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Democracy as Impartiality

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The history of human rights and democracy is a major field of activity in which the Faculty of Historical and Cultural Studies at the University of Vienna is engaged. Gerald Stourzh, professor emeritus of modern history and one of the most renowned Austrian historians of his generation, has prominently positioned the history of human rights and democracy at the University of Vienna during nearly three decades of research and teaching. At the same time, his academic achievements in the field have provided profound and lasting incentives internationally. In the annual *Gerald Stourzh Lectures on the History of Human Rights and Democracy* distinguished scholars present new insights in this field and put them up for discussion. The lectures are published at <http://www.univie.ac.at/gerald-stourzh-lectures>.

Democracy as Impartiality

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There are two possible definitions of democracy: a procedural one and an essentialist one. As a *procedure*, democracy stands for a system of popular choice. In an essentialist perspective democracy is rather considered a *quality*. Democracy as a quality refers to internal elements such as rights as a general character of institutions. The essentialist definition is more demanding than the procedural one, for a very simple reason: the idea of *majority* is regarded as a workable element for making valid choices, whereas the notion of unanimity is required for defining democracy as a quality; because “democratic,” in the broadest possible sense, means “expressive of social generality.” However, we behave *as though* the majority were the same as the whole, *as though* majority rule were an acceptable way of imposing stronger demands on the governed. This first blurring of distinctions is connected to a second: the identification of the nature of a regime with the conditions under which it was established. The part stands for the whole, and the electoral moment stands for the entire term of government. Today, the legitimacy of democratic governments rests on these two postulates, which means that it rests on fictions.

Impartiality is an appropriate approach to unanimity. It refers to an achievement of generality by way of detachment from particularity, through systematic rational construction of a point of view at some distance from any particular aspect of a given issue. This defines power in terms of *un lieu vide*, an empty place or vacuum. The generality of an institution is then reflected in the fact that no one can appropriate it. This is a *negative generality*. It is characterized by a structural variable (the fact of independence) and a behavioral variable (the maintenance of distance or equilibrium).

Independent authorities are one example of impartial institutions. In most democratic countries, the last two decades of the twentieth century witnessed an increase in the pace of creating independent bodies charged with regulatory and oversight functions that had previously been entrusted to “ordinary” bureaucratic departments. This is an example for negative generality that allows an institution to oversee or reg-

ulate the activities of others and distinguishes the bearers of such authority from elective branches of government.

Although quite diverse in character, all of these organizations share a certain hybrid quality: they have an executive dimension even though they also exercise normative and judicial functions. The scope of change has been considerable. In many countries vast areas of government intervention have increasingly been entrusted to these new organizations, clearly reducing the scope of administrative executive power.

The United States was the first country to set up independent authorities. Indeed, it did so quite early on: an institution of this type, the *Interstate Commerce Commission*, was created to regulate railroads already at the end of the nineteenth century. The *Interstate Commerce Act* of 1887 was a milestone, the symbol of a new approach to public administration. First, the new law laid down rules governing railway freight tariffs and prohibited discriminatory pricing. More than that, it set up an independent agency, the *Interstate Commerce Commission*, to implement these rules and regulate the railroads generally. The Commission marked a break with traditional ideas about the role of the bureaucracy.

The lawmakers' major concern was to "keep politics out" of the business of regulating a sector of the economy of vital importance to the nation's general interest. They also wanted to "nationalize" as well as "depoliticize" the railroad issue, which by its very nature could not be dealt with effectively at the state level and which was further complicated by corrupt party influence. In short, Congress recognized that the federal bureaucracy of the day was not inherently well suited to defend the general interest. It also doubted the ability of the executive branch to serve the common good.

In the United States, the weakness of the bureaucracy and the prevalence of political corruption created the conditions for the establishment of the first independent agencies. A century later, similar circumstances attended the creation of similar institutions in a number of countries. Elsewhere, especially in Europe, events took a different course. Independent authorities initially proliferated in response to demands for regulation in areas where existing bureaucratic structures had run into difficulty owing to technical complexity, overlapping competences, multiplication of affected parties, and/or diffusion of responsibilities. There was also a need to overcome a deficit of democratic legitimacy.

Although it was never made explicit, this reflected the idea that a *suspicion of partiality* amounted to a denial of legitimacy (the simple charge that an elected authority could represent an “attack on freedom” indicated that the government was suspected of partiality). Hence in practice, legislation amounted to making a distinction between electoral legitimacy and the *legitimacy by impartiality*. It was also a recognition of the insufficiency of the majority principle.

How can we characterize the legitimacy of independent authorities as *political forms*, abstracting from the specific nature of each such authority and the specific issues they are intended to deal with? These authorities are created by law and consequently enjoy what might be called a derivative legitimacy. But that legitimacy does not flow directly from the citizens of the state, because authorities are not elective bodies. A different type of relation exists between them which is connected to the importance and quality of the services authorities render. Hence one can speak of a *legitimacy of efficacy*, acknowledged by citizens as users of public services. This is a more precise designation than what has been sometimes called “output legitimacy.” It is a functional type of legitimacy. But is it possible to go farther and argue that these independent authorities can be endowed with a *democratic* legitimacy of some sort? This is an important question. To answer it, we need to ask whether they are representative in character, whether society can exert control over them, and whether they meet standards of establishment and accountability. We also need to ask what type of generality they implement.

Can a power be representative even if it is not elective? Political theory distinguishes between two main forms of representation: representation as delegation, which refers to the exercise of a mandate (“acting for,” or *Stellvertretung*), and representation as figuration which is associated with the idea of incarnation (“standing for,” or *Repräsentation*). Different qualities are expected of the representative in each case: ability in the former and proximity in the latter.

Delegates are generally chosen by election to which all citizens readily assent. Elections are also the least controversial procedure for choosing someone to represent the image of a group. Who is more qualified than the members of a group to determine which individuals they believe capable of adequately incarnating what they take to be their most important traits? In practice, moreover, elections combine both of these functions, and trust stems from a feeling that the person elected can serve as both delegate and image.

In these respects, independent authorities and neutral third parties are not representative. Quite apart from the manner in which they are chosen, they are not delegates in any legal or practical sense; nor are they incarnations of the community in a sociological or cultural sense. Hence, they are not democratic according to either a procedural or a functional/substantial definition.

It is possible, however, to look at the matter differently. We can ask about other ways in which independent authorities can represent society. Here it could be useful to distinguish between a “representation of attention and presence” on the one hand and “organic representation” on the other.

An independent authority can be representative in a traditional sense if it is structurally pluralistic (e.g., the “bipartisan commissions” one finds in the United States). But it can also be representative in a *pragmatic* sense if it is open to social input and attentive to the aspirations and demands of citizens. To be representative then means to be attentive to social problems, conflicts, and divisions. It also means to be concerned about diversity and to show particular solicitude for those citizens likely to have difficulty in making their voices heard.

An impartial institution can be representative in another sense as well: it requires all information about a problem to be taken into account. No relevant situation can be ignored. Impartiality thus implies vigilance and an active presence in the world, a determination to represent social reality as faithfully as possible. As Hannah Arendt points out, impartiality for Immanuel Kant meant adopting all conceivable points of view.¹ Far from being the result of aloofness from the world, impartiality, from a detached and superior view, is rather a consequence of “reflective immersion.” Arendt concludes that it involves broadening one’s own thinking in order to take account of the thinking of others. This “enlargement of thought” is a way of overcoming the narrowness of particular views and working toward a kind of generality. It stems from an effort to represent all of society rather than just a few dominant voices or highly visible segments of public opinion.

A second modality of representation that is neither a form of delegation nor a means of figuration takes us back to a concept that originated in revolutionary times. I refer to representation in the sense of an *organ* that gives meaning and voice to a social totality that cannot exist or express itself independently. In this sense, today’s

¹ See the letter that Kant wrote to Marcus Herz, dated 21 February 1772, quoted in: Hannah Arendt, *Lectures on Kant’s Political Philosophy* (Chicago 1982) 42.

independent authorities may be seen as exemplifying the philosophy of representation developed by Emmanuel-Joseph Sieyès in France and, to a lesser extent, by Alexander Hamilton and James Madison in the United States.

One can go even further and ask whether these kinds of independent authorities are not examples of what might be called “the pure theory of representative government.” The founding fathers of both the American and French republics distinguished between representative government and democracy. Consider the views of Madison and Sieyès. Both agreed that representatives should remain independent of the people who elected them so that they might deliberate freely. They also agreed that those same representatives ought to have qualities that the voters, taken collectively, had not. Thus the thinking of Madison and Sieyès much more directly reflects the concepts that describe the new authorities – concepts such as independence, impartiality, and competence – than do today’s legislative bodies.²

Turning now to English public law in the eighteenth century, it is striking to find that it, too, distinguished sharply between election and representation. The latter had, at that time, primarily a constitutional rather than a democratic meaning (in the electoral sense). Representation was understood as an instrument for defending individual liberties and limiting the power of government. It imposed restrictions on executive power and, more generally, obliged the authorities to adopt an “impartial” stance in relation to society.³ Hence the conditions under which the legislature was elected were deemed to be of lesser importance than the mission of the legislator. There was a radical insistence on the centrality of representative principles quite apart from the procedures for electing representatives.

Here, again, we may ask whether today’s independent authorities do not in fact revive this older idea of representation. In England as in France and the United States, this idea seemed at first to have been wiped out by the advent of universal suffrage. But it survived in various hidden or implicit forms and became the basis of a variety of mixed regimes. The elitist Republic of “capacities” advocated in France by François Guizot is exemplary in this regard. In today’s democracies we find two distinct poles: a democratic order in the strict sense, based on the anointment of the bal-

² Cass Sunstein makes this point clear for the United States in the 1930s in drawing a parallel between the Madisonian view and the celebration of expert-led independent agencies in the New Deal. See his *Constitutionalism after The New Deal*, in: *Harvard Law Review* 101/2 (1987) 421-510.

³ John Phillip *Reid*, *The Concept of Representation in the Age of the American Revolution* (Chicago 1989).

lot box, and a new representative order based on independent authorities. These two poles clash at times over the issue of legitimacy, but they also complement each other. Each reflects a different set of expectations which have evolved over time as people gained more experience with the actual workings of democratic politics.

A key feature of independent authorities is their collegial character. That is why the words *council*, *committee*, *commission*, *board*, and *conference* appear so frequently in their titles.⁴ Such bodies usually consist of five to ten members, or sometimes slightly more (precise statistics are hard to come by, since there is a great deal of variation from country to country). Members are generally appointed rather than elected. But collegial composition is one of the main features that distinguish independent authorities from executive decision-makers. As collegial bodies, they generally deliberate and vote on decisions, whereas executive decisions are usually made by sovereign individuals. The decision-maker's legitimacy depends on his election, it can be defined as a status and his power to make decisions on his own is one of the prerogatives of the office. By contrast, independent authorities derive their legitimacy from the procedures they use to reach their decisions. They deliver their judgments only after exchanging information and mulling over arguments. In the course of debate, members may change their views without renouncing any of their convictions. Decisions are subject to strict procedural rules. Their legitimacy is a quality.

The internal operation of these panels is reminiscent of the old ideal of deliberation as formulated by the classic theorists of English parliamentarism from Edmund Burke to Walter Bagehot and John Stuart Mill to Albert Venn Dicey. Independent authorities are not "congresses of ambassadors" but groups of individuals without mandates. Each member of a commission has the same right to make his voice heard and the same acknowledged competence to participate in debate. Since internal deliberations are not public, in most of cases members need not feel compelled to strike a pose. The better argument has real force in such a group. Finally, because the panels are small, members feel psychological pressure to express themselves in a mature, deliberate manner. All work together toward a common goal. The structural prerequisites of rational deliberation are thus at least approximated, if not fulfilled.⁵

⁴ The term "bureau," which smacks of hierarchy and bureaucracy, is almost never used.

⁵ See the criteria set forth by Jon Elster and Philippe Urfalino in a special issue on of the journal "Négociations" (2005/2) devoted to deliberation and negotiation: Jon Elster, *L'usage stratégique de l'argumentation*, pp. 59-82; Philippe Urfalino, *La délibération n'est pas une conversation. Délibération, décision collective et négociation*, pp. 99-114.

Collegial procedures also allow for the development of collective intelligence. The plural character of decision-making not only improves deliberation but generally leads to better decisions. Plurality makes for greater rationality, as recent work on what might be called “epistemic democracy” has suggested.⁶ This work points out that cognitive diversity is often more important than mere analytic competence when it comes to making good decisions. In this respect, independent authorities have an epistemic advantage over ordinary sovereign decision-makers. This gives them yet another claim to a place within the democratic order.

In addition to these inherent features of collegiality, most independent authorities exhibit two other useful characteristics: members cannot be removed, and their terms are strictly limited. Without job protection there could be no independence. Term limits further reinforce that independence. They ensure that the nominating power, whatever it might be, cannot exert pressure on commission members. Indeed, members may even feel an “obligation of ingratitude” in order to perform their jobs as independently as expected. Contrast this with the position of an elected representative, who has made promises to voters and who knows that he must please them if he hopes to be re-elected. The purpose of democratic elections is to make the views of representatives dependent on the views of voters, whereas independent authorities seek to reinforce their independence. Finally, it is generally the case that not all members of an independent commission are replaced at once, and this further strengthens the virtuous effects of collegiality. The systematic increase of the number of decision makers involved in staking out the authority’s position also limits the influence of the nominating power.⁷ Another consequence of this system is that it “functionalizes” the independent authority by giving it continuity, so that its decisions are not simply a reflection of its current membership.⁸ The authority takes on a corporate dimension, again distinguishing it from the power that issues from the ballot box, which is at once homogeneous and precarious.

⁶ See the thesis by H el ene *Landemore*, *Democratic Reason. Politics, Collective Intelligence, and the Rule of the Many* (Harvard University 2007), as well as David *Estlund*, *Democracy Count: Should Rulers be Numerous?*, unpublished paper presented at a colloquium on “Collective Wisdom: Principles and Mechanisms,” Coll ege de France, 22-23 June 2008.

⁷ This effect is enhanced when there is more than one nominating power, as is often case in Europe. Members of independent bodies are appointed not only by the executive but also by legislative leaders and heads of other institutions.

⁸ Such independent authorities are good examples of what Maurice *Hauriou* called “living institutions.” See his seminal article *La Th eorie de l’institution et de la fondation. Essai de vitalisme social*, in: *Cahiers de la nouvelle journ ee*, cahier IV (1925) 1-45.

Finally, collegiality affords protection to those subject to the jurisdiction of independent authorities, especially those that are authorized to impose sanctions. The fact that members of such bodies come from diverse backgrounds and have diverse competences offer guarantees similar to those associated with the composition of juries in the judicial realm. This makes it easier to influence the institution. In all these ways, collegiality thus helps to ensure that independent authorities function democratically.

A power can be called democratic if it has been subjected to a *public test of validation*. Elections are the most obvious form of such testing, the test of exams has been considered as central in some other cases, but there are other, less formal tests as well, among them tests validating the democratic character and impartiality of regulatory and oversight authorities. Independence in itself is no guarantee of impartiality. Independence means to be in a position to resist pressure and not to be subject to hierarchical authority. It is to be free to make a choice or take a decision. Independence as absence of subordination cannot exist, therefore, unless it is organized and instituted. It must be *guaranteed* by rules: for instance, rules preventing the removal of members of a commission or guaranteeing certain specific protections. If independence is a *status*, impartiality is a *quality*, a characteristic of the behavior of certain individuals. A person is impartial if he or she does not prejudge a question and has no preference for one party to a dispute over another.⁹ Independence and impartiality are not the same. One can be independent of the government hierarchy and still entirely biased on the issues that one is charged with overseeing. Independence is an intrinsic *general* characteristic of a function or institution, but impartiality is a characteristic of a *particular* actor or decision maker. Impartiality requires independence, but independence by itself is not enough to achieve impartiality.

If impartiality is a quality and not a status, it cannot be instituted by a simple procedure (such as an election) or by fixed rules (such as those governing independence). Nor can it be regarded as an historical achievement. It is something that needs to be perpetually constructed and validated. The legitimacy of impartiality needs to be fought for at all times. Although an authority may claim a *presumption* of impartiality, it still needs to prove in practice that such a presumption is justified. An impartial institution is by its very nature subject to constant testing. Its legitimacy must be

⁹ See Alexandre Kojève, *Esquisse d'une phénoménologie du droit* (Paris 1981).

demonstrated *in practice*, through three kinds of tests: procedural tests, tests of efficacy, and review tests.

Procedural tests are the most important of the three. They ensure that regulatory authorities adhere closely to their own rules, insist on rigorous standards of argument, enforce procedural transparency, and open their operations to public scrutiny. Each intervention, each decision is tantamount in effect to a refoundation of the institution. The instituting authority remains an important element of day-to-day operations. Procedural tests are important in defining the institution's relation to society. It cannot remain entirely opaque (unlike closed institutions whose power rests on secrecy and sovereign decision-making authority). Impartial institutions call to mind a celebrated adage of English law: "Justice must not only be done, it must also be seen to be done." In other words, impartiality must be externalized. The procedural test is thus associated with a test of reception. In other words, impartiality does not belong to the realm of appearance or show; it is not simply a matter of public relations. An institution is impartial only if it is able to make its impartiality evident to everyone. It must establish itself as a public good, which citizens can value or, at any rate, which they do not doubt. An impartial institution cannot prove itself by way of the electoral process. Its demonstration of impartiality reinforces and enriches active citizenship in a different way, by making the characteristics that constitute a just order visible and accessible to all.

Tests of an institution's efficacy are more obvious. They are simply evaluations of its actions and decisions. In the construction of its legitimacy they are of secondary importance. Finally, review tests are procedures that enable impartial institutions to reflect on their own actions. They introduce "feedback loops" in order to ensure that "guardians" are not isolated from the consequences of their decisions and must constantly monitor the effects of their impartial deliberations. That is why many regulatory agencies in the United States have established public counsels and a hearing examiner system.¹⁰ The role of the public counsel is to force agencies to look at their own procedures with a suspicious eye by assigning a person to represent the user's point of view in public hearings. This is an implicit recognition of the fact that a regulatory agency cannot represent the general interest by itself. The hearing examiner plays a third-party role within the agency. This is a prestigious and well-compensated

¹⁰ See, for example, the pioneering work of Louis M. *Kohlmeier Jr.*, *The Regulators. Watchdog Agencies and the Public Interest* (New York 1969).

position. Hearing examiners must have law degrees, and their job is in a sense to remind the institution of its duty of impartiality. Congress mandated that they be put in place to make sure that the regulatory agencies did the job they were intended to do. Like all institutions, independent agencies can easily ossify into bureaucracies, thereby compromising their mission. The independence of the agency protects it from the vicissitudes of politics, but it needs to be protected from itself by its own internal procedures. Endless review is of course impossible, so the agencies must rely on simple feedback loops and multiple tests of the type described above.

If the legitimacy of independent authorities depends on their ability to demonstrate their impartiality, that legitimacy is inherently unstable. It is subject to constant challenge and can never be taken for granted. Still, a reputation for impartiality can be established; it is a form of capital. Although a reputation can be lost faster than it can be gained, it does have a cumulative dimension: the greater an institution's reputation for impartiality, the easier it is to establish the impartiality of any particular decision. Hence the credibility and effective social power of an institution depend on its accumulation of legitimacy. A government that has lost the confidence of its citizens can legally continue in power until the end of its mandate, but an independent authority that loses its reputation might not be able in practice to continue its interventions. The legislature would then have to act to set up a new institution.¹¹

The de-centering of democracies has changed the relation between society and institutions. Strictly electoral-representative democracies had institutions that had a high status but were short on quality. This has changed: power now depends more on quality and less on status (this is also true of elected authorities).

Electoral legitimacy rests on popular recognition. It represents an aggregate generality, a quantitative social weight. Impartiality refers to a different type of generality, a negative generality implicit in the fact that *no one* should benefit from a privilege or advantage. In a divided society, where an aggregative generality of identification can no longer be taken for granted because the general interest remains in doubt and subject to pressure from many different interest groups, there is a greater tendency to adhere to a negative-procedural form of generality. People increasingly want society

¹¹ This was what happened in France when the *Commission Nationale de la Communication et des Libertés* was abolished in 1989 and replaced by the *Conseil Supérieur de l'Audiovisuel* after only three years of operation, marked by a series of controversies and a scandal that ultimately undermined the credibility of the institution.

to be governed by principles and procedures aimed at eliminating special privileges and arrangements. Pursuing the general interest requires rooting out favoritism to special interests. Impartiality is therefore identified with detachment, in the sense of disinterestedness. To be impartial is to avoid being swayed by public opinion, to avoid compromise, and to pay attention to everyone's needs by treating all issues according to the dictates of law and reason. Independent regulatory and oversight bodies are organized so as to facilitate the attainment of these goals. In this respect they exhibit certain similarities to judicial institutions, although their functional role is much broader than that of the justice system (it is both executive and normative).

Negative generality did not come to the fore simply because other ways of expressing social generality were thought to have lost their effectiveness. It was also a direct response to social change. In a more individualistic society, negative generality is more attuned to the desire of all citizens to be treated fairly, without discrimination or favoritism. Indeed, equality is no longer judged solely in terms of inclusion (as was the case during the fight for universal suffrage). It is now a matter of being able to insist that one's particular situation be taken into account and fully assessed by the government. The expectation of impartiality, and hence the importance of negative generality, arises from the concrete ways in which society works. Today's societies are divided in a myriad of ways: particularity is everywhere. This is an inevitable consequence of economic growth and increasing complexity. The influence of special interests and pressure groups has increased for structural reasons. In order to rein them in, the most effective strategy is to create institutions whose role is to defend negative generality, because it is no longer possible to conceive of society as a positive totality.¹²

The democratic project also hinges on the idea that power must designate an "empty place" (*lieu vide*). Claude Lefort formulated this phrase to suggest that in a democracy no one can monopolize power (in contrast to aristocratic power, which is conceived as *dominium*, and ecclesiastical power, which is conceived as *ministerium*); it can arise only from free consent.¹³ In fact, there are two ways of accomplishing this necessary "disappropriation," as I called it in an earlier work.¹⁴ One is to say

¹² Historically, this was the idea behind economic planning and regulation and the nationalization of industry and finance.

¹³ See especially Claude Lefort, *Le Pouvoir* (2000), in: Claude Lefort, *Le temps présent. Écrits 1945-2005* (Paris 2007) 981-992.

¹⁴ See my *L'âge de l'autogestion ou La politique au poste de commandement* (Politique 80, Paris 1976).

that power can belong only to the entire community of citizens, that it is the indivisible property of a social subject called “the people” or “the nation.” The problem, however, is that this subject is always virtual, never substantive. It is always divided by divergent interests and opinions. So this approach to the collective appropriation of power which might be termed “positive” will not do. While it may be all but unavoidable, we must never forget that it is incomplete and unsatisfactory, since it always comes down to majority rule in a society in which elections revolve around the clash of opposing political interests. Hence the socialization of power in a negative form is needed as a corrective to the shortcomings of the positive form. That is what it means to say that democratic power designates an empty place.

This way of understanding negative power has a long history. For instance, election by the drawing of lots was originally understood in these terms. In some medieval Italian towns, lots were drawn when divisions were deemed to be insurmountable. Everything possible was done to see the drawing of lots as a sign of unanimity: the *negative unanimity* of a blind choice took the place of the positive unanimity that could not be obtained through a vote. In nearly all the towns where this was done, it was forbidden to go near the place where lots were drawn, as if only a radically empty place, singled out solely for its function, could stand in for a public square filled with active citizens. Drawing lots was thus a way of restoring a hollowed-out version of a unified society in a divided world. It is this function that the institutions of negative generality seek to fill today in an effective and durable manner.

1. The categories of impartiality and negative generality should be recognized as constituent elements of a democratic order. It should also be emphasized, however, that these categories strictly speaking cannot provide a basis for a new power or branch of government, in the sense in which the administrative power was founded. The new institutions should rather be conceptualized in terms of the old notion of *authority*. To grasp this crucial distinction between power and authority, we must go back to Antiquity. Indeed, it was the Roman distinction between *potestas* and *auctoritas* that expressed for the first time a form of political regulation that did not depend exclusively on the recognition of a hierarchical relationship among powers. Cicero’s celebrated maxim, “authority resides in the Senate, while power belongs to the people,” suggested that the reference to tradition and to the fundamental values of the city served as a warning, a corrective, and a justification but not a direct injunc-

tion.¹⁵ Mommsen pointed out that “*auctoritas* was less than an order and more than advice: it was advice that one could not easily decline to follow.”¹⁶ Coercive power belongs incontrovertibly and directly to the people, but authority belongs to no one. It is a regulatory function whose efficacy depends on implicit consensus. “In modern terms,” the great historian of Roman law continued, the Roman Senate “was not so much a parliament as a higher administrative and governmental authority.”¹⁷ As this simple example shows, we can learn a great deal about independent authorities today by situating them in a much broader historical context.

To expand our view even more, we can look at the way in which religious institutions were called upon to take charge of certain fundamental aspects of civic life. Quite often the dividing line between spiritual and temporal powers was based on a distinction between, on the one hand, the fundamental values by which communal life was organized and, on the other hand, the routine management of public affairs and political decisions. In seventeenth-century Europe, for example, the concept of *potestas indirecta* was invoked to clarify the difference between the two spheres.¹⁸ Rousseau, for his part, examined the distinction between active power and indirect government.¹⁹ These brief remarks will suffice to indicate what a broad comparative study of these issues might contribute to our understanding. Our knowledge of the nature and history of democracy would benefit greatly, as would our ability to comprehend the new hybrid institutions. If we do not broaden our interpretive frameworks, we will continue to find it difficult to incorporate these institutions into our theories, and we will go on seeing them as variant forms of judicial or administrative power.

2. Independent authorities correspond to a demand for *horizontal responsibility* that should not be confused with political responsibility as such which is vertically oriented.²⁰ Vertical responsibility, regulated by the electoral process, creates a direct obligation of the government to the people. It is an essential feature of democracy.

¹⁵ Cicero, *De legibus*, book III, 12/28: “... cum potestas in populo, auctoritas in senatu sit.”

¹⁶ Theodore Mommsen, *Le Droit public romain* (1891), vol. 7 (Paris 1985) 232; see the whole chapter on the competence of the Senate, 218-235.

¹⁷ *Ibid.*, 233.

¹⁸ See Bernard Bourdin, *La Genèse théologico-politique de l'État moderne. La controverse de Jacques I^{er} d'Angleterre avec le cardinal Bellarmin* (Paris 2004) 109-124, which shows how the distinction between “indirect power” and the “right of command” was formulated at the time.

¹⁹ This has been explored by Arthur M. Melzer, *The Natural Goodness of Man. On the System of Rousseau's Thought* (Chicago 1990).

²⁰ Guillermo O'Donnell, *Horizontal Accountability in New Democracies*, in: Guillermo O'Donnell, *Dissonances. Democratic Critiques of Democracy* (Notre Dame, Ind. 2007) 49-76.

Horizontal responsibility is different: it is more narrowly functional and imposes on all branches of government an obligation to serve the social interest as defined by some means other than elections. The role of independent authorities should therefore be understood in terms of a broader concept of responsibility. Indeed, these authorities merely represent an institutionalization of this function, to which many civil society organizations also contribute.

3. If independent authorities are to be truly independent, the rules governing them must be formalized and rationalized. Among the rules in question are those governing appointments and budgetary autonomy. Good rules are crucial to prevent regulatory capture, i.e. a bias towards special interests. Partisan appointments are still commonplace (and in this respect the French case is far from exemplary).

In this connection, we can distinguish three ways of thinking about the composition of independent authorities. The first, which is the most obvious and widely used, is to think in purely individualized terms. Here, the idea is to achieve impartiality by avoiding links to special interests. An impartial group of officials is achieved by selecting individuals for their competence and other personal qualities, such as aptitude for serving the general interest or reputation for independence. Such “general individuals” are supposed to enable the authority to achieve its goals.

A second model is multiparty organization.²¹ It reflects a more “realistic” approach to impartiality, in that it seeks to strike a balance among partisan views. It acknowledges the existence of political affiliations and individual commitments and seeks to limit their effects by ensuring pluralist representation.

Finally, a third way of looking at the matter is to make the institution itself a representative body. None of these three models has gained exclusive dominance over the others in defining what independent authorities ought to look like. Hybrids are common. Selection of individuals also matters, even when no strict rules apply. Just as no perfect system of representation in the electoral-representative sphere of democracy exists, there is no perfect institutional model in the realm of negative generality. There is, however, a big difference between the kind of selection achieved by elections and the kind achieved by nominating members of an independent authority. An election is a direct procedure against which there is no appeal, whereas a nomina-

²¹ Each of these two models reflects a different allegorical attribute of impartial justice: the scales and the blindfold. Scales reflect a concern with achieving balance between parties. A full understanding of actual differences is assumed. By contrast, the blindfold suggests a more abstract approach.

tion can be challenged in a variety of ways. Society will not accept a nomination unless it judges the selection procedure to be adequate. In addition to rules governing the membership of boards, there are various ways of testing the “democratic” character of a nomination. For one thing, nominating officials and bodies risk their reputation by their choice. But more formal tests are also important. If a nomination is to be seen as being as legitimate as an election, it must in some sense be unanimous. Validation procedures instituted by third parties (such as parliaments) can play an essential role here, so can rules requiring clear public justification of every choice.

4. Independent authorities will contribute to the development of democracy only if they can be socially appropriated. That can happen only if their structure and function are transparent. Their activities should be explained in public documents and widely debated. Any problems they encounter should also be discussed publicly. Citizen access should be facilitated. These institutions cannot really accomplish what they are supposed to do if they are seen as committees of wise men or experts meeting on Olympus, as is all too often the case. Their democratic character must be subject to permanent open debate if they are really to be seen as public goods. Hence their democratic history has only just begun.

Describing the advent of democracy in his own time, Tocqueville observed: “The idea of government has been simplified: number alone determines what is law and what is right. All politics is reduced to a question of arithmetic.”²² Today one would have to say exactly the opposite. The striking fact is that democracy is becoming more complex. We can see this in a pair of dualities: between electoral-representative institutions and the institutions of indirect democracy on the one hand and between the realm of procedures and behavior versus decisions on the other. Democracy as regime type rests on the first dualism, democracy as government on the second. These two dualisms are superimposed on the tension between electoral democracy and counter-democracy, which defines the sphere of citizen activity. Taken together, these dualities define the new democratic order.

To begin with, the institutions of electoral-representative democracy form a system with the institutions of indirect democracy. Their articulation makes it possible to reconcile majority rule with the ideal of unanimity: a tension is set up between the-

²² Alexis de Tocqueville, *Considérations sur la Révolution* (material for L’Ancien Régime et la Révolution), in: Alexis de Tocqueville, *Œuvres*, vol. 3 (Paris 2004) 492.

se two poles in such a way as to respect the requirements of each. This tension is central to the democratic idea.

The organization of this duality requires full recognition of the fact that democracy rests on a necessary fiction, the assimilation of the majority to the unanimous whole. Organization makes the tension explicit and arranges for the coexistence of the two elements from which it stems. Indeed, the problem is that this fiction has never been recognized as such. This is not usually the case with legal fictions. Normally, reliance on such fictions does not deceive anyone. Legal forms that involve proceeding “as if” something were true are not intended to hide anything. They are merely a way of gaining control, reducing complexity, or taming contradictions in the interest of governability. As Yan Thomas rightly points out, legal fictions “establish the power to control reality by ostensibly denying it.”²³ Their meaning is clearly limited by their function and makes no claim to change the real nature of things. The fundamental fiction of democracy was not understood in these terms. It was never made explicit but rather dissimulated and left unacknowledged. This was necessary in order to establish the democratic idea on a firm footing, since it was impossible to conceptualize a decisive and effective political order without unanimity of decision at the time of its creation. Recognizing duality is a way of escaping from this impasse. It makes visible the separation of the two poles of the democratic idea and encourages citizens to unravel the implicit fictions that can distort that idea or divert its practical consequences. Majority rule should therefore be understood, prosaically, as a mere *empirical convention*, which remains subject to the need for higher levels of justification. Its legitimacy is *imperfect* and must be strengthened by other modes of democratic legitimation, notably through impartiality.

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Pierre ROSANVALLON, Democracy as Impartiality. 2nd Gerald Stourzh Lecture on the History of Human Rights and Democracy 2010, online at <<http://gerald-stourzh-vorlesungen.univie.ac.at/vorlesungen/>> and <<http://phaidra.univie.ac.at/o:397696>>.

²³ Yan Thomas, *Fictio legis*. L’empire de la fiction romaine et ses limites médiévales, in: *Droits. Revue française de théorie, de philosophie et de culture juridiques*, no. 21 (1995) 17-63, here 20. A legal fiction, Thomas continues, “takes the form of a decision to counter reality” (*ibid.*, 22).