method (understood as the combination of the majority principle and representation) is effective, in almost all democratic political systems, only in relation to one third of the total constitutional territory. We have further seen how political representation may be resolved into an unconditional, indiscriminate transfer of the will of one subject to another subject: a transfer that the claimed identity (or representation) of interests between representative and the represented cannot suffice to distinguish from an institutional relationship of hierarchy. The "superior" differs from the "representative" only when the latter is presented as interpreter of the will of his "inferior". Not every "superior" is ideologically presented as representing the will of his "inferiors"; and the "representative" (in the relationship modelled by

58 *Ibid.*, p. 574.

59 See A. PIZZORNO, *Le radici della politica assoluta e altri saggi*, Feltrinelli, Milan 1993, chapter IV.

political representation, as present in today's democratic States) is often a sort of "superior" in relation to his electors.

One of the most frequent ideological justifications for the hierarchical relationship makes use of the argument that the "superior" interprets (defends) the interests of the "inferior", even in the absence of an explicit, express fiduciary relationship. Not even *Führerschaft* does without this legitimation, basing it on the exceptional qualities of the "leader", his "personality", but not forgetting to stress that he "interprets" and "represents" the interests of the *Gefolgschaft*, of the masses[60]. So-called "organic" representation may calmly exclude any electoral link whatever between "the representative" and "the represented" or an explicit will of the "represented". Biscaretti di Ruffia defines political representation as "representation of general interests"[61], excluding the possibility of its being seen as representation of will. This is barred by the prohibition of the binding mandate, of the *mandat impératif*, by which the representative would be bound by the instruction of his electors, and thus the genericity (generality) of the subject represented. If, then, "organic representation" and "representation of general interests" differ because of the presence, in

[60] On the relationship between the charismatic leader, the *Führer*, and his people, see the fine pages of T. MANN, *Mario und der Zauberer. Ein tragisches Reiseerlebnis*, in idem, *Die Erzählungen*, Fischer, Frankfurt am Main 1986, especially p. 831.

[61] "Political representation takes the shape of [...] 'total, generic representation of the most disparate interests of an individual collectivity' and accordingly of a *representation of general interests*, of *political ones* (ROMANO): and the *political responsibility* it determines comes into play only at the time the Chamber is dissolved, when the members of the collectivity represented may, when re-electing it, judge whether the aforesaid representative task has been satisfactorily performed by their parlamentarians or not" (P. BISCARETTI DI RUFFIA, *Diritto costituzionale*, cit., p. 270).

the latter's structure, of an electoral mechanism, they are fairly similar in the place they give to the actual will of the "represented". The relation between "superior" and "representative" may be that of *genus ad speciem*, if the "representative" is conceived of as a "superior" periodically subjected to "political responsibility" (that is, to the response of the electorate).

The concept of *political responsibility* deserves a few more words, since given the impossibility of demonstrating a real correspondence of will between "representative" and "represented", it supplies the ideological justification of political representation. The citizen, it is maintained, has the possibility of "judging" the work of the parlamentarian on whom he has conferred his trust through the vote, by reconfirming or denying it at the new elections. However, a section of constitutionalist thinkers is doubtful about the notion of political responsibility at least where the stress is on the noun; political responsibility could thus hardly be seen as *legal* institutional responsibility. If instead we put the stress on the adjective, responsibility might be seen as the effect of the relation existing between "politicians" and "public opinion", so that what they do interacts with what it decides; which is in an extrainstitutional context, completely freed of the electoral tie between "representative" and "represented".

Some distinguish between "diffuse" and "institutional" political responsibility. While the former (diffuse) type of responsibility is regarded as an actually existing factual datum, in relation however not just to voters but also non-voters, the second type of political responsibility (institutional) is said not to be found in most Western democratic States, and in particular in the Italian republican system. In fact, in order for non

re-election to be regarded as a sanction on behaviour found not to comply with the duties of the elected representative, thus taking the shape of a kind of judgment of political responsibility, at least two conditions would have to be met: that the subject elected as parlamentarian be obliged to stand again at the next elections; that any re-election be institutionally subjected (according to institutionalized procedures) to an assessment of a political nature. Since these two conditions are not met, "institutional" political responsibility is not manifested. The only political responsibility actually in being remains "diffuse" political responsibility, which can however be called "responsibility" only in an improper sense[62].

There has also been talk, in connection with political responsibility, of "representation-substitution" (designation of the able in place of the unable), and it has been observed that in the representative system consensus does not "preexist" but "follow"; that the elector does not "act" but "react", and that political initiative runs from the top down, not the other way round. The case is, then, that the very theory of "political responsibility" (a refined legal version of the idea of *posterior* consent to the will of the "representative") ends up in a hierarchical conception of political *representation* in which the relation between "representative" and "represented" has a downward rather than upward direction[63].

As far as the majority principle goes, it is mostly based, legally (and logically), on a fiction: the majority prevails by becoming a totality. The

62 See G.U. RESCIGNO, *La responsabilità politica*, Giuffrè, Milan 1967, especially pp. 103 ff.

63 See V. MURA, *Rappresentanza politica*, in *Il Mondo Contemporaneo*, vol. 9: Politica e Società - II, La Nuova Italia, Florence 1979.

majority pretends to be no longer a *part*, but the *whole*; in consequence, the other part, the minority, disappears, is *de jure* eliminated[64]. The majority-minority relation too can thus follow the path of the hierarchical relation. As has been remarked, "in the majority principle one often sees rather than a principle of democracy, a principle which, on the contrary, legitimates a legal form of violence: the violence of the number, the majority's overpower on minorities"[65].

It cannot be forgotten that the majority principle can without contradiction be used *against* fundamental rights. "A legally unrestricted majority rule", writes Hannah Arendt, "that is, a democracy without a constitution, can be very formidable in the suppression of the rights of minorities and very effective in the suffocation of dissent without any use

64 "Having banned all research into its political advisability and moral value, the Romans were concerned first and foremost with giving it [the majority principle] a legally exact formulation, by classifying it within the framework of legal phenomena. The jurisconsults managed this through the following legal fiction: what the majority has done has to be regarded as if it had been done by all. "Refertur ad universus quod publice fit per majorem partem" (Ulpian). "Quod maior pars curiae efficit, pro eo habetur ac si omnes egerint" (Scaevola). There is thus no legal bond between majority and minority. The objective law recognises only the former; accordingly, the majority is all, the minority nothing. The Romans' was the first, perhaps the only, decisive word ever said on the majority principle. Their fiction was to have its greatest fortune in the Middle Ages. But even today legal thought has not gone much further" (E. RUFFINI, *Il principio maggioritario (profilo storico)*, Adelphi, Milano 1976, pp. 21-22). At the end of his work Ruffini writes that "from a substantive viewpoint and at a deeper level", the principle supremely incompatible with the majority principle is that of hierarchy.

65 G. GALGANO, *Problemi storici e attuali del principio maggioritario*, in "Annali Perugia", 1980, p. 544.

of violence"[66]. Ronald Dworkin, among others, defends the crucial idea that democracy is not the same thing as the majority principle, and the position that in a real democracy freedom and minorities are legally protected in the form of a written constitution that not even Parliament can amend to adapt it to its whim and its policies[67]. Equally, in the sphere of private law the majority principle comes into a collision course with the fundamental principle of private autonomy: "it is presented as what subjects some individuals to the will of others in a system borne up by the principle that no one can be bound except by his own will; it attributes to the unilateral declaration of certain individuals binding efficacy upon others, in a system in which declarations of will do not produce effects for third parties"[68].

There is thus a perception in several quarters of a misfit, or even tension, between the two elements making up the democratic system. Representation and majority principle on the one hand, and rights on the other, are bound to look at each other with mutual suspicion. The tension between rights on the one hand and institutional democratic apparatus on the other is also at the origin of certain recent communitarian proposals. "As bearers of rights", writes Michael Sandel, "where rights are trumps, we think of ourselves as freely choosing, individual selves, unbound by obligations antecedent to rights, or to the agreements we make. And yet, as

66 H. ARENDT, *On Violence*, now in *idem*, *Crises of the Republic*, Penguin, Harmondsworth 1973, p. 111.

67 See R. DWORKIN, *A Bill of Rights for Britain*, Chatto & Windus, London 1990, p. 13.

68 F. GALGANO, *Principio di maggioranza*, in "Materiali per una storia della cultura giuridica", 1982, p. 293.

citizens of the procedural republic that secure these rights, we find ourselves implicated willy-nilly in a formidable array of independencies and expectation we did not choose and increasingly reject"[69]. The trouble is, though, that such observations lead to an undervaluation of rights in favour of duties, and in the materialization, and so to speak moralization, of the latter from duties towards the law into obligations towards the community, the latter being seen as the source of the subject's "real" identity[70].

The division of powers, always imperfect though it be, is an "effect" (and not a "cause") of the constitution of the modern democratic State, and does not call its unity or its nature into question, even though it may contribute to developing corporative dynamics: these do not by themselves imply any liberal potential. The division of powers in constitutional theory is completely internal to the modern State form turning round the notion of sovereignty; it is located within the hierarchical relationship between political society and civil society, subordinating the latter to the former. Dividing a power unchanged in attributions and qualities does not necessarily mean changing its quality. As for the law (positive State law), so also for power, it is not enough to multiply (even to infinity) the subjects who produce the former or hold the latter, in order to change its meaning and nature.

Civic freedoms, the most interesting and "progressive" element in the political and legal structure of the democratic State, become operational in

[69] M. SANDEL, *The Procedural Republic and the Unencumbered Self*, in "Political Theory", 1984, p. 94.

[70] See, e.g., *ibid*, pp. 90-91.

practice to the extent that they are filled with the substance of citizens' action and become a weapon in the individual's libertarian striving. Democracy also means "turbulence"[71], that is, a political system not closed in on itself but instead open to demands coming from society, aware of the risk of instability that may involve: a social structure ready to call in question its own criteria of justice and of redistribution of wealth. There is an unbreakable nexus -- as John Rawls has forcibly emphasized -- between democracy and "well-ordered", that is, *just* society.

In short, the concept of democracy is strongly normative: any descriptive viewpoint about it ends up not understanding its scope, and, if taken seriously, risks denaturing it[72]. As Giovanni Sartori well puts it, "the descriptive viewpoint leads to definitions that have little or no resemblance to the normative definitions of democracy. The description of what democracy *is* in the real world is almost never oriented to the notion of the people"[73]. That is why so many political scientists and sociologists are embarassed about the concept, and seek stubbornly to reduce it to something else: to a system of *élites*, to polyarchy, to competition. There is similar embarassment about the concept of fundamental rights: these are reinterpreted as mere *inputs* of decisional procedures, or as instruments for implementing institutional decisions (for allocating economic goods, for instance). But democracy is above all else a normative ideal:

71 Cf. A. CAFFI, *Cristianesmo e ellenismo*, in "Tempo presente", maggio 1958, p. 358. A similar interpretation of democracy is offered by Claude Lefort when he praises "the force of subversion of the established order" inherent in democratic systems (see C. LEFORT, *L'invention démocratique*, Fayard, Paris 1981, p. 24).

72 See J. HABERMAS, *Faktizität und Geltung*, cit., chap. 8.

73 G. SARTORI, *Democrazia e definizioni*, III ed., Il Mulino, Bologna 1972, p. 324, emphasis in the text.

government by the people[74]. And fundamental rights turn around a moral concept: that of the *human person*. Without this ideal reference, democratic systems lose their meaning, their "idée directrice", and are condemned to decadence. Rules and procedures, though fundamental, are not enough to define, or to give us, democracy. What is further needed is a "meaning" to guide and give content to those rules and those procedures.

Democracy amounts to very little if it is equivalent to multilateral checks and balances between powers, leading to a system of mutual institutional conditioning among the constitutional organs of the State: the system of "weights and counterweights" that prevents any organ, whatever its constitutional position, from being decisively elevated over all the rest[75]. On this understanding of democracy, civil liberties have a marginal role: they do not act autonomously, but appear and are comprised within

[74] Suggestively enough it is the normative ideal of people's self-government the main target of Domenico Settembrini's criticism. This centers around the argument that prescribing people's self-government is a supreme form of contempt towards the people who do not have any intention (and capacity) to govern themselves. All those - so runs the argument - who defend a concept of democracy as the people's self-government do not accept people as they actually are (see D. SETTEMBRINI, *Democrazia senza illusioni*, Laterza, Bari 1994, pp. 67 ff). According to the Italian scholar democracy cannot go beyond some kind of oligarchy, since the people as such are not capable of managing directly or indirectly public (their own) affairs. In short, according to Settembrini democracy is only one form more of political command and does not represent in the least a manner to overcome political subordination. But the problem with this idea is that democracy, both in its direct and representative form, is based on one fundamental assumption: that people *are* "competent" to deliberate on public affairs. As has been pointed out by Robert Dahl, once this assumption is rejected, democracy gives way to *guardianship* (see R. DAHL, *Controlling Nuclear Weapons. Democracy versus Guardianship*, Syracuse University Press, Syracuse, N.Y. 1981, chap. 1).

[75] Cf. N. BOBBIO, *Democrazia rappresentativa e democrazia diretta*, cit., p. 50.

the interval of the swing of the pendulum between the powers. Democracy instead becomes very relevant if instead of being only a theory of a political form it becomes a theory of civil rights. In the first case, civil liberties find their justification in the spaces left open by mutually jealous, suspicious powers; in the second, they no longer assume instrumental value, and are what determines the patterns and changes of political forms. The basic rule for this substantive normative conception of democracy lies in the metalegal principles of the Constitution, not in the compromise reached by the State's powers.

6. Democracy and Tensions: Some Conclusions

It may be said that the democratic system in general, by comparison with its foundation myth (people's self-government) and the underlying normative ideal (the "freedom" mentioned at the outset, that is, individual autonomy understood as a universalizable principle) shows a number of shortcomings and tensions. The first tension arises within the dynamic between representation and popular (and individual) will. There is here a certain gap that does not allow full equivalence between the will of the represented (which is sometimes even not there) and the will or action of the representative. This happens irrespective of adoption of a model of representation as *Vertretung* (conventional, and hence more open to influence from the represented) or as *Repräsentation* (which may instead be close to authoritarian and totalitarian conceptions, justifying the superfluity of a link between the *will* of represented and representative).

Another continuous source of tension is the majority principle, as far as its use as a method of collective decision goes, since this principle may end by wiping out the will of minorities, thus vanifying the aspiration to full popular sovereignty (which should include the will of "all"). Between "general will" and "will of all" there is no equivalence. Yet the "general will" aspires to become or to be justifiedly be considered as the "will of all", and is ultimately justified only thanks to this aspiration.

Then comes the separation of powers. Here too there are several reasons for tensions. One should in particular point to the fact that the functional division of power often serves to justify the inapplicability of the democratic method to certain "regions" of the political institutions. There is thus ground for conflict between the division of powers and a consistent, or if you will *radical*, application of the democratic method. In particular, there is a tension between the idea of the division of powers and the role given to legislation as the seat of people's self-determination.

But it is the very principle of popular sovereignty that is, so to speak, at risk, in the sense that it may be more or less easily twisted into justifying illiberal behaviour. Above all, for popular sovereignty to be fully exercised, there is a need for active participation in political life by the greatest possible number of citizens. To secure such participation, "republican" virtues need to be cultivated, constant attention to the common wealth should be stimulated, and a sort of "mobilization" aimed at the administration and discussion of public affairs. But this sort of "mobilization", quite apart from the difficulty of realizing it, may conflict with the possible legitimate desire to "keep out", the indiduals' need for *privacy*, their right not to want to bother about public affairs. A

paternalist stance could be adopted to bring about and strenghten "republican" virtues among citizens. But paternalism often conflicts with individual autonomy, and democracy as people's self-determination is nothing more than the universalization of individual autonomy.

Then comes the problem of the necessary material conditions for democracy. For a people actually to exercise its sovereignty, they must be already "sovereign" *de facto*, that is, not economically and culturally dependent on other overlying powers, and moreover morally integral and prepared to treat public affairs as questions of general interest to which the principle of universalizability applies. A "democratic" people is one that knows how to distinguish instrumental or strategic rationality from communicative rationality, and regards the main province of the latter as politics. A "prudential", "economistic" or "realistic" vision of politics is at bottom incompatible with the democratic administration of public affairs. "Representative institutions", wrote John Stuart Mill over a century ago, "are of little value, and may be a mere instrument of tyranny and intrigue, when the generality of electors are not sufficiently interested in their own government to give their vote, or, if they vote at all, do not bestow their suffrages on public grounds, but sell them for money, or vote at the beck of some one who has control over them, or whom for private reasons they desire to propitiate"[76]. Democracy is in short possible only where the civic conscience and public freedoms are already strong and flourishing.

There is still more than one possibility of tension between the popular will (even if unanimous) and certain principles and rights that do not

[76] J.S. MILL, *Considerations on Representative Government*, cit., p. 179.

derive either their justification or their (howbeit limited) binding force from that will.

This tension may also take the shape of conflict between "people" and "constitution", that is, the body of formal and/or material rules and principles that underlie that given political community. There may, that is, be conflict between democracy as society supported on a constitution (by principles and rules endowed with superior dignity and force to those enjoyed by the ordinary laws issued by the organs of popular sovereignty) and democracy as government by the people. This tension may take the form of a conflict of powers between the legislative and the judicial power, between the "people's representative" and the "guardian of the constitution" (which in systems with "rigid" constitutions is today generally the judge, whether constitutional or ordinary)[77].

Because of a paradox common to various forms of extreme voluntarism or "libertarianism" (to make it clear, of the type of those represented by such American thinkers as Ayn Rand), the exaltation of will, that is, an "autopoietic" or self-founding justification of both individual liberty and the popular will, may lead to situations of annihilation of that very will. If I am absolutely free to do what I want with myself, then I can also make myself a slave. If the people is absolutely

[77] For a critical discussion of "judicialist" tendencies, with particular reference to U.S. experience, see the excellent article by M. WALZER, *Philosophy and Democracy*, in "Political Theory", 1980. Cf. also the recent important contribution by B. ACKERMANN, *We the People*, Vol. 1, *Foundations*, Harvard University Press, Cambridge, Mass. 1991, which was subsequently the object of lively debate in "Ethics" for March 1994.

sovereign, it may decide to give itself a dictator. In both cases, for radical voluntarism, there is no ground for objections. This reminds us that both individual freedom and democracy presuppose, and refer back to, a body of principles to which freedom itself and sovereignty itself (as individual and collective will respectively) can (justifiably) do nothing. This most notably means a series of rights the breach of which -- even with conscious assent by those concerned -- would constitute a morally unacceptable situation; and breach of which by a given political regime -- even with the unanimous consent of the citizens -- would indicate the illiberal nature of that regime. In democracy "substance", people's government, is often a matter of "form", when not of procedure[78].

78 Cf. Habermas' plea for a procedural concept of democracy (J. HABERMAS, *op. ult. cit.*, chap. 7).

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