BENTHAM WAS RIGHT. WAS HE?

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Abstract: The importance that the majority principle occupies in Bentham's theory reveals how it was in tune with what others thought about this principle. I will discuss only the role that this principle holds in Kelsen. For him, the majority principle is central to his articulation of the legal-political order and will have an essential place within the state in shaping the rules of the normative will of the state. The same will not occur with the act of foundation, in which the majority will be relegated by the requirement for unanimity. The difficulty of the problem does not lie in the recognition of the importance of the role that the majority principle occupies but in the way that it is justified. The major differences appear in terms of its legitimacy. This will eventually lead us to ask whether Bentham was right or not in his approach to the majority principle.

Keywords: General Will; Civil Society; Democracy and Rule of Majority.

I. INTRODUCTION

"[The] great Earl of Warwick dined at his table in his different manors in the country about 30.000 persons every day in the year, of his dependants"[2]. And he did it not just for goodwill, humanity or justice, but by necessity, the need to satisfy the immensity of his desires. Thus it was his luxury and whim which enabled his dependents to get what is necessary for life. This allows us to describe the Earl of Warwick's behavior as both selfish and wilful, while at the same time the result of his conduct could be considered as reasonable, to the extent that his selfishness implies that those who not only have to satisfy their whims, but to go on being able to do so, will have access to the necessary means to ensure their survival. So the fruit of the property of the lord cannot be solely in his hands, but must be shared among all and moreover, according to Adam Smith, on a relatively equal basis, for those who have more cannot consume much more than those who have nothing. Adam Smith expressed it most clearly when asserting:

> "The produce of the soil maintains at all times nearly that number of inhabitants which it is capable of maintaining. The rich only select from

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[2] A. Smith, *Lectures on Jurisprudence*, 1762-3, pos. 982.

> the heap what is most precious and agreeable. They consume little more than the poor, and in spite of their natural selfishness and rapacity, though they mean only their own conveniency, though the sole end which they propose from the labours of all the thousands whom they employ, be the gratification of their own vain and insatiable desires, they divide with the poor the produce of all their improvements. They are led by an invisible hand to make nearly the same distribution of the necessaries of life, which would have been made, had the earth been divided into equal portions among all its inhabitants, and thus without intending it, without knowing it, advance the interest of the society, and afford means to the multiplication of the species. When Providence divided the earth among a few lordly masters, it neither forgot nor abandoned those who seemed to have been left out in the partition"[3].

Therefore we have to qualify as rational what at first sight would have to be characterized as irrational, greed, desire and whim, on finding that they produce a reasonable effect. Thus, the satisfaction of luxury and caprice, that is, the very convenience of the rich, is rational, in so far as it satisfies their desires, and yet, at the same time it creates a benevolent effect- the reasonable- for those who satisfy those desires. This is what explains the distribution of the necessities of life among all the inhabitants of the earth and consequently, the promotion of the general interest, the interest of society. According to Smith there is an invisible hand-providence-that ensures social order. That invisible hand is so because in the need to satisfy the whim, at the same time public interest is ensured. It seems clear that Adam Smith's attempt to explain the social order has something to do with other attempts contemporary to his own work, although the matrix of the former is just the opposite of the preeminence of the individual against the universal, the particular will, capricious and selfish, compared to the general will, as the central and essential element by which human action has to be understood and legitimized. I refer especially to Rousseau's proposal that has a different character, mainly because he cannot admit Smith's play between the rational and reasonable insofar as he holds that rationality can only be found under the direction of the general will, by which the particular will has to be ordered. Desire and whim respond only to a selfish will, and as such irrational will. From here it is well understood that the path laid out by Rousseau is radically different from Smith's.

Rousseau establishes, in principle, the general will on a unanimous agreement, although later and given the problems that the appeal to such unanimity causes, he deemed the agreement of many to be sufficient. With this he would have no other remedy but to admit the will of all as the addition and subtraction of individual wills, that is, he had to rely on the particular will to institutionalize the foundational will of the social order. This does not mean that the individual will was not also in unanimity, although its emergence was seen even more clearly when considering the will of the many. However, problems arising from the infiltration of contingency implicit in the individual will, in the grounding of the general will, are corrected to the extent that its

[3] A. Smith, *The Theory of Moral Sentiments*, Digireads.com Book, 2010 (1759, 1790), pp. 127-128.

institutionalization demands "for all the votes to be counted. Any formal exclusion is a breach of generality"[4]. At the same time, production of the general will is settled on three conditions, which are those which, in turn, give legitimacy and justify the act of "total alienation [aliénation] of each associate together with all of his rights to the entire community"[5]. These conditions are what the social order has to achieve, first, the protection of life and possessions of all associates; second, that in this association each of its members shall obey nobody but himself, and finally all will remain as free as they were in the previous situation, ie, when they had their natural freedom. This is what we should properly understand as the meaning of that alienation of which the act of association consists, since

> "it is so false that there is, in the social contract, any genuine renunciation on the part of private individuals that their situation, as a result of this contract, is really preferable to what it was beforehand; and, instead of an alienation, they have merely made an advantageous exchange of an uncertain and precarious mode of existence for another that is better and surer. Natural independence is exchanged for liberty; the power to harm others is exchanged for their own security; and their force, which others could overcome, for a right that the social union renders invincible"[6].

Thus, Rousseau thought of the social order as a social contract articulated around the general will, in which the individual will has its own space assured in the law. Therefore, it cannot depend on the individuality, but has to do it from that same general will, which is typical of a people's assembly in order to give itself the law:

> "When a law is proposed in the people's assembly, what is asked of them is not, to be precise, whether they approve or reject the proposition, but whether or not it conforms to the general will that is theirs. Each man, in

[4] J. J. Rousseau, *On the Social Contract*, in id., *Basic Political Writings*, second edition, trans. and ed. by D. A. Cress, int. and new annotation by D. Wootton, Hackett Pub. Comp., Indianapolis, Cambridge, 2011 (1762), p. 171, fn. 36.

[5] Rousseau, *On the Social…, op. cit.,* p. 164. Moreover, that alienation had to be implemented "without reservation, the union is as perfect as possible, and no associate has anything further to demand. For if some rights remained with private individuals, in the absence of any common superior who could decide between them and the public, each person would eventually claim to be his own judge in all things, since he is on some particular point his own judge. The state of nature would subsist and the association would necessarily become tyrannical or hollow", p. 164.

[6] Rousseau, *On the Social…, op. cit.,* p. 176. In the same sense we can see what Rousseau says about transformation of possession into proprietary ownership: "What is remarkable about this alienation is that, in accepting the goods of private individuals, the community is far from despoiling them; rather, in so doing, it merely assures them of legitimate possession, changing usurpation into a true right, and enjoyment into proprietary ownership. So, since owners are considered trustees of the public good, and since their rights are respected by all members of the state and maintained with all its force against foreigners, through a surrender that is advantageous to the public and still more so to themselves, they have, so to speak, acquired all they have given. This paradox is easily explained by the distinction between the rights the sovereign and the proprietor have to the same land", Rousseau, *On the Social…,op. cit.,* p. 169.

> giving his vote, states his opinion on this matter, and the declaration of the general will is drawn from the counting of votes"[7].

The people in assembly has to decide, necessarily, according to the majority rule, which would raise the paradox of how it is possible to establish by majority in what the general will consists. However, Rousseau believes that it is feasible to establish the general will through majority rule. The reason would be found, in his opinion, in that when one votes one is not expressing agreement or disagreement with the proposition, but whether it is in conformity with the general will which is one's own will. Thus the declaration of the general will could be obtained from the calculation of votes. His argument rests on the assumption that it is possible to identify the will of each one with the general will, but only when the people are gathered in assembly to give themselves the law. Once the law is created, Rousseau admits in it the play of the particular will, which we can see when he speaks of the election of the government, in which the people as government choose those who have to be responsible for the implementation of the law.

II. BENTHAM WAS RIGHT

However, neither Smith's nor Rousseau's explanations seem sufficient. Clearly the claims of Rousseau, or his conceptualization of what the act of alienation consists of or the ability of the individual will to determine whether something is or is not in conformity with the general will when the people are met in assembly are not indisputable. But it is also evident that the distribution of wealth is irrational, so it seems clear that the social order cannot be legitimized purely on the self-interest of those who govern in a society-the sinister interest-an interest that Bentham considered opposed to the general interest, which he defines as the sum of individual interests. In this sense, Bentham continues Rousseau's understanding of the will of all, and thinks the general interest as that which is expressed by that will, the will of all, which, according to Rousseau, is simply the "sum of private wills"[8].

This is the climate and the problems that face Bentham when justifying human actions, whether of individual or of government. To do that he argues that such actions should be justified from the principle of utility, which meant "that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words, to promote or to oppose that happiness. I say of every action whatsoever; and therefore not only of every action of a private individual, but of every measure of government"[9]. The principle of utility rules the possibility of the judgment of any action and is seen as an increase or decrease in the

[7] Rousseau, *On the Social…, op. cit.,* p. 227.
[8] Rousseau, *On the Social…, op. cit.,* p. 172
[9] J. Bentham, *An Introduction to the Principles of Morals and Legislation*, ed. by J. H. Burns and H. L. A. Hart, The Athlone Press, London, 1970, pp. 11-12.

happiness of the party whose interests are at stake, ie, an increase or decrease of his pleasure over pain.

Thus, individual action would be justified provided that it promotes individual interest, which always happens when it increases "the sum total of his pleasures"[10], for which there is no better judge than oneself when judging what actions lead to the increase of one's own happiness[11]. Regarding the latter, the actions of government, they can only be described as useful if they increase the happiness of the subjects whose interests are affected by them. Bentham defines "the business of government" as the promotion of "the happiness of the society, by punishing and rewarding"[12]. The difficulty lies in the definition of what we understand by happiness of society. Bentham argues that the interest of the community is "the sum of the interests of the several members who compose it"[13]. That is, he poses the question of the happiness of society as the "general interest" or "universal interest", which he resolves, as we have said, according to Rousseau's the will of all, but confronts Rousseau's conception thereof on the general will, in the sum of individual interests or "aggregation of the self-interests of all the individual members of the community"[14]. Bentham's problem was in determining how the sum of the different interests should be made, that is, how the question of the will of all is solved. Bentham did it in the Additions he made in July 1822 to *An Introduction to the Principles of Morals and Legislation,* in which he made his position clear. He defined the principle of utility as "the *greatest happiness or greatest felicity* principle"[15] as a way of lightening the phrase "the greatest happiness of all those whose interest is in question, as being the right and proper, and only right and proper and universally desirable, end of human action"[16]. The problem is centered on "those whose interest is in question", that is the "number, of the interests affected"[17] and the number is to be understood as its "largest proportion"[18]. Later, in another Addition, also of July 1822, in footnote d, Bentham again insisted that against "those features of the English Government, by which the greatest happiness of the ruling *one* with or without that of a favoured few, are now so plainly seen to be the only ends to which the course of it has at any time been directed"[19], the principle of *utility* may "be designated by the name of the *greatest happiness principle*"[20], that is, "a principle, which lays down, as the only *right* and justifiable end of Government, the greatest happiness of the greatest number"[21].

[10] Bentham, *An Introduction…op.cit, p. 12*
[11] "[T]here is no man who is so sure of being *inclined*, on all occasions, to who upon the whole can have had so good opportunities as you must have had of *knowing* what is most conducive to that purpose. For who should know so well as you do what it is that gives you pain or pleasure?", in Bentham, *An Introduction…, op. cit.,* p. 244.
[12] Bentham, *An Introduction…, op. cit.,* p. 74.
[13] Bentham, *An Introduction…, op. cit.,* p. 12
[14] P. Schofield, "Bentham on the Identification of Interests", *Utilitas*, vol. 8, nº 2, July 1996, p. 233.
[15] Bentham, *An Introduction…, op. cit.,* p. 11a.
[16] Bentham, *An Introduction…, op. cit.,* p. 11a.
[17] Bentham, *An Introduction…, op. cit.,* p. 11a.
[18] Bentham, *An Introduction…, op. cit.,* p. 11a.
[19] Bentham, *An Introduction…, op. cit.,* p. 14d.
[20] Bentham, *An Introduction…, op. cit.,* p. 14d.
[21] Bentham, *An Introduction…, op. cit.,* p. 14d.

The principle of utility as a legitimating principle of government action is resolved, in Bentham, by the greatest happiness of the greatest number, i.e. majority rule. Thus the principle of utility ends by transforming itself into the recognition of the unlimited power of the sovereign, the majority, to which the action of the government has to be submitted and from which finally any law has to be justified or not. This is the impossibility of justifying the originating power, because Bentham actually adhered to demand justification for government action, but not the action of the real power, the sovereign power, which is the power of the majority. Therefore, the limit, the principle of utility, which is nothing but the recognition against the power of government -operative power-, of the authentic sovereign -the constitutive power-, which is identified with the power of those who make up through the sum of their individual interests the universal interest, understood by this as the greatest happiness of the greatest number.

Regardless of the systems of aptitude and securities, as well as the fact that "[a]lthough the other three Authorities [Legislative, Judicial, and Administrative] are subordinate to the constitutive authority, by their very existence in the state they effectively limit the constitutive power of the authority"[22], Bentham devised a mechanism to counteract all power, by which I mean the institutionalization of the public opinion tribunal, which is the recognition of freedom of conscience and expression as central to the construction of the social order[23]. Bentham's argument relating to the creation of this tribunal implies the attempt to create a genuine limit to the sovereign, as we have already seen that the principle of utility was nothing but the recognition in the limitation of government action the true sovereign, but posed no limitation on this. Now, however, the limit of what the tribunal is, ie, the limit which involves the recognition of freedom of conscience and expression, poses two problems. First, if in reality it is actually such a limit and not a self-limitation and, secondly, whether the creation of that limit would not be inconsistent with Bentham's approach. If the law and therefore the institutionalization of this tribunal must follow the indications of the principle of utility, i.e., the greatest happiness of the greatest number, and this involves the recognition of the power of the majority as sovereign, then it seems clear that the creation of such a tribunal and the political freedoms on which it rests cannot be a real limit of the sovereign, but only and exclusively a self-limitation, for those freedoms of conscience and expression will be recognized to the extent that the sovereign has decided to do so, and they will also be suppressed if that is his desire. Fundamentally, Bentham's model responds to the conception of a majoritarian democracy in which the limit is designed from the principle of legality or rule of law, which starts its operation from that established by the majority rule. On the rule of law a series of measures have been established that serve to ensure the construction of a controlled democracy, although it does not possess any mechanism necessarily to submit the majority, it is only possible to understand the resignation of the majority to the arbitrary imposition of its will as a self-limitation. Regarding the question of whether the creation of that limit, the freedoms of conscience and expression, would be a contradiction to Bentham's system, while those freedoms would have to be outside the

[22] F. Rosen, "Jeremy Bentham and democratic theory", in G. J. Postema (ed.), *Bentham: Moral, Political and Legal Philosophy I*, Ashgate-Darmouth, 2002 (1979), p. 48.
[23] See in this respect, F. Rosen, "Jeremy Bentham and democratic theory", art. cit., pp. 52 and ff.

scope of the decisions of the majority, we would have to say that there is no contradiction, because in Bentham the recognition of public rights and liberties can only ultimately depend on the sovereign, while law is created by the will of the legislator in terms of his mandate, so that rights other than those provided by the legislator are not acceptable.

The conclusion we might draw from these pages is that Bentham was right, he could see the shortcomings of models of Smith and Rousseau, the first settled on the invisibility of providence and the second on the abstract spirituality of the general will, both far in excess of the actual real will of the members of a particular society. The best proof of his correctness can be found in Kelsen's model of democracy which hinged on the majority rule. This model assumes the reaffirmation of Bentham's project from the moment in which not only the primacy of the majority will is posed, but also the need to establish, in Bentham's wake, certain corrections on the functioning of that rule of the majority to avoid it degenerating into the empire of the majority.

III. KELSEN AFTER BENTHAM

Following Bentham, who believed he had resolved the problem put by Rousseau by dissolving the general will in the will of all, that is, by identifying the general interest with the sum of the interests of all, with the interest of the majority, Kelsen persisted in this approach, and highlighted what in his opinion is Rousseau's error, the "metaphysical -or, better, metapolitical- illusion"[24], as he thinks it cannot be defended, as Rousseau does, the general will as the objective foundation of the state order. On the contrary, the "theory of a social contract [...] is a function of the subjective *volonté* of the *tous*"[25]. In this way, Kelsen, like Bentham, departs from the essentialist grounding, abstract or providential, to approach a foundation of the state attached to actual reality and therefore contingent. This implies that for Kelsen we have to approach three questions: 1º the rule of the majority; 2º the need to conceive the common will as transaction and 3º the recognition that the common will and its instrument, majority rule, may end up by committing excesses.

In line with what Bentham had argued to uphold the principle of the greatest happiness of the greatest number, Kelsen asserts that of freedom for the greatest number. He will maintain that majority rule cannot be justified "by saying that more votes carry a greater total weight than fewer votes", since the "purely negative assumption that the will of one person should not count more than the will of another does not entail the positive claim that the will of the majority should rule"[26].The reason which justifies majority rule is that if in a given social order it is not possible for all men to be free, the use of such a rule would at least ensure they were "the greatest possible number", so "that the number of individual wills that are in conflict with the general

[24] H. Kelsen, *The Essence and Value of Democracy, e*d. by N. Urbinati and C. Invernizzi Accetti, trans. by B. Graf, Rowman and Littlefield Publishers, Lanham, Maryland, 2013 (1929), pos. 789.
[25] Kelsen, *The Essence…, op. cit.,* pos. 691, fn. 10.
[26] Kelsen, *The Essence…, op. cit.,* pos. 610.

will of the social order should be minimized"[27]. Therefore, majority rule is a presupposition of any agreement, to the extent that the "compromise [between the different interests, between the majority and the minority] constitutes a real approximation to the unanimity that the idea of freedom demands in the development of the social order by its subjects"[28].

Regarding the second question, the formation of a common will, Kelsen says this is what enables a democratic system to be built based on transaction, so that it would be surrendered to 'a "higher" absolute truth or an absolute value standing above group interests"[29], since it would only try to reach an agreement or compromise between these different interests. If "the will of society is not to be the expression of the interests of one group alone, that will must be the result of a compromise between opposing interests"[30], so that the common will is constructed "in a moderate direction"[31], as an agreement between the majority and the minority, between the various interests of the majority and the minority.

To justify this reasoning Kelsen constructs a syllogism in which the major premise says that the concept of the majority "already presupposes the existence of a minority",[32] the minor premise establishes "the right of the minority to exist"[33] and he draws the conclusion that "[t]hough this does not entail the necessity, it at least raises the possibility of a protection of the minority […which] is the essential function of so-called freedoms and fundamental rights or human and civil rights"[34]. If we read it backwards we see there are two inconsistencies. First, the conclusion dilutes what is already stated in the second premise, because it gets less than the minor premise implies, and second, this premise, the minor, is a change of terrain, because the field in which the major is formulated, the terrain of pure logic, is abandoned, to move to the field of law. This second incongruity has less relevance to the fact that his conception of majoritarian democracy cannot avoid slipping into "majority domination"[35]. In relation to the above the first inconsistency has more substance, because if in the second premise he situates the reflection in the terrain of law and I admit that the right of one, the majority, *implies* the right of another, the minority, I cannot get less at the conclusion of what was already in the premise, and this is what Kelsen does when speaking of *possibility* rather than *necessity*. If the right of one *implies* that of the other, then it is not a matter of *possibility*, but of *necessity*. To admit this would have led Kelsen to have abandon axiological relativism and consistent with this, his conception of the transaction and the compromise between different positions that defend opposing values and interests, and none of them can be considered better than the others as they are all relative. Obviously he could not do it.

[27] Kelsen, *The Essence…, op. cit.,* pos. 620.
[28] Kelsen, *The Essence…, op. cit.,* pos. 1473.
[29] Kelsen, *The Essence…, op. cit.,* pos. 1365.
[30] Kelsen, *The Essence…, op. cit.,* pos. 796.
[31] Kelsen, *The Essence…, op. cit.,* pos. 796.
[32] Kelsen, *The Essence..., op. cit.,* pos. 1305.
[33] Kelsen, *The Essence..., op. cit.,* pos. 1305.
[34] Kelsen, *The Essence..., op. cit.,* pos. 1305-1316.
[35] Kelsen, *The Essence..., op. cit.,* pos. 1446.

This is the reason why, finally and just like as Bentham, he conceived the limit of the majority will as self-restraint and therefore designed it as the "principle of legality"[36]. From here he establishes a series of constitutional measures that serve to ensure a controlled, limited democracy. In order to avoid a "dictatorship of the majority over the minority"[37] and since we have no mechanism that necessarily subjects the majority, it is only possible to understand the majority's resignation to "the implementation of its will in the face of a qualified minority" as a "self-restraint"[38], which constitutionally must be reflected in the recognition not only of the absolute majority -the legislative authority-, but also of the "principle of the qualified majority" - the constituent authority-, which has to function in relation to the "[m]easures, which infringe upon certain national, religious, economic, or broadly intellectual spheres of interest, are possible only with the assent, and not against the will, of a qualified minority; that is, they require agreement between the majority and the minority"[39], which ensures a higher level of protection than mere legality, on dealing with issues requiring greater degrees of consensus, which is similar to the majority required to amend the basic rules of a system, ie, rules of constitutional reform. Secondly, he introduces the constitutional court, which is what has to ensure that the majority does not slide into its empire, by protecting those legislative procedures that require qualified majorities, since "the enforcement of the constitution in the legislative process is in the eminent interest of the minority"[40], that is, the protection of their rights.

IV. CONCLUSION: WAS BENTHAM RIGHT?

In short, the above measures would not prevent, as Kelsen himself acknowledges, "the limitless expansion of state power and, consequently, the complete loss of individual 'freedom' […] as long as this state power is constituted by its subjects"[41]. It is true that this statement could result in the play between majority and minority saying that the majority could subjugate the minority, in that the latter had consented to participate to it, which seems opposite to all reasonableness, as the limits of the political will have be so constructed that they cannot be widened or constricted depending on the contingency of that same will. In my opinion, I think this is the reason why Kelsen ends by stating:

> "He who views absolute truth and absolute values as inaccessible to the human understanding cognition must deem not only his own, but also the opinion of others at least as feasible. The idea of democracy thus presupposes relativism as its worldview. Democracy values everyone's political will equally, just as it gives equal regard to each political belief and opinion, for which the political will, after all, is merely the

[36] Kelsen, *The Essence..., op. cit.,* pos. 1605.
[37] Kelsen, *The Essence..., op. cit.,* pos. 1349
[38] Kelsen, *The Essence..., op. cit.,* pos. 1322
[39] Kelsen, *The Essence…, op. cit.,* pos. 1322-1332.
[40] Kelsen, *The Essence..., op. cit.,* pos. 1600.
[41] Kelsen, *The Essence..., op. cit.,* pos. 629.

> expression. Hence, democracy offers every political conviction the opportunity to express itself and to compete openly for the affections of the populace"[42].

With this, Kelsen, without knowing it, goes beyond his conception of limit as self-restraint, ie on the declaration and protection of a number of freedoms and fundamental rights, which finally depended on that same majority will, which meant being locked into the same presuppositions as Bentham's conception, for whom the institutionalization of the public opinion tribunal, built on the recognition of freedom of conscience and expression, is eventually supported by majority decisions. However, if we read carefully what Kelsen says, we can appreciate that his discourse is contradictory, in so far as, on the one hand, he asserts the relativism on which democracy rests, arguing that it appreciates alike all political will and opinion, while at the same time it has to ensure, on the other, the possibility of manifestation, that is, to express one's opinion to all men, which cannot be left to what a majority may decide at any given time. So when I say that everything is relative, I cannot maintain at the same time there is something that is not, freedom of expression, which cannot be questioned, as one cannot both defend one thing and its opposite. Only if we delve into the principles on which Kelsen stands can we avoid this contradiction.

To put it another way, would it be possible to settle a social order on the recognition of freedom of expression while we rely on such recognition of the contingency of a decision adopted by the majority? Or, on the contrary, would it not be a better remedy to recognize that right as a necessity, as that which the concept of democracy demands, beyond the accidental support of the majority at a given time? This would allow us to abandon the contingency and, therefore, find the foundation of social order not in the particular will of the majority sum of individual wills, but in the general will. If this were so, then Bentham would be wrong, although going more deeply into this question would require much more space than I have already taken.

[42] Kelsen, *The Essence..., op. cit.,* pos. 1906-1017.