

# Is Hyperpluralism Compatible with Dualist Constitutionalism?

## On Alessandro Ferrara's Conception of Multivariate Democratic Polity

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**Abstract:** In this essay I first set out the advantages the “multivariate democratic polity” framework proposed by Ferrara offers in comparison to other more consensus-based notions of democratic legitimacy. Secondly, I highlight some ambiguities concerning the meta-theoretical status of this frame, since it is not clear whether it consists of an adaptive realistic description, or otherwise is a normative argument. Thirdly, I cast some doubts on the compatibility between the multivariate frame and the “dualist conception of democratic constitutionalism” adopted by Ferrara, since the latter seems too indebted to the domestic analogy, and to a consensus-based model of legitimacy. Finally, I argue that the dualist approach does not seem a convenient way to include citizenship in deliberative processes, and the question of the emergence of a transnational *demos* should rather be reconsidered as crucial for this purpose.

[**Keywords:** Democratic Legitimacy, Overlapping Consensus, Pluralism, Deliberation, *Demos*]

*The Democratic Horizon* is a conceptually rich, creative and thought-provoking book, which exhibits an example of political philosophy at its best, exploring crucial issues for contemporary social thought and proposing a number of innovative conceptual tools to deal with ongoing transformations of democratic legitimacy. In this essay I will concentrate on what I assume to be one of the most promising conceptual frameworks developed by Alessandro Ferrara, that is his notion of “multivariate democratic polity”. I will first set out the advantages the multivariate framework offers in comparison to other more consensus-based notions of democratic legitimacy. Secondly, I will highlight some ambiguities concerning the meta-theoretical status of this model, since it is not clear whether it consists of an adaptive realistic description of the present state of multicultural democratic polities, or otherwise is a normative argument on how their political legitimacy should be better conceived. In a third step, I will cast some doubts on the



compatibility between the multivariate frame and the “dualist conception of democratic constitutionalism” Ferrara adopts in order to rethink democratic legitimacy in a transnational context. In particular, I will argue that whereas the multivariate framework is a promising point of departure in order to capture the transnational transformation of democratic polities, the dualist conception is still too indebted to the domestic analogy, and to a consensus-based model of legitimacy, and as such cannot capture multilevel processes of postnational constitutionalization and governance adequately. Finally, I will analyze the governance-based notion of transnational democratic authorship which Ferrara proposes and try to clarify its normative criteria. I will argue that once we adopt a deliberative model of democracy as Ferrara does, then it should be the deliberative process which establishes the criteria for the evaluation of the legitimacy of governance practices. But if this is the case, then again the dualist approach does not seem a convenient way to include citizenship in deliberative processes, and the question of the emergence of a transnational *demos* should rather be reconsidered as crucial for this purpose.

### **Hyperpluralism and multivariate democratic polity**

The whole project of *The Democratic Horizon* strives towards a non-procedural definition of democracy based on a pluralized notion of democratic ethos – understood as “passion for openness”<sup>1</sup> – and on a pluralistic model of its political justification. Accordingly, “reflexive pluralism” (see *DH*, pp. 67 ff.) is meant to be a strategy that should allow for a plurality of arguments for the acceptance of liberal democratic pluralism, thus avoiding the *petitio principii* – and subsequent performative contradiction – of monist accounts based from scratch on the liberal notion of autonomy. The idea is that pluralism could be justified proceeding from a variety of premises which could be legitimately interpreted as immanent to the respective central categories of different religious, metaphysical and moral comprehensive conceptions. These arguments would have the form of what Rawls labelled as conjectural arguments, that is arguments where we “argue from what we

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<sup>1</sup> A. Ferrara, *The Democratic Horizon. Hyperpluralism and the Renewal of Political Liberalism*, New York, Cambridge University Press, 2014, henceforth *DH*, pp. 48-51.



believe, or conjecture, are other people's basic doctrines".<sup>2</sup> As such, conjectural arguments are arguments that do not presuppose shared premises.

So far, Ferrara's model is an extension of the model of overlapping consensus to the problem of the justification of ethical pluralism, which should allow us to address the question, neglected by both Rawls and Habermas, "Why be pluralist in the first place?" (*DH*, pp. 71-72). A theoretical change happens when Ferrara, in chapter four of *DH*, introduces the notion of "hyperpluralism" (*DH*, pp. 91 ff.). This is at first negatively characterized as a situation where immanent conjectural arguments for the endorsement of pluralism do not work. "What happens when conjectural arguments fail to convince minorities to endorse the "political values", to accept pluralism and to join in the existing constitutional consensus?" (*DH*, p. 15). According to Ferrara, hyperpluralism is a notion that describes the actual conditions in which contemporary democracy operates and then represents a major challenge that cannot be solved within the limits of classical political liberalism, forcing us to adopt new vocabularies and conceptual tools. As such, hyperpluralism is understood as the condition in which some comprehensive conception endorsed by a majority of people, or even a sizeable minority, can reach an overlapping consensus on the basic structure and all the constitutional essentials. Whereas some other comprehensive conceptions endorsed by minorities – or even by a majority of minorities – cannot reach an overlapping consensus on the basic structure of society on *all* the constitutional essentials – perhaps they endorse some constitutional essentials on the basis of conjectural arguments and some others on the basis of prudential arguments, or even *none* on the basis of conjectural arguments and *all* of them only on the basis of prudential arguments (*DH*, pp. 105-107).

Hyperpluralism is then conceived as a situation where a widespread overlapping consensus based on conjectural arguments cannot be attained. The "multivariate democratic polity" is here proposed by Ferrara as the best answer to the phenomenon of hyperpluralism. But what kind of answer is this? In the first instance, the notion of multivariate democratic polity seems to be a restatement of the problem it should answer: just another term to refer to the fact of hyperpluralism in a democratic political society.

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<sup>2</sup> J. Rawls, "The Idea of Public Reason Revisited", *The University of Chicago Law Review*, 64 (1997), 3, pp. 765-807, p. 786.



The notion of multivariate democratic polity is introduced then to refer to the fact that in contemporary democratic societies there is a coexistence of multiple and variable orders of relations between groups and their respective comprehensive conceptions – overlapping consensus and *modus vivendi* would be not exclusive, but would coexist alongside variable geometries.

On closer inspection, the notion of the multivariate democratic polity, rather than being a bare restatement of the fact of hyperpluralism, could be interpreted as a model that re-describes the way political liberalism captures the fact of pluralism. In this sense, the multivariate democratic polity is a second order notion introduced as an amendment of the received interpretation of the scheme of *Political Liberalism*, understood as involving a sort of linear, homogeneous and preordained progression of polities from religious conflict, up to *modus vivendi*, constitutional consensus, and finally overlapping consensus (*DH*, p. 105). I would say that the notion of multivariate democratic polity is firstly a diagnostic tool, which is useful insofar as it can help us to detect and to bring into question the underlying consensualist teleological scheme of standard interpretations of political liberalism, where some kind of (overlapping) consensus is understood as the final stage of a process of historical and logical completion. Consequently, such a notion is to my mind useful insofar as it leads us to reconceive of the relation between consensus and dissent and the role they play in political legitimacy. According to Ferrara himself, the multivariate democratic polity conception

constitutes the best response to the tenuousness of consensus and the ubiquity of dissent that political liberalism can offer, in line with the premise (often neglected or contradicted by most of its agonistic interpreters) of an enduring relevance of the distinction between legitimate coercion and arbitrary oppression (*DH*, p. 108).

Still, as I will argue, this is a point where Ferrara is not radical enough and does not draw all the conclusions that to my mind should follow also at the normative level from the endorsement of such an understanding of the relation between consensus and dissent.

### **Meta-theoretical arguments**

As we have seen, the multivariate democratic polity is first presented as a “last resort way to remedy the shortcomings of public reason” (*DH*, p. 107) – a remedy for the failure of



conjectural arguments. And secondly as a (second order) answer to the tenuousness of consensus and the ubiquity of dissent. But how does this work exactly? In dealing with this problem, I will now consider some meta-theoretical ambiguities of such a notion. The first thing to note is that it is not clear whether such a conception amounts to an argument and to whom it is addressed. When conjectural arguments fail to convince those who follow some comprehensive conceptions, what is the multivariate democratic polity conception supposed to do? First, it does not seem to consist of a last resort argument, which should convince those who did not accept conjectural ones. If those arguments, which did not involve any shared premises, could not work, one cannot see what argument could now work for convincing the skeptics. Moreover, the multivariate democratic polity conception does not seem to have, *prima facie*, the form of an argument. At first sight, as we have seen, it seems to be just a restatement, or a re-description, of the fact of hyperpluralism. Now, important as it may be to get this fact of contemporary democratic societies right, this move is not *per se* an argument that could be used to convince anyone to be a pluralist. I cannot convince anyone to endorse pluralism just by stating that hyperpluralism is a fact of contemporary democratic societies (nor by saying that it works because the consent it provides, though not universally widespread, is enough to establish a multivariate polity).

But as we have seen, the notion of multivariate democratic polity could rather be interpreted as a meta-theoretical device, a notion introduced to amend the received interpretation of the scheme of political liberalism. If we assume this, then it is again clear that its addressees cannot be those minorities who fail to be convinced by conjectural arguments. Still, this allows us to reconstruct the multivariate democratic polity conception as being a part of some kind of meta-theoretical argument. This would be an argument addressed on the one hand to political liberalist theories – a sort of self-reflexive argument where political liberalism aims to prove to itself to have enough resources to cope with the fact of hyperpluralism if only it manages to modify some of its conceptual tools on how to understand the relation between consent and dissent. On the other hand, this argument would be aimed at those agonistic political theories, such as Mouffe's,



Tully's and Wingenbach's,<sup>3</sup> which deny that political liberalism can treat dissent and conflict in an adequate way.

Now that we have specified the intended target of the argument we can better reconstruct its form. This argument seems to firstly involve a descriptive appeal to a fact – “hey look, in hyperpluralist societies overlapping consensus and *modus vivendi* are variously intertwined and are not mutually exclusive”. And secondly it involves the proposal of a theoretical model (the multivariate one) that can describe this fact adequately and that is consistent with political liberalism. The argument would then be that political liberalism can still be a convincing model since there can be an overlapping consensus robust enough to sustain and legitimate the basic structure and the constitutional essentials even when some minorities or a majority of minorities are only partially reasonable, that is, even when dissent is widespread – as happens to be the case today. If reconstructed this way, the multivariate conception could be interpreted as a realist adaptive argument – a “last resort” to adapt political liberalism to a situation which is not considered the best possible and is rather quite inhospitable for it. The linear progression from religious conflict up to overlapping consensus would continue to be the first choice, but now we can be reassured that political liberalism can survive and function also within factual conditions where this does not occur. If so, then the multivariate conception would not really modify the viewpoint of political liberalism on consent and dissent, because the burden of political legitimation would still be based exclusively on the former and on its teleological deployment.

But there is another way to interpret the descriptive component of the argument. This may involve not only a sort of realistic acceptance of de facto hyperpluralism, but also a constitutive component. On this stronger reading, the varying intertwinement between overlapping consensus, constitutional consensus, *modus vivendi* and conflict, would not just be a contingent fact of societies nowadays, but a constitutive fact of political legitimacy. Democratic political legitimacy is *constituted* by an interplay of consensus and dissent, and not just a matter of legitimate consent but also of legitimate

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<sup>3</sup> See Ch. Mouffe, *The Democratic Paradox*, London, Verso, 2000; J. Tully, *Public Philosophy in a New Key*, vol. 1: *Democracy and Civic Freedom*, Cambridge, Cambridge University Press, 2008; E. Wingenbach, *Institutionalizing Agonistic Democracy: Post-Foundationalism and Political Liberalism*, Farnham, Ashgate, 2011.



dissent: and a multivariate democratic polity would represent in this sense an increase in the quality of political legitimation, because it would better embody its normative architecture. If it were based on such a constitutive description of democratic polity, then Ferrara's conception could give rise to a normative argument. Whereas the reconstruction of the realist argument tells us that political legitimation can function also within hyperpluralism, the normative argument reconstruction would say that political legitimation at its best should be conceived in multivariate terms and would work better this way. To my mind, it is not clear which of these alternatives is followed by Ferrara in the book and a certain amount of oscillation between the realist descriptive argument and the normative argument is to be detected. I take the second option to be more promising, because it points toward a deeper transformation of the notion of democratic political legitimacy, which in my opinion, if we take hyperpluralism seriously, needs to embody dissent within itself as a constitutive fact.<sup>4</sup>

### **Transnational democratic legitimacy and dualist constitutionalism**

In chapter 7 of *DH*, "Beyond the Nation: Governance and Deliberative Democracy", Ferrara addresses the question of democratic legitimacy from a transnational perspective. The multivariate framework is here an advantageous point of departure, since it can offer a theoretical model to account for contexts characterized by a low degree of initial convergence and a variable geometry of dissent and consent, and as such can be extended very well to emerging transnational dynamics. And I find also extremely fruitful the vaguely pragmatic and Deweyan methodological approach adopted by Ferrara, according to whom it would be a fallacy to apply old standards of democraticness, modeled on domestic regimes and state-like polities, to the new context of the worldly society (*DH*, pp. 19, 167). When it comes to the evaluation of the democratic legitimacy of transnational contexts, we rather need to elaborate new standards which adapt themselves to current problems rather than to apply received standards, which were solutions to old problems posed by previous contexts. Such an approach furnishes us with an interesting

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<sup>4</sup> For a notion of legitimacy based on the interplay of dissent and consent, and for a model of reconstruction of democracy as progressive institutionalization of legitimate dissent, see I. Testa, "Dissenso e legittimità democratica", in P. Costa (ed.), *Tolleranza e riconoscimento*, Bologna, EDB, 2014, pp. 143-159.



tool, which allows us to see that many contemporary diagnoses concerning the alleged crisis of democracy are wholly based on disputable methodological assumptions and tend to overlook the dynamic transformative character of political concepts.

In this spirit, Ferrara argues that practices of supranational global governance seem to necessarily involve a democratic deficit only if we apply to them standards modeled on domestic democratic contests. And he defends the thesis that on the contrary practices of global governance can be shown to be compatible with democratic legitimacy (*DH*, pp. 19-20), provided that we adopt a deliberative approach to democracy on the one hand, and that we conceive of governance as a method of ruling which would differ from state-like government insofar as it would not involve the threat of sanction but would rather be based on soft-law, best practices, benchmarking and moral suasion.

Now there is really a lot that is not democratic in contemporary practices of supranational governance based on technocratic, expert-guided negotiations, vertical processes of decision making, and, as is unfortunately increasingly the case with the EU, prevailing intergovernmental power relations. However, Ferrara does not want to legitimate this lamentable situation but aims rather at giving us some novel normative standards to evaluate and possibly democratically improve the legitimacy of transnational governance. In what follows I will analyze some conceptual tools, which Ferrara adopts in order to rethink democratic legitimacy in this new context. In particular, I will concentrate on the bridging role which the dualist conception of democratic constitutionalism plays within Ferrara's model in order to rethink the democratic legitimacy of transnational governance and I will argue that this move is not wholly consistent with the multivariate framework.

The dualist conception is introduced by Ferrara as a means to overcome the problem that, if we are to judge governance on the basis of the classical criterion of the legislative authority of the *demos* – the idea that citizens obey laws of which they are themselves the authors, or in other terms the normative criterion of the consent by the governed (*DH*, p. 177) – then processes of governance may seem massively deficient as regards democratic legitimacy. Ferrara proposes overcoming this problem by adopting here, on the transnational level, the sort of bipartition between two levels of the authorial function that is posited by the dualist conception of democratic constitutionalism.





According to the latter model, elaborated by Ackerman, and adopted also by Michelman and by Rawls's "principle of liberal legitimacy"<sup>5</sup>, we are to distinguish between two levels of political legitimacy and two respective forms of authorial function (*DH*, pp. 177-178). We would place here at the upper, "constitutional" level the institutional framework concerning constitutional law making, and the correlative constitutional essentials. And at the lower, "subconstitutional" or "ordinary" level, would be legislative, administrative, and judicial acts. Democratic authorship as specified by the principle of the consent of the governed would apply directly only to the upper level. Whereas the lower level may follow different paths (including technocratic and expert-like forms of regulation), not involving the full authorship of the *demos*, and would be legitimated indirectly by its consistency with the principles assented to at the upper level.

The first thing to note here is that the dualist model is clearly not only a case of a political conception of legitimacy which has been originally elaborated on the domestic scale, as Ferrara himself is aware of, but is also to my mind heavily indebted to the architecture of national political spaces. It seems to presuppose a state-like structure, and an established constitutional tradition, where a level of constitutional law and connected political procedures is clearly identifiable and distinguishable from ordinary law. This may engender from the very beginning the risk of falling back to the domestic fallacy. Hence, I think here Ferrara would have the burden of proving that the dualist model can be adapted to a transnational context in a way that escapes this problem. Unfortunately, there are a number of difficulties here that are pretty hard to overcome and that are connected to the multivariate structure of transnational spaces.

Let's use here as a guiding thread the EU, the example of transnational democratic legitimacy most frequently cited by Ferrara as an emblematic one. Let's first leave aside the (not unreasonable) position according to which there is no properly identifiable constitutional level in the architecture of the EU, but what we have at the moment is rather an intergovernmental treaty – the Lisbon Treaty – that has been adopted as a last resort remedy after the failure of the European Constitutional Treaty, which had not been

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<sup>5</sup> See B. Ackerman, *We the People*, Vol. 1, *Foundations*, Cambridge, MA, Harvard University Press, 1991; F.I. Michelman, "How Can the People Ever Make the Laws? A Critique of Deliberative Democracy", in J. Bohman, W. Rehg (eds.), *Deliberative Democracy*, Cambridge, MA, MIT Press, 1997; J. Rawls, *Political Liberalism*, New York, Columbia University Press, 2005, p. 137.



consented to by the French and the Dutch people, and which was in any event not a constitutional text, but rather an intergovernmental treaty aimed at having constitutional effects. Ferrara clearly is not a supporter of this skeptical attitude towards the treaties and, along with post-national and pluralist constitutional theories of the so-called new constitutionalism,<sup>6</sup> assumes rather that the Constitutional Treaty, The Lisbon Treaty, together with the pronouncements of the European Court of Justice (such as the judgment “Les Verts”, April 23, 1986), already represent a *sui generis* European process of constitutionalization, which may be said to be legitimate even in the absence of a European *demos* acting as a constituent power. The problem here arises because this model of constitutionalization as an emerging process is clearly based on a multileveled and composited architecture which is hard to combine with the clear-cut distinction between a higher and a lower level that the dualist conception presupposes. Whereas the latter architecture is a hierarchical and top-down one, where legitimation is transmitted from the upper to the lower level, the multileveled process of constitutional emergence – if it is not just another neoliberal strategy to give a decisive power to judicial authority and technocratic elites and to limit popular accountability, as some of his critics assume<sup>7</sup> – *should* be meant to be the composited result of a horizontal, netlike process plus both top-down and bottom-up dynamics. The question is not only, as some may argue, that here what the constitutional essentials to which we are supposed to consent to is not very clear – free and equal consent of the citizens to what exactly? – or at least are subject to a never-ending process of transformation. More importantly, even if we suppose that, at some given point, some constitutional essentials are specifiable, these are to a great extent to be conceived as something which also emerges from processes that, from the perspective of the dualist conception, are very often conceived of as emerging from the “ordinary” level of legislative, administrative and judicial acts. Hence, the dualism between constitutional and subconstitutional level, which was modelled on a more

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<sup>6</sup> See for instance G. Amato, “L’originalità istituzionale dell’Unione europea”, in G. Preterossi (ed.), *Un passato che passa?*, Roma, Fahrenheit 451, 2000, pp. 81-91; I. Pernice, “Multilevel Constitutionalism in the European Union”, *European Law Review*, 27 (2002), 5, pp. ; J.H.H. Weiler, M. Wind, (eds.), *European Constitutionalism Beyond the State*, Cambridge, Cambridge University Press, 2003.

<sup>7</sup> See for example L. Hilbink, “Assessing the New Constitutionalism”, *Comparative Politics*, 40 (2008), 2, pp. 227-245.



traditional and state like form of constitutionalism – where the bounds of constitutional law-making are at least sufficiently clear cut – does not seem to be wholly compatible with the multilevel model of transnational constitutional process, which Ferrara is keen to adopt.

Furthermore, the dualist conception seems to be deeply indebted to a consent model of political legitimacy, where the source of legitimacy is established at the upper level by some form of consent (be it some sort of original position or else of overlapping consensus), whereas dissent does not play a constitutive role and is rather understood as a residuum or a local perturbation manifested at the lower level. But if we take the multilevel dynamics of constitutionalization seriously, and we conceive of it in terms of a multivariate transnational polity, then we should assume that there cannot be a clear-cut bipartition between consensus and dissent and the allocation of these to two different levels, but rather that they are intertwined as constitutive elements of legitimacy. Furthermore, the multileveled process of transnational constitutionalization is combined with what Rosanvallon has analyzed as an ongoing process of pluralization and differentiation of forms of legitimacy – including not only consent-based “electoral” legitimacy but also “impartial”, “reflexive” and “proximity” legitimacy<sup>8</sup> – which again is hardly compatible with the dualist bipartition of authorship. And this also affects the way we are to conceive forms of transnational governance, since, if we assume this description, then also Ferrara’s definition of governance as a “monopoly on the attribution of legitimacy” (*DH*, p. 174) may seem in need of being reformulated: the current phenomenon of differentiation of forms of legitimacy seems rather to bring into question the idea that a monopoly of it can be effective.

### **Citizenship authorship, deliberation, and transnational *demos***

I would now like to have a closer look at the governance-based notion of democratic authorship proposed by Ferrara. What are the normative criteria that specify it? The definition of governance as a method of “ruling without compelling” cannot of course suffice to specify normative criteria of democratic legitimacy, since there can be forms

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<sup>8</sup> P. Rosanvallon, *Democratic Legitimacy: Impartiality, Reflexivity, Proximity*, Princeton and Oxford, Princeton University Press, 2011.



of governance – for instance in financial capitalism – which do rule by imposing sanctions for non compliance but that are still not democratic. Ruling without compelling could be a necessary but not sufficient standard for postnational democratic authorship, which means that the notion of governance itself needs to undergo further normative criteria. A clue is offered by Ferrara when he writes that methods of governance do not necessarily represent a burden for democracy

*if and only if* they (a) take place within the boundaries of “constitutional essentials” that meet with the consent of free and equal citizens as manifested in referenda or in more indirect but still recognizable ways and (b) some recognizable form of accountability remains in place (*DH*, p. 178).

Here, the dualist conception of constitutionalism seems to offer in clause (a) the first normative criterion needed to distinguish between legitimate and non legitimate forms of governance. But a problem immediately arises because, as we have seen, in the multilevel process of constitutionalization of Europe, for instance, the boundaries of what are to be considered the “constitutional essentials” are rather contested and may not be so determined in themselves. Moreover, even the subjects of this process of constitutionalization are rather variable. As Ferrara himself writes, if we are keen to say that there is here some form of “citizenship authorship”, then we must accept that it is “much more *indirect* than the authorship to which we are used in the domestic framework” (*DH*, p. 181). It is some kind of authorship not in the hands of a single identifiable subject, but rather “located at the crossroads of the European Parliament, the European Commission, and intergovernmental bodies such as the European Council” (*DH*, p. 181). Here it is clear that we would need at least some further criteria to evaluate, in light of democratic authorship, the balance between these components. Otherwise, everything would go, and we would be left with the unsatisfactory outcome, which is what is happening nowadays. Intergovernmental bodies are overly dominant and depriving the other components of decisional power – look at what is happening as regards to who is going to conduct the negotiations over the UK’s exit from the EU – and this would be wholly legitimate within Ferrara’s framework. Hence, even if we were keen to accept the dualist conception of authorship as being adequate in a transnational context and not affected by a domestic analogy fallacy, I do not think this could alone offer the



alleged kind of top-down legitimacy for governance practices. It is certainly the case that dualist approaches to national constitutional democracy are, as we know, already challenged by those who find this “legal” model of constitutionalism, which revolves around judicial review and tends to “juridify” political confrontation, to be inherently paternalist and depoliticizing.<sup>9</sup> But at least at the domestic level the boundaries of legal constitutionalism are identifiable, and their relation to representative democracy is established by a constitutional tradition and/or procedures. However, when we step to the transnational level and the fluid process of its constitutionalization, all this remains much more undetermined and permeable to vertical and non-transparent dynamics that are more worrying and risk remaining unchecked.

Even if we leave aside these questions connected with the dualist conception, and come back to clause (a) of the formulation of democratic legitimacy offered above – “if and only if they (a) take place within the boundaries of constitutional essentials that meet with the consent of free and equal citizens” – we can realize that at the very end the stronger normative standard is that of the free and equal consent of the citizens. Important as consent may be, I think that a renewed notion of democratic authorship should also incorporate within it dissent as a source of legitimacy – democracy is a process that progressively institutionalizes dissent (individual rights, majority vote, social rights, rights to strike, rights to conscientious objections are in many aspects also institutionalized forms of dissent) – and for this reason I would prefer the clause to instead be “if and only if they (a) take place within the boundaries of constitutional essentials that meet with the consent of free and equal citizens *and allow for legitimate dissent*”.

Now let’s leave aside the previous point, which would need a longer discourse than we have time for here, and consider the fact that in his book Ferrara proposes adopting a deliberative paradigm in order to rethink democratic authorship. I think we should read in this light the normative constraint that Ferrara poses when writing that methods of governance are not a burden for democracy if and only if the free and equal consent by the citizens is “manifested in referenda or in more indirect but still

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<sup>9</sup> See R. Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy*, Cambridge, Cambridge University Press, 2007; J. Waldron, *Law and Disagreement*, Oxford, Oxford University Press, 1999; M. Tushnet, *Taking the Constitution Away from the Courts*, Princeton, Princeton University, Press, 1999.



recognizable ways and (b) some recognizable form of accountability remains in place”. Accountability, important as it may be, is here a criterion (b) subordinated to clause (a) and as such is clearly not enough to specify normative criteria for the democraticness of governance. Hence, the normative priority is to be assigned to the specification of clause (a), that is to the criterion that the free and equal consent of citizens be somehow manifested “in referenda or in more indirect but still recognizable ways”. A strong, deliberative reading of this specification requires that the formation of consent (and dissent) be part of some sort of deliberative process (of which referenda are an instance). This offers us then a clue as to the question of the normative criteria that should distinguish between democratic and non-democratic forms of governance. It is in the end some notion of deliberation that should offer us a stronger standard for democratic legitimacy.

For methods of governance, it is not enough to take place within the boundaries of constitutional essentials – whatever they may be – nor to meet with the formal consent of free and equal citizens, nor to be somehow accountable. They need in the end to comply with standards of public deliberation. They have to be rooted in deliberative processes and somehow contribute to enhancing the quality of them. But this is a point which is to my mind required by Ferrara’s strategy, but that remains rather underdetermined. Here it is not enough to appeal to the fact that in transnational contexts such as the EU, citizenship authorship is “much more indirect than the authorship which is located at the domestic framework” (*DH*, p. 181). Because this fact is part of the problem we are faced with, that is, the problem that at the fluid crossroads between European Parliament, the European Commission, and dominating intergovernmental bodies such as the European Council and other more informal and restricted bilateral or trilateral meetings, it is not at all clear in what sort of deliberative process – indirect as it may be – citizenship authorship is taking place. The problem is that these crossroads – which by the way include processes that could be classified both at the alleged constitutional higher level, and the alleged subconstitutional, ordinary level – are not governed by enlarged deliberative processes in the proper sense, but are rather mainly being reshaped by interstate power relations and technocratic dynamics molded by them. Now this may be a factual circumstance that Ferrara’s framework could help us to denounce as not legitimate – or not fully legitimate



– if it could better specify how and where deliberative bodies of citizenship could be located here. If forms of governance are not rooted in deliberative processes, they cannot be said to have a full democratic legitimacy.

Of course democracy is not necessarily based on majority vote, and we have apprehended from the deliberative paradigm, as Ferrara notes, that majority vote is not the only, and maybe not the best method of deliberation (*DH*, pp. 176-177). Still, can we really frame in terms of processes of democratic deliberation what is happening at the mentioned crossroads? I think this is more than simply a factual problem concerning the current state of the EU, but instead is also connected with constitutional theory. As Ferrara notes, the deliberative democracy paradigm requires both an object of deliberation, a deliberating process, and a deliberating body, a subject of deliberation (*DH*, pp. 168-169). On the other hand, while confronting himself with the *no demos thesis*, Ferrara assumes together with new constitutionalism that the EU represents a novel and peculiar situation where the relation between constitutional treaty and state apparatus is weakened. Here we would have to deal with a higher law of a supranational polity of citizens rather than with the higher law of a state, for which a national *demos* would be needed as a legitimating source (*DH*, p. 181). But here the problem is that in this new situation there is either no deliberative subject, or else, if there is one, it is not at all clear if and how citizens are included within it even in an indirect way. And we cannot be satisfied with the fact that members of the EU parliament are democratically elected by EU citizens, and that national governments that operate in the EU council are democratically elected at the national level. What happens at the crossroads between these institutions is hardly to be represented as a process of deliberation – what sort? – of democratically elected representatives and seems to follow a pretty different logic, increasingly modelled by interstate power relations.

For the above mentioned reasons I think that even those who are keen to abandon a strong notion of democratic authorship, and a strong connection between constitution, state apparatus and nation, should reconsider the question of the *demos*. If both transnational constitutional practices and practices of governance do not include citizens in a deliberative process, we cannot be satisfied as to their democratic legitimacy. But for this to happen, the supranational polity of citizens must be engaged in supranational



practices of democratic citizenship. Now, it is certainly the case that democracy, as Ferrara assumes, is better understood as an ethos, and the latter can be understood as an individual attitude, a passion for openness to which, as in the nice quote from Dewey that opens the book, institutions should conform rather than the other way round.<sup>10</sup> Still, individual attitudes, to be such, have to be developed through and within shared practices. For individuals to have standing, stable democratic attitudes, there must be a democratic life-form of practices they embody and sustain. And this cannot just consist of a spurious mix of constitutional judicial reviews, top-down methods of governance, intergovernmental power relations, plus some indirect deliberation provided by the democratically elected representative in the EU parliament: if not also supported by practices of political subjectivation, there cannot be any supranational polity of citizens. Here the question of the *demos* strikes back. We do not necessarily need to think it as a substantive, already given entity at the national level. In fact, the question of the emergence and consolidation of a transnational *demos* as a legitimating source and scope is still the crucial question for contemporary democracy, since in its absence legitimizing deliberation, even in its indirect forms, cannot succeed.

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<sup>10</sup> “Democracy is a personal way of individual life [...] it signifies the possession and continual use of certain attitudes, forming personal character and determining desire and purpose in all the relations of life. Instead of thinking of our own dispositions and habits as accommodated to certain institutions we have to learn to think of the latter as expressions, projections and extensions of habitually dominant personal attitudes” (J. Dewey, “Creative Democracy. The Task Before Us”, in *John Dewey and the Promise of America*, *Progressive Education Booklet No. 14*, Columbus, Ohio, American Education Press, 1939).