

## The Constitution of the Democratic Principle and the Majority Rule\*

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### I. INTRODUCTION

Constituting --and reconstituting-- principles to the core not only of legal standards and tests but also of legal analysis and reasoning has been one of the major developments in contemporary jurisprudence for at least fifty years. Curiously, in 1960, Hans Kelsen published the second (revised and enlarged) edition of his *Reine Rechtslehre* with the ambition “to free the science of law from alien elements”;<sup>1</sup> and, his fellow Austrian Friedrich A. Hayek published *The Constitution of Liberty* with the aspiration to interweave “the philosophy, jurisprudence, and economics of freedom”.<sup>2</sup>

Let me clarify, despite these apparent contradictory aims: on the one hand, the great Austrian jurist and author of the draft of Austria’s constitution, which was enacted in October 1, 1920, had empowered a constitutional court to guard the constitutional principles embedded in it and nothing suggests that he meant that those principles were among such alien elements. Additionally, in his *General Theory of Law and the State* he did recognize not only the existence of “the principle of self-determination” and of “the principle of majority” but also suggested that “If the principle of self-determination is to be made the basis of a social organization, it must be somewhat restricted.”<sup>3</sup> Furthermore, he added:<sup>4</sup>

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<sup>1</sup> Hans Kelsen, *Pure Theory of Law*, 2<sup>nd</sup> ed., trans. Max Knight, Berkeley, University of California Press, 1967, p. 1.

<sup>2</sup> Friedrich A. Hayek, *The Constitution of Liberty*, Chicago, The University of Chicago Press, 1960, p. 6.

<sup>3</sup> Hans Kelsen, *General Theory of Law and State*, trans. Anders Wedberg, Cambridge, Massachusetts, Harvard University Press, 1945, pp. 285-286.

<sup>4</sup> *Ibid.*, p. 287.

The principle of the majority is by no means identical with absolute dominion of the majority, the dictatorship of majority over minority. The majority presupposes by its very definition the existence of a minority; and the right of the majority thus implies the right of existence of the minority. The principle of majority in a democracy is observed only if all citizens are permitted to participate in the creation of the legal order, although its contents are determined by the will of the majority. It is not democratic, because [it is] against the principle of majority, to exclude any minority from the creation of the legal order, even if the exclusion should be decided upon by a majority.

If the minority is not eliminated from the procedure in which the social order is created, there is always a possibility for the minority of influencing the will of the majority. Thus it is possible to prevent, to a certain extent, the contents of the social order determined by the majority from coming into absolute opposition to the interests of the minority. This is a characteristic element of democracy.

On the other hand, the great Austrian economist, insisted the problem --especially in a democracy-- is whether a consenting majority is entitled to enforce its rule on a dissenting minority or whether the majority rule is limited by constitutional principles. According to him:<sup>5</sup>

The important question that arises here is whether the agreement of a majority on a moral rule is sufficient justification for enforcing it on a dissenting minority or whether this power ought not also to be limited by more general rules --in other words, whether ordinary legislation should be limited by general principles just as the moral rules of individual conduct preclude certain kinds of action, however good may be their purpose. There is as much need of moral rules in political as in individual action, and the consequences of successive collective decisions as well as those of individual decisions will be beneficial only if they are all in conformity with common principles.

Hence, in this paper, I intend to recall the constitution of principles, in general, and of “democratic principle”, *i.e.* the principle of self-determination, self-government, or

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<sup>5</sup> Friedrich A. HAYEK, *The Constitution of Liberty*, *supra* note 2, pp. 67-68.

democratic rule, in particular. Additionally, we will remember the existing tensions between constitutional principles, such as the two concepts of liberty, *i.e.* “negative” and “positive”, by analyzing the relationship between individual liberty and the democratic principle, not only to reinforce the priority of the former over the latter, but also to review whether the so-called “majority principle” is really a principle and can be identified with the “democratic principle” or not. In my opinion, even if the “majority principle” is compatible with the “democratic principle”, it is a mistake to equate --or even reduce-- the “democratic principle” to the “majority rule”, *i.e.* to whatever pleases the majority. In that sense, I will like to confront two competing conceptions of democracy, in the quest for an authentic, pure or true “democracy”. For that purpose, after remembering its etymology as “government of the people” neither of the many nor of the few, but of the people, not some but all, we will contrast two conceptions: on the one hand, the *majoritarian conception* as the government of the many --and even of the few on behalf of the many, *i.e.* the consenting majority; and, on the other hand, the *partnership conception* as the government of all, both many and few, *i.e.* the consenting majority and the dissenting minority. The distinction between the two conceptions can be traced all the way down to John Stuart MILL’s *Considerations on Representative Government*<sup>6</sup> and has been reintroduced recently in Ronald DWORKIN’s *Is Democracy Possible Here? Principles for a New Political Debate*,<sup>7</sup> who by embracing the partnership conception has become the champion of democracy and of the “democratic principle”, and the main critic of the “majority rule”.

## II. THE CONSTITUTION OF PRINCIPLE AND OF DEMOCRATIC PRINCIPLE

In this part, we pretend to recall the constitution of principle, in general, and of “democratic principle”, *i.e.* the principle of self-determination, self-government, or democratic rule, in particular, and for that purpose we start by recalling the existing tensions not only between

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<sup>6</sup> John Stuart MILL, *Considerations on Representative Government*, Indianapolis, Liberal Arts Press, 1958.

<sup>7</sup> Ronald DWORKIN, *Is Democracy Possible Here? Principles for a New Political Debate*, Princeton, Princeton University Press, 2006.

liberty and other values but also between the two concepts of liberty, *i.e.* “negative” and “positive”. In addition, we will reinforce the priority of the former over the latter, by analyzing the relationship between individual liberty and “democratic principle”, and by critically assessing the problem of the limits of the “majority rule”.

To get started, let me quote the “Introductory Chapter I” of John Stuart MILL’s *On Liberty* (1859):<sup>8</sup>

The aim, therefore, of patriots was to set limits to the power which the ruler should be suffered to exercise over the community; and this limitation was what they meant by liberty. It was attempted in two ways. First, by obtaining a recognition of certain immunities, called political liberties or rights, which it was to be regarded as a breach of duty in the ruler to infringe, and which, if he did infringe, specific resistance, or general rebellion, was held to be justifiable. A second, and generally a later expedient, was the establishment of constitutional checks, by which the consent of the community, or of a body of some sort, supposed to represent its interests, was made a necessary condition to some of the important acts of the governing power.

Later on, in due time, the rulers became identified with the ruled, by assuming that they were elected by them as their representatives: “What was now wanted was, that the rulers should be identified with the people; that their interest and will should be the interest and will of the nation.”<sup>9</sup> To the extent that, apparently, there can be no deviation and much less tension between the ruler and the ruled giving rise to the ideals of “self-determination”, “self-government” and of “the power of the people over themselves”. However, as MILL recognized:<sup>10</sup>

The ‘people’ who exercise the power are not always the same people with those over whom it is exercised; and the ‘self government’ spoken of is not the government of each by himself,

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<sup>8</sup> John Stuart MILL, “On Liberty”, in Stefan COLLINI (ed.), *On Liberty and other Writings*, Cambridge, Cambridge University Press, 1989, I, p. 6.

<sup>9</sup> *Ibid.*, p. 7.

<sup>10</sup> *Ibid.*, pp. 7-8.

but of each by all the rest. The will of the people, moreover, practically means the will of the most numerous or the most active part of the people; the majority, or those who succeed in making themselves accepted as the majority; the people, consequently, may desire to oppress a part of their number; and precautions are as much needed against this as against any other abuse of power.

The “tyranny of the majority” --as any other tyrannical form-- operates mainly through the actions and laws of the public authorities, but it may be the case that one part of the society oppresses the other. In MILL’s voice:<sup>11</sup>

Protection, therefore, against the tyranny of the magistrate is not enough: there needs protection also against the tyranny of the prevailing opinion and feeling; against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them; to fetter the development, and, if possible, prevent the formation, of any individuality not in harmony with its ways, and compel all characters to fashion themselves upon the model of its own. There is a limit to the legitimate interference of collective opinion with individual independence: and to find that limit, and maintain it against encroachment, is as indispensable to a good condition of human affairs, as protection against political despotism.

For this reason, it is necessary to check the power not only of formal institutions but also of informal instruments which facilitate the imposition of one conception over the others, by legal and moral means. The majority cannot cancel the possibility of some individuals --a significant minority and even a numerical majority of the society-- of freely conceiving and responsibly fulfilling their own plan of life. As MILL clarifies:<sup>12</sup>

The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public

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<sup>11</sup> *Ibid.*, pp. 8-9.

<sup>12</sup> *Ibid.*, p. 13.

opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.

In consequence the only time in which it is possible to interfere with the realization of someone's plan is to avoid harm to others. The so-called "harm principle" of MILL constitutes a clear limit to the exercise of liberty, since it must always be exercised with responsibility in order not to harm others and less impede someone else from achieving their own ends in life. In MILL's own words:<sup>13</sup>

No society in which these liberties are not, on the whole, respected, is free, whatever may be its form of government; and none is completely free in which they do not exist absolute and unqualified. The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it.

At the heart of MILL's doctrine on liberty there is the pursuit of our own plan of life, as long as it does not harm others. Moreover, in a lengthy paragraph, he acknowledges the appropriate region of human liberty and recognizes:<sup>14</sup>

It comprises, first, the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological. The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people; but, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it. Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we

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<sup>13</sup> *Ibid.*, p. 16.

<sup>14</sup> *Ibid.*, pp. 15-16.

like, subject to such consequences as may follow: without impediment from our fellow-creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong. Thirdly, from this liberty of each individual, follows the liberty, within the same limits of combination among individuals; freedom to unite for any purpose not involving harm to others: the persons combining being supposed to be of full age, and not forced or deceived.

In this paragraph MILL not only establishes the “harm principle” as a limit to both individual and collective liberty, but also stipulates two priorities: 1) liberty --and its different kinds-- over other ends of life; and, 2) individual liberty over collective liberty. To reinforce these priorities, let me bring to attention that it was Henri Benjamin CONSTANT de Rebeque’s distinction amid “liberty of the ancients” and “liberty of the moderns”,<sup>15</sup> which captured, first, the conflict that Isaiah BERLIN, the champion of pluralism, later, popularized among the “two concepts of liberty”, *i.e.* between “negative” and “positive” liberties.<sup>16</sup>

The former is a liberty “from” and entails “absence of interference”; whilst the latter is a liberty “to” and involves “presence in self-government”. As a result there are two competing concepts of liberty: one of the ancients or republican, identified with a liberty to participate in democratic rule, where the collective or political liberty is accentuated and so community and equality are emphasized; and, other of the moderns or liberal, identified with a liberty from interference, where the individual or civil liberty is highlighted and so individuality and liberty are stressed.

Although the two concepts are in competition nothing precludes the possibility of their collaboration. As BERLIN acknowledges “Self-government may, on the whole, provide a better guarantee of the preservation of civil liberties than other régimes, and has been defended as such by libertarians. But there is no necessary connection between individual liberty and democratic rule.”<sup>17</sup> Actually, if democratic rule can suppress individual liberty,

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<sup>15</sup> *Vid.* Benjamin CONSTANT, “De la liberté des anciens comparée à celle des modernes”, in *Collection Complète des Ouvrages*, Paris, Béchét Libraire, 1820.

<sup>16</sup> *Vid.* Isaiah BERLIN, “Two Concepts of Liberty”, in *Four Essays on Liberty*, London, Oxford University Press, 1969, pp. 118-172.

<sup>17</sup> *Ibid.*, p. 130.

as BERLIN points out, for a society to be truly free it is necessary to be governed by two interrelated principles:<sup>18</sup>

[F]irst, that no power, but only rights, can be regarded as absolute, so that all men, whatever power governs them, have an absolute right to refuse to behave inhumanly; and, second, that there are frontiers, not artificially drawn, within which men should be inviolable, these frontiers being defined in terms of rules so long and widely accepted that their observance has entered into the very conception of what it is to be a normal human being, and, therefore, also of what it is to act inhumanly or insanelly; rules of which it would be absurd to say, for example, that they could be abrogated by some formal procedure on the part of some court or sovereign body.

Both principles reinforce the primacy of a right --negative liberty-- over a power --positive liberty-- not only to the degree that certain rules cannot be abrogated by formal procedures but also to the extent that certain minimum area of individual liberty must not be violated by democratic rule:<sup>19</sup>

Consequently, it is assumed... that the area of men's free action must be limited by law. But equally it is assumed... that there ought to exist a certain minimum area of personal freedom which must on no account be violated; for it is over-stepped, the individual will find himself in an area too narrow for even the minimum development of his natural faculties which alone makes it possible to pursue, and even to conceive, the various ends which men hold good or right or sacred. It follows that a frontier must be drawn between the area of private life and that of public authority.

Additionally, BERLIN's suggestion is summarized in a well-known paragraph:<sup>20</sup>

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<sup>18</sup> *Ibid.*, p. 165.

<sup>19</sup> *Ibid.*, p. 124.

<sup>20</sup> *Ibid.*, p. 171.

Pluralism, with the measure of 'negative' liberty that it entails seems to me a truer and more humane ideal than the goals of those who seek in the great disciplined, authoritarian structures the ideal of 'positive' self-mastery by classes, or peoples, or the whole of mankind. It is truer, because it does, at least recognize the fact that human goals are many, not all of them commensurable, and in perpetual rivalry with one another.

Thus, to reinforce the priority of the negative over the positive liberty, in the remainder of this part we will revisit the relationship between individual liberty and democratic principle, by critically assessing the problem of "majority rule".

Before proceeding we must recall, following KELSEN, that it was Jean-Jacques ROUSSEAU who did formulate "the question to which democracy is the answer", namely: "How is it possible to be subject to a social order and still be free?"<sup>21</sup> In the voice of the Geneva's contractualist:<sup>22</sup>

"Find a form of association which defends and protects with all common forces the person and goods of each associate, and by means of which each one, while uniting with all, nevertheless obeys only himself and remains as free as before?" This is the fundamental problem for which the social contract provides the solution.

In the words of the Vienna's jurist: "A subject is politically free insofar as his individual will is in harmony with the «collective» (or «general») will expressed in the social order. Such harmony of the «collective» and the individual will is guaranteed only if the social order is created by the individuals whose behavior it regulates."<sup>23</sup> Likewise, according to him:<sup>24</sup>

The ideal of self-determination requires that the social order shall be created by the unanimous decision of all its subjects and that it shall remain in force only as long as it enjoys

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<sup>21</sup> KELSEN, *General Theory of Law and State*, supra note 3, p. 285.

<sup>22</sup> Jean-Jacques Rousseau, "On the Social Contract", in *The Basic Political Writings*, trans. Donald A. Cress, Indianapolis, Hackett, 1987, I, VI, p. 148.

<sup>23</sup> KELSEN, *General Theory of Law and State*, supra note 3, p. 285.

<sup>24</sup> *Id.*

the approval of all. The collective will (the *volonté general*) must constantly agree with the will of the subjects (the *volonté de tous*). The social order can be changed only with the approval of all subjects; and each subject is bound by the order only as long as he consents thereto.

Since the “unanimity” is virtually impossible, the “majority principle” has been adopted as a device that enables the government to rule by facilitating, on one side, the election of our representatives and so the configuration of (national) representation, and, on the other, the decision-making process and thus the conformation of government. However, the “majority principle” does not imply that any election or decision is justified *per se*. As we have already pointed out, by quoting KELSEN, it is not enough to comply with adjective-formal procedures but to abide by substantive-material principles as well.<sup>25</sup>

(1) “The principle of the majority is by no means identical with absolute dominion of the majority, the dictatorship of majority over minority.”

(2) “The majority presupposes by its very definition the existence of a minority; and the right of the majority thus implies the right of existence of the minority.”

(3) “It is not democratic, because [it is] against the principle of majority, to exclude any minority from the creation of the legal order, even if the exclusion should be decided upon by a majority.”

(4) “If the minority is not eliminated from the procedure in which the social order is created, there is always a possibility for the minority of influencing the will of the majority.”

Additionally, as KELSEN emphasizes:<sup>26</sup>

The will of the community, in a democracy, is always created through a running discussion between majority and minority, through free consideration of arguments for and against a certain regulation of a subject matter. This discussion takes place not only in parliament, but also, and, foremost, at political meetings, in newspapers, books, and other vehicles of public opinion. A democracy without public opinion is a contradiction in terms...

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<sup>25</sup> *Vid. supra* note 4.

<sup>26</sup> KELSEN, *General Theory of Law and State*, *supra* note 3, pp. 287-288.

In that sense, “insofar as public opinion can arise only where intellectual freedom, freedom of speech and press and religion, are guaranteed”,<sup>27</sup> democracy, *i.e.* the “democratic principle”, coincides with individual liberty, and with the “majority principle”, but not with a “majority rule”. Furthermore, as Kelsen acknowledges:<sup>28</sup>

Free discussion between majority and minority is essential to democracy because this is the way to create an atmosphere favorable to a compromise between majority and minority; and compromise is part of democracy’s very nature. Compromise means the solution of a conflict by a norm that neither entirely conforms with the interests of one party, nor entirely contradicts the interests of the other... It is precisely because of this tendency towards compromise that democracy is an approximation to the ideal of complete self-determination.

All in all, the problem is that, even if the “majority principle” is compatible with the “democratic principle”, the “majority rule” is not identical to a “democratic rule”. In a democracy it does not suffice to be concerned with the legitimate interests of the majorities since the minorities must also be respected in order for the legislative decisions to represent the common general interest and be truly general in both their creation and application.

Even though it is true that the majority is legitimated to rule it is also true that it represents --and must represent-- the minorities, by respecting their legitimate interests. The problem is that the majority principle tends to degenerate into majority rule by creating winners that take it all without sharing the corresponding part with the losers that end up with nothing at all. In a nutshell, the majority rule, in which the winner takes it all, makes politics a zero sum game of win-lose (them or us), instead of a win-win situation for all (them and us).

The justification of the majority principle relies on the notion of “virtual representation”, *i.e.* the winners represent all, both those who voted for and against them,

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<sup>27</sup> *Ibid.*, p. 288.

<sup>28</sup> *Id.*

and two principles of reciprocity: 1) the majorities are fluid and not fixed beforehand; and 2) the minorities are capable of becoming part of the governing coalition or majority in the future. Moreover, when the majority consistently and constantly excludes the minority and/or systematically and thoroughly rejects its demands, to the extent not only of ignoring their legitimate interests but also of destroying the virtual representation and the principles of reciprocity, by transforming the legitimate “majority principle” into its antithesis: “majority rule” --also known as the “tyranny of the majority”.<sup>29</sup> In MILL’s words: “in political speculations ‘the tyranny of the majority’ is now generally included among the evils against which society requires to be in guard.”<sup>30</sup> In addition, a couple of years later, he added in his *Considerations on Representative Government* (1861):<sup>31</sup>

The injustice and violation of principle are not less flagrant because those who suffer by them are a minority; for there is not equal suffrage where every single individual does not count for as much as any other single individual in the community. But it is not only a minority who suffer. Democracy, thus constituted, does not even attain its ostensible object, that of giving the powers of government in all cases to the numerical majority. It does something very different: it gives them to a majority of the majority, who may be, and often are, but a minority of the whole.

The problem is that, despite the virtual representation and the principles of reciprocity, the majority neither recognizes nor represents the interests of the minority, as Alexis de TOCQUEVILLE emphasized: “The majority, being in absolute command both of lawmaking and of the execution of the laws, and equally controlling both rulers and ruled, regards public functionaries as its passive agents and is glad to leave them the trouble of carrying out its plans.”<sup>32</sup>

Notwithstanding, when the majority possess all the power and exercises it beyond any proportion it may lose all its legitimacy, as James MADISON pointed out one of the

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<sup>29</sup> Lani GUINIER, *The Tyranny of the Majority. Fundamental Fairness in Representative Democracy*, New York, The Free Press, 1994, pp. 102-105.

<sup>30</sup> MILL, “On Liberty”, *supra* note 8, I, p. 8.

<sup>31</sup> MILL, *Considerations on Representative Government*, *supra* note 6, p. 104.

<sup>32</sup> Alexis de TOCQUEVILLE, *Democracy in America*, New York, Anchor Books, 1969, pp. 253-254.

objectives of establishing a government is to avoid the dominance of any group with particular interests by recognizing: “It is of great importance in a republic not only to guard the society against the oppression of its rulers but to guard one part of the society against the injustice of the other part.”<sup>33</sup> And, reiterating: “In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in the state of nature, where the weaker individual is not secured against the violence of the stronger...”<sup>34</sup>

Actually, TOCQUEVILLE insisted that the will of the majority is the essence of the democratic rule:<sup>35</sup>

The moral authority of the majority is partly based on the notion that there is more enlightenment and wisdom in a numerous assembly than in a single man, and the number of the legislators is more important than how they are chosen...

The moral authority of the majority is also founded on the principle that the interest of the greater number should be preferred to that of those who are the fewer.

However, he warns that the germ of the tyranny is found precisely in the “omnipotence of the majority”. On this regard, he affirms: “I will never grant to several that power to do everything which I refuse to a single man.”<sup>36</sup> The majority will must be moderated to control the possibilities of becoming a tyranny. Moreover, the use of power is not necessarily good: “This irresistible power is a continuous fact and its good use only an accident.”<sup>37</sup>

In a democracy, the “majority principle” is justified *prima facie* as long as the majority does not exercise all the power and oppress the minority, by not protecting their interests. It is incontestable that the majority is entitled to a majority of seats but not all since some of them belong to the minority and much less to be unconstrained. The

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<sup>33</sup> James MADISON, “No. 51”, in Clinton ROSSITER (ed.), *The Federalist Papers*, New York, Mentor, 1961, p. 323.

<sup>34</sup> *Ibid.*, p. 324.

<sup>35</sup> TOCQUEVILLE, *Democracy in America*, *supra* note 32, p. 247.

<sup>36</sup> *Ibid.*, p. 251.

<sup>37</sup> *Ibid.*, p. 256.

legislative body ought to be a micro-cosmos of the constituency, where both majorities and minorities are represented according to their true representativeness without either adulterations or dilutions of any type. The majority principle means that it is not sufficient to represent the majority but all the people, including the minority.

Likewise, Alexander HAMILTON warned: “Give all the power to the many, they will oppress the few. Give all the power to the few they will oppress the many. Both therefore ought to have power, that each may defend itself against the other.”<sup>38</sup> In other words, democracy is more than the government of the majority. In a pure or true democracy the power is neither in the majority nor in the minority but in all the people. As MILL emphasized:<sup>39</sup>

The pure idea of democracy, according to its definition, is the government of the whole people by the whole people, equally represented. Democracy as commonly conceived and hitherto practice is the government of the whole people by a mere majority of the people, exclusively represented. The former synonymous with the equality of all citizens; the latter, strangely confounded with it, is a government of privilege, in favor of the numerical majority, who alone posses practically any voice in the State. This is the inevitable consequence of the manner in which the votes are now taken, to the complete disfranchisement of minorities.

### III. THE DEMOCRATIC PRINCIPLE AND THE MAJORITY RULE

In this part, since we have been critical of the tendency to reduce the “democratic principle” to the “majority rule”, *i.e.* to whatever pleases the majority, we will like to confront two competing conceptions of democracy. For that purpose, after remembering its etymology as “government of the people” --neither of the many nor of the few, but of the people, not some but all-- we will contrast two conceptions: on the one hand, the *majoritarian conception* as the government of the many --and even of the few on behalf of the many, *i.e.* the consenting majority; and, on the other hand, the *partnership conception*

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<sup>38</sup> Alexander HAMILTON, “Speech, June 18, 1787”, in *Selected Writings and Speeches of Alexander Hamilton*, Washington, D. C., American Enterprise Institute, 1985, p. 101.

<sup>39</sup> MILL, *Considerations on Representative Government*, *supra* note 6, pp. 102-103.

as the government of all, both many and few, *i.e.* the consenting majority and the dissenting minority.

According to its etymology --*demos* (people) and *kratos* (government, power or rule)- - “democracy” means “government, power or rule of the people”. It is *prima facie* a form of government in contraposition to other forms of government. The classical typology includes not only three “pure” forms: 1) “autocracy” (better known as “monarchy”) as government of *one* --*i.e.* the monarch; 2) “aristocracy” as government of *few* --*i.e.* the better ones; and 3) “democracy” as government of *all* --*i.e.* the people.<sup>40</sup> But also three “impure” or “corrupt” forms: 1) “tyranny” as government of *one* --*i.e.* the tyrant; 2) “oligarchy” as government of *few* --*i.e.* the rich; and 3) “demagogy” as government of *many* (on behalf of all) --*i.e.* the poor (or the mob).

It is worth to mention that ARISTOTLE considered “democracy” pejoratively, an equivalent to the term “demagogy”, as one vicious extreme in contraposition to “oligarchy” as the other vicious extreme, whereas his *politeia* was the virtuous middle term by comprising the government of the middle class and as such of both the poor and the rich, *i.e.* of both the many and the few.<sup>41</sup> Let me explain that dislike him I will reserve “demagogy” for the “impure” or “corrupt” form and “democracy” for the “pure” or “true” one. But I will assume like him that the latter is the government of *all* the people: not only of both the poor and the rich but also of both the many and the few (or alternatively of both the majority and the minority).

The problem is that for some authors “democracy” seems to be reduced to the government of the *many* or of the *majority* in detriment of the *few* or of the *minority*, a so-called majoritarian or populist democracy. On the contrary, an authentic or true “democracy” and democratic government must be neither of poor or rich, nor of many or few (nor of majority or minority), but of all: both of poor and rich, both of many and few (both of majority and minority).

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<sup>40</sup> Hans Kelsen did criticize the traditional classification and its trichotomy, and distinguished between two types of constitutions: democracy and autocracy. *Vid.* Kelsen, *General Theory of Law and State*, *supra* note 3, p. 284: “Democracy means that the «will» which is represented in the legal order of the State is identical with the wills of the subjects. Its opposite is the bondage of autocracy. There the subjects are excluded from the creation of the legal order, and harmony between the order and their wills is in no way guaranteed.”

<sup>41</sup> ARISTOTLE, *The Politics*, New York, Cambridge University Press, 1988, IV, 11, 1295<sup>b</sup>, pp. 97-98.

So far the notion of “democracy” as a form of government and the typology has served to emphasize the ownership (or partnership) “of” the political or sovereign power, depending on whether it corresponds to one, few, many, or all. Nevertheless, the exercise of this political or sovereign power not only must be done directly and indirectly “by” its owners (or partners) and their --legitimate-- representatives, but also must be done “for” them and their benefit, not in their detriment. The three ideas already sketched can be put together into an integral definition, such as the one contained in Abraham LINCOLN’s Gettysburg address and, curiously, in the Fifth French Republic’s “Preamble”: “government of the people, by the people, for the people”.<sup>42</sup>

Thus, a pure or true “democracy” must be the government of, by and for all the people: not only many and few, majority and minority, but also poor and rich, men and women, heterosexuals and homosexuals, believers and non-believers... and so on. Hence, “democracy” is “government of all the people, by all the people --directly on their own (“direct democracy”) or indirectly through their representatives (“representative democracy”) -- and for all the people”.<sup>43</sup>

However, as stated a couple of paragraphs above, the problem is that there are two competing conceptions of democracy. As far as I know the distinction can be traced all the way back to MILL, who almost one-hundred and fifty years ago, in his *Considerations on Representative Government*, under the epigraph “Of True and False Democracy: Representation of All, and Representation of the Majority Only”, indicated that the two different

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<sup>42</sup> Abraham LINCOLN, “New Birth of Freedom. The Gettysburg Address, November 19, 1863”, in Mario M. CUOMO and Harold HOLZER (eds.), *Lincoln on Democracy*, New York, Harper Collins, 1990, p. 308. (The emphasis is added.)

<sup>43</sup> Vid. Imer B. FLORES, “Heráclito vis-à-vis Parménides: Cambio y permanencia como la principal función del derecho en una democracia incipiente”, in Luis J. MOLINA PIÑEIRO, J. Fernando OJESTO MARTÍNEZ P. and Fernando SERRANO MIGALLÓN (eds.), *Funciones del derecho en las democracias incipientes. El caso de México*, México, Porrúa and Facultad de Derecho, UNAM, 2005, pp. 154-157; “Actores, procesos e instituciones democráticas: Hacia una verdadera democracia en México”, in Luis J. MOLINA PIÑEIRO, Fernando SERRANO MIGALLÓN and José Fernando OJESTO MARTÍNEZ PORCAYO (eds.), *Instituciones, Actores y Procesos Democráticos en México 2007*, México, Porrúa and Facultad de Derecho, UNAM, 2008, pp. 314-319; and “¿Es posible la democracia en México?”, in Luis J. MOLINA PIÑEIRO, José Fernando OJESTO MARTÍNEZ PORCAYO, and Ruperto PATIÑO MANFFER (Coords.), *¿Polarización en las expectativas democráticas de México 2008-2009? Presidencialismo, Congreso de la Unión, órganos electorales, pluripartidismo y liderazgo*, México, Porrúa, Facultad de Derecho-UNAM, Instituto de Derechos Humanos “Bartolomé de las Casas”-Universidad Carlos III de Madrid y COPUEX, 2009, pp. 476-480.

ideas were usually confounded under the name “democracy”. On one side, the true idea was the “government of the whole people by the whole people equally represented”; and, on the other, the false with “the government of the whole people by a mere majority of the people, exclusively represented”.<sup>44</sup>

Nowadays, as DWORKIN pointed out the two competing conceptions of democracy not only coexist but also are still in conflict:<sup>45</sup>

The two views of democracy that are in contest are these. According to the majoritarian view, democracy is government by majority will, that is, in accordance with the will of the greatest number of people, expressed in elections with universal or near universal suffrage. There is no guarantee that a majority will decide fairly; its decisions may be unfair to minorities whose interests the majority systematically ignores. If so, then the democracy is unjust but no less democratic for that reason. According to the rival partnership view of democracy, however, democracy means that the people govern themselves each as a full partner in a collective political enterprise so that a majority’s decisions are democratic only when certain further conditions are met that protect the status and interests of each citizen as a full partner in that enterprise. On the partnership view, a community that steadily ignores the interests of some minority or other group is just for that reason not democratic even though it elects officials impeccably by majoritarian means. This is only a very sketchy account of the partnership conception, however. If we find the more familiar majoritarian conception unsatisfactory, we shall have to develop the partnership view in more detail.

Actually, as he acknowledges, the United States of America is neither a pure example of the majoritarian conception of democracy nor of the non-majoritarian (or partnership) one. Although the bipartisan system and the

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<sup>44</sup> MILL, Considerations on Representative Government, *supra* note 6, pp. 102-103.

<sup>45</sup> DWORKIN, *Is Democracy Possible Here?...*, *supra* note 7, p. 131. *Vid.* “Introduction: The Moral Reading and the Majoritarian Premise”, *Freedom’s Law. The Moral Reading of the American Constitution*, Cambridge, Massachusetts, Harvard University Press, 1996, pp. 1-38. *Vid.* also W. J. WALUCHOW, *A Common Law Theory of Judicial Review. The Living Tree*, Cambridge, Cambridge University Press, 2007, pp. 106-109; and, Imer B. FLORES, “The Living Tree Constitutionalism: Fixity and Flexibility”, *Problema. Anuario de Filosofía y Teoría del Derecho*, No. 3, 2009, pp. 37-74.

majority rule reinforced the former, since the founding fathers limited the power of the majorities in various forms, by including anti-majoritarian devices, such as the filibuster and the judicial review (of the constitutionality) of the acts of the (elected) branches of government, it can be said that they also supported the latter.<sup>46</sup> On one side, a minority of either thirty-four or forty-one (out of the one-hundred senators) can block the majority of bringing a decision to a final vote, depending on whether it is a substantive or procedural issue. And, on the other, the power of the political majorities is limited by the recognition of individual constitutional rights that the legislative majorities cannot infringe and much less step over.

Aside DWORKIN alerts that the degraded state of the public debate endangers the partnership conception of democracy and strengthens the majoritarian one, including viewing the other as an enemy and politics as a war:<sup>47</sup>

If we aim to be a partnership democracy... the degraded state of our political argument does count as a serious defect in our democracy because mutual attention and respect are the essence of partnership. We do not treat someone with whom we disagree as a partner --we treat him as an enemy or at best as an obstacle-- when we make no effort either to understand the force of his contrary views or to develop our own opinions in a way that makes them responsive to his. The partnership model so described seems unattainable now because it is difficult to see how Americans on rival sides of the supposed culture wars could come to treat each other with that mutual respect and attention.

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<sup>46</sup> Ronald DWORKIN, *Is Democracy Possible Here?...*, *supra* note 7, pp. 137 and 135. In fact, the existence of the Senate was designed to divide the most dangerous branch of government and to give stability to the government by protecting the minorities against a speedy and unreflected legislative majority in the House of Representatives. For an illustration of the filibuster, *vid.* Frank Capra's film "Mr Smith Goes to Washington" (1939).

<sup>47</sup> DWORKIN, *Is Democracy Possible Here?...*, *supra* note 7, pp. 132-133.

Moreover, as DWORKIN has emphasized:<sup>48</sup>

The majoritarian conception purports to be purely procedural and therefore independent of other dimensions of political morality; it allows us to say, as I indicated, that a decision is democratic even if it is very unjust. But the partnership conception does not make democracy independent of the rest of political morality; on that conception we need a theory of equal partnership to decide what is or is not a democratic decision, and we need to consult ideas about justice, equality, and liberty in order to construct such a theory. So on the partnership conception, democracy is a substantive, not a merely procedural, ideal.

#### IV. CONCLUSION

Finally, let me insist, my main claim has been that the “democratic principle” is compatible with the “majority principle”, but that it is a mistake to equate --or even reduce-- the “democratic principle” to the “majority rule”, *i.e.* to whatever pleases the majority; and, derive from it some conclusions:

First, although the “democratic principle” and the “majority principle” are legitimated, they are limited and as such must respect the “individual liberty” reinforcing the priority of the “negative liberty” over the “positive liberty”;

Second, even though the “majority principle” reinforces the view that the majority is legitimated to rule it cannot exclude or eliminate the minority, because that amounts to transforming itself into its antithesis: the “majority rule” --or the so-called “tyranny of the majority”; and

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<sup>48</sup> *Ibid.*, p. 134.

Third, though the “majoritarian conception” of democracy is still very influential in the design of our electoral systems, due to its intrinsic danger to degenerate into a “majority rule” it is necessary to take seriously the “partnership conception” to guarantee democracy as the government of, by and for both the majority and the minority, not merely of the majority.