Is Liberalism a Condition of or an Obstacle to Democracy?
A Short Institutional History of the "Liberal Trap"

By Lauréline Fontaine,

Full Professor in Constitutionnal Law, Sorbonne Nouvelle University (France)
Author of the website www.ledroitdelafontaine.fr

This study will be part of the book directed by Sandra Laugier et Dominique Rousseau, *La démocratie, une idée-force,* to be published, Mare et Martin, Paris, 2022-2023.

The two notions of liberalism and democracy bring into play the relationship between the individual and the collective and between the collective and the individual. But there are so many ways of defining one and the other of these two notions that it seems first impossible, without running the risk of falling into essentialism, to determine their links yet so fully thought by different authors since the 19th century. Basically, following the Italian political and legal theorist, Noberto Bobbio, there would be three possible types of links between liberalism and democracy, according to definition and content that one gives these notions: relations of compossibility, relations of antagonism or relations of necessity[1]. Well, choose your side, comrade! Bobbio chooses his, thinking liberalism and democracy in a relation of necessity. According to him, liberalism must indeed be thought as a condition of democracy, a democracy that he especially thinks from a procedural model.

Thus, the choice that one can make appears to depend to a large extent on the intellectual representations that one elaborates oneself or that one borrows from the history of ideas. It seems to me, however, again without falling into essentialism, that understanding links between liberalism and democracy may also depend on the historical construction of the institutions from which the use of terms "liberalism" and "democracy", as well as their relations, have acquired their qualities as meaningful notions for the understanding of political organization. It is indeed because our officially shared history records that modern Western regimes were constructed as liberal regimes, then as democratic regimes, that we ask ourselves today the question of what makes their relationship. We must therefore not only think liberalism and democracy with ideas and the history of ideas, but also with the history of institutions that reveals the ideas and representations actually at work. Put differently, what is at work in a society is the manifestation that certain ways of thinking or certain ideas have more capacity to be realized than others, even if they do not always appear explicitly formulated: they can be identified *by what they do*, *and not only by what they say*.

To understand what has happened and what is happening, it is thus necessary to finding one's way through ideas, institutions and beliefs. By starting from the reasons how we commonly represent liberalism and democracy, and from what the two notions embody the Western political regimes and those built on this model, we can thus try to keep up with the history. It is a question of identifying the ideas that have really been at work in the construction of modern Western regimes since the 17th century, without, strictly speaking, reconstructing theories *a*

[1] Noberto Bobbio, *Liberalismo e Democrazia* [*Liberalism and Democracy*], Franco Angeli, Milano, 1984, English translation by Martin Ryle and Kate Soper, Verso, 1990.

posteriori, but by becoming aware of by what people live, to use the terms of the anthropologist Malinowski[2].

The so-called liberal democracies are thus qualified by virtue of their institutional characteristics, which our officially shared history considers to go hand in hand with constitutionalism. Indeed, writing a constitutional is gradually viewed as a necessary act from the XVIIIth century to the XXIst century everywhere in the world, because of it would be the implementation of the liberal principle, i.e. the limitation of the State power by the existence of an autonomous sphere of rights and liberties. And, if state has to be democratic, it, therefore, reinforces the idea of the necessity of the constitutional text as it would lay its foundations. Following these last ideas, observation of contemporary constitutions in Europe shows first that all of them proclaim the existence of individual and collective rights (in the text itself or by reference), which are considered as many limits to the action of the State. This way, regimes are considered as "liberal" ones. Secondly, same constitutions affirm that the people are the source of all power (sometimes after God[3]), and they all attribute legislative power to at least one body whose members are elected by universal direct suffrage. It is these mechanisms that earn the name "democracy".

Nevertheless, it appears that democracy seems to be weakened today, perhaps by where it was built: disaffection with suffrage (even though it is attributed now to the vast majority of the population living on a territory), and distrust of the representative logic that implies that only elected officials are those who exercise power. Successive crises have not altered this process of democratic dereliction, in spite of numerous initiatives to restore it[4]. It is also true that there is concern about a weakening of rights as the basis of modern political organization, a weakening embodied either by the idea of "illiberal democracy"[5] or by that of a "permanent state of exception"[6]. But, as a limitation of the State's capacity to disturb the enjoyment of rights and property, liberalism seems to be holding its own and even strengthening itself, at least for those, especially the "big owners", who have the capacity, i.e. the power, to defend their rights, in spite of their speeches to the contrary, which often appear to be methods of strengthening it[7].

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[2] Bronislaw Malinowski, *Argonauts of the Western Pacific* (1922), Routledge, p. IX: "In each culture, we find different institutions in which man pursues his life-interest, different customs by which he satisfies his aspirations, different codes of law and morality which reward his virtues or punish his defections. To study the institutions, customs, and codes or to study the behavior and mentality *without the subjective desire of feeling by what these people live*, *of realizing the substance of their happiness*—is, in my opinion, to miss the greatest reward which we can hope to obtain from the study of man." (emphasis added).

[3] For example, Article 6 of the 1937 Constitution of Ireland.

[4] The literature on democracy and the means of stimulating or reactivating it has been immense for several decades, and crosses almost all political societies that have claimed to be democratic. In terms of practices and initiatives, participatory instruments have been tested in many parts of the world, almost always at the local level, with varying degrees of success.

[5] Although discussed or contested, this notion is characterized by its capacity of use, which makes it successful.

[6] See of course the works of Georgio Agamben on the subject, and in particular Lo *stato di eccezione*. *Homo sacer*. Vol. II\1 [*State of Exception*], Bollati Borighieri, Torino, 2003, English translation by Kevin Attell, Chicago, University of Chicago Press, 2005.

[7] Indeed, there are speeches that worry about the disappearance of liberalism, based on an analysis of the intervention of the state in the areas of life and the economy. According to an *Ipsos* survey conducted in 1998 for the magazine "Enjeux-Les Echos" in France, 67% of business leaders thought that the state intervened too much in the life of companies (https://www.ipsos.com/fr-fr/pour-les-chefs-dentreprises-letat-intervient-trop), while in their essay published in 2018, *Transformer la France ; en finir avec mille ans de mal français* [*Transforming France; Ending a Thousand Years of French Disease*], Mathieu Laine and Jean-Philippe Feldman believe that France is not a liberal state. Conversely, there are more "intellectual" discourses that consist in saying that "true" liberalism is not the one that is unfolding before our eyes: see, for example, Monique Canto-Sperber, "Pourquoi

If, in some respects, one is becoming stronger and the other weaker, we can perhaps look for the core reasons in their history. There is no longer any doubt in anyone's mind that the democracy we know was born in the bath of liberalism of which constitutionalism is the expression: democracy was not a significant idea, nor was it very well developed at the time of the establishment of the first "representative" regimes that, if based, in whole or in part on elections, are not often familiar with universal and direct suffrage. From this starting point, what makes the line of the institutional evolutions, the notions and the ideas which accompany them, their coherence or against the times, can be drawn.

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The idea of democracy to be built by opening the designation of the legislator to the greatest number of people slowly makes its way to really succeed from the beginning of the XXth century, accompanying the idea of the Welfare State, to be nevertheless tainted by the emergence of authoritarian and totalitarian regimes whose human balance sheet will prove particularly heavy. The post-World War II period thus seems to mark a decisive moment in that many actors are trying to make political systems evolve in the direction of an effective reinforcement of the rights and freedoms of individuals - "great" texts are adopted, the Universal Declaration of Human Rights in 1948, the European Convention for the Protection of Human Rights and Fundamental Freedoms in 1950, the inscription of rights and liberties in the text of new political constitutions - and in the sense of a reinforcement of democracy - by the extension of the universality of suffrage and the extensiveness of its understanding (some countries will attribute the right to vote to foreign residents and many will progressively lower the age of the electoral majority). But the reconstruction is also built in the sense of a better understood articulation between liberalism and democracy, democracy not being allowed to hurt liberalism, as proposed by the "neo-liberals" as early as 1938, explicitly against the welfare state[8]. The contemporary retreat of human rights, which has become an increasingly recurrent subject of observation in political and doctrinal news, the disaffection of the traditional instruments of democracy that seems to accompany it, as well as the undisputed success of the neo-liberal program, should not only question the evolutions of liberalism and democracy, but, as political practices, the reality of the ideas they carry. As is often the case in the analysis of social facts, everything is there "before", which has not yet been said.

As a consequence, if we think that the democracy that has become institutionalized in our contemporary political systems cannot be understood without taking into account its liberal substratum, it is not in the commonly accepted sense of the necessary basis of individual freedom - which is undoubtedly one of the most shared beliefs in philosophy and political and legal thought about democracy - but in the sense that it marks its powerlessness from the beginning (Part 1). Understood in this way, democracy struggles to make its mark on institutions: major evolutions of legal technique, sometimes associated with democracy, are in fact as so many means of reinforcing the liberal principle at the origin of democratic impotence, a liberal principle whose so-called deviation is solely a trace or an extension of the profound representations that are at its origin (2nd part).

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le libéralisme n'est pas le laissez faire" [*Why Liberalism Is Not the* Laissez Faire], *En Temps réel*, Cahier 7, February 2003, http://www.entempsreel.com/files/cahier7.pdf.

[8] The original intellectual history of neoliberalism is now well known, of which the famous colloquium organized around Walter Lippmann in 1938, author of a book entitled *An Inquiry Into the Principles of The Good Society* published in 1937 (Little Brown, Boston), seems to have embodied the philosophy.

Part I. The irrevocability of origins. The structural impotence of democracy in liberal ground

One of the blind spots in thinking about liberalism and democracy is perhaps the fact that they are two different fields of power, one of which gives the measure of the other. Democracy was not thought as to correct existing or produced inequalities in the field of the enjoyment of rights and properties, but only to ensure, strictly within the scope assigned to it since the modern era by subjectivist thought, which has become liberal thought (1), the sovereignty of the people, transforming it, moreover, into a pure accounting operation (2).

1. The intrinsic limitation of the democratic field

If it is often insisted on liberalism as a principle of valuing human rights and freedoms, and if this implies that "power" is only exercised out of the scope of these rights, the consequences of the principle are not further examined: "power" is not only limited, it is "delimited", which means that, as a power, it is not the only one. At least, the "political" power, that of the State, coexists with the power derived from the rights and liberties of men. This principle of delimitation is at the origin of our contemporary political systems. Whatever the form or the nature of the State power, democratic for example, it is in all ways delimited. The form or the nature of the State power are in any case dependent on this principle of delimitation which permeates the ideas, the representations, and in certain respects the practices since the 17th and 18th centuries.

Clearly, democracy was not the primary nor the secondary intention of the actors of the various so-called liberal revolutions that took place between the 17th and 18th centuries in Europe and the United States and that led to the writing of constitutions. Recently, John Dunn has also highlighted the unfavorable ground for democracy until the 18th century[9], its only true representative being Jean-Jacques Rousseau. When the English made the glorious revolution and imposed a limitation of power on the monarchy, it was not with a view to democracy but to protect their interests from the decisions of the king: the Bill of Rights of 1688 was very clear, as were the Magna Carta of 1215 and the first declaration of 1628: no taxes or loans without the agreement of the individuals gathered in Parliament, and no arbitrary arrests that would be a way of gaining access to property. The independent United States established "only" a Republic, which was considered preferable to democracy, while one of the major actors of the French Revolution, Emmanuel Siéyès, declared that "Citizens who appoint representatives renounce and must renounce making the law themselves; they do not, therefore, have a particular will to impose. If they dictate their wills, it would no longer be a representative state; it would be a democratic state. I repeat, in a country that is not a democracy (and France could not be one), the people can speak, can act only through its representatives"[10].

It is therefore the enunciation of rights and liberties, largely favored by the different intellectual currents from rationalism to the Enlightenment and the school of natural law, that has been the driving force behind the political regimes resulting from the different revolutions at work between the 17th and 19th centuries on Western territories. Liberalism institutes the State as a principle of power, a power that is limited, "cheaply governed" to use Benjamin Franklin's

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[9] John Dunn, *Setting the People Free ; The Story of Democracy*, London: Atlantic Books, 2005.

[10] Emmanuel Siéyès, Speech delivered in September 1789 *Sur l'organisation du pouvoir législatif et la sanction royale* [*e*]. I translate.

expression rediscovered by Michel Foucault in his *Naissance de la biopolitique*[11], whereas democracy consists in organizing power in this already limited liberal State. Thus, democracy can only be a form of exercise of a fundamentally limited power.

To this extent, and because the representations of man, collectivity and state power are such, democracy cannot be assimilated to the power of the people over everything: it is only a form of the political, i.e. the question of the definition and the field of the political is outside it. Even when democracy becomes an obligatory political form in common representations of majority of people, it has, in a way, no choice but to be dependent on a framework where "power" is not regulated by the same principles since, roughly speaking, it is regulated by the effective power procured by the enjoyment of rights. Such is the object of the various declarations of rights adopted since the 17th century; following, constitutions are the regulated organization of the form of the power, having taken note and reiterating the principle of its delimitation.

At this point, the question of who or how power is exercised *outside* the political frame is rarely asked. This is because the image of the famous *invisible hand* theorized by Adam Smith has been very powerful, bringing in its wake ideas of self-regulation. But these images do not affect the real functioning of these spaces of power, which we would like to see without a State, or a State in accordance with their functioning. The anchoring of legitimacy and representations of liberalism in different social and political spaces has led to the creation of one or more "markets" in which "the strongest" prevail, according to the principle of competition, which the State may have to guarantee, or even is obliged to guarantee. Karl Polanyi in *The Great Transformation*[12] has shown very well that the promotion of democracy between the end of the 19th century and the beginning of the 20th century was a way of having the greatest number of people validate the delimitation of the fields of power, while the devastating effects of an industrialized and capitalist economy were already being seen.

To speak of liberal democracy is thus not to speak of democratic liberalism: it is not seen that, precisely, the liberal "zone" is not democratic and is remove from democratic questioning. The apparent paradox is that by reinforcing the democratic principle at the end of the 19th century and the beginning of the 20th century, it is in reality liberalism that was being reinforced: the question was thus concentrated on "who exercises power", and much less on "on what is this power exercised? By limiting democratic reasoning in this way, reduced to a logic of participation of some and others in the designation of rulers, the ability to overcome its pitfalls was also reduced.

While the democracy has been thought and re-thought very widely since the 1970s, in practically all Western countries, democratic dissatisfaction does not dissolve and is even growing stronger. The inevitable outcome of the question - the backing of the democratic regime by numbers - is not enough to make up for the effects felt from the evolutions of an all-out liberalism.

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[11] Benjamin Franklin, letter addressed in 1978 to Charles de Weissenstein, quoted by Michel Foucault, "Cours du 17 janvier 1979", in *Naissance de la biopolitique* [*Birth of biopolitics*]. *Cours au collège de France,* 1978-1979, Seuil, p. 30, English translation of Grahal Burchell published in 2008 by Palgrave MacMillan.

[12] Karl Polanyi, *The Great Transformation*, New-York, Farrar & Rinehart, 1944.

2. The pitfalls of the enhance of democracy

In *Principles of Representative Government*, Bernard Manin asks how democracy could be built on the basis of the choice of election, when almost all the most important thinkers had qualified this process as aristocratic[13]: indeed, election implies that only those recognized as "the best" by the majority of the voters greatest number are designated to govern and constitute therefore an elected aristocracy. From Aristotle to Jean-Jacques Rousseau, all had considered that the mode of selection of rulers proper to democracy was the one that did not imply any qualitative differentiation between the rulers and the ruled, namely the drawing of lots, which puts everyone on an equal footing in the exercise of power. In theory at least, the draw of lots appears to be a technique that ensures a priori the non-prevalence of specific interests over all others.

We have to remember that if election historically imposed itself on democracy, it is because it precedes it institutionally, within the framework of a continuum of thought in which liberalism fits. The election emerges indeed as a liberal principle, already in use in the various communities of power since the Middle Ages, namely the principle according to which "whatever touches all must be approved by all" (the famous "Q.O.T."[14]), principle which, at the level of the political institutions in a State was initially translated by the need for the consent to taxation, and which, at the level of the ideas and the representations, founded the principle of the consent as central element of the liberal philosophy[15]. Acting on the freedom of each individual, the election has thus been able to prosper as an instrument of appointment of governors, including in a democratic framework. But, compared to the drawing of lots, the election changes the logic of democracy. While the lottery directly designates the individuals destined to exercise political functions, the election forces to determine a winner by arithmetic. "In fact, that is precisely the definition of an electoral law. It is a mechanism to transform numbers into numbers"[16]. One only has to look at the complex calculations that can be made about voting methods, considering that, apart from the case of the election of one by all, there is no system allowing a transformation of votes into seats, without "losses". The substitution of the election for the drawing of lots in the democratic functioning is thus not without consequences on the conception of the exercise of power; it tends to overvalue the interests carried by those who, by the effect of the number, gain the favors of the vote, even if they are themselves few in number, thus breaking with the dogma of the equality of all, unequally destined to take part in the exercise of the power.

Coupled with the effects of the realization of the liberal ideal in a market producing inequalities of conditions, the election sets up a logic where the collective is obliged to take note of the existence of a sphere beyond its reach, a sphere where individuals are not equal, contrary to their status in the democratic framework, which creates a functional hiatus. Democracy thus postulates equality in contradiction with reality, and finds itself both unable and prevented from correcting it, despite the logic of numbers.

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[13] Bernard Manin, *The Principles of Representative Governement*, Cambridge Université Press, 1997.

[14] It is originally a rule of Roman civil law, *Quod ad omnes tangit, ad omnibus tractari et approbari debet*. See in particular Yves-Marie Congar, « Quod omnes tangit ab omnibus tractari et approbari debet », *Revue historique de droit français et étranger*, 81, 1958, p. 210.

[15] See in particular John Locke, and the famous paragraph 99 of chapter VIII of the *Second Treatise on Civil Government* (1689).

[16] Pasquale Pasquino, *The Nature and Limits of the Majority Principle*, Books & ideas, https://booksandideas.net/The-Nature-and-Limits-of-the.html, 20 April 2011.

If the election is in some way unfavorable to the democratic logic, one can nevertheless imagine that, in a liberal paradigm, the introduction of the drawing of lots, undoubtedly healthier in terms of the process of selection, would not give more possibility to the governors to break with the principle of delimitation of the field of action of government, even a democratic one. Thinking of democracy considered from the point of view of the modes of appointment of governors and/or participation of the governed, leads to a dead end, as soon as it is a question of countering the possible effects of the unfettered enjoyment of rights and freedoms on a given market. Another pitfall concerns proposals to modify how suffrage has to be expressed: for example, the initiative of the "Popular Primary", organized in France in January 2022 by a group of activists outside the political parties in order to present a unique candidate of the left, if it substitutes the technique of the "Majority judgment" for that of the so-called majority vote[17], it does not solve the problem of the structural restriction of the field of democratic decision, even if it seems less divisive, and even if it remains theoretically possible that the law of numbers can burst the solidly anchored boundaries between liberalism and democracy.

Procedural, deliberative or participatory, the different models of democracy elaborated with the aim of improving it all concern the modalities according to or from which each member of the political community has a voice in the appointment process and in the exercise of power. But none of them really deal with the object of power, except to consider that a majority coup de force will be able to explode the well anchored and maintained framework of what is the foundation of the social organization, namely the existence of a scope beyond the reach of the democratic question. In order to be credible, audible and debatable in the current framework to think, it seems that democratic idea must focus on the means of popular sovereignty, and not, unfortunately, on its field of action. If the idea focus that last question, it is not retained in the public debate, or in an anecdotal way. By the way, "socialism", originally a thought about the spectrum of political action, is politically dead.

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History has taught us that it is much easier to accentuate a tendency than to curb it: in fact, the origins of modern democracy seem to confer on its ill-construction a character that is difficult to overcome, and the fundamentally liberal tropism of the organization of modern political regimes went increasingly. Indeed, since the democratic question upset the initial balance of rights vis-à-vis a power not organically linked to the whole political community, a "renewed" liberalism was proposed, notably by Walter Lippmann[18]. The entry into the political arena of the greatest number of people required the reinforcement of the tools of liberalism so that it would remain the matrix of action, which was made possible by the progressive realization of the neoliberal program and by the aporias of democracy by numbers which were proven with the establishment of authoritarian regimes in its name. The reservation towards the electoral process thus generated - very visible in the organization of referendums - led to an emphasis on political mechanisms that belonged to liberalism, such as, as we will see in a moment, the judicial review of constitutionality of laws.

[17] The technique of majority judgment was theorized by Michel Balinski and Rida Laraki, in "A Theory of Measuring, Electing, and Ranking" Proceedings of the *National Academy of Sciences*, vol. 104, no. 21, May 11, 2007, p. 8720. It consists of each voter "judging" all the candidates according to a preferential grid - "very good", "good", "fairly good", "fair", "insufficient".

[18] Walter Lippmann, *An Inquiry Into the Principles of The Good Society*, *op. cit*.

The liberal tropism has in a way become a "liberal obligation", and reinforces with the concept of "illiberal" democracy, since it is a matter of pointing the finger at what would not be liberal. Under these conditions, the "idea of democracy" is weakened, since, in the liberal paradigm, it is even a question of avoiding its effects. While today individual initiatives to make democracy live "differently" are multiplying, none of them seems to convince. All the tricks and sophistications intended to improve or increase the democratic value of a political organization seem from this point of view doomed to failure.

Part 2. The surprisingly impotence of democracy, via tools which are in fact those of liberalism

If contemporary democracies are still unfailingly linked to the principle of election, they have also become "engineering", i.e. they rely on a set of institutions and mechanisms supposed to guarantee them. This is the case with the judicial review of constitutionality of laws, a mainstay of the rule of law, itself declared a necessary framework for democracy. The regional and international institutions promoting the rule of law and democracy - and not officially liberalism - therefore promote the judicial review of constitutionality of laws, whatever the way it is organized[19]. Some theories even make it precisely an instrument of democracy, like the thesis of continuing democracy[20]. Nevertheless, as a necessary accessory to the hierarchy of norms[21], the judicial review of constitutionality of laws can be analyzed historically and practically as a means of curbing the desire to extend the democratic field, rather than as a means of avoiding a possible tyranny of the majority (1). And it is still the use of the hierarchy of norms that serves today as a support for an extension of the liberal field: indeed, the "primacy" of European law, which consists in asserting it over any other norm, thus ensures the primacy of the societal vision constructed by European norms, that is to say, the perpetuation and development of markets that are resistant to the democratic question (2).

1. The primary function of judicial review of constitutionality of laws: keeping democracy at bay

For several decades, in France and in many other countries of the world, law schools - as well as the textbooks used in them - have been the place where the idea of the long march of judicial review of constitutionality of laws has been acclimatized, from the American Supreme Court decision *Marbury v Madison*, already mentioned, to the establishment of constitutional courts in all the countries that emerged from the break-up of the Soviet bloc between the 1990s and 2000[22], via the theory of the Austrian Hans Kelsen, considered the architect of the "European

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[19] This can be seen from the work of the *European Commission for Democracy through Law* (the so-called *Venice Commission*), which has been providing advice and assistance on constitutional justice since 1990. See for example the *Vademecum on Constitutional Justice*, 2007, CDL-JU (2007) 012).

[20] See Dominique Rousseau, *La démocratie continue* [*The Continuing Democracy*], LGDJ-Bruylant, 1995.

[21] And formulated quite early in liberal history, from the idea of the necessary supremacy of a constitution that organizes and limits the powers of the various actors: see the opinion of the Chief Justice of the United States constituting *Marbury v. Madison*, 5 US (1 Cranch) 137, (1803).

[22] And this with the assistance of the Venice Commission (see note 19) and Western jurists. See in particular Renaud Dorandeu, "Les Pélerins constitutionnels. Eléments pour une sociologie des influences juridiques" [*Constitutional Pilgrims. Elements for a Sociology of Legal Influences*], *in* Yves Mény (ed.), *Les politiques du mimétisme institutionnel. La greffe et le rejet* [*The Politics of Institutional Mimicry. Grafting and Rejection*], L'Harmattan, 1993, p.83.

model" of constitutional justice[23]. If today it is the symbol of democracy and the rule of law, the judicial review of constitutionality of laws gives above all its meaning to constitutionalism, that is to say to the norm that separates the field of the exercise of political power from the field of individual exercise of rights and freedoms. Here again, it should be remembered that constitutionalism, with its roots in humanism[24], has no specifically democratic ambition. It is obviously much more linked to liberalism, and even to the development of capitalism[25]. Thus, the tool that gives constitutionalism its meaning would inevitably tend to reinforce the very thing that makes its bed.

Technically, the constitutionality review consists of ensuring that the actions of those in power, and especially those of the elected legislative power, are in conformity with the constitution. In other words, the laws enacted by the political legislator have to respect the scope assigned to the exercise of political power, whether democratic or not. The constitutionality review cannot therefore be considered as an originally democratic instrument. And if one can note a coincidence between its development and promotion and an opening up of political systems to democracy between the end of the nineteenth century and the beginning of the twentieth century, this coincidence is not to be credited to aspirations to democracy. Indeed, between the end of the 19th century and the beginning of the 20th century, the opening to democracy was coupled with a propensity of most States to be more interventionist in economic and social areas: this was the era of the welfare States, whose ambition was to ensure to individual members of the political community rights that they could not visibly enjoy without this intervention. In other words, the welfare states acknowledge that in the field of the enjoyment of rights and freedoms, many are actually deprived of them. States then attempt to restore what the use of non-state powers has removed. They "intervene" in a field that had previously been left to individuals alone and to the outcome of their relations. It is precisely at this point that we see the development and/or promotion of the constitutionality review as an institution to be established, i.e., at the very moment when laws are, in spite of the liberal constitutional pact, intended to provide protection to individuals who do not actually enjoy their rights outside the political sphere.

The case of the United States is a good starting point for discussing the effect of constitutionality review, if not counter-democratic, then at least protective of powers that are exercised apart from political power. The role of the Supreme Court as provided for in the U.S. Constitution of 1787 was to guarantee the right balance between the new federal government resulting from

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[23] The Austrian Hans Kelsen, who lived in a country that had not been totally unfamiliar with the idea of reviewing the constitutionality of laws since the middle of the nineteenth century, theoretically defended and founded judicial review of constitutionality of laws on the existence of a necessary hierarchy of norms. Thus, he laid down the conditions for a review that would allow it to be effective, i.e., what would later be called the *European model of constitutional justic*e. See the French publication of Hans Kelsen (translated by Charles Eisenmann) "La garantie juridictionnelle de la Constitution (la justice constitutionnelle)" [*The Judicial Guarantee of the Constitution (Constitutional Justice)*], *Rev. du Dr. Pub, 1928*, p. 197. See also on this subject the article by Joseph Pini, "La Cour constitutionnelle autrichienne et les rapports entre juge constitutionnel et pouvoir constituant"[*The Austrian Constitutional Court and the Relationship Between the Constitutional Court and the Constituent Power*], *Les cahiers du Conseil constitutionnel, no°7, 1999*, https://www.conseil-constitutionnel.fr/nouveaux-cahiers-du-conseil-constitutionnel/la-cour-constitutionnelle-autrichienne-et-les-rapports-entre-juge-constitutionnel-et-pouvoir.

[24] See the important study by Jean Leclair, "L'Avènement Du Constitutionnalisme En Occident: Fondements Philosophiques Et Contingence Historique" [*The Rise of Constitutionalism in the West: Philosophical Foundations and Historical Contingency*], *Revue de droit de l'Université de Sherbrooke*, 2011, Vol. 41, p. 159.

[25] See in particular the book resulting from a symposium organized in 2019 on *Capitalism, Liberalism and Constitutionalism* (book coordinated by Lauréline Fontaine, Capitalisme, libéralism et constitutionnalisme, Mare et Martin, 2021).

the union of the states and the states themselves. In the mind of James Madison, among the most important framers of the U.S. Constitution, the powers given to the Federation were intended to prevent the interests represented by some states from becoming the law of the land, to the detriment of others[26]. The historian Charles Austin Beard sought, at the beginning of the 20th century, to show that, in fact, it was a question of allowing the development of financial capitalism, which the interests of landowners and farmers in certain states could hinder[27]. In the system, the Supreme Court was the institution for resolving conflicts between the federal government and the federated states, based on the constitutional division of their respective fields of action. In this sense, the constitution set the rules of the game. The role of the Supreme Court was thus to control the delimitation of power. The *Marbury v. Madison* case already mentioned, delivered as early as 1803, seems to divert attention somewhat by basing the review on the very value of the Constitution as a norm "above" the law, and not on its *raison d'être*, which would be to set apart the power of individuals in a market[28]. However, by this change of "display", the Supreme Court manages to reinforce the legitimacy of the *raison d'être* of the institution of review: it is not so much a question of protecting the interests of the federated states themselves, nor even those of the Federation, but those that their protagonists, individuals, have to defend. Actually, it is these individuals, endowed with the constitution, who defend their interests before the Supreme Court.

And what happens when, faced with the human disaster of industrialization and capitalization, the federated states or the Federation intend to take on the role of a welfare state? What happens is that, faced with measures to improve working conditions or social protection for workers and employees, individual entrepreneurs take their case to the Supreme Court, and win, since from 1905 to 1937, the Court almost without exception declared social laws in violation of the constitution on the grounds that they infringed on the right to property or freedom of contract, which it considered guaranteed by the U.S. Constitution. This so-called *Lochner era*, named after the first ruling in this sense in 1905[29], would only end with the popularity of the Roosevelt doctrine, the *New Deal*, which the Supreme Court could no longer take the political risk of preventing. At the level of the Federation, however, the *New Deal* did not last, and the then lasting emergence of a renewed liberalism would no longer constrain it in the same way. On the contrary, it was to become the guarantor of this liberalism, which it did not sanction, and even encouraged[30].

The history of constitutionality review in Europe cannot be described in the same way as in the United States, which is characterized by its federal system, but, the chronology and the principles that motivate the various actors are comparable. At first, the welfare states were politically shaken up from within, but did not come up against constitutional review that is note institute yet. Nevertheless, this was the time when constitutionality review began to be the

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[26] This is what in particular emerges from an interpretation of the text of November 22, 1787, known as *Federalist no°10*.

[27] Charles A. Beard, *An Economic Interpretation of the Constitution of the United States*, 1913. See for an analysis of this work, Violaine Delteil and Lauréline Fontaine, *About the Economic Imprint of the American Constitution, cross-reading of Charles Beard* **,** in Lauréline Fontaine (ed.), *Capitalisme, libéralisme et constitutionnalisme*, *op.cit*., p. 75.

[28] See references in note 20.

[29] *Lochner v. New York*, 198 U.S. 45 (1905).

[30] See, for example, *Citizens United v. Federal Election Commission*, 558 U.S. 310, January 10, 2010, which discusses the regulation, and indeed deregulation, of election spending, making the election a competitive arena equivalent to other markets.

subject of several studies and theorizations[31], and when democracy was associated with the supremacy of the constitution[32]. Historically, the institution of constitutionality review came about, with varying degrees of speed and delay depending on the country, shortly after the states began to intervene outside the field defined by liberalism, and at the same time as the extension of suffrage. By their interventionism, the States have shown their capacity to go beyond the scope of political power, a capacity based on the use of universal suffrage. In this way, and in a way, from a liberal perspective, they have made necessary the institution of the constitutionality review. It is not for nothing that the neoliberal program had the clear ambition of making the welfare state legitimateless, through the law[33].

The historically important development of the constitutionality review in the Western democracies after the Second World War thus corresponds to the progressive implementation of the liberal and neo-liberal program. Moreover, it can be seen that the France of the program of the *National Council of the Resistance*, as early as 1945, with its set of social rights, did not establish any real constitutionality review[34].

Since then, constitutionality review has almost constantly evolved - despite singular and non-continuous histories in different countries - in the direction of a practice that makes democracy powerless, insofar as it is condemned to remain within its very limited scope. The *Lochner* spirit has instilled itself in most supreme and/or constitutional courts, as has the French Constitutional Council[35]. For all that, the supreme and constitutional courts continue to convey an image that liberates people from state power, while validating - and even encouraging - the alienations generated by spaces not subject to the rule of democracy. This image is the result of the discourse of the courts themselves, but also of the doctrine and the media[36].

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[31] See for example, for the French case, Gaston Jèze, "L'inconstitutionalité des lois en Roumanie"[*Unconstitutionality of Laws in Romania*], *Rev. du Dr. Publ*., 1912, and "Le contrôle juridictionnel des lois (en France)" "[*The Judicial Review of the Constitutionality of Laws (in France)*], *Rev. du Dr. Publ,* 1924; Henri Desfougères, *Le contrôle judiciaire de la constitutionnalité des lois* "[*The Judicial Review of the Constitutionality of Laws*], dact. thesis, Paris, 1913; Ho Hio Ky, *Le contrôle de la constitutionnalité des lois en France,* dact. thesis, Paris, 1926; or Paul Duez, "Le contrôle juridictionnel de la constitutionnalité des lois. Comment il convient de poser la question" [*The Judicial Review of the Constitutionality of Laws. How to Ask the Question]*, *in Mélanges Maurice Hauriou,* Sirey, 1929, p. 211; André Hauriou, "La Technique française en matière de contrôle juridictionnel de la constitutionnalité des lois. Introduction à l'étude du droit comparé" [*The French Technique of Judicial Review of the Constitutionality of Laws. Introduction to the Study of Comparative Law*], *in Recueil d'études en l'honneur d'Edouard Lambert*, T. 2, Sirey, 1938, p. 333.

[32] See, for example, the classic work by Joseph-Barthélémy and Paul Duez, *Traité élémentaire de droit constitutionnel* [*An Elmentary Treatise on Constitutional Law*], p. 186: "The supremacy of the constitution is (...) an idea proper to organized democracy". The authors also regret that in France, a reform allowing a judicial review of the constitutionality of laws by way of a plea does not seem possible, but they do not propose the institution of a review by way of direct action (pp. 219-220).

[33] See on this subject Louis Rougier, organizer of the Walter Lippmann colloquium, *Les mystiques économiques* [*The Economic Mystics*], éd. de Médicis, 1938, in which he proposes "a legal order such that the possibility of free competition is always safeguarded".

[34] It will be instituted only with the Constitution of the Fifth Republic in 1958.

[35] See in this sense its decision 2013-672 rendered on June 13, 2013, which censures a solidarity mechanism in favor of contractual freedom (on this subject, Alain Supiot, "La solidarité civile et ses ennemis. A propos de la décision du Conseil constitutionnel 2013-672 du13 juin 2013" [*Civil Solidarity and Its Enemies. About the Decision of the Constitutional Council 2013-672 of June 13*], 2013, *in Mélanges en l'honneur de Jean-Pierre Laborde*, Dalloz, p.15, p. 481.

[36] See the almost caricatural example of the French Constitutional Council in Lauréline Fontaine, "Bilan et réflexions sur une éthique de la justice constitutionnelle à la lumière de ce qu'en font et de ce qu'en disent ses acteurs. Que doit-on attendre d'une réforme – nécessaire – du Conseil constitutionnel ?" [*Reflections on the Ethics of Constitutional Justice in the Light of What Its Actors Do and Say About It. What Should We Expect From a - Necessary - Reform of the Constitutional Council?], in* Elina Lemaire and Thomas Perroud (eds.), to be published

This image, which is out of sync with the real work of the constitutional courts, is due in particular to an extreme focus on a possible effect of the constitutionality review, namely the censorship of those laws that are not considered to be in conformity with the constitution. However, one of the relevant keys to reading contemporary case law is, on the contrary, to consider it "in the negative": not, therefore, from the point of view of laws that are declared in violation with the constitution, but from the point of view of laws that are not. Since the laws adopted are a certain way of situating the exercise of power that favors or does not hinder the various markets (economic, industrial, financial, of ideas, of identities, of causes, etc.), the control that ends up validating them is itself an important element of this determined social organization. The constitutionality review is thus, both in principle and in practice, an instrument for reinforcing liberalism and the impotence of democracy.

2. Uses of the hierarchy of norms: subordinating suffrage to the logic of markets

The hierarchy of norms has been promoted as a political principle in the name of democracy[37] and is today the symbol of the rule of law[38]. What is to be understood, then, when it is said that a state such as Poland reinforces its position as the gravedigger of the rule of law because of its Constitutional Court affirms that European standards are contrary to the Polish constitution? It must be understood that the rule of law is nowadays understood in Europe as a hierarchy dominated by European norms, with which other norms – including the constitution - must not be incompatible. This state of affairs seems to contradict the paradigm of the primacy of the constitution, which we have just seen was the basis for a liberal societal organization. If it is really contradicted, democracy, as the expression of the strict delimitation of the field of democratic decision, then could be extended. Following, one could hope that the norms that come to compete with constitution do so in the sense of an enlargement of the field of democracy, thus less dependent on the liberal, i.e. competitive, understanding of human relations.

But the opposite is true. Norms that prevail over the constitution, organize and support a competitive understanding of the rights and freedoms of individuals more than it did itself, avoid also an extension of the field of democracy by gradually narrowing it, in a vast movement that normalizes that principle. This is what the European norms seem to be fundamentally about: principles of organization of a market on which neither individuals nor institutions can put obstacles. These European standards, as a result of the agreements concluded between the various member states of the European Union, are placed under the responsibility of a Court of Justice which, since the 1960s, has scrupulously affirmed their primacy over all other legal standards[39], including the constitution. In the various States, judges also give precedence to

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in 2022 by the *Institut Francophone pour la Justice et la Démocratie*, following the colloquium they had organized and which was finally held in September 2021 in Paris on "Déontologie et transparence du Conseil constitutionnel" [Ethics and transparency of the Constitutional Council].

[37] This illustrates the intellectual malleability of this notion. One should not forget, moreover, that the theorist of the hierarchy of norms and of constitutional justice in Europe, Hans Kelsen, is also the author of a study on democracy, *Vom Wesen und Wert der Demokratie* [*The essence and Value of Democracy*], 1929, English edition by Nadia Urbinati and Carlo Invernizzi Accetti, translated by Brian Graf, Lanham, Rowman & Littlefield Publishers, Inc., 2013.

[38] See, for example, the Venice Commission document adopted in 2016 drawing up the *Rule of Law CheckList*, https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf

[39] This primacy has been affirmed in relation to the legal norms of the Member States, but also in relation to international norms, such as resolutions of the United Nations Security Council: judgment of the Court of Justice

European norms over national and international legal norms. If they sometimes seem reluctant to subordinate the constitution[40], the question seems to remain purely formal, because, neither in fact nor in law, the societal organization carried by European norms does not find any real or legal obstacle in its implementation, either by the political authorities, or by the administrative and jurisdictional authorities[41].

European law could have organized and supported an alternative societal organization and its primacy would have had another meaning. But the primacy of European law reinforces the liberal vision of social organization at the expanse of its democratic character[42].

On can note that, despite the fact that it appears to weaken the constitution, this institutionalized competition with the constitutional norm in fact strengthens its *raison d'être*. This is why we can arrive at more or less the same conclusions about American law, where the value and the symbol of the constitution appear to be very strong: the constitution sets up and maintains a societal organization in which the power of non-institutional actors could be analyzed as equivalent to that of institutions. As Marie-France Toinet points out, based on the American legal historian Morton Horwitz, "it is remarkable that American analysts, who have quarreled a great deal, not about the reality of state intervention, but about its scope, modes and effectiveness, have shown very little interest in 'the effects of government activity on the distribution of wealth and power in American society'[43]. At the same time, Morton Horwitz considers that, over the period he studies (1780-1860), it is in fact the interests of emerging groups that have been favoured, in the name of the general interest[44]. Following him, Maria Rosaria Ferrarese emphasizes that, in a market economy, the essence of law takes the form of private agreements between and among private persons: contracts, transfers of property, donations, wills, etc. become the cornerstone, the main meaning, the fund of law and make private persons the essential sources of law[45].

Whether from the European or the American point of view, the focus on constitutional law as a norm that liberates people has the effect of obscuring the real power issues that take place in the daily lives of individuals: in both cases, law remains decisive, as it actually supports the organization of the struggle and competition of all, thus institutionalizing the "law of the strongest", with the help of lawyers and legal principles. It was the French writer and diplomat Romain Gary who, observing the United States, analyzed the situation perfectly: *in La nuit sera*

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of the European Communities *Kadi and Al Barakaat International Foundation v. Council and Commission*, 3 September 2008, aff.C402/05.

[40] See, for example, the Assembly decision of the French Council of State of 30 October 1998, *Sarran and Levacher*.

[41] The few decisions that can be found here and there are, in the end, more anecdotal than they appear to be, given the stakes involved. The symbolic effect - when it is a question, for example, of affirming the constitutional identity of a State, against which European law cannot go - is itself most of the time limited to the restricted circle of legal experts. See for an overview of this question, Laurence Burgorgue-Larsen (ed.), *L'identité constitutionnelle saisie par les juges en Europe* [*The Constitutional Identity Viewed by the Judges in Europe*], Pedone, 2011.

[42] See also Dieter Grimm, "Quand le juge dissout l'électeur" [*When the Judge Dissolves the Voter*], *Le Monde diplomatique*, July 2017, p. 19.

[43] Marie-France Toinet, "L'Etat américain" [*The American State*], *Le Débat*, 1985/4, p. 13 of the online version on the Cairn portal (https://www.cairn.info/revue-le-debat-1985-4-page-41.htm). She cites the first important work by the American legal historian Morton Horwitz published in 1992, *The Transformation of American Law: 1780-1860*, Cambridge, Harvard University Press, 356 p. (p.XIII and XIV).

[44] See also Françoise Michaud, *Le mouvement des Critical Legal Studies. De la modernité à la postmodernité en théorie du droit* [*The Critical Legal Studies Movement. From Modernity to Postmodernity in Legal Theory*], Presses de l'Université de Laval, Québec, 2014, p. 40.

[45] Maria Rosaria Ferrarese, "An Entrepreneurial Conception of lLw ? The American Model Through Italian Types", in D. Nelken (dir.*), Comparing Legal Cultures*, Dartmouth, 1997, p.157.

calme [The Night Will Be Calm], published in 1974, he notes that "the aim is to control the law 'legally', to establish a para-legal society that is situated entirely in holes specially arranged by the law for this purpose".

And then what?

Whether this is done through a formal and institutional hierarchy or through an ever-deepening interpretation of the limitation of the field of politics, and despite a democratic form, today's liberalism structures the impotence of democracy well. To oppose to this democracy another idea-force can only pass by the well comprehension of this construction. It cannot only be a question of thinking democracy within the walls built by liberalism, reinterpreted by the thought of a Hayek and maintained by representations very widely shared by men and women capable of winning on different markets. It is therefore not only a question of challenging the hierarchy of norms, as Poland is doing with its constitutional court[46], nor of proposing new modalities of suffrage, nor of course of implicitly militating for the status quo by discrediting these attempts. If talking about deliberative or participatory democracy is not enough, invoking the sovereignty of peoples or States against other powers cannot have more impact on what does not seem to be the object of a real and credible debate. For it must be emphasized that what is happening cannot be reduced to a desire on the part of the "powerful" to preserve their position: it is rather the result of representations widely conveyed by all social actors, whether they be merchants, experts, politicians, academics or journalists, representations that are often the only ones available to the greatest number, even if it is not well understood[47].

Unfortunately, the ground for reflection on these spaces of power is not very favorable today, and even deteriorates. The health crisis, it is said, has brought the role of the state back to the forefront, showing its power to control bodies. And yet, this new "welfare state" shows that it is not so much democracy that is winning, but rather a state of affairs that is being reinforced. What is now decided at the level of the state, whether it is a question of creating obligations for individuals or supporting markets, no longer even follows democratic procedures: parliaments have not deliberated, executives have decided on the basis of non-participatory tools, and judges have not been good brakes to this trend. The incessant contemporary invocation of urgency and necessity[48] has continued to slow down the possible extension of the field of social dialogue and that of decisions taken according to the modalities of consensus, to the benefit of an institutional logic that reduce the space for discussion to the majority will.

In order to undermine the "model" either in the direction of liberalism or in the direction of democracy, it would be necessary first of all to discuss what is open to democracy, and not how to make democracy. The breeding ground exists. One can find, for example, in the ideas of "social democracy" and/or "economic democracy" interesting elements insofar as they would move the walls of separation between the waves of liberalism and the exercise of political

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[46] Decision K3/21 du 7 octobre 2021, *Assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union*, https://trybunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej

[47] For example, a french professor of public law, Xavier Magnon, recently signed an article in the newspaper *Le Monde* entitled "Donnons au peuple des instruments pour décider de la production de la loi" [*Let's Give the People Instruments to Decide on the Production of the Law*] (*Le Monde* dated January 27).

[48] See on this subject my speech of November 2021 in Die (Drôme, France) and the text *Droit et démocratie au temps du Covid 19* [*Law and Democracy at the Time of Covid 19*], online : https://www.ledroitdelafontaine.fr/droit-et-democratie-au-temps-du-covid-19/.

power. On one hand, social democracy is emblematic of an old left today minority[49], and thus badly connoted, and moreover as often badly defined as badly understood[50]. On the other hand, economic democracy is at the same time older[51], and more recent when it is called "economic and social"[52] as it focuses almost exclusively on the economic question[53]. Nevertheless, at the basis of these ideas and proposals, it is postulated that democracy must not stop at the door of liberalism, and it is this only path that seems to be taken to get out of the "liberal trap" that seems to accept the criticism only on the condition that it does not concern this essential.

If it is falsely prophetic to take a position on the possible evolutions of this model of democracy, which is confined and surpassed by societal representations that largely ignore it, we can keep in mind certain analyses of what effectively animates the individual and the group. Thus, for example, the one appearing in Sigmund Freud's *Das Unbehagen in der Kultur* [*Civilization and Its Discontents*], first published in german in 1930, and frequently quoted as a questioning of the relationship between individual freedom and (political) community: "What makes itself felt in a human community as a desire for freedom may be their revolt against some existing injustice, and so may prove favourable to a further development of civilization; it may remain compatible with civilization. But it may also spring from the remains of their original personality, which is still untamed by civilization and may thus become the basis in them of hostility to civilization"[54]. In fact, while democracy seems to engage the collective, democratic disaffection today is more like a sum of individual disaffection, which is difficult to correlate with the status of each individual with respect to liberalism: many seem to have reasons to turn away from democracy as a political form, either out of fear that it might still thwart the hoped-for gain of the struggle on the market of individualities, or because it is precisely powerless to thwart the effects of this struggle. Wherever one considers it, contemporary democratic dissatisfaction is the result of a liberal way of representing social relations[55].

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[49] See for example the book by Alain Chatriot, La démocratie sociale à la française. L'expérience du Conseil national économique, 1924-1940 [*Social Democracy* à la française. *The Experience of the National Economic Council*], La découverte,Paris, 2003.

[50] See Anne-Marie Gingras, Adriana Dudas, Magali Paquin and Marc Foisy, "Les représentations sociales de la démocratie. Réflexivité, effervescence et conflit " [*Social Representations of Democracy. Reflexivity, Effervescence and Conflict*], *Politique et Sociétés*, 2008/2, p. 11-40.

[51] See, for example, Alain Supiot's lecture at the *Collège de France* on December 9, 2016, *La vision révolutionnaire de la démocratie économique* [*The Revolutionary Vision of Economic Democracy*], to be re-listened to on *France culture* website (https://www.franceculture.fr/emissions/les-cours-du-college-de-france/figures-juridiques-de-la-democratie-69-la-vision-revolutionnaire-de-la-democratie-economique-0).

[52] See, for example, Richard Hyman's article, "La démocratie économique : une notion redevenue d'actualité?" [*Economic Democracy: A Reborn Concept?*], https://global-labour-university.org/fileadmin/GLU_Column/FR_papers/no_56_Hyman_FR.pdf.

[53] See for example the interesting article by Bernard Friot, "Un droit fondateur de la démocratie économique" [A founding system of law of the economic democracy], *Le sujet dans la cité*, 2012/2, p. 92. See also the Veblen Institute's 2018 summary report by Julien Dourgnon, *Démocratiser l'économie* [*Democratizing the Economy*], https://www.veblen-institute.org/Democratiser-l-economie.html.

[54] Sigmund Freud, *Das Unbehagen in der Kultur* [*Civilization and Its Discontents*] (1929), translated from the German by James Strachey, on line : http://www.stephenhicks.org/wp-content/uploads/2015/10/FreudS-CIVILIZATION-AND-ITS-DISCONTENTS-text-final.pdf, pp.21-22.

[55] This is perhaps a way of euphemizing the thought of Jacques Ellul, who postulated in the journal *Esprit* that fascism is the son of liberalism, "Le fascisme, fils du libéralisme" [*Fascism, Son of Liberalism*], *Esprit,* 1937 (https://lesamisdebartleby.wordpress.com/2020/03/26/jacques-ellul-le-fascisme-fils-du-liberalisme/), translated and introduced by Jacob Rollison in *Political Illusion and Reality: Engaging the Prophetic Insights of Jacques Ellul*, by David W. Gill, David Lovekin, Wipf and Stock Publishers, 2018, p. 3.