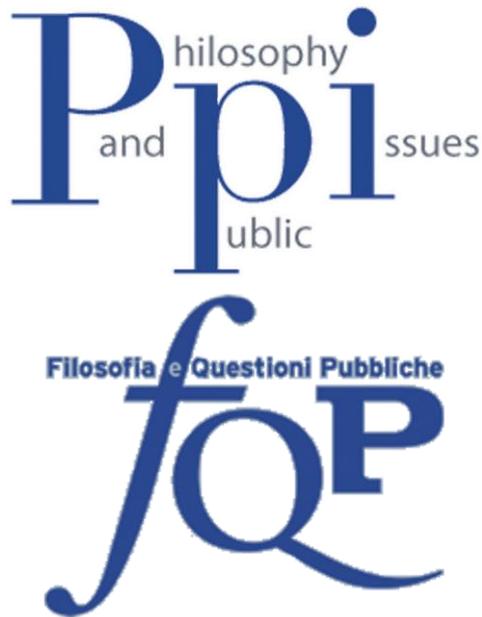


THE LIFE, THE IMAGE AND THE PROBLEMS  
OF DEMOCRACY



FICHTE ON DEMOCRACY  
AND REVOLUTION  
SKETCHES FOR A NORMATIVE ACCOUNT

BY  
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# Fichte on Democracy and Revolution.

## Sketches for a normative account

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### Introduction

**I**n the Terror Year 1793 Johann Gottlieb Fichte anonymously published two essays in which he stood up for the freedom of thinking and for the right of each citizen *qua* human (rational) being to lay claim to an equal and just State. At the collective level he defended the right of people to choose and change their own form of government. Some years later (1796), in the broader frame of a philosophical inquiry on the coercive power of the right and on the normative and juridical status of the State, Fichte addresses again some of those issues.

The paper aims at giving an account of the basic issues of Fichte's stances not (only) from a historical perspective but mainly from a normative point of view, showing analogies between Fichte's argumentation and some modern normative approaches to State justice. With targeted reference to John Rawls' hypothesis concerning the original position and Seyla Benhabib's proposal of a universalistic model of deliberative democracy, some essential issues for democracy will be discussed:

the dual link between reason and justice, on one hand, and reason and freedom, on the other hand, people's sovereignty to choose their form of government, the mutual control of State and citizenship. What ensues is a new way of considering Fichte's contribution to the political thought of modern democracy.

## I

### **Fichte in political traditions**

Democracy is both old and young. If its birth is settled in the ancient Greek world, its political institutionalization dates back to the last two centuries when many peoples in the world gained the power to choose and to establish a form of self-government in which all citizens are considered as equal and equally entitled to take part in the government. Self-government of the people and legal equality of the citizens are to assume in our consideration as fundamental components of modern democracy (Petrucciani 2014, 112-113). Self-government implies also the faculty to change not only the persons but also the forms of government, if they are considered no more suitable for people life, security and wellbeing. People's sovereignty expresses itself both in power acceptance and in power rejection, both in giving itself a law-based constitution and in breaking a constitutional law no more considered as just.

Fichte is an author not immediately put in connection with the history of democracy. A not marginal problem discussing political issues with reference to him is represented by the fact that in his work different State models are advocated – from the legal contract to the closed commercial State as exemplar of a rational State, from a *Rechtsstaat* to a *Nation-* and *Kulturstaat* (Schottky 1991) – making difficult to find, among attitudes and proposals which

are not always consistent with each other, a linear stance.<sup>1</sup> This difficulty applies to the issue of democracy as well.

For our sketches we will consider the first stage of Fichte's political work, in particular the writings between 1793 and 1796. In these writings Fichte confronted the question about the lawfulness of the State, i.e. its accordance with the law assumed as rational ground of rightfulness. In Fichte's argumentation some elements ascribable to the theoretical discussion on democracy and its content are to trace – or at least this is what we intend to expose.

## II

### A constitutional democracy

The idea of democracy does not seem to play an important role in Fichte's political thought. The only important exception at this sentence is given by the treatise on natural law. In the *Naturrecht* (1796) the issue appears with a negative meaning. In continuity with the ancient tradition, which challenged the ruling power of the people, democracy is represented there as a form of government legally admitted but unstable and not secured from the jurisdictional point of view. The cause of its inherent injustice is the fact that democracy recognizes no distinction between the judging power exerting the law and the role of being subjected to the law: judge and involved part are the same, unified in the people community. The absence of intermediating powers and the lack of limits to people's liberty let open the door to those

<sup>1</sup> The only common denominator of Fichte's political thought is probably represented by the idea and concept of freedom (Pareyson 1976, 2011; Braun 1991).

dangers of tyranny and brutality that traditionally the opposers discover in democracy. “A *democratic* constitution, in the most proper meaning of the word, would be the most insecure one among all since not only violent acts from everybody, as one would be out of the State, would be continuously to fear, but, from time to time, also the blind fury of an agitated mass, which in the name of the law would unfairly act.” (*GA I/3*, 439)

The strong impressions delivered by the Parisian Terror have their echoes here. In order to avoid those dangers, Fichte deduced the necessity to make the power accountable. This goal gets to be achieved through what Fichte imagined to be a fictional representation of power (the word he uses here is *Repräsentation*). This is directed at divorcing the ruling power – in which he puts together the executive and the judicial power – from the control power, which guarantees for justice and honesty to the extent in which the power is submitted to inspection and check out system. The “Ephorate” (*Ephorat*) is the institution Fichte conceived to make a form of government legitimate and legal (*GA I/3*, 448; Rampazzo Bazzan 2006; Städtler 2017) – no matter how many people are involved in administrating the power and how they are selected. Keeping aside the discussion about the best form of government – a question about which, Fichte remarks, not the jurisprudence but politics has to decide – what is here to stress is his sensitivity for power excesses and his purpose to find legal devices for the power control. In his view, democracy stands for a particularly fearful example of uncontrolled and unlimited power.

At a more sharpened way of looking at the question, however, we can notice that this content of democracy corresponds “only” to “the most proper meaning of the word” (*GA I/3*, 439). But there is also a more restricted meaning of the word permitting a positive evaluation of the democracy. This positive evaluation

rests on the constitutionalization of the public political power. Make the power constitutional means to make it submitted to the law.

The big issue of political philosophy and legal philosophy is the establishment of a form of civil life in which the individuals can live together in a free, stable and safe way, and this is the topic at stake in Fichte's essay on the natural right (Shell 1992). The supposed condition for this is a coercive law (*Zwangsgesetz*) to be put into effect, according to which "from each violation of the right [...] the same violation of the own right [of the injuring individual] necessarily and inevitably follows" (*GA I/3* 430).

The coercive law implies a relationship of proportionality between the renunciation of the individual at his claims and the power of the law mutually recognized. It is well known that in the tradition of contractualism the device that gets to be supposed to establish life in common is the contract by which individuals waive some kind of rights (first of all, the right of taking revenge on injustice by himself) in order to set up a political body, the State, acting as law holder and administrator (Schottky 1995; Hopfl and Thompson 1979). Fichte calls *res publica* (*gemeines Wesen*) a legitimate political body established by a contract and instituting a proportional relation between force (*Gewalt*) and right (*Recht*) (*GA I/3* 132). This happens according to a constitutional law (*constitutionelles Gesetz*) from which an order of law, i.e. all other State laws, descend (*GA I/3* 438).

This considered, democracy is in so far admitted by Fichte as a rightful form of government as it turns itself into a *res publica*. A constitutional democracy is legitimate, not democracy in itself, and admitting this Fichte shows to adhere to a stream within the democratic tradition which is not trivial at all (Vile 1998; Zuckert 2012). This means that in order to be legitimate two fundamental principles of the political thought has to come to conjunction in

democracy: the rule of law and people's sovereignty (Petrucciani 2014, 128-178). The first one, ensuing from the tradition of classical liberalism (Epstein 2017; Zuckert 2012), is guaranteed by the contract setting up the effective power of the right by reason (*GA I/3*, 389-403, 401); the second one expresses the peculiar democratic issue within a constitutional structure (Birch 1993). The balance between these two issues makes necessary to provide the State with an institutionalized system of distinct powers, to which Fichte gives a different interpretation from the classical one of the liberalism. If this one provides for the separation between the legislative, the executive, and the judicial power, for Fichte the fundamental distinction runs between the executive power and the control power: this coincides with "the right of supervising and judging how the power is managed" (*GA I/3*, 440), or, said in an other way, with the faculty of verifying that the public power is exercised in conformance with its own goal (*GA I/3*, 439).

It is at this point that the *Ephorat* enters the scene. It works as the institution asked to ascertain and assure that the civil power keeps on being responsible in front of itself and against the people. Only the verifiability of the performed conformity between public power and people's goals vouches for the constitutionality of the power-based state action and therefore for the rightfulness of its laws. Actually, in this frame, the *Ephorate* is only one of the forms in which the principle of constitutionalized power finds an institutionalized translation. The second one is the principle that people's power, i.e. the executive power, needs representatives (*GA I/3*, 440). The number of selected persons who can be charged with this duty and the ways of their selection (election, nomination, transmission, co-optation) can change, originating different forms of government, going from the monarchy to aristocracy passing through pure or mixed democracy (*GA I/3*, 441-442). What indeed makes the difference

for Fichte is the distinction between a despotic State and a *res publica*, shaping also the ways in which democracy can be realized.

In the absence of control and representation what ensues is a democracy “in the sense explained above,” that is to say, “a constitution [which] not only [is] not political, but absolutely contrary to the right” (*GA* I/3, 440): a tyrannical or “despotic democracy” (Ciliberto 2011). Consistent with the right is on the contrary the democracy “in the narrow meaning of the word”, that is to say, that one which “has representatives (*eine Repräsentation*)” and that “*for this reason* is a legitimate constitution” (*GA* I/3, 442). The rule of law, consisting in tutelage forms against the arbitrary confusion of overlapping powers and against the uncontrolled power of the people, requires also the necessity to make the democratic participation of the people in the government mediated and graduated. In order to meet this need the mechanism of representation has been devised, whose fictional character has not rarely also been questioned and challenged as not-democratic (Manin 2017, 154, Kelsen 1984, ch. 1, 2). By suggesting this solution, Fichte shows to believe that the rule of law keeps a priority on the *demos* because it works as an essential condition for each democratic freedom.

Not the form of government (how many people are elected and by how many people the power is exerted) seems to be decisive for Fichte, rather the system of checks and balances by which the supervision both of the power and of the people is guaranteed. These forms, established by law, vouch for the effective validity of people’s constituent power, that is to say, of people sovereignty (*GA* I/3, 450ff.).

### III

#### People's rupture power

People's constituent power, however, can express itself also in an other way. It is the form in which people's sovereignty comes to the point to oppose the power of law: it is an "extra-constitutional form" (Fonnesu 1994, XXII).

In order to make this possibility happen and to recognize it as legitimate, two conditions have to occur: the people have to act unanimously, by constituting themselves into a unitary and unified body, and unanimously it has to be recognized that "the injustice has risen to the highest" (*GA I/3*, 457), without any exception. When this happens, it means that the law, from being a law of mutual security, has changed into a law of injustice and repression. If the people, for this reason, decide to act against this law, one can speak of a revolution, which is not a private but a collective act. It represents the moment in which "the only allegedly common will represented by the governing people is challenged, in this only case, by the real common will of the people" (Fonnesu 1994, XXII). The revolution is the upheaval through which people manifest their will to change power modalities, forms of government, and leading persons. In that moment the people call back their whole sovereignty, laying claim to self-government.

According to Fichte the legitimate contract rests on unanimous consent (*GA I/3*, 454). This ensues from implying an original right (*Urrecht*) corresponding to the faculty of each individual of being a free causality to itself (*GA I/3*, 404). By force of this faculty each man gives consent to adhere to the social contract, for whose efficacy the reason accounts. In a specular way, this faculty, given by reason, is also the same permitting the citizens to leave the State in the moment in which

they do not accept any more its deliberations (*GA I/3*, 455) and do not recognize any more the State law as a rightful law. Fichte admitted this opportunity, but he does not care much about it. What matters to him is less the will of minorities and much more the chance to restore soon the inner unanimity needed to consider the political body as legitimate and sovereign – what happens in the moment in which, very simply, the opponents of the State “move away from the borders of the State” (*GA I/3*, 455).

Only these few passages are dedicated by Fichte to this problematic – and for the democratic thought crucial – issue regarding the civil criticism, the disobedience against the public power and the relationship between minorities and majorities. A reason for this can be found in the fact that Fichte is engaged here in identifying the conceptual and normative conditions for the establishment and the functioning of the State as the institution in which the fundamentally social character of the human being can come into effect in an universally recognized and civil way. Admitted that the individuals have the right both to create and to leave the State, and that “man can also surely renounce his own rights” (*GA I/3*, 398), the task of the transcendental philosopher stops here, letting the determination of the single content of criticism, and reaction to them, to the political struggle. After all, the same attitude is showed by Fichte dealing – or better, neglecting of dealing – with the issue regarding the choice of the best form of government (*GA I/3*, 442). Nevertheless, the impression issuing here is that Fichte’s overemphasis on the concept of people unanimity, how much hypothetical this supposition may be (*GA I/3*, 400-403, 437), lets the space open for the suspicion that minorities and opponents can be easily excluded from the State – what is proper of each despotic and totalitarian government, even of authoritarian democracies.

To challenge the State, up to the point of going off it, is an act of rebellion (*Rebellion*), equivalent to an act of private citizens performed against the State. “The people (as a whole) is never a rebel” because “rebellion happens only against a superior. But on earth who is higher than the people?” (*GA I/3*, 456-457). People’s unanimity calls for revolution. This is in fact a different issue: the revolution is a collective act aiming at calling back the consent to the State, suspected or charged to have betrayed its goals, and at restoring a new order conceived in conformity both with the rule of law and the people wellbeing. So, admitted that the revolution consists properly in a break of the law order carried out at collective level and in unanimous way, the inherent logic in it suggests to consider it as the radical act through which people’s sovereignty tries to express and impose itself against an order of law become un-democratic, that is to say, injurious for citizen’s dignity and harmful for their freedom. In this alternation of continuity and rupture, people can manifest what has been also called their “negative power” (Urbinati 2006, 27). The goal of such general rising consists in restoring the claim to a legal order fitting the need of people for security and justice – which are the grounds for which a State had been established, and still has to be established.

If the people do not rise, this means *either* that the oppression and the general insecurity have not yet become enough perceptible, or that they do not exist, or *that* the people have not yet awaked to the will for freedom and to the clear insight of their rights, they have not yet grown for the big juridical deal with whose decision they are entrusted (*GA I/3*, 458).

As Luca Fomesu writes, the French Revolution finds here its philosophical justification (Fomesu 1994, XXII).

## IV

### The French Revolution

The French Revolution, broken out in 1789, generated a tremendous impact throughout all Europe. Intellectuals, beyond and on the other side of the French border, were affected by such an overcoming event and they reacted to it, as the case may be, with interest, anxiety, excitement, fear, or enthusiasm (Ritter 1965; Baioni 1969; D. Schulthess, P. Muller 1989; La Vopa 1989; Racinaro 1995; Gonnelli 1996; Alessiato 2016).

Fichte himself didn't remain indifferent. On the contrary the Revolution gave him the impulse to reflect on some essential political issues and to write two essays, both published as anonymous in 1793: *Zurückforderung der Denkfreyheit von den Fürsten Europens, die sie bisher unterdrückten* and *Beitrag zur Berichtigung der Urtheile des Publikums über die französische Revolution*. The basic political issues covered here are essentially, on one hand, the equal right of the people to choose their own government and, in extreme case, to be legitimised to the revolution and, on the other hand, the duties of the State making it a rightful State – in the double meaning of legitimate and right: namely, a State built up according to the law and exerting rightful laws. For both issues, the impact of the French Revolution was crucial because for the first time in the history of mankind it had shown the will of a people to turn upside down a political system perceived as unjust in order to fix it in accordance with universal values. In that happening Fichte, like many others, wanted to see something “important for the whole mankind,” “an opulent picture for a big text [concerning] the human right and the human value” (GAI/1, 203).

In these writings Fichte, not even properly speaking of democracy or of a democratic form of government, argues for

basic issues of democracy, like the equality of citizens in front of the law and their right to choose their own form of government. Some of these issues will be deepened or reformulated in the following *Grundlage des Naturrechts*, so making admissible to consider all these three texts inside the same conceptual and temporal frame. In our opinion, the analysis of Fichte's way of claiming these principles in those essays will not only make possible to put also a thinker like him in connection with the glorious tradition of democratic thought, but it will also allow us to identify some normative preconditions implied by the building of a democratic system of life.

## V

### **In defense of freedom**

In the first essay, Fichte defends the freedoms of thought, speech, and press, so he takes implicitly sides against the censorship, which at that time checked the conformity of all books and published writings to the traditional morals and to the official religious doctrine. Fichte's defense proceeds from the distinction between alienable and inalienable rights: inalienable rights are those rights connected to the accomplishment of the moral law that is kantianly affirmed as the "law in us," the law of our conscience (Clarke 2016, 57f.). This moral law recommends that the human being has to stay free by any extraneous influence, without observing or obeying any law but the law which he gives to himself, that is the reason law. Given that this law qualifies the human nature, the man has the right to be able to follow this law and to realize it in the world: he has the right to live under those conditions which make him able to fulfill his "duty" as a moral subject, i.e. the duty given him by the moral law. The right of free speaking, the right of moral

accomplishment and the right of searching the truth belong to that kind of conditions. Therefore they have the status of inalienable rights. To these rights the rulers can lay no claim, against them the politicians are allowed to do nothing: “The free search about every possible object of thinking, to any possible direction and endlessly, is undoubtedly a human right.” Consequently, Fichte warns the rulers not to lay claim to “our freedom of thought” since they have “no right” on it, “no decision on what is true and what is false; no right to determine the objects of our research or to fix the limit of it; no right to prevent us from imparting the results of it, no matter if they are true or false, to whom and how we want” (*GA* I/1, 182-183, 187). What strictly ensues is that the government can wield his power only on the alienable rights, which are established and regulated by the social pact lying at the basis of the social order.

It is clear that by his defense of human being’s inalienable rights Fichte combines together the Kantian moral philosophy, advocating the moral autonomy of each human being, with ideas issuing from the tradition of contractualism, which distinguishes between the natural law and the legal-judicial thought, so gaining the normative prerequisite for the social contract. More than this, however, what in our perspective is to point out is that Fichte upholds here a basic principle of the democratic constitution: it is the untouchable equal right of each human being to be recognized and treated in a civil State as he actually is and finally has to be: as a *human* being. This right issues as a consequence from the fact of being a rational being and is a sufficient ground for becoming a citizen of the State. In this way, Fichte recommends for a normative philosophical frame, which is assumed to exist prior to each historical and political reality. It is postulated as the inviolable and intangible foundation for human dignity (*Würde*). By arguing so, Fichte shows to advocate a deeply modern understanding of the legal status of the citizen and of the

connection of it to its moral justification (Clarke 2018). In fact, in Seyla Benhabib's words, "for moderns, the moral equality of individuals *qua* human beings and their equality as citizens are imbricated in each other. The modern social contract of the nation-state bases its legitimacy on the principle that the consociates of the nation are entitled to equal treatment as rights-bearing persons precisely because they are human beings; citizenship rights rest on this more fundamental moral equality, which individuals enjoy as persons. 'The rights of Man' and 'The rights of the Citizen' are coeval for the moderns" (Benhabib 2002, 175).

The two dimensions come to unity by means of the postulation of a social contract (James 2011, 30f.). In it individuals liberally waive some of the personal rights ensuing from their original right. In this way the passage from the natural to the civil state, from the original right to the positive and positively (i.e. through law) secured order of rights, may take place<sup>2</sup>. The remark made by Fichte in the *Naturrecht* applies also for this dualism between "man" and "citizen." There, in fact, Fichte underlines the fictional character of the concept of an original, i.e. natural, right (James 2014). "There is no state of original rights, and there are no original rights of the human being. He has really rights only in community with the others, and he can [...] be thought only in the community with the others. Hence an original right is a mere fiction (*Fiktion*)" (*GA* I/3, 403-404). At the same time he points up that the mental operation of abstracting such a right from the positive rights of the *res publica* is absolutely necessary in order to identify the

<sup>2</sup> For a critical approach to Fichte's contractualism see recently Martin 2006 and Baur 2006.

juridical status of the human being and the normative requirements for the life in common.<sup>3</sup>

On the basis of the fictional representation of the human being, as member of the natural state and potential member of the civil State, it is possible to distinguish, as Fichte does, between the human being and the citizen, between “*Menschheit*” and “*Bürgerthum*” (*GA* I/4, 17). The citizen is the one who, submitting himself to the State, makes himself subject of the law. But this act of self-subjection is motivated by the need to have secured and guaranteed the freedom and the right which are due to him as human being, and for whose protection the public power has been established as the only legitimate and efficacious authority (Clarke 2019, 331-332). The hypothetical and theoretical distinction between man and citizen, which at conceptual and philosophical level is necessarily to perform, comes to reconciliation in the historical and juridical political practice.

Inherent in this view is an issue which will be made explicit in the second Fichte’s text: it regards the moral neutrality of the state of nature, that quite automatically implies its potential of becoming a field for morality (Neuhouser 1994; Kersting 2001). Unlike Hobbes, the state of nature is for Fichte morally neither bad nor good, but with the possibility of being good and morally

<sup>3</sup> On the abstraction in Fichte see Kim 2014. In the same book remarks are made by many authors on Fichte’s philosophical method, with the result that Fichte’s transcendental approach is clarified with reference to the mental operation of abstraction and fictionalism (Kim 2014, 11-70) – which is interesting also for our consideration of the artificial “devices” or hypothesis assumed in the frame of the social and political thought (right, state of nature, contract). The methodological function of fictionalism for Fichte’s transcendental approach has been repeatedly and brilliantly highlighted by Daniel Breazeale: for instance, Breazeale 2014, 103ff. On this line Estes 2006 speaks of “hypothetical imperative.”

performed. This attitude results from Fichte's consideration of the human being as a dynamic and not pre-fixed *synolon* of nature and reason, instinct and rationality, whose balance is continuously to re-create and to secure. The uncertainty is in Fichte's view strongly consistent with liberty (Alessiato 2018). To say, as Fichte does, that "perfection is the highest and unattainable goal of the man and his endless perfecting is his mission" (*GA I/3*, 32), means to assume that the human being is perfectible. This not pre-determined openness, which is proper for Fichte's consideration of the practical and historical world (Ivaldo 2012; Nomer 2010, 489), issues from a pre-historical assumption, regarding the reasonable character of the human being, that is to say, the always persisting possibility for the human being to bring the natural impulses under the control of the reason, so setting up a process of progressive rationalization of the natural world, whose aim is the conscious and free realisation of the reason law on earth. "To subdue to us everything is irrational, to master it freely and according to our proper law, is the final goal of the human being" (*GA I/3*, 32).

The state of nature is the condition in which the human being obeys only to his own law, without external coercion. Since what is valid for me (according to the not coercive will-based power of the reason) is also valid for the other, the human beings are tied together by a moral bond, based on mutual acknowledgment and rational recognition. This moral relationship is implied according to Fichte by any form of not-solipsistic life, namely by any possible situation where more than one human being has to live together with another. The possibility itself of physical proximity between human beings relies on this moral connection. That means that the human beings are morally capable of living together in a society (Verweyen 1975; De Pascale 2012). In fact, according to Fichte's radical view, the society stands for a natural state without legal bonds or contracts but only determined by

means of the moral reciprocity existing between humans beings, namely, at the last instance, by the moral rational law (*GA* I/1, 276f.). For Fichte, the state of nature is already in itself a social state of life. What is, however, important to make clear in order to avoid superficial or naïve interpretations of Fichte's stance is that a moral possibility does not still mean effectual feasibility. The non-automatic correspondence issues from the open and unstable character of human nature, namely from the fact that the human being is a perfectible but not yet perfect being. What in the state of nature is missing is the assurance of the temporal continuity of the moral bond, from which also the institutional (in)stability derives. The openness of human nature reveals its dark side. The State as a social agreement between rational and sensitive beings comes into being in order to secure them in their natural rights against arbitrary violence and irrational choices (Duso 1993). But the original point is made clear from the philosopher: "It is a big mistake to believe that the state of nature of the man will be abolished by the social contract; it can never be suppressed, but keeps on continuously existing simultaneously with the State" (*GA*, I, 1: 277-278). The human being goes on with being moral also inside the State order. Similarly, his value as a human being is not dependent on the State but proceeds from his rational nature, therefore, is prior to any social, juridical, and political order. Human being and citizen are theoretically to be distinguished but in the concrete validity of their issue they are also for Fichte coeval.

## VI

### **The right of revolution: people and sovereignty**

The second essay, *Contribution to the Rectification of the Public's Judgment of the French Revolution*, is uncompleted. It deals with the

question of the right of the people to make a revolution and to change their government or the form of government. Fichte maintains that people have this kind of right and therefore that a revolution, under certain conditions, is rightful and legitimate. It is rightful and legitimate, that is to say allowed and justified and even necessarily demanded by the moral law, when a government acts and makes laws contrary to it, that is to say when a State by means of its own activity prevents human beings subjected to its power from fulfilling the law of their reason and from accomplishing their last tasks.

Fichte repeats here the distinction, already declared in the first essay, between alienable and unalienable rights, with the consequence that the social contract refers only to alienable rights, that is only to the external conditions for pursuing the moral law and fulfilling the moral duty: it does not refer to the inner conscience and the inner will of the human beings. From these assumptions, he draws the idea that no political form is unalterable and eternal. It is good only that political constitution which makes the human beings able to continuously carry out the moral destination connected to the accomplishment of the moral law, creating the conditions for the implementation of it and for the fulfillment of the moral duty set by the law. For this reason the right of the people to change the constitution of their country cannot be considered as alienable: on the contrary, it has to be preserved, therefore the free attempt to change a wrong or unsuitable or unmoral constitution is rightful.

By using Fichte's words, it is possible to build such a syllogism, which sums up his argument for the legitimacy of the revolution, considered as the extreme attempt of the people to bring a State back to its accordance with the imperatives of the moral law:

1) “I have the right to be free and to do my duty means: nothing and nobody has the right to prevent me from it.” (GA I/1, 220)

2) “Only the moral law rules the human being as a human being and sets up to him an end in itself. The firstly following, foreclosing prerequisite of any morally possible State affiliation is that the final aim of it does not contradict the final aims of any individual prescribed by the moral law; that its attainment does not inhibit or hamper it. A final aim violating these cardinal laws is already in itself damnable, for it is unjust.” (GA I/1, 221) In fact, a State setting up different ends from those of the moral law is neither just nor moral, nor consistent with the reasonableness of the human being.

3) *Ergo*: “No constitution is unalterable [...] No human being (has) the right to resign his humanity.” (GA I/1, 254)

Also, the second essay shares the same normative prerequisite of the first one, corresponding to the assumption of the reasonable, and for this reason progressively and endlessly rationalizable nature of the human being. Compared to the first essay, this second can be considered as an extension and a radicalization of the consequences previously drawn. The essay defending the freedom of speaking, arguing and standing for opinions puts the focus of the attention on the individual, implicitly promoting and securing the social function of the scholar by searching the truth. This assumed, the second writing incorporated an enlarged political perspective. A collective political subject comes on the scene: it is the people, generated by means of a will-based contract between individuals and acting in their political role as the subject of right(s) and sole holder of sovereignty. The right, and corresponding power, to choose and change the form of their own government and of their political organization is part of this sovereignty.<sup>4</sup> Inspired by the great

<sup>4</sup> A problematic discussion of this issue is delivered by Zenker 2017.

event of the French revolution, Fichte gives a legal formalization to a collective subject, the people, whose norm of action is democratic, namely established in accordance with their shared and self-determined power. The same attitude finds acknowledgment also – as we have seen – in the *Naturrecht*, both at the level of the individual (*GA I/3*, 455) and at the level of the whole people acting “as a one and only man” (*GA I/3*, 457).

At this stage Fichte did not deliver material determinations of the people: he did not outline their distinctive character nor describes contents of their essence. This will be made in the late political works, like die *Grundzüge* or, as the title already suggests, the *Reden an die deutsche Nation* (Raddrizzani 2008). In the previous essays, the author’s perspective stays on a formal and logical level of discussion: the political subject is here still represented through abstract and a-historical terms, and for this reason it maintains a normative power which enables to consider it as a universal model. People’s right of speech begins, Fichte observes, in the presence of a collective contract clinched by individuals in a free and consensus-based way. Up to that moment, we have only one single subject, i.e. the whole mankind (*die ganze Menschheit*) (*GA I/1*, 258). The tight link between people and State is given by the central role taken for both by the social contract, meant as the mutual agreement between individuals on the combined transfer of rights and on the reciprocal recognition of duties. One contract, we can synthesize, originates a State, to which a people corresponds. John Rawls’ minimalistic definition of the State as a “union of unions” (Rawls 1971, 527) suits also this context. The comprehension given to the function of the social contract is in both cases minimalistic. A commentator has noticed that “in Rawls’ theory, the social contract is not used to set up a particular form of government. Rather, the guiding idea is that the object of the social contract is the principles of justice for a society.” (Lehning 2009, IX) Similarly in the anonymous text of 1793

Fichte's hypothesis of the social contract is not directed to defend a particular form of government in opposition to others. This step will be made some year later in the *Naturrecht*, yet still only in a juridical and argumentative perspective and not in a political one, by confronting the different options of managing the power from a juridical point of view. The political determination will be rather given in 1800 by the *Closed Commercial State*.

What is discussed in 1793 is more fundamental and regards both the possibility to rationally establish a form of social life conforming to the unalienable rights of the human being and simultaneously the moral justification for the break-up of that contract for the same symmetrical reason, that is to say the lost concordance of that social pact with the unalienable rights of the human being. However distant their respective theoretical proposals may be, both Fichte and Rawls are interested in delivering a formal and normative scheme of political thinking. This should be able to take into account, for Rawls, "a moral conception of justice for a democratic society wherein persons regard themselves as free and equal citizens" (Freeman 2019); for Fichte, the irrepressible right of each human being to fulfill his moral duties and pursue his final destination (*GA I/1*, 174).

Regarding Fichte's argumentation from this prescriptive and artificial perspective, the fact that Fichte's discourse is played not at the historical level but on a meta-historical and constructivist<sup>5</sup> stage clearly emerges. What remains unexplained is under which conditions it becomes possible to speak of a group of individuals in term of a people. Only the final target point is made clear, namely, the fact that "all members of the State are equal" (*GA I/1*, 254). However essential this assumption can be – having

<sup>5</sup> For a comprehension of "Political Constructivism" see the corresponding chapter in Rawls 1993, 89-129.

become a binding principle of each modern democratic constitutionalism – it does not give an account of the requirements for such an equality status. Who is actually entitled to set up the unification process and who is empowered to manage it? Who can join the State-defined group? Which are the conditions required by the affiliation? Which type of rights and duties are at the core of the social contract and who is qualified to decide them? Finally, who decides whom is qualified to decide for others?

Many of these questions are not answered nor dealt by Fichte. However, what is sufficiently interesting for us is that the large spectrum of problematic issues stimulating the actual debates on citizenship – entitlement, conditions, restrictions – are already present on the background of Fichte's conceptualization of the State understood as a mere contract not even more important than other forms of social agreement.

The potentially universal extension of the rational logic underlying the constitution and the political action of a people, up to the moment of a collective upheaval of the State, makes Fichte's stance even more radical. This potential political radicality follows from a philosophical attitude asserting the inalienable right of the subject – it may be individual or collective – of being reasonable, that means the capability of following through the law of reason and of pursuing the imperative of progressive perfectibility. No surprise that this potential radicality implied by Fichte's argumentation was clearly identified by the political authorities of his time, which considered his writings as potentially subversive and denigrated his, in the meantime discovered author, as "Jacobin", that is to say – according to the vocabulary of that time – as a radical democratic thinker.

Democracy is conceptually connected to equality. Democracy should be the form of government where people of equal citizens

have the faculty to determine their own form of political power and organization. The thesis that equality goes through the tension with the opposite value of the liberty is postulated by a prestigious tradition (Bobbio 1995; Maffettone 1991; Carter 2005). In fact, one of the classical criticisms exerted to democracy by his antagonists is that the equality between individuals, which are as such socially different historical subjects, prejudices the freedom of each individual to express himself according to his proper nature.

By Fichte, it is interesting to notice that his “Jacobin” stance develops from a philosophical attitude focusing both on moral and consequently political freedom at the individual level and on the equal right for freedom at the collective level. What issues, it is a peculiar form of balance between the two controversial issues. It is this balance which enables Fichte to assert, firstly, that the claim for the unalterability of a political constitution is rationally unacceptable “because directly contradicts the higher goal of the mankind” (*GA I/1*, 259), coincident with its endless perfectibility, and, secondly, that “the will of the State originates only from the will of everybody. [...] If I keep my obligation, and the State keeps its own obligation, then the contract is executed.” (*GA I/1*, 280-281) As a consequence of the absence or lack of such reciprocity by this mutual exchange of rights between the individual, the people and the State, the possibility of a revolutionary act aiming at redressing the balance is by Fichte rationally included and morally justified. In so far that people’s constituent power comes to expression in it, by even a radical degree, the revolutionary event helps to shape people’s democratic freedom of self-determination, consisting in choosing forms and modalities of their own collective life.

## VII

### The normative function of a “zero point” hypothesis

An eloquent sign of the consideration into which Fichte took the Revolution is an assessment of him in a letter (1795), where he compares his philosophical system, on which he has been working in the previous years and which has been published in 1794, to the effects issuing from the French Revolution:

“My philosophy is the first philosophy of freedom; the French Nation aims at freeing the human being by the chains of an external power, in the same way, my philosophical system aims at freeing him by the chains of the thing-*an-sich* and by the influence of the external reality [...] so that the human being can be free, he can decide on himself by himself” (*GA* III/2, 298).

Fichte says that the first ideas about his philosophy of freedom came to him by writing the essays on the Revolution.

What he admired in the French Revolution was the fact that for the first time in the history a people had become aware of the possibility to use the human reason for changing the reality and for choosing autonomously the way they wanted to be governed. Taking into account the connection between reason and liberty, Fichte saw a parallelism between the Revolution and his own philosophy: the central issue of this was, in fact, the idea that the reason itself creates the conditions for its own fulfillment and for the accomplishment of the prescriptions laid down by itself – in the last resort it is the reason which creates its own reality and the connected conditions of (and for) humanity (Rohs 1991, 22-23; Sinigaglia 2017). The defense of the French Revolution means for Fichte the defense of the human reason, of his activity and capability for creating a new, more reasonable world. And this faculty must be assured to each individual *qua* human being. So

each human being has to be awarded the right to be properly himself, equal to all the other and without any consideration neither for social, economic, professional differences nor for ethnical origin or status. In Fichte's view, democracy ensues by the shared will to safeguard the right of each human to be integrally himself and equally together with the others. According to this political order, the will is upheld by the reason.

Reason orders the human beings to form an association, which vouches for the freedom and the safety of each individual, a form of partnership which every man joins voluntarily in order to get liberty and security ensured. This form of association is the State issuing from a social contract settled by each individual with all the others and by the all with the individual. In this agreement, each individual voluntarily waives some rights, some piece of liberty (essentially the faculty to individually take private revenge on somebody for injustices) in return for legal security.

But the same reason orders, under certain conditions, to leave the State. This can happen when the State violates the law of reason, that is when the State violates the normative condition lying at the base of its legitimacy. This normative clause prescribes that each individual has to recognize its own reason in the laws and decisions taken by his State – what means that each individual has to recognize the State laws *as if* they would be decisions and manifestations of his own (rational) will, that is to say, *as if* he himself would have chosen in that way. If the State gives up his function of being the rational State of every rational being and then fails to respect his duty, then the individual has the faculty to break the contract and move out of the State.

In these writings, Fichte admits a very easy possibility of “State exit”. The State is continuously submitted to check out and to the examination by its subjected people, which compare the States decisions with the prescriptions of the universal reason

according to which 1) all human beings are created equal – with the same reason, the same dignity, the same duties – and 2) each human being can accept no law except the law of his own reason (Rousseau's influence is at this point evident). This means that in coherence with the Kantian idea, the properly free will is not the license of doing everything one wants but, on the contrary, it accounts for the will accorded with the moral idea of duty, namely with a moral obligation towards his own reason like that of each other human being.

According to the Fichte author of these “Jacobin” writings, leaving the State is very easy: it is enough that the citizen takes back his consent to the State. As the agreement with the others in order to join the State is free and voluntary, similarly also the withdrawal is:

The binding nature of social contracts arises only from the will of the contracting parties, and this will can change, so it is clear that the question, whether they can modify their contract and the question whether they can enter into a contract, are fully the same. [...]. That all contracting parties need to agree and that no one can be forced to enter into a contract follows directly from the above. Otherwise, a law **would be imposed** to it by means of something different from its will. [...] Is not an immutable constitution something contradictory and impossible? [...] The question sounds like this: does not clash the unalterability of any constitution with the destination of mankind set up by the moral law? (*GA I/1*, 240)

The acknowledgment and following observance of the State laws depend on the consistency of these with the moral law and the ensuing rights. These not given, the citizen has the right to “change his mind,” to reformulate the requirements of his obedience and to give reason to his dis-obedience. The outcome of Fichte's artificial and constructivist approach admits no half-

measure: “Now one changes his will and from this moment he is no more member of the contract in front of the invisible court of law; he has no more claim to lay to the State and the State no more claims on him” (*GA* I/1, 264).

Fichte doesn’t give explanations about the real ways to retire from the State, about what this actually means for the individual and what then happens to him. The only specification he offers concerns the reference to the “unsichtbaren Richterstuhle,” the “invisible court of law,” which makes us think at an interior court of law coincident with the personal moral conscience. Can disobedience be only an interior act of conscience? In this case, would this have still a political meaning or only a moral connotation, which makes it invisible to the public world? A passage in *Naturrecht* (*GA* I/3, 451) seems to suggest such a not reconcilable tension.

If, on the contrary, we assume that disobedience has a public, effective political consistency, we can also admit that Fichte’s proposal for the “State exit” is too easy because it is portrayed as a quite utopian and unrealistic act. If any citizen is legitimated to change his mind at any moment and at any public decision, how can the State stand up to disorder, selfishness, and particularism? In fact, one of the recurrent criticism launched against Fichte’s stance is that of naïvety: Fichte’s proposal looks too easy, oversimplified and failing to take into account a large number of questions about its feasibility. By means of his proposal, it is as if Fichte would authorize an anarchic disintegration of the State (Schottky 1995, 159-175), which brings the revolution from a collective to an individual level. Each citizen can do his personal revolution: but then what is still revolution? It seems that in this essay Fichte delivers a formally minimal idea of revolution, still holding the connotation of a private-law, yet simultaneously

postulated as reproducible in large-scale: revolution as a contract-break (*GAI*/1, 291).

It is not meaningless in this frame to notice that the anarchic risk is implicitly inherent in any doctrine taking the State as an artificial device established in a constructivist and voluntarist way through the will, the choice and the decision of many individuals. Martin Walzer focuses the point: “Liberalism is distinguished less by the freedom to form groups on the basis of these identities than by the freedom to leave the groups,” with the consequence that “association is always at risk in a liberal society” (Walzer 1990, 15). By keeping central the idea of a contract-break, some years later, in the *Grundlage des Naturrechts*, Fichte – as we have seen – will distinguish between a rebellion as an individual act shaping a private decision and the revolution as a collective act bringing the people to unity.

In order to keep this danger under control and to ward it off, modern doctrines standing for the contractualistic origin of the State minimize the role of individuals’ consent by their mutual State agreement. This is understood in a static way, as a decision *a priori* which fixes the power extension of the State and the consequent status of its members. John Rawls gives a transparent version of this assumption: “Then, we are not seen as joining society at the age of the reason, as we might join an association, but as being born into a society where we will lead a complete life” (Rawls 1993, 41). No matter how theoretically fecund and still functional that hypothesis might be: such a rigid comprehension of the boundaries of a civic community, to which a static and homogeneous vision of his internal cohesion corresponds, seems to be put under strong stress by our multicultural societies and by the following critical debates concerning the different degrees of permeability of State boundaries, the endangered State sovereignty in identity policies,

the national or international management of the immigrant flows. Finally, it appears overwhelmed and surpassed by our global times (Benhabib 2002, 168).

By underlining the consensus-based nature of the State and its continuous dependency on the will of its members, Fichte intensifies the risk of political and even institutional chaos. At the same time, he leaves the State more open for political accommodation, legal adjustments, and rational tests. Formally, he suggests the always persisting possibility of pursuing a State politics which may be irreversibly fixed on moral (philosophical) principles, yet flexible on legal regulations, including transformations, restyling, adaptation and harmonization. The only thing that cannot be called into question is the conformity of the human being with the moral law ruling his conscience and with the requirements for the accomplishment of his final task. If at the level of the individual human being there are core principles which cannot be deteriorated, neglected, falsified, or distorted, at the level of the political play space of negotiation comes into being, where people can meet and project together their future and their mutual way of being. After all, Fichte suggests: “the truth is a common patrimony of this higher world, free as the air and destined to be simultaneously enjoyed by a multitude of spirits, without that this diminishes it” (*GA* I/1, 289).

Apart from the critical point, which is possible to notice in Fichte’s legitimation of revolution and that we can call “the anarchic breach”, what it is important to remind is the historical meaning of such a normative view. What for Fichte is at stake in this context, is the right-based liberty of each citizen, consisting in his right as a human being, as a moral and rational agent.

We have to consider the type of State at Fichte’s time: an absolute, non-democratic, monarchical, hierarchical, patrimonial,

and centralizing State, exerting an unlimited and absolute power over its subjected and holding the power to decide for their life or death. These were exposed to the mercy and the license of prince's will. Against such a State, which wanted to keep the individual in a condition of docility, submission, and juridical inability, Fichte contends for the right of the citizens to have their rights acknowledged also by the State, he claims for putting the State (and its decisions, actions, and laws) under the control of the citizens and under the pressure of their freedom of arguing and thinking, so that the rights of the citizens are admitted as inviolable and incoercible limits to the State will: Fichte wants to reduce, check and moderate the power of the State through the firm claim for the human and juridical rights of each citizen.

What Fichte writes at the end of the Preface to *Zurückforderung der Denkfreiheit* is to remind because it combines together far-sightedness and civil courage: “No Prince, You are not our God. From Him we look for blessedness; from you (we expect) the protection of our rights. You are not supposed to be beneficent towards us; you should be equitable” (*GA I/1*, 172).

By postulating both the individual and the collective right to break the State contract, Fichte thinks about the possibility for the citizen(s) to go in a sort of “zero point” (*Nullpunkt*) space in which an unjust State, or even a no-more-legitimate State, exists no more for the individual: it is like it stops existing for the individual. Fichte admits the hypothesis of a “zero point” area in which the human being is alone out of the State but in front of his conscience, of his rational will, of his reason, that is to say, in front of the natural (the rational) law.

This is the important point: according to Fichte to be out of the State does not mean to stay out of the law and out of the society, more radically said, out of the reason, in a “nobody's land” in which each man is fighting against every other, in a kind

of war state like that described by Hobbes as a “*bellum omnium contra omnes*.” On the contrary, according to Fichte also in this condition something very important (more important than the State itself) still exists and is kept outside the State: this is the natural law, that is the law of our nature conceived as a rational being (*vernünftiges Wesen*). The natural law is the law of the reason that governs our conscience and that is at the head of our proper liberty as rational (moral) being (James 2004). So the “zero point” following the act of breaking the social contract applies to the State, but it is in itself not completely empty of values: the moral law is there still persistent and valid. The act of resetting the State to the zero level basically endangers the political institution raised by the contract. But regarded under moral conditions, its effectiveness is always still relative. That results from the fact that the moral law is valid (then, has value) in itself, it doesn’t need the existence and the tutelage of the State for being worthy of regard. It needs the intervention and the force of the State only for becoming (more) effective, for getting efficacy and certainty.

We can fictionally expound Fichte’s argument in this way: we have the rational law, that is like the seal of God in us, “a divine sparkle in our conscience” (*GA* I/1, 173). Its presence in us suggests that we are able to act and to live according to the prescriptions of the reason. But as human beings we are finished beings, so we are weak, we often fail in controlling and disciplining our pulsions, passions, and sensible instincts. So we need the help of an artificial organism enforcing the rational natural law and fixing the conditions for the fulfillment of our duties: this organism is the State. Nevertheless, we keep full control upon it because the State itself is subjected to our reason and to the check of our conscience. What is postulated here is a limited, minimal State. It originates from only a particular type of contract which, like every other contract, can be rescinded when it no more satisfies the conditions for which it has been

established and the grounds according to which the individuals have entered into it. At this regards, Fichte uses the famous image of the four circles to depict the consequent relationships between the field of the conscience, correspondent to the larger circle, and the others, progressively smaller, of the natural law, of contracts in general, and of the particular social contract giving origin to the State:

The domain of the conscience encompasses everything; that of the social contract the least of all. Everybody is allowed to draw back from the center to the boundary, and even to go out of the domain of the natural law [...]; but nobody goes out of the domain of the conscience if he is not a beast (*GA I/1*, 279).

In other terms: the right of the ‘man’ and the right of the ‘citizen’ are axiologically coeval, but historically the human being has to become citizen of a State in order to make his right properly and constantly secure(d).

## VIII

### **The social contract as a rational hypothesis**

Two issues are worthy to be noticed in this approach. The first one is the fully artificial and functional character of the State. There is in Fichte’s view no hint for State sacralization. The State works and has to act simply as a historical and strategical instrument to carry out in history the task of the human being, that is to accomplish his own *Bestimmung*, the perfect coincidence between nature and reason, and so to make the law of reason achieved in the reality. This functional relativist consideration of the State will represent a constant element in Fichte’s political

thought, still in the phases in which the State will take a major role in the organization of the human life. But also in those conceptual configurations the aim of the State will be to make itself progressively useless and superfluous. This functional understanding of politics fits in the modern secularization of the democratic State, depriving it of any claim on ontological superiority.

The second point to stress is again the a-historical and a-temporal character of Fichte's hypothesis concerning the end of the State, such as previously the hypothetical construction regarding its origin was. We have seen how innovative Fichte's comprehension of the state of nature in comparison with the previous traditional ideas (especially Hobbes) is. The "null point" – however relative, as we have seen, it may be – from which the State originates and to which it can at every moment theoretically return, reminds in a paradigmatically functional way Rawls' original position. In the frame given by his theory of justice as fairness this position has been thought as the equivalent to the state of nature postulated in the traditional theories of the social contract<sup>6</sup> (Rawls 1971, 12): both have a hypothetical character. The use of such an "*as-if*-tool" (Appiah 2017) has a creative function concerning the working out of a conceptual device (the social contract, the State) fixing the ideal requisites for the life-in-common. More precisely it helps, by Fichte, to challenge the question about the unalterability of political constitutions and the legal and moral limits of the State action; by Rawls, to pinpoint the principles of justice regulating social institutions and political relations between moral persons who are free and equal, have a sense of justice and a conception of their rational good, yet have different conceptions of their personal good, as well as different

<sup>6</sup> This equivalence is contested by Freeman 2019.

religious, philosophical, and moral views. Inherent in this “thought experiment” (Rawls 1971, 17) is also the fiction of the well known “veil of ignorance”, consisting in an imagined situation in which all parties are deprived of all particular knowledge about themselves and the others, namely knowledge concerning identities, social role, contingent capacity and circumstances – in a word, all kind of knowledge which could bias the judgment of the parties on the principles of justice and therefore result in unfairness and impartiality. In fact, what this fictional hypothesis aims to is the achievement of a strict position of equality, objectivity, and symmetry between persons as a starting point for their fair agreement on constitutive principles about the basic structure of the society.

Original position and “veil of ignorance” work in Rawls’ philosophy not only as hypothetical pre-requisites for the construction of a fair society but also as paradigmatic patterns for the preservation of the social justice in it. That kind of “null point,” wherein no social and economic differences nor race and gender classifications are known and wherein only the moral capacity and the ability for rational choices of the parties pertain and are in force, incorporates a normative idea of pure procedural justice. Therefore it seems pertinent to say that Rawls “used the original position in two capacities – as an analytic device and as a justificatory device” (Mukherjee and Ramaswamy 2011, 485). This applies in the sense that, by entering that abstract (through abstraction from any particular difference and contingent circumstance) and neutral (without moral determination but the capacity as free and equal moral persons) “null point,” the parties account time by time for the principles of fairness enabling each of them to pursue their ends and fundamental interests as free and equal persons. The original position, which – Rawls says – we can “enter [...] at any time simply by reasoning for principles of justice in accordance with the enumerated restrictions on

information” (Rawls 1993, 27), represents the “ground zero” of differences: it works as a standard of universal measure useful to organize our convictions and principles of justice, clarify their implications, question our judgments and consequently assess the pertinent standards of justice and democracy in the State. Like by Rawls the “device” of the original position, similarly by Fichte the hypothesis of an original state of nature is functionally subordinated to the constructivist goal of working out the juridical and legal requisites necessary for the establishment of a social agreement between rational agents (Ferry and Renaut 1994, 152).

In that original state of nature an original right – we have seen – is placed, or better, is to postulate, whose fictional character issues from the necessity of performing a reason-based act of abstraction from the social rights (James 2014, 345). This abstraction has a philosophical function because it allows to detect the rational and constitutive grounds for the necessary constitution of the State. As an interpret observes: “Fichte’s concept of right therefore obtains its binding force not from the ethical law, but rather from the general laws of thinking and from enlightened self-interest, and the force of such considerations is hypothetical rather than categorical. The theory of right examines how the freedom of each individual must be externally limited if a free society of free and equal individuals is to be possible” (Breazeal 2001, 2018).<sup>7</sup>

<sup>7</sup> The same author has interestingly reflected on the philosophical role of fiction in Fichte’s philosophy, coming to the point of considering his philosophy as “fictional.” This perspective can fit also in our frame, limited to the political thought and to the fiction devices applied in it. Cf. Breazeale 2002. With reference to this topic see Crowe 2008.

The hypothesis of a rational contract freely endorsed by individuals represents the other side of the same theoretical hypothesis – that of the state of nature – because it corresponds to the device to apply, under suggestion of the reason, in order to get over the permanent conflict and insecurity inherent in the state of nature.<sup>8</sup> From the “a priori deduction of intersubjectivity,” performed proceeding from the analysis of the structure of self-consciousness and of the requirements for the self-positing of it,<sup>9</sup> Fichte comes to propound the “citizen’s contract”, producing what we can call a “contract theory of the State” (Breazeal 2001, 2018), whose necessity is grounded on reason. This rational necessity is the same applying also to Rawls’ hypothesis of the “original position,” and in general to each theory which settles the origin of the State in the union of free and equal wills put together through a rational (and legal) mechanism.

So, the transit from the state of nature to the civil state immediately implies also the determination of the moral conditions and juridical limits for the action both of the State and of the citizens. Framed the original pattern given by the rational State, coming to life by means of an hypothetical contract shaped by rational law, the way of acting of the historical State and of his representatives (the princes, at Fichte’s time) is continuously confronted with and assessed through it. In this way, the philosopher delivers, on one hand, to the State a norm for the justification of its power claims and decisions and, on the other hand, to the citizens a powerful, however ideal, tool of power control. To show in which extent these tools can be applied is the

<sup>8</sup> On the artificial character of the State cf. the classical Skinner 1999 and Bobbio 1989.

<sup>9</sup> See Nomer 2010, 469-490. See also Herbert 1997, 201-202.

purpose of both anonymous Fichte's writings, which in their sequence show a remarkable degree of modernism and a consistent escalation of radicalism.

Thus, after having championed the "right of voice" of each citizen meant as his irrepressible right of freely speaking, questioning and criticizing the power and searching the truth, Fichte goes a step beyond. Since the possibility of withdrawing the consent to the State is admitted and has to be constantly preserved and kept open, each citizen acts as the persistent holder of an "exit strategy tool"<sup>10</sup> making himself master of his own State by virtue of his own reason. This is the modern achievement of Fichte's political thought, which finds a manifest correspondence, though in a radicalized measure, with the democratic principle asserting the equal right of each citizen of taking part in the political life of his own State.

## IX

### **Norms of democracy: Pluralism and Accountability**

The natural law (law of reason, the law of God in us) is what distinguishes the human being from animals. Giving up and betraying the reason, or permitting that this law is betrayed from other, also from the State, is unacceptable because it would mean for the human being to renounce his peculiar dignity and to give away his own humanity. In such conditions, the "State exit" has to be possible and is totally rightful.

<sup>10</sup> The terminology is allowedly delivered by the famous essay by Hirschman 1970.

As an individual can exit the State, so several individuals can do. Toward each other, and towards the State they left, they stay under the sole natural law. If those who have isolated themselves want to associate with each other and to enter into a new contract by any desired condition, so by virtue of the natural law, into whose domain they have drawn back, they have the full right to it. – So a new State is born. The revolution [...] is completed. The renunciation of the previous contract and the association to a new one belong to each revolution. Both acts are legitimate, hence also any revolution by which both happen by rights, namely through a free will” (*GA I/1*, 291).

Each citizen is awarded a big power and a huge trust: namely, the ability to decide by free will what is consistent with the moral law, namely the law in itself, which is a track and an evidence of the universal law. Apart from the optimistic and confidence-based anthropology Fichte asserts in this view, the political meaning of this faculty is not to underestimate.

The faculty of each citizen to get out of the State works like a hypothetical threaten: it has the value of a warning addressed towards the State. It is like saying: “Hey State, keep attention! You can not do whatever you want, you can not decide only for your interest or for the advantage of a small clique of privileged people, you have to give account to us which are your citizens, you are not absolute and all-powerful, you are tied to our rational will and control.” In order to stress and to point out this principle, which will become a central issue of the modern State of right (*Rechtsstaat*) and a basic principle of constitutionalism and liberal thought, Fichte radicalizes the power of the individual in face of the State, bringing his freedom of choice to its extreme consequences.

What we have made clear until now is that according to Fichte the constitution of the State is always reversible and involves each citizen, whose free decision and consent represent the effective requisite of each political constitution. If these issues are entitled

to be called – *ante litteram* – as democratic, we can go even further by pointing out how Fichte’s standpoint shows similarities with some stances claimed by modern theories in order to formulate conditions useful to ground both consolidation and enlargement of democratic issues in pluralistic societies. In particular, it seems quite astonishing that Fichte’s idea of the State building at the stage of these early writings can be correlated, in a fictional and enlarged frame, to the normative requirements postulated by an advocate of a pluralistic model of deliberative democracy like Seyla Benhabib. These requirements, in Benhabib’s words, are: 1) the “egalitarian” reciprocity, according to which the members of minorities have to enjoy all rights the majorities do; 2) the voluntary self-ascription, according to which the choice to join or belong to a group should lie exclusively in the individual, not in automatisms set down by groups or by the State; finally, 3) the unlimited “freedom of exit,” namely the liberty of leaving an identity group, combined with the symmetrical liberty of associating and joining a new group (Benhabib 2002, 131).

It is patent that Benhabib’s discourses concern the issue of cultural identities, detecting the normative requirements for the pacific co-habitation of different identity groups inside a multicultural State or society. On the contrary, Fichte’s stance fits in the still more traditional contractualist tradition aiming at establishing a civil order. But, once the correct distance between the two projects gets measured, some correspondences are still to draw. Fichte clearly maintains that “all the members of a State are equal,” and this legal status is – at this stage of his thought – not a consequence of the State-entry but an evidence implied by the moral status of the individual as a human rational being. No matter which the origin, the social status, the economic or social power may have been. The social pact is grounded on the mutual reciprocity that the parties are willing to recognize to each other: “Where the moral law is silent, nothing forces but our own will.

My *right* relies on the *obligation* (of another); then, in the last analysis, on his will. [...] I make a promise in return for another (promise)” (*GA I/1*, 260-261).

The ideal subscription of an agreement with others and the self-ascription to the social contract giving rise to the State should be completely free and will-determined. This point, for which Fichte is affected by Rousseau’s approach, accounts for the basic argument of the whole exposition: “The compulsory nature of the civil laws [results] from the voluntary acceptance of them by the individual” (*GA I/1*, 238). From this claim a radical consequence, as we have noticed, has been drawn: each individual has to be left free to choose and to assess the reason-conformity of the contract, without external coercion or social pressure (*GA I/1*, 240). The freedom of thinking and of questioning the power is an explicit and socially performed expression of such freedom. The same freedom is implied by the exit strategy, that is to say by the right ascribed to the individual to leave the State community whose he is a member of for eventually establishing by contract another community or joining a different group – assumed that the moral sphere is much more inclusive and larger than the sphere delimited by the State or by any other form of civil contract. These conditions mark Fichte’s idea of the State in a sense that we can properly call democratic in a modern sense.

Implied in the described conditions of the State building is still an element, which Fichte recognized in advance as an important rule of modern democracies: the principle of accountability for State officers and political actors in front of the citizenship. Consistent with the rule of law in opposition to the rule of men<sup>11</sup>,

<sup>11</sup> “It is the law that should rule by means of the prince, and he has to be strictly subject to it. [...] The prince as prince is a machine vivified by the law” (*GA I/1*, 369).

the core of this principle lies in the idea that each personal and political power is (should be) submitted to higher principles than personal convenience, cultural tradition, or social habits. We have seen that the issue of the power-control emerged already in the *Naturrecht*, where Fichte maintained the necessity of separating the executive power of the community from the faculty of supervision. This duality should work as a prerequisite for the accountability and law-conformity of the power against the dangers of arbitrariness and tyrannical violence coming from a democratic constitution.

Two years earlier, in the so-called “Jacobin” writings, the principle of accountability had been already declared, actually asserted with emphasis. Fichte’s stance there, however, is more radical because his defense of this instance proceeds from a properly democratic principle, namely the alleged equality of each human being *qua* rational human being, then subjected to the rational law. From this equality-status both the right of each member of the State of being recognized as a subject of right and the right of the citizens to call the rulers to account for their power administration ensue. The principle of accountability grows out of the idea of right which applies for each member of the State and, even more broadly, for each human being *qua* rational being. Thus, “the master has to assure maintenance to the slave which conveys to him the control over his forces; he is not a good man; the subjected person has the full right to claim for this. Any human being has to live; this is his unalienable right. [...] Your slave is a human being” (*GA I/1*, 315-316).

Fichte’s stance shows a revolutionary power to shake any conventional social order and make it tottering in the name of the universality of human rights: in front of these no classes, origin, economic status are still more valid. The only fact making the difference is the belonging to the human race. High is also the

responsibility expected by the prince: he counts as simply the first among others like him, towards whom he has to give an account for his own actions, omissions, decisions, and behaviours. The social superiority of the prince does not exempt him from the control by his subjects as citizens. By forestalling the modern idea of accountability Fichte addresses directly the prince:

You received offices and dignities in the State; awards and attestations of honor; you give support to the *miserables* and give bread to the poor – but it is a lie if one says that these are benefactions. You are not requested to be beneficent. The office you get is not a gift; this is a part of your responsibility that you load on the shoulders of your fellow citizens if you give it to the worthiest; it is a robbery at society's expense, and at the **worthiest's**, if the least worthies get it (*GA I/1*, 188).

Here we find the outspoken idea that the public function is not a privilege in the ancient meaning of a “present,” a grant, a private concession given from the superior to a subordinate as a benefit or as a compensation for private advantages. If it were so, that post would be subordinated to the mercy and arbitrary will of the most powerful, as in the ancient patrimonial form of State (as Max Weber called it) happened (Weber 1980, 130, 133f). On the contrary, the public post is an employment, which calls the officer, who has been charged with, for responsibility towards the people for which it is wielded. It is not an easy play, but a heavy practice: that post stands for public service. It is not granted on the basis of private favor but assigned on the basis of moral integrity, professional competence, and public utility. Thus, the fact that the last chapters of Fichte's *Beitrag* deal with the claim of a meritocratic society, protesting against inborn privileges and aristocratic hierarchy (*GA I/1*, 299-404), seems consistent with this perspective.

In this outlined frame two issues are to highlight. They account for the modernity of Fichte's view and discover in his thought hints of democratic sensibility. The first point is the normative ground of accountability: it ensues from the faculty of each citizen to make the claim of his own reason effective. In fact, by virtue of the equal reason for which each citizen accounts, each citizen has the power to claim for recognition, and recognition means here to be acknowledged as a social and political subject, namely as the free holder of equal rights. No other grounds must count in front of the court of justice. Evidently, this claim opens the way to the democratic issue of the full sovereignty of the people.

Secondly, the principle of accountability implies the mutual control of State and citizenship. Accountability applies in a double direction: it proceeds both from the popular basis against the summit of the social pyramid and from the top power towards the people. The State has the power to manage the law and, if necessary, the authority for strategically exerting right and force in order to preserve the rational civil order. Reciprocally, the citizens are in charge to preside over the effective application of their rights as citizens, up to the point of withdrawing their personal consent to the no-more-legitimate-State. Since this power-to-be-in-charge-of ensues from the free exercise of reason, this connection of bilateral control between State and citizens should not be understood in patriarchal and pre-modern terms, as a mechanism of subordination of the citizens to the State in exchange of social protection. On the contrary, it should be translated into mutual responsibility, so setting a basic and innovative principle of the modern liberal-democratic State.

It is interesting to notice that during the years Fichte has modified his point of view about the factual civic contents implied by such a link of mutual responsibility between the State and the citizenship. In the *Closed Commercial State*, for instance, the

social and legal protection ensured by the State to the citizen will be made dependent on his work activity. The connection between right and work will be made so tight that it will apply both from the top down and from the bottom up. It will go from the State to the citizens since the State can subordinate the full exercise of the citizenship rights to the obligation of each citizen to work; at the same time, it will proceed also from the citizen to the State in so far the citizen can demand from the State the right to have and to get a work in order to fulfill the first law-connected imperative prescribing that “each individual should be able to live by his work” (*GA I/4*, 22). If deprived of such a right, the citizen has the correlate right to violate the laws of the social order and to commit acts of insubordination by means of which he aims at providing by himself what the social order is not able to give him (*GA I/7*, 88-89).

In the *Grundlage des Naturrechts* Fichte identifies such an act of insubordination as “revolt.” But considered inside the more radically affected frame given by the writing on the French Revolution, that right can be considered as a radicalized extension on the social field of the previous right, thematized in the second anonymous writing and concerning the political level, which – as we have seen – enabled each citizen to enter or exit the State and similarly empowered a people to choose or change the form of their constitution and self-organization.<sup>12</sup> This right accounts in our comprehension for the “core ideal” of each political project, which wants to be defined as democratic. In Gerhard Leibholz’s words: it is possible “to designate Fichte as the State philosopher of the German democratic thought in so far he, in the statements of his thought which he often changed, defends the principles of

<sup>12</sup> A seminal understanding of these right also in economic terms is actually present already in *GA I/1*, 285 and *GA I/1*, 323-324.

people's sovereignty and the principle of universality and equality of the political rights associated with the rejection of hereditary- or richness-based privileges" (Leibholz 1921, 18).

If political philosophy ensues from the theoretical attempt to make "meet the individual and the collective" (Figal 1995, 70), Fichte's contribution to it, regarding the issue of democracy, can be seen in the fact that, despite the authoritarian radicalization of State power in the *Closed Commercial State*, the link between State and citizenship is going to stay valid and effective, so accounting for a confirmation of the fact that the status of the full nominal right of each citizen will be no more questioned by Fichte. More or less directly, this can be considered as an evidence of the fact that the French Revolution – a major step in the history of people's rights (and in the story of political thought as well) – was not only a magnificent event but also an irreversible one. The whole 19th and 20th century debates about the legal requirements of the democratic State and the normative requisites of a social order based on social justice ensue also from that event, despite the theoretic difficulties, the practical problems and the historical limits connected with the achievements of the declared postulates – difficulties and problems which are still at stake in our so called "mature" democracies.<sup>13</sup>

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<sup>13</sup> For some reports on the "health" of democracy in our world see "*Democracy index 2012: Democracy at a standstill*". *Economist Intelligence Unit*. 14 March 2013. Retrieved 24 March 2013; more recently "Freedom House: Democracy Scores for Most Countries Decline for 12th Consecutive Year", VOA News, 16 January 2018. Retrieved 21 January 2018; see also Fuchs and Roller 2018.

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