

Democracy and Representation

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In what follows, I will review the question of the moral justification or legitimacy of parliamentary representation in modern democratic societies – an institution established in a specific period of European history as a technical device to ensure the effective validity of the rights and liberties of one particular social class: the *bourgeoisie*. This genealogical link between institution and social class has often been at the root of assertions claiming that the institution is obsolete because the socio-political conditions that gave rise to it no longer obtain. It is therefore not without interest, first of all, to take a brief look at the arguments which at the time of its establishment were given in favour of parliamentary representation and which were also often used later to criticize parliamentary democracy (I); in this first part of my essay, Edmund Burke and Carl Schmitt will serve as guides. Secondly, I will discuss some central aspects of the democratic foundation of a parliamentary political system; here, I will refer mainly to two classical studies by Hans Kelsen (II). Finally, the confrontation of these two positions will allow me to draw some conclusions about the justification as well as the moral limits of democratic parliamentary representation (III).

I.

Among theorists of parliamentary representation, it was arguably Edmund Burke who most clearly exposed the link between parliament and *bourgeoisie*. In his view, because of their education and economic status, the members of the latter were optimally suited to take on the general representation of a nation. Of course, according to Burke the task of a representative is not that of making merely technically sound legislative decisions; above all, his decisions are supposed to be morally correct. This idea of moral correctness presupposes the belief in the existence of moral “truths” in political matters and the identification of criteria by which to assess assertions claiming to express such truths.

For Burke, since morally correct answers to political problems exist, there is also a moral obligation to discover them. Government is a matter of reason and wisdom rather than will. And parliament should be the forum where truth is discovered through public debate, i. e., rational deliberation. The political truth is what coincides with the national interest; its satisfaction is to the advantage of every member of the community. Contrary to John Stuart Mill, for example, Burke did not believe that individuals are the best judge of their own interests. He therefore did not think that there is a necessary relationship between what people desire and the satisfaction of their interests. That is why, in this view, the represented do not need to be consulted about what their representatives decide in parliament. Only the representative is present in the sessions and can take part in the search for political truth. Hence, Burke asked

“what sort of reason is that, in which the determination precedes the discussion; in which one set of men deliberate, and another decide; and where those who form the conclusion are perhaps three hundred miles distant from those who hear the arguments?” (1949, 115)

If political decisions are a matter of reason rather than will, the will of the people has no special status. On the contrary, the people should give their representatives the greatest possible freedom to act as those representatives think best. A representative who subjects his own best judgment to the opinion of those who elected him “betrays, instead of serving” them (*ibid.*). In his famous speech to the electors of Bristol, Burke therefore said:

“Parliament is not a congress of ambassadors from different and hostile interests; which interests each must maintain, as an agent and advocate, against other agents and advocates; but parliament is a deliberative assembly of one nation, with one interest, that of the whole; where, not local purposes, not local prejudices ought to guide, but the general good, resulting from the general reason of the whole.” (1949, 116)

The discrepancy between interest and will is related to a second distinction made by Burke, namely, that between interest and opinion. The objective interest of an electoral district is not the same as the opinions of some or even all citizens of that district. Opinions tend to be premature, spurious, full of prejudices, and a matter of great and frequent fluctuation. Opinions are subjective and thus contain a large dose of irrationality. Interest, by contrast, is objective and can be rationally founded on deliberation, e. g. in parliament. The people as such are not in a good position to discover their own interest since they cannot participate in parliamentary sessions. Only with time a coincidence between parliamentary decisions and public opinion may arise. Parliament “imitates

in the sphere of government the natural character of society as a whole” (1949, 348) and, through rational deliberation and prudent judgment, reaches conclusions to which the society at large could come only indirectly and more slowly. That is why Burke observed:

“I am to look, indeed, to your opinions, – but to such opinions as you and I *must* have five years hence. I was not to look to the flash of the day.” (Quoted from James Hogan 1945, 189)

The coincidence between the results of rational parliamentary decision-making and the long-term opinions of the people will then become manifest in the collectivity’s feelings of approval towards those decisions. In their feelings, the people rarely err. Only when they try to speculate about the grounds of their feelings they drift off into opinion:

“[...] the most poor, illiterate, and uninformed creatures upon earth are judges of a practical oppression. It is a matter of feeling; and as such persons generally have felt most of it, and are not of an over-lively sensibility, they are the best judges of it. But for the real cause, or the appropriate remedy, they ought never to be called into council about the one or the other.” (1949, 492 f.)

Appearances, unlike scientific facts or interests, are essentially a matter of personal subjectivism, so the only trustworthy authority about one’s feelings is oneself. It is therefore important, if the people are to be well governed, that they transmit their feelings as precisely as possible:

“The people are the masters. They have only to express their wants at large and in gross. We are the expert artists, we are the skilful workmen, to shape their desires into perfect form, and to fit the utensil to the use. They are the sufferers, they tell the symptoms of the complaint; but we know the exact seat of the disease, and how to apply the remedy [...]” (Quoted from Ernest Barker 1951, 201)

The transmission of those symptoms takes place in elections which, thus, serve as a corrective for the possible deviations of parliamentarians in their capacity as persons entrusted with determining the national interest.

Burke’s elitist conception of parliamentary representation depended on one empirical condition – the homogeneity of the electoral body – and one epistemological claim – the existence of political truths that can be discovered through the exercise of reason in parliamentary deliberation. His criterion for truth was correspondence with the national interest, and this is corroborated or falsified, he thought, through the people’s expression of feelings in elections.

In the late 1920s, Carl Schmitt, relying partly on Burke’s interpretation as well as on observations from Donoso Cortés about the crisis of the middle class, formulated one of the most ferocious criticisms against

parliamentarianism ever written. Some of his main arguments were the following:

Schmitt like Burke accepted the idea that there are political truths which can be found out by discussion: “truth emerges from the free clash of opinions” (1926, 46). But in his view, parliament was no longer a forum where “a will of the state, above party egoisms” (1931, 88) could form. Far from being

“a forum of the free, unitary negotiation of free representatives of the people, i. e., of transformers of party interests into one supra-party will [it has become] the forum of a pluralistic division of organized social powers.” (1931, 89)

This failure of parliamentarianism, he thought, was due to

“[t]he instable parliamentary majorities, changing from one case to the next, of the numerous and in all respects heterogeneous political parties [...] majority is always the majority of a coalition and, depending on the different areas of the political battle – economic, social, cultural, foreign policy – totally changing” (1931, 88).

In this context, rational debate had been replaced, he thought, by negotiation and compromise:

“what matters is not to find out what is rationally correct, but to calculate interests and the chances of winning, and of imposing one’s own interest as much as possible.” (1926, 10)

“Big political and economic decisions on which the fate of mankind today depends are no longer the result of a balancing of opinions through discourse and its public manifestations nor the result of parliamentary debates.” (ibid., 62)

Decisions are actually taken in parliamentary committees, he observed; and what happens in those committees is that the interests of politically and economically powerful groups are weighed against each other: “The privilege of free discourse thus loses its precondition.” (1928, 319)

And the same is also true for publicity. The custom of working in ever smaller committees tends more and more to reduce the functions of the plenary sessions of parliament:

“The small committees where decisions are taken are not even real parliamentary committees, but merely meetings of party leaders, conversations among the leadership of parties, interest groups, etc.” (1928, 319)

Whearas, according to the original liberal conception, parliament should be the place of political integration by independent representatives, these representatives had now become simple delegates, i. e., the “ambassadors” criticized by Burke. According to Schmitt, the Weimar

Republic was ruled by tightly organized party factions firmly representing different interest groups. And besides this pluralistic degeneration of parliament, there was also the phenomenon of “polycracy”, i. e., the confusing simultaneous existence of different autonomous centers in the economic sphere. According to Schmitt, this polycratic system, which was another effect of mass society, lacked a unitary leadership and all coordination.

Mass democracy, Schmitt argued, was unable to channel the pursuit of interests through parliamentary representation and instead needed to search for an identity, by eliminating the causes of its heterogeneous plurality. This solution proposed by Schmitt is well-known and I will not say more about it here.

However, three aspects of the Burke-Schmitt position deserve to be underlined and kept in mind:

- 1) the belief in the existence of political truths;
- 2) the conviction that for parliamentary representation to be feasible, the society must be homogeneous; and
- 3) the idea of the relationship between discussion and negotiation concerning the satisfaction of people’s “true” interests.

II.

While the leading idea in the Burke-Schmitt position was the search for political truth, for Kelsen it was individual liberty, or autonomy, and the essential equality of all human beings. It is the synthesis of these two principles which, according to Kelsen, characterizes democracy. Following Kant’s conception, Kelsen believed that freedom for equal beings is possible only if natural freedom is replaced by political freedom; in other words, we can be free only if we accept to be governed by the State. Political freedom means, however, that while being subjected to the State, one obeys only one’s own will, not the will of someone else. But such a perfect coincidence of individual wills and the provisions of the State can be imagined only in the hypothetical situation of the foundation of political order through an original contract. In real political life, the principle of unanimity must be replaced by the majority principle as the closest possible approximation to the idea of freedom:

“Only the idea that, if not all, then at least the largest possible number of persons should be free, i. e., that the smallest possible number should see a contradiction between their own will and the general will of the social order, leads rationally to the majority principle.” (1929, 9 f.)

It is obvious that when decisions are taken by majority this implies that the freedom of those belonging to the minority is restricted. But it is also a fact that if democracy is to be feasible in societies with a fairly large number of members, this kind of restriction must be accepted. Moreover, since direct democracy is impossible in such societies, the system must be representative, i. e., it must be a system of parliamentary representation. The main function of such a system, according to Kelsen, is

“The formation of the will of the State through a collective organism elected by the people on the basis of a universal, equal right of suffrage, i. e., democratically, and which decides by majority rule.” (1929, 28)

Parliamentarianism is thus a compromise between the democratic requirement of freedom and the division of labour imposed by modern nation states (1925, 7). And also precisely because of the complexity of contemporary societies, the “people” as such cannot practise direct democracy and must therefore content themselves with the creation of that organism which then determines the will of the State. But since, on the other hand, there is the wish to keep up the appearance that parliament expresses unfailingly the idea of every citizen’s equal freedom, we rely on the fiction of representation, that is, on the idea that parliament is merely a representative of the people and that in parliament the people can express their will – despite the fact that in all liberal constitutions the principle of the representatives’ free mandate is accepted, which means that representatives are not bound by instructions from those they represent. This independence of the representatives from those represented is what distinguishes today’s modern parliaments from the earlier corporatist representation that worked by an imperative mandate.

The idea of representation is thus a fiction for the purpose of legitimizing parliamentarianism from the point of view of popular sovereignty. However, as long as democracy was struggling with autocracy and parliaments had not yet fully succeeded in imposing themselves against monarchs and estates, the fictitious nature of the idea of representation did not occupy the center stage of political awareness. Only when democracy had triumphed, the plausibility of this fiction began to be questioned. The argument then was that the will formed in parliament is not the will of the people.

In Kelsen’s view, this argument is correct only if one tries to justify the essence of parliamentarianism on the basis of the idea of liberty rather than as a compromise between liberty and a necessary division of labor.

The backbone of this compromise is the majority principle, together with minority protection. Conceptually, or logically, the majority principle presupposes “the minority’s right of existence” (1925, 31; 1929, 53). Its protection is the essential function of the declaration of fundamental, or human, rights as contained in modern liberal democratic constitutions:

“The catalogue of basic rights and freedoms, by protecting the individual against the State, protects minorities [...] against absolute majorities. This means that measures that affect certain national, religious, economic or otherwise spiritual spheres of interest are possible only by agreement between majority and minority.” (1929, 54)

Moreover:

“What matters is that from the tendency to form a majority [...] arises the effect that in the end two groups essentially confront each other and compete for power [...] The strength of social integration is what mainly characterizes the majority principle from the sociological point of view.” (1925, 31; 1929, 56)

While for Carl Schmitt one of the causes of the crisis of parliamentarianism was the replacement of discussion by negotiated compromise, for Kelsen the possibility of compromise is precisely an essential aspect of parliamentary democracy:

“A quick glimpse at parliamentary practice shows that particularly in the context of the parliamentary system the majority principle functions as a principle of compromise.” (1925, 31 f.)

and

“compromise means putting aside what divides in favor of that which unites. Every exchange, every contract is a compromise, as contract (*Vertrag*) means getting along (*sich vertragen*).” (1925, 31, 1929, 57)

Kelsen’s idea of “getting along”, of tolerating each other, is based on a position of value relativism which rejects the possibility that there are absolute political truths that can be known. The objectivity of values is denied; everybody can fix their own subjective scale of values. For those who believe that values are subjective, it is only through tolerant compromise that it may be possible to live together in an organized way that does not entirely sacrifice individual autonomy. And this tolerant attitude based on value relativism is what makes it possible to justify democracy:

“Given the impossibility of knowing absolute truth or absolute value, and therefore the incapacity to claim exclusive validity for any particular conception, excluding all others, so to speak, dictatorially, philosophical relativism, always willing to consider opposing conceptions to be at least possible, encourages that dialectical method which must allow the development of opinions and counter-opinions [...] Is

this not basically the same method as that of democratic parliamentarianism, with its recognition of minority rights and its contradictory procedure, aimed at reaching compromise?" (1925, 40 f.)

All parliamentary procedures are aimed at finding a middle line between the two opposing views of majority and minority:

"[Parliamentary procedure] creates the guarantees that the different interests of the groups represented in parliament can raise their voices, can manifest themselves as such in a public process. And if the specifically dialectical procedure of parliament has any deeper sense, it can only be that from the opposition of thesis and antithesis of political interests some synthesis will arise. But this cannot mean, as is often wrongly believed in a confusion of the reality and the ideology of parliamentarianism, an absolute, 'superior' truth, an absolute value that is above the interests of groups; it means only a compromise." (1929, 58)

The idea of compromise also supports Kelsen's conception of the majority principle, which must not be confused with majority domination in the sense of conceptions advocating the absolute domination of a majoritarian social class.

Certainly, if the application of the majority principle presupposes a certain basis of agreement between majority and minority, this also requires a reduced degree of social heterogeneity. For Kelsen, social homogeneity is ensured by cultural and linguistic community. At this point, it is interesting to note that these same two elements had already been the necessary foundations of national units as actors of the international system for Kant. For Kelsen, the socio-economic differences identified by Marxism as a serious impediment to representative democracy are not of primary importance. Even in a situation of economic inequality, democracy remains for him the only means to avoid the danger of dictatorship:

"If, as precisely the Marxist critique of so-called bourgeois democracy underlines, what matters is the real distribution of power, then the system of parliamentary democracy, with its two essential groups, according to the majority-minority principle, is the 'true' expression of the current society's division in two classes. And if there is any form that offers the chance not to lead this strong opposition, which one can lament, but not deny, into a catastrophe by way of bloody revolution, but to balance it out peacefully and slowly, it is this form of parliamentary democracy [...]" (1929, 68)

Kelsen's confidence in the possibility to avoid the dictatorship of a class, as proposed by Marxism, or the dictatorship of a *Führer*, as advocated by Schmitt, in a society divided by great socio-economic differences was challenged by another great defender of parliamentary democracy, Hermann Heller, who argued for the creation of a welfare state precisely in order to overcome social heterogeneity; but his posi-

tion does not need to be elaborated here. Rather, I wish to underline the differences between the positions of Burke-Schmitt, on the one hand, and Kelsen, on the other. They seem to be at least the following:

- 1) While there are absolute truths in the realms of politics and morality for Burke-Schmitt, for Kelsen only value relativism is rationally tenable.
- 2) For Kelsen, the core activity of a parliament is negotiation and compromise, which is precisely what for Schmitt were degenerate forms of discussion.
- 3) For Kelsen, social heterogeneity is not a fact that may endanger the viability of representative democracy, as it was for Burke and Schmitt; rather, under this circumstance representative democracy is the most adequate arrangement to ensure social peace.

I think these are the most important differences, which, taken at face value, make the two positions irreconcilable.

At closer inspection, however, there is another possible reading of Kelsen's position which substantially reduces its radical relativism. First of all, the starting point of Kelsen's defense of democratic parliamentarism is the acceptance of two basic values: liberty and equality. This explains why Kelsen relies on the idea of a social contract hypothetically accepted unanimously, and on the majority principle combined with minority respect and protection. Kelsen explicitly defends the conception of a formal democracy. But one can certainly question to what extent a democracy that supports the respect of fundamental human rights to ensure the existence of the minority is purely formal. As mentioned above, this guarantee is logically linked to the majority principle which, in turn, is what permits the greatest possible approximation to the ideal of freedom, understood as obedience only to laws everyone would be willing to impose on themselves. Seen from this perspective, the majority principle is not an empty procedure that legitimizes the political system regardless of the outcomes that it may have. Kelsen does surely not belong to the camp of those who, like Niklas Luhmann, claim that the existence of a mere procedure is a necessary and sufficient condition for the legitimacy of a political system.

Kelsen insists that negotiation is the essence of parliamentary activity. But such negotiation is surrounded by the idea of tolerance, of getting along, that is conceptually linked to the idea of contract, i. e., the idea of the hypothetical unanimous acceptance of a form of government that overcomes anarchy without destroying individual autonomy.

In this sense, although it is true that negotiation is an essential element of parliamentary activity, it seems that according to Kelsen such things as individual autonomy cannot be a matter of negotiation. If nothing were non-negotiable and the idea of the unconditional equal worth of all possible moral convictions were taken seriously, then how could one explain Kelsen's reference to the "minority's right of existence" which opens the "possibility of protecting the minority from the majority" (1925, 31; 1929, 53), and his characterization of the "essential function" of human rights to protect minorities against majorities? According to Kelsen, it is precisely the majority principle that prevents one class from ruling over another, that is, majority domination, or "arithmetic arbitrariness" (as he says in 1929, 55 – an expression which reminds one of Jorge Luis Borges's famous assessment of democracy as "a widespread superstition, an abuse of statistics"). Kelsen reasons forcefully against the identification of "majority principle" with "majority domination"; thus, his assertion that the majority principle presupposes the existence of a minority is more than the mere tautology that one cannot speak of a majority without also conceiving a minority.

And one does not need to throw overboard all advantages of parliamentary representation in order to challenge Kelsen's belief that even in societies with great socio-economic heterogeneity parliamentary democracy is feasible.

III.

With these two opposing positions in mind, we can now approach the third of the tasks mentioned at the beginning of this paper and attempt to analyze how parliamentary representation in democracy can plausibly be justified. Three basic questions can be distinguished:

- 1) What should the relationship between representatives and represented be?
- 2) Can all questions be submitted to parliamentary discussion and decision-making?
- 3) Is it morally necessary to guarantee some minimal threshold if parliamentary negotiation and compromise are to be legitimate?

The first question concerns the relationship between desires and interests (Burke) or between autonomy and government (Kelsen); the second the existence or inexistence of political truths (Burke-Schmitt) or the

possible constraints on parliamentary discussion/negotiation (Kelsen); the third refers to the precondition of homogeneity (Burke-Schmitt).

1) Two different types of theories have attempted to answer the first question. According to the mandate or delegation theory, a representative must represent the wants of the represented. According to the theory of the representative's independent judgment, the representative must represent the interests of the represented, regardless of what they may actually desire.

The first theory assumes not only a logical (conceptual) relationship between people's wants and interests, but also that no-one is a better judge than oneself about what furthers or damages one's own interests. This is the position made famous by John Stuart Mill, according to which

“the most ordinary man or woman has means of knowledge immeasurably surpassing those that can be possessed by any one else.” (Mill 1978, 207)

Elsewhere, I have discussed this radical thesis against all kinds of legal paternalism and tried to show that as a general empirical proposition it is false (Garzón Valdés 1987). I will not repeat these arguments here. Let me just note that the determination of a particular person's interests under certain circumstances and with respect to a specific policy presupposes knowledge about all kinds of relevant aspects of the case at hand as well as coherence concerning the set of desired ends and the means necessary to obtain them. Burke had severe doubts about the relationship between the satisfaction of the people's wishes and the promotion of their interests. That is why he distinguished, as we saw, between opinions, on the one hand, and knowledge of political truths, which he identified with knowledge about how to satisfy the community's interests, on the other.

Still, one could insist that it is convenient to uphold a necessary relationship between what the represented desire and a representative's conduct. If the justification of the state in general and of parliamentary representation in particular is based on the consent every single subject gives to these institutions, a representative may not simply ignore or dismiss the desires of the represented, as every person's autonomy is expressed precisely in the treatment of what she wants or does not want. Leaving aside cases in which the represented suffer from some basic incompetence – in which case, I think, legal paternalism would be justified –, the position presented here would argue that the representative has the moral obligation to act in accordance with the desires of those (s)he represents.

Again, one could reply that this reasoning is correct, but that the empirical premise of the basic competence of the represented must

generally be assumed to be false, since the represented usually do not have knowledge of the relevant data that only the representative has and therefore the proposals of the represented will mostly be mere opinions, as Burke said. If those opinions were unconditionally implemented, the results could be far from those actually desired.

If one accepts this argument, then one must conclude that good representation does not emphasize the desires, but the interests of the represented. The consent of the represented can then give legitimacy to the representative's conduct only if the former do have sufficient information and if they are willing to accept criteria not only of rationality but also of reasonableness concerning the proposed measures. In other words: what matters would then be not the factual consent of the represented but a hypothetical consent, i. e., the consent the represented *would* presumably give *if they had* all the relevant information and *could* participate in parliamentary discussion. This is the strong argument of those who defend the principle of the representative's freedom in attempting to satisfy the real interests of the represented.

An advantage of this position is its undeniable dose of realism concerning the relationship between the desires of deficiently informed people, as is usually the case in our complex modern societies, and the actual satisfaction of their needs. It does, however, open the door to an unjustifiable legal paternalism which, under the pretext of always knowing better than the affected themselves what the people's interests are, could easily degenerate into a constant intervention in people's plans of life, thereby infringing on their personal autonomy.

The problems connected with these two extreme positions seem to recommend searching for a more moderate, intermediate solution. I will come back to this later.

2) But first I will have a look at the second of the questions mentioned above: Are there any limits to what may be submitted to parliamentary discussion?

Whether one believes that parliamentary debate and decision-making is the adequate means to find political truths or that parliamentary negotiation and compromise lead to the nearest possible approximation to the ideal of liberty and equality, there seems to be no reason why any questions should in principle be excluded from parliamentary deliberation.

But in fact, neither Burke nor Kelsen advocate such unconstrained openness. For Burke, a limit is imposed by the precondition that property rights – more specifically, the property rights of the middle classes – must be respected. Besides, only decisions that are “true”, i. e., that

further the interests of the whole society, are permitted. For Kelsen, in turn, decision-making according to the majority principle is limited by the respect of minority rights, which – not insignificantly – he calls “basic” or “human” rights. In a way, debate and negotiation are similar to market situations as described by economists, where individuals take into consideration their own as well as others’ subjective preferences and decide the courses of action they will take based on cost-benefit analyses. But even for market relations, there is a consensus that they can function only if the respect of certain basic values such as everyone’s individuality and freedom of choice are assumed. But not only this: Even advocates of the market model and of the idea of negotiation and compromise agree that goods which are fundamental for the realization of any plan of life must be excluded from the free play of the market.

In this sense, then, the exclusion at least of some fundamental matters from the market as well as from parliamentary negotiation seems to be morally required. What those matters should be, and on what criterion they are excluded, I propose to answer as follows:

a) All goods considered necessary for the realization of any plan of life must be excluded from parliamentary negotiation and compromise.

b) The determination of what this includes cannot be left merely to an actual consensus of representatives or represented. An actual consensus reflects only the positive, empirical morality of a given collectivity at a given point in their history. From the fact that the members of a community agree on accepting certain standards of conduct it does not automatically follow that the accepted standards are also permitted from the point of view of critical morality, i. e., of an ethical theory. For a rational and reasonable foundation of moral norms we must construct hypothetical situations which include the acceptance of background conditions such as impartiality and universality.

c) Concerning the effective implementation of those rights protecting the “off limit” of the above-mentioned basic goods, it is irrelevant whether or not the members of the community want or desire it. If they are unable to understand the importance of those basic goods, a paternalistic attitude in this respect seems entirely justified. After all, if a person does not accept that her own basic goods are guaranteed, this can count as clear evidence either of irrationality or of a lack of knowledge about elementary causal relationships, namely those between access to those goods and the chance to realize any plan of life. People who don’t understand the relevance of basic goods are in the category of the basically incompetent.

d) If one accepts what has just been said, then one must also accept that to those who defend such basic goods, the principle of non-dictatorship as formulated by Kenneth J. Arrow does not apply:

“There is no individual whose preferences are automatically society’s preferences independent of the preferences of all other individuals.” (1967, 226)

In Nazi Germany, for instance, any single person who opposed Hitler’s policies was morally justified to do so even against majority opinion and would also have been morally justified to impose her position against the majority (on this topic, cf., e. g., Höffe 1980). That the principle of non-dictatorship in Arrow’s sense is inapplicable in such cases is the necessary starting point for the morally justified struggle against dictatorships as that of the fascists and, in general, all those in which majority domination has replaced the majority principle, to use Kelsen’s terminology.

e) And if one agrees – as I think one should – that the moral sphere tends to expand, it seems to follow that the “off limits” of basic goods also has this tendency. This expansion responds to two kinds of factors:

(i) factors of a cognitive nature – i. e., the insight that hitherto unnoticed conclusions can be inferred from the premises of the moral system. This is the case, for instance, when we speak of different “generations” of human rights. The more recent generations did not come about through the incorporation of new premises into the system, but through new conclusions drawn from already accepted premises. Think, for example, of the relationship between the right to life (a human right of the so-called “first generation”) and the right to an unpolluted environment (a “third generation” right), or that between the negative duty not to cause harm and the positive duty to help others when this can prevent a harm to them;

(ii) but there are also material factors concerning the access to economic, technical or cultural resources, that may require an expansion of the limits of the “off limits”.

f) In the light of such restrictions, the area of a representative’s activities is, on the one hand, that of ensuring the effective satisfaction of basic needs, i. e., the guarantee of primary goods (Rawls) or universalizable interests (Habermas); but, on the other hand, it also contains a sphere of negotiation and compromise, concerning what, following a proposal of James Grunebaum (1981), may be called people’s secondary wants, i. e., those not related to their basic needs. On the secondary level, the

principle should be to respect the wants or desires of the represented, with one proviso: Secondary wants of the represented should be promoted – provided this can be done, to the best of the representative’s knowledge, without sacrificing any basic good and without frustrating secondary wants that are more highly valued by the represented themselves. Suppose, for instance, that the satisfaction of a secondary want W_1 – say, the construction of an industrial plant at a certain location – would result in such severe environmental pollution that it would endanger the health – a primary good – of the people living in the area, or that for some other reason one of the coalition partners of a government that intends to permit the construction of the plant is strongly against it and threatens to quit the coalition, which would result in the frustration of another secondary want W_2 of the members of the party in favor of the plant – say, that of continuing the coalition government – which they value more highly than W_1 . In both cases the proviso would require abandoning the project.

Generally, however, for the pursuit of secondary interests negotiation and compromise on the basis of cost-benefit considerations is the adequate approach. Within the constraints just explained, the representative is under a moral obligation to secure the best possible satisfaction of the secondary wants of those he represents; and his strategy for negotiation and compromise should be prudent. In the words of David Gauthier:

“He is willing to temper his single-minded pursuit of advantage only by accepting the obligation to adhere to prudentially undertaken commitments. He has no real concern for the advantage of others, which would lead him to modify his pursuit of advantage when it conflicted with the similar pursuits of others. Unless he expects to gain, he is unwilling to accept restrictions on the pursuit of advantage which are intended to equalize opportunities open to all. In other words, he has no concern with fairness.” (1978, 196)

But even if negotiation and compromise must be guided by prudential cost-benefit considerations, it seems to me that this sphere of prudence may only be accessed over a threshold determined by ethical considerations. This brings me to the third question I wanted to treat.

3) As political negotiation and compromise has many features of a market setting, for this question it seems interesting to look at the ideas of economists and of legal scholars who have approached the topic with reference to such ideas.

Even deeply liberal economists such as James Buchanan think that in the market negotiations make sense only if the participants have at least some hope of success:

“‘Hope’ is an extremely important component of any social order that lays claim to being ‘just’.”(1986, 135 f.)

And the hope of success in this sense does not rely on such factors as luck or skill, but on the equality of the rights with which people enter into the game of market negotiation. In Buchanan’s words:

“Few persons could say that the economic game is intrinsically unfair just because some persons are lucky or because some persons make better choices or because some persons exert more effort than others. Unfairness in the economic game described by the operation of market institutions within a legal framework of private property and contract tends to be attributed to the distribution of endowments with which persons *enter* the game in the first place, *before* choices are made, *before* luck rolls the economic dice, *before* effort is exerted.” (1986, 129 f.)

When Hermann Heller insisted that social homogeneity is a necessary condition for a well-functioning parliamentary democracy, he too emphasized the importance of people’s hope that negotiations may result in benefits for all sides:

“Only if the proletariat comes to believe that the democratic equality of rights of its overpowering adversary will, under democratic forms, lead into a dead end, dictatorship will irrupt.” (1971, II, 430)

The proletariat’s lack of trust in the rules of the democratic game was, according to Heller, the consequence of a social disparity that transformed *summum jus* into *summa injuria*.

Likewise, Jürgen Habermas, distinguishing between interests that are universalizable (or justifiable in discourse) and those that are not (i. e., that are only particular interests), sees an indirect possibility of justifying the latter by way of compromise:

“We call compromise a norm-based balancing of particular interests that comes about under conditions of a balance of power between the parties.” (1977, 154)

If the condition of a balance of power is not satisfied, an arrangement between the parties is only a pseudo-compromise or, to use Habermas’s own terminology, an “ideological form of justification” (1977, 155), leading to a normative system based merely on coercion.

Negotiation and compromise thus presuppose that legal and political resources are distributed more or less equally. In analogy, if parliamentary negotiation is to be morally acceptable, it presupposes a degree of homogeneity that permits all parties to uphold that hope of success to which Buchanan and Heller allude. Hence, what we need now is a criterion by which to determine whether a society is sufficiently homogeneous in the

right sense for compromises to be fair and for all social groups to feel that they can be integrated through parliamentary activity. My proposal for such a criterion is the following:

A society is homogeneous in this sense if all its members effectively enjoy all rights that belong to the 'off limits' sphere of basic goods.

When that is not the case, we get majority domination rather than majority-principle rule (Kelsen), or an ideological form of the justification of normative power (Habermas).

Already in the 19th century, Abraham Lincoln said:

“If by the mere force of numbers a majority should deprive a minority of any clearly written constitutional right, it might in a moral point of view justify revolution [...]” (First Inaugural Address, 1861)

Similar arguments were used in the 20th century for the moral, political and legal justification of phenomena such as civil disobedience.

The requirement of this threshold of homogeneity becomes obvious if one considers that parliamentary representation, as a necessary form of division of labor, is the only feasible type of democracy in our contemporary societies, and that democracy is the best candidate for the moral justification of political rule, provided it is not reduced to a mere procedure but includes the normative feature of respect for individual liberty and equality. Only such a concept of democracy makes it possible for Kelsen to begin his argument for the justification of democracy from natural freedom and its contractual transformation into political freedom – an idea shared by Kant as well as by Rousseau:

“what man loses through the social contract is his natural liberty [...] what he gains is civil liberty [...] to what is gained by the civil state one could also add moral liberty, the only one that really makes a man the master of himself.” (1964, III, 364 f.)

Burke too believed in homogeneity, but only that of the British public opinion of 400,000 electors. Carl Schmitt converted the requirement of homogeneity into that of a community of “blood and land” (*Blut und Boden*) and saw its supreme manifestation in an identity with the *Führer*. Kelsen introduced the constraint on the rights of majorities as a conceptual requirement of the principle of parliamentary negotiation. And though he did not emphasize the aspect of homogeneity, with his defense of fundamental rights he also aimed at initial bargaining conditions not unlike those I have proposed above.

I thus come to the end with a conclusion that may seem banal: Parliamentary representation is morally justifiable if it respects everyone's rights to all primary goods and in addition attempts optimally to satisfy

the secondary wants of the members of the respective political community by way of compromise. But the detour through the analysis of Burke's, Schmitt's and Kelsen's arguments was not unnecessary, I think, to bring to light this rather obvious truth which in large parts of the world, unfortunately, is far from being a banality of life.

From the legal point of view, the no less obvious conclusion is that rights belonging to the 'off limits' sphere of universalizable interests, i. e., fundamental rights, may not be the object of parliamentary negotiation. They constitute the non-negotiable constitutional core of any liberal and social democratic system under the rule of law. The 'off limits' may not be subjected to constitutional reform (a prohibition similar to that of art. 79, 3 of the German Basic Law), and the efficacy of its provisions must at all times be ensured through adequate measures.

Having said this, I certainly do not claim to have presented an exhaustive treatment of the problems of parliamentary representation, particularly concerning possible situations of conflict when it comes to the satisfaction of primary needs. At least two different sources of such conflicts would have to be taken into account:

- (1) that two basic needs cannot be satisfied simultaneously; and
- (2) that some basic good cannot be provided for lack of economic resources.

In the first case, parliamentary decision-making may perhaps be guided by the wish to avoid the worst. If "compromise" is understood as a technical term that makes no sense in the case of universalizable interests, i. e. primary goods, this would then not qualify as a compromise, but rather as a decision taken under the conditions of a "tragic choice".

In the second case, if one accepts the Kantian principle of "ought implies can", it is obvious that there is no moral obligation for the provision of something as long as there are no means to provide it.

But it is important to keep in mind that those who claim to be in a situation of tragic choice or of a lack of necessary resources carry the burden of proof and are required to give empirical evidence for it. Given the disposition of politicians to justify their failure effectively to implement the basic rights of the 'off limits' with these kinds of claims, this seems to be no trivial requirement.

Someone may object that my proposal is too demanding, and that very few political systems actually satisfy it. The latter is true. But that is no argument – no more so than the observation that morality imposes

severe constraints on people's conduct, and that there are not very many persons who fully satisfy them. To this, one can only respond: So what? Too bad for them!

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