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## On State, Identity and Rights: Putting Identity First

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*The paper considers the nature of the state understood as the political unity articulated on the basis of a collective identity which provides the state with its capacity to make decisions. The foremost decision of the state to protect and defend this identity is the source of its authority to enforce laws. Collective identity thus represents an object of special interest, unlike both “political” interests (Millian other-regarding acts) and private interests (Millian self-regarding acts). The validation of laws through this special interest is a necessary condition for both of these latter kinds of interests to materialize. Hence, unlike the Millian thesis of two different kinds of interests (self- and other-regarding), here we take that there are three types or spheres of interests. Any conception of rights, then, will cover a subset of interests found in the domains of all of those three*

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*types of interests: in the domain of political interest the issue concerns selection among competing sets of legitimate interests, within the domain of private interests the point is to discern those that will be protected by law, , while the third type of interests, the object of which is a unique collective identity and its defining specificity, represents an overarching interest that is embedded in any legitimate collective concern. In this*

*scheme, well-suited for democratic theory, the majority/minority discourse is a matter of distinguishing which particular set of legitimate interests is dominant (e.g., which political party is in power) and which ones are waiting for the opportunity to achieve their transformation from minority (opposition) to majority (i. e. government). If, however, there is no well-defined collective identity then minorities acquire a new meaning, rather than being possible future majorities, they form a nucleus of competing collective identities with, sometimes hopeless but still alive, aspirations to sovereignty and thus they are sources of likely conflicts that may go well beyond political controversies.*

## **1. Introduction**

The underlying claim in this paper is that the role of the state is to provide conditions for the validity of laws. It seems that nothing could be a substitute for the state in this regard. The very essence of the state is contained in its function contained in *the power to enforce laws*. This is a precondition for any regulated social state of affairs. Without guarantees provided by the rule of law there is no freedom, although the validity of laws functions in such a way that it simultaneously limits freedom(s). These limitations, however, must be precisely formulated and adequately justified.

These two provisions of the state (guarantees and limitations) offer the basis for a possible constitution of the moral stature of the state. They create conditions for the

rationality of expectations and predictions, along with trust on which the expectations and predictions are based. The latter is important, for it is precisely what makes predictions possible. On their basis subsequent expectations are being formed. Together with *security*, it is this *reliance* that provides the chief moral reason for the state's existence. "Security" refers to the domain of limitations on freedom and thus constituted guarantees. What follows from this is that security and ability to make predictions are crucially linked.

I will contend that, when considering the nature of the state, we should try to understand it in terms of politically expressed collective identity. Metaphysically, this underlying identity elevates the state into an entity capable of making decisions. Controversially, in this paper I will understand this capacity of the state to make decisions as not reducible to decisions made by individual agents, the citizens of the state. Thus, the state *qua* politically expressed collective identity is taken to be a form of life capable of acting for an end, and while being distinct from any set of individual choices, decisions that the state makes encompass all individual decision-makers who are its members independently of what they might individually think of those state decisions. This is a rather complex relationship. One of my goals here is to make it a bit more transparent. To this end we must consider in some detail the role of collective identity in generating a special kind of interests - when there is a preparedness to promote and defend collective identity. This in turn justifies the authority of the state to enforce its laws. Furthermore, equipped with this justification, the state legitimizes political power and facilitates the pursuit of other kinds of interests (political or private) people might have.

The principal decision and ensuing determination of the state to protect and promote the identity it is based on is, therefore, the source of its authority to enforce laws. Collective identity thus represents an *object of special interest*, unlike both the “political” interests (contained in Millian other-regarding acts) and private interests (contained in Millian self-regarding acts). The validation of laws through this special interest is a necessary condition for both of these latter kinds of interests to be legitimized and materialized. Any conception of rights, then, will cover a subset of interests: within the domain of private interests the point is to discern those that will be protected by law; in the domain of political interests, the issue is a selection among competing sets of legitimate interests; the third kind of interests, the defense of collective identity, represents an overarching concern embedded in any legitimate interest. In this scheme, one that is well suited for democratic theory, the majority/minority discourse is a matter of distinguishing which specific set of legitimate interests is dominant (for example, which political party is in power) and which ones are waiting for the opportunity to achieve their transformation from minority to majority. If, however, there is no well-defined collective identity, minorities can acquire a new meaning. They tend to form a nucleus of competing collective identities with aspirations to sovereignty and thus they are sources of likely conflicts that may go well beyond political controversies.

## **2. Three spheres of interests**

When pondering the phenomenon of the state it is helpful to distinguish the following two questions. First, what are the *spheres* of social life in which the state enjoys authorization to regulate practices? Second, independently of what these spheres of

influence are, there is the question “What are the ways in which the state may exercise its authority?” The answer to the first question is that there are three such spheres, while the answer to the second one is that there are two ways (as a master or as an official moderator - something to be discussed later<sup>1</sup>).

(1) The first sphere comprises daily life issues that in a broad sense make up the field of public life, politics and economics. They consist of specific decisions that must fit into the totality of actions undertaken within a society. Such decisions are marked by the fact that they are other-regarding rather than simply agent-regarding acts. Decisions about these acts and goals need not be decisions for single use. They may be long-term decisions, such as decisions arrived at after elections or decisions incorporated into laws and regulations, such as tax laws or traffic regulations. Those laws and regulations may be amended or changed and they deal for the most part with issues of distribution: distribution of liabilities, opportunities, restrictions etc. This is typically done through the articulation and distribution of various rights, licenses, tasks, jobs, functions, titles, penalties, etc. The exact content of such distribution, however, is dependent on available resources: resources in knowledge (regarding what is possible to be done), means (including material means), opportunities (dependent on circumstances which are

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<sup>1</sup> In J. S. Mill’s well-known distinction between self- and other-regarding actions the interests from the first and third sphere would fall into the second group while the interests from the second sphere would fall into the first group of acts. Cf. J. S. Mill *On Liberty* (J. S. Mill, *Utilitarianism – On Liberty – Essay on Bentham*, ed. by Mary Warnock, Collins – The Fontana Library, 1971, p. 136ff) pp. One interpretation of Mill claims him holding that only the second group of actions (our first and third sphere) properly belongs to the concerns of ethics, while the domain of liberty in the strong sense is completely private. Cf. Chapter V; cf. Also D. G. Brown, “Mill on Liberty and Morality,” *Philosophical Review* April 1972, pp. 133-158. Liberty in the proper sense of the word, however, also comes to play in the case of other regarding actions, which may (perhaps must) be chosen politically—that is, these are actions that are neither forbidden nor exactly determined by the need to avoid harming or hurting others. This represents the entire domain of human cooperation, particularly the segment that permits a formal and precise articulation.

presuppositions for possible action), and wills (various decisions, including the decision not to decide at all).

Rules governing this sphere of interests are *regulative* in nature, despite the possible appearance that constitutive rules are present in determining roles people play within a society. Some institutions, traditions, and contexts provide the backdrop for some situations which, when observed from “within,” make it so that rules regulating some specific values in the social articulation of life determine human interactions in a very specific way. The specificity makes it *appear* that the rules in question *define* those practices in a constitutive manner. The fact of such definite articulation of social roles makes it seem that the obligations they imply are such that there is a sort of necessity contained in them. They are expressing socially established rights and duties in a way that makes it difficult to envisage them as merely contingent, but rather only as absolutely obligatory. With respect to many rights from the domain of positive freedom, situated in the domain of this sphere of human interests, this appearance suggests the necessity of their being obligatory beyond the limits of the mentioned resources. It is as if those rights are independent of decisions in virtue of which they were created, and as if they belong according to their source to the domain of negative freedom. The entire ideology of human rights, as well as approaches to social and many other rights as if they were obvious and necessary, are rooted in this ambition stemming from the confusion of these two types of obligatoriness.

The obligatoriness of values regulating this first sphere of human interests may have a lower or a higher intensity. It can even be the case that some of these rules may rightly be considered laws, but even then they are susceptible to change. Valid norms within a

society demand respect, of course, but this is so only until decisions on which these norms are grounded hold. It is not necessary to move to another country in order to live “under laws” acceptable to us; instead, decisions instituting these “laws” are an option. Adaptation and acceptance, on the one hand, and criticism and change, on the other, are two complementary sides of political life. Conventions, existing laws, and political decisions oblige, but this obligatoriness contains no *normative necessity*. This sphere is the true domain of the political, and generally speaking of utilitarian, or, in even broader terms, rational decision making. It is representative of life in the context of temporality: setting goals, whatever they may be, and searching for ways to realize them.

(2) The state is excluded, however, from the *second* sphere of human interests, the *sphere of privacy*. The set of interests making up this sphere is not easily definable. It is essential, however, to establish the existence of that set of interests, as the price for denying its existence would be quite high. What is interesting and important in those denials is that they represent a consequence of theoretical claims regarding authorization boundaries on the part of the state - as can be seen from the way various prohibitions function in everyday life. However, once it is determined that such a sphere of human interests exists, one that the state has no authority to interfere with, significant work still remains to be done. A definition must be provided which constitutes a demarcation line within the set of all human interests. This demarcation line ought to set apart those interests that are situated beyond the point where the state or society is permitted to interfere. For sure, one of the central issues of political philosophy is to discover a proper justification for a specific demarcation between “political” and “private”, because there is a sense in which even the interests from the first sphere are “private”. A recognition that

such demarcation exists is the possibility of rejection of interference *both* in the political and private spheres. We are free to decide what we want in both spheres. In the private sphere, however, this rejection is much more far-reaching—it includes not only the prohibition of the state’s interference in the private sphere, but also a maximal protection against the influence of others, including the influence of freely set political decisions. This is certainly a forceful and important boundary within the sphere of freedom. The existence of the private sphere is a *condition* not only for having a decent quality of life (and this quality depends on where the defined boundary of this sphere is: not too close, not too far), but of “quality politics” as well.

(3) This leads us to the *third* sphere of interests. One essential problem in the relationship between the state and the domain of privacy consists namely in the fact that the state’s entitlement to facilitate satisfaction of both private and public interests falls not only in the first two spheres of interest, but also in a third. That is the sphere of collective morality. This sphere of interests comprises everything that relates to the question of what living together *presupposes*. The primary among those presuppositions is security, understood in its simplest form as the built-in safeguards needed to enable a possibility of the realization of those goals *people set for themselves* (and that have not been ruled out as illegitimate). Furthermore, the role of security is to establish a rational expectation of the ways in which authorities can respond to what one does. Consequently, the law and law-abiding behavior are constituted in terms of those expectations. At this point the third kind of interests emerge; they are a peculiar sort of interests invested in laws and having a double nature: obliging peremptory but aspiring that situations which trigger the application of laws occur as infrequently as possible, preferably not at all.



*Peace* is, therefore, what is desired as the domain in which actual applications of the law are least needed. But in real life, interventions by authorities will be required on a frequent basis. Hence, the third sort of interest takes the form of safeguarding the non-objectionability of these interventions. For these reasons, the rules regulating this sphere of interests are *constitutive* in nature and cannot be subjected to the demand for at-will amendments. They articulate, namely, the description of an underlying collective identity and a shared sense of justice, the two ingredients of “peace”. These rules must therefore be protected from daily political decision-making processes. They are not supposed to receive their justification through political procedures such as “majority support,” “consensus,” etc. Rather, they are the components that state constitutions are made of.

This third sphere of interests is the domain of *negative freedom*<sup>2</sup>, and must be protected by laws, no matter what specific goals anyone may set for oneself. At first it is that individuals are the bearers of the capacity to set ends. In this sense, there are two quite distinct kinds of ends. First, those that are *desired* as ends. Second, those that can be designated as legitimate. The first define who one is. The second are the domain of a shared sense of justice. The first define the collective identities that decide what the second will be. A collective with that kind of identity is capable to decide what is “legitimate”. It has the capacity to decide what is permissible, proper, and decent, as well as what the laws in the society it resides in will be. Hence, as one of its ingredients, the principle of shared justice in a way belongs to the definition of a specific collective identity. It is contained in, but irreducible to the properties and criteria of the preferences of particular members of the collectivity. The specific identities and their basic principles

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<sup>2</sup> The term has been used in the sense that can be found, for instance, in I. Berlin essay “Two Concepts of Liberty”.

of shared justice define collective interests. They provide the content and framework for communal life in a specific society. This sphere is also where the entitlement to the guarantee of protection of collective interests is constituted. The existence of these interests and their (attempted) realization determines common identity.

These interests are not subject to being shaped on an ongoing basis. Rather, by virtue of their actuality and their inherent presumptions they *define* a sort of common framework. They thus provide the basis upon which other interests will establish themselves, on the presupposition that they could, *prima facie*, receive recognition as valid in the sense that they will not be arbitrarily forestalled or hampered. This common framework could be defined as a *nation* that, by virtue of its own state, presumes to be universal in character (although it also contains in itself an element of particularity).

To demand a strict, universal right to protection for these interests (which serve to define the identity of the nation and state), the state must regard these interests as a prevailing and universally binding value. Their protection is, just as in the case of the protection of negative freedom, fully obligatory and independent of what one separately may want. Similar to the case of individual existence that requires the respect of individuals as persons, this comprehensive assumption expresses a sort of universality that admits no subsequent changes, as its purposes are presented to have an enduring and universal value. By virtue of their universality, these values are not dependent on being established as a result of actual desires. If threatened, they are prescribed as obligatory goals. And even though they are not necessary goals (in the sense that they are shared by all states), they are *necessarily obligatory*. The reason for this is that they are required by

the state's identity *qua* existing state. This identity cannot be a source of lawfulness without full normative necessity.

The existing *status quo* represents a source of obligations and duties. These duties (including moral duties), which are seen as established social facts, are normally based on some previous state of affairs (as a duty to fulfill a promise is based on the fact that the promise was made). But the constitutive element of a state's identity and its bearer, a nation, is linked to the mentioned value of security in a fundamental way. The bearer of this identity possesses some abstract features of a *personality*, it has a power to decide, to act, it can suffer the consequences which refer indiscriminately to all members of the collectivity. It can be proud, it can be humiliated, etc. This makes it possible to attribute to this bearer of collective identity something analogous to rights and duties.

The vital role of the rules from this sphere is to ensure that the fundamental and important social structures and institutions are functioning. In order for the rules to work, however, a sort of social cohesion must be in place that is expressed as a sense of unity achieved by living together in the same community under the same laws. Furthermore, this comes as a sort of common fate within a specific space and time, and on this basis a sense of mutuality and basic solidarity develops. This sense of unity, furthermore, produces the need to protect the fundamental values of the underlying identity. Collective identity manifests itself in no other way than through this sentiment and actual protection of those qualities which are its subject. It is not just a matter of mechanical and indistinct functioning of conditions for effecting cooperation—as can be the case with contractarianism or utilitarianism, together with all its unpleasant impersonal and

heteronomous implications. Instead, it is a dynamic field of possible motivation. Furthermore, the realization of goals does not simply increase happiness momentarily. It also contributes to the constitution of a world of true opportunities and lasting values within an accepted worldview. The rules of the game have vested in them the *protection* of what has been taken as a genuine impartiality among persons. This is what makes them universal - in effect moral rules or rules with moral force. The demand for their respect is thus unconditional or at least not dependent on some explicit consent.

Clearly, the domain of the state's authority stretches through the first (political) and third (identity based in a shared sense of who we are and what the justice is) sphere, while the domain of freedom stretches over the first and second (privacy) sphere. Hence, the first sphere is the sphere of overlap: the third one is characterized by a lack of freedom (nobody has the right to demand the abolition of, for example, criminal law, or, for that matter, that the state be abandoned for the sake of ensuing anarchy or lawlessness, or the change of the identity of the nation whose state it is), while the state lacks the right to interfere within the second sphere. The first sphere is where social and political regulation takes place. That is why sometimes the first sphere is absorbed into the third sphere (as is the case, for example, in theories of divine right that characterize some types of monarchies, but also in all kinds of tyrannical regimes and dictatorships, and, of course, in totalitarian systems of rule). In this case, however, rules that regulate social life and constitute applicable rights within the domain of a state, are not grounded authorizations, but rather ungrounded types of domination. We will turn to this in the next section.

### **3. The Three Spheres Applied to the Issues of Democracy and Legitimacy of Authority**

There are two motivations for compliance with the rules issued by a state: the consent of the governed or mere obedience. When state power is legitimized through authorization to rule, its basis is not domination but regulation. Hence, obedience cannot be substituted for consent. This is so, however, only in our first, political sphere of interests. In the second sphere, authority *cannot* regulate. It can only dominate. This is another reason why the state is out of place in the second sphere, while in the third sphere the power *qua* state is, by being authorized to enforce laws, *de iure* authorized to *de facto* dominate. It might appear strange that the state is authorized for such a role. But the *choice* presupposed in this authorization is the choice between absolute freedom (such as the one in the state of nature) and the state as a presupposition for a social (or civil) order (which provides some *guarantees* for freedom at the price of *limiting* some other freedoms at the same time). Since opting for the former is irrational, while choosing the latter is in fact a condition for realizing inter-subjective rationality, the absurd nature of one option dictates that everyone will rationally “opt” for the other one—the only remaining option.

Hence, in the third sphere we have a principled, unconditional authorization to enforce two basic sets of laws which are the necessary conditions for social life: laws defining the collective “self” of those to whom they apply, and laws reflecting the community’s shared sense of justice. We do not have room for freedom of choice there. The “social contract” thus loses its contractual dimension that presupposes consent: it

seems undeniable that any state which tolerates negation of its own existence and disrespect for its own basic or constitutive laws has clearly less *right* (in fact no right) to freedom of choice than we as individuals have with respect to suicide<sup>3</sup>. Perhaps this is so because in the case of the state, as opposed to the case of an individual, it is considerably more *difficult* to satisfy conditions that can justify a decision in favor of self-negation. This is in fact quite logical given how much more complicated collective decision-making is in comparison with individual decision-making. To what extent the state will “dominate” within the third sphere is largely dependent on the features of the mentioned “authorization.” Although this is an authorization only in principle, the extent to which the state will rule within the third sphere will depend on how much influence from the “state of nature” still remains. For, political, civil and any other freedom—whether expressed in coercion, a breach of rules and regulations, or as the power of self-control—depends in the end on that “brute” freedom that represents the power of choice. Consequently, we find the true place and full expression of the core meaning of the notion of “authorization” in the first, political sphere of human interests. Most directly we find it in *democracy*.

Democracy refers to the rule of the *majority*, and majority consists of the so-called ordinary people whose choice, the assumption must be, can get us as close as possible to general consensus. But there is another relevant matter here. “Ordinary people” are likely to agree on the basic common values, as opposed to the educated elite, which will create a plurality of divergent and mutually exclusive viewpoints. They can do this even regarding such issues as purely moral questions, those that certainly should not engender

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<sup>3</sup> This does not mean that suicide should be forbidden by law. Still there is little sense, if any, in claiming a *right* to it.

discord. The elite is creative, but also prone to lose the sense of importance regarding the most essential common values that enable the unmediated connection between the first and third sphere, and for that matter the crucial element of the third sphere - the identity of the legislator. The creative elite might confuse the values of the third sphere for those from the first sphere. The latter values, however, may be changed on an on-going basis according to an established political (democratic) procedure. On the other hand, the majority is, per assumption, *serious*. In comparison to other areas of life, in politics *seriousness* is, in critical moments, more important than creativity. It is more directly concerned with security and defense, which is a core part of the third sphere, as opposed to the first, in which matters of happiness and wellbeing prevail. Seriousness, not ambition is what the special right of the majority is derived from. It is a right that attains its expression in elections. This conservative point of view (being adverse to change) represents an interesting and powerful argument in favor of democracy: seriousness invested in the majority protects people from abrupt and unpredictable changes in politics. More importantly, it sets a requirement that significant changes be properly justified and well articulated. Given that societies do not emerge anew, but have their pre-existing features, it is possible to distinguish certain institutions and values that make it what it is. Thus, an abrupt and radical change could so strongly affect these institutions and values that they would go out of existence. This would further take away the ability of people to orient themselves and articulate their life plans with a certain continuity. Even though such a change would not spell an end to their biological being, they would no longer live in the same society and are prone to undergo an identity crisis. It is a different question, however, whether only fundamental institutions and values must

remain at the core and be fully protected from change, or that all institutions and values ought to be spared from rapid and radical changes<sup>4</sup>.

The conservatism of the majority is neither such that it secures democracy, nor that it provides the basis for some truly conservative political position. This conservatism is just a feature of majority rule. If it is taken as desirable, this feature provides an argument in favor of democracy. The resistance to change that a majority is likely to generate, however, is typically weak and vulnerable. In order to effectively resist political, ideological or any other sort of manipulation that people are generally susceptible to, a majority would have to demonstrate a much better preparation and higher qualifications than can be reasonably expected – and as historical experience teaches us.

A majority still offers a certain seriousness which in itself has a particular political weight and quality to it. On the other hand, the majority is marked by a certain inertia and lack of creativity. This will produce not only an adverse attitude toward any eccentricity, but also reduce the scope of needs and aspirations in the process of fixing goals, as well as an opposition to change as such. Both features, in particular the latter (although it sometimes stems from the former) represent a significant burden in the process of fixing and realizing social goals from the first sphere. However, by hindering change, the existing articulation of the third sphere tends to be preserved. This results in the demand that the reasons offered to justify change are both significant and plausible.

The “conservatism” of the majority to an established set of values is in fact a demand to relinquish expectations for change, even at the price that their mistaken calculation may be costly both for them and the minority. If democracy is defined in

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<sup>4</sup> For a quite different approach, see R. Norman, "A Case for Pacifism", *Journal of Applied Philosophy*, Vol. 5, 1988, no. 2, pp. 197-210.



terms of a majority choice, then this majority will be an extant majority rather than one forced to fit into some description of the good for a specific society (or the entire world). This is, then, an argument *in favor of* democracy as a form of majority rule, for it demands an additional justification for any change. Whether it is a final argument or not will depend on two issues: the actual costs involved in decisions made in that (democratic) way, and the question whether there is something ingrained in democracy that makes it incomparable to any alternative.

The essential problem for us here is the kinds of change that characterize the first sphere of interest. They turn out to be transformations that build on a given identity, i.e. on the third sphere. They make it possible for one and the same society, even one and the same state, to articulate different social orders and actualize different political regimes.

One of the principles governing change in general (and political change in particular) is that the *status quo ante* enjoys normative primacy over any proposed change. This principle has its most direct application in the context of democratic decision-making: while change in general requires explication and justification which the *status quo ante* does not, in the democratic framework the *status quo ante* always represents the outcome of some prior decision. Consequently, the reasons that led to this decision impose upon everybody (whether a member of that collectivity or not) a duty to respect it. Upon the authorities it imposes an obligation to defend the contents of the decision from arbitrary and unjustified change.

Change-in-view might stem from wishful thinking in the following two senses. In one sense the imagined end-result of the proposed change may be too costly, despite its attractiveness if viewed in isolation from the whole (which also includes the necessary

means for the actualization of change). In another sense, the end-result is in fact impossible, since no means exist for its actualization (again, regardless of its possible attractiveness as a conceived or imagined end-in-view). The carelessness embodied in both these ways of thinking about change is what concerns those who advocate more cautious deliberation about the *status quo* and any proposed change. They see a crucial *asymmetry* between the *status quo* and contemplated change, demanding that change be justified in two ways:

- a) in terms of *comparing* the end-results of the *imagined* change with a description of the *status quo*;
- b) by comparing two wholes, one of which is the status quo without change while the other is one which consists of the accomplished change together with the actual implementation of all means that are necessary for its realization.

From the foregoing follows a very interesting conclusion about any attempt to justify an axiological contention regarding the value of defense (whatever it is to be defended). If the *status quo* and change were to have the same axiological status, then citing any sort “defense” as one’s reason for action would be empty; what would be required for justification is a certain description of what is being defended. But if the justifiability of defense in such a case includes considerations concerning the value and content of what is defended, then there is no moral difference between defense and attack as such. In that case, there are no states of affairs that can be defended as such and life consists of continuous change without the possibility for steadfast obligations. Without obligations, peace and stability cannot be the purpose of any lawmaking. In that case, the state loses its purpose.

The support of a majority opinion is clearly not a guarantee that the choice is the best one in the sense that on the normative level no imaginable alternative could appear better. This is why a political minority must always be looked at as a potential majority. Rival alternatives thus restrict the power of any given majority. Being authorized to rule solely as a result of receiving more votes is not sufficient to ensure that everything authorities will do enjoys the mark of legitimacy. Questions of legitimacy mark the place where the third sphere of interests penetrates the first. In order to legitimate, political power, which has been authorized by majority support, must continuously act in congruence with the demands from the third sphere of interests. Legitimacy is therefore a feature obtained solely on the basis of an ongoing compatibility between constitutional and political interests. The restricted nature of power is thus the result of the necessary limitations placed on political interests by constitutional ones, of the first sphere of interests by the third.

The mandate by the people is therefore a necessary, but not a sufficient condition for the legitimacy of a political regime. In a political sense, the majority constitutes a *will* that is characterized through its relations to the minority. This will can properly be called a *political will*. Its value resides in the fact that democracy *eliminates* any *a priori* way of selecting political goals. Democracy does not sanction, recommend, or prescribe any particular worldview. The quality of democracy consists in the fact that people *rule themselves* to the highest possible degree: there is no dominance or hegemony, only authorized governance. The normative path to eliminating discrimination is only one: a *principled* equality of *all* goals. Without such equality, an *independent assessment* of these goals as good or bad, right or wrong, permissible or impermissible, is not

impossible. There are many potential social goals, among which more than one may be good. The possibility of choice presupposes that none of them is pre-selected. Hence, it is that much more needed that we exclude the third sphere from politics. The people's mandate does not stretch to that sphere, which is in fact the state's domain *strictu senso*. What is more, it can be stated that it is precisely the state that represents the supreme social or national interest. For it is the state that secures the rule of law and the possibility of meaningful life<sup>5</sup>. Neither the majority nor a minority has any rights whatsoever in this respect: although social life unfolds within the context of freedom, the conditions making social life itself possible are not equally subject to freedom of choice<sup>6</sup>.

The conditions that make social life possible belong to the third sphere and are related to the issue of legitimacy. Whenever the question of legitimacy is raised, *the legality of power is in doubt*. This question comes up in two general cases. First, when political power is no longer a means (equipped with its authorization), but becomes an end in itself (thus turning into dominance). Second, when it is used for purposes other than for which it has been authorized. Consequently, the essential question about political power is whether it has legitimacy – not whether the population has elected it. Electoral triumph is

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<sup>5</sup> Here is how Hobbes describes *life* in the state of nature: "In such condition, there is no place for industry; because the fruitfulness thereof is uncertain: and consequently no culture of the earth; no navigation, no use of the commodities that may be imported by sea; no commodious building; no instruments of moving, and removing such things require much force; no knowledge of the face of the earth; no account of time; no arts; no letters; no society; and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short", Th. Hobbes, *Leviathan*, ed. by J. C. A. Gaskin, 1996, p. 84.

<sup>6</sup> In Hume's parable about the society as a ship on the open sea, we still have two kinds of freedom (and motion). The ship moves freely, depending on the will and capabilities of the people on board, but on the ship itself movement is clearly quite restricted (and complex), and thus must be regulated (more or less stringently).

not an absolute warrant of legitimacy. It is possible for a pack of bandits or robbers<sup>7</sup>, or a group of political partisans, unprepared to show respect for the law, to come to power and privatize the state. Through indoctrination, manipulation, and the use of scare-tactics, they might even emerge as victorious at subsequent polls.

It is therefore needed to have indicators of legitimacy. Among them, one appears to be more prominent than all others: *a demonstration of the possibility of defeat*, manifested in an actual transfer of power. Hence, the best or, perhaps, the only way to establish the legitimacy of a political authority is to look not so much at its stability, but whether it exhibits the feature of electoral replaceability. That is, authorities that *cannot* lose an election (and accept defeat) have no legitimacy.

Governments can come and go while states tend to remain--but only if the third sphere of interests is successfully insulated from the kind of political change that characterizes the first sphere. This may not be an easy task, for the same authorities holding political power, enforcing the law, formulating policies etc., are also responsible for safeguarding interests from the third (constitutional) sphere. Difficulties lie in the fact that while interests from the third sphere are essentially collective, authorities selected to run affairs in the first sphere (in congruence with the interests from the third) might encounter all kinds of temptations. That is the case because the entire state is then, as it were, in their private possession. The monopoly on the use of power necessary to make the enforcement of law possible is not, however, sufficient to guarantee the sacrosanct nature of the interests from the third sphere. Are we faced then with the requirement that political authorities go about their business in a way that protects the interests from the

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<sup>7</sup> Cf. St. Augustine, *The City of God*, Bk. IV, Ch. III: "Remove justice, and what are states but gangs of bandits on a large scale?"

third sphere by something imposed on them from the moral order? If so, this implies not only the right to defend a given collective identity and one's shared sense of justice, but also a moral obligation to respect others with different collective identities. This further implies a moral obligation not to take morality as some universal legislation in legal sense. Hence, it is morally wrong to treat moral demands as legal ones. If the defense of collective identity and other elements from the third sphere of interests is based on a *moral* requirement, then there is no *legal* sanction for failures. Those failures would be in a much deeper sense tragic. This explains why there is no freedom to penetrate the third sphere of interests from the first. In fact, the congruence requirement entails that the third sphere influences the first, but not *vice versa*--even though this massive moral failure could occur in principle.

What would constitute this massive moral failure is a collapse of the third sphere of interests into the first – something that is discerned in all totalitarian regimes. In totalitarian societies the problem resides in the fact that the second sphere, the sphere of privacy, is absorbed into a set of interests without a demarcation line between the first and third sphere. This lack of recognizable characteristics of particular spheres is problematic in its own right. If, namely, the first and third sphere are not kept separate according to the above offered theoretical framework, the second sphere of privacy is also impossible. More dramatically, the third sphere of interests ceases to represent a defensible form of life<sup>8</sup>.

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<sup>8</sup> One of the best examples of how things can go terribly wrong when the fact that collective identity is both logically and *de-facto* prior to the viable state is ignored, is the application of the *Uti possidetis iuris* principle in the process of decolonization of Africa. By treating as sacrosanct the borders created by colonial powers, a number of states were created inhabited by minorities that can never become majorities. At the moment of the “transition of power” such states lacked an underlying national identity, while the newly established “nations” could not be subjected to a democratic style of decision-making. The departing former colonizers left a legacy of

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stillborn states, because those newly established “nations” did not represent viable forms of life. They were not collectivities in the sense described in this paper, but instead just an aggregation of minorities without the opportunity to become majorities in the future. Democratic governance was not an option, precisely because neither the “minority” nor the “majority” represented *parts of a same truly living collectivity*. They were rather mechanically combined parts of divided collectivities that stretched across frontiers of newly concocted states. The inability of those states (or quasi-states) to constitute their collective political identities, i. e. the non-existence of interests from the third sphere, prevents the possibility for the “majority” and “minority” to play appropriate political roles, i. e. roles they should have in the context of the interests of the first sphere. Consequently, these states have been disabled from the get go in the constitution of their democratic general wills. Hence, they have been condemned to mere survival, typically through the sell-off of natural recourses while fostering political dictatorships.