From the People to the Constitution. Inventing Democracy during the French Revolution

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Preface

In recent years, the concept of the people, in his varied semantic and polysemic ways, was on the one hand the object of renewed scientific attention, on other hand the object specifically of a constant reminder in the public discourse. This was due to an increased awareness developed about the limits of a post-modern narrative that had judged the modern categories as tools not usable to decrypt the new global order[1].

The French experience, in particular, has been a constitutional laboratory where, starting from the Great Revolution, it was tested in different forms of public (but also private) authorities about alternative ideas on State and society. The legal debate since 1789 has been characterized by a constant dialectic between direct democracy and representative system with a predominant focus on the question of the identity between the people and the representation[2].

According to the revolutionary terminology, both American and French, debtor to the classical model (interpreted and used for political purposes), the expression "democracy" means "direct democracy", "absolute democracy", "pure democracy" or "simple democracy" to which they referred, respectively, for example James Madison and John Adams in *The Federalist*, indicating a government based on popular assemblies, unthinkable, in their view, in a country of wide dimension. The term democracy until the French Revolution was synonymous with anarchy and chaos[3].

1. *The Constitution and Its Discontents: the "veto" debate*

The constitutional debate during the French Revolution is almost based on relationship between 'traditions' and 'changes'. The idea of old constitution and of

ancient law (defended, for instant, by the *monarchiens*) was criticized by "left wing" revolutionary men that proposed a new idea of constitution that criticised and stigmatized the *ancien régime* (definition "invented" during the Revolution to underline the split between old and new). The revolutionary idea of constitution – as a limit to the power but also as a way to legitimise the power – found his 'constituent moment' in article 16 of the *Declaration of the Rights of Man and of the Citizen* of August 1789, a really modern constitutionalism manifesto[4]. The idea of separation of powers and the rule of law was (and is) a powerful instrument for the new regime to legitimise itself making recourse to English tradition. But the problem was not only the interpretation of constitution, but his relationship with the sovereignty and, in particular, with the new form of government. Starting from 1789, the new political and juridical subject was the nation that identified the King and the people of France, than, at the turn of 1793, the "empty throne", was occupied by the people[5]. But the fight of the whole revolutionary period was, briefing, based about the definition of the constitution and the people, interpreted in a continuous dialectic discourse between 'tradition' and 'change', or, 'past' and 'future'[6].

The debate of the early years of the French Revolution, in the period between the fall of the Bastille and the promulgation of the Constitution of 1791, focuses on one hand on the issue of royal veto (absolute or suspensive) and the research for an "impossible balance" between monarch and parliament, on the other hand on the attempt to stem the constituent power of the people, manifested in the forms of insurgent democracy[7].

The constituents of 1789 questioned themselves about the influence of the executive over the legislature and, in particular, if it was appropriate to give the King a capacity to intervene in the process of the law, through the veto, and if it violates the principle of separation of powers[8].

The representatives had three institutional alternatives: the absolute veto, the suspensive veto and the separation of powers. The first appeared to be a violation of this last principle, as a power granted to the executive to intervene in the legislation; the second option attenuates the principle of separation of powers; the third possibility, as it is known defended by Sieyès, advocates the exclusion of the King from the legislative process to guarantee the separation of powers[9].

Between the position of Sieyès which totally excludes the veto and the opposite perspective of Mounier that wanted to give the King an absolute power, emerged a number of compromise proposals on the institutional dispute, including that of Thouret about the suspensive veto[10]. This solution tries to reconcile two antithetical principles: one hand, the recognition – shared by supporters of absolute veto – that the King had to be able to protect its prerogative in cases where it deems appropriate against the acts of the legislative body; on the other hand the principle – supported by Sieyès – that the general will – *la volonté générale* – can not be subjected to the "special" will of the King[11].

The solution adopted by the constitution of 1791 had a double limit: on the one hand the people were deprived of that form of direct participation advocated by many of the Jacobin group, from another, the veto exercised by the King as a form of balance of power in revolutionary France was perceived as a kind of usurpation of the general will,

"Robespierre, Danton, et Marat", painting by Alfred Loudet, 1882

particularly when used to block the acts that characterize the revolutionary strategy[12].

The use of the veto by the King (on sensitive issues such as the law on *émigrés* and on the refractory priests) involved the revolt of the masses in Paris and the suspension of the constitution and with it of the monarchy, the 10th August 1792.

The royal veto was a considerable constraint placed on the Legislative Assembly, that couldn't stand this limit to its sovereignty. In a more radical way, the sections, the Paris Clubs and the movement of the sans-culottes, had considered the veto as an instrument of monarchical tyranny. The veto therefore – too powerful of a weapon in the hands of a too weak monarch – turned against the King, and its use involved, as well as the fall of the monarchy, the end of the Constitution of 1791. The suspensive veto was an instrument that, paradoxically, could only exist if not used, or only when the prior agreement between the King and the legislature had succeeded[13].

2. *The Jacobin Moment*

The people ousted from direct participation in the legislative process, had regained it through the channel of the revolutionary days, ushering in the dialectic, between the street and the institutions, that would continue to characterize the revolutionary decade and the crucial moments of the French constitutional history.

With the election by universal male suffrage of the National Convention, the reference to the people and to the will of the people

became the new dominant paradigm of the French public law. On the first day of his inauguration, 21st of September 1792, the members of the Convention attribute themselves the prerogatives of the nation, to the point that the mediation between the people and its representatives tended to disappear[14].

As a confirmation of the new institutional role played by the people, Bertrand Barrere – the 19th October 1792 – invited citizens to participate, with the members of Convention, by the choice of the constitutional text for France, presenting constitutional projects to the Assembly. In the Girondin constitution project – mainly the result of the work of Condorcet[15] – based on Rousseau's thought, sovereignty belonged to "the universality of the people", and neither the representatives nor the citizens could take the place of the general will[16].

According to this detailed project also the election of the members of the executive power – who remains in office for two years and is renewable at the end of the first year – was entrusted directly by the people, so that its members were independent by the Assembly, elected by universal male suffrage for the same length of time. Condorcet, not completely satisfied by the representative model, tried to protect people from the risk that the legislature violated the constitution and the human rights, through a variety of institutional arrangements which will represent, in later years, the tools of modern constitutionalism[17].

In particular Condorcet theorized the possibility that the people could participate in the legislative process through a kind of a constitutionalisation of the right of resistance (*censure du peuple*)[18]. Although he proposed, for the first time, to include in the legislative procedure of a modern State, mechanisms of popular participation, the system developed by Condorcet, was strongly criticized by the Jacobins, because it had harnessed the right of resistance in constitutional engineering, such as to frustrate his revolutionary value[19]. After the rejection of the so-called Girondin project, was the Jacobin Constitution of 24th of June 1793, with him heavily indebted, which, through the referendum on the measures adopted by the Assembly, brought the people to the rank of co-legislator. According to the Jacobin text, outside of elections, the citizens were called upon to intervene in public affairs in two ways: by indirect designation of the government members and with the referendum. The competence of Members was limited to the preparation of projects of law, that had to be sanctioned by the citizens (art. 53: «les corps législatif propose les lois»). The new republican constitution – according to the jurist Marie-Jean Hérault de Séchelles, the main drafter of Jacobin text – was both Democratic and Representative[20].

On the constitutional level, while the text drawn up by Condorcet advocated a "semi-representative" regime in which citizens were not allowed to use their influence in the legislative process in a direct manner, the Jacobin Constitution organized a "semi-direct" system, where the consent of the people was essential to the formation of law[21].

As it is well known, the path of democratic constitutionalism traced during the year I was frustrated by the events and circumstances that led to the revolutionary decree of 10th October 1793 – 19 Vendemiaire year II – which suspended the constitution, instituted the revolutionary government and opened the way for the Terror[22].

A choice that is legitimized, according to the interpretation of Carl Schmitt – who inserted this analysis within the reflection on the distinction between the ancient and modern dictatorship – in the extra-constitutional and extra-legal appeal to constituent power of the people. The suspension of the text of 1793 is clearly the combination between political and legal system, always following the reasoning of Schmitt, based on the logic of the exception, when the decision is separated from the norm[23].

3. *Uprising of Spring 1795*

During the post-Thermidor period the debate on the link between popular sovereignty and power of people, central in the "Jacobin moment"[24], gradually changes perspective, until to relegate the people in a kind of *trompe l'oeil* to be represented in Assembly, but kept away from the decision-making process.

The constitution of 1795 was in fact characterized by the return to a system exclusively for the benefit of the bourgeois class, and by the refusal of the forms of direct democracy, the refusal of the right of resistance and the participation of the people to the legislative phase, and the downsizing of the progressive taxation, and more generally the refusal of the characteristic elements of the democratic constitutionalism[25].

In the revolutionary period the popular participation in public decisions goes beyond the legal processing and expresses itself through a dialectic between institutions and people, or rather between legislative bodies and requests (sometimes violent) of the sans-culottes movement of Paris, that had driven the bourgeois revolution of human rights until the acceptance of advanced democratic and social issues[26].

A last attempt to counteract the reactionary drift undertaken by the new ruling class occurred during the revolutionary days of the spring of 1795, marked by the return, on the political stage, of an actor unexpected that seemed to belong to the past: the popular crowd[27]. In the poorest neighbourhoods of Paris, in particular Faubourg Saint-Antoine and Faubourg Saint-Marcel, the suspension of the *maximum* (the determination of a maximum price for bread and other food), had serious consequences on the population. Following this crisis, the 12th germinal year III (2nd April 1795) the men and the women (often surrounded by their children) of these neighbourhoods invaded the Convention shouting "The Bread and the Constitution" (*Du pain et la Constitution de 1793*)[28], combining social criticism and democratic constitution[29].

At the end of floral began to circulate a petition in the Parisian sections – *Insurrection du peuple pour obtenir du pain et reconquérir ses droits* – that was the manifesto of the revolution organized by the people of Paris in the name of the whole of France. The insurrectionary pamphlet, anonymous, written by militant sans-culottes, identified in the people the political entity that would have to act to change the situation of the food crisis and of political tyranny[30].

The insurrection of the 1st Prairial year III (20th May 1795), driven mainly by economic crisis, saw, after the occupation of the Convention by the crowd, the dramatic beheading of the girondin jurist Jean Bertrand Feraud, (whose head was hoisted on a pike in front of the President of the As-

sembly François-Antoine Boissy d'Anglas, according to a macabre ritual of collective violence, combining archaic characters with elements of modernity)[31] and the establishment of a simulacrum of deliberation which was attended by some Jacobin members[32].

Just as in the late eighteenth century and at the turn of the Revolution in Paris news spread via so-called *nouvellistes de bouche*[33], the opinion of the revolutionaries and the sans-culottes, especially during the economic crisis of the year III, was formed not only in the Convention or in sections, but in the streets, squares and especially in the queues in front of the ovens, where women in particular discussed the increase in prices, cold, hunger, death and suicide in the street of mothers (after they had killed their children). If you can not speak of true "public opinion", they spread, however, the opinion that it was the power (before of the King then of the Convention) responsible to organize the famine to starve the people, and that the latter therefore had to organize and arm themselves to defend themselves against the conspiracies[34].

Conclusions

The failure of the insurgency project during the spring of the 1795, that was the expression of "insurgent democracy" (according to the suggestive expression of Miguel Abensour) or of "emancipatory struggle of the poor" (according to Jacques Rancière), implied the impossibility of applying the democratic Constitution of 1793 and to establish a "modern" democratic system. However, it remained the typical contradiction of the Jacobin thought, among constitutional architecture and exaltation of the uprising. Between the constitution and the people.

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