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**Minorities in search of privileges:  
When toleration of protests threatens democracy<sup>1</sup>**

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**1. INTRODUCTION**

This panel will address the relationship between a democratic regime and protest movements. Lately, the political scenario of many Latin American countries is highly determined by these movements. Basically, the question is whether these protests are compatible with a democratic government or not; and more particularly, since they are beyond the limits of legality, whether they can be justified arguing that existent democratic institutions are not a proper channel to satisfy the protesting groups' interests.

Obviously, protests are not intrinsically incompatible with a democratic regime. In fact, historically, democracy may very well be indebted to certain protest movements crucial for its establishment. Furthermore, in any constitutional democracy, pacific demonstrations -even if they are vigorous, as long as third parties are not harmed- amount to no more than the exercise of the right to free speech, which is a paramount in this kind of government. Constitutions and laws lay down the procedures for the performance of demonstrations. For example, article 2, paragraph 12, of the Peruvian Constitution states the freedom to peacefully gather without weapons in public places. Paragraphs 3 and 4 enshrine free conscience, opinion and speech. The

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<sup>1</sup> Para este trabajo se utilizó como base el artículo “Poderes Secretos. Reflexiones sobre el poder de la ley en una democracia incipiente” publicado por el autor en la edición especial “El Poder en el Perú 2003” de la revista “Semana Económica” el 21 de julio de 2003.

<sup>2</sup> El autor agradece a Enrique Pasquel por su colaboración en la preparación de este trabajo. Desde luego, la responsabilidad por lo errores sólo alcanza al autor.

most basic consistency among these provisions is sufficient to conclude that protest movements are, in principle, constitutional and democratic. The only legal restriction is the requirement of prior communication of any public demonstration to the authorities, which can only ban it on the basis of proven reasons of security or public health.

Since the principle against violating other citizens' rights is intrinsic to democracy, the problem arises when the protests go beyond the constitutional and legal framework. Essentially, when they undermine property, free movement, life or any right of other citizens.

This is the scenario of this paper, since it is not at all clear whether this kind of protests should be tolerated within a democratic regime<sup>3</sup>. The issues discussed in this paper will be analyzed from the perspective of the protest movements that have constituted the background of the Peruvian political life over the last years.

## **2. WHAT IS DEMOCRACY?**

Before considering the extent to which democracies are compatible with violent protests conducted by minority groups, it is necessary to understand why we opt for democratic governments. Only being aware of the foundations of democracy, can we analyze whether these protests threaten its main principles and goals and whether they are compatible with democratic governments or not.

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<sup>3</sup> Cabe precisar que estas protestas no califican dentro de lo que en la teoría rawlsiana se denominaría “desobediencia civil”. Esta, precisamente, se caracteriza por no ser violenta y porque sus actores aceptan consciente y pacíficamente la sanción legal que les será impuesta. Ver: RAWLS, John. *The Justification of Civil Disobedience*. En: STEWART, Robert. (Ed.) *Readings in Social and Political Philosophy*. Oxford University Press, 1986.

The most simple way to understand why we opt for democracies is examining what other kinds of governments have to offer. Therefore, in the following pages, governments where the political power is decentralized, democracies, will be compared to other forms of government where power is centralized in particular groups.

## **21. Centralized power: the government of minorities**

Governments where power is centralized in a few individuals can take many forms, such as monarchies, dictatorships, oligarchies, or others. The common feature to all of them is that state power is centralized in a small group of individuals. And state power -political power- is not minutia. First of all, it involves the control, actually the monopoly, of the use of force. Second, it amounts to the capacity of formally establishing what the rest of individuals are allowed to do or not. This minority possesses the tools to design the legal framework. Third, this power includes the authority to decide about a large amount of citizens' property. At present, all states collect taxes to develop activities under their, maybe too much, discretion.

Regardless of the title, origin or formal limits of this government, when a minority group centralizes state power, the actual risk of undermining others' basic interests, such as life, physical integrity or freedom, is enormous. This is the unlimited Leviathan, to which all power was granted, without the certainty it will respect the lives it was committed to protect.

There are plenty of historical examples. It is not necessary to mention the cases of the nazi Germany, the communist Russia and the fascist Italy to remember the horrors to which the centralization of power and the imposition of a single ideology might lead. It is not necessary

either to elaborate on the details of more recent totalitarian regimes, some of them still in place, such as the dictatorships of China, Cuba, Iraq or North Korea.

However, an evident and open despotism is not indispensable to make a nation whose citizens do not hold any political power suffer. For a decade, a dictatorship behind the democratic mask of a supposedly legitimately elected government ruled in Peru. Today, after the investigations of the Truth and Reconciliation Commissions, we know that Alberto Fujimori's government (and his intelligence advisor, Vladimiro Montesinos) were involved in countless violations of human rights. My point is that an old-styled militarist Latin American coup d'état is not the only way to centralize power. A coup d'état, such as Fujimori's, may consist in taking on powers beyond those for which the president was elected, in violation of the Constitution, becoming a tyrant. Could this be the case also of Venezuela, under Hugo Chavez?

Centralized power in small groups is not only a threat to individuals' life. It is also an obstacle to progress and economic development. Nazi and fascist governments were characterized not only by the most irrational and brutal violence, but also by pernicious interventions in their citizens' economic freedom. The nazis, for instance, suspended the guarantees of private property within the first month in government. They regulated prices, wages, dividends and investments. They discretionarily intervened companies and passed a cartel law to reduce competence and grant monopolies and privileges to special interest groups. All these measures were due to pressures from the factions that funded Hitler's war politics<sup>4</sup>.

Something similar occurs nowadays in many Latin American states, which hide atavistic mercantilisms behind the mask of free market. As a matter of fact, many specific policies are

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<sup>4</sup> Al respecto puede verse PIPES, Richard. *Propiedad y Libertad*. Turner, 1999. p. 281-290.

decided by small interest groups that concentrate the actual political power. Laws are tailor-made and there are almost no limits to prevent these minorities from changing the rules of the game at their own will. In Peru, Valdimiro Montesinos even recorded these dealings. At present, there are several businessmen in jail for having negotiated with him special privileges at the expense of the money and interest of the rest of the citizens.

As a consequence, all the region stands out for the lack of stability in public and economic policies. Since power is centralized in a small number of individuals, the course of the country varies constantly, depending on their particular convenience and current needs. Not surprisingly, this situation discourages private commerce and investments, on which our country depends.

Precisely, the Report on World Development 2000/2001, conducted by the World Bank, demonstrates that respect for the rule of law and stability are linked to better economic results for the state. This index shows the relationship between an indicator of the rule of law and the gross national product per capita in 166 countries between 1997 and 1998. It shows that market and economic development depend on the creation of state mechanisms to strongly protect individual rights and to maintain a stable politico-legal framework<sup>5</sup>.

The forms of the governments in which power is centralized in a small number of individuals are diverse. They might be pure authoritarian regimes or a mere mercantilist ones, where the state grants privileges to the individuals who found the way to gain the favors of the

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<sup>5</sup> BANCO MUNDIAL. "Informe Sobre el Desarrollo Mundial 2000/2001" Madrid, Ediciones Mundi-Prensa, 2001. pp. 102 y 103.

current leader. However, regardless of the form, it is clear that when power is centralized in small groups, either openly, as in a dictatorship, or surreptitiously, citizens' life, security and freedom and national economic development are at risk.

## **2.2. Decentralized power: the democratic government**

Democracy is much more than a kind of government in which state acts are the expression of the popular will. We tend to believe that, in a democracy, people can talk and use language, as Arendt thought<sup>6</sup>, to bring individuals closer and reduce conflict, violence and aggressiveness. This might be true in certain cases, but it is not what defines a democracy. What about, for instance, societies where there are very few people who actually have the interest or time to get involved in political deliberations about the problems and goals of their community? Are they still democracies or not? If they were not, we would have to regard poor countries, where the average citizen only has time for precarious productive activities to secure his survival, as undemocratic, until they achieved a sufficient level of material well-being that allowed citizens to thoroughly participate in the *res publica*, if that ever happened.

In addition, democracy is not of a plebiscite nature. In the most strong democracies, the electorate does not choose each particular public policy. Rather, they vote for general political guidelines represented by certain candidates. Politicians can even vary their plan of government once they have been elected, without any legal or political mechanism to prevent that. We should remember, for example, the case of Fujimori. To some extent, he was elected due to the widespread rejection of the alleged social costs of the economic plan proposed by his competitor,

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<sup>6</sup> ARENDT, Hanna. *La Condición Humana*. Paidós, 1993.

Mario Vargas Llosa. Paradoxically, shortly after he started governing, Fujimori enforced a very similar plan, but much more improvised and socially costly.

Finally, the large number of governmental activities makes it impossible for the average citizen to be aware of whether the authorities are following their electoral commitments and the main political lines chosen by the majority<sup>7</sup>. Then, in a democratic regime, it is impossible for the majority to actually control -not only formally or indirectly- the country's destiny<sup>8</sup>.

Historically, properly functioning democracies have achieved two important goals: (i) Greater respect for life, security, property and individual basic freedoms; and (ii) the promotion of the economic development of the nation. This has been possible because democracy decentralizes power and keeps it away -to a greater extent than other forms of government- from factions. As Bobbio points out, one of the features of democracy is that it has various centers of power. In a democracy, power is diffuse, decentralized and fragmented<sup>9</sup>.

That is why, in a democracy, it is essential to keep the political power away from factions<sup>10</sup>. Its goal is to allocate power among as many different institutions as possible to make

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<sup>7</sup> Todo ello vuelve –incluso- a teorías de la democracia como la de Nelson. Nelson considera que lo que hace deseable a la democracia es que los gobernantes deben defender sus ideas en público. Este debate abierto permite el desarrollo de una moralidad colectiva a la que responderán las leyes y políticas públicas. NELSON, William. *On Justifying Democracy*. Routledge & Keagan Paul, 1980.

<sup>8</sup> Esto, sin embargo, no es necesariamente negativo. Posner, por ejemplo, señala que si las libertades individuales están aseguradas y la actuación estatal restringida, la democracia se convierte en un sistema que permite aprovechar la especialización del trabajo. Los electores se especializan en realizar actividades productivas y se olvidan de la actividad política. Por otro lado, los políticos se especializan en el rol de gobernantes y dejan de lado actividades productivas en las que el común de ciudadanos se especializan y llevan a cabo para vivir. Ver: POSNER, Richard. *Law, Pragmatism and Democracy*. Harvard University Press, 2003. p.176-177 y 189.

<sup>9</sup> BOBBIO, Norberto. *Liberalismo y democracia*. Fondo de Cultura Económica, 1989. p. 106.

<sup>10</sup>PASQUEL, Enrique. *Para qué sirve -realmente- la democracia*. (Borrador no publicado). Si entendemos así la democracia, hace mucho sentido la invocación de Giddens de que tomar la globalización en serio significa que la democratización no puede limitarse al ámbito nacional. (Ver: GIDDENS, Anthony. *La tercera vía y sus críticos*.



it tremendously difficult for a small group to impair the interests -and rights- of others. This way, it is less likely for somebody to take our life or limit our freedom. Furthermore, in a democracy, there are predictable norms that ensure individuals the results of their investments and the respect of their property. At the end, this is a mechanism to secure the fundamental rights of all citizens, which, under a totalitarian government -in the sense of any regime that centralizes too much power in a few individuals-, are, by definition, at risk<sup>11</sup>.

Nevertheless, to achieve these goals, it is important to understand that a democratic government is more than a system with popular vote and periodic elections. A healthy (modern) democracy does not (only) mean running elections to choose the authorities every certain period of time, but effectively subjecting (all) members of society (without any exception) to the rule of law.

As Raz notes, a culture of legality is necessary, in other words, the willingness to be governed by law, even when this entails losing something for ourselves. This is a system where it is accepted that, if there is disagreement, law offers the correct way to solve it<sup>12</sup>.

This idea was fully grasped by the American framers. In contrast to Latin American countries, in the United States, the goal of the constitution was not to transfer power to a new leader or governing group, but rather to subject any person in its territory to the rule of law. The constitution was an instrument to guarantee individuals their rights against the state, and prevent

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Taurus, 2000. p. 170,171). La construcción de centros de poder supranacionales, efectivamente, puede colaborar a desconcentrar el poder y proteger nuestros derechos y bienestar.

<sup>11</sup> SCHUMPETER, Joseph. *Capitalismo, Socialismo y Democracia*. Orbis, 1983.

<sup>12</sup> RAZ, Joseph. *La Ética en el Ámbito Público*. Gedisa, 2001. p. 404.

certain groups from gaining special privileges against the rest. At the end of the day, the American revolution fought against a government that violated its own laws, imposing illegal and unfair taxes.

For all the foregoing reasons, democracy does not work unless it develops institutions to ensure the decentralization of political power. In this sense, there are two key elements that a democracy must include.

First, power has to be allocated among the state institutions. This is, precisely, the system of checks and balances: independent institutions ensuring that the power is not absolutely centralized in the current leader.

Contrary to a widespread opinion, this system does not make ones to control the others. Actually, it might be convenient for some authorities to disregard the corruption of others, for them to disregard their own. In practice, there are no special incentives for authorities to control each other. Rather, the reason for the allocation of powers is better grasped by comparison with a cartelized industry. The more actors exist, the more costly it is to reach an agreement to monopolize an industry. Likewise, the more divided political power is within the state (the monopolist of the use of force) the more difficult it is for the governing authorities to reach agreements undermining the interests of the governed<sup>13</sup>.

Second, it is necessary that the rules of the game, in other words, individual rights, are clearly established. It is not my goal here to define in detail the specific rights to which all

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<sup>13</sup> COOTER, Robert. *The Strategic Constitution*. Princeton University Press, 2000. p. 211.

human beings are entitled to. There should be agreement, however, on including as such, following Berlin's terminology<sup>14</sup>, at least the traditional negative rights -life, individual freedom, private property and free speech, among others- and several positive rights clearly determined, which neutralize the main externalities generated by poverty and social inequality. Even the most stubborn antiredistributionists should admit -as Holmes and Sunstein point out- that social policies are necessary to prevent the poorest from feeling that they are socially excluded and reacting with violence<sup>15</sup>.

In any event, the positive rights recognized to some cannot undermine the negative freedoms of others, and vice-versa. That is why it is necessary to define the boundaries of positive rights. The constitution and laws of each country, on the basis of their social realities, are the tools to establish these limits. It cannot be assumed that there is a sort of "natural right" of all citizens to absolute substantive equality, nor to a certain comforts that in free societies are achieved through one's own abilities (legally channeled) and efforts. To emphasize this point is important, since, otherwise, we could succumb to the temptation to simplify and affirm that a democracy that does not guarantee these aspirations to all citizens -even by force, confiscating others' property- is not a democracy anymore, and, therefore, it should be fought against, even using violence.

The consequences of admitting this would be antidemocratic, since no single regime has reached this aspiration. Therefore, no democracy would have existed in the history of humanity; democracy would be a mere utopia. Consequently, no ideal would justify the duty to respect

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<sup>14</sup> BERLIN, Isaiah. *Two Concepts of Liberty*. En: *Four Essays on Liberty*. Oxford University Press, 1969.

<sup>15</sup> HOLMES, Stephen y SUNSTEIN, Cass. *The Cost of Rights*. W.W. Norton & Company, 1999. p. 204-219.

legality, which would be imposed by force in all cases. In addition, since in order to achieve absolute substantive equality confiscation is necessary, democracy would be impossible, because private property would be abolished and, among other functions, it is indispensable to avoid the centralization of power in a single ruler (although it can also lead to the centralization of power, but this is controlled by other legal or regulatory democratic means). Thus, this would be the terrible consequence of justifying the use of violence on the basis of the failure of democracy to achieve absolute substantive equality. Amartya Sen is not wrong when she notes that -even when a consequential moral perspective is not accepted- “ignoring the consequences is to leave an ethic story unfinished”<sup>16</sup>.

Existent democratic mechanisms prevent any minority -and even the majority- from using political means to impair others' individual interests. Thus, it looks more like a Lockean than a Hobbesian social convention; in other words, individuals, rather than giving to the state all their rights, except for life, only transfer the right to take the law into one's own hands.

It is also important to take into consideration the fiduciary elements of modern democracy. Benjamin Cardozo, the famous judge, made a distinction between the duties (and rights) of loyalty/trust and obligation/contract in private law relationships<sup>17</sup>. This same distinction might be applied to the public sphere. In some way, the limitation of power allows citizens to trust that their rights will be respected. This generates a fiduciary relationship -a relationship of trust- between the citizens and the law, the system, the state and, ultimately, the authorities who represent these institutions, to the extent that not only do they respect, but they

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<sup>16</sup> SEN, Amartya. *Sobre Ética y Economía*. Alianza Editorial, 2001. p. 93.

<sup>17</sup> Ver: MEINHARD vs. SALMON. (249 N.Y. 458.) Court of Appeals of New York. Dec. 31, 1928

also make others respect (that is, they protect) citizens' rights. This relationship of trust extends to any kind of relationships between citizens. Obviously, the impact of interpersonal trust in commerce is not minutia (it allows a fluid and dynamic exchange). Trust has been essential for the success of the democratic systems. This was correctly pointed out by Alexis Tocqueville at the dawn of the American independence and democracy, and more recently by Francis Fukuyama in a book called *Trust*<sup>18</sup>.

In this context, in 1997, Michigan University conducted a poll in order to measure the degree of interpersonal trust between citizens in several countries of different continents. The main question of this opinion poll was: Can you trust most people or you always should be very careful about the others? The vast majority of countries where there is more interpersonal trust enjoy developed democracies and economies. Among the first fifteen positions, we find countries such as Norway, Switzerland, Finland, Japan, Germany, Australia and the United States. On the other hand, the countries in the last positions of the ranking, usually have poor and unstable democracies and economies. Among them, there are countries such as, Slovenia, Venezuela, the Philippines or Turkey. Peru is in one of the last positions, with an interpersonal trust ratio of 5%, in contrast to Western Europe and the United States, where the average is 44.6%. Even worse, Peru is far behind of the rest of Latin American countries studied in this poll, where the interpersonal trust average is 16.6%.

In conclusion, the essential function of democracy is to diminish the likelihood of somebody becoming politically powerful enough to jeopardize others' life, security, property and

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<sup>18</sup> FUKUYAMA, Francis. *Trust (The social virtues and the creation of prosperity)*, p.26, 39 (1995); Russell Hardin, *Trust in Government*, in *Trust and Government* (Braithwaite and Levi, eds.) p. 9 (1998)

freedom, as well as the economic development of society. The accomplishment of this function enhances trust between citizens and makes all sorts of relationships between them easier.

#### **4. PROTESTS IN PERU**

I acknowledge that certain social phenomena with greater media or political impact might be more attractive for an academic discussion like this, and that those cases might have inspired the choice of this topic for the current panel. This paper, however, does not include references to Bolivia, with its famous “bolivianazo”, or Argentina and its pickets, because it is difficult to make a diagnosis of those facts from a Peruvian perspective. If those who actually know these cases believe that the Peruvian facts I describe are so similar that the same rationale should apply -and, thus, the same “law” or “legal philosophy”- then, these conclusions might be applied *mutatis mutandi* to those realities. If those who know these cases feel that they are significantly different from the ones I will refer, these conclusions are only valid for Peru.

Peruvian democracy is clearly dysfunctional. Generally speaking, political parties do not structure the national political scenario. This is obviously troubling because any democracy needs parties -few and strong- to guarantee the institutions, alternating governments in power and pluralism, among other fundamental elements of the rule of law. The "no-party system" (the lack of parties), as well as the “single party system” are a favorable environment for authoritarianism and anarchy. These are two possible consequences, opposed but equally undesirable, of the lack of institutionalization. In Peru, under Fujimori, the no-party system was

in place, dressed up as three “independent movements” that supported the regime. They lacked, however, party structure, organized bases, mechanisms for democratic elections, etc. More or less the same can be said about the current Alejandro Toledo’s government and his pseudo-party “Peru Possible”. The substantial difference is that this one does not even have control over its members, who seem to be more motivated by the sensuality of power and the possibility of making money or getting a job in the state bureaucracy (the more modest) than by their admiration for the leader. In the former case, we had authoritarianism, and in the latter, we are close to anarchy.

In Peru, power is channeled through means different from the political parties. There is a dissociation between formal and factual power, which expresses, to some extent, the little power of the law in our country. The *de facto* power, based on sheer force, is, however, difficult to understand. In any event, it exists. Nilver Lopez, a school teacher leader of a teachers’ labor union (Sutep), was in the 43<sup>rd</sup> position in the poll about Power by APOYO. However, as a matter of fact, the public protests led and organized by him proved to be strong enough, regardless of the lack of any constitutional or legal representation, to succeed in translating his demands into political decisions. This effectiveness was directly proportional to the amount of violence used.

Another more emblematic case is the one of the city of Arequipa, in the Southern mountains of Peru, where in April 2002, there was a wave of protests as a consequence of the privatization of the electric companies EGASA and EGESUR. The privatization of these companies was decisive to achieve the level of investment required to face the future demand of electricity in the South of the country, as well as to reach the fiscal goals established by the

government. Nevertheless, in a display of clumsy demagoguery, and being aware of the need of privatization, in his political campaign, the candidate -later on president- Alejandro Toledo promised not to privatize these companies.

The frustration felt after he failed to fulfill his promise was fully justified. However, it cannot be said the same regarding the reaction following this frustration. As a result of the violent protests, the student Edgar Pinto died and around 150 people were hurt. Public places were looted, and both state and private buildings suffered damage. Most of the main streets of the country were also damaged, all banks were attacked and telephone booths were completely destroyed. Furthermore, during those days the urban and inter-provinces traffic was paralyzed affecting the other citizen's right to free movement.

As a consequence of these protests, the risk of the country increased 39 points and the material losses amounted to around \$100 million. The government, due to the generalized violence, declared the state of emergency in the south of the country. This measure was strongly criticized by several groups of the population. The executive branch was forced to send a High Level Commission to negotiate with the protesters the cessation of violence, just several hours after the president announced to the nation that he would not give an inch to the blackmail of the protesters. The bus in which this Commission traveled was received by the protesters of Arequipa with a shower of stones.

At the same time, the mayor of Arequipa -one of the protesters' leaders- filed a constitutional complaint ("acción de amparo") to stop the process of privatization arguing that



the region -instead of the central government- was the owner (at least partly) of the electric companies. The judge decided -in an office surrounded by hundreds of protesters carrying sticks and stones- in favor of the plaintiffs. The reasoning and constitutionality of this decision were strongly criticized by the national legal community, particularly the section holding that the people from Arequipa had a sort of “natural right” over the electric companies (which, by the way, had been built and sometimes subsidized with taxes paid by the whole country). This decision was eventually reversed by the Constitutional Court, on the basis of procedural arguments.

This decision, however, did not have any effect, because the government had given up and the process of privatization stopped ( until the beginning of 2004, no other company or assets were privatized. Only this year, a hydroelectric central, Yuncan, in the poor mining region of Pasco, was given in concession to the private sector). For a short period of time, there were no more protests. Since then, however, demonstrations became very common in Peru and their leaders learnt that sticks and stones are more effective than the constitutional mechanisms to convince the government to satisfy their demands.

Violent protests became part of the Peruvian daily life. At the beginning of 2004, thousands of farmers growing coca blocked roads and violently protested against the governmental policies to fight drug trafficking. Among other demands, they requested the authorization to expand this plant cultivation and subsidies for the production of different species. The threats from the coca farmers were so serious that it was thought that some had the intention to overthrow Alejandro Toledo’s government in a sort of “bolivianazo”.

The protests from the truckers might have been the most implausible. The current and previous year, they went on strike several times with the aim of forcing the government to grant them special benefits. They claimed for the creation of an unconstitutional structure of minimum prices that would allow them to determine the minimum price to be paid by consumers. Moreover, they demanded that the police did not seize their driving licenses in case of committing an infraction. Furthermore, they complained because the municipality of Lima required the payment of traffic fines within a very short period of time. Note that the accumulated debt over the last decade was more than \$21 millions. About six thousand policemen were needed to control the violent protesters, who interrupted the traffic and criminally attacked those who did not join them. Ultimately, the truckers obtained several state benefits, among them, an unconstitutional legal system of minimum prices for private transportation, later repealed by the Constitutional Court and the Antitrust Agency.

The truckers were followed by the state teachers, social security workers and workers of the judicial branch. They basically protested against the low wages paid by the state. Almost all of them, after burning tires, disturbing others' free movement and damaging private property, obtained wage benefits and promises of salary increases, among other kinds of benefits, such as credit for housing. It is not clear whether the government is going to be able to fulfill these promises. Yet it is making an effort to increase the expenditure establishing a new tax over financial transactions, which most economic analysts regard as technically wrong and most lawyers -though maybe not the majority- as unconstitutional. All of this will be paid, obviously,

by the taxpayers, whose freedoms were violated by the protesters. Regardless of these agreements, later on, some interest groups resumed their protests.

## 5. PROTESTS VERSUS DEMOCRACY

A functional democracy requires -in addition to popular vote and periodic elections- the following elements: (i) allocation of powers; and (ii) clear recognition and respect of individual rights. In other words, *rule of law*. The framework for coexistence -contractual, fiduciary, both?- should be the constitution. Ultimately, the constitution states the "rules governing the government"<sup>19</sup>.

When a faction influences the political system to obtain privileges at the expense of others -beyond the rights and procedures laid down in the constitution, either formally or substantively- we are moving towards a centralized power regime, with all its risks.

It does not matter whether such a faction is a corporate association that accomplishes its goals bribing the legislator or a labor union that pressures the government by means of violent public protests threatening others' life, integrity and property.

In all these cases, the following occurs: (i) a minority centralizes enough political power to manipulate or direct the government, obtaining privileges at the expense of the other citizens; (ii) this minority uses force or deception -to which any social convention renounces- to subjugate the rest of individuals; (iii) the rights established in the constitution are modified -according to

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<sup>19</sup> MERQUIOR, José Guilherme. *Liberalismo viejo y nuevo*. Fondo de Cultura Económica, 1997. p. 42.

the interests or opinion of one group-, which involves breaking off the social convention and undermining the trust embodied in the social fiduciary relationship<sup>20</sup>.

All these features make this kind of minority action absolutely incompatible with a democratic regime, which aims at limiting the political power of individuals through the respect of the rule of law. Therefore, movements seeking to satisfy special interests -sacrificing those of the rest of individuals- using unconstitutional mechanisms, are incompatible with a democratic government.

If a democracy tolerated these pressure mechanisms, it would fail to protect the rights, positive or negative, of the citizens affected by this violence, such as life, physical integrity, free movement or property. In this situation, the state fails to comply with its duty to protect the freedoms of these citizens, third parties who have nothing to do with the controversy between the state and the protesters. The existence of these freedoms is not conditioned to the possibility of powerful factions occasionally deciding to violate them. Citizens' rights are not recognized by the constitution or the state with a sort of "limit", meaning that they can be suspended when others want to protest. The state of emergency allowing to suspend the exercise of rights cannot be undetermined. Actually, in all parts of the world, the states of emergency or similar ones allow less and less restrictions to negative rights or freedoms. Furthermore, and this is essential, these situations are not presumed; in other words, they can only be declared and applied when the conditions explicitly and specifically laid down in the constitution are fulfilled. There is no

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<sup>20</sup> De hecho, no es casualidad que en un país en el que las leyes se violan tanto –incluso desde el Estado o poder constituido– haya tan poco confianza interpersonal, como hemos visto en un punto anterior.

constitution, as far as we know, that subordinates the citizens to the caprices -not even real needs- of minority interest groups in search of privileges, publicity or anything else.

We should be careful with these pressure groups because democracy is particularly vulnerable to them. On the one hand, as it was argued, citizens have very few effective mechanisms of control. On the other, it is easier for small groups of individuals than for large masses to organize themselves with the object of influencing the government.

In any event, should democratic principles be set aside to tolerate this kind of protests, under the argument that democracy does not satisfy the legitimate aspirations of all these groups?

Some of their demands may very well seem reasonable to many people. However, even if the political system does not function properly, demonstrations through channels not provided in the constitution should not be allowed. First, the misfortune of one individual does not justify impairing the rights of others. What gives legitimacy to individuals who, in disagreement with the political system, destroy others' property, attack them and ruin their business or disturb their free movement?<sup>21</sup>

What Mill stated about commerce, may be perfectly applied to the political process:

"society admits no right, either legal or moral, in the disappointed competitors; to immunity from

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<sup>21</sup> Esto, por lo menos, desde una posición filosófica distinta a una teoría contractual basada en los beneficios mutuos (sobre esta posición ver principalmente GAUTHIER, David. *La Moral por Acuerdo*. Gedisa, 2000. NARVESON, Jan. *The Libertarian Idea*. Broadview Press, 2001). Entendemos que desde ella puede parecer legítimo que si el sistema no beneficia a alguien, éste puede desconocer el mismo. Sin embargo, si creemos que los derechos responden a razones de justicia y no de conveniencia, no entendemos por qué nuestra mala suerte nos legitima a violar derechos ajenos. (Para una crítica a las posiciones contractualistas basadas en beneficios mutuos ver: BARRY, Brian. *La justicia como imparcialidad*. Paidós, 1995).

this kind of suffering; and feels called on to interfere, only when means of success have been employed which it is contrary to the general interest to permit -namely, fraud or treachery, and force"<sup>22</sup>.

The argument claiming that the legal mechanisms available do not satisfy the protesters' interests is not valid either, since it is not compulsory to satisfy them always. Democracy does not guarantee -as any political system- that all of us will obtain what we want. It is not intrinsic to democracy, for instance, to prevent the privatization of electrical companies in Arequipa. It is important, instead, that the privatization follows the laws and constitutional procedures through which the political process is channeled. Citizens delegate these decisions to somebody, and this person takes them on the basis of the powers granted to him. It is true that president Toledo lied to the population of Arequipa about the willingness to privatize these companies. As a result of this lie, however, the rights of others should not be undermined. It may very well be that the political system should be modified to establish more effective accountability mechanisms concerning electoral promises (although they should not be so rigid as to ban any change in public policies). In any event, the absence of these mechanisms -in a functional democracy- could be resolved through constitutional and legal reforms aimed at solving its shortcomings. Those are provided by any constitutional system, even the Peruvian, and the fact that it is more complex to recourse to them than to vandalism cannot justify the latter.

Usually, as a result of any political decision, there are winners and losers, those who were for and against. This is part of the democratic game. The advantage is that, in a democracy, the winning position is pacifically shared by different groups over time, because the state guarantees

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<sup>22</sup> MILL, John Stuart. *Sobre la Libertad*. Alianza Editorial, 2001. p. 179.

a minimum of negative and positive freedoms that cannot be violated merely by changing governments. When the political power is based upon sheer force, the winner simply obeys to those who are capable of committing the most irrational acts of violence. Thus, the dividing line between protests and terrorists actions tends to blur.

Finally, if violent protests are allowed, under what arguments can the benefits requested tomorrow by a different group using the same means be denied? What happens, in the case mentioned above, if those who protest are the ones in favor of the privatizations? The only option for the state will be to agree with those who exercise more pressure and use more violence. Actually this is what happened in Peru, for instance, concerning the truckers, who are owners in search of privileges, such as minimum legal prices for their services, and who did not hesitate to use violence to channel their demands.

Although formally -legally- what each of these groups carried out "could not be done", they succeeded in doing it without being punished. When I say that it could not be done, I'm talking about both the substance and the form of their demands. With regard to substance, for example, the truckers' claim to avoid being subject to free competence is against the constitution. With regard to form, destroying public and private property and blocking roads violate others' rights protected by the constitution and the law. According to these texts, individual rights are equally protected for everybody, under the principle of equality before the law.

Nevertheless, the toleration of these excesses and the failure to protect the victims meant that the principle of equality before the law was ineffective, since it was not enforced against the

protesters. This situation is an instance of the old category that in Peru is almost a sacrament: the privilege or immunity before the law, the capacity to avoid obeying it.

This is what the several oligarchies governing Peru did. For this reason legality is so discredited. And they did it even through the law, in other words, enacting laws to legitimize their own privileges. They precisely violated, however, the constitutional principle of equality before the law. So, in spite of being theoretically legal, these privileges were absolutely illegitimate (and unconstitutional since constitutions enshrining this principle existed). It is not by chance that Henri Lepage defines the legal concept of "norm" (or law) as opposed to the concept of "privilege"<sup>23</sup>. Norms or laws are supposed to provide equal rights for all. Laws that establish privileges are an oxymoron.

The fact that political power might obey a faction -either a group of corrupt civil servants or a group of violent protesters- has generated a culture where the highest aspiration of those seeking power is to put the laws to their service. Isn't it, in Peru, an undeniable proof of power to boast about not obeying the bothersome laws that the rest of citizens must obey? Isn't this the first thing that those who get power do, such as not paying tolls anymore, not obeying traffic lights, not waiting in lines, or even not paying taxes? Isn't it the fact that power is understood as a source of income or other benefits what explains the abusive and mean attitude of the

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<sup>23</sup> LEGAPE, Henri, "Mañana el Liberlismo", citado por GHERSI, Enrique. El Costo de la Legalidad. En: THEMIS-Revista de Derecho/Segunda Epoca/ 1991/Nº 19 p. 13, quien sostiene: "(...)fundamentalmente en el sistema jurídico romano-civil, y en todo sistema jurídico en general, hay normas de carácter general, con supuestos de hechos abstractos, aplicables a una pluralidad de personas, generalmente ordenadas en razón de la naturaleza de las cosas y no de los individuos, y normas de carácter particular, con supuestos de hecho concretos, propósitos distributivos, limitado rango de aplicabilidad y ordenadas en atención a las diferencias entre las personas y no de las cosas. A las primeras, Lepage las llama "normas". A las segundas, "privilegios."



archetypical Peruvian bureaucrats who exercise their little amount of power from a window or a ministerial office?

Nothing, then, distinguishes the motivations of the vandal protesters seeking benefits from the corrupt congressmen and civil servants who put the power that should be at the service of the citizens to the service of their own private interests: both are in search of privileges.

This attitude, probably the most despicable flaw of our political culture, is summarized in the sentence that history attributes (I ignore whether justifiably or not) to marshal Oscar R. Benavides: "To my friends everything, to my enemies the law". In Peru, obeying the law is something so burdensome and undesirable that is reserved to the enemies. Friends should find a way to avoid its enforcement. Consequently, equality before the law -which is enshrined in the constitution and fundamental for the rule of law- lacks any support in Peru.

Historically, in Peru, power has served interests different from the realization of fundamental democratic values, such as the rule of law and equality before the law. Unfortunately, although there has been some progress in terms of democratic institutionalization, we still live in that lamentable tradition. Consequently, we are still oscillating in the despicable pendulum of authoritarianism/anarchy, whose extremes are equally far away from true democracy, since both allow the violation of citizens' fundamental rights without punishment.

In this kind of situations, the state becomes an instrument of small groups of individuals to subjugate the others. This is precisely what democracy aims at preventing. Therefore, if a

minority is allowed to use force to impose its own interests, an extraordinary political power is granted to this minority group. This situation makes a defective democratic system become even more dysfunctional. Precisely, it is the centralization of power in small groups of interests, such as politicians, businessmen, the military, labor unions, what explains the failure of democratic political systems. Surrendering to the pressure of factions amounts to the creation of new centers of power. This only makes things worse. Furthermore, it encourages other groups to try to appropriate for themselves part of the political power violating the rights of others.

## **CONCLUSION**

As it was argued, the essential function of democracy is to keep power away from minorities. This can only be accomplished if individual rights (positive and negative) are clearly defined and all individuals are subject to the rule of law. In this sense, all privileges obtained through unconstitutional mechanisms are -in addition to socially undesirable- totally incompatible with democracy.

Violent protests, beyond the channels laid down by the constitution for the public exercise of the right to free speech, are incompatible with a democratic government. Moreover, even when their demands are somewhat reasonable, democracy should not give up. Otherwise, we are moving towards governments in which the political power is centralized in minority groups, jeopardizing our fundamental interests and the development of our countries.