

Democracy, Law and Governance

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ASHGATE

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Introduction¹

The context for this book is a crisis in democratic political systems interpreted as consisting essentially of a major failure in collective regulatory methods for the market economy. There has flowed from this a generalized crisis of confidence in politics, reflected in the search for new forms of “resistance” to power and in the effort at establishing new forms of counterforce. And yet, however radical this crisis may appear to be, it does not represent a challenge to the major principles of the democratic ideal. Rather, what is manifested is the felt need to redefine the conditions for fulfilment of the democratic ideal and to change the forms of democratic organization, which actually confirms the success of the democratic ideal. Thus, as P. Rosanvallon (2006: 9) recently wrote, “the democratic ideal prevails unchallenged, but nearly everywhere, the regimes that profess to subscribe to it are eliciting vigorous critique.” It is undoubtedly significant that this crisis has arisen during the continuation of a period of intense reform in methods of governance of the welfare state and an effort to “modernize” or redefine the conditions for building public interest policy. The issue is first and foremost a problem of the effectiveness and relevance.

Thus, this crisis and this requirement for change reflect neither a rejection of the democratic ideal, nor a challenge to the basic beliefs which this ideal is understood in the sphere of modern political philosophy to embody: the belief in the sovereignty of the general will, self-government, and the common good. Rather, they reflect the recognition of the inadequate way in which applied democratic theory has conceptualized the conditions for its own fulfilment, that is, the conditions that will allow for a collective action to produce a form of common life that meets the normative expectations of its members. For, rightly understood, applied democratic theory is in fact a theory of collective action, that is, a theory that allows for determining the conditions that a collective action must satisfy in order to guarantee, to the extent possible, the fulfilment of its participants’ normative expectations.

Although it is true that the concept of democracy is more usually associated with the principle that the people are the sole legitimate basis of power, or, as J. Cohen (1989) has recently pointed out, with “the notions of autonomy and the common good”, there are many benefits to framing it in terms of an applied theory of collective action.² Framing it in these terms makes it possible to take a fresh look

1 This research has been supported by the Sixth European Framework Programme in Research and Development and by the Interuniversity Attraction Pole Programme (IAP)—Belgian State—Belgian Science Policy (BELSPO).

2 D. Cefai’s studies provide good evidence of the helpfulness of this perspective in understanding the role played by new forms of collective action in what he calls the “public

at political philosophy and understand the reasons for the inadequacy of current democratic theory. It brings to light the consequences for democratic theory of its own failure to attend to the concept of action it deploys and nevertheless inevitably presupposes. In fact, the hypothesis we will defend here is that, because of this “failure to attend”, the existing approach to democracy has remained dependent on an inadequate conceptualization of collective action. This, we maintain, is the case at two levels of analysis: that of the construction of the legitimacy of public authority and that of the mobilization of the actors concerned with the application of norms.

This inadequate conceptualization results in a twofold analytic blind spot, or, as we call it, blockage, in current theorizing about democracy, including the most recent efforts at reformulation. It is these two blockages in current political thought that this book seeks to analyse and overcome by engaging with them point by point across the book’s two main parts. As a preliminary to this detailed analysis, we identify the two blockages in this introduction. In so doing, we hope to make clear to the reader the specific nature of our approach to the political; the nature of the intellectual shift we propose; and the outline of our contribution to the debate. Each of the two blockages relates to an aspect of the social production of the generality of power, understood both as a capacity specific to the institutional mechanisms of public authority and as a capacity of collective actors themselves to participate in establishing this authority through social participation.

The First Blockage in Democratic Theory

The first blockage in current democratic theory relates to the institutional mechanisms by means of which the legitimacy of public authority is thought to be guaranteed. We refer to this blockage as the “representationalist belief” that persists in applied democratic theory. It takes the form of the ascription of self-sufficiency to the reference to public authorities. Thus every drive to broaden the conditions for respecting democratic legitimacy has been translated into the expansion of the “rights” that may be legally opposed to the authorities’ sway, the creation of a new power granted to the authorities, or the creation of a new authority. Although democratic theory has thus in effect progressively increased the number and scope of the conditions that must be fulfilled for a public action to be “rationally acceptable”, it has always been understood that the conditions for fulfilment of the normative operation itself (that is, of the effective determination of the new norm) reside solely in the final say-so of the public authorities. Thus, the process of social transformation has always been understood to take adequate shape through the actions of the public authorities themselves. Let us see if we can better grasp the nature of this first blockage as it relates to institutional reforms.

The first analytic blockage relates to the fact that political philosophy has usually focused on the question of the “legitimacy of the norm”, that is, on the

arenas” of democracy (Cefaï 2007).

question of the conditions that must be respected in order for a norm adopted by a public authority to be rationally acceptable. The underlying presupposition is reflected in the prevalence, at the heart of traditional democratic theory, of a political model that privileges a representative form of democracy. The idea assumed to be self-evident and left unexamined is that the action by which the group acts upon itself—that is, the action by means of which the group adopts norms for shaping and transforming reality in the light of its own objectives—is performed exclusively through the established public authorities. Let us try to pinpoint the implications of this idea.

Political inquiry has worked hard to define the conditions that a democratic theory requires for “establishing” “legitimate” public authorities and accordingly for guaranteeing the legitimacy of those authorities’ normative actions. Three main forms of condition have thereby been successively identified.

(1) First, the concept of democratic legitimacy has been defined by reference to electoral mechanisms, the notion of universal suffrage, and the progressive extension of the franchise to all categories of citizen (with debate continuing in our day as to whether it should be extended to non-citizens). Thus, the representative form of democracy was, in the first instance, reduced to its “electoralist” version.

(2) Next, without abandoning this electoralist perspective, political inquiry expanded the conditions for political legitimacy by broadening the bases of the rights that must be respected by public authorities. The concept of representation could not be limited solely to the rights implied by the electoral representative mechanism. In association with the liberalism-socialism debate and the more recent debate initiated by the communitarian critique of liberalism, the question of expanding the basis for rights beyond the civil and political to the socioeconomic and the “cultural” (thus allowing for the guarantee of respect for the cultural conditions for moral autonomy) has been increasingly studied.

(3) Last, it is possible to identify a third type of expansion of the conditions for democratic legitimacy. As has been suggested by P. Rosanvallon, this consists of engaging with the position of impartiality and the reflexivity of the mechanisms that back up the actions of the public authority. This type of change has flowed from the concern to better ensure the presence of the conditions necessary to social representation by rethinking the institutional frame for the practices that enable the production of the “general interest”. The establishment of the welfare state had already led to a change in the balance among the various public authorities, especially the balance foundationally established between the legislative and executive branches. It would appear today, however, that even a “true administrative power” (Rosanvallon 2008: 12) based on competency is not sufficient to guarantee the adequate substantive framing of the general interest, as was seen in the cases of the public service model in France and the rational-administration model in the USA (Rosanvallon 2008: 12, Lenoble 1994: 7–32). The truth is that the idea that a bureaucratic force can ensure fulfilment of the general interest continues to rest on a “substantive” presupposition. During the second half of the twentieth century, applied democratic theory saw a decline in this perspective. Alongside

that trend, new methods for “achieving the social generality” were developed that corresponded to new forms of democratic legitimacy;³ yet, in our view, the analytic blockage we have identified persisted.

One new method for achieving the social generality is that of the legitimacy of impartiality (Rosanvallon 2008: 18), whose clearest manifestation is in the development of surveillance and regulatory authorities. These authorities’ legitimacy derives from their ability to demonstrate their impartiality. In an irreducibly fragmented world, the project of a positive identification of the general interest no longer makes sense. Power must take its distance from individual interests and transcend them, by appropriating to itself the locus not of a higher interest but of an “empty place” (Rosanvallon 2008: 157). With this expression, P. Rosanvallon (2008: 157) (who borrows it from C. Lefort) conveys not so much the idea that power cannot be “hijacked by just anyone”. Rather, the expression conveys the idea that the social subject in which the indivisible property of power resides “remains ever virtual; it is never substantially single: it is always traversed by the divergent nature of interests and opinions” (Rosanvallon 2008: 158), whence the need for a constant reminder of this incompleteness and for organizing the production of a social generality in a “negative-procedural” form.

A second new method of achieving democratic legitimacy consists of the reflexive “shaping” of the expression and construction of the popular will. This P. Rosanvallon terms “reflexive legitimization”. Whereas legitimization through impartiality aimed to embrace the impossibility of a completed substantive determination of the “content” of the general interest, here incompleteness relates to the conditions for the expression of the general will. It’s a question of becoming free of the old myths about the possibility for an immediate expression of the popular will. The “social generality” can only be the outcome of a reflexive process.⁴ The idea is that the social will must somehow be organized to “enter into dialogue” with itself, with the requirements it rests on. Its meaning cannot be considered to have been “exhausted” by any one of its representations. The most definitive expression of this form of legitimization is observable, as P. Rosanvallon shows, in the recent opening up of the accepted role of supreme courts. Contrary to what is usually maintained, the opening up of the area of control of supreme courts (or constitutional courts) is not so much the logical unfolding of the consequences of the regime of the rule of law for the public authorities subject to it. Instead, the specific meaning of a development of this kind is above all that, through these

3 P. Rosanvallon identifies three such forms of legitimacy: impartiality, reflexivity, and proximity. We will initially focus on the first two, which are associated with the institutional blockage. The third will be addressed when we come to deal with the second blockage (the actantial blockage, that is, the blockage concerning the actors’ capacity to act) in current political thought.

4 As used in this instance by P. Rosanvallon, the term “reflexive” must be understood in a comparatively non-technical sense—in the ordinary sense of involving “dialogue with the self”. As will be seen, in this book we assign a more technical meaning to “reflexiveness”.

constitutional courts, a “reflecting third party” (Rosanvallon 2008: 213) is set up, by means of which the social will is organized for ongoing assessment of the norms adopted, and the actions taken, in its name, in the light of the “principles” that define it. By means of this control, a twofold reflexive task is accomplished: not only does the body social evaluate its concrete choices on the basis of the principles that define its axiological horizons; but through this very control, it also continuously redefines the meaning of these axiological requirements. R. Dworkin, whose thought we will examine more closely in Part II, has given clear expression to this role of the supreme court as a privileged agent of a social hermeneutic.

As evident, then, from this brief overview of the evolution of democratic theory, the very concept of representation has significantly broadened in meaning and in so doing has led to an increasing complexity in those conditions that must be respected in the organization of the public sphere in order to ensure that the current understanding of representation is adequately fulfilled. Nevertheless, with every increment in the inclusiveness of the concept of representation, the idea persists in the background that, beyond these limitations imposed on the legitimacy of normative actions, the actions of the group upon itself can be reduced to the norms adopted by the established authorities. The group need only place itself in the hands of the established authorities in order to “advance” the cause of the social, that is, in order to translate into normative actions the objectives for social change that lie behind the collective action.

Our discussion of the first blockage in terms of the “representative” approach to democracy is intended, then, to reflect the existence in current political philosophy of this underlying belief. The belief in question is manifested in the self-sufficient nature of the reference to the established authorities, which in turn flows, as we have just shown, from the self-referential nature of this conception of how social authority is guaranteed. The reference to authority is an expression of the unending dialogue with itself of the social group, as it undertakes analysis of its own divergences and resistances. *The conditions for fulfilment of the democratic requirement are thus thought to be subject to formalization and integration into an institutional arrangement of the “reflexive” or self-referential representation of the sovereign will of the group members.* It is a belief of this nature that accounts for how rearrangements in our democratic regimes have usually been conceived of in terms of the extending of rights to be granted to individual citizens or groups of citizens (groups marginalized by virtue of their culture, their gender, their sexual orientation, and so on), or else in terms of the creation of new public authorities. These rights expansions and institutional innovations are thought to be able to “resolve” the democratic incompleteness they seek to engage with.

In our view, it is an assumption of this nature that constitutes one of the two blockages in existing conceptions of democracy and that undoubtedly accounts for the recurring search for new forms of “counter-power” observable in democratic regimes today.

To substantiate this diagnosis and present its foundations, we dedicate Part I to a critical analysis of the concept of law. Rightly understood, the representative

approach to democracy—in the sense we have just given it—rests in the last analysis on a specific conception of the meaning of “law”. This conception assumes that, as the positivist theorists believe, law is determinable based on the social practices of the public authorities alone.⁵ Thus, without taking cognizance of the fact, political philosophy endorses the definition of the concept of law that is advanced today by positivist theory. We will show that defining the concept of law in this positivist manner, by exclusive reference to the practices (often defined in terms of the “rule of recognition”) of the public authorities, is problematic and theoretically incomplete. It does not allow for an account of all the conditions for possibility required to provide the foundations of the operation by which members of a social group determine obligatory rules. The hypothesis we will present has three components. In one of these components, we are in agreement with current thinking and in the other two we diverge from it.

(1) *The point of agreement.* First, like all the leading current authors in the field, we share the perspective well expressed by H. Kelsen: the conditions for the definition of law are internal to social practices and thus cannot be defined by an assumed substantive definition of a reality “external” to a given social convention, such as (to take one example) the ideal of justice. The perspective we adopt is thus purely conventionalist and internalist. The conditions for possibility of the normative operation are internal to the social practices by virtue of which the operation is carried out. As will be seen, those authors who are most representative of current research in philosophy of law, be they positivist (for example, H. Hart and J. Coleman) or critical of positivism (for example, R. Dworkin) subscribe to this epistemological requirement. Nevertheless, the implications of this internalism remain to be clarified. And it is here that our twofold divergence from the current state of research arises.

(2) *The first point of divergence.* The first aspect of this divergence relates precisely to the issue of taking account solely of recognition by the public authorities in determining what constitutes law within a given social group. We will show how other authors conceive of this practice of recognition and, in that light, how little relevance there is to the hermeneutically based critiques of it, foremost among them R. Dworkin’s. We will also show, however, that the mere fact of recognition by the public authorities is not sufficient to account for the obligatory dimension characteristic of normative practices. On this score, it could be said that our argument is in accord with a critique made by H. Kelsen. As he discerned, the mere fact of recognition by a public authority—even when correlated with the legal system’s effectiveness as a whole—cannot “on its own logically account for the normative operation”. Such a way of understanding the “conditionality” of the normative operation—that is, the ability to produce the norm’s normativity: its validity or obligatory nature, its nature as a necessary condition for something

5 See Part I for a more explicit and rigorous articulation of this positivist thesis. In reality, this thesis does not exclude reference to citizens’ behaviour. But this reference is conceived solely in terms of a general habit of obedience.

else—is incomplete. Reference to the practices of the public authorities requires turning to something external to them, in a sense a second-order recognition. As H. Kelsen demonstrated with rigorous logic, a “condition cannot be identical to what depends on it”.⁶ True, being a good Kantian, H. Kelsen then conceives of this “exteriority” along the lines of an “assumed norm”, which he calls a “basic norm”. But this solution is easily seen to be problematic: whence comes it that the assumed norm circumvents the stipulation H. Kelsen has himself just articulated, namely that a “condition cannot be identical to what depends on it”? By assuming that the “hypothesis of a transcendental logic” is always-already given within a social group, he “mentalizes” this second-order conditionality.

Positivist authors subsequent to H. Kelsen grasped the difficulty associated with this mentalization of the internalist requirement. To speak in terms of an “assumed” norm (and thus one that is always already inscribed in the “heads” of the social group’s members) is to err in regard to the internalist project of conceiving the conditions for carrying out a normative operation in terms of a social operation, a social practice that must be organized. Thus, those authors sought to correct H. Kelsen’s position and reinterpret the hypothesis of a fundamental norm in terms of a practice of recognition. Moreover, they progressively increased the complexity of their account of this practice of recognition of criteria for legality by the public authorities. On this score, as will be seen, the contribution made by pragmatist philosophy has proven crucial: the practice of recognition must be analysed as a cooperative practice.

Our own hypothesis (which is internalist and genetic) will allow, as will be seen, for fulfilling both the requirements⁷ that the positivist position would thus appear unable to accommodate simultaneously. Besides reference to a cooperative practice of recognition of criteria for legality by the public authorities, the existence of law also requires, as we will show, a condition of “practical acceptance” by the norm’s citizen-addressees. *A norm’s normativity does not depend only on its compliance with a norm of recognition that results from a cooperative practice by the public authorities charged with its application. It also depends on its being recognized and practically accepted by the citizens who constitute its “private” addressees.*

(3) *The second point of divergence.* The second point of our twofold divergence from current thinking flows directly from the first. The first point of divergence makes it possible to see how the concept of law includes in itself a “normative” requirement that the positivist approach contributes to obscuring. True, as was said above, this normative dimension is not to be understood along the old lines of the “substantive” approach to a given ideal of justice. The debates of the past about

6 “Eine Bedingung kann mit dem von ihr Bedingten nicht identisch sein” (Kelsen 1960: 219).

7 Let us recall the two requirements. The first is that reference to the practices of the public authorities necessitates turning to something external to them, that is, it entails a second-order recognition. The second is that of avoiding the “mentalist” trap implicit in the hypothesis of a fundamental norm.

natural law have, in that sense, been definitively laid to rest. But what is revealed by a reconstruction of the conditions for possibility of the collective action by which the members of a social group aim to regulate themselves and adopt obligatory rules is that such an operation carries within itself the requirement for “attention to the necessary practical acceptance” of the norm in process of adoption, by those who are to be its citizen-addressees. The norm’s “end purpose”—its “regulatory” aim, its internal teleology—thus necessitates that there be inscribed within the rule’s development attention to the forms of cooperative action by which the norm’s addressees will be able to cooperatively construct their normative expectations and thus to participate in the shared construction of this norm. Thus, the concept of law bears within it a requirement that makes it possible to measure, depending on the level of attention paid to the condition of practical acceptance, the capacity of a normative operation to fulfil its “internal teleology”, or, put in more familiar terms, its capacity to satisfy to the extent possible the normative expectations of the actors concerned.

This second point of divergence has important consequences. We will mention two that are of direct concern at this point.

First, it makes it possible to grasp why inquiry on law must incorporate inquiry on political philosophy, that is, open itself up to the question of the conditions for organization of cooperative participation by the norm’s addressees in the norm’s construction.

It also makes it possible to grasp, however, how important it is for inquiry on political philosophy not to stop—however great the gains already made—with inquiry into the investigation into the conditions for “rational acceptability” of the norm, that is, with the various conditions that democratic theory has progressively illuminated in defining the conditions that action by public authorities must fulfil if those public authorities are to be deemed legitimately representative of the public will. And with this we arrive at the second blockage in current political thought.

The Second Blockage in Democratic Theory

The second blockage in current democratic theory relates to the other aspect of the production of the social generality, namely, recourse to citizen participation in order to guarantee the acceptability of norms. P. Rosanvallon defines this mode of production of generality as that of legitimacy through proximity. In this context, participation is now a means of government (Maesschalck 2008: 182–94). The dynamic at work is that of an effort to improve society’s “reflexive” power by improving the task of interaction between power and society. From here on in, the question is not so much that of challenging the governing with a view to replacing them to the extent possible with the governed. On the contrary, the issue is based on the assumption of the need for a governed-governing duality and consists of how to enhance the quality of the interaction between governed and governing parties.

Judged by its engagement with “participation”, recent political philosophy has not remained wholly the prisoner of the “representative” approach to democracy. True, as we have just seen, the process of going beyond the electoralist frame has been largely dominated by the belief that it was sufficient to create new institutions to ensure better respect for the requirements of the democratic project. But it was not limited to this belief. Since the 1990s, the will to organize more direct relations between citizens and the public authorities has been manifested: “[A] flowering of original initiatives—establishment of neighbourhood committees, experiments with citizen juries, consensus conferences, public forums, public inquiry procedures, participatory budgets, etc.—has given rise to an imperative in this vein in many countries” (Rosanvallon 2008: 319).

The democracy of interaction is not limited, however, to these new forms of participation and deliberation, whose actors are essentially from “the activist world of associations, whose movement traces out a kind of cooperative and contradictory double of power” (Rosanvallon 2008: 329). It also includes the development of more diffuse forms of democracy associated with the “multiple more informal or more individualized manifestations of involvement in the life of the city”.⁸ What is important to note, however, is that in these two forms (formal innovations to enable participation and diffuse citizen involvement), the emergence during the 1990s of this democracy of interaction cannot be viewed as the resurgence of traditional demands for the narrowing or the abridgement of the distinction between the governed and the governing.

Thus since the 1960s, the will has been manifested to raise anew and in a transformed version the old critique regularly levelled, somewhat quixotically, by advocates of direct democracy against the “representative” strand of democratic theory. But the more recent development of new participatory and deliberative forms of democracy are distinct in two ways from the “self-management” and “participatory” demands made, in the USA as well as in Europe, by the student and activist movements of the 1960s.

(1) First, the development of these new forms of “governance”, unlike those older demands for “self-management” and “direct democracy”, does not aim to “increase the influence of citizens at institutions’ and parties’ expense” (Rosanvallon 2008: 323). The participatory innovations developed since the 1990s aim essentially either to facilitate the handling of new, controversial sociotechnical

8 “The interest in public issues can also be measured in terms of newspaper readership, interest in political programming on radio and television, discussions with friends and colleagues, information searches on the internet, and contributions to associations. One of the rare studies on the subject, conducted by the Electoral Commission of the United Kingdom (Bentley 2005: 31), did suggest the importance of this form of involvement, estimating that close to 15 million political conversations are held daily in that country. The forms taken by what might be called *diffuse citizenship involvement* merit attention however” (Rosanvallon 2008: 327).

issues' or to "organize better developed information-gathering channels to facilitate decision making in a universe where the potential for blockages is multiplying" (Rosanvallon 2008: 324). "That is why the terms governance and functional democracy are probably those best suited to designating what is happening" (Rosanvallon 2008: 325).

(2) Then, the development of a "democracy of interaction" precisely reflects a dynamic at play at an entirely different level than the more traditional one of the effort to "narrow" the gap between the governed and the governing. What is at issue with the advent of a democracy of interaction consists precisely of no longer focusing on the question of the "mandate" under which the "representatives were simply the extension of those represented" (Rosanvallon 2008: 328), and instead on enhancing the quality of the interaction between the represented and the representatives.

In this light, it could be said that this reflects a sort of recognition of the first blockage we identified. The idea is emerging, both in the transformations that affect the reality of our societies and in political thought about democracy, of the need to strengthen the forms of citizens' participation in the exercise of power. Often, however, the purport of the term "participation" is left vague. Moreover, even when analysis is more precise, the requirement the term points to remains more of a black box than a theoretically constructed operation. This defect in theoretical construction not only accounts for what we have identified as a blockage; it also justifies the detour we will take in Part II via current social-scientific research into "theory of governance" in order to better grasp the requirement for participation and its limitations, so that the theoretical implications of the hypothesis we are presenting may be better understood.

In effect, on the view usually adopted in political philosophy, it would appear that everything happens as if the generalizability of the "social" were always-already given, that is, as if the mere summoning together of groupings or even individual citizens as individuals could instantly give a "form and substance" to society in its task of reflecting on itself. The reflexivity that would be thus expressed through the process of interaction presupposes as given the two parties to this task of interaction; that is, it presupposes that each of the terms placed in interaction with each other—society and power—is transformed by the sole fact of their having been brought together.

In other words, the question of the conditions for generating this "social whole" is not posed: it is assumed to have been resolved by the mere bringing together of either the "activist" actors involved in the associative process that is part of the new forms of participation or of the diffuse and informal expressions of citizen involvement. But whence comes it that we can assume this bringing together immediately enables the construction of this collective expression? Thus, things appear to unfold as if the mere summoning together of the actors, their

⁹ "The 'hybrid forums', or citizen conferences, set up to explore possible responses to issues surrounded with radical uncertainty (as in the case of GMOs, nuclear waste, and health problems with no precedent) have this role" (Rosanvallon 2008: 323–4).