



An Entangled Democracy

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Abstract

The concepts of 'democracy', 'the right to decide', legitimacy and 'people' now, more than ever, in need of clarification. "Confusion is integral to every time of crisis [...] We do not know what is happening to us, and this is precisely what is happening to us, not knowing what is happening to us: man today is beginning to be disoriented with respect to himself, *dépaysé*, he is outside his country, thrown into a new circumstance that is like unknown territory. Such is always the vital sensation that takes hold of man in historical crises".

J. Ortega y Gasset, *En torno a Galileo*, pp. 412 and 443^a.

^aTaurus, Madrid, 2006 (1947,1942, 1933), in *Obras Completas*, Vol.6 (1941-1955).

Man is the only animal that has speech. In the common medium of language we open up to the world and to others, making a space of inter subjectively shared coexistence possible, although this does not exclude the possibility of confusion. Speakers can be misinformed, misled and manipulated through communication. That is why we can become entangled through discourse, which happens when we talk about what we do not know or misunderstand, when we let ourselves be carried away by fashion, when we are absorbed by palaver, by noise. This is how we could define the situation in which we find ourselves, bewildered and in need of guidance. I will give several examples of this confusion about some of the concepts we possess. I am referring to those of *democracy*, *the right to decide*, *legitimacy* and, finally, *people*, perhaps because they are the ones most in need of clarification.

With regard to the *concept of democracy*, it is true that we all define ourselves as democrats; we all are, although everyone understands it in their own way. Some understand democracy as the political regime in which decisions taken by the majority of the people must predominate, even regardless of the established rules, since these must be subordinated to that majority will and do not have to condition it. The people are sovereign and democracy is about voting. Others, I would

argue, do not know what they are saying, because they assert that "respect for legality must not lead to the violation of the democratic principle. A principle that demands giving a relevant and primary value to the decision of Basque citizens. A principle that is current legality, with equal or greater force"¹. With which both one thing and its opposite are defended. Finally, there are those who understand it as a political regime in which the decisions of the majority cannot contravene the established rules, although they can change them in accordance with what is in them. This latter conception of democracy implies that it is understood in a more complex way insofar as it is understood that democracy is also the rule of law, separation of powers and respect for individual rights and freedoms. The ultimate reason for these limitations on the will of the majority of the people lies in a different understanding of popular sovereignty, in that it is not immediately conceived of as the direct expression of the majority's will, but is thought of normatively, as an idea, as requiring certain mediations in order to achieve its determination, that of the general will, first through the rule of the majority, then through the elected representatives, in order to ensure the rationality of its manifestation, which is

¹ Proposal of PNV (Partido de Nacionalistas Vasco-Basque Nationalist Party)

achieved when its determination through the shaping of the majority will is carried out into law.

Something similar happens with political freedoms, among which we should highlight the *right of participation*, which is confused with the *right to decide*, insofar as it is understood that our political participation, that is, the political expression of our particular conscience, has to be absolute, sovereign, and therefore cannot be restricted by what is established in the rules. If we have the capacity to decide, we have it insofar as we can use our own power as we please, without limitations, that is, without external impediments, of which the restrictions imposed by law are an example. This is a somewhat blurred way of looking at what political freedoms mean and the role they have to play in determining the will of the people or popular will. Something similar happens with freedom of expression, where the right to freely express one's ideas is often confused with the idea that these ideas must be given equal respect and consideration, as they are the manifestation of the exercise of a fundamental right. If we were to admit such confusion, we would be basing freedom of expression on a relativistic conception, which would prevent us from understanding that freedom of expression is not incompatible with the exercise of our reason, if we want to differentiate between different opinions with the aim of establishing which one or a number of them may be correct and which may be incorrect, without this implying any disregard for the right that everyone has to express their opinion. To put it more clearly, everyone has freedom of expression, although their opinion does not have to deserve equal consideration; what everyone deserves is equal respect, although it cannot be deduced that their opinions are admitted equally, without any kind of discrimination.

However, the confusion surrounding the right to decide has more disastrous consequences, since this right is not simply conceived as an individual right that goes beyond the right to participate, but rather it is understood that this right is possessed by the different nations/peoples (*Völker*), and should therefore be understood as a right of self-determination for them. Here the level of confusion is accentuated, since not only are individual political rights entangled with collective rights, but those same collective rights are also involved, insofar as it is a matter of applying them to situations for which they were neither intended nor would they make sense. I am referring, of course, to the fact that the solutions that were offered in relation to the processes of decolonization cannot be used to solve the problems that may arise from the fitting together of different collectivities with their own language and culture within a democratic state governed by the rule of law.

The third problem in which we find disarray concerns

the *concept of legitimacy*. It is true that this is one of the most complex issues we can face in legal and political reflection, so I am only going to point out one of the imbalances, which has to do with another basic issue, the *concept of sovereignty*. I am referring to the fact that number is identified with the correctness of the opinion that is held. Thus it is considered that if something is defended by the majority will of the people, this is not, according to the first two errors I spoke of earlier, simply democratic or an expression of the exercise of our rights, but also legitimate. In this way, the contingency of the majority decision is mixed with that of its legitimacy, confusing the number that supports a decision with the legitimacy of what has been decided. It is true that in democratic systems number is fundamental, even though it is not enough, because the contingency of the decision cannot be corrected merely by the number; on the contrary, the contingency is found in the number or, in other words, in the sum of the individual wills. Therefore, this contingency can only be corrected if the majority decision is taken under formal conditions that avoid it and ensure, on the contrary, a decision mediated by universality.

Dworkin perceived very accurately the problems that could arise from the unrestricted defense of majority rule. He therefore made a clear distinction between what could be the subject of agreement and therefore of a transaction, and what could only be the subject of compromise. While compromises can be made on interests, this is not the case with principles, which can only be the subject of compromise and not agreement. The difficulty of the majority approach stems from the fact that this difference was not taken into account and it was thought that everything could be the subject of a transaction, since, in order for a transaction to be sustainable, it must necessarily have a limit, that is, the settlement cannot be settled in itself, but has its own limit. In short, it is nothing but the old problem of relativism, everything is relative except the affirmation that everything is relative, that is, except relativism itself, with which we would fall into a new absolutism, which can be even worse insofar as it seems justified, when it is not². In short, majority decisions are faced with the argument of '*reductio ad hitlerum*', an argument which, whether we like it or not, is very consistent, since it states that the correctness or incorrectness of a decision cannot depend on the number of people supporting it, but on the correctness of the argument being defended. This does not mean that the number

2 H. Kelsen, *On the Essence and Value of Democracy*, 1929, trans. by Brian Graf, (2013). See Chap 6, on The Majority Principle (on correction of the excesses of the majority principle by the transaction led to this departure point, which he attempted to correct later in the book. The reasons for all these twists and turns is found in the same place as he had not tackled well the central problem on which all this is built, namely, to think that by leaving on one side the problem of the general will, the problems that it brings with it can be solved. As we can appreciate, this did not happen.

is irrelevant. In other words, the number of people is a necessary condition, but not sufficient. Without a majority of people supporting a measure there is nothing to be done, but number alone is not sufficient. We need something else, because the majority principle alone cannot prevent the establishment of a political system that is contrary to the very game of the majority principle. Thus, the majority could prevent the formation of another majority of a different sign. Hence, majority rule, through which the principle of popular sovereignty is determined, requires limits, being a series of individual rights, which can be framed under the principle defended by Dworkin, following in the footsteps of Rawls, as the principle that everyone deserves equal concern and respect³.

Finally, something similar happens with the *concept of people*⁴. I will give an example of the confusion that reigns in the use of this concept. Savater says that the word people “seem to demand homogeneity among the members of the collective, a moral and perhaps ethnic identity that determines them and at the same time excludes those who should not try to mix with them. The people is an *us* that is always and primarily equivalent to a non-other [...] Of course, calling all citizens a people is not a sin, just as calling a horse a steed is not a sin: it is poetic license, that is, dubious rhetoric. But it is misleading to believe that [...] the people [are] more than the citizens”⁵. There are two confusions in this text, which show perfectly the climate of the situation in which we find ourselves. Firstly, it confuses people with nation. It is true that the same thing happens in the Spanish Constitution, which attributes sovereignty to both the Spanish nation and the Spanish people, and therefore ends up qualifying it as national sovereignty. It is also true that such ambivalence is found, since the 19th century, in the German word *Volk*, which makes its translations into other languages inconsistent, because while in Spanish it is translated as people, in English it is translated as nation, which in my opinion is more accurate. Precisely, Hegel tried to fight against such ambivalence, by recovering an old concept, *Demos*, which would make possible a conception of people that would go beyond the immediacy in which the concept of *Volk* had been rooted, having been built on the reality of language, culture and even race.

The second mistake consists in qualifying as poetic license the fact of calling all the citizens a people. The underlying reason for this is that of believing that the people cannot be something more than the citizens. Several confusions slide into these statements. First of all, there is a fundamental disarray, as it seems that the existence of the people is denied, while the existence of the citizen is affirmed, thus blurring the existence of natural persons, that is, flesh and blood. By this I mean that in Savater's words two levels are being confused, the factual and the normative, which is what makes it possible to reject a concept of people, understood as a nation, and to accept that of citizenry as if it were the authentic concept that expressed reality and from which, moreover, the concept of people should be channeled. To solve this gibberish, we would have to understand that the concept of people can also be understood as an artificial person, that is, as a legal-constitutional construction, in which we make sovereignty reside, with which we could then speak of a sovereign people as in the American constitution -We, the people...-. This was Kant's proposal when, in his Critique of the Judiciary and following what was happening in the United States, he defended the need to transform the people into a state. Only in this way could we talk about citizenry, since talking about it independently of the construction of popular sovereignty would not make much sense. Only if we were capable of instituting a general will could we introduce the concept of citizenship, or in other words, both concepts, popular sovereignty and citizenship, are inseparable, as they require each other. That is why it cannot be said that the people are only citizens, as if they were something more than the people. So it is not a question of establishing a game between people as a nation and citizenry, but between the sovereign people as the general will and citizenry, between democracy and individual rights and freedoms. Only by entering the normative field can we begin to establish the possibility of solving the confusions that accompany us in the construction of the basic concepts of a democratic legal-political philosophy, although we are aware that despite its defects and the present crisis, “there is no alternate, comprehensive set of political and economic ideas poised as a rival to liberal democracy with universal aspirations and global appeal”⁶.

3 In this respect, R. Dworkin, *Taking Rights Seriously*, Harvard University Press, Massachusetts, 1977, pp.272-273

4 We could stop to consider some other confusion regarding the concept of people, such as those that identify it with public opinion -*Öffentlichkeit*-, or with the population -*Bevölkerung, das gesamte Publikum*-, or that of the populists themselves who claim to represent the true people -*das wahre Volk*. On the first confusion, see I. Maus, *Über Volkssouveränität. Elemente einer Demokratietheorie*, Suhrkamp, Berlin, 2011, p. 10 and 44 ff. In connection with the second, see L. Haffert, “Metropole des Populismus -Berlinal Totem der Elitenkritik”, *Merkur*, 30-1-2018, p. 1.

5 F. Savater, “Pueblo”, *El País* November 25. 2017, p.56



6 PD.Miller, Fukuyama Was Right (Mostly). *The American Interest*, January 2019.