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On the Complementarity of Liberalism and Democracy[*]

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***Abstract*:** The growth of the democratic welfare state has been accompanied by significant restrictions on individual liberty, raising doubts about the sustainability of the ideals of liberalism in democratic polities. The principal claim of this paper is that, adequately understood, liberalism and democracy represent *complementary* ideals. The argument in support of this claim is based on a distinction between three levels at which liberalism and democracy can be compared, namely the level of their *"institutional embodiment,"* the level of their *principal focus*, and the level of their *underlying normative premise*. It is argued that democracy and liberalism share the same fundamental normative premise, namely the principle of *individual sovereignty*, that they complement each other in their respective principal foci, namely *citizen sovereignty* and *private autonomy*, but that frictions between the two ideals have arisen at the level of their institutional implementation. It is conjectured that the threat that the democratic welfare state has posed to the ideals of liberalism must be attributed to particular institutional realizations of the ideal of democracy, not to the ideal itself. It is discussed what kinds of reforms in political institutions are needed in order for liberalism and democracy to be in harmony, not only at the level of their normative premises but also at the level of their institutional implementation.

1. Introduction

Even though neither theoretical arguments nor historical evidence provide reasons to believe that the ideals of liberalism may be better preserved by non-democratic regimes, one cannot overlook the fact that the growth of the modern democratic welfare state has been accompanied by growing restrictions on individual liberty.[1] Nor can one overlook the fact that the liberal voice is only one among many in the democratic contest of political programs, a voice moreover that is rarely articulated in a principled manner, and hardly ever succeeds to win broad electoral support. Does one have to conclude from

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[1] As Hayek (1978c: 145) notes on the "development of the modern Welfare State": "Though it should have been possible to achieve many of its aims within a liberal framework, … the desire to achieve them by the most immediately effective path led everywhere to the abandonment of liberal principles …, to a progressive growth of the government controlled sector of the economy and to a steady dwindling of the part of the economy in which liberal principles still prevail."

such observations that the ideals of the democracy and liberalism are difficult to reconcile or, as it has been put, that there is a "dichotomy between liberalism and democracy"?[2]

Hayek (1978c: 142f.) has sought to clarify the relation between the "two doctrines" by pointing to the fact that they are "concerned with different issues": "Liberalism is concerned with the functions of government and particularly with the limitation of all its powers. Democracy is concerned with the question of who is to direct government."[3] And, indeed, if one divides the issues that an inquiry into matters of politics may address into two main sub-questions, namely, first, what government should do and what its limits should be, and, second, how government should be organized, it is quite apparent that the advocates of liberalism have traditionally focused their attention on the first issue while advocates of democracy have been primarily concerned with the second. Yet, while this difference in focus clearly accounts for the divergences between the two doctrines, the liberal ideal would surely be interpreted in a too narrow sense if it were thought to be not concerned at all with the issue of how government should be organized, just as the democratic ideal would surely be interpreted in a too narrow sense if it were thought to entirely neglect the issue of what limits to put on the powers of government. In fact, taking my lead from F.A. Hayek's and J.M. Buchanan's thoughts on the subject, the argument that I shall seek to support in this paper is that the basic normative premises on which the ideals of liberalism and democracy are based have clear implications for both of the issues noted, implications furthermore that are in harmony with each other. More specifically, I shall argue that both ideals are founded ultimately on the same normative premise, the principle of *individual sovereignty*, and that they can be interpreted as complementary applications of that premise.

2. Liberalism and Private Autonomy

When J.M. Buchanan (1995/96) identifies "the liberty and sovereignty of individuals" as the fundamental value premises of liberalism he thereby intends to indicate that i*ndividual liberty* and *individual sovereignty* should be regarded as distinguishable

[2] D. Samet and D. Schmeidler (2003:214). As the authors (ibid.: 213) note: "The liberal and the democratic principles dominate modern political thought. The first requires that decisions on certain matters rest with the individual and not with society. The second assigns the power of decision making to majorities."
[3] See also Hayek (1960: 164f.; 1967:161).

normative principles.[4] As I suppose, and as I shall explain in more detail below, it is the failure to carefully distinguish between the two principles and to realize that both are constitutive for a consistent liberal outlook at politics that has obfuscated the close relation between the ideals of liberalism and of democracy.

Advocates of liberalism have generally focused on the ideal of *individual liberty* as "freedom under the law" (Hayek 1960: 153), an ideal that is succinctly captured by the concept of *private autonomy*. This concept implies the notion of "an assured free sphere" (ibid.: 139) within which individuals are free to choose and to act, and to engage in voluntary exchange or cooperation with each other as equally free persons.[5] Understood as private autonomy individual liberty means, as Hayek (1960: 155) puts it, "that what we may do is not dependent on the approval of any person or authority and is limited only by the same abstract rules that apply equally to all."

Private autonomy is individual liberty *from* politics. It finds its limits where the domain of politics begins, i.e. the domain where individuals are not free to choose separately and individually but are subject to collective-political choice. Politics is, as Buchanan (1995/96: 260) notes, "by its nature … coercive; all members of a political unit must be subjected to the same decision."[6] It is this inherently coercive nature of politics that lets a liberalism that concentrates on the ideal of private autonomy naturally focus on the issue of how the political domain may be minimized in the sense of being limited to its essential functions. 'Private autonomy liberals' do not all agree on what should be counted among the essential functions that government is needed for, because of their focus on the issue of 'how much government,' though, they generally tend to pay little attention to the issue of how government, whatever its functions, should be organized. And they do the less so the fewer 'essential functions' they recognize. At the extreme end of the spectrum of liberal views on governmental functions are anarcho-libertarians who

[4] Referring to the title of his article, "Federalism and Individual Sovereignty," Buchanan (1995/96: 267) emphasizes that he deliberately used the term "Individual Sovereignty" rather than "Individual Liberty" in order to indicate the difference between, on the one side, individual liberty *from* political-collective action and individual sovereignty *in* political-collective action.

[5] Hayek (1960: 139): "(T)he 'rights' of the individual are the result of the recognition of such a private sphere." – "The recognition of property is clearly the first step in the delimitation of the private sphere which protects us against coercion" (ibid.: 140).

[6] Buchanan (1995/96: 264): "Political action, regardless of how decisions are made, involves choices that are made for, and coercively imposed on, all members of the relevant political community."

carry the goal of minimizing government to its seemingly logical conclusion.[7] As they do not recognize any legitimate role of government, they have nothing to say on the issue of how, from a liberal perspective, government should be organized.[8]

The limitations of a liberalism that does not address this issue become apparent as soon as one recognizes that there are preconditions for private autonomy to exist. Private autonomy means individual liberty within a framework of rules that must, somehow, be defined and enforced "by some authority that has the necessary power" (Hayek 1960:139). Individual liberty as private autonomy is constituted by, and at the same time limited by, an effectively enforced legal framework[9] or, more specifically, by the rules of *private* or *civil law* that constitute the "rules of the game" of the *Privatrechtsgesellschaft* (Boehm 1980; 1989), the *civil law society*.[10] The rules of civil law ensure the "compossibility" of the same liberty for everyone, and they protect the individual sphere of liberty from private encroachment and government intervention.

Private autonomy means autonomy of the individual *within the limits of the rules of law*, rules that define the content of property rights and that set limits to the freedom of contract. Since systems of private law do change over time and differ in the specific ways in which they define the content of property rights and set limits to the freedom of contract, what "private autonomy" specifically means varies over time and across legal

[7] I shall return for a critical comment on the anarcho-libertarian position below. For a critique see also e.g. D. Godefridi 2005 and R.G. Holcombe 2004. – M. Friedman's (1962: 25) expresses the prevailing liberal view on the issue of anarchism when he notes: "These then are the basic roles of government in a free society: to provide a means whereby we can modify the rules, to mediate differences among us on the meaning of the rules, and to enforce compliance with the rules … The need for government in these respects arises because absolute freedom is impossible. However attractive anarchy may be as a philosophy, it is not feasible in a world of imperfect men."

[8] While anarcho-libertarians otherwise like to draw on L. von Mises as their principal source of inspiration, their vision of a functioning social order without government does not find support in what Mises (1985: 35, 37, 39) had to say on this issue: "We call the social apparatus of compulsion and coercion that induces people to abide by the rules of life in society, the state: the rules according to which the state proceeds, law: and the organs with the responsibility of administering the apparatus of compulsion, government. … Liberalism is not anarchism. … The liberal understands quite clearly that … behind the rules of conduct whose observance is necessary to assure peaceful human cooperation must stand the threat of force … It is a grave misunderstanding to associate it (liberalism, V.V.) in any way with the idea of anarchism. For the liberal, the state is an absolute necessity."

[9] Hayek (1960: 144f.) speaks of "a private sphere delimited by general rules enforced by the state."

[10] In reference to Böhm's article on "Privatrechtsgesellschaft und Marktwirtschaft" ("Private Law Society and Market Economy") Hayek has approvingly noted that Böhm "described the liberal order very justly as the private law society" (Hayek 1967: 169).

systems.[11] The question, therefore, arises of which criterion ought to be used for evaluating the suitability or adequacy of potential alternative legal rules. Evidently such a criterion cannot be derived from the idea of private autonomy itself, because, as argued above, the notion of private autonomy has meaning only *relative* to a given system of rules and, thus, cannot be used as a standard against which the system of rules that define it can itself be judged.

As noted before, private autonomy is not only defined and limited by the rules of private or civil law it finds its limits as well at the demarcation line that separates the "private" from the "public" realm or, in other words, the *civil law society* from the *state* as the domain of collective-political choice. Since this demarcation line may also be drawn in different ways, the question arises again of which criterion should be used for judging where the line should be properly drawn. And here, too, the ideal of private autonomy cannot by itself provide such a criterion, even though, as I shall argue below, it does suggest the kind of criterion that, from a liberal perspective, should be applied to this issue.

3. Constitutional Liberalism and Individual Sovereignty

The essence of the liberal ideal of private autonomy is the notion that *voluntary agreement* among the parties involved should be the principal mode of social coordination. It implies that exchange transactions and cooperative ventures derive their legitimacy only from such voluntary agreement among the participants.[12] It is this very notion that legitimacy in social matters derives from the voluntary agreement among the participating individuals that must, as I suppose, be regarded as the fundamental norm on

[11] Hayek (1960: 229): "The decision to rely on voluntary contracts as the main instrument for organizing the relations between individuals does not determine what the specific content of the law of contract ought to be; and the recognition of the law of private property does not determine what exactly should be the content of this right in order that the market mechanism will work as effectively and beneficially as possible." – "Nor would it be desirable to have the particular contents of a man's private sphere fixed once and for all" (ibid.: 139). - See also Hayek (1948: 19): "But if our main conclusion is that an individualist order must rest on the enforcement of abstract principles rather than on the enforcement of specific orders, this still leaves open the question of the kind of general rules we want."

[12] It is in this sense that the *market order*, constituted by rules of private law, can be viewed as the paradigmatic case of a *liberal order*. A market is, in the ultimate analysis, nothing other than an institutionally secured arena for voluntary exchange (Vanberg 2001a). - In his seminal contribution to the research program of the Freiburg school of law and economics, "Privatrechtsgesellschaft und Marktwirtschaft" (see footnote 26 above), Franz Böhm (1980; 1989) has emphasized the twin-relation between *private law society* and *market economy*. – For more details see Vanberg 2001c.

which the ideal of liberalism is based. The liberal ideal of *private autonomy* specifies this norm with regard to the *internal functioning* of the private law society, i.e. within the context of a given framework of rules. In its more general interpretation, for which I use the term *individual sovereignty*, the notion of the legitimizing role of voluntary agreement can, however, not only provide us with a criterion for evaluating the legitimacy of the rules of private law that constitute private autonomy, but also with a criterion for judging the appropriateness of the demarcation line between the civil law society and the state. Looked at in this way the ideal of *private autonomy* is simply a specification of the more general normative principle of *individual sovereignty*, the principle that legitimacy in social matters, including the legitimacy of the rules of private law themselves, derives only and exclusively from voluntary agreement among the persons involved.[13]

The interpretation suggested here may draw support from J.M. Buchanan"s (1995/96) distinction between "individual liberty" and "individual sovereignty" that I quoted earlier in this paper, a distinction on which Buchanan comments: "It may be useful to clarify the distinction. What is the ultimate maximand when the individual considers the organization of the political structure? … (T)his maximand cannot be summarized as the maximization of (equal) individual liberty from political-collective action. … A more meaningful maximand is summarized as the maximization of (equal) individual sovereignty. This objective allows for the establishment of political-collective institutions, but implies that these institutions be organized so as to minimize political coercion of the individual. … So long as one's agreement to such political action is voluntary, the individual's sovereignty is protected *even though liberty is restricted*."[14]

If, as I suppose, the principle of individual sovereignty must be regarded as the fundamental normative premise of the liberal ideal, a consistent "liberalism" must be more than a "private law liberalism" or "free market liberalism." It must include a

[13] The notion that the principle of *individual sovereignty* is the normative foundation of the liberal ideal appears to be implied when Hayek (1972: 59) notes: "It is this recognition of the individual as the ultimate judge of his ends, the belief that, as far as possible his own views ought to govern his actions, that forms the essence of the individualist position."

[14] Buchanan (1995/96: 267f.; emphasis added).

constitutional liberalism,[15] a liberalism that views individual persons not only as *sovereigns* within the legal framework of the *private law society*, but draws attention to the fact that individuals must be respected no less as *sovereigns* at the antecedent, constitutional level of choice at which the "rules of the game" themselves are chosen. Just as voluntary agreement legitimizes social transactions and corporate arrangements *within* the private law society, voluntary agreement among the parties involved must also be considered the ultimate source of legitimacy of the legal framework within which individuals exercise their private autonomy. From the perspective of a constitutional liberalism the questions of what are the appropriate rules for a private law society and how the demarcation line between the civil society and the state should be drawn cannot be answered by recourse to criteria that are *external* to or independent of the preferences of the individuals concerned, but only in terms of what sovereign individuals voluntarily agree upon.[16] Constitutional liberalism is, in this sense, naturally 'democratic.'[17]

4. Constitutional Liberalism versus Anarcho-Libertarianism

In its *contractarian* approach to the issue of *constitutional choice* a constitutional liberalism[18] is in stark contrast to anarcho-libertarian views that, because of their denial of any legitimate role of collective-political choice, ignore the categorical distinction

[15] It is, in particular, J.M. Buchanan who has developed a generalized, and more consistent, liberal paradigm that includes the constitutional dimension of individual sovereignty. For a more detailed discussion of the notion of a *constitutional liberalism* and Buchanan's contribution to it see Vanberg 2001c.

[16] Buchanan (1999a: 288): "The justificatory foundation for a liberal social order lies, in my understanding, in the normative premise that individuals are the ultimate *sovereigns* in matters of social organization, that individuals are the beings who are entitled to choose the organizational-institutional structures under which they will live. In accordance with this premise, the legitimacy of social-organizational structures is to be judged against the voluntary agreement of those who are to live or are living under the arrangements that are judged. The central premise of *individuals as sovereigns* does allow for delegation of decision-making authority to agents, so long as it remains understood that individuals remain as *principals*. The premise denies legitimacy to all social-organizational arrangements that negate the role of individuals as either sovereigns or principals. On the other hand, the normative premise of individuals as sovereigns does not provide exclusive normative legitimacy to organizational structures that – as, in particular, market institutions – allow internally for the most extensive range of separate individual choice. Legitimacy must also be extended to 'choice-restricting' institutions so long as the participating individuals voluntarily choose to live under such regimes."

[17] Buchanan (1999b: 392): "(B)y adherence to the individualistic postulate … the whole of the constitutional economics research program rests squarely on a *democratic* foundation."

[18] Buchanan and Congleton (1998: 4): "The … contractarian conception of law and politics is based squarly in the rejection of any claim that the institutions and the policies that are good for the community are 'out there' waiting to be discovered by experts or anyone else. The rules for living together – the basic law and political structure – are, quite literally, made up or created in some participatory process of discussion, analysis, persuasion, and mutual agreement."

between the sub-constitutional and the constitutional level at which individuals may choose to cooperate. Or, more, specifically, they ignore the distinction between sub-constitutional choices that are made within a private law framework and constitutional choices that are made about how the framework itself is to be defined and enforced. In essence, their rejection of any role for government is based on the claim that private contracting among individual proprietors is sufficient to secure a functioning social order and that there are no problems of defining and enforcing law for which government would be needed or justified.[19] There is no place in the anarcho-libertarian scheme for a political-constitutional contract among individuals who establish among themselves a self-governing political community by which they organize the (re-)defining and enforcing of the 'rules of the game' under which they wish to live.

What allows anarcho-libertarians to ignore the issue of political-constitutional choice are two core assumptions on which their whole argument rests. First, the assumption that there are rights – so called 'natural rights' - that antecede and exist independently of any political organization,[20] such that a political process is neither needed nor authorized to define rights. Second, the assumption that enforcement of these pre-existing rights can be provided by competing private protection agencies without any need to rely on governments as territorial monopolists.[21] Both assumptions are subject to criticism.

There is, to be sure, a meaningful sense in which rights can be said to precede government, namely in the sense – explained by Hayek in numerous writings[22] – that long before people organized in political communities and began to deliberately shape the

[19] As H.-H. Hoppe (2001: 235f.), one of the most outspoken advocates of anarcho-liberalism, puts it: "Liberals will have to recognize that no government can be contractually justified … . That is, liberalism has to be transformed into the theory of private property anarchism (or a private law society) … . Private property anarchism is simply consistent liberalism; liberalism thought through to its ultimate conclusion, or liberalism restored to its original intent."

[20] Hoppe (2001: 226): "According to liberal doctrine, private property rights logically and temporally precede any government."

[21] Refering to von Mises' comments on the issue (see fn. 7 above) Hoppe (2001: 226) censures "liberals" for having concluded that the "indispensable task of maintaining law and order is the unique function of government." As Hoppe (ibid.) argues: "Whether this conclusion is correct or not hinges on the definition of government. It is correct if government simply means any individual or firm that provides protection and security services to a voluntary paying clientele of private property owners. However, … government possesses two unique characteristics. Unlike a normal firm, it possesses a compulsory territorial monopoly of jurisdiction (ultimate decisionmaking) and the right to tax. However, if one assumes *this* definition of government, then the liberal conclusion is false."

[22] For references see Vanberg 1994.

'rules of the game' under which they lived, rules of conduct had evolved that provided the foundation on which governmental enforcement and deliberate legislation were to build. But this uncontroversial observation is worlds apart from the claim that 'natural rights' exist 'out there' from which the rules that should govern human interaction now and here could be deduced as an exercise of logic, rules the enforcement of which could be safely left to private protection agencies.[23] Apart from other objections that could be raised against such claim, one obvious objection concerns the problems which arise where members of a community disagree on what the content of the supposed 'natural rights' is. Who is entitled, and on what grounds, to provide the 'authoritative' and binding interpretation, and by whom or how is it supposed to be enforced?[24] And what does legitimize, from a liberal perspective, the procedures – whatever they may be – that are employed to settle disputes? From the perspective of constitutional liberalism there is a clear answer to this question, namely that the ultimate source of legitimacy for whatever procedures are applied must be the voluntary agreement among the members of the respective community. This criterion of legitimacy is *internal* to the community of participants in the – explicit or implicit – constitutional contract. What do anarcho-libertarians suggest should be done in cases in which this internal criterion of legitimacy gets into conflict with what they mean to be able to deduce from 'external,' pre-existing ('natural') rights? They must either deny people the right to voluntarily choose the constitutional regimes under which they wish to live, thus coming into conflict with the ideal of voluntary choice, or give up the claim to possess a predefined, external standard for judging the legitimacy of socio-political arrangements.

According to the anarcho-libertarian argument it is the virtue of enforcement by private agencies that, in contrast to enforcement by monopoly-governments, it takes place in a competitive context where individuals are free to contract with their preferred agency. The objection to this image of a world where private protection agencies peacefully compete for freely choosing customers is that it presupposes what it is supposed to explain, namely the presence of conditions that insure the voluntariness of

[23] Hayek (1976: 60): "The evolutionary approach to law (and all other social institutions) which is here defended has as little to do with the rationalist theories of natural law as with legal positivism."
[24] As von Mises (1957: 49) has commented on this issue: "Thus the appeal to natural law does not settle the dispute. It merely substitutes dissent concerning the interpretation of natural law for dissenting judgments of value."

transactions carried out and contracts concluded among the participating agents. The effectively enforced framework of private law within which ordinary market transactions take place serves exactly this function. Yet, this private law framework within which the anarcho-libertarians presume the competition among competing private protection agencies to take place, cannot be established itself by the voluntary contracts that are concluded under its umbrella.[25] We surely need to distinguish here between two levels or kinds of contracts. In addition to the contracts that are concluded within the framework of a private law order, i.e. at the sub-constitutional level, there must be an explicit or implicit contract by which the framework itself is established or legitimized, a political-constitutional contract that binds a territorially defined community and that is to be enforced within the respective territory. Whatever the social arrangement may be through which such political-constitutional contracts are concluded and through which their enforcement is administered, it is, in effect, a government, whether it is so called or not.

With its deceptive simplicity and seeming logical rigor the libertarian "theory of private property anarchy" has the unfortunate effect of distracting attention from the issue that the liberal discourse on the role of government should rather focus on, namely how those matters that people need to decide on as territorially defined political communities can be organized in ways that are most compatible with the ideals of individual liberty and sovereignty. Instead of speculating about the logical feasibility of a world without government, liberal intellectual energies are better put into a comparative analysis of alternative political institutions, as they exist and as they might be realized.[26]

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[25] R.G. Holcombe (2004: 332) makes the same argument in his critique of the anarcho-libertarian position: "Economic theorists … make the assumption that market exchange arises from mutual agreement, without theft or fraud. In the analysis of protection firms, this assumption of voluntary exchange amounts to an assumption that the industry's output is already being produced – as a prerequisite for showing that it can be produced by the market!"

[26] Holcombe (2004: 338) notes in the same spirit: "A libertarian analysis of government must go beyond the issue of whether government should exist. Some governments are more libertarian than others, and it is worth studying how government institutions can be designed to minimize their negative impact on liberty." – Godefridi (2005: 134) comments on the intricacies of libertarian aprioristic reasoning: "Now why do these anarcho-libertarians entangle themselves in these nasty intellectual morasses where they are forced to sustain the unsustainable? They have a reason for doing so …: to elude the political question. Indeed, if the whole body of law cannot be derived *a priori* from basic principles, then *someone will have to determine the content of the rules*. … This brings us to the very essence of the political question: who will make the rules? The scope of the possible answers is finite: a self-chosen legislator (a dictator, in other words), an oligarchy, or a limited or unlimited democracy, and their different variants."

While anarcho-libertarians claim that a 'consistent liberalism' must adopt their vision I argue here that a consistent liberalism, i.e. a liberalism that consistently adheres to the principle of individual sovereignty, must regard as "legitimate" at the political-constitutional level no less than at the sub-constitutional level of market choices whatever the individuals involved voluntarily agree upon. To be sure, the test of "voluntariness" cannot be quite the same at both levels, at the level of private autonomy and at the level of constitutional choice. At the level of private autonomy the rules of the game imply a definition of what counts as "voluntary," a definition that can be adjudicated. At the constitutional level the relevant meaning of "voluntary contracting" is clearly more difficult to specify. This cannot be an excuse, however, for ignoring the role that a consistent liberalism must assign to the principle of individual sovereignty at this level no less than at the level of private autonomy. The challenge to a consistent liberalism is to give an answer to the question of how, in recognition of the factual difficulties that exist at this level, voluntariness in constitutional contracting can be defined in the most meaningful way, and be secured most effectively, given the inherent constraints that are unavoidably present at this level.

Adopting the perspective of constitutional liberalism does not mean to ignore the fact that people may well have erroneous beliefs about the working properties of rules and may, therefore, come to agree on rules that work in fact to their disadvantage. It means, however, to acknowledge that this problem can surely not be a legitimate reason for not respecting the right of sovereign individuals voluntarily to choose the "rules of the game" under which they wish to live. Recognizing the problem of "constitutional ignorance" can only provide an argument for taking adequate precautions in the choice of rules that govern the process in which the rules for the "social games" are chosen.[27] Surely, the rules of the civil law society as well as the demarcation line between the "private" and the "public" domain should be prudently chosen, informed by adequate knowledge of the actual working properties of alternative constitutional regimes. Yet, as far as the legitimacy of constitutional regimes is concerned there is simply not a substitute for the voluntary approval of the persons involved. Constitutional recommendations to sovereign individuals can, in the last resort, be no more than

[27] For a more detailed discussion see Vanberg and Buchanan 1994.

conjectures for how they may advance their common interests. And there can be, of course, no other ultimate test for what serves their common interests than their voluntary agreement.[28]

5. F.A. Hayek on Democracy and Liberalism

The relationship of liberalism and democracy is one of the central themes in F.A. Hayek's works. *The Constitution of Liberty (1971)* devotes special attention to it; it is at the center of the third volume of his trilogy *Law, Legislation, and Liberty (1979),* and it is the principal subject of a series of articles published in the 1950s, 60s, and 70s. According to Hayek, liberalism is "the same as the demand for the rule of law in the classical sense of the term," (1967: 165),[29] i.e. as the demand to limit the coercive power of government to the enforcement of universal rules that apply to everyone in the same manner, "protecting a recognizable private domain of individuals" (ibid.: 162).[30] Hayek emphasizes in particular that the liberal principle is based on the ideal of a non-discriminating, privilege-free order.[31] As he notes: "The basic conception of classical liberalism, which alone can make decent and impartial government possible, is that government must *regard* all people as equal, however unequal they may in fact be, and that in whatever manner the government restrains (or assists) the action of one, so it must, under the same abstract rules, restrain (or assist) the actions of all others" (1979: 142).[32]

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[28] Rawls (1963: 112): „If rational individuals have willingly and knowingly joined a cooperative scheme …, and if they persist in their willing cooperation and have no wish to retract or no complaints to make, then that scheme is fair or at least not unfair."

[29] Citations from Hayek's work will be identified in the text only by the year of publication, without the author's name.

[30] Hayek (1978b: 109): "Today it is rarely understood that the limitation of all coercion to the enforcement of general rules of just conduct was the fundamental principle of classical liberalism, or, I would almost say, its definition of liberty." – See also Hayek (1948: 18f.; 1960: 192).

[31] Hayek (1972: ix f.): "The essence of the liberal position, however, is the denial of all privilege if privilege is understood in its proper and original meaning of the state granting and protecting rights to some which are not available on equal terms to others." - Hayek (1948: 30): "Individualism is profoundly opposed to all prescriptive privilege, to all protection, by law or force, of any rights not based on rules equally applicable to all persons."- See also Hayek (1960: 164f.). – W.H. Hutt (1975: 29) refers to the "non-discrimination rule" as "the ultimate rationale of classic liberalism."

[32] Hayek (1978c: 141): "Liberalism merely demands that so far as the state determines the conditions under which the individuals act it must do so according to the same formal rules for all. It is opposed to all legal privilege, to any enforcement by government of specific advantages on some which it does not offer to all." – As Hayek emphasizes, the liberal ideal does not rule out that "government may render…, by the use of the means placed at its disposal, many services which involve no coercion except for raising of the means by taxation" (1978c:144). - See also Hayek (1967: 162, 165-66, 177).

"By the insistence on a law which is the same for all and the consequent opposition to all legal privilege" (1978b: 142), liberalism was, as Hayek explains, originally closely connected with the democratic movement and its demand for equal political participation rights.[33] And he adds that in "the struggle for constitutional government in the nineteenth century, the liberal and the democratic movements indeed were often undistinguishable" (ibid.). In Hayek's account the ideals of liberalism and democracy came only to appear to be in conflict with each other when the victory of democracy over authoritarian regimes lead to the false belief that "the safeguards men once painfully devised to prevent abuse of government power are all unnecessary once that power has been placed in the hands of the majority of the people" (1978c: 96).[34] It was this erroneous belief, he argues, that fostered a perception of democracy which he criticizes as "doctrinaire" and "dogmatic" (1960: 105f.), a perception that regards "current majority opinion as the only criterion of the legitimacy of the powers of government" (1978c: 143), and according to which "this same majority must also be entitled to determine what it is competent to do" (1960:107).

It is not the original ideal of democracy but its currently predominant interpretation that Hayek blames for promoting "the particular forms of democratic organisation, now regarded as the only possible form of democracy" (1978b: 107), a form that he describes as *unlimited democracy*, and which he charges with producing "a progressive expansion of government control of economic life" (ibid.). Hayek expressly does not want his critique of the democratic contemporary institutions to be understood as a critique of the "basic ideal of democracy" (1979: 1)[35] but instead as a plea for

[33] Hayek (1960: 103): "Equality before the law leads to the demand that all men should also have the same share in making the law. This is the point where traditional liberalism and the democratic movement meet."
[34] Hayek (1979: 3): "The tragic illusion was that the adoption of democratic procedures made it possible to dispense with all other limitations on governmental powers." – Hayek (ibid.: 128): "But the endeavour to contain the powers of government was almost inadvertently abandoned when it came to be mistakenly believed that democratic control of the exercise of power provided a sufficient safeguard against its excessive growth." - Cf. also Hayek (1960: 403f.; 1978d: 152f.).
[35] Hayek (1978d: 152): "The concept of democracy has one meaning – I believe the true and original meaning – for which I hold it a high value well worth fighting for." With a critical eye on "the anti-democratic strain of conservatism" (1960: 403) Hayek notes, "But I believe that the conservatives deceive themselves when they blame the evils of our time on democracy. The chief evil is unlimited government…The powers which modern democracy possesses would be even more intolerable in the hands of some small elite" (ibid.).

institutional reform towards an effectively constrained democracy.[36] He insists that we must distinguish between the "basic principle of democracy" (ibid.: 4), namely that all political power originates from the people (2001: 84), and the now prevailing institutional realization of this principle, namely *unrestricted* majority rule.

The liberal ideal of "freedom under the law" (1960: 153) and the principle, derived from this ideal, "of the necessary limitation of all power by requiring the legislature to commit itself to general rules" (1978b: 108)[37] are, in his view, not threatened by the ideal of democracy as such but solely by the erroneous belief "that this omnipotence of the representative legislature is a necessary attribute of democracy" (ibid.).[38] The target of his objections is not the principle of the *sovereignty of the people*, understood as the principle "that whatever power there is should be in the hands of the people" (1979: 33). Rather, what he objects to is the "constructivist superstition of sovereignty" (ibid.), the belief that the representative legislature operating under majority rule should enjoy unlimited power.[39]

6. Democracy: Majority Rule and Citizen Sovereignty

While he explicitly distinguishes between the "true content of the democratic ideal" (1979: 5) and "the particular institutions which have long been accepted as its embodiment" (ibid.: 1f.), Hayek is not entirely unambiguous about what he regards as part of the 'true ideal' and what as part of 'the particular institutional embodiment'. In particular his comments on the status of the majority rule[40] are somewhat ambiguous in this regard. In some of his comments on this issue he seems to imply that the majority principle is not an integral part of the democratic ideal itself, but a part of its institutional embodiment. This reading is suggested, for instance, when he notes that, by contrast to its

[36] Hayek (1960: 403): "But it is not democracy but unlimited government that is objectionable, and I do not see why the people should not learn to limit the scope of majority rule as well as that of any other form of government." – Cf. also Hayek (1979: 11, 98).
[37] In this sense, Hayek notes (2002: 47), the liberal ideal of '*the rule of law*' must be understood as '*a rule for the legislator*.'
[38] Hayek (1978c: 143): "Liberalism is thus incompatible with unlimited democracy, just as it is incompatible with all other forms of unlimited government. It presupposes the limitation of powers even of the representatives of the majority by requiring a commitment to principles … so as to effectively confine legislation." – Cf. also Hayek (1979: 101,103).
[39] Cf. Hayek (1960: 103f.; 106f.; 1978b: 142f.)
[40] Hayek (1948: 29): "(D)emocracy is founded on the convention that the majority view decides on common action."

"wider and vaguer" meaning the word "democracy" is also "used strictly to describe a method of government – namely majority rule" (1960: 103). By contrast, the opposite view, namely that majority is part of the core of the democratic ideal, seems to be implied when Hayek asserts: "If it could be justly contended that the existing institutions produce results which have been willed or approved by a majority, the believer in the basic principle of democracy would of course have to accept them" (1979: 4).[41]

In *The Calculus of Consent* (1962) James M. Buchanan and Gordon Tullock have detailed the reasons why, from an individualistic perspective, the majority principle should be regarded as a particular institutional implementation of the ideal of democracy, but must not be confused with the fundamental ideal itself. According to their argument, in a free society, as in any association of free people, the majority rule cannot be regarded as an *a priori legitimate* or *self-legitimizing* decision rule. Rather, it must be regarded as a rule that can derive its legitimacy solely from the fact that the members-citizens of a polity or association *voluntarily agree,* explicitly or implicitly, to decide on their common affairs according to this rule.[42] In other words, as an institutional feature of democracy the majority principle is indirectly legitimized by the more fundamental normative principle that, in associations of free individuals, *voluntary consent* among the participants is the ultimate source of legitimacy.

Implicit in Buchanan and Tullock's "contractarian exercise of legitimization or justification for politics" (Buchanan and Congleton 1998: 18) is the concept of "politics as exchange."[43] This is the notion that, as in ordinary market exchange, it is the prospect of mutual gains that provides the rationale for free individuals to engage in collective political action and that, as in ordinary market exchange, voluntary agreement among the participants is the relevant test of mutual advantage.[44] It is the voluntary exchange of

[41] See also Hayek (1979: 6): "If all coercive power is to rest on the opinion of the majority, then it should also not extend further than the majority can genuinely agree."
[42] In their chapter on "A Generalized Economic Theory of Constitutions" J.M Buchanan and G. Tullock (1962: 63-84) discuss the prudential reasons that members-citizens of polities or associations have for agreeing to adopt the majority rule.
[43] Buchanan (1999c: 461): "Politics is a structure of complex exchange among individuals, a structure within which persons seek to secure collectively their own privately defined objectives that cannot be efficiently secured through simple market exchanges."
[44] Buchanan and Tullock (1962: 19): "The market and the State are both devices through which cooperation is organized and made possible. … At base, political and collective action under the individualistic view of the State is much the same. Two or more individuals find it mutually advantageous to join forces to

commitments at the constitutional level that, in terms of the "politics as exchange" paradigm, provides legitimacy to the coercive elements that are necessarily present in collective political action.[45] In essence, the exchange perspective on politics is equivalent to the notion of a democratic polity as a *citizens' co-operative*, a notion that John Rawls' (1971: 84) employs when he speaks of a democratic society "as a cooperative venture for mutual advantage." In analogy to ordinary co-operative enterprises or voluntary associations, democratic polities are viewed as member-owned organizations. The citizens as members of the co-operative political enterprise jointly "own" the polity as a territorial organization. They are the "sovereigns" with whom the ultimate authority to decide on the polity's affairs resides.[46] To be sure, drawing an analogy between democratic polities and "ordinary" co-operative enterprises or voluntary associations is not meant to deny the differences that separate the two kinds of associations. Among the distinguishing features of polities is, in particular, the fact that – apart from their *territorial* nature – they are *intergenerational* organizations in the sense that new members are typically "born into the polity" rather then admitted by an explicit act of voluntary entry. Differences like this can, however, not alter the fact that for the democratic state no less than for any other co-operative enterprise the consent of its members is the crucial test for the ultimate legitimacy of its *constitution*, i.e. of the rules that determine how decisions on common affairs are to be made.[47]

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accomplish certain common purposes." – Buchanan (1995/96: 260): "Normatively, the political structure should complement the market in the sense that the objective for its operation is the generation of results that are valued by citizens."

[45] Buchanan (1999b: 389): "In agreeing to be governed, explicitly or implicitly, the individual exchanges his own liberty with others who similarly give up liberties in exchange for the benefits offered by a regime characterized by behavioral limits." – Buchanan (1999c: 461): "Without some model of exchange, no coercion of the individual by the state is consistent with the individualistic value norm on which a liberal order is grounded."

[46] Rawls (1999: 577) describes "democratic citizenship in a constitutional democracy" as "a relation of free and equal citizens who exercise ultimate political power as a collective body." – In similar terms J. Habermas (1996: 278) characterizes the democratic state as an "association of free and equal citizens (Assoziation freier und gleicher Rechtsgenossen)" and as "self-government of free and equal persons (Selbstherrschaft von Freien und Gleichen)" (ibid.: 290).

[47] V. Ostrom (1997: 280) points out that the American federalists in developing their covenantal concepts of a self-governing polity "drew on prior experiences in constituting free cities, monastic orders, religious congregations, merchant societies, craft guilds, associations among peasants, markets, and other patterns of human association."

The view of the democratic state as a member-owned, co-operative enterprise or, in short, as a *citizens' co-operative*[48] allows for a clear distinction between, on the one hand, the issue of what must be regarded as the *fundamental ideal* of democracy, and, on the other hand, the issue of which procedural rules or "*institutional embodiments*" can be expected, under real-world constraints, to serve this ideal best. The fundamental ideal of democracy must surely be seen in the normative principle that a democratic polity, as "a cooperative venture for mutual advantage," ought to serve its members *common interests*, i.e. the interests that *all* its members have in common. Accordingly, as a *matter of principle*, democratic politics should be organized in ways that best insure responsiveness to citizens' common interests. This ideal can, I submit, properly be called *citizen sovereignty.* By contrast, identifying the specific set of institutions that are best suited to serve this ideal is a *matter of prudence*. Actual and potential alternative democratic constitutions can, as institutional embodiments of the ideal of citizen sovereignty, be compared in terms of how well they are suited to promote citizens' common interests. In other words, they can be compared in terms of their capability to ensure, as far as this can be ensured at all at the level of collective decision making, that only such decisions and actions are taken that serve the interests of all citizens, and that decisions and actions are prohibited that run counter to the interests of all or part of the citizenry.

In requiring that the ultimate source of democratic legitimacy must be located in citizens' voluntary agreement to the polity's constitution, the principle of *citizen sovereignty* implies, as a still more fundamental normative premise, the ideal of *individual sovereignty*, i.e. the tenet that the individuals are to be respected as the ultimate judges in their own affairs.[49] In other words, it is based on the principle of normative individualism according to which the ultimate test of 'social desirability' lies

[48] I have discussed the concept of the democratic state as a citizens' co-operative – in German 'Bürgergenossenschaft' - in more detail in Vanberg (2000: 267ff.). On the use of the term 'Genossenschaft' or 'co-operative' as label for a democratic community V. Ostrom (1991: 10) notes: "German-speaking Swiss still refer to confederation as *Eidgenossenschaft*. *Genossenschaft* means association or comradeship. *Eid* refers to oath. An *Eidgenossenschaft* is an association bound together in a special commitment expressed by reciprocal oath. A Swiss citizen is referred to as an *Eidgenosse*, that is, a covenantor – a comrade bound by oath. The source of authority resides, then, in a covenant that each is bound to uphold in governing relationships with another."

[49] A similar notion of individual sovereignty appears to be implied in Rawls' (1963: 124) remark: "The peculiar feature of the concept of justice is that it treats each person as an equal sovereign, as it were, and requires unanimous acknowledgement from a certain original position of equal liberty."

in the informed voluntary agreement among the persons involved. As Buchanan and Tullock have shown, the principle of citizen sovereignty does in no way rule out that citizens may, for prudential reasons, voluntarily agree on abandoning unanimity as a *decision rule* and on deciding, instead, their ongoing common affairs by majority rule and even by delegating decision making authority to representatives. It is important, therefore, to distinguish carefully between unanimity as the *ultimate legitimizing principle* in democratic polities and unanimity as a *decision rule* for ongoing policy choices. The first is, in light of the fundamental ideal of democracy, a matter of principle, whether the second is practiced or not is a matter of prudence.[50]

The above interpretation of the majority rule as a procedural principle that is secondary to the more fundamental democratic ideal of citizen sovereignty is, as I suppose, fully compatible with the general thrust of Hayek's outlook at the ideal of democracy and its institutional "embodiments." Hayek emphasizes again and again that all democratic power is based on "the consent of the people" (1979: 6),[51] that legitimacy rests "in the last resort on the approval by the people at large of certain fundamental principles underlying and limiting all government" (ibid.: 35), and that "the power of the majority ultimately derives from, and is limited by, the principles which the minorities also accept" (1960: 107).[52]

[50] Rawls (1963: 112) seems to draw a similar distinction between matters of principle and matters of prudence when he says about the "principle of constitutional liberty": "In view of this principle, which may be referred to as the principle of free association, an account of the concept of justice need not pass judgment on those forms of cooperation in which rational individuals are willing to engage from a position of equal liberty. In this way, … by allowing a liberty to set up cooperative schemes and other associations which may be freely joined, the free decisions of individuals may be left to determine the form of institutions (so far as the concept of justice applies)."

[51] With regard to the issue of how the power of the representative assembly in a democracy may be limited Hayek (1979: 3) notes: "Its power may be limited, not by another superior 'will' but by the consent of the people on which all power and the coherence of the state rests." – See also (ibid.: 4): "It is allegiance which creates power and the power thus created extends only so far as it has been extended by the consent of the people."

[52] Hayek (1960: 106): „To him (the liberal V.V.) it is not from a mere act of will of the momentary majority but from a wider agreement on common principles that a majority decision derives its authority." – Hayek (1979: 6): "The ultimate justification of the conferment of a power to coerce is that such a power is required if a viable order is to be maintained, and that all have therefore an interest in the existence of such a power."

7. Individual Sovereignty: The Normative Foundation Of Liberalism and Democracy

In the previous section I have argued that a distinction should be made between two concepts of democracy, namely between the common definition of *democracy as majority rule* and the "generic" definition of *democracy as citizen sovereignty*. I have argued that it is not the principle of majority rule but the norm of citizen sovereignty that captures the *fundamental ideal* of democracy. The majority principle represents a particular *institutional feature* of democracy that "sovereign citizens" have prudential reasons to adopt, but that is not itself an essential ingredient of the fundamental ideal. Earlier, in section 3 I had argued that, in a quite similar way, a distinction can be drawn between two concepts of liberalism or between two readings of the *ideal of liberalism*, namely, on the one hand, as the ideal of *individual liberty* in the sense of "*private autonomy*" (Privatautonomie) and, on the other hand, as the ideal of *individual sovereignty*. Both distinctions are in need of further specification.

In contrasting the democratic principles of majority rule and citizen sovereignty on the one side and the liberal principles of private autonomy and individual sovereignty on the other I made it appear as if both distinctions are at the same level of generality. This is, however, not quite correct. A more accurate analysis must, as I would like to suggest, distinguish between three levels at which liberalism and democracy can be compared, namely the level of their *"institutional embodiments,"* the level of their *principal focus*, and the level of their *underlying normative premise*. In terms of this three-level-distinction democracy can be characterized by *majority rule* as part of its "institutional embodiment," by *citizen sovereignty* as its principal focus, and by *individual sovereignty* as its underlying normative premise, while liberalism can be characterized, in reverse order, by *individual sovereignty* as its underlying normative premise, by *private autonomy* as its principal focus, while its "institutional embodiment" are the *specific systems of rules that constitute existing private law systems and market economies*. The matrix below summarizes this threefold classification.

In terms of their underlying normative premise democracy and liberalism can be said to be equally based on the principle of individual sovereignty.[53] In terms of their principal ideals, namely citizen sovereignty and private autonomy, they can be said to complement each other in the sense explained above. It is at the level of their respective institutional embodiments that liberalism and democracy have come to appear as different and even conflicting concepts. Yet, this is the essential message of my argument, the particular institutional embodiments of the ideals of liberalism and democracy should not be confused with the ideals themselves. Nor should the apparent differences in their institutional embodiments distract attention from the fact that their principal ideals are rooted in the same fundamental normative premise.

	Underlying Normative Premise	**Principal Focus**	**Institutional Embodiment**
Democracy	Individual Sovereignty	Citizen Sovereignty	Majority Rule and Other Institutions of Democracy
Liberalism	Individual Sovereignty	Private Autonomy	Specific Systems of Private Law and of Market Institutions

An implication of the above "refined" distinction between different levels at which the ideals of liberalism and democracy can be compared is that, in the case of liberalism no less than in the case of democracy, the choice of their respective institutional embodiments should be regarded as a *matter of prudence* rather than a *matter of principle*. The question of what specific democratic procedures and institutions promise

[53] Hayek (1948: 29): "True individualism not only believes in democracy but can claim that democratic ideals spring from the basic principles of individualism." – In his early treatise on *Socialism* L. von Mises emphasized the correspondence between the liberal principle of "consumers' democracy" (1981: 11) and "political democracy," arguing: "Democracy is self-government of the people; it is autonomy. … Political democracy necessarily follows from Liberalism" (ibid.: 63, 65).

to serve the ideal of citizen sovereignty best is a factual matter. It is not pre-answered by the fundamental ideal of democracy itself, but is a matter of prudent institutional choice. Likewise, the question of how exactly the rules of the private law society should be defined, and where specifically the demarcation line between the "private" and the "public" realm ought to be drawn, is not pre-answered by the fundamental ideal of liberalism. It is a matter of prudent constitutional choice of sovereign individuals.

When Hayek argues that "the problem of whether or not it is desirable to extend collective control must be decided on other grounds than the principle of democracy itself" (1960: 106) this can not be meant to imply that liberalism can offer a criterion for determining the appropriate demarcation line between the civil law society and the state that is external to, or independent of, the interests and preferences of the individuals concerned. In the context in which the quoted statement appears the term "principle of democracy" clearly is not meant in reference to the fundamental democratic ideal of *citizens' sovereignty*, but in reference to the *majority principle* as a particular institutional feature of democracy.[54] Yet, a consistent advocate of the democratic ideal of citizen sovereignty would have to agree no less that it is not the majority rule per se, but only the voluntary consent of the persons involved that provides the ultimate measuring rod for what may be regarded as "the desirable extent of collective control." The logic of both ideals, of the liberal ideal of individual sovereignty and of the democratic ideal of citizen sovereignty, cannot but lead to the same conclusion, namely that, ultimately, there can be no other criterion for determining the desirable demarcation line between the private and the public sphere than voluntary agreement among the individuals concerned. Likewise, the two ideals must lead to the same conclusion in regard to the question of how the content of the rules of civil law and, by implication, of private autonomy should be defined, namely that, here too, voluntary agreement is the ultimate source of legitimacy.

8. The Liberal and Democratic Ideal of a Privilege-Free Order

Hayek's critique of democracy in its prevailing institutional form centers around the charge that the absence of effective limitations to majority rule inevitably results in a

[54] In the same context Hayek (1960: 106) notes: "While the dogmatic democrat regards it as desirable that as many issues as possible be decided by majority vote, the liberal believes that there are definite limits to the range of questions which should be thus decided."

policy that, instead of serving the common interests of the citizenry, gets entrapped in what one may justly call the *dilemma of privilege granting* or, in the terminology of public choice theory, the rent-seeking dilemma.[55] It is, as Hayek argues, the very lack of effective limitations on its rule that forces the presently governing majority, in order to stay in power, to grant privileges to those groups on whose support it depends.[56] It is this very fact that, according to Hayek, presents the principal threat to liberty, i.e. the fact "that unlimited democracy will abandon liberal principles in favor of discriminatory measures benefiting the various groups supporting the majority" (1978c: 143).[57]

The granting of privileges to some at the expense of other members of the polity is, however, not only in evident conflict with the liberal principle of non-discrimination, it is equally in conflict with the ideal of *citizen sovereignty* as the fundamental normative principle of democracy as a *citizens' co-operative,* as a "cooperative venture for mutual advantage" (Rawls). In this sense, Hayek's liberal critique of unlimited democracy can be said to imply that the absence of effective limits to the power of majorities not only violates liberal ideals but is in conflict with the fundamental democratic ideal as well.[58] Instead of serving the *common* interests of all members of the citizens' co-operative an unlimited democracy is bound to become an instrument in the service of special interests.[59]

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[55] Buchanan and Congleton (1998: 43): „Democracy, as such, loses its raison d'étre if politics … becomes, and is seen to become, nothing more than a means through which one coalition of persons (groups) succeeds in extracting value from another coalition." – "Majority coalitions must be restricted in their authority to advance the interests of some groups differentially at the costs of other groups" (ibid.: 125f.).

[56] Hayek (1979: 128): "(T)he very omnipotence conferred on democratic representative assemblies exposes them to irresistible pressure to use their power for the benefit of special interests, a pressure a majority with unlimited power cannot resist if it is to remain a majority. This development can be prevented only by depriving the governing majority of the power to grant discriminatory benefits to groups or individuals." – "An omnipotent sovereign parliament, not confined to laying down general rules, means that we have … a government which … must maintain itself by handing out special favours to particular groups" (ibid.: 102).

[57] Hayek (1978c: 143): "Thus, though the consistent application of liberal principles leads to democracy, democracy will preserve liberalism only if, and so long as, the majority refrains from using its powers to confer on its supporters special privileges which cannot be similarly offered to all citizens." - Hayek (1978b: 110): "Once such discrimination is recognized as legitimate, all the safeguards of individual freedom of the liberal tradition are gone."

[58] Commenting on Rousseau's and Kant's concepts of democracy Habermas (1992: 611) says about the principle of popular sovereignty („Volkssouveränität"): „Der vereinigte Wille der Staatsbürger ist, da er sich nur in der Form allgemeiner und abstrakter Gesetze äußern kann, per se zu einer Operation genötigt, die alle nicht-verallgemeinerungsfähigen Interessen ausschließt und nur solche Regelungen zulässt, die allen gleiche Freiheiten garantieren."

[59] Hayek (1978a: 96): "There is no reason whatever to expect that an omnipotent democratic government will always serve the general rather than particular interests. Democratic government free to benefit

To critics who accuse modern democracy for being a "mass democracy" Hayek (1979: 99) responds: "But if democratic government were really bound to what the masses agree upon there would be little to object to." What, in his view, deserves to be rightly criticized is, instead, the fact that what is called "the will of the majority" has in reality little resemblance to what might justly be called the "common will" (1979: 1). The so-called "will of the majority" is, so Hayek's verdict, "really an artifact of the existing institutions" (1978b: 108), of institutions that create conditions under which "even a statesman wholly devoted to the common interest of all citizens will be under the constant necessity of satisfying special interests" (ibid).

In the sense explained, Hayek's demand that the power of the majority must be limited by general rules does not only reflect the liberal ideal of safeguarding individual freedom, it can be argued to be equally in line with the democratic ideal of safeguarding citizen sovereignty. This argument is indeed implied when Hayek points out that effectively denying government and legislator the power to grant privileges is not only an essential means for securing individual liberty, but also a pre-condition for "the power of the state to be freed up again for those tasks that are in fact in the common interest."[60]

To be sure, as Hayek (1960: 154f) recognizes, depriving government and legislator of the power to grant privileges does not eliminate every threat to individual liberty. Yet, so he argues, even though liberty may also be severely limited by general rules that are equally applicable to all, an important "primary precaution" against this threat is provided by the requirement "that the rules must apply to those who lay them down and those who apply them – that is to the government as well as to the governed – and that nobody has the power to grant exceptions" (ibid.: 155).[61] In Hayek's account, to limit the power of government and legislator in such manner does not mean to weaken the effective power of the democratic state but does, on the contrary, strengthen its ability

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particular groups is bound to be dominated by coalitions of organized interests, rather than serve the general interest in the classical sense of 'common right and justice, excluding all partial or private interest.'"

[60] Hayek (2001: 87; translated by V.V.).

[61] Hayek (1960: 155) adds: "If all that is prohibited and enjoined is prohibited and enjoined for all without exception (unless such exception follows from another general rule) and if even authority has no special powers except that of enforcing the law, little that anybody may reasonably wish to do is likely to be prohibited." – Hayek does not ignore the problem that it may not always be obvious whether rules are discriminating or not and that, in this regard, workable criteria are needed. For a discussion of this issue see Hayek (1960: 153f.). – See also Hayek (2003: 171).

to devote its powers to its true task, namely to advance the *common* interests of its citizens. "The reason is," as he notes, "that democratic government, if nominally omnipotent, becomes as a result of its unlimited powers exceedingly weak, the playball of all the separate interests it has to satisfy to secure majority support" (1979: 99).[62]

What is at stake here is not a demand to impose, as an 'external' constraint, preconceived "liberal" principles on how sovereign citizens of democratic polities are to govern their own affairs. Rather, the purpose is to point to the need to submit the democratic decision making process to rules that promise to serve the citizens' *common* interests.[63] In other words, the demand for constitutional constraints on government power can be made on behalf of the democratic ideal of citizen sovereignty no less than on behalf of the liberal ideal of securing individual liberty. Or, as Hayek puts it (1960: 115): "The liberal believes that the limits that he wants democracy to impose upon itself are also the limits within which it can work effectively and within which the majority can truly direct and control the actions of government."

[62] Hayek (2001: 87; translated by V.V.): „In a democracy a state with unlimited powers is necessarily a weak state, dependent upon interest groups that will raise their demands exactly because the state has the power to satisfy them, and the government must satisfy if it wants to maintain a governing majority. Such a state will soon be an ineffective state that is forced to buy agreement to its policies through bribing interest groups." - It is, as Hayek asserts (2001: 85; translated by V.V.), only "an apparent paradox that the greater the legal powers of the highest bodies of the state are, the weaker they are in truth. The reason is very simple. A representative body that can legally grant privileges is forced to do so." – On this issue see also Hayek 1978b: 107f.; 1978d: 157. – The founders of the Freiburg School of Ordoliberalism (see Vanberg 2001c), Walter Eucken and Franz Böhm, argued likewise that the seemingly 'strong' interventionist state is in fact a weak state, "a plaything in the hands of interest groups" (Eucken 1990: 326: Böhm 1980: 258), and they used the term 'strong state' as a label for a constitutionally constrained state that is unable to serve the demands of interest groups for special treatment. As Böhm (1989: 61; 1980: 148) put it: "The situation in a private law society which is combined with a democratically structured constitutional state favors the realization of a social structure which makes the attempt by social groups to exploit other social groups a more and more hopeless undertaking."

[63] That in his view the ideals of democracy and liberalism are intimately related, Hayek indicates when he writes: "But while ... it seems almost certain that unlimited democracy will abandon liberal principles in favor of discriminating measures benefiting the various groups supporting the majority it is also doubtful whether in the long run democracy can preserve itself if it abandons liberal principles. … It is therefore not unlikely that the abandonment of liberalism by democracy will in the long run also lead to the disappearance of democracy" (1978c: 143f.). – On this issue von Mises (1981: 64f.) has noted: "Grave injury has been done to the concept of democracy by those who … conceived it as limitless rule of the volonté générale (general will). … The conflicts which arise out of this misconception show that only within the framework of Liberalism does democracy fulfill a social function. Democracy without Liberalism is a hollow form."

9. Improving Democracy: Hayek's Proposal for Institutional Reform

"Many of the gravest defects of contemporary government, widely recognized and deplored but believed to be inevitable consequences of democracy, are in fact the consequences only of the unlimited character of present democracy" (Hayek 1979: 143). In thus summarizing his own diagnosis of the deficiencies of contemporary democracy Hayek points out the direction that institutional reforms must take if democracy is not only to safeguard the liberal ideal of individual liberty but also to live up to its own ideal of citizen sovereignty. According to what has been argued above, the main focus of such reforms must be provisions that aim at preventing discriminatory politics by restricting the power of government and legislator to grant special privileges.[64]

Hayek's own proposal for reforming the institutions of democracy is explicitly aimed at this goal. It can be read as a recommendation to the citizens of democratic polities for how they may improve the capacity of the democratic decision making process to advance their genuine *common interests* and to limit the scope for a policy of privilege granting that can only work to their mutual detriment.[65] In Hayek's account, the principal defect in the prevailing institutional structure of democracy must be seen in the fact that one and the same representative body, the parliament, has been entrusted with two fundamentally different tasks. The one task is making the general laws on which the democratic society is based, including the laws for the "private realm," i.e. the rules of the private law society, as well as the laws for the "public realm," i.e. the rules of politics. And the other task is to monitor and direct the day-to-day activities of the current government.[66] As Hayek argues, the inevitable effect of the bundling of these two tasks in

[64] In the concluding remarks to a proposal for constitutional reform that he was invited to make Buchanan (2005) notes: "(P)erhaps the Hayekian requirement for political nondiscrimination seems the most inclusive. … If all governmental action must conform to the generality norm, how much regulation could exist?" – Buchanan (1992) discusses the general issue of "How Can Constitutions Be Designed So That Politicians Who Seek To Serve ‚Public Interest' Can Survive?" – In reference to Buchanan's and Tullock's arguments on the "logical foundations of constitutional democracy" W.H. Hutt (1975: 29) notes: "(A)lmost every conclusion they draw appears to justify constitutional restraint to exclude the use of the State for the achievement of differential advantages. And that enshrines, we suggest, … what classic liberalism has above all stood for."

[65] Hayek (1978d: 155): "I believe indeed that the suggestion of a reform, to which my critique of the present institutions of democracy will lead, would result in a truer realization of the common *opinion* of the majority of citizens than the present arrangements for the gratification of the *will* of the separate interest groups which add up to a majority."

[66] Hayek (1978d: 155): „Prevailing forms of democracy, in which the sovereign representative assembly at one and the same time makes law and directs government, owe their authority to a delusion. This is the

one and the same assembly has been "that the supreme governmental authority became free to give itself currently whatever laws helped it best to achieve the particular purposes of the moment" (1979: 101). An assembly that is entrusted with both tasks will be under the constant temptation to use its legislative authority in the service of short-term interests of the current administration, at the expense of the true task of legislation, which is to choose, with a long-term perspective, rules of the game that, if applied over an extended period of time, serve the common interests of the citizenry best.[67] Its short-term approach to legislation is, as Hayek charges, the principal reason why such an assembly must become the target of the pressures of interest groups, and will be forced to "use its powers to satisfy the demands of sectional interests" (1978b: 115).

There exists, in Hayek's diagnosis, only one effective remedy to the noted structural defect in modern democratic institutions, namely to strictly separate the genuine task of legislation from the task of directing the day-to-day operation of government, and to entrust the two tasks to two distinct assemblies.[68] In order to achieve the intended purpose, adequate institutional precautions must be taken to ensure an effective rather than a purely formal separation of the legislative assembly from the governmental assembly. As Hayek (1978d: 160) puts it, the separation must be institutionalized in a manner that can effectively "prevent collusion of the legislative with a similarly composed governmental assembly, for which it would be likely to provide the laws which that assembly needed for its particular purpose."[69]

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pious belief that such a government will carry out the will of the people." – Hayek (1978b: 115): "Now, I believe we are right in wanting both legislation in the old sense and current government to be conducted democratically. But it seems to me it was a fatal error, though historically probably inevitable, to entrust these two distinct tasks to the same representative assembly. This makes the distinction between legislation and government, and thereby also the observance of the principles of the rule of law and of government under the law, practically impossible."

[67] As Hayek (1972: 73) indicates, the longer the period is for which rules are chosen the less special interests interfere with the goal of finding rules that are in citizens' common interest: "And they are, or ought to be, intended for such long periods that it is impossible to know whether they will assist particular people more than others."

[68] Hayek (1978b: 115): „It would seem the obvious solution to this difficulty to have two distinct representative assemblies with different tasks, one a true legislative body and the other concerned with government proper, i.e. everything except the making of laws in the narrow sense."

[69] Hayek (1978b: 117): "The purpose of all this would of course be to create a legislature which was not subservient to government and did not produce whatever laws government wanted for the achievement of its momentary purposes, but rather which … laid down the permanent limits to the coercive powers of government, limits within which government had to move and which even the democratically elected governmental assembly could not overstep."

Hayek (1979, chap. 17) has worked out quite detailed institutional suggestions for how an effective separation between legislative and governmental assembly may be achieved, and much of the discussion on, and critique of, his proposal for reform has focused on these specific suggestions rather than on the principal thrust of his argument.[70] Indeed, with his ambition to come up with a specific "institutional invention" (1973: 3) Hayek may have, in effect, done a disservice to his principal cause, because he invited critics to focus on the entirely *secondary* issue of institutional specifics and to draw attention away from the essential and *primary* issue, namely how legislation, i.e. the choice of the "rules of the game," can be prevented from becoming subservient to the short-term interests of day to day government. If Hayek is right with his diagnosis that the insufficient separation between legislative and governmental functions is at the root of major defects in the currently prevailing form of democracy, as he surely is, the challenge is to find effective institutional remedies. How the separation of legislative and governmental functions that Hayek calls for can be best institutionalized is an issue that a liberal theory of democracy must carefully explore, just as it must explore potential other institutional provisions by which the generality or non-discrimination constraint may be more effectively implemented.[71]

10. Conclusion

The principal claim of this paper is that liberalism and democracy should be viewed not only as *compatible* ideals, as Hayek has suggested, but as *complementary* ideals. I have based my argument on a distinction between three different levels at which liberalism and democracy can be compared, the level of their specific "institutional embodiment," the level of their principal focus, and the level of their underlying normative premise. I have argued that liberalism and democracy share as their common normative foundation the

[70] In particular the role that Hayek assigns to "representation by age groups" (1979: 117) in the legislative assembly has been the target of critical comments.

[71] Among the prime candidate surely are constitutional provisions for an effective competitive federalism. As Buchanan (1995/96: 261) notes: "Federalism offers a means for introducing essential features of the market into politics. … The availability of the exit option, guaranteed by the central government, would effectively place limits on the ability of state-provincial governments to exploit citizens, quite independently of how political choices within these units might be made." In addition to enhancing the exit option a competitive federalism also benefits the 'voice option' because "voice is more effective in small than in large political units" (ibid.: 262).

ideal of *individual sovereignty*, and that their respective main foci, the liberal principle of *private autonomy* and the democratic principle of *citizen sovereignty*, can be best understood as applications of the ideal of individual sovereignty to the realm of the private law society on the one side and to the "public" realm of collective-political choice on the other.

That individuals should be free to choose, separately and jointly, how they wish to live in mutually compatible ways with each other must, in terms of their fundamental normative premise, be a *matter of principle* for advocates of democracy no less than for advocates of liberalism. By contrast, the question of what kinds of rules and institutional provisions are best suited to allow individuals freely to choose how they wish to live, separately and jointly, in mutually compatible ways, is, in terms of the liberal as well as the democratic ideal, a *matter of prudence*.[72] It is a question that must be answered in terms of our knowledge of the factual working properties of potential alternative institutional regimes and in light of what the individuals involved actually wish for themselves. In answering this question, liberalism's traditional focus has been on the rules of the private law society while democracy's focus has been on the rules of the public realm.

Clearly to distinguish between the fundamental normative premise of individual sovereignty and its institutional embodiment, in the private law arena as well as in politics, can not only help to avoid misconceptions that have unnecessarily burdened the discourse between advocates of liberalism and advocates of democracy, it can also help to clarify the relation between *value judgments* and *theoretical or 'scientific' conjectures* within the liberal doctrine.[73] Liberalism, over its long tradition, has accumulated a rich body of insights on how different kinds of institutions work, and which are more conducive to human welfare than others. This body of insights provides the intellectual

[72] Mises (1985: 30) implicitly refers to the distinction drawn here when he notes: "If they (the liberals, V.V.) considered the abolition of the institution of private property to be in the general interest, they would advocate that it be abolished. … However, the preservation of that institution is in the interest of all strata of society."

[73] In this regard clarification is needed, for instance, when Mises (1985: 88) asserts: "For an ideology based, like that of liberalism, entirely on scientific grounds, such questions as whether the capitalist system is good or bad … are entirely irrelevant. Liberalism is derived from the pure sciences of economics and sociology, which make no value judgments within their own spheres and say nothing about what ought to be or about what is good and what is bad, but, on the contrary, only ascertain what is and how it comes to be."

foundation on which liberals can, with great confidence, recommend market-type institutions as providing superior solutions to most of the problems that men face in their social life. Yet, one must not forget that the institutional *recommendations* that liberals make are based not only on 'scientific' arguments about the working properties of institutions but also on the normative premise of individual sovereignty. In other words, they are made under the presumption that the measuring rod for the 'goodness' of institutions are the wants – or, more, precisely, the *constitutional interests*[74] - of the individuals who are to live with them. The arguments that liberals employ in support of their institutional recommendations are prudential arguments that can help sovereign individuals to make better informed institutional choices, not arguments that would allow one to ignore the institutional preferences – or constitutional interests - that these sovereign individuals may have. Sometimes liberals, especially libertarians who are preoccupied with demonstrating the logical rigor of their deductions, seem to forget that their fellow citizens are the ultimate addressees of their proposals for institutional reform. If the fundamental liberal ideal of individual sovereignty implies that individuals' freedom of choice must be respected not only in the private law realm but at the constitutional level as well, institutional recommendations must ultimately be addressed to the individuals who are to live with them, and it is they who have to be convinced that opting for the suggested provisions is in their interest.

[74] On the concept of 'constitutional interests' see Vanberg 2005.

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