

Political totalitarianism and the social contract: Envisioning contractualism for the 21st century

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Abstract

This paper proposes an analysis of the social contract as a vital *a priori* concept needed in thinking about the prevention of political totalitarianisms. After analysing its conceptual foundations out of the dynamics of Western metaphysics, it demonstrates how the social contract for the 21st century cannot be a mere continuation of the contractualism of the 17th century. The most important shift in contractual thought is the insight that the individual (and his contractual will) cannot be taken as the foundation of the state organism. To understand the relationship between the individual and general will, against which it is possible to consider contractualism for the 21st century, the paper draws on Hegel's concept of the civil society (*Bürgerliche Gesellschaft*). This allows for overcoming the impasse of contractualism in thinking about the state, while at the same time keeping the initiative of the autonomous individual at its core. A legitimate state must incorporate countless channels through which the thinking of autonomous individuals passes into the life of a state. It is precisely the keeping alive of this sphere that guarantees that the state does not slide into a totalitarian pattern.

KEYWORDS: social contract, totalitarianism, state, legitimacy

Introduction

This paper will highlight the significance of the social contract as a concept which *a priori* guards against the emergence of political totalitarianisms. Political totalitarianism can be roughly defined in the words of Mussolini: 'everything (was) in the state, nothing outside the state, and nothing against the state' (Mussolini, cited in Gregor 2001: 63). Despite the superficiality of such a definition, it is precisely the unconditional demand that the entire social life be reduced to uniform state ideology that has given rise to phenomena, the condemnation of which today represents the widest possible ethical consensus. However, it is not enough to simply condemn the totalitarianisms of the 20th century; it is necessary to analyze their conceptual foundations, their emergence out of the dynamics of Western metaphysics. For only on the bases of such an insight, will the significance of the social contract as a deterrent in the development of totalitarianisms emerge.

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Totalitarianism in the first instance demands a whole human being. Gentile, the philosopher and founder of Italian fascism, describes the civic virtue of the individual in the following terms:

But Fascism – in so far as it is a party, a political doctrine – is before all else a total conception of life. ... One cannot be a Fascist in politics and not a Fascist ... in school, not a Fascist in one's family, not a Fascist in one's workplace. Just as the Catholic, if a Catholic, invests all of his life with his religious sentiment, and speaks and works, or remains still, thinks and meditates ... as a Catholic. Similarly, the Fascist – whether he goes to parliament or remains in local association, writes in the newspapers or reads them, provides for his own private life or converses with others, looks for the future or remembers his past and the past of his people – must always remind himself that he is a Fascist! (Gentile 2009c: 57).

It is not difficult to see the intellectual unease provoked by such a demand on the individual. A lay person, in verbalising why such an approach is completely unacceptable, would probably emphasise two things: that it breaches moral standards and denies individual freedom. Both objections require further elaboration, since the totalitarian demand made on the individual is an expression of a *particular* conceptualisation of morality and freedom (i.e. not their negation), which came into being at the beginning of the 19th century. As we explore totalitarian attitudes towards the individual in more detail, we will come to realise that we are in fact closer to these than we would think. The impression that the democratic ethos is *absolutely* divorced from the concepts on which fascism bases its imperatives, is false. Fascism is merely an *excess* of the concept today shared also by western democracies. A precise conceptual apparatus is needed if we are to determine the core-defect of totalitarianism, while we simultaneously delineate a field in which the social contract of the 21st century can play its part in political thinking.

Freedom, will and the individual

Let us begin with the widespread belief that totalitarianism is a type of organisation that breaches individual freedom. However, individual freedom for fascism is not a taboo topic; on the contrary, Gentile writes amply on the subject, never forgetting to stress that it is only fascism that can bring about a full attainment of individual freedom. It is supposed to lift the individual above the perspective of selfishness established by political individualism, and affirm him or her as a collective being who finds total fulfilment within a community. These principles, however, are also principles voiced by democratic systems founded on human rights. In order to explain where fascism violates what is sacred to the individual, we need to first analyse the dialectics of the concept of freedom. We will ascertain that fascism cannot be divorced from democratic morality merely on the circumstantial basis that it takes away individual freedom. When in continuation we will hear the arguments against the individualist (i.e. bourgeois) conception of freedom, which fascism of course also shares, the attempt to distinguish between the two will become only more difficult.

Usually, the freedom of the individual is understood uni-dimensionally, whereby only one side of the entire spectrum of the dialectics of freedom is considered. A classic example would be the condemnation of police, ideological, and economic violence: if a human being is incarcerated, persecuted, put under surveillance, reduced to poverty, we would say that his freedom is curtailed. Rightly so. However, it is very easy to commit the mistake at this point and define freedom as a simple mirroring of its violation: freedom should be – at least *idealiter* – a state of limitless possibility for acting in any number of different ways. The more social rules there are, the more the range of possible actions of the individual narrows, for which s/he is less free (and vice versa). This is the dominant, commonsensical view of the concept of freedom, also shared by a segment of political philosophy (e.g. anarchism), and which established itself in emancipatory processes, particularly after the Second World War.

However, the concept of freedom thus described immediately stumbles upon a difficulty: every day, at every step, people's actions are contrary to what has just been described as an ideal of freedom. When, for example, a student goes to attend a lecture, the horizon of his or her possible actions at once fundamentally shrinks: in the lecture hall s/he must respect the norms of behaviour prohibiting a whole set of actions permissible outside. The same holds true for all regulated activities, from taking part in traffic onwards. Even if we imagine a completely informal situation, an encounter between friends, for example, the freedom – if understood in the above sense – narrows drastically: the participants are bound by rules of respectable conversation, they cannot terminate it arbitrarily, go about doing some unrelated thing, etc.

It turns out that the initial definition of freedom – as striving after an ideal, having the most possibilities at hand – needs to be complemented. The dialectics of the concept of freedom encompasses two seemingly opposing aspects: freedom-from (physical, ideological, economic coercion) and freedom-for investing the first aspect of freedom into concrete actions. With this step, freedom stops being something abstract, a state out of which infinite possibilities can be enacted. This transition is not arbitrary or a *post-festum*, contingent supplement to freedom-from. It is its immanent core and the condition of its meaningfulness.

A good illustration of freedom-from is money. Money embodies the state of possibilities of infinite actions, since with money we can buy anything. However, there is a saying: money you have never spent is in fact money you never had. Therefore, the point of the condition of “having money” lies precisely in the condition of “not having money”, in its investment in a purchase. The contradiction of “having” and “not having” is not a sign of an error in thinking, on the contrary, it is a *sine qua non* of their meaningfulness: *contradictio est regula veri*. We have come close to Hegel's famous definition by which freedom is only the other side of (known, i.e. rational) necessity. The point of money is thus neither in “to have” nor in “not to have”, but rather in the slippage of the first into the second. This dialectical transition Hegel describes – with the example of being and nothing – in the first paragraph of his *Science of Logic* thus:

Pure Being and pure nothing are, therefore, the same. What is the truth is neither being nor nothing, but that being – does not pass over but has passed over – into nothing, and nothing into being. ... Their truth is therefore, this movement of the immediate vanishing of the one into the other: becoming, a movement in which both are distinguished, but by a difference which has equally immediately resolved itself (Hegel 2010: 34).

The conceptualisation of freedom, on the basis of which we felt intellectual unease alongside the demands fascism makes on the individual, has not enabled us to adequately describe the defect of fascism. It appeared that the transgression of fascism is in that it limits human freedom and replaces it with necessity. However, it turns out that every meaningful act, even the most informal one, always invests freedom (-from) into a practical necessity. Every person contains within himself, in Kant's jargon, a moral law. Moreover, once he realises what his duty is, he is no longer free (in the first, naive sense). S/he has to live (if we paraphrase Gentile): in the world of politics, of school, of his own family, in the work place, as s/he speaks, works, refuses to speak, thinks and meditates, if s/he goes to the parliament or stays in a local association, if s/he writes for a newspaper or reads it, if s/he dedicates himself to private life or communicates with others, if s/he looks ahead to the future or remembers the past – always in line with this duty.

The common sense concept of freedom has turned out to be one-sided. Its flaw is not merely in that it is limited to one side of the concept of freedom only, but that it starkly pits this side against the other, which, as we have seen, is always co-extant. One side of the coin thus understands itself to be its all-encompassing definition, its key characteristic being to oppose the other side. This is at the basis of countless misunderstandings in contemporary political thought, where this one-sided and naive definition of freedom is used as a tool of critique. Consequently, at every step the conclusion – inevitably and at the same time banally – is always the same; that the state violates the freedom of the individual, supplemented by the worn-out rhetoric of charges of fascism.

We need to go a step further¹ and search for a new criterion that will include the defect of fascism. We will try to define it by way of asking *who* is it that enacts the transition from the freedom-from into the freedom-for. If the student enters a lecture hall of his own free will, he does indeed narrow the range of freedom of infinite possibilities of behaviour to the necessity of observing academic norms, but it is quite clear that in this instance the usage of the signifier *fascism* would be completely amiss. Fascism is namely characterised by an ideological dispositive of a total state which, equipped with a monopoly over physical enforcement, demands that the individual submit himself fully to the state. Is then the *state's* intervening into the individual's decision about how to invest freedom that which constitutes the crux of fascism?

¹ For the abstract freedom (-from) to have to always realize itself concretely in a decision (in freedom-for) has been known in philosophy at least from the German classical thought onwards. There would be no need to bring this up if it were not for the existence of the naive conceptualization of freedom constituted precisely through a stark protest against fascism: freedom is allegedly defined and protected solely through opposition-to. Consequently, such a conceptualization is dependent on fascism and therefore a one-sided and deficient concept.

Social contract and the individual

The answer to this question could be sought in two ways. The first would carry out an elaboration of the very concept of freedom to realise that rational necessity based on mutual recognition does not stand opposed to human freedom. Therefore, state regulations do not automatically qualify as fascism. This is the path taken by Hegel in his *Phenomenology of Spirit*, and especially in the *Philosophy of Right*, in which he unfolds the conceptual structure of law as a medium of recognition between legal subjects. Given the limitation of space, we cannot elaborate on this approach at any greater depth here; suffice it to point out the rather self-evident conclusion that the necessity of respecting road regulations, penal codes, etc., does not in any way curtail human freedom. On the contrary, it is its cultivation, rational execution. It would be irrational to claim that we are not free because we cannot drive through a red light. State intervention into the individual's freedom is not *eo ipso* totalitarian intervention.

However, this paper is dedicated to the notion of the social contract, so we will follow another path. We started this chapter by analysing (the controversy) of state intervention into the sphere of the individual that dictates the manner of freedom's investment. In this light, contractualism presents an interesting option, for its central message lies in the contention that state intervention into the individual's investment of freedom (i.e. the penal code) is in fact only a manner of its self-regulation. Enforced subjection to state regulation is, therefore, only a subjection to oneself, conveyed through entering into the social contract. The state does not have an existence by itself; it is an entity that has emerged out of the will of the individual. The theory of social contract is a well-known concept across the humanities and social sciences; therefore, we will deal only with the aspect relevant to our paper. Primarily this will have to do with bringing the individual into the heart of the debate on law and state and, by implication, the making of the distinction between two types of will (*arbitrium* vs. *voluntas*).

At the beginning of the modern age, the individual constitutes himself through the traumatic experience of existential disorientation. Despite the fact that the history of philosophy is familiar with any number of individualistic concepts, the experience which launches the new age represents an extreme version of individualism: Descartes' cry 'I think, therefore I am' is an act of utter isolation from the world, for this insight is utterly non-transmittable between subjects. Cartesian philosophy is an answer to the crisis of truth brought about by the demise of the Christian image of man and the world, which had been providing the unquestionable referential framework for man's orientation for fifteen hundred years. If we are to understand the depth of this crisis, we need to transpose ourselves into a situation when the most precious books in scholastic libraries were in an instant reduced to mere paper. Christianity could no longer offer guidance by way of exiting the disorientation; on the contrary, it was one of its causes. It is enough to mention the Thirty Years' War.

The solution to the crisis comes in the shape of a new type of *thinking* that warrants its own existence: *cogito, ergo sum*. With this, thinking evolves an entirely new dimension. It is not merely the potential of knowing Being in the existent world, but also of its *creation*. The fact that *I am*, insofar as *I think* is a realisation of the possibility of

creation out of nothing (*creatio ex nihilo*), which represents the secular heritage of Christianity. Furthermore, precisely this is what constitutes the crux of contractualism. Ten years following the publication of *Meditations* (Descartes 2008), in 1651, Hobbes brings out his *Leviathan* (Hobbes 1985). In this work, he confronts a similar break in the field of political philosophy as did Descartes in the field of ontology. When he poses the question about the source of human sociality, he cannot resort to anything the Christian tradition has on offer: from Aristotle's *zoon politikon* to Thomas's *lex naturalis*. Hobbes goes on to explicate the experience of the individual's radical individualisation from within the horizon of natural sciences (he is known to have had a personal acquaintance with Galileo). Society is made up of individuals as parts, moving according to mechanical laws.

With this, Hobbes introduced an entirely new philosophical anthropology without which the emergence of contractualism would not have been possible. Man is no longer *zoon logon echon* and *zoon politikon*, as the ancient Greeks had taught. Neither is he *imago dei* and a sinful creature as Christianity would have it. Now, he is merely a machine: a mechanism in motion. It is hard to imagine the full extent of the turning point such a view of man then signified. To the field that had traditionally been understood to be an emanation of the highest perfection of the cosmos, Hobbes applied a perspective of natural sciences. Both man and interactions between people were now considered as an a-teleological phenomenon of movement. Hobbes did not realise that with this he had managed to break entirely with the old philosophical anthropology, which had systematically prevented a view of human existence and co-existence today taken for granted. He got rid of the notion that man is a defective and sinful being inevitably managing his life in a deficient way. Now, there was no *a priori* reason that the world could not be a place of fulfilled longings. The French Revolution represented the political realisation of this radical shift.

Nonetheless, to move from Hobbes to the French Revolution, the path is long. Namely, Hobbes's world beyond the inherited sin is not paradise, if anything it is hell: *Bellum omnium contra omnes*. However, this problem is now a technical problem and is no different to a badly functioning machine. If we understand its workings, there is no reason why we should not amend the error. The solution comes in the form of the social contract, which harmonises the destructive forces in a community. The profit of Hobbes' social contract is poor, for it cannot entertain the possibility of peace without giving unlimited authority to the ruler, that is to say without absolutism.

Nonetheless a new pattern of thinking about human sociality has entered history and received different treatments by different authors. Locke, for example, supplemented the context of entering into a social contract with the presupposition that in the natural state man already has a core set of inalienable rights. Consequently, the state does not have an independent existence; it is created as an instrument for protecting rights: 'I easily grant that civil government is the proper remedy for the inconveniencies of the state of nature, which must certainly be great, where men may be judges in their own case' (Locke 2005: 13).

Even though there are differences between authors of the social contract, all of them share the idea of the state being created with the intention of improving the position

of all the participants, i.e. co-contractors. When we submit ourselves to social rules, it is not the state that determines how the individual will invest his freedom into a necessity of concrete action. On the contrary, the individual himself has determined the parameters of this transition.

The limits of contract theory

We have attempted to elucidate wherein lies the defect of the attitude towards the individual as illustrated by the protagonist of Italian fascism, Gentile, in the above citation. We saw that the conclusion whereby the freedom of the individual has to be transformed into a necessity of a particular action, does not go far enough in explaining the core defect of fascism. Specifically, this transition characterises every rational act. Then we focused on the condition where the state usurps for itself the mandate to dispose with individual freedom as it likes. That is why we turned in the diametrically opposite direction and examined the (social contract) theory, which explains every (legitimate) state intervention into the personal sphere as an intervention on the part of the individual himself. As a co-contractor of the social contract, one arranges rights and duties as would be the case in any contract.

This establishes conceptual priority for the individual over and above the state, which in itself inhibits the totalitarian (i.e. fascist) political dispositive. Such a relation between the state and the individual completely excludes the perspective, upheld by Hegel:

The state is the actuality of the substantial will, an actuality which it possesses in the particular self-consciousness when this has been raised to its universality; as such, it is the rational in and for itself. This substantial unity is an absolute and unmoved end in itself, and in it, freedom enters into its highest right, just as this ultimate end possesses the highest right in relation to individuals, whose highest duty is to be members of the state (Hegel 1991: 258).

A detailed analysis of the mechanism that prevents state's infringement upon the individual, is given by Locke:

For it [i.e. the government] being but the joint power of every member of the society given up to that person or assembly which is legislator, it can be no more than those persons had in a state of Nature before they entered into society, and gave it up to the community. For nobody can transfer to another more power than he has in himself, and nobody has an absolute arbitrary power over himself, or over any other, to destroy his own life, or take away the life or property of another (Locke 2005: 135).

The crux of the argument boils down to the principle of civil (i.e. personal) law, which states: *nemo plus iuris in alium transferre potest quam ipse habet* (no one can transfer a greater right than he himself has) and forms the basis of all derivative means of obtaining rights. In line with the supposition that in his state of nature, man has rights in their perfected form (*jus perfecta*), the subject of the contract cannot encompass more (!)

than what he who transfers the rights already has. In the same way, someone cannot sell or gift someone things that are not in his possession to give. Because man in the state of nature does not have the right ‘to destroy his own life, or take away the life or property of another’ (ibid.), and because the government derives its authorisation exclusively from the contractors, the government simply cannot have this right under any circumstances. This constitutes the apex of Lockes’ contribution to the evolution of the democratic political culture.

This might seem like a concept which could work as a safety valve against the (proto)totalitarian tendencies we are witnessing now in Europe. Alas, this conclusion is too hasty. The social contract for the 21st century cannot lean directly on the contractualism of the 17th century, since meanwhile, within Western metaphysics a whole process has unfolded which cannot be ignored. This process became articulated precisely in a sequence of very serious theoretical misgivings and practical objections as to the fundamental thesis of contractualism: that the individual himself manages his own freedom within the framework of rational self-love. The mistrust in the individual as the foundation of the state organism is the unifying thread of political philosophy of the 19th and the first half of the 20th centuries.

Of course, it is shared also by fascism, which builds its whole identity on it. Gentile teaches that the freedom of the individual cannot be the foundation of the state, on the contrary, it is its destroyer: ‘Liberalism seeks a liberty in itself that confronts the state’ (Gentile 2009a: 30). A parliamentary system does not manage to forge a true will of the people and in the best case scenario it leads to a point at which ‘The state ... would devolve into a mechanical thing’ (Gentile 2009a: 31). According to Gentile the individual in a democracy is already in a state of self-alienation, for he is condemned to the sphere of finite values. Fascism sees true human freedom in a complete negation of individual liberty: fascism is ‘a system of true and concrete liberty as opposed to abstract and false liberty!’ (ibid.: 530).

Certainly, these elucidations of the theoretician of Italian fascism make us once again intellectually uncomfortable, but we will see that they cannot be rejected out of hand merely on the bases of their superficial disparity with contemporary conceptualisations of individual freedom. In considering a number of weighty objections against contract theory, we expect two things to emerge: that the individual’s will cannot in the final instance be considered as the *sole* builder of a state organism, and that the presupposition of entering into a contract (i.e. rational self-love of the contractor) does not finally manage to explain key features of the state.

Let us begin by noting that states vary enormously amongst themselves. It will suffice to mention the difference between Western and Eastern conceptualisations of the state, which dictated the dynamics of the cold war, or the contemporary conflict of the West with the “wayward” states. Contract theory does not possess adequate instruments for thematising these differences, or for enabling us to understand the state in its interaction and relations with others. Specifically, this is the dimension which often shapes the fate of a given state to a greater extent than its internal political goings-on. The reach of contract theory amounts to an abstract affirmation of an organisation of individuals,

whatever that might be, leading us to a tautological conclusion that different groups of individuals have decided for themselves to create different types of states.

Another difference exists between the states that questions the thesis that the contractual will of the individual is the *sole* builder of the state. It is a fact that some states are more successful in guaranteeing welfare to their citizens than others. If a state is supposed to be the product of the will of its citizens, we should then be saying that the citizens of failed states desire such a state for themselves, which is of course nonsense. It seems that in explaining the state, another ingredient – besides the will of the citizens – needs to be taken into account: an ingredient that has, as will be seen, an independent life, and in this case in fact is *contrary* to the will of the people to create a state in line with their aspirations. It has become clear that the citizens cannot manage to put themselves into the role of self-loving co-contractors (as exclusive creators of the state) even when they want to do so. Moreover, we will see that often they in fact *do not want* to do so, which finally undermines the supposition that the situation of drawing up a contract is the relevant horizon against which to understand the state.

With this we come to the already mentioned perspective of antagonistic relations between states. Such relations often draw out into conflict and then escalate into war. A large-scale conflict is not possible merely on the basis of the government forcing its citizens to take up arms. On the contrary, the citizens are in large measure voluntary participants. They are ready to sacrifice everything, from their wellbeing to their lives, for something “greater” than themselves. They are conscious of the fact that even in the case of victory, from the point of view of their personal interests, they will be none the better off. In fact, they will be worse off. This amounts to a diametrically opposed situation as envisioned by the drawing up of a contract based on rational self-love. To conclude: the individualist approach to the state cannot adequately explain these characteristics of the human spirit that have shaped our historical reality.

To the theoretical misgivings, we can also add practical ones, wide-spread as they are to this day and shared by a large part of public opinion. Liberal democracies based on elections – a supposedly symbolic re-enactment of the social contract – are becoming ever less popular. The first line of objections stresses the inefficiency and weakness of democratic set ups, for they seem unable to push any one significant idea through procedures, committees, and boards. Meanwhile, governments change hands and projects run out of steam one after another. The second line of objections highlights the falsification of the original will of the voters, which is never left unadulterated once it passes through the lobbying networks. It is enough to mention the wide-spread negative attitude towards “neoliberalism”, which (amongst other things) leads to an ever-greater domination of capital over politics. Finally, the argument runs that the modern West is allegedly disorientated as to its value system, reduced to greed and consumerism.

Ideas for a way out of the democratic deficit are various. At the beginning of the 20th century, the dominant belief was that all of the described was an outcome of an originary mistake to try and substantiate the state organism with the individual and his personal will. Marx alerted us to this defect in his criticism of bourgeois society, which does not at any one point ‘rise above selfishness’ (Marx 1844: 201), since the fulfilment

of man's freedom 'does not rest on the connection between man and man' (ibid.) but on his isolation.

Voluntas and arbitrium

These misgivings cannot be dismissed out of hand. A social contract for the 21st century will need to take them into consideration and adjust itself to them conceptually. In particular, it must accept the existence of an entity that has marked the political philosophy from the 19th century onwards. The entity in question is *will onto itself*. Within the framework of national states, this entity has contended as an ethical substance, emerging as an answer to the impasse of contractualism, which was gradually becoming obvious. The challenge of how to explain away the behaviour of citizens – their sacrifice-for – which is contrary to the presupposition of entering into a contract on the basis of rational self-love, has played a major role in the emergence of the concept of will onto itself.²

We are dealing here with a complex constellation related to man's fulfilment. In this, our humanity – paradoxically – remains unfulfilled when *we ourselves* are the highest value. Put differently, our life is worthy of living only insofar as we are ready to sacrifice it for something "bigger" than ourselves. Such an understanding of man and the world is a constant throughout the entire western civilisation. Philosophy explains this paradoxical relation to man's will by differentiating between the will's two aspects, between – using Latin terminology – *voluntas* (will, Ger. *der Wille*, Eng. *will*) and *arbitrium* (choice, Ger. *die Willkür*, Eng. *licence*).

This could be seen as representing the finite and infinite side of will. *Arbitrium* represents the domain of the individual as the sole arbiter of its formation and direction. A textbook example would be a purchase: when a person goes into a shop, deciding to buy something following his will, he enacts this will as *arbitrium*. Its reference is another individual, a co-contractor, with whom he freely enters into an interpersonal relationship. The core idea of contractualism is in the possibility of grounding the idea of the state precisely against this horizon. We have seen that in explaining the phenomenon of coexistence it is necessary to take into account another concept, i.e. of the will onto itself understood as *voluntas*. Its primary characteristic lies in the fact that it did not emerge as a subject of individual decision and therefore does not belong to anyone. It is valid not because of a consensus, but because of intrinsic authority. This is the manner in which the 19th century began to understand the state.

A textbook example for *voluntas* is human rights, for they cannot be explained away through *arbitrium*, through negotiations. An agreement can be annulled or changed should the participating parties agree to it. Such a possibility is quite alien to the very concept of human rights. Take, for example, the right to life, which cannot be made subject of negotiations and outvoting. Natural rights for Locke mark the lower limit in

² Widespread is the platitude that all the major difficulties of contemporary West are the outcome of people's selfishness. In fact, it is the reverse. All the major totalitarianisms of the 20th century, which committed the worst possible crimes, were rooted in the unselfish behaviour of its citizens, their readiness to place an idea of intrinsic values above their self-interest.

drawing up the social contract, for they signify those rights into which the government should never intervene. However, we have seen that not only individual rights, but also the very concept of public rule, cannot be explained away through *arbitrium*, through the finite aspect of the will.

Even the core of democratic decision-making, voting in parliament, cannot be explained away without the concept of the will onto itself. Rousseau defines it as the general will (*volonte generale*), which has to be strictly distinguished from the will of all (*volonte de tout*), an outcome of a joint decision. Only with the help of the general will is it possible not to misunderstand voting as a victory of one (parliamentarian, social, political) group over another. The general will, which is not the will of any one person in particular, becomes formed in parliament. Consequently, a law that is passed with a 51% vote is equally valid as the law passed unanimously. Moreover, only so can we explain why the decision should also apply to those who voted against it: because the general will, being the will of no one in particular, is the will of everyone. The result of regulating relations dependant on *arbitrium*, in contrast, always only applies to those participating in given negotiations, i.e. *inter patres*.

The state exists as an independent entity possessing general will. It demands loyalty, even respect for itself, which is reflected also in the Penal Code, Article 163, which persecutes acts of disparagement against the state.³ Contractualism sees the state as merely an instrument of the individuals for managing their rights and interests, and exists only insofar as it is derived from the will of the individuals. The defining feature of fascism – with which we started our discussion – is not in that it knows the general will, which is placed above the individual – this is a feature of every modern state – but in that it *does away with the individual altogether*, the individual as a politically relevant entity which affirms itself through the irreducible individual will, through *arbitrium*: ‘Fascist authoritarianism rejects license [i.e. *arbitrium*] – which is not a liberty at all’ (Gentile 2009b: 34).

In the relation between a free individual – the building block of liberalism – and a community, fascism perceives only conflict: ‘Liberalism strives for the freedom onto itself which objects to the state’ (Gentile 2009a: 30). The particular is sinful; therefore, acknowledging the rights of the individual can lead to one outcome only: the bolstering of his selfishness and the creation of destructive forces within the community. The only thing of consequence is thus an absolute priority of the nation in the sense of an organic, ethnically homogenous community over the individual, constituting ‘a system of true and concrete freedom, which opposes the abstract and false freedom’ of liberalism. (Gentile 2009a: 530).

³ ‘Disparagement to the Republic of Slovenia. (1) Whoever publicly commits any of the offences under Articles 158 – 162 of the present Code against the Republic of Slovenia or against the President of the Republic with respect to the exercising of his office, shall be punished by a fine or by imprisonment of not more than one year. (2) The same sentence shall be imposed on anyone who has publicly desecrated the flag, coat-of arms or national anthem of the Republic of Slovenia’ (Penal Code).

Condition for the possibility of social contract for the 21st century

With this we have delineated a framework that makes it possible for us to think about the social contract for the 21st century. A naive period of the 17th-century emerging contractualism, the optimistic yearning to find the foundation for co-existence in the autonomy of man, is a thing of the past. The evolution of Western metaphysics gave rise to the concept of the state as an entity (conceptually) divorced from the individual. Its excess is the fascist degeneration in the image of a totalitarian state. However, as we have seen, the contemporary state is unthinkable without the general will. The difference between a democratic and a totalitarian conception is in that the totalitarian set-up does not anticipate any kind of role for the individual (and arbitrium) when it comes to understanding the state. It will not be satisfied with the state *inter homines*, but rather demands it *interiore homine*, as a dedicated life of its citizens who absorb the state into their innermost intimate sphere. There is no longer a private sphere; the domain of freedom in which the individual could execute arbitrium is gone. It is replaced by an unfulfillable duty of constant reminders of one's calling, '[Man] must always remind himself that he is a Fascist!' (Gentile 2009c: 57).

The challenge of the social contract of the 21st century is but a project of protecting the place of the individual and his *arbitrium* as a *sine qua non* of the political horizon. Central is the question of how to think the relationship between the state and the individual beyond the sacrifice of one to the other. Contractualism reduces the state to the individual, to his will. Fascism dissolves the individual entirely in the will onto itself of the state, embodied by the Leader. As a horizon against which to understand the relationship between the individual and the general will, I suggest Hegel's concept of the civil society (*Bürgerliche Gesellschaft*). We are not interested in his definition of civil society, a society that *Philosophy of Right* articulates by way of a system for satisfying needs, which we would call the economic perspective today. For the 21st century, the civil society, if to be made relevant, needs to be taken in a wider sense, going beyond the perspective of the individual's satisfaction of needs. In the first instance, we are interested in the architecture of the relation between the civil society and the state as described by Hegel in his *Philosophy of Right*.

This relation is marked by a realisation that the period from that Reformation, through Cartesianism to the Enlightenment gave rise to a new phenomenon which needs to be taken into account: the concept of man defined in his irreducible individuality. Horstman describes the characteristic of the modern state through the emergence of 'the principle of the autonomy of the individual' and 'the phenomenon of a sphere separate from the state defined by the activities of particular individuals always in pursuit of their own individual goals' (2005: 195). That is the sphere of the civil society most intimately connected to the freedom of consciousness. The freedom of consciousness – the autonomy of the individual – demands that the state be located nowhere else but in the knowledge and will of its members. However, for this, the individual must be actual, affirmed, and recognised. Blind obedience and fanatic sacrifice no longer play any part. In short, there is no state without the individual, and there is no individual without the system to recognise him.

What is at stake here is not only the breach of individual (i.e. human) rights; in the first instance, a state without a fulfilled individual is unstable:

The principle of modern states has enormous strength and depth because it allows the principle of subjectivity to attain fulfilment in the self-sufficient extreme of personal particularity, while at the same time bringing it back to substantial unity and so preserving this unity in the principle of subjectivity itself (Hegel 1991: 260).

The collapse of all totalitarian systems, which wanted to knead a society into a lump with no particles, leaving the individual unacknowledged, sacrificing him to the Totality, was sadly affirmed by the realisation which, at the level of philosophy, already was present at the beginning of the 19th century.

Let us elaborate on this. Even though Hegel places the individual at the very foundation of the state, this is by no means a return to contractualism. In minute detail, Hegel addresses the inherent limitation of civil society, marked by a particular perspective of the *arbitrium* (i.e. the logic of drawing up contracts). The problem of the civil society, however, is in that '[t]he relations of external existence fall within the infinite of the understanding; consequently, no boundary is present in itself between what is harmful and what is harmless' (Hegel 1991: 243). He dubs the system of the civil society also as 'the external state, the state of necessity and of the understanding' (Hegel 1991: 183). All three concepts – external reality, necessity, reason – are limited in their ability to describe reality and therefore *a priori* exclude the possibility of the civil society being a place of freedom's fulfilment. The moment of *bad infinity*⁴ sets off a chain reaction which leads to self-destruction.

A political system which rests too greatly on the role of the individual and the *arbitrium* – today we would call it a neoliberal model – brings in its wake social defects, particularly inequalities and poverty.⁵ The inequality and poverty lead to 'an inability to feel and enjoy the wider freedoms, and particularly the spiritual advantages, of civil society' (Hegel 1991: 243). They are not a natural fact, but an injustice, giving rise to resentment against the rich, society, government, etc. At the beginning of the 19th century, Hegel predicted its destructive potential for the state organism, which is founded upon a paradox: 'This shows that, despite an excess of wealth, civil society is not wealthy enough - i.e. its own distinct resources are not sufficient - to prevent an excess of poverty and the formation of rabble' (Hegel 1991: 245).

This is the key insight, which clearly shows that Hegel's insistence on an affirmed individual as a basis of the state is not a simple return to contractualism. It is imperative that the civil society – the realm of (social) contracts – have supervision from above, which can only be carried out by the state as an emanation of will-onto-itself. Above the sphere of (private) interests there must loom a sphere of (general) good, which 'assert[s] the universal interest within these [particular] ends' (ibid.: 287). The blind goal must simply have 'its truth in the end which is universal in and for itself and in the absolute actuality of t/his

⁴ 'Particularity in itself [the civil society, note R. S.], on the one hand indulging itself in all directions as it satisfies its needs, contingent arbitrariness, and subjective caprice [i.e. *arbitrium*, note R. S.], destroys itself and its substantial concept in the act of enjoyment' (Hegel 1991: 185).

⁵ Hegel alerts us to the fact that the inequalities are not an arbitrary error of the system founded upon the particular, but rather emerge from the very concept itself: 'The spirit's objective right of particularity, which is contained within the Idea, does not cancel out the inequality of human beings in civil society – an inequality posited by nature, which is the element of inequality but in fact produces it out of the spirit itself and raises it to an inequality of skills, resources, and even of intellectual and moral education' (Hegel 1991: 200).

end' (Hegel 1991: 256). This is no guarantee for a society without conflict, but it is the only and urgent means to shorten and soften the dangerous oscillations and the length of periods when collisions of blind necessity even out. The civil society is *eo ipso* a risky society.

To give free hand to the market would be a mistake that overlooks the laws of the concept of freedom. Falke (1996) sees the entire Hegel's philosophy as an attempt to set limits to the bourgeois man. A detailed discussion of the conceptual relationship between the civil society and the state, between the individual and the general good, between the arbitrium and voluntas, must be omitted here for lack of space. Put somewhat crudely, we are dealing here with a concept of dialectical thinking which encompasses a concept of *determinate negation*.⁶ What is negated in this is not destroyed or erased, but rather preserved and elevated to a higher level. It still exists as a moment within a more perfected concept. The expression "moment" is a *terminus technicus* of Hegel's conceptual apparatus. We could translate it as "aspect", "feature", "designation" of a given something which is indispensable, but does not have – and this is crucial – its own meaning or significance. In this sense, we can say that the moment of the state is also the individual, the sphere of the civil society, though that is merely its subordinate feature, its moment.

Conclusion

Despite the critique of contractualism, Hegel does not negate the independent sphere of the individual in his concept of the state; rather he keeps and cultivates it – in the image of the civil society. Two things are achieved in this: we have *overcome* the impasse of contractualism in thinking about the state, while at the same time kept its core, the *initiative of the autonomous individual*. This is the horizon against which we can conceptually posit and coherently think about the social contract of the 21st century. Social negotiations, for instance, are an indispensable moment of every democratic state. How to think about consensus against this horizon, however, is a topic for another paper.

It is clear that we have to give up the idea of the concept of one, all-encompassing contract, upon which traditional contractualism builds. In line with the post-modern discourse, we could suggest a multitude of projects of civil attentiveness along any number of small fronts, which must imprint their seal of legitimacy at every single point of the state organism. We are not thinking here only of the active system of checks and balances; what is important is to know that a legitimate state has countless channels of possibility – from consulting civil society, the culture of NGOs, to public forums held prior to legal procedures – through which the thinking of autonomous individuals passes into the life of a state. It is precisely the keeping alive of this sphere which guarantees that the state does not slide into a totalitarian pattern. Following Schnädelbach, the concept of 'the civil society can justifiably be seen as the apex of the *Philosophy of Right*' (2000: 263), since it prevents the state

⁶ Dellvalle notes that the development of the concept of the civil society was enabled by the revision of its logic: 'From Nürnberg's trials onward, philosopher has had a conceptual apparatus at his disposal which allows him to understand and present the multilayered criss-crossing of plurality and oneness as well as the transition from one to the other and vice versa. The difference when it comes to the relation between oneness and plurality in the logic of essence and the logic of the concept ultimately serves on the one hand as support of the function of the political community and on the other as support of the function of the state' (Dellavale 1998: 232).

from ever becoming total. And honouring this central tenet presents the main challenge for the social contract of the 21st century.

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Povzetek

Članek predlaga interpretacijo družbene pogodbe kot ključnega instrumenta, ki na a priori ravni preprečuje nastanek političnih totalitarizmov. Po prikazu, kako koncept družbene pogodbe izhaja iz dinamike zahodne metafizike, članek pokaže, da družbena pogodba 21. stoletja ne more biti zgolj nadaljevanje kontraktualizma 17. stoletja. Najpomembnejši premik v mišljenju kontraktualizma je spoznanje, da posameznik (in njegova pogodbeno volja) ne moreta predstavljati temelja državnega organizma. Da bi razumeli odnos med individualno in občo voljo, glede na katerega je možno misliti kontraktualizem 21. stoletja, razprava tematizira Heglov pojem občanske družbe (Bürgerliche Gesellschaft). To omogoči preseganje zadreg kontraktualizma pri mišljenju države, hkrati pa ohranja iniciativo avtonomnega individuuma v njenem jedru. Legitimna ureditev mora vsebovati nešteto kanalov, preko katerih mišljenje avtonomnih individuumov prehaja v življenje države. Prav ohranjanje te sfere pri življenju zagotavlja, da država ne zdrsne v totalitarne vzorce.

KLJUČNE BESEDE: družbena pogodba, totalitarizem, država, legitimnost

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