SCHOOL OF GOVERNMENT
LUISS Guido Carli

Working Paper Series

POLITICAL REPRESENTATION IN THE EUROPEAN PARLIAMENT: A REFORM PROPOSAL

SOG-WP12/2013 ISSN: 2282-4189

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Printed in Italy, January 2014

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ABSTRACT

The present work deals with political representation in the European Parliament, attempting to put into focus the independent mandate, as the main guarantee of the generality of such representation and as a reflection of the superiority of the governors, and is organized in four parts.

Part one, looking for a definition of political representation, discusses the analysis of its formal and substantial requirements according to the various theoretical perspectives from which the concept has been known and studied.

Part two comes to a classification of political representation, facing the criticism of the relationship between the agent and its principal, regarded from the different doctrinal positions by which the concept has been shaped and modeled.

Part three contains a description of political representation in the European Parliament, in the light of conclusions previously reached.

The last part concerns the formulation and justification of a reform proposal of political representation in the European Parliament, centred on the institution of the liberty of imperative mandate at conventional level.

Keywords: political representation, European Parliament, prohibition of imperative mandate, independent mandate, equality between the governors and the governed

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INDICE

"Thus arises a city, not of freemen, but of masters and slaves,
the one despising, the other envying;
and nothing can be more fatal to friendship and good fellowship in states than this:
for good fellowship springs from friendship;
when men are at enmity with one another, they would rather not even share the same path"
(Aristotle, *Politics*, IV (Δ), 11, 1295 b).

1. ANALYSIS AND DEFINITION OF POLITICAL REPRESENTATION[1]

In a literal sense, the noun "*representation*" stands for: a) the act of meaning: for example, the breaking of the bread at the Last Supper represents the passion and sacrifice of the body of Christ on the Cross; b) the act of making something present: to make present in a certain way what is absent, e.g. the bread represents the body of Christ, or to show the presence of someone or something, e.g. to represent money, the price of something sold. On the other hand, the adjective "*political*" refers to what has to do with the collective life of an organized group of people and, in particular, to what regards State and government, in opposition both to economic facts and so-called social issues, both to justice and administration, as well as to other activities of civil life, like art, science, teaching and national defence (Lalande, 1971: 639-640 and 725). Therefore, the expression "*political representation*" – as the etymology of the words "*repraesentatio*" and "*πολιτικός*" suggests – means "the making present in some sense of something which is nevertheless not present literally or in fact" and which is related to State and government (Pitkin, 1967: 8-9).

"Now, to say that something is simultaneously both present and not present is to utter a paradox, and thus a fundamental dualism is built into the meaning of representation. It has led some writers – notably a group of German theorists – to regard the term as shrouded in mystery, a *complexio oppositorum*. But there is no need to make mysteries here; we can simply say that in representation something not literally present is considered as present in a nonliteral sense" (Pitkin, 1967: 9).

In private law, *"representation"* means the substitution in front of a third party of a subject (the *representative* or procurator) in the legal activity of another subject (the *represented* or dominus) (Gazzoni, 2011: 1045). In other terms, *representation* is the conclusion of a legal transaction, by a legal subject (the *representative*), *on behalf* (in the interest) – but not necessarily in the name – of another legal subject (the *represented*) and towards a third party, except – in any case – that the representative is overly dependent or autonomous with relation to the represented (Barbero, 2001: 227-229). Thus, there is no representation when the activity of the one who acts on behalf of

[1] I thank my friend Vivienne Formosa, Senior Teacher at the British Institute and Cambridge Examiner, for the linguistic revision.

another is carried out with such a close connection as to give rise to a *nuntius* figure, or when the activity of the one replacing another in the exercise of its rights or in the fulfillment of its obligations is so autonomous that the former has no connection with the legal sphere of the latter (Zangara, 1952: 17).

Two are the requirements of representation: the representative power and the *contemplatio domini*. The *representative power* is the right to represent, which is conferred to the representative by the represented or by law. While, the contemplatio domini is the declaration of the representative to act in the name of the represented or the need that the representative tends to the interests of the represented.

Referring to usual classifications, representation can be distinguished in: a) *voluntary* and *legal*, according to whether the representative power is conferred on the representative by the represented or by law; b) *subjective* and *organic*, according to whether the representative and the represented are two separated legal subjects or the first one is an organ of a legal person and the second one is that legal person; c) *individual* and *collective*, according to whether the represented interest is *individual* (belonging to an individual) or *collective* (belonging to a community); d) *of interests* and *of wills*, according to whether the represented interest is *objective* (determined by the representative) or *subjective* (determined by the represented). The subjective representation, in turn, can be distinguished in *direct* and *indirect*, according to whether the representative acts *in someone else's name* (with immediate destination of the legal effects of the transaction on the legal position of the represented) or *in his own name* (with immediate destination of the legal effects of the transaction on the legal position of the representative, but with the obligation to re-transfer them on the legal position of the represented). The collective representation, in turn, can be distinguished in *general* and *special*, according to whether the represented interest is *general* (belonging to the totality of the components of the community) or *special* (belonging to a majority or a minority part of the components of the community) (Barbero, 2001: 230-232).

In public law, *political representation* can be defined as the representation of a State of classical democracy (Biscaretti di Ruffìa, 1988: 64-70). In fact, *political representation* is the representation of political interests (or general interests), which tend to reach a harmonious synthesis of the various collective interests (as well as individual ones) (Mortati, 1991: 226). At the same time, however, *political representation* can be conceived as representation of the people, it being understood that representative assemblies are neither practically nor juridically able to act as a full-lenght mirror of the nation, because this is prevented both by the formalities of their election and by the functions that they are called to carry out (Paladin, 1998: 267).

Pitkin (1967: 1-13) believes that "representation does have an identifiable meaning, applied in different but controlled and discoverable ways in different contexts". "It is not vague and shifting, but a single, highly complex concept that has not changed much in its basic meaning since the seventeenth century". To reconstruct this concept, we need to "account for many of the wide disagreements among theorists about the meaning of representation".

"We may think of the concept as a rather complicated, convoluted, three-dimensional structure in the middle of a dark enclosure. Political theorists give us, as it were, flash-bulb photographs of the structure taken from different angles". So, it seems now opportune to travel over Pitkin's discussion of the main theories[2] of the concept again and then to try reconciling such theories in a unified framework, showing that each theory is tempting because it is partly right, but wrong because it takes a part of the concept for the whole.

1.1. Formalistic theories of political representation

Formalistic theories of political representation conceive political representation bringing into focus the formalities of its relationship. The most important are the authorization and the accountability theories (Pitkin, 1967: 38-59).

I. *The authorization theory*. – Those who support or expound the authorization theory (the *authorization theorists*), the most eminent of whom is probably Hobbes, define political representation "in terms of formal arrangements which precede and initiate it". According to the *authorization theory, political representation* is the transfer by a subject (the *represented*) to another subject (the *representative*) of government authority, following which the representative has the power to govern and the represented has the duty to observe and to bear the consequences of government activity. This transfer is normally, but not necessarily, identifiable with elections. "It is a view strongly skewed in favor of the representative. His rights has been enlarged and his responsibilities have been (if anything) decreased. The represented, in contrast, has acquired new responsibilities and (if anything) given up some of his rights" (Pitkin, 1967: 39 and 43).

Hobbes (1651: 83-84) begins his discussion on political representation defining a *person* as "he, *whose words or actions are considered, either as his own, or as representing the words or actions of an other man, or of any other thing to whom they are attributed, whether Truly or by Fiction*". This way, the author distinguishes two kinds of persons, natural and feigned or artificial: a *natural*

[2] See Modugno, F. (2012) *Interpretazione giuridica*, 2nd edition, Padova, CEDAM, p. 40, according to whom the *theory* is the science that studies *being*, while the *doctrine* is the science that studies *needing to be*.

person is that whose words and actions are considered as his own; a *feigned or artificial person* is that whose words and actions are considered as representing the words or actions of someone else. "Of Persons Artificiall, some have their words and actions *Owned* by those whom they represent. And then the Person is the *Actor*; and he that owneth his words and actions is the AUTHOR: In which case the Actor acteth by Authority". "So that by Authority, is alwayes understood a Right of doing any act: and *done by Authority*, done by Commission or License from him whose right it is". "From hence it followeth, that when the Actor maketh a Covenant by Authority, he bindeth thereby the Author, no less than if he had made it himself; and no less subjecteth him to all the consequences of the same".

This is what Fraenkel and Matteucci think. For Fraenkel (1958: 39), *political representation* is the juridically authorized exercise of sovereignty functions by State organs, or by other public power holder, constitutionally organized, who act in name of the people without imperative mandate and that derive their authority mediately or not mediately by the people and legitimize it with the claim to serve the collective interest of the people and therefore to realize its true will. Matteucci (1993: 267-268) believes that, because of the crisis of authority principle, regardless if authority is based on tradition, transcendence of values, superior and representative men or ideas and principles shared by all, "Men are no longer bound together by ideas, but by interests; and it would seem as if human opinions were reduced to a sort of intellectual dust, scattered on every side, unable to collect, unable to cohere" (Toqueville, *Democracy in America*, II, I, 1). As a matter of fact, "As citizens become more equal and alike, the penchant of each to believe blindly in a certain man or class diminishes. The disposition to believe the mass is augmented, and more and more it is opinion that leads the world"; nevertheless, "the public does not persuade others to its beliefs, but imposes them and makes them permeate the thinking of everyone by a sort of enormous pressure of the mind of all upon the individual intelligence" (Toqueville, *Democracy in America*, II, I, 2).

"The formality of the authorization view may be demonstrated most clearly by considering a view which, while diametrically opposed to authorization in one sense, is equally formal and empty of substantive content" (Pitkin, 1967: 55).

II. *The accountability theory*. – Those who share and promote the accountability theory (the *accountability theorists*), the most prominent of whom is probably Locke, define political representation "by certain formal arrangements that follow and terminate it". According to the *accountability theory*, *political representation* is the transfer by a subject (the *represented*) to another subject (the *representative*) of government responsibility, preceding which the representative has the duty to govern and the represented has the power to control and to sanction the consequences of government activity. This transfer is normally, but not necessarily, identifiable

with elections. “In a sense, then, this view is diametrically opposed to that of the authorization theorist. For the latter, being a representative means being freed from the usual responsibility for one’s actions; for the accountability theorist, being a representative means precisely having new and special obligations. Whereas authorization theorists see the representative as free, the represented as bound, accountability theorists see precisely the converse” (Pitkin, 1967: 55-56).

Locke (1689: 194) teaches that the constitution of the legislative is “the first and fundamental act of society, whereby provision is made for the continuation of their union, under the direction of persons, and bonds of laws, made by persons authorized thereunto, by the consent and appointment of the people; without which no one man, or number of men, amongst them, can have authority of making laws that shall be binding to the rest. When any one, or more, shall take upon them to make laws, whom the people have not appointed so to do, they make laws without authority, which the people are not therefore bound to obey; by which means they come again to be out of subjection, and may constitute to themselves a new legislative, as they think best, being in full liberty to resist the force of those, who without authority would impose any thing upon them. Every one is at the disposure of his own will, when those who had, by the delegation of the society, the declaring of the public will, are excluded from it, and others usurp the place, who have no such authority or delegation”.

Of this opinion are both Friedrich and Neumann. Friedrich (1950: 263-264) says that, whether the basis is religious or political, “representation is closely linked to responsible conduct”. “If A represents B, he is presumed to be responsible *to* B, that is to say, he is answerable to B for what he says and does”. In modern language, responsible government and representative government are therefore almost synonymous. Neumann (1957: 192) maintains that “the essence of the democratic political system does not lie in mass participation in political decisions, but in the making of politically responsible decisions. The sole criterion of the democratic character of an administration lies in the full political responsibility of the administrative chief, not to special interests, but to the electorate as a whole”. Political action, in a democracy, means the free election of representatives and the capability of spontaneous and prompt responsiveness to the decisions of the representatives.

As seen, the formalistic theories of political representation, privileging sometimes government authority, others government responsibility of the representative to the represented, emphasize the situation of power or the situation of duty of the former to the latter.

1.2. Thories of political representation as a substantive “standing for”

Theories of political representation as a substantive "standing for" define political representation in terms of what a representative is and how he is regarded, what he must be like in order to represent. These theories are the description and the symbolization theories (Pitkin, 1967: 59-111 and 113).

I. *The description theory*. – An entirely different theory of representation emerges for writers who are concerned with the proper composition of a legislative assembly, with constituencies and apportionment, with suffrage and party organization or with electoral systems and voting. According to the *description theory*, *political representation* is the substitution in government activity by a subject (the *representative*) to another subject (the *represented*), by reason of correspondence or resemblance of features or skills between the representative and the represented, based on images or ideas (the *descriptive representativeness*). This substitution is often identified with elections. "For these writers, representing is not acting with authority, or acting before being held to account, or any kind of acting at all. Rather, it depends on the representative's characteristics, on what he *is* or is *like*, on being something rather than doing something. The representative does not act for others; he «stands for» them, by virtue of a correspondence or connection between them, a resemblance or reflection" (Pitkin, 1967: 60-61 and 78).

The description theorists can be divided into two currents of thought, the aristocracy current and the draw current.

The *aristocracy current* is that of those – as, for example, Mill and Orlando – who require that the legislature is selected in such a way that its composition reflects – as in a "portrait", a "map" or a "mirror" – the nation, public opinion, the people, the state of public consciousness or the movement of social and economic forces in the nation (Pitkin, 1967: 61). Mill (1861: 125) notices that the two dangers incident to a representative democracy are: "danger of a low grade of intelligence in the representative body, and in the popular opinion which controls it; and danger of class legislation on the part of the numerical majority, these being all composed of the same class". Orlando (1940: 443) professes the so-called "*aristocratic principle*", according to which State government should be entrusted to the best, in other terms, to the most capable. The main difference between these authors seems to be the fact that the former has especially in mind the intelligence and the abilities of the governed, while the latter mainly refers to those of the governors.

The *draw current* is that of those – as, for example, Montesquieu and Manin – who desire a legislature that is an average sample of ordinary men, which might be achieved – similarly to "a miniature or condensation of the original" or to "a part of the original that can be used to stand for the rest" – by a randomizing process of selection (Pitkin, 1967: 73). Montesquieu (1748: 17) writes that election by lottery is democratic in nature, because the lottery is a way of electing that isn't

unfair to anyone, leaving each citizen with a reasonable hope of serving his country. Manin (1995: 60-61) declares that what makes a system representative is not the fact that a few govern in the place of the people, but that they are selected by election only, never by lot; selection by lot guarantees anyone who seeks office an equal probability of exercising the functions that were performed by a smaller number of citizens, while elections do not guarantee the same equality. So, if the first author does not exclude that elections can guarantee all citizens the same opportunities to hold an office, the second one has a contrary opinion.

II. *The symbolization theory*. – Descriptive likeness is not the only basis on which one thing can be substituted for another, can represent by "standing for": symbols, too, are said to represent something, to make it present by their presence, although it is not really present in fact. According to the *symbolization theory*, *political representation* is the substitution in government activity by a subject (the *representative*) to another subject (the *represented*), by reason of arbitrary, conventional or hidden connections between the representative and the represented, based on emotions or feelings (the *symbolic representativeness*). This substitution is rarely identified with elections. "To say that a symbol represents is to suggest a precise correspondence, a simple reference or substitution, and perhaps the existence of a whole series of further correspondences of which this one is but a single instance". Whereas, "To say that a symbol symbolizes is to suggest the vagueness or diffuseness of what it stands for, the impossibility of exchanging the one for the other, expression rather than reference". "Since the connection between symbol and referent seems arbitrary and exists only where it is believed in, symbolic representation seems to rest on emotional, affective, irrational psychological responses rather than on rationally justifiable criteria", contrary to the descriptive representation (Pitkin, 1967: 92, 98, 100 and 108).

The symbolization theorists can be articulated through two currents, the monarchy current and the democracy current.

The *monarchy current* is that of those – like, for example, Maurras and Hitler – for whom the symbol is a single man, on the model of an emblem representing a cult. Maurras (1900: 21-22) affirms that the main criterion of authority legitimation is the attachment and the interest of the sovereign to his office. Hitler (1925: 156) believed that the main criterion of authority legitimation is the theoretical and practical talent of the Head of State. What these authors seem to have in common, after all, is an extreme appreciation of the personal qualities, sometimes psychological and affective, others empirical and rational of the leader, considered capable of governing by himself.

The *democracy current* is that of those – like, for example, Sieyès, Marx and Engels – for whom the symbol is a community, on the model of a flag representing the nation. Sieyès (1888: 32)

considers that the only possible political representation is that of the third state. Marx and Engels (1848: 72) sustain that the only possible political representation is that of the proletariat. These authors, therefore, seem to share the idea that, for reasons of fact or law, only one class of citizens, although still the widest, is entitled to govern, either the third state, or the proletariat.

As seen, the theories of political representation as a substantive "standing for", privileging now the resemblance of opinions and then the communion of feelings between the representative and the represented, emphasize the knowledge and desires of the two subjects of the representative relationship.

1.3. Theories of political representation as a substantive "acting for"

Theories of political representation as a substantive "acting for" define political representation in terms of what a representative does and how he does it, what goes on during representing, the nature of the activity. These theories are the authoritativeness and the Liberalism theories (Pitkin, 1967: 59, 114, 143 and 168-208).

I. *The authoritativeness theory*. – What happens to the idea of representation when a writer concentrates on the representing of unattached abstractions is nowhere shown more clearly than in the authoritativeness theory thought, whose principal founder can be considered Burke (Pitkin, 1967: 168). According to the *authoritativeness theory*, *political representation* is the development of government activity by a subject (the *representative*) to another subject (the *represented*), through the care of the interests (or of the objective interests), first, of the nation[3] and, secondly, of their party (which should consist in the constituency where the election occurred)[4]. For this theory, *interest* is something that men "recognize" as advantageous, especially through intellect or reason, and that has a predominantly objective, singular and stable nature, in ascertaining which one can

[3] See Burke in William, C., Fitzwilliam, E. and Bourke, R. Sir (1852) *The Works and Correspondence of the Right Honourable Edmund Burke*, III, London, Francis & John Rivington, p. 236: "Parliament is not a *congress* of ambassadors from different and hostile interests; which interests each must maintain, as an agent and advocate, against other agents and advocates; but parliament is a *deliberative* assembly of *one* nation, with *one* interest, that of the whole; where, not local purposes, not local prejudices ought to guide, but the general good, resulting from the general reason of the whole".

[4] See Burke in William, C., Fitzwilliam, E. and Bourke, R. Sir (1852) *The Works and Correspondence of the Right Honourable Edmund Burke*, III, London, Francis & John Rivington, p. 237: "We are now members for a rich commercial *city*; this city, however, is but a part of a rich commercial *nation*, the interests of which are various, multiform, and intricate. We are members for that great nation, which however is itself but part of a great *empire*, extended by our virtue and our fortune to the farthest limits of the east and of the west. All these widespread interests must be considered; must be compared; must be reconciled if possible".

ignore and oppose their opinions and wishes[5]. The identification of the interests of the nation and of each constituency is entrusted to the judgment and conscience of the representative[6]. The prevalence of the interests of the nation over those of each constituency relies upon the will and virtue of the representative[7].

Since Burke seems to present no consistent doctrine of representation, we must begin by identifying two separate and seemingly inconsistent views of the concept.

The first view is elitist, ratiocinative in character and national in scope, to be precise an aristocracy of virtue and wisdom governing for the good of the entire nation: the representation of interest; where, interest has an objective, impersonal, unattached reality. "It appears particularly when Burke is speaking of the representing of the whole nation by Parliament, or derivatively by each member of Parliament. These members are an elite group, discovering and enacting what is best for the nation; that activity is what representation means. Burke holds that inequalities are natural and unavoidable in any society, that some «description of citizens» must always be uppermost. In well-ordered society, however, this ruling group is a genuine elite, what he calls a «natural aristocracy». Such an elite «is an essential integral part of any large body rightly constituted», because the mass of the people are incapable of governing themselves, were not made «to think or act without guidance and direction»".

The second concept of political representation encountered in Burke's thought is that of representation of particular constituencies by particular members of Parliament: the representation of interests; where, interests are broad, relatively fixed, few in number and clearly defined, of which any group or locality has no more than one. "The objective, fixed «interest» of a constituency is quite different from the opinions of some or even all of the people that compose it. The true interest

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[5] See Burke in William, C., Fitzwilliam, E. and Bourke, R. Sir (1852) *The Works and Correspondence of the Right Honourable Edmund Burke*, III, London, Francis & John Rivington, p. 236: "Certainly, gentlemen, it ought to be the happiness and glory of a representative to live in the strictest union, the closest correspondence, and the most unreserved communication with his constituents. Their wishes ought to have great weight with him; their opinion hight respect; their business unremitted attention. It is his duty to sacrifice his response, his pleasures, his satisfactions, to theirs; and above all, ever, and in all cases, to prefer their interest to his own. But his unbiassed opinion, his mature judgement, his enlightened conscience, he ought not to sacrifice to you; to any man, or to any set of men living".

[6] See Burke in William, C., Fitzwilliam, E. and Bourke, R. Sir (1852) *The Works and Correspondence of the Right Honourable Edmund Burke*, III, London, Francis & John Rivington, p. 236: "My worthy colleague says, his will ought to be subservient to yours. If that be all, the thing is innocent. If government were a matter of will upon any side, yours, without question, ought to be superior. But government and legislation are matters of reason and judgement, and not of inclination; and what sort of reason is that, in which the determination precedes the discussion; in which one set of men deliberate, and another decide; and where those who form the conclusion are perhaps three hundred miles distant from those who hear the arguments?".

[7] See Burke in William, C., Fitzwilliam, E. and Bourke, R. Sir (1852) *The Works and Correspondence of the Right Honourable Edmund Burke*, III, London, Francis & John Rivington, p. 237: "To be a good member of parliament, is, let me tell you, no easy task; especially at this time, when there is so strong a disposition to run into the perilous extremes of servile compliance or wild popularity. To unite circumspection with vigour, is absolutely necessary; but it is extremely difficult".

of any group, or for that matter of the entire nation, has an objective reality about which one may be right or wrong, about which one may have an opinion. The intelligent, well-informed, rational man, who has studied and deliberated and discussed the matter, is the man most likely to know the true interest of any group. Conversely, particular individuals or groups may be mistaken about what is to their interest. Thus the representative's duty toward his constituents is «a devotion to their interests *rather than* to their opinions»".

"Thus there is no real contradiction for Burke in thinking of a member of Parliament as representing, say, the trading interest, and yet of every member of Parliament as representing the national interest. The two are part of the same process: both the parts and the whole emerge from rational deliberation, and neither requires that the member convey the will or opinions of any group outside Parliament. The interests are only discovered in Parliament, through debate. But their discovery presupposes the participation of representatives of every interest so that all considerations will be brought to light in the debate. For Burke this has nothing to do with compromise among the wishes of conflicting groups; government is a matter of reason and not of will. But reason needs able deliberators from every relevant point of view" (Pitkin, 1967: 168-169, 172, 174, 176 and 187).

Among other authors, Romano (1943: 244-245) thinks so. For this author, first of all, the idea that political representation is a representation of wills is discarded: the State expresses the will made through the Chamber, which is one of its organs, always and only in its own name, not in the name and on behalf of the popular community; this does not have its will and no will of others is juridically replaceable to that which it has not. The representation of the nation by the Chamber is, therefore, a representation of interests: of all the national interests, material and moral, economic and political, that the legal order considers worthy of care and protection.

II. *The Liberalism theory*. – "A view more familiar to us than Burke's was already being articulated in his time by the theorists of Liberalism on both sides of the Atlantic. In America, representation was clearly to be of persons, and interests became an inevitable evil, to be tamed by a well-constructed government. In England, Utilitarism not only favored the representation of persons, but made interest an increasingly personal concept. The theorists of Liberalism generally thought of representation as being «of individuals rather than corporate bodies, 'interests' or classes. In harmony with the individualism of their economic outlook, they also thought of representation as based upon rational, independent, individual persons»" (Pitkin, 1967: 190).

According to the *Liberalism theory*, *political representation* is the development of government activity by a subject (the *representative*) to another subject (the *represented*), through the

observance of the wills (or of the subjective interests), first, of the nation[8] and, secondly, of their party (which should consist in the constituency where the election occurred)[9]. For this theory, *interest* is something that men "feel" as advantageous, especially through whim and taste, and that has a predominantly objective, plural and changing nature, in ascertaining which one needs to consult and to follow their opinions and wishes[10]. The identification of the interests of the nation and of each constituency is entrusted to the sensation and discretion of the represented[11]. The prevalence of the interests of the nation over those of each constituency relies upon the freedom and intention of the represented[12].

For Hamilton, Jay and Madison (1992: 43-45 and 267), although direct democracy is the best form of government conceivable *a priori*, representative democracy results in practice necessary, both for the impossibility of assembling large numbers of people in a single place and as a remedy for the tyranny of the majority or dominant faction. A *faction* is a number of citizens, whether amounting to a majority of the whole, who are united and actuated by some common impulse of

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[8] See Hamilton, A., Jay, J. and Madison, J. (1788) *The Federalist Papers*, New York, Buccaneer Books, p. 10: "It is not a new observation that the people of any country (if like the Americans intelligent and well informed) seldom adopt, and steadily persevere for many years in, an erroneous opinion respecting their interests. That consideration naturally tends to create great respect for the high opinion which the people of America have so long and uniformly entertained of the importance of their continuing firmly united under one Fœderal Government, vested with sufficient powers for all general and national purposes".

[9] See Hamilton, A., Jay, J. and Madison, J. (1788) *The Federalist Papers*, New York, Buccaneer Books, p. 60: "It is in vain to say, that enlightened statesmen will be able to adjust these clashing interests, and render them all subseervient to the public good. Enlightened statesmen will not always be at the helm: Nor, in many cases, can such an adjustment be made at all, without taking into view indirect and remote considerations, which will rarely prevail over the immediate interest which one party may find in disregarding the rights of another, or the good of the whole.

The inference to which we are brought, is, that the *causes* of faction cannot be removed; and that relief is only to be sought in the means of controling its *effects*".

[10] See Bentham, J. (1789) *An Introduction to the Principles of Morals and Legislation*, London-New York, Methuen, p. 11: "Nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne. They govern us in all we do, in all we say, in all we think: every effort we can make to throw off our subjection, will serve but to demonstrate and confirm it. In words a man may pretend to abjure their empire: but in reality he will remain subject to it all the while. The *principle of utility* recognises this subjection, and assumes it for the foundation of that system, the object of which is to rear the fabric of felicity by the hands of reason and of law".

[11] See Bentham, J. (1789) *An Introduction to the Principles of Morals and Legislation*, London-New York, Methuen, pp. 11-12: "By the principle of utility is 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. […]

3. By utility is meant that property in any object, whereby it tends to produce benefit, advantage, pleasure, good, or happiness, (all this in the present case comes to the same thing) or (what comes again to the same thing) to prevent the happening of mischief, pain, evil, or unhappiness to the party whose interest is considered: if that party be the community in general, then the happiness of the community: if a particular individual, then the happiness of that individual.

[…] The community is a fictious *body*, composed of the individual persons who are considered as constituting as it were its *members*. The interest of the community then is, what? – the sum of the interests of the several members who compose it".

[12] See Bentham, J. (1789) *An Introduction to the Principles of Morals and Legislation*, London-New York, Methuen, p. 84: "**2.** First, then, the intention or will may regard either of two objects: 1. The act itself: or, 2. Its consequences. Of these objects, that which the intention regards may be styled *intentional*".

passion, or of interest, adversed to the rights of other citizens, or to the permanent and aggregate interests of the community. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which the *Federalist*'s inquiries are directed. And the solutions proposed are three: a) the first one is the delegation of the government to a small number of citizens elected by the rest, which would allow to refine and enlarge the public views, by passing them through the *medium* of a chosen body of citizens (the *elitist solution*); b) the second one consists in the great number of citizens and the great sphere of country, over which the State may be extended, which would promote and encourage the election of the most deserving (the *procedural solution*); c) the last solution is based on preventing the concentration of interests and powers in the same hands, which would render the factions unable to concerte and to realize schemes of oppression (the *egalitarian solution*). The concept of interests expressed in the *Federalist* is much more pluralistic than it ever was for Burke, and it is essentially pejorative: interests are identified with "factions", and are something men "feel". No longer are interests the clearly defined, broad, objective groupings that compose the nation, but multiple, shifting alignments, largely subjective, and likely to conflict with the welfare of the nation; therefore, the term "interest" in the *Federalist*'s thought becomes almost interchangeable with Burke's "opinion" and "will", or even "feeling" and "sentiment".

Consequently, although they deal with the representation of persons rather than interests, the authors of the *Federalist* see this activity as a pursuit of their interests in accord with their wishes. Only if each representative pursues the factious interests of his constituency can the various factious interests in the nation balance each other off in the government. Unlike the Burkean representative, however, the representative of the *Federalist*'s authors does not know his constituents' interests better than they do themselves. His furtherance of their interests is conceived as fairly responsive. There is a link between the Burke's view of interest and politics as mainly matters of reason and wisdom, and his conviction that forms of government are not very important so long as they are operated by the right kind of men. Similarly, Hamilton, Jay and Madison's view of politics and interests is linked with their unwillingness to relay on the right kind of men and their insistence on the forms of government.

A further step in the direction of subjectivity is taken by the English Utilitarians, who variously argue that all men are always, or most men are usually, motivated by their own interests. Each individual is the only reliable guardian of his own interest, either because other men are too selfish to guard it or because they do not know it well enough to guard it. If no one can act in the interest of another, then representing becomes impossible and the most a representative can do is to act on orders from his principal. The law must make it unattractive for men to act contrary to the common

good, and attractive to act for it. However, the fact that the individual is the final judge of whether something is in his interest is not equivalent to saying that nobody but he can know what is likely to be in his interest. There is such a thing as objective interest after all, which men can know about others, and the more intelligent, informed, rational man is likely to know it best (Pitkin, 1967: 191-192 and 196-200 and 205).

As seen, the theories of political representation as a substantive "acting for", privileging now the pursue of interests and then the compliance of wills by the representative to the represented, emphasize the efficiency and effectiveness of the object and content of representative activity.

1.4. Political representation: an overall view

We should now be able to draw a concept of political representation, which takes into account the contribution of each of the discussed theories. The theory of political representation we are arrived at is based on the following definition formulated by Pitkin: "*representing*" means "acting in the interest of the represented, in a manner responsive to them". "The representative must act independently; his action must involve discretion and judgment; he must be the one who acts. The represented must also be (conceived as) capable of independent action and judgment, not merely being taken care of. And, despite the resulting potential for conflict between representative and represented about what is to be done, that conflict must not normally take place" (Pitkin, 1967: 209-210)[13]. According to this author, representation is recognizable and qualifiable depending on what is to be represented, what the relative capacities of representative and constituents are and the nature of the issues to be decided: all these elements contribute to defining a theorist's position on the *continuum* between a "taking care of" so complete that it is no longer representation, and a "delivering their vote" so passive that it is at most a descriptive "standing for".

The more a writer sees interests (or welfare or whatever) as objective, as determinable by people other than the one whose interest it is, the more possible it becomes for a representative to further the interest of his constituents without consulting their wishes and opinions. In contrast, the more a writer sees interests or wants as subjective, as definable only by the person who feels or has them, the more likely he is to require that a representative consult his constituents and act in response to

[13] See Pitkin, H.F., *The Concept of Representation*, Berkeley, Los Angeles and London, University of California Press, pp. 209-210: "He must not be found persistently at odds with the wishes of the represented without good reason in terms of their interest, without a good explanation of why their wishes are not in accord with their interest".

what they ask of him. But if such views are pushed too far, substantive acting for others becomes useless (when not even harmful) or impossible.

"The more a theorist sees the representative as member of a superior elite of wisdom and reason, as Burke did, the less it makes sense for him to require the representative to consult the opinions or even the wishes of those for whom he acts". "Conversely, to the extent that a theorist sees representative and constituents as relatively equal in capacity and wisdom and information, he is likely to require that the views of the constituents be taken into account". "Again the extremes are outside the concept altogether: a true expert taking care of a helpless child is no representative, and a man who merely consults and reflects without acting is not representing in the sense of substantively acting for others".

"The more a theorist sees political issues as questions of knowledge, to which it is possible to find correct, objectively valid answers, the more inclined he will be to regard the representative as an expert and to find the opinion of the constituency irrelevant". "On the other hand, the more a theorist takes political issues to be arbitrary and irrational choices, matters of whim or taste, the less it makes sense for a representative to barge ahead on his own, ignoring the tastes of those for whom he is supposed to be acting". "At the extremes, again, representation disappears".

"Political issues, by and large, are found in the intermediate range, where the idea of representing as a substantive acting for others does apply. Political questions are not likely to be as arbitrary as a choice between two foods; nor are they likely to be questions of knowledge to which an expert can supply the one correct answer. They are questions about action, about what should be done; consequently they involve both facts and value commitments, both ends and means" (Pitkin, 1967: 214 and 210-212).

Besides, if a member of parliament – as provided by modern-western democracies – is selected by an electoral college, is it his duty to pursue the interest of that college (or the one of his political party) or that of the nation as a whole? The Constitutions of Belgium, France, Germany, Italy, Luxembourg, Netherlands, Spain and Switzerland, read in a simultaneous and coordinated way, establish that each Member of Parliament represents, not only his constituents, but the general interests of the Nation, or – as some Constitutions more correctly declare (Orlando) – of all the people, and exercises his functions without being bound (under penalty of nullity of these) by directives or imperative mandates, without reporting to their costituents and being subject only to his own conscience[14]. In agreement with the above mentioned reading, Miceli and Rossi specify the

[14] See Article 42 of the Constitution of Belgium (February 14, 1994): "The members of the two Chambers represent the Nation, and not only those who elected them"; see Articles 3, paragraph 1, and 27, paragraph 1, of the Constitution of the French Republic (October 4, 1958): "National sovereignty shall vest in the people, who shall exercise it through

characters and the ownership of the interests to be represented. Miceli (1892: 146 and 149) writes that representation of common interests does not mean disavowal of special interests, but it means subordinate representation of the latter, as they are in fact subordinated to the former: so, political representation is always, firstly, representation of general interests and, second, representation of local interests; this when there is no disharmony or conflict between them, in which case the first ones always take precedence over the second ones. Rossi (1894: 115, 121, 128-129 and 132-133) says that the declaration, contained in modern-western constitutions, according to which "each Member of Parliament represents the Nation", means that each Member of Parliament does not represent a particular class or a social circle, neither a constituency or the electorate, nor a special party or individuals, but the whole people, including the constituents, the non-constituents, the voting in favour, the voting against and the non-voting, or even the State.

"Political representation is primarily a public, institutionalized arrangement involving many people and groups, and operating in the complex ways of large-scale social arrangements. What makes it representation is not any single action by any one participant, but the over-all structure and functioning of the system, the patterns emerging from the multiple activities of many people. It is representation if the people (or a constituency) are present in governmental action, even though they do not literally act for themselves. Insofar as this is a matter of substantive acting for others, it requires independent action in the interest of the governed, in a manner at least potentially responsive to them, yet not normally in conflict with their wishes. And perhaps that can make sense and is possible even in politics, if we understand how and where to look for it" (Pitkin, 1967: 221-222).

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their representatives and by means of referendum"; "No Member shall be elected with any binding mandate"; see Article 38, paragraph 1, of the Basic Law for the Federal Republic of Germany (May 23, 1949): "(1) The deputies to the German Bundestag are elected in universal, direct, free, equal and secret elections. They are representatives of the whole people, are not bound by orders and instructions and are subject only to their conscience"; see Article 67 of the Constitution of the Italian Republic (December 27, 1947): "Members of parliament represent the nation; they are free from imperative mandate"; see Article 50 of the Constitution of the Grand Duchy of Luxembourg (October 17, 1868): "The Chamber of Deputies represents the country. Deputies vote without referring to their constituents and may have in view only the general interests of the Grand Duchy"; see Articles 50 and 67, paragraph 3, of the Constitution of the Kingdom of the Netherlands (July 4, 2002): "The States General shall represent the entire people of the Netherlands"; "3. The members shall not be bound by a mandate or instructions when casting their votes"; see Articles 66, paragraph 1, and 67, paragraph 2, of the Constitution of the Kingdom of Spain (December 27, 1978): "1. The Cortes Generales represent the Spanish people and consist of the Congress of Deputies and the Senate"; "2. The members of the Cortes Generales shall not be bound by a compulsory mandate"; and see Articles 148, paragraph 2, 149, paragraph 1, and 161 of the Federal Constitution of the Swiss Confederation (April 18, 1999): "2 The Federal Assembly comprises two chambers, the National Council and the Council of States; both chambers shall be of equal standing"; "1 The National Council is composed of 200 representatives of the People"; and "1 No member of the Federal Assembly may vote on the instructions of another person.

2 Members must disclose their links to interest groups".

2. CRITIQUE AND CLASSIFICATION OF POLITICAL REPRESENTATION

The concept of political representation, therefore, mainly develops between the two familiar elements of wishes and welfare. But these two elements form two opposed sides in a long-standing debate, undoubtedly the central classic controversy in the literature of political representation. The question at issue may be summarized as: “Should (must) a representative do what his constituents want, and be bound by mandates or instructions from them; or should (must) he be free to act as seems best to him in pursuit of their welfare?”.

Both poles of this mandate-independence controversy may be convincing from a certain point of view. “It is true that a man is not a representative – or at most is a representative «in name only» – if he habitually does the opposite of what his constituents would do. But it is also true that the man is not a representative – or at most is a representative in name only – if he himself does nothing, if his constituents act directly”. If we start from the idea of representation as acting for others, then the more we think of the member of a ruling body as a mechanical thing, as a tool or limb or extension of those who act through him, the more inclined we are to say that they acted themselves and that no representation took place. On the other hand, if the representative not only fails to follow the instructions of his constituency, but also persists in doing the opposite of what the constituency desires, he may nevertheless be their formal representative, the official holder of the office, but nobody would maintain that he really represented that constituency.

The concept of representation itself is what accounts for the truth in each of these two conflicting positions: being represented means being made present in some sense, while not really being present literally or fully in fact. For the independence doctrine, the representative must have some freedom, some discretion to act, or it is difficult to imagine his constituency wholly present in him; if he is totally bound and instructed, we tend to think of him more as a tool or limb or puppet whose motivating or deciding power is elsewhere. As, for the mandate doctrine, the representative cannot be persistently at odds with the desires of his constituency, or else it is again too difficult to conceive the constituency as present in him; when they are at odds, we tend to think of him as a separate being acting on his own to pursue his own goals.

“The substance of the activity of representing seems to consist in promoting the interest of the represented, in a context where the latter is conceived as capable of action and judgment, but in such a way that he does not object to what is done in his name. *What* the representative does must be in his principal’s interest, but *the way* he does it must be responsive to the principal’s wishes. He need not actually and literally act in response to the principal’s wishes, but the principal’s wishes

must be potentially there and potentially relevant. Responsiveness seems to have a kind of negative criterion: conflict must be possible and yet nevertheless not occur". It now seems appropriate, first, to classify the main doctrines on political representation according to their position in the mandate-independence controversy and, then, to indicate the mixed doctrine as preferable, compared to the authoritarian and democratic ones, explaining the reasons of such choice; in doing so, we will of course still move away from the analytical plan to better approach the critical one (Pitkin, 1967: 144-156).

2.1. The authoritarian doctrine

We will call "*authoritarian doctrine*" that according to which each Member of Parliament represents the Nation and exercises his functions without a mandate bond or, in other words, political representation: a) is directed to the care of general interests (the *generality of political representation*); b) is guaranteed by the power of the representative to disregard the electoral engagements assumed to the represented (the *prohibition of imperative mandate*); c) is based on the idea that the identification of the interests to be represented should be exclusive competence of the governors, on the assumption that the governed can only pursue their own interests (for lack of knowledge rather than of diligence) (the *superiority of the governors*) (Cerutti, 2012: 2).

The kind of political representation resulting from the authoritarian doctrine presents itself, on a substantial plane, as general and of interests; while, on a formal plane, as organic and legal (the *authoritarian political representation*). It follows: a) on a substantial plane, that the representative and the represented respectively consist in the governor and in the totality of the governed and that the representative activity can prescind from elections; b) on a formal plane, that the representative and the represented constitute a unique legal subject and that the representative relationship is regulated by a moral agreement (the *independent mandate*): that is why the representative precept has a moral character and the representative sanction is typically the non-confirmation. This political representation, therefore, is characterised by the power of the representative to totally disexpect the electoral promises (Cerutti, 2008: 1-2).

The main founding fathers of the authoritarian doctrine can be considered Hobbes, Burke, Heller and Maurras.

Hobbes (1651: 90 and 119) defines the *State* as "*One Person, of whose Acts a great Multitude, by mutuall Covenants one with another, have made themselves every one the Author, to the end he may use the strength and means of them all, as he shall think expedient, for their Peace and*

Common Defence". "A *Common-wealth* is said to be *Instituted*, when a *multitude* of men do Agree, and *Covenant, every one, with every one,* that to whatsoever *Man*, or *Assembly of Men*, shall be given by the major part, the *Right* to *Present* the Person of them all, (that is to say, to be their *representative;*) every one, as well ha that *Voted for it*, as he that *Voted against it*, shall *Authorize* all the Actions and Judgements, of that Man, or Assembly of men, in the same manner, as if they were his own, to the end, to live peaceably amongst them-selves, and be protected against other men". "For of the Act of the Soveraign every one is Author, because he is their Representative unlimited".

Burke says that to deliver an opinion, is the right of all men; that of constituents is a weighty and respectable opinion, which a representative ought always to rejoice to hear; and which he ought always most seriously to consider. But *authoritative* instructions; *mandates* issued, which the member is bound blindly and implicitly to obey, to vote, and to argue for, though contrary to the clearest conviction of his judgment and conscience, these are things utterly unknown to the laws of this land, and which arise from a fundamental mistake of the whole order and tenor of our constitution (Fisichella, 1983: 66).

Heller (1934: 334) believes that of course it is only a small minority of the people of State that for which reality (*Sein*) and peculiarity (*Sosein*) of State flow, daily renewed, into a normative decision (*Sollensentscheidung*), that which takes part in the configuration and defence of State with an aware action. The great masses instead, unless being induced to act in accordance with the statal will just from hunger and tyranny, consider the habitual reality (*Sein*), or that which imposes itself with success, as the norm (*Sollen*): for them normativity, or better the almost unaware habituality of their relationship with concrete reality constitutes a sufficient basis for the legitimacy of State. The problem of legitimacy arises, however, for the decisive minority, as the vital question of State. When it loses faith in the real raison d'etre of the concrete State or of the State as institution, here comes the end of it: for the people of State, for its culture or for all humanity.

For Maurras (1900: 5), power in the hands of thousands of individuals adds to the inconveniences, abuses and excesses inherent to any authority, the very frequent danger of being insufficient and of refusing to the people their right to be governed: power concentrated in the hands of a single person, less exposed to this danger, is a much higher guarantee of political health.

It is thus evident that the authoritarian doctrine subtends all the political representation theories, but especially the authorization one, the symbolization one and the authoritativeness one.

2.2. The democratic doctrine

The expression "*democratic doctrine*" means the one according to which each Member of Parliament represents only a part of the Nation (which may consist in individuals or groups) and exercises his functions through a mandate bond or, in other words, political representation: a) is directed to the care of special interests (the *speciality of political representation*); b) is guaranteed by the duty of the representative to fulfill the electoral engagements assumed to the represented (the *obligation of imperative mandate*); c) is based on the idea that the identification of the interests to be represented should be exclusive competence of the governed, on the assumption that the governors can only pursue their own interests (for lack of diligence rather than of knowledge) (the *superiority of the governed*) (Cerutti, 2012: 2).

The kind of political representation resulting from the democratic doctrine presents itself, on a substantial plane, as special and of wills; while, on a formal plane, as subjective and voluntary (the *democratic political representation*). It follows: a) on a substantial plane, that the representative and the represented respectively consist in the elected and in the majority of the electors and that the representative activity can not prescind from elections; b) on a formal plane, that the representative and the represented constitute two legal subjects and that the representative relationship is regulated by a legal agreement (the *imperative mandate*): that is why the representative precept has a legal character and the representative sanction is typically the revocation. This political representation, therefore, is characterised by the duty of the representative to totally respect the electoral promises (Cerutti, 2008: 2).

The main founding fathers of the democratic doctrine can be considered Locke, Rousseau, Hamilton, Jay, Madison and Sieyès.

Locke (1689: 197) identifies, among the ways whereby governments are dissolved, that which occurs when "the legislative, or the prince, either of them, act contrary to their trust"; whensoever therefore "the legislative shall transgress this fundamental rule of society; and either by ambition, fear, folly, or corruption, endeavour to grasp themselves, or put into the hands of any other, an absolute power over the lives, liberties, and estates of the people; by this breach of trust they forfeit the power the people had put into their hands for quite contrary ends, and it devolves to the people, who have a right to resume their original liberty, and, by the establishment of a new legislative, (such as they shall think fit) provide for their own safety and security, which is the end for which they are in society".

Rousseau (1797: 228-229) writes that sovereignty, for the same reason as makes it inalienable, cannot be represented; it lies essentially in the general will, and will does not admit of representation: it is either the same, or other; there is no intermediate possibility. The deputies of the people, therefore, are not and cannot be its representatives: they are merely its stewards, and can carry through no definitive acts; every law the people has not ratified in person is null and void — is, in fact, not a law. The people of England regards itself as free; but it is grossly mistaken; it is free only during the election of members of parliament; as soon as they are elected, slavery overtakes it, and it is nothing.

Hamilton, Jay and Madison (1992: 289) affirm that the elective mode of obtaining rulers is the characteristic policy of republican government. "The means relied on in this form of government for preventing their degeneracy are numerous and various": the most effectual one is "such a limitation of the term of appointments as will maintain a proper responsibility to the people".

According to Sieyès (1888: 36, 39, 43 and 49) the third estate has not had up to the present true representatives in the Estates General and, to this end, it has three requests to advance. First request: the representatives of the third state must be chosen only among the citizens that actually belong to it. Second request: its deputies must be equal in number to that of the two privileged orders. Third and last request: the Estates General must vote not by orders, but by heads.

It is thus evident that the democratic doctrine subtends all the political representation theories, but especially the accountability one, the description one and the Liberalism one.

2.3. The mixed doctrine

The *mixed doctrine* is the doctrine according to which each Member of Parliament represents the Nation and exercises his functions through or without a mandate bond or, in other words, political representation: a) is directed to the care of general interests (the *generality of political representation*); b) is guaranteed by the liberty of the representative to undertake or not to fulfill the electoral engagements assumed to the represented (the *liberty of imperative mandate*)[15]; c) is based

[15] See Modugno, F. (2009) *Lineamenti di teoria del diritto oggettivo*, Torino, G. Giappichelli Editore, p. 12: "Depurato dal suo carattere psicologistico, l'**imperativismo si riduce** alla concezione della norma giuridica come norma obbligante, che pone essenzialmente un **obbligo**. Quest'ultimo costituisce la **qualificazione primaria** del comportamento, alla quale tutte le altre sarebbero riducibili attraverso la (operazione di) **negazione**. E difatti, se si assume l'obbligo come qualificazione primitiva, la norma assume la forma «obbligatorio P», ossia «O P» («P» è la proposizione variabile che descrive un'azione o il risultato di un'azione). Negando la variabile, si ha «O non P», ossia la norma di divieto. Negando invece la

on the idea that the identification of the interests to be represented should be concurrent competence of both the governors and the governed, on the assumption that they are equally able to pursue them (the *equality between the governors and the governed*). It follows that the mixed doctrine shares its purposes with the authoritarian doctrine, although it differs from this in both means and basis, while it has nothing to do with the democratic doctrine, diverging from this in purposes, means and basis (Cerutti, 2012: 2).

The kind of political representation resulting from the mixed doctrine presents itself, in whole or in part, as authoritarian or democratic (the *mixed political representation*). This political representation, therefore, is characterized by the liberty of the representative to bind himself or not to respect in whole or in part the electoral promises (Cerutti, 2008: 2).

To understand the meaning of the expression "liberty of imperative mandate", which contains an oxymoron (if not a contradiction), and to separate it from that of the expression "independent mandate", it is necessary to distinguish two moments in relation to the mandate, that of its stipulation and that of its execution. If the expression "liberty of imperative mandate", in fact, refers to the first of these two moments, that of "independent mandate" refers to the second one. And, in particular, while the first expression indicates that the mandate stipulation is facultative or permitted (instead of prohibited or obligatory), the second one indicates that the mandate execution is juridically binding (instead of morally binding).

The mixed doctrine is defended, among others, by Montesquieu, Toqueville, Mill and Constant.

Montesquieu (1748: 168-169) says that political liberty is to be found only in moderate governments; and even in these it is not always found. It is there only when there is no abuse of power. But constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go. Is it not strange, though true, to say that virtue itself has need of limits? To prevent this abuse, it is necessary from the very nature of things that power should be a check to power.

Toqueville (2010: 404-405 and 410) affirms that the moral dominion of the majority is partly based upon the notion that "there is more enlightenment and wisdom in many men combined than in a man alone, more in the number than in the choice of legislators". "The moral dominion of the majority is based as well on the principle that the interests of the greatest number must be preferred to those of the few". When I refuse to obey an unjust law, I do not contest the right of the majority to command, but I simply appeal from the sovereignty of the people to the sovereignty of mankind.

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qualificazione normativa, si ha «non O P», ossia la norma permissiva negativa o facoltativa. Negando infine sia la variabile sia la qualificazione normativa, si ha «non O non P», ossia la norma permissiva positiva".

Mill (1861: 55) holds that "human beings are only secure from evil at the hands of others in proportion as they have the power of being, and are, self-*protecting*; and they only achieve a high degree of success in their struggle with Nature, in proportion as they are self-*dependent*, relying on what they themselves can do, either separately or in concert, rather than on what others do for them".

According to Constant (1819: 22 and 33-34), individual independence is the first need of the moderns; it follows: a) that they should never be asked to make sacrifices in order to establish political liberty; b) that none of the numerous and over-praised institutions which hindered individual liberty in the ancient republics is admissible in modern times. Political liberty, by submitting to all the citizens – no exceptions – the care and assessment of their most sacred interests, enlarges their spirit, ennobles their thoughts, and establishes among them a kind of intellectual equality which constitutes a people's glory and power. Therefore, far from renouncing either of the two sorts of freedom that have been described, it is necessary for us to learn to combine the two.

So – like the previous doctrines – also the mixed doctrine subtends all the political representation theories, but – unlike them – it does not prefer some theories compared to others, but it looks for a substantial balance, at the same time, between the formalistic theories of political representation, the theories of political representation as a substantive "standing for" and the theories of political representation as a substantive "acting for".

2.4. The preferable doctrine

The preferable doctrine, among those above-mentioned, seems to be the mixed one, since – compared to the authoritarian one – it has the advantage of ensuring a public administration more representative, while – compared to the democratic one – it has the advantage of ensuring a public administration more functional. It seems now the case to dwell for a moment upon the advantages of the mixed doctrine, compared to the other two doctrines, on each of the three levels on which the mixed political representation develops itself, the generality of political representation, the liberty of imperative mandate and the equality between the governors and the governed.

I. *The generality of political representation*. – First of all, the generality of political representation, compared to its speciality, seems to be a more adequate guarantee of social peace and welfare.

In this sense, among others, reference is made to Zampetti (1993: 96). He recalls that the State is a result of the unification of individual wills. Admitting that the deputies are at the service of a part, even if large, of the community, means to undermine the unification process itself. If, in fact, the organ is the instrument by which the State – that is the whole – acts, how can an organ, such being the representation, make itself mouthpiece of party interests? The crisis of that State and of its bureaucratic machinery, the result of a long and tiring gestation, would be inevitable. And society would plunge into the Hobbesian chaos, which a modern State in any way intends to prevent.

II. *The liberty of imperative mandate*. – At this point, the question arises: if political representation must consist in the care of general – rather than special – interests, *who* can say *which* these interests are? Or, in other words, *to whom* is to be recognized the capability to discover those interests to be represented and, in consequence, *to whom* is to be attributed the right-duty to identify them: only to the governors, only to the governed or to both? This is the origin of the *vexata quaestio*: the relationship between the representative and the represented should have a legal character or a moral one and, hence, the imperative mandate should be forbidden, obligatory or *free* (facultative or permitted)?

The most convincing answer seems to be the latter. The liberty of imperative mandate, compared to its prohibition, seems to be able to ensure a greater responsiveness of the representative, a greater participation of the represented and a greater impartiality of political representation; while, compared to its obligation, seems to be able to ensure a more specialized political representation, more flexible and more effective. We will now try to scrutinize and verify each of these advantages separately.

A) *On responsiveness*. The mixed political representation, compared with the authoritarian one, could better preserve and increase the *responsiveness of the representative*, that is the willingness and the receptiveness of the representative to the interests and wills of the represented, since it requires further empathy and dialogue between the representative subjects.

In this sense, it is to see Böckenförde (1985: 255). He defines *responsiveness* as the availability and sensitivity of the representatives to the wishes and interests of the constituents. But this authority does not produce a dependency on the interests and wishes of the constituents and does not consist in a simple executive role, but it conserves its own initiative and the capacity to anticipate needs and interests. It follows an intermediate position between the extreme ones of the formal representation with free mandate and that of the agent depending on instructions.

B) *On participation*. – The representation at issue, in respect to the authoritarian one, seems able to further promote the *participation of the represented*, that is the control of the representative by

the represented and the cooperation between the former and the latter, since it reinforces the situation of power of the represented in relation to the representative.

In favour of this solution, can be cited Leibholz (1973: 314-315). He remembers that Lincoln defined democracy as "a government of the people for the people, by the people". This means that the greater is the number of participants in the formation of the popular will, the larger is the participation of active citizenship to the formation of the "common will", the more the regime is democratic. Therefore, it appears that equality is inborn to the autentic nature of democracy, because only through it can the dominion of the people be realized.

C) *On impartiality*. – Such representation, more than the authoritarian one, may lead to protect the *impartiality of political representation*, that is the greatest possible generality of the interests to be represented, since it reinforces the situation of duty of the representative in relation to the represented.

This would seem to find confirmation in Zanon (1991: 91-92). He believes that, at the time of the concrete Weimarian constitutional situation, the old nineteenth-century parliament, mostly composed of notables and eminent personalities had disappeared, oriented to the "common good", who had substantially homogeneous cultural and social origins, among whom a real discussion was possible, and who played the role of representatives of the nation in the presence of a limited and census suffrage and mostly majoritarian electoral systems. It had been replaced by an essentially functionarial parliament, especially formed by professional politicians (from men no longer suitable *for* politics, but who lived *of* politics), heralds of different and diverging ideologies, who felt and interpreted the role of deputies, not as representatives of the nation, but as officers or delegates of the parties that had favoured their election: devoid of a personal representative quality, that the same proportional electoral system had notably helped to eliminate, they had turned parliament from a central place of political trend determination, to a recording chamber of decisions taken elsewhere.

D) *On specialization*. – The mixed political representation, in respect to the democratic one, could better favour the *specialization of political representation*, that is the best possible identification of the interests to be represented, since it allows to make the most of the qualities and abilities of the representative.

For this topic, may be considered Rossi (1894: 34-35). He notices that some authors consider representation as resulting from the modern fact that in social economy not all are suitable to devote themselves to public affairs, and that also in politics the division of labour should be realized, biologically proven by the natural law of organs specification. Following this order of ideas, with the concern of damages and dangers of the popular Assemblies, representation was also seen as a

rational improvement and almost a purification of direct democracy. And still more decisively the basis of representation was found in the absolute inability of the people to take care of government and politics.

E) *On flexibility*. – The representation at issue, more than the democratic one, seems able to improve the *flexibility of political representation*, that is the possibility to adapt the representative activity to the needs of the contingency, since it reinforces the situation of power of the representative in relation to the represented.

Upholder of this hypothesis seems to be Miceli (1892: 140). He affirms that the great complexity of interests and needs produced by the extension of the State was to preclude the imperative mandate. When the interests and needs become so numerous and different, it is no longer given to each individual to understand them all, to interpret and to formulate them all in a precise way; as it is not possible to predict all the transformations to which they are subject and all the ways to satisfy them. And it is also no longer possible to a group of constituents to determine the whole line of conduct which is to be followed by the representative, nor it is possible to closely comply with a line of conduct previously determined in all its peculiarities for him.

F) *On effectiveness.* – Such representation, compared with the democratic one, may turn to better account the *effectiveness of political representation*, that is the suitability of the representative activity to realize the programmed objectives, since it reinforces the situation of duty of the represented in relation to the representative.

This would seem to be confirmed, among others, by Schmitt (1981: 45). He says that, while before, in the nineteenth century, the danger came from government, that is it came from the sphere of the "Executive", today the apprehension is primarily towards the "Legislator". Today the constitutional legislative regulation already largely serves the purpose of protection from the legislator, that is from the changeable parliamentary majority, certain affairs and interests which would otherwise be matter of ordinary legislation. The constitutional legislative anchoring must ensure certain interests, especially the interests of the minority, in front of the respective majority.

III. *The equality between the governors and the governed*. – We finally have to deal with the basic issue of our research: if, in order to attribute the right-duty to determin the general interests to be represented, the differences in diligence and knowledge between the governors and the governed can justify or not a difference in treatment between them. If there is no doubt that, from the point of view we are interested in, there are both analogies and differences between the governors and the governed – as, for example: among the first ones, a material and spiritual dependence of each one from each other; and, among the second ones, the variability from case to case of the potentials of each one in a broad range – it also seems sure that, in the balance between those analogies and

differences, the former should prevail on the latter, involving the recognition of the right and duty to determin the general interests to be represented to both the governors and the governed.

This conclusion seems to be advanced, among others, by Kelsen (1982: 43-44). For the author, the idea of democracy is the idea of liberty as political self-determination. It expresses itself relatively to pure State where the statal order is directly produced by those who are subjected to it, where the people deliberate in the citizens assembly the rules of their conduct. The fact that instead of the popular assembly taking over a parliament elected by the people – although according to the principle of a general vote – and that self-determination is therefore limited to the creation of the organ which produces the statal order is already a weakening of this principle of autonomy, just masked by the fiction of representation. The essence of democracy can not be fully understood, however, on the only basis of the idea of freedom. The latter, taken by itself, certainly can not establish a social order, the essential meaning of which lies in a bond and that only as a normative bond it constitutes the social relationship, the community. The deepest meaning of the democratic principle is that the political subject wants liberty not only for himself, but also for others, the *self* wants it for the *you*: and this because the *self* perceives the *you* as identical to itself. So, in order to achieve the concept of democratic social form, it is necessary that to the idea of liberty is added, limiting it, to the idea of equality.

3. POLITICAL REPRESENTATION IN THE EUROPEAN PARLIAMENT

Beyond the substantive question whether the European Parliament is actually a "Legislator" or not[16], according to the letter of the Founding Treaties of the European Union[17] and in consideration of the development of the European Integration[18], it is to say that the same Parliament certainly

[16] For an in-depth analysis on the point, see – among others – Muylle, K. (2000) "*Is the European Parliament a "Legislator"?*", EPL, pp. 243 ss..

[17] See, first of all, Article 10, paragraph 1, of the Treaty on European Union: "The functioning of the Union shall be founded on representative democracy".

[18] See, one for all, Tesauro, G. (2010) *Diritto dell'Unione europea*, 6th edition, Padova, CEDAM, pp. 24-25: "Originariamente Assemblea comune, poi Assemblea parlamentare europea, in concomitanza con la creazione della CEE e dell'Euratom, finalmente Parlamento europeo in virtù di una sua decisione del 30 marzo 1962 e poi dell'Atto unico, l'istituzione fu per molti anni composta da membri dei Parlamenti nazionali, da questi designati, sì che la rappresentatività dei popoli riuniti nella Comunità era indiretta e imperfetta. Era indiretta in quanto i parlamentari non venivano eletti direttamente dai cittadini europei, bensì dai rappresentanti di questi ultimi eletti in seno ai rispettivi Parlamenti. Era altresì imperfetta in quanto, almeno in alcuni casi, non rifletteva esattamente e proporzionalmente la presenza di tutte le componenti politiche in seno ai Parlamenti nazionali.

Prefigurata dai trattati istitutivi, l'elezione diretta dei membri del Parlamento fu decisa da un Atto del Consiglio europeo del 20 settembre 1976 e successivamente realizzata con apposite leggi nazionali. Le prime elezioni si sono

expresses a veritable political representation[19]. This representation – as it is usual in the Member States[20] – has an essentially authoritarian character. It has in fact – as we shall see – all the constituent elements of the authoritarian kind of political representation, the generality of political representation, the prohibition of imperative mandate and the superiority of the governors.

3.1. The generality of political representation in the European Parliament

The generality of political representation in the European Parliament is especially provided by Articles 9-10 and 14 of the Treaty on European Union, by Article 223, paragraph 1, of the Treaty on the Functioning of the European Union and by Article 30 of the Rules of Procedure of the European Parliament, which – identifying the active and passive subjects of such representation – implicitly confer to the European Parliament the task of representing general interests, rather than special ones.

As for the passive subjects, Articles 9[21] and 10, paragraphs 2-3,[22] of the Treaty on European Union provide that they are the citizens of the Union.

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svolte nel 1979, in base a sistemi elettorali diversi. È peraltro previsto che, su progetto del Parlamento e decisione unanime del Consiglio, sia raccomandata agli Stati membri l'adozione, in base alle rispettive norme costituzionali, di una procedura uniforme di elezione, procedura che, a seguito di una precisazione apportata dal Trattato di Amsterdam e che riene conto delle difficoltà finora incontrate rispetto alla previsione di una disciplina uniforme, potrà essere fondata anche solo su principi comuni agli Stati membri (art. 223, n. 1, TFUE)".

[19] See, among everyone: a) Costa, O. (2001) *Le Parlement européen, assemblée delibérante*, Bruxelles, Editions de l'Université de Bruxelles, p. 93: "Le système politique de l'Union est contraint, lui aussi, à une forme de délibération «pluraliste» en raison de la conjonction de multiples facteurs: absence de cadre constitutionnel, faiblesse du paradigme de la représentation politique, distance séparant les institutions des citoyens, sentiment communautaire insuffisant à l'extension du vote majoritaire, nécessité de préserver de multiples équilibres... La délibération du Parlement européen s'organise ainsi autour de nombreux clivages non concordants dont il faut chercher l'origine dans la nationalité, les convictions politiques, la religion, les engagements, le profil socioprofessionnel, etc., des élus, mais aussi dans les sollicitations ou pressions dont ils sont l'objet de la part des corps intermédiaires (groupes d'intérêt, partis, syndicats, associations, O N G...) qui emplissent un espace d'action public européen où les citoyens se contentent de la portion congrue. La multiplicité des identités des parlementaires et les glissements qui s'opèrent entre elles, l'ambiguïté de leur mandat représentatif, sont autant d'éléments montrant l'intérêt que peuvent avoir les théories du pluralisme pour appréhender le fonctionnement du Parlement européen"; b) Kreppel, A. (2002) *The European Parliament and Supranational Party System*, Cambridge, Cambridge University Press, pp. 7-8: "The opportunity to impact, directly and effectively, policy outcomes had a significant and lasting influence on the internal dynamics between the party groups within the EP. The overall pattern of internal evolution within the EP after the SEA suggests that increasing the decision-making powers of a legislature can lead to the radical transformation of the institution as a whole. In effect the EP has evolved from an ideologically dogmatic, loosely organized chamber of debate to a frequently bipartisan and hierarchically structured legislative body".

[20] For the Constitutions of Belgium, France, Germany, Italy, Luxembourg, Netherlands and Spain, see note n. 70.

[21] See Article 9 of the Treaty on European Union: "In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship".

[22] See Article 10, paragraphs 2-3, of the Treaty on European Union: "2. Citizens are directly represented at Union level in the European Parliament.

As for the active ones, Article 14 of the Treaty on European Union[23] and Article 223, paragraph 1, of the Treaty on the Functioning of the European Union[24] provide that they are, directly, the Members of the European Parliament; while, Article 10, paragraph 4, of the Treaty on European Union [25] and Article 30 of the Rules of Procedure of the European Parliament[26] provide that they are, indirectly, the political parties at European level and the political groups in the European Parliament.

In doctrine, this seems to be confirmed, among others, by Corbett, Jacobs and Shackleton (2011: 7), where – with reference to the European Parliament – they write: "It also takes the edge off national conflict. Council can all too often give the appearance of decision-taking by gladiatorial

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Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.

3. Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen".

[23] See Article 14 of the Treaty on European Union: "1. The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions. It shall exercise functions of political control and consultation as laid down in the Treaties. It shall elect the President of the Commission.

2. The European Parliament shall be composed of representatives of the Union's citizens. They shall not exceed seven hundred and fifty in number, plus the President. Representation of citizens shall be degressively proportional, with a minimum threshold of six members per Member State. No Member State shall be allocated more than ninety-six seats.

The European Council shall adopt by unanimity, on the initiative of the European Parliament and with its consent, a decision establishing the composition of the European Parliament, respecting the principles referred to in the first subparagraph.

3. The members of the European Parliament shall be elected for a term of five years by direct universal suffrage in a free and secret ballot.

4. The European Parliament shall elect its President and its officers from among its members".

[24] See Article 223, paragraph 1, of the Treaty on the Functioning of the European Union: "1. The European Parliament shall draw up a proposal to lay down the provisions necessary for the election of its Members by direct universal suffrage in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States.

The Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, which shall act by a majority of its component Members, shall lay down the necessary provisions. These provisions shall enter into force following their approval by the Member States in accordance with their respective constitutional requirements".

[25] See Article 10, paragraph 4, of the Treaty of the European Union: "4. Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union".

[26] See Article 30 of the Rules of Procedure of the European Parliament: "Rule 30 Formation of political groups

1. Members may form themselves into groups according to their political affinities.

Parliament need not normally evaluate the political affinity of members of a group. In forming a group together under this Rule, the Members concerned accept by definition that they have political affinity. Only when this is denied by the Members concerned is it necessary for Parliament to evaluate whether the group has been constituted in accordance with the Rules.

2. A political group shall comprise Members elected in at least one-quarter of the Member States. The minimum number of Members required to form a political group shall be 25.

3. If a group falls below the required threshold, the President, with the agreement of the Conference of Presidents, may allow it to continue to exist until Parliament's next constitutive sitting, provided the following conditions are met:

- the members continue to represent at least one-fifth of the Member States;

- the group has been in existence for a period longer than a year.

The President shall not apply this derogation where there is sufficient evidence to suspect that it is being abused.

4. A Member may not belong to more than one political group.

5. The President shall be notified in a statement when a political group is set up. This statement shall specify the name of the group and the names of its members and bureau members.

6. The statement shall be published in the Official Journal of the European Union".

combat between those representing «national interests». Reality is more complex and the fact that the parliament organises itself not in national delegations but in Political Groups shows that the dividing line on most concrete subjects is not so much between nations but between different political viewpoints or between various sectoral interests".

3.2. The prohibition of imperative mandate in the European Parliament

The prohibition of imperative mandate in the European Parliament is instituted, at the secondary normative level, by Article 2 of the Rules of Procedure of the European Parliament[27], by Article 3 of the decision of the European Parliament of 28 September 2005 adopting the Statute for Members of the European Parliament (2005/684/EC, Euratom)[28] and by Article 6, paragraph 1, of the Act concerning the election of the representatives of the Assembly by direct universal suffrage[29], which punctually and expressly decree that Members of the European Parliament shall exercise their mandate independently, without being bound by any instructions or receiving any binding mandates, under the penalty of their nullity.

Even the doctrine peacefully admits the existence of the prohibition of imperative mandate in the European Parliament. In this sense, it is to consult, in particular, Lupo and Manzella (2006: 4121). They consider that, as national parliamentarians, also Members of the European Parliament enjoy a number of guarantees aimed to protect their autonomy in the exercise of the mandate – that, although the Treaties remain silent on the point, is to be considered free from any obligation with the constituents – and, at the same time, the autonomy of the institution they belong to.

3.3. The superiority of the governors in the European Parliament

From the generality of political representation and the prohibition of imperative mandate in the European Parliament it follows the superiority of the governors, in respect to the governed, in the

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[27] See Article 2 of the Rules of Procedure of the European Parliament: "Rule 2 The independent mandate
Members of the European Parliament shall exercise their mandate independently. They shall not be bound by any instructions and shall not receive a binding mandate".

[28] See Article 3 of the decision of the European Parliament of 28 September 2005 adopting the Statute for Members of the European Parliament (2005/684/EC, Euratom): "1. Members shall vote on an individual and personal basis. They shall not be bound by any instructions and shall not receive a binding mandate.
2. Agreements concerning the way in which the mandate is to be exercised shall be null and void".

[29] See Article 6, paragraph 1, of the Act concerning the election of the representatives of the Assembly by direct universal suffrage, annexed to the Council decision of 20 September 1976 (76/787/CECA, CEE, Euratom): "1. Members of the European Parliament shall vote on an individual and personal basis. They shall not be bound by any instructions and shall not receive a binding mandate".

same Parliament, in the manner and for the reasons outlined above, which – by analogy – seem to be valid at both national and European level (and to which, therefore, we refer).

In addition to others, Siedentop (2000: 60) seems to make the importance of the principle of equality clear in the construction of the legal order of the European Union. He notices that "the deepest European urge" is "a passion for that equality of status which confirms our dignity as individuals". That passion has had an extraordinarily important *unintended* consequence. For the demand to be treated as equals has generated a new scale of social organization. "It is a scale embedded in the two most characteristic institutions of modern Europe: the nation-State and the market". "The nation-State emerged as the agency for creating and protecting individual rights, the instrument of civil equality". "And a market economy flourished as a direct consequence of civil equality". "For the freedom to move about, buy and sell (including one's own labour) – as well as the *need* to do so – can be seen as the other side of the coin of civil equality".

4. A REFORM PROPOSAL OF POLITICAL REPRESENTATION IN THE EUROPEAN PARLIAMENT

4.1. The methodology of implementation

A reform proposal of political representation in the European Parliament from authoritarian to mixed necessarily entails the replacement of Article 2 of the Rules of Procedure of the European Parliament ("Members of the European Parliament shall exercise their mandate independently. They shall not be bound by any instructions and shall not receive a binding mandate"), of Article 3 of the Decision of the European Parliament of 28 September 2005 adopting the Statute for Members of the European Parliament (2005/684/EC, Euratom) ("1. Members shall vote on an individual and personal basis. They shall not be bound by any instructions and shall not receive a binding mandate. / 2. Agreements concerning the way in which the mandate is to be exercised shall be null and void") and of Article 6, paragraph 1, of the Act Concerning the Election of the Representatives of the Assembly by Direct Universal Suffrage ("1. Members of the European Parliament shall vote on an individual and personal basis. They shall not be bound by any instructions and shall not receive a binding mandate") by the following formula: "1. Members of the European Parliament shall vote on an individual and personal basis. They shall not be bound by any instructions and shall not receive a binding mandate**, except as provided by the European mandate of political representation**. 2.

Any other agreement concerning the way in which the mandate is to be exercised shall be null and void".

This reform would involve the establishment of a kind of contract, the so-called "*European mandate of political representation*": a) whose agreement would be made by elections to the European Parliament and would exist between citizens of the Union and Members of the European Parliament; b) whose cause would be the representation of the Union; c) whose object would reside in the essential nucleus of the electoral programs of political parties at European level; d) whose form would consist in a founding treaty provision.

It follows that this mandate would have a *contractual nature*, that is a juridically free stipulation, but a juridically bound execution – whose coercibility could be guaranteed by the judiciary power, constitutional organs, a popular jury or the electoral body[30] –, and the following *characters*: a) a *preventive* character, since its negotiations could occur before the beginning of the political mandate to the European Parliament, and not after it; b) a *general* character, since its end would be the representation of the whole Union, and not just of a part of it, while its subjects would be the Members of the European Parliament – the *active subjects* – and the citizens of the Union – the *passive subjects*; c) a *party-dominated* character, since – in its negotiations – the power to propose would be concentrated namely in the candidates hands, but in fact it would be held by political groups and mainly by political parties, whereas the power to accept would be distributed among the constituents; d) a *conventional* character, since it would have the strength and the value of a source of law of supreme rank (Cerutti, 2008: 3).

The proposed reform would come to establish political representation not only on the principles of superiority and freedom of conscience of the representatives, but – primarily – on the principles of equality and freedom of participation of the represented and – secondarily (although to a greater extent) – on those principles, strengthening – thus – the principle of legal certainty with respect to that of equity and, therefore, bringing the representation of public law closer to that of private law[31].

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[30] See Rossi, *I principî*, cit., pp. 89-90: "E qui taluno proporrebbe che in caso di violazione del mandato imperativo la Camera o spontaneamente, o dietro istanza degli elettori, dovesse dichiarare decaduto il rappresentante; altri vorrebbe che la constatazione della violazione del mandato, fosse deferita al potere giudiziario; altri che fosse dichiarata da un giurì: altri ancora che ne fossero competenti gli elettori stessi, o che la decadenza fosse intimata dietro istanza d'un certo numero di loro, o che il deputato venisse giudicato in una riunione elettorale dopo sentita la sua difesa".

[31] See Ferrara, G. (1996) "*Sulla rappresentanza politica. Note di fine secolo*", *Rivista di Diritto Costituzionale*, Torino, G. Giappichelli Editore, p. 39: "Insomma, non sembra convincente ribadire come esclusiva la giuridicità della rappresentanza disciplinata dai codici civili, l'indisponibilità di molti dei suoi tratti ad essere assunti da quella definita politica e dedurre che questa indisponibilità impedisca che il rapporto rappresentativo politico possa qualificarsi come giuridico. Molto più utile alla scienza costituzionalistica può essere, invece, riconoscere la possibilità che vicende rilevanti nella dinamica degli ordinamenti riprodottesi con frequenze plurisecolari possano aver acquistato la loro configurazione giuridica autonoma da quella del diritto privato e, prendere atto, nella specie, della irresistibile attrazione della rappresentanza politica nell'ambito della giuridicità come la sua storia dimostra. Come altrimenti qualificare se non con la denominazione di atti giuridici le convocazioni, le operazioni, peraltro autoritativamente disciplinate dal

In practice, with the opportunity for the political actors to avail themselves of such a contract, some of them would stand for elections without proposing any binding mandate – just as presently they are obliged to do – others would stand for elections proposing penalities for the event of non-fulfillment of certain points of their political agenda – as typically, but not only, the forfeiture of the mandate – and still others would stand for elections proposing a penality for the event of non-fulfilling of each point of their political agenda. It is just the case to say that every subject in play would assume political responsibility for his choices, both in the pre-election competition and even more in the hoped performance of the political mandate. This, at least in the long term, should prevent candidates and parties from proposing things which are impossible or even harmful to be realized, as well as constituents from accepting them, moving more and better political actors towards the common good and promoting the development of a relationship between them as open and as close as possible, in the sign of the constitutional principle of labour[32].

The control on the observance of the political representation mandate would be up to the European Parliament, to the Court of Justice of the European Union, to the other institutions, organs and organisms of the European Union, to the Member States and to the European citizens.

4.2. The benefits produced

The mentioned contract, other than presenting the advantages discussed above (to which we refer), would put the political forces in competition with each other, not only on the electoral programs, but also on the consequences of their missed realization (which could consist in the revocation of the Member of Parliament or in something else – as, for example, the non-re-

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titolare del potere di convocazione, di scelta (anche se non esattamente di tipo elettorale) dei rappresentanti, la verifica dei loro poteri, le deliberazioni delle assemblee, consigli, diete, cortes, parlamenti, stamenti, etc., vincolanti l'autorità convocante e i destinatari degli atti posti in essere a seguito dell'attività di *consilium* e di *auxilium* svolta dalle assemblee rappresentative?".

[32] See Pessi, R. (2010) *Lezioni di diritto del lavoro*, 4th edition, Torino, G. Giappichelli Editore, pp. 33-34: "La Costituzione adotta in proposito una definizione amplissima di lavoro, inteso «come un'attività o una funzione che concorra al progresso materiale o spirituale della società» secondo un modello che non fa distinzione, non solo tra lavoro manuale ed intellettuale, ma anche tra lavoro subordinato, autonomo, imprenditoriale, dovendo, comunque, l'individuo concorrere al benessere sociale «secondo le proprie possibilità e la propria scelta» (art. 4, c. 2).

È un progetto di «pari dignità sociale» garantita a «tutti i cittadini» senza distinzioni, non solo riferibili a fattori storici di discriminazione, quali il «sesso», la «razza», la «lingua», la «religione», ma anche riferite alle «condizioni personali e sociali» dell'individuo (art. 3, c. 1). […]

In questo contesto il già ricordato riconoscimento del diritto al lavoro e del relativo dovere acquistano ulteriore significatività; si chiarisce ancor meglio il progetto costituzionale, che è quello di consentire a tutti i cittadini di realizzarsi come persona, divenendo produttori di reddito e di benessere individuale e collettivo, rimuovendo gli ostacoli che potrebbero impedire tale realizzazione e ponendo in essere le necessarie azioni positive".

eligibility of the parliamentarian or fines for the same parliamentarian or for his political party),[33] would allow politicians to use a new and effective working tool, the imperative mandate, and – as a result, at the European level – would involve, among others, the following benefits, revealing himself as an efficient remedy to the so-called "crisis of political representation"[34].

First, the possibility of using the imperative mandate would contribute to push forward the process of creating an ever closer union among the peoples of Europe and, consequently, to resolve the "contradiction" currently existing between the establishment of a single body of political representation in the European Union, the European Parliament, and the existence of as many European peoples as there are Member States[35].

Second, the institution in question would help to achieve the ultimate goal of the origin and evolution of the European integration, namely the creation of a federal system between the European countries, as a guarantee of world-wide peace and justice, in the gradual way chosen by

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[33] See Cerulli Irelli, V. (2011) *Amministrazione pubblica e diritto privato*, Torino, G. Giappichelli Editore, pp. 246-247: "La capacità negoziale delle organizzazioni pubbliche ha dunque una vastissima espansione (probabilmente copre la porzione maggioritaria dell'azione amministrativa), ma nella grandissima parte dei casi, e per regola, si svolge, nella fase fondamentale della scelta del contraente, attraverso procedimenti amministrativi intesi alla tutela della concorrenza, e a salvaguardia degli interessi protetti dei terzi".

[34] See Cerutti, C. (2012) "*Perché serve il mandato imperativo per gli eletti*", *La discussione. Quotidiano fondato da Alcide De Gasperi*, 8 settembre, p. 2: "«L'attività politica è in gran parte opera di convincimento, battaglia per la conquista delle menti e, soprattutto, dei cuori dei governati» (Boccalatte). È evidente che la fiducia e l'affezione dei cittadini per i rappresentanti politici sono in questo momento al minimo storico. Quali le cause? Nei dibattiti politici si parla sempre di chi debba succedere ad altri nell'esercizio di un potere, schierandosi a favore di qualcuno e contro qualcun altro, e mai delle modalità di esercizio del potere stesso. I programmi elettorali sono sempre vaghi, ambigui e privi di un ordine di priorità sia tra i fini da perseguire che tra i mezzi da utilizzare, e mai sufficientemente dettagliati e immediatamente applicabili. Gli eletti dipendono dai partiti piuttosto che dagli elettori e, di conseguenza, rappresentano i partiti più che gli elettori; mentre, i partiti mirano al potere piuttosto che alla rappresentanza e sono privi di metodo democratico (infatti, escludono puntualmente la partecipazione dei cittadini dai dibattiti, dai programmi e dalle candidature). In punto di diritto, il popolo sembra sovrano soltanto nella scelta del «chi» debba governare, nei limiti delle candidature imposte dai partiti politici e delle disposizioni dalla legge elettorale, ma non anche del «cosa» e del «come» debba governarsi".

[35] See Costa, O. (2001) *Le Parlement européen, assemblée delibérante*, Bruxelles, Editions de l'Université de Bruxelles, pp. 266-267: "L'article 189 CE (ex-article 137) dispose que «le Parlement européen, composé de représentants des peuples des Etats réunis dans la Communauté, exerce les pouvoirs qui lui sont attribués par le présent traité». Les traités ne permettent pas de préjuger du sens qu'il convient d'attribuer au syntagme «peuples des Etats»: ils ne précisent pas s'il s'agit pour les délégations nationales de représenter leurs concitoyens respectifs de façon à ce que l'assemblée exprime la somme des intérêts généraux des peuples européens, ou si les députés doivent au contraire représenter collectivement les peuples européens conçus comme un tout indivisible, de façon à exprimer un «intérêt collectif» distinct de la somme de leurs intérêts particuliers.

Le refus des Pères fondateurs de faire référence à un «peuple européen» chimérique, s'est traduit dans un premier temps par une représentation du premier type. Le principe originel de la désignation par chaque gouvernement d'une délégation instaurait un lien manifeste entre les parlementaires et leurs concitoyens. Néanmoins, les membres de l'Assemblée commune décidèrent, dès juin 1953, de siéger par affinités politiques et non par nationalité, ce que les plus fédéralistes d 'entre eux interprétèrent comme un signe de «fusion» de la représentation européenne, et donc de «généralité» du mandat. La faiblesse des pouvoirs de l'assemblée favorisa cette évolution vers le second type de représentation, les députés disposant d'une grande liberté d'action et d'une autonomie certaine à l'égard de leurs assemblées d'origine, de leurs partis et des opinions publiques nationales".

the European Union law, that is the feeding of a "de facto solidarity" in areas progressively more numerous and in accordance with the order of priority among the political objectives[36].

Third, the availability of the imperative mandate would favor the reduction of the so-called *democratic deficit*, namely the weakness of the legitimacy and powers of the European Parliament compared to the other institutions, organs and organisms of the European Union, to the Member States and to the European citizens, and the development of democracy and efficiency in these institutions, organs and organisms[37].

Fourth, the conventional liberalization of the imperative mandate would promote, in the discipline of the organization and functioning of the political groups in the European Parliament, the integration of the different nationalities of the deputies, according to their political affinities, the overcoming of the conditioning produced by the national element in the political representation expressed by these groups and the valorization of the political element in the formation and activity of such representation[38].

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[36] See Costa, O. (2001) *Le Parlement européen, assemblée delibérante*, Bruxelles, Editions de l'Université de Bruxelles, p. 104: "Les traités fondateurs des Communautés et de l'Union attestent dans leurs préambules de l'existence de ces valeurs, intérêts et objectifs communs aux peuples européens. Certains juristes considèrent d'ailleurs que ces traités forment une «constitution» dûment approuvée par les peuples d'Europe en vertu de leur ratification parlementaire ou référendaire: leurs préambules rempliraient la fonction de définition du projet de société dévolue aux préambules et déclarations dans les constitutions des Etats membres. Les progrès réalisés par les traités de Maastricht et Amsterdam en la matière sont significatifs de cette évolution. Il est certes aisé de contester cette conception «fédéraliste» de l'Europe, en invoquant l'absence de peuple européen, de «contrat social» et de *telos* à l'échelle de l'Union, la permanence des Etats-nations, l'attachement des individus à leur citoyenneté nationale, les barrières linguistiques et culturelles qui les divisent, ou encore le déficit démocratique. Toutefois, même si l'on considère avec hauteur les éléments de cohésion que constituent le patrimoine commun de l'Europe, les solidarités de fait qui découlent des réalisations de la construction communautaire ou encore la citoyenneté européenne, l'intérêt croissant que les partis politiques, les associations de citoyens et les groupes d'intérêt portent aux institutions européennes ne peut être nié. La présence sans cesse accrue des représentants de ces groupes auprès de celles-ci et leur souhait d'être associés à la définition et à l'exécution des politiques publiques de l'Union contribuent à la cohésion du système politique européen et à la création de solidarités entre eux".

[37] See Costa, O. (2001) *Le Parlement européen, assemblée delibérante*, Bruxelles, Editions de l'Université de Bruxelles, p. 60: "Le déficit démocratique de l'Union a plusieurs aspects. Le premier est subjectif, lié à l'«étrangeté» du schéma institutionnel de l'Union, qui déboussole les citoyens habitués au régime parlementaire et à l'exercice du politique dans le cadre national, et suscite chez eux le sentiment confus qu'il est entaché d'un déficit démocratique. Ce sentiment découle d'une multiplicité de facteurs: rôle réduit du Parlement européen, caractère technocratique de la Commission, ambivalence du Conseil, complexité du processus décisionnel, place dévolue aux groupes d'intérêt... […]

La thématique du déficit démocratique trouve également sa source dans des phénomènes plus objectifs. Même s'il l'on prend acte de l'existence d'autres modes de légitimation que l'élection directe et si l'on récuse tout parallèle avec le modèle parlementaire, on constate des carences dans la responsabilité de l'«exécutif» de l'Union, et donc des entorses à un principe essentiel de la démocratie, l'*accountability* des gouvernants".

[38] See Costa, O. (2001) *Le Parlement européen, assemblée delibérante*, Bruxelles, Editions de l'Université de Bruxelles, pp. 110-111: "La structuration de l'assemblée selon une logique politique transnationale a constitué une sorte de pari, qui aurait pu conduire à une atomisation de la représentation européenne si les délégations nationales n'avaient pu s'entendre au sein des groupes. La faiblesse des pouvoirs de l'assemblée et de l'attention que suscitaient ses travaux, ainsi que la proximité idéologique des partis socialistes et démocrates-chrétiens dans les six Etats fondateurs, ont toutefois limité les sources de conflits et permis aux parlementaires européens de faire l'apprentissage de la délibération supranationale. Cette option audacieuse a minoré les risques d'éclatement et apporté la preuve que des représentants de six, neuf, dix, douze, puis quinze nations étaient capables de travailler en bonne intelligence et de nouer des liens sur la base d'affinités politiques transnationales".

4.3. The desired aims

From what has been said, can be inferred that which would be the *ratio* of the institute. On the one hand, the European mandate of political representation would guarantee democracy[39], the principle of majority[40], the rights of minorities[41] and human rights[42] (the *substantial* ratio *of the European mandate of political representation*). As, on the other hand, it would lead to increase the application of the principle of separation of powers[43], although *vertically* considered (in the relations between the governors and the governed, with regard to the legislative function), rather than *horizontally* (in the relations of the governors with themselves, with regard to the classical functions of the State), as it would be confirmed, among other things, both by a small, but significant, redistribution of sovereignty among legislators, judges and jurists at the expense of the firsts and for the benefit of the others and by a greater participation of the citizens in the political and social life of the community (the *formal* ratio *of the European mandate of political representation*). Accordingly, such mandate would represent the most effective constitutional

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[39] See Kelsen, H. (1949) *General Theory of Law and State*, Cambridge, Harvard University Press, p. 285: "The ideal of self-determination requires that the social order shall be created by the unanimous decision of all its subjects and that it shall remain in force only as long as it enjoys the approval of all. The collective will (the *volonté générale*) must constantly agree with the will of the subjects (the *volonté de tous*). The social order can be changed only with the approval of all subjects; and each subject is bound by the order only as long as he consents thereto. By withdrawing his consent, each individual can at any moment put himself outside the social order".

[40] See Pasquino, G. (ed.) (1988) *Rappresentanza e democrazia*, Roma-Bari, LATERZA, p. 14: "Per rendersi conto della differenza fra rapporto privato e rapporto pubblico di rappresentanza non è trascurabile inoltre la considerazione, di solito trascurata, che la designazione del rappresentante pubblico avviene col procedimento dell'elezione, vale a dire con la scelta della persona di fiducia fatta contemporaneamente da più individui ma indipendentemente l'uno dall'altro in base al principio di maggioranza, per lo meno nelle elezioni a collegio uninominale, cui si riferiscono in genere gli scrittori non contemporanei. Nella maggioranza possono influire diversi interessi, tutti quanti particolari, fra i quali l'interesse che deve prevalere non può essere deciso, a suo talento e assumendosene tutte le responsabilità, se non dall'eletto".

[41] See Schmitt, C. (1981) *Il custode della Costituzione*, Milano, Giuffrè Editore, pp. 45-46: "Dopo il precedente di J. St. Mill – che ha fornito molte costruzioni statuali tipicamente liberali del XIX secolo ed ancora oggi influenza le rappresentazioni politiche più fortemente di quanto in mancanza di una concreta coscienza storica non sia per lo più chiaro ai portatori di queste rappresentazioni – la «vera» democrazia può essere definita anche come protezione della minoranza; uno stabile compromesso fra maggioranza e minoranza deve allora essere la sua vera e propria essenza".

[42] See Barbera, A. (1998) "*Le basi filosofiche del costituzionalismo*", *Le basi filosofiche del costituzionalismo*, Roma-Bari, Editori Laterza, p. 4: "I valori e le tecniche del costituzionalismo […] possono così riassumersi:

[…]

6) i «diritti dell'uomo» hanno il primato su ogni valore che li trascenda, e al loro servizio è subordinato lo stesso potere pubblico".

[43] See Volpi, M. (2010) *Libertà e autorità*, 4th edition, Torino, G. Giappichelli Editore, p. 37: "*La separazione dei poteri* è uno dei principi-cardine dello Stato liberale. La tripartizione tra potere legislativo, esecutivo e giurisdizionale risale, come noto, soprattutto a Montesquieu nel già citato *L'esprit des lois*. L'origine storica della affermazione di tale principio va ricercata nella volontà della classe borghese di spezzare l'assolutismo monarchico, garantendo una distribuzione del potere sovrano tra diversi soggetti, e nel fatto che il potere legislativo e quello esecutivo rappresentano due diverse classi sociali ed è all'interno del primo che la borghesia afferma dapprima la propria egemonia. Nello Stato liberale tale principio viene assolutizzato, nel senso di prefigurare una perfetta corrispondenza tra organo, funzione attribuita, forma ed efficacia degli atti prodotti nel suo esercizio. Tuttavia ciò non corrisponde pienamente al pensiero di Montesquieu, il quale sottolineava come fra i tre poteri dovessero esistere forme di reciproco controllo e condizionamento, al fine di evitarne la degenerazione, impostazione questa effettivamente ripresa nell'esperienza degli Stati Uniti dei *checks and balances*".

guarantee of that efficient limitation of governmental authority by means of a written and rigid constitution (whose formulation should be up to the same citizens, through the work executed by their representatives in Parliament) which constitutes the essential characteristic of a State of classical democracy[44].

In other words, the conventionalization of the liberty of imperative mandate in the European Parliament would bring the European Union law significantly nearer to that model of "mixed constitution" which is unanimously considered as a key contribution of the Aristotelian thought to modern constitutionalism[45], in so far as the mandate referred above would be a powerful remedy to both the incompleteness[46] and the degeneration[47] of the two oldest forms of constitution affected by political representation, aristocracy (which degenerates into oligarchy) and policy (which degenerates into democracy), with the exception of monarchy (whose degeneration is tyranny)[48].

As for the polity, the reform – providing the constitutional faculty of the governed to concur with the governors in determining a part of the national policy – would entail, on the one hand, an improvement of the competences and abilities of the governors as a result of the negotiations with the governed[49] and, on the other hand, an encouragement of the good faith of the governors favored

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[44] See Biscaretti di Ruffìa, P. (1988) *Introduzione al diritto costituzionale comparato*, 6th edition, Milano, Dott. A. Giuffrè Editore, pp. 53-54.

[45] See Cerri, A. (2006) *Istituzioni di diritto pubblico. Casi e materiali*, 3rd edition, Milano, Giuffrè Editore, pp. 183-184: "Nel pensiero costituzionale e nell'esperienza delle repubbliche antiche non è presente una teoria della divisione dei poteri; è presente, invece, una teoria del *governo misto*, che prevede una ripartizione dell'influenza dei diversi ceti sociali sugli organi della repubblica, in guisa da mantenere equilibrata e coesa la compagine sociale complessiva".

[46] See Plato (1968) *The Republic*, 2nd edition, New York, BasicBooks, pp. 225-226: "«You certainly speak of a regime,» he said, «which is a mixture of bad and good.»

«Yes, it is mixed,» I said, «but due to the dominance of spiritedness one thing alone is most distinctive in it: love of victories and of honors.»

«Very much so,» he said".

[47] See Aristotle (1999) *Politics*, Kitchener, Batoche Books, p. 61: "Having determined these points, we have next to consider how many forms of government there are, and what they are; and in the first place what are the true forms, for when they are determined the perversions of them will at once be apparent. The words constitution and government have the same meaning, and the government, which is the supreme authority in states, must be in the hands of one, or of a few, or of the many. The true forms of government, therefore, are those in which the one, or the few, or the many, govern with a view to the common interest; but governments which rule with a view to the private interest, whether of the one or of the few, or of the many, are perversions. For the members of state, if they are truly citizens, ought to participate in its advantages".

[48] See Mazziotti Di Celso, M. and Salerno, G.M. (2007) *Manuale di diritto costituzionale*, 4th edition, Padova, CEDAM, p. 35: "Grande importanza, anche perché ripresa secoli dopo dalla filosofia scolastica, ha la classificazione delle forme di Stato operata da Aristotele (ma già adombrata da Platone) in funzione del numero dei governanti: egli distingueva la monarchia, o governo di uno solo, l'aristocrazia, in cui il governo appartiene ad una minoranza di ottimati, e la *politìa*, in cui appartiene alla maggioranza".

[49] See Kelsen, H. (1985) *La democrazia*, Bologna, Società editrice il Mulino, p. 246: "Dal fatto che la tensione permanente tra maggioranza e minoranza, governo e opposizione, risulta così caratteristica nel processo dialettico della formazione democratica della volontà dello Stato, si può ben dire: democrazia è discussione. Di conseguenza, la volontà dello Stato, vale a dire il contenuto dell'ordinamento giuridico, può essere il risultato di un compromesso. Questo tipo di governo, garantendo la pace interna, è preferito dai caratteri amanti della pace e non aggressivi"; and see Aristotle (1999) *Politics*, Kitchener, Batoche Books, pp. 65-66: "Most of these questions may be reserved for another occasion. The principle that the multitude ought to be supreme rather than the few best is one that is maintained, and, though not free from difficulty, yet seems to contain an element of truth. For the many, of whom each individual is but an ordinary

by the control of the governed[50]. The negotiations, in fact, are guarantees of effective self-determination[51], on the condition that the proponent and the acceptor are in good faith[52]. The control, moreover, is a guarantee of legality and opportunity of the administrative action[53], provided

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person, when they meet together may very likely be better than the few good, if regarded not individually but collectively, just as a feast to which many contribute is better than a dinner provided out of a single purse. For each individual among the many has a share of virtue and prudence, and when they meet together, they become in a manner one man, who has many feet, and hands, and senses; that is a figure of their mind and disposition".

[50] See Hayek, F.A. von (1979) *The Political Order of a Free People*, III, London, Routledge & Kegan Paul, p. 134: "Buying majority support by deals with special interests, though this is what contemporary democracy has come to mean, has nothing to do with the original ideal of democracy, and is certainly contrary to the more fundamental moral conception that all use of force ought to be guided and limited by the opinion of the majority. The vote-buying process which we have come to accept as a necessary part of the democracy we know, and which indeed is inevitable in a representative assembly which has the power both to pass general laws and to issue commands, is morally indefensible and produces all that which to the outsider appears as contemptible in politics. It is certainly not a necessary consequence of the ideal that the opinion of the majority should rule, but is in conflict with it"; and see Aristotle (1999) *Politics*, Kitchener, Batoche Books, pp. 62-63: "For all men cling to justice of some kind, but their conceptions are imperfect and they do not express the whole idea. For example, justice is thought by them to be, and is, equality, not, however, for all, but only for equals. And inequality is thought to be, and is, justice; neither is this for all, but only for unequals. When the persons are omitted, then men judge erroneously. The reason is that they are passing judgment on them-selves, and most people are bad judges in their own case".

[51] See Gazzoni, F. (2011) *Manuale di diritto privato*, 15th edition, Napoli, Edizioni Scientifiche italiane, pp. 841 e 786, according to which "*negotiations*" means the dialogue between two or more parties, finalized to the meeting of the wills of the contractors on a disciplinary order that realizes their interests and concluded by the acceptance of the proposal; and see Modugno, F. (2009) *Ragione e ragionevolezza*, 2nd edition, Napoli, Editoriale Scientifica, pp. 119-120: "Ho, poco fa, citato sinteticamente il felice passo di Alexy e lo ripropongo per esteso: grazie ai criteri ulteriori (rispetto a quelli di non contraddizione, di verità empirica e di razionalità scopo/mezzo) ossia ai criteri di «interpretazione» (degli interessi dei terzi), di «uguaglianza» (trattamento ugualitario degli interessi di tutti) e di «critica» (discussione dei vari interessi, convinzioni, tradizioni, compresi quelli propri) «si abbandona la sfera della mera massimizzazione del proprio utile». E allora, in tal modo, «diventa possibile un *discorso razionale* capace di portare a dei *risultati condivisibili*, con *buone ragioni da tutti*. Il *consenso che si basa su buone ragioni* non solo offre *la garanzia della maggiore correttezza possibile*, ma costituisce anche la condizione per una stabilità sociale durevole» (corsivi miei)".

[52] See Bianca, C.M. (2000) *Diritto civile*, III, 2nd edition, Milano, Dott. A. Giuffrè Editore, pp. 162-163 e 706, according to which the *good faith* is the ignorance of infringing someone else's right – the *good faith in a subjective sense* – and, according to the principle of contractual solidarity, the respect, in terms of loyalty, of the obligations of information, clarity and secret and, in terms of safeguard, of the obligation of fulfilling the conditions necessary for the validity and effectiveness of the contract, within the limits of an appreciable sacrifice – the *good faith in an objective sense*); and see Buscema, S. and Buscema, A. (2008) *I contratti della pubblica amministrazione*, 3rd edition, Padova, CEDAM, p. 97: "La responsabilità precontrattuale della P.A. è configurabile in tutti i casi in cui l'ente pubblico, nelle trattative con i terzi, abbia compiuto azioni o sia incorso in omissioni contrastanti con i principi della correttezza e della buonafede, alla cui puntuale osservanza anch'esso è tenuto, nell'ambito del rispetto dei doveri primari garantiti dall'art. 2043 cod. civ.".

[53] See Monorchio, A. and Mottura, L.G. (2010) *Compendio di contabilità di Stato*, 4th edition, Bari, Cacucci Editore, pp. 469 e 473, according to which "*control*" means the set of the operations of review or revision of someone else's activity, in order to verify the formal and substancial regularity of the decision-making process, the conformity of the acts to the law (the *control of legitimacy*) as well as the compliance of the administrative action to the parameters of efficiency, effectiveness and economy (the *control of merit*); and see Barbera, A. (1998) "*Le basi filosofiche del costituzionalismo*", *Le basi filosofiche del costituzionalismo*, Roma-Bari, Editori Laterza, p. 12: "Come già accennavo, mentre nel costituzionalismo di ispirazione giacobina la politica viene concepita come l'attività attraverso cui si enuclea la «sovranità popolare» e si individuano «interessi generali», nel costituzionalismo di ispirazione anglosassone la politica e intesa soprattutto come conflitto e competizione, attraverso cui si confrontano e ricompongono verità parziali e interessi settoriali. E proprio per questo è possibile sottoporre gli atti di composizione di questi interessi e verità «parziali» a controlli di «reasonableness», di «ragionevolezza». È significativo di tale orientamento che nella tradizione americana si siano sviluppate le «hearings» (udienze legislative di fronte a Commissioni parlamentari in cui, come in processo, si confrontano i vari gruppi di interesse) e si sia dato riconoscimento giuridico alle *lobbies* parlamentari".

that there is the maximum possible publicity and transparency, compatibly with the constitutional constraints[54].

And, as for the aristocracy, the reform – providing at the constitutional level the obligation for the governors and the prohibition for the governed of determining at least a part of the national policy – would allow, on the one hand, the integration of the middling capacities of the collectivity through the representative system[55] and, on the other hand, the containment of the selfish impulses of the individuals through the rule of law[56]. The representative system, in fact, implies an unequal distribution of power between the governors and the governed based on the presumption that the former are more able and better disposed to govern than the latter[57]. The rule of law, moreover,

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[54] See Casetta, E. (2010) *Manuale di diritto amministrativo*, 12th edition, Milano, Giuffrè Editore, p. 53, according to which the *publicity* is the communication, directed by the public administration to the privates, of news on facts that concern it and the *transparency* is the possibility, guaranteed by the public administration to the privates, to inquire on facts that concern it; and see Urbinati, N. (2009) *Lo scettro senza il re. Partecipazione e rappresentanza nelle democrazie moderne*, Roma, Donzelli Editore, p. 124: "Questo spostamento di attenzione dall'autorizzazione elettorale alle forme indirette di partecipazione ha come scopo pratico quello di invitare i legislatori e i cittadini a raffinare la loro immaginazione istituzionale per dotarsi di nuovi mezzi legali e costituzionali, capaci di migliorare la funzione di trasparenza e di controllo sul quel sistema intricato che è il giudizio: di rendere fattiva l'interdipendenza tra eletti e cittadini; di regolare e limitare l'uso delle risorse economiche private nelle campagne elettorali; di tutelare l'indipendenza dei sistemi pubblici di informazione dal potere delle maggioranze politiche; di tutelare il pluralismo delle fonti di informazione dal monopolio privato".

[55] See Schmitt, C. (1984) *Dottrina della costituzione*, Milano, Giuffrè Editore, p. 386: "La forma politica dell'aristocrazia si basa sull'idea della rappresentanza. Tuttavia, la conseguenza di questo principio formale è indebolita e attenuata per il fatto che svolge le funzioni di rappresentanza non una singola persona, ma una pluralità di persone. C'è così nella aristocrazia stessa una certa «*modération*»"; and see Aristotle (1999) *Politics*, Kitchener, Batoche Books, p. 61: "Of forms of government in which one rules, we call that which regards the common interests, kingship or royalty; that in which more than one, but not many, rule, aristocracy; and it is so called, either because the rulers are the best men, or because they have at heart the best interests of the state and of the citizens. But when the citizens at large administer the state for the common interest, the government is called by the generic name – a constitution. And there is a reason for this use of language. One man or a few may excel in virtue; but as the number increases it becomes more difficult for them to attain perfection in every kind of virtue, though they may in military virtue, for this is found in the masses. Hence in a constitutional government the fighting-men have the supreme power, and those who possess arms are the citizens.

Of the above-mentioned forms, the perversions are as follows: of royalty, tyranny; of aristocracy, oligarchy; of constitutional government, democracy".

[56] See Hayek, F.A. von (1973) *Rules and Order*, I, London, Routledge & Kegan Paul, p. 82: "Nevertheless, we find in the Athenian democracy already the first clashes between the unfettered will of the «sovereign» people and the tradition of the rule of law; and it was chiefly because the assembly often refused to be bound by the law that Aristotle turned against this form of democracy, to which he even denied the right to be called a constitution"; and see Aristotle (1999) *Politics*, Kitchener, Batoche Books, p. 88: "Such a democracy is fairly open to the objection that it is not a constitution at all; for where the laws have no authority, there is no constitution. The law ough to be supreme over all, and the magistracies should judge of particulars, and only this should be considered a constitution. So that if democracy be a real form of government, the sort of system in which all things are regulated by decrees is clearly not even a democracy in the true sense of the word, for decrees relate only to particulars.

These then are the different kinds of democracy".

[57] See Paladin, L. (1998) *Diritto costituzionale*, 3rd edition, Padova, CEDAM, p. 263, according to which "*representative system*" means the system in which the electoral body limits itself to elect one or more colleges politically representative of the people, which are entrusted with deliberating laws and, more generally, with determining the political trend; and see Bobbio, N. (1985) "*Liberalismo e democrazia*", *Il pensiero politico contemporaneo*, I, Milano, Franco Angeli, pp. 40-41: "Del resto la democrazia rappresentativa nasceva anche dalla convinzione che i rappresentanti eletti dai cittadini fossero in grado di giudicare quali fossero gli interessi generali meglio che i cittadini medesimi, troppo chiusi nella contemplazione dei loro interessi particolari, e pertanto la democrazia indiretta fosse più adeguata proprio al raggiungimento dei fini cui era stata predisposta la sovranità

entails a hierarchy of the sources of law, for legal force and value, pervaded by the assumption that the legally superior sources produce a more equal right[58].

In synthesis and following a psychological and sociological interpretation, it can be said that both the negotiations and the control as well as the representative system and the rule of law seem to be all different forms of interconnection[59], which provide the individuals with an access to the life of the society and to its advantages[60], starting with those arising from the participation of each

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popolare. […] Se per democrazia moderna s'intende la democrazia rappresentativa, e se alla democrazia rappresentativa è inerente lo svincolamento del rappresentante della nazione dal singolo individuo rappresentato e dai suoi interessi particolaristici, la democrazia moderna presuppone l'atomizzazione della nazione e la sua ricomposizione a un livello più alto e insieme ristretto che è quello delle assemblee parlamentari. Ma questo processo di atomizzazione è lo stesso processo da cui è nata la concezione dello stato liberale, il cui fondamento deve essere ricercato, come si è detto, nella affermazione dei diritti naturali e inviolabili dell'individuo".

[58] See Mortati, C. (1991) *Istituzioni di diritto pubblico*, 10th edition, Padova, CEDAM, pp. 144-145, according to which "*rule of law*" means the primacy of laws over men (or, better, of the general and abstract provisions with respect to the special and concrete measures), which occurs when are predisposed jurisdictional remedies, susceptible of stopping the illegal action of the executive organs, and when in the regimes with a rigid constitution these remedies become experimental even against the unconstitutional laws, with which it is stated the claim of the citizens against the same legislator to ensure his subordination to the constitution; and see Ridola, P. (2011) *Democrazia rappresentativa e parlamentarismo*, Torino, G. Giappichelli Editore, p. 67: "Tuttavia, queste ultime sono due direttrici solo parzialmente convergenti: mentre il principio pluralistico presuppone una visione della società fondata sulla positività e sull'ineliminabilità del conflitto, l'affermazione del principio democratico richiede la stabilizzazione del patto costituente sull'obiettivo di creare un'effettiva e diffusa condizione partecipativa (C. Mortati, 1946, 350 s.; Id., 1955, 279 ss.; G. Zagrebelsky, 1984, IX ss.; W. Bauer, 1968, 62 s.). È questo il dilemma di fondo delle democrazie pluralistiche contemporanee, sospese fra il rispecchiamento nell'ordine costituzionale della pluralizzazione dei centri di potere affermatasi prepotentemente dopo il crollo delle grandi sintesi dell'Ottocento liberale, e la ricerca di una tavola di valori comune alle divisioni, di congegni atti a realizzare la traduzione del pluralismo sociale in unità politica: ciò che delinea pertanto come davvero ineliminabile, in ogni ordinamento democratico, l'esigenza di assicurare, insieme all'affermazione di una sovranità articolata, un obiettivo di unificazione intorno ad un nucleo di valori fondamentali. In altri termini, se il pluralismo sociale deve essere *garantito* al massimo grado, esso deve anche essere, in qualche misura, *organizzato* (U. Scheuner, 1978, 145 ss.; P. Ridola, 1987, 149 ss.)".

[59] See Costa, O. (2001) *Le Parlement européen, assemblée delibérante*, Bruxelles, Editions de l'Université de Bruxelles, p. 71: "Aristote et ses sectateurs vont établir fermement que ni la vérité, ni la tradition ne peuvent assurer la pérennité de la cité. Ce faisant, ils vont livrer les hommes à eux-mêmes, les appeler à recourir à la délibération, que rien ne peut plus entraver, pour rendre possible leur vie en commun. Cette activité politique est nouvelle: elle ne vise pas à trouver la vérité ou des fins universellement valables et use de la raison et de procédures d'argumentation. La politique doit consister en un débat entre des opinions qui ne soient ni intangibles, ni de pures croyances, afin qu'une entente puisse – au moins en théorie – se dégager à l'issue des argumentations successives. Les parties doivent présenter leurs opinions à la collectivité, mais aussi essayer de s'en convaincre réciproquement et user de la raison pour expliquer leurs choix et leurs options. La discussion a pour objet l'obtention d'une position commune qui exclue l'idée de vérité et respecte les préférences de chacun. La politique suppose donc l'existence de conventions – voire d'une éthique – qui rendent possible un dialogue fructueux; celui-ci contribue en retour à les enrichir. A ce prix, la délibération se distingue radicalement du marchandage et de la négociation: idéalement, les parties ne se contentent pas de chercher à préserver leurs intérêts et à imposer leurs valeurs, et s'interdisent toute violence. Pour ce faire, Aristote a défini les conditions auxquelles une délibération peut être vertueuse, c'est-à-dire permettre des choix prudents à l'individu et à la cité".

[60] See Cerutti, C. (2012) "*Il lavoro come fondamento della Repubblica democratica italiana*", *Il lavoro nella giurisprudenza*, pp. 1064-1065: "Per concludere con una celebre metafora rousseauiana, si può dire che la Carta costituzionale racchiuda in sé la chiave del passaggio dallo stato di natura allo stato civile, che solo consente all'uomo di raggiungere il pieno sviluppo della sua persona, «sostituendo nella sua condotta la giustizia all'istinto» («e il diritto all'appetito»). L'uomo, infatti, – secondo Rousseau – «pur privandosi in questo nuovo stato di molti vantaggi che la natura gli accorda» – e, nella specie, della possibilità di concentrarsi sulla cura dei propri interessi, nei limiti delle proprie forze (la *libertà naturale*) –, «ne ottiene in compenso di tanto grandi» – e, nella specie, la possibilità di usufruire della forza altrui, nei limiti della difesa del bene comune (la *libertà civile*). In effetti, solo con tale passaggio – prosegue Rousseau – le facoltà dell'uomo si esercitano e si sviluppano, «le sue idee si ampliano, i suoi sentimenti si nobilitano» e «la sua anima intera si eleva a tal segno, che se il cattivo uso della nuova condizione spesso non lo degradasse

to a kind of superbrain, formed – as for the former (the negotiations and the control) – by all the members of the community and – as for the latter (the representative system and the rule of law) – by mankind and that expresses a powerfull collective intelligence[61].

In conclusion, therefore, also in the view of the "mixed constitution" of Aristotelian matrix, the reform at issue: a) is based on a re-evaluation in an egalitarian sense of the political knowledge and diligence of the governors, compared to those of the governed – and, in the specific case, on the prevention of both an overestimation of the potentialities of the governors and an underestimation of the potentialities of those governed[62] –; b) consists in a greater distribution of power between the governors and the governed: the more the power is divided, the less who administers it is interested in using it for private purposes, rather than public ones[63]; c) advances the care of general interests:

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facendolo scendere al disotto di quella da cui proviene, dovrebbe benedire senza posa l'istante felice che lo strappò per sempre di là, facendo dell'animale stupido e limitato che era un essere intelligente e un uomo»".

[61] See Lévy, P. (1994) *L'intelligence collective. Pour une anthropologie du cybespace*, Paris, La Découverte/Poche, p. 29: "Qu'est-ce que l'intelligence collective? *C'est une intelligence partout distribuée, sans cesse valorisée, coordonnée en temps réel, qui aboutit à une mobilisation effective des compétences*. Le fondement et le but de l'intelligence collective sont la reconnaissance et l'enrichissement mutuels des personnes".

[62] See Aristotle (1999) *Politics*, Kitchener, Batoche Books, p. 96: "But a city ought to be composed, as far as possible, of equals and similars; and these are generally the middle classes. Wherefore the city which is composed of middle-class citizens is necessarily best constituted in respect of the elements of which we say the fabric of the state naturally consists. And this is the class of citizens which is most secure in a state, for they do not, like the poor, covet their neighbors'goods; nor do others covet theirs, as the poor covet the goods of the rich; and as they neither plot against others, nor are themselves plotted against, they pass through life safely"; and see Modugno, F. (2009) *Ragione e ragionevolezza*, Napoli, Editoriale Scientifica, pp. 118-119: "Ma ecco l'obiezione che mi ha mosso Andrea Longo: se il consenso si fonda su buone ragioni, *chi ci dice che siano* «*buone*»? per stabilire la «bontà» di un'asserzione (bontà sostanziale e non formale) ci si può basare *o* sulla adesione ad un parametro di riferimento (assiologico) precostituito, *oppure* sul consenso riscosso dall'argomentazione. […] Se si rinuncia a ricercare il consenso sulla base di ragioni sostanziali – che sono massimamente opinabili – le buone ragioni si vengono formando, progressivamente e proceduralmente, a mano a mano che si produce o si realizza il consenso da parte dell'uditorio. Non si dà cioè un *prius* (buone ragioni o consenso) e un *posterius* (consenso fondato su buone ragioni, ovvero buone ragioni risultanti dal consenso), bensì un processo circolare fondato su presupposizioni o condizioni trascendentali che rendano possibile il dialogo e l'intesa (se si ottiene) tra i dialoganti".

[63] See Aristotle (1999) *Politics*, Kitchener, Batoche Books, p. 97: "These considerations will help us to understand why most governments are either democratical or oligarchical. The reason is that the middle class is seldom numerous in them, and whichever party, whether the rich or the common people, transgresses the mean and predominates, draws the constitution its own way, and thus arises either oligarchy or democracy. There is another reason – the poor and the rich quarrel with one another, and whichever side gets the better, instead of establishing a just or popular government, regards political supremacy as the prize of victory, and the one party sets up a democracy and the other an oligarchy"; and see Toqueville, A. de (1840) *Democracy in America*, Indianapolis, Liberty Fund, pp. 186-187: "The partisans of centralization in Europe maintain that governmental power administers the localities better than they would be able to administer themselves. Perhaps that is true, when the central power is enlightened, and the localities are not; when it is active, and they are passive; when it is in the habit of taking action, and they are in the habit of obeying. You can even understand that the more centralization increases, the more this double tendency grows; and the capacity of the one and incapacity of the other become more striking.

But I deny that this is so when the people are enlightened, alert to their interests, and accustomed to consider them as they do in America.

I am persuaded, on the contrary, that in this case the collective strength of the citizens will always be more powerful for producing social well-being than the authority of the government".

the compliance of common good is directly proportional to the full development of the human person and social welfare[64].

Furthermore, already in the Italian Constituent Assembly, a voice was raised against the prohibition of imperative mandate. It was that of Hon. Grieco, as reported in the meeting minutes of 19 September 1946 of the II Subcommittee of the Committee on the Constitution, p. 223: "GRIECO è contrario a includere la formula «senza vincoli di mandato», perché, a suo avviso, i deputati sono tutti vincolati ad un mandato: si presentano infatti alle elezioni sostenendo un programma, un orientamento politico particolare. Con l'aggiunta proposta dall'onorevole Mannironi si favorirebbe il sorgere del malcostume politico"[65]. This – despite the apparent isolation – echoed the teaching of the fathers of Italian legal literature – nowadays universal – according to which, if right is generated by moral, moral is safeguarded by right[66].

[64] See Aristotle (1999) *Politics*, Kitchener, Batoche Books, p. 59: "First, let us consider what is the purpose of a state, and how many forms of government there are by which human society is regulated. We have already said, in the first part of this treatise, when discussing household management and the rule of a master, that man is by nature a political animal. And therefore, men, even when they do not require one another's help, desire to live together; not but that they are also brought together by their common interests in proportion as they severally attain to any measure of well-being"; and see Zagrebelsky, G. (2011) "*Sul diritto alla libera ricerca della felicità. In onore di Franco Modugno*", *Studi in onore di Franco Modugno*, Napoli, Editoriale Scientifica, p. 3668: "La definizione socratica è costruita su uno stato di tensione - il desiderare - che si scarica nella distensione della cosa ottenuta. Lì, in quel momento, si trova la felicità e in quel punto, il punto del fine raggiunto, sembra raggiunta la pace e l'appagamento dell'anima cioè la felicità *stabile* epicurea. Ma pace e appagamento presuppongono che, nel momento in cui ciò che si è desiderato si è ottenuto, si possa dire *per sempre*: per sempre questo mio desiderio troverà soddisfazione".

[65] Assemblea Costituente. Commissione per la Costituzione. Seconda Sottocommissione – 19 settembre 1946, 223.

[66] See Brugi, B. (1891) *Introduzione alle scienze giuridiche e sociali*, Firenze, G. Barbèra Editore, pp. 50-51: "La legge di trasformazione dei doveri morali in giuridici è semplicemente questa, che i primi si mutano nei secondi in base ad un convincimento che la pura sanzione della coscienza individuale non basti a tutelarli"; and see Laguna de Paz, J.C. (2011) "*La regulación del mercado. Lecciones para alumnos díscolos*", *Derecho administrativo y regulación económica. Liber Amicorum Gaspar Ariño Ortiz*, La Ley, pp. 1195-1196: "La experiencia demuestra que las garantías técnico-jurídicas que la legislación construye para garantizar la independencia de estas entidades [(las Administraciones independientes)] -aunque admiten grados-, tienen una virtualidad relativa. «Por desgracia, la independencia teórica de las instituciones no basta para asegurar la imparcialidad de quienes la integran. Necesita estar arropada por unos hábitos culturales que otorguen valor a la ecuanimidad y susciten suficiente confianza en que la nobleza propia al elegir candidatos de valía será correspondida por los demás» [M. CONTHE, (2010)]. Al final, la clave para su eficaz funcionamiento radica en algo tan difícil de construir y quebradizo como su prestigio institucional. A la larga, solo eso puede mantenerles a resguardo de cualquier intromisión política o de intereses particulares (captura del regulador). Sin embargo -como decimos-, esto no es algo que pueda conseguirse con el mandato imperativo de una norma, sino que requiere de una cultura institucional, que no crece por igual en todas las latitudes".

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Details of the author's institutional affiliation, full postal and email addresses and other contact information must be included on a separate cover sheet. Any acknowledgements should be included on the cover sheet as should a note of the exact length of the article. A short biography of up to 75 words should also be submitted.

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