

---

# Citizens in Europe

Essays on Democracy, Constitutionalism  
and European Integration

Claus Offe  
Ulrich K. Preuß

## Chapter One

# The Union's Course: Between a Supranational Welfare State and Creeping Decay

*Claus Offe and Ulrich K. Preuss*

The politics of European integration and the management of its various crises is currently (fall of 2015) in an unusually hectic mode. The difficulties of the Eurozone produce front page news in all major media where highly consequential last minute decisions (and the contested authority of EU institutions to make them) are being reported and commented upon. From the Euro crisis to monetary policy, to the crisis in Ukraine, to the issues of refugee migration, policy makers adopt bold and untested measures to sail uncharted seas, fully aware of heightened risks and dangers.

In such a context it may seem slightly frivolous to prepare the publication of a volume, many of the contributions to which revisit the basic institutional features and normative principles of the European Union, elaborating on key concepts such as citizenship, constitutionalism and democracy. Aren't there, given the culmination and interaction of various crises, more urgent intellectual challenges to address and policy proposals to submit? In response to such doubts, we would like to insist at the outset that the crisis may be exactly the right time to reconsider some of the basics, such as they are indicated by the three concepts in the subtitle of the present volume. That, at least, was also the view of colleagues, most prominently Dario Castiglione, who are familiar with the work that either of the two authors (and occasionally also both of us jointly) have written. These colleagues have encouraged us to put together this collection of essays which were written over a period of more than 30 years. The hope, to be either fulfilled or frustrated by the judgement of critical readers, is that the normative and analytical arguments presented in our earlier work may still throw light on the issues that the EU and its citizens must come to terms with if the current turbulences of the European integration process are at all to be coped with. Hectic emergency pragmatics, in other words, are not enough.

What is the problem the EU and its citizens are facing? It consists in the coincidence of dilemmas, processes, contradictions, events and conflicting demands which, taken together, pose an extraordinary challenge to the EU's political capabilities, arguably even its survival. The most important components of this challenge are, briefly, the following:

- the 'Euro crisis' – aptly named that way because of a dual reference: a crisis *caused* by the ill-considered introduction of a common currency in an area

that was not adequately prepared for it in economic and institutional terms and a crisis *affecting*, as a consequence of these deficiencies, the very viability of the currency area itself. Another aspect of the ‘Euro crisis’ is that the currency has driven a wedge into the EU which is now *divided* by its common currency and the winners and losers it has created;

- the economic crisis with deflationary tendencies and economic stagnation prevailing in many EU Member States, causing high rates of unemployment, in particular amongst young people, and also causing, together with extreme monetary policies adopted by the ECB and austerity-obsessed fiscal policies, a forceful onslaught on European welfare states and the, by now largely obsolete, ‘European Social Model’;
- ‘mass immigration’ into the EU and failure of the latter to cope with the rising tide of refugees and asylum-seekers in ways which minimally conform with Europe’s declared humanitarian standards; in addition, even the Treaty-based freedom of mobility within the EU has come to be challenged by several Member States;
- within many Member States, we see an escalating erosion of *party systems* (which is at best marginally compensated for by the halting emergence of a transnational European party system). While centre-left and centre-right parties are losing electoral support (as well as the capacity to defend lost ground in terms of their hegemonic capacities as they have largely become indistinguishable administrators of political and economic realities to which, they claim, ‘there is no alternative’), all countries on the ‘winner’ side of the Euro-divide have seen the rise of rightist populist parties, making, together with the rise of leftist protest parties in some of the ‘loser’ countries, for an unprecedented political destabilisation of Member States and, by implication, the EU polity as a whole;
- the Ukraine conflict and the confrontation with Russia which is critical not just because of its threatening military implications but also because it epitomises the failure of the EU’s Eastern Neighborhood Policy (ENP) as well as the ambiguities involved in the accession of Serbia and the other aspiring Member States of the Western Balkans;
- the EU’s helplessness and virtual strategic irrelevance in the face of the armed conflicts in its Middle East and North African (MENA) neighborhood, including the precarious geopolitical situation of Israel and its failure to settle the conflict with the Palestinians in the Occupied Territories.

With the (partial) exception of the latter crisis, all the others are to a large extent ‘European’ by origin – endogenous and home-made by Europeans and their political elites. They have been caused by deficiencies inside the institutional system of the EU – be it by inadequacies of its institutional structure itself, be it by the absence of political leaders with the requisite far-sightedness and the failure to adopt adequate precautionary policies. This shorthand list of current crises affecting the EU serves us just to highlight the discrepancy between these events

and developments, on the one hand, and the basic normative commitments of the EU to principles of citizenship, constitutionalism, and democracy. To simplify: if these principles had been more vigorously adhered to and implemented, the impact of those cumulative crises could either have been prevented from emerging in the first place or more effectively coped with after it has manifested itself. The resulting problem can be summarised in the question: Which principles and which institutional embodiments of them are called for in order to strengthen the EU's capacity to cope with those crises and prevent their perseverance or repetition? Unless that key question can be answered, the EU is not just caught in a context of crises, it is itself the core and ongoing generator of crises, and eventually likely to become its victim.

### **The crisis of the EU: two cases**

Let us briefly look at two instances where the political realities of the EU stand in blatant contradiction to its core normative principles, thus entangling it in a profound crisis of consistency and credibility. First, *the Greek debt crisis*. In January 2015 the Greek people elected a new political force into government which credibly vowed to end the decades-old system of clientelism, nepotism, corruption, excessive defence spending and tax evasion which eventually had driven the country to the verge of state bankruptcy and ungovernability. The previous government had not only seen itself forced to accept harsh restrictions of its fiscal policies imposed by its private and public creditors which saved Greece from insolvency, but also to subject its government to a strict regime of monitoring and control of its economic and social policies which large parts of the Greek population – and beyond in the European Union – considered as humiliating and as being contrary to any semblance of democratic self-rule. To end this external control imposed by the 'Troika' on the Greek government, which amounted to a veritable political expropriation of its constituency, has been the main promise in the victorious campaign of *Syriza*. The new government, sworn in on January 26, 2015, entered into negotiations with the finance ministers of the Eurozone with the objective of modifying the 'reform program' which the previous government had been forced to adopt by Greece's international lenders (ECB, IMF, EU Commission [representing the lending states of the Eurozone]). While the economic effects of that programme of 'austerity', 'structural reforms' and privatisation of state held assets were to a large extent plainly counterproductive by increasing rather than reducing the debt/GDP ratio, the social suffering it produced has been positively disastrous as the 'reforms' resulted in unprecedented levels of unemployment as well as the 'internal devaluation' of wages, pensions, and public services. Yet the Eurozone finance ministers insisted upon the legal bindingness of the obligations which Greece had incurred. In the name of *pacta sunt servanda* and under the self-righteous (if evidently mistaken) presumption of supranational paternalism ('we know better what is good for you than you do yourself'), Greeks were administered a poisonous medicine to the further taking of which the majority of the electorate expressed its clear refusal.

This election result indicated the desperate attempt to replace an old regime of two entrenched and corrupt centrist parties with a fresh political force. This old regime was, after all, one that had collaborated in producing the economic and fiscal disaster of Greece and had run the country down to virtually the status of a third-world country. Yet this democratic change of government was in no way respected and appreciated as such within the EU: it did not give rise to an EU-wide reconsideration of the appropriateness and viability of the conditions which have produced the misery of large parts of the Greek population. To the contrary, the unmistakably expressed will of the people was dismissed as unworthy of respect, giving rise to the bitter comment of one of the Greek ministers ‘If we cannot change economic policy through elections, then elections are irrelevant’<sup>1</sup>. While in the realm of international politics this democratic argument is normally overruled by the cold logic of creditor-debtor relations, the democratic nature of an electoral outcome should provide a compelling argument in the framework of the EU which proclaims ‘democracy’ as one of its core values. Is not the EU’s commitment to democracy, more than anything else, an essential element of its political identity? Instead, since the beginning of the Euro crisis in 2008/2009, there is a growing tendency among EU Member States towards mutual distrust and nationalist-chauvinist quarrel which politicised their economic and cultural diversity and heterogeneity to an extent which is on the verge of undermining the entire European integration project. The idea of a supranational, i.e., heterogeneous democracy, while deeply underlying the philosophical idea and the institutional setup of the EU, is largely absent in the conduct of its policies.

The events of Greece’s turbulent summer of 2015 provide compelling evidence of how the European ‘institutions’ have used their power to overrule the results of a democratic political process in one of the EU member states. Here is a brief recapitulation of the time line.<sup>2</sup> On June 25th, the ‘Troika’ (a supervisory body consisting of representatives of the ECB, the IMF and the European Commission installed after the adoption of the first Greek bailout program of 2010) specified its harsh austerity conditions for a renewed (third) Greek bailout programme. In mid-2015, the country had arrived at a truly dismal economic situation, unparalleled in any advanced country during peace time: GDP was down 25 per cent since 2010, unemployment averaged at 26 per cent (with a large part of the unemployed receiving no social insurance benefits whatsoever), wages went down by 38 per cent and pensions by 45 per cent. 32 per cent of the population live below the poverty line and the critical ratio of sovereign debt to GDP was approaching 180 per cent. The solvency of Greek banks is threatened by huge amounts of non-performing loans extended to both the public and the private sector.<sup>3</sup>

On June 27th, Prime Minister Tsipras called a referendum on the bailout conditions, which was held on July 5th. 62 per cent of voters rejected those conditions. On July 8th, Tsipras applied for an emergency loan of the European Stability Fund. Contrary to the vote of more than three fifths of voters, Tsipras had to accept the terms of a third bailout package during the decisive negotiations that took place in the Euro group in the night of July 12th in Brussels. This package provided for conditions which are even considerably *harsher* than those rejected

by Greeks in the referendum. They stipulated further spending cuts (among other things concerning pensions), tax rises designed to achieve a primary budget surplus of 3.5 per cent of GDP by 2018, large scale privatisation of state-owned assets as well as a detailed schedule specifying which legislation must pass the Greek parliament within days or weeks, respectively.<sup>4</sup> Moreover, the Greek government 'commits to consult and agree with the European Commission' on every step of this legislative agenda, practically handing over Greek law-making powers to a non-elected body in Brussels. Jürgen Habermas rightly speaks of this exercise of raw power as the '*de facto* relegation of a member state to the status of a protectorate [that] openly contradicts the democratic principles of the European Union'.<sup>5</sup> The two components of this blackmail were (a) the Commission dictating the legislative agenda and decisions of the Greek parliament (which was given two days to pass required legislation, which it did on July 15th) by (b) forcing Prime Minister Tsipras to perform a plain U-turn<sup>6</sup> regarding the majority will the Greek electorate had expressed – and Tsipras had strongly advocated – just a week prior to the negotiations of July 12th. 'Ten days after 62 per cent of the voters rejected the terms of a harsh bail-out package, the country's parliament voted with clenched teeth for an even tougher set of reforms.'<sup>7</sup>

How could this brutal act of overpowering the will of the Greek people succeed? When submitting to *power* (as opposed to force or coercion), the less powerful party in a conflict makes a *choice* opting for the 'lesser evil' among two or more alternatives which are presented to it by the more powerful player. The latter exploits a condition of asymmetrical dependency for serving its own interests: Trivially, Greece depends more strongly on the ECB and the other Eurogroup members than these depend on Greece. The logic of the situation was the following: As Greece needed to obtain financial assistance from the EU in order to prevent an imminent meltdown of its banking sector (and, as a consequence, its entire economy), the country's population and its government were given the choice between being politically expropriated (deprived of the 'ownership' of even its legislative agenda, let alone sovereignty) and being instantaneously plunged into an economic disaster. Yet the negotiators on the other side of the bargaining table had also to worry about the consequences of the latter alternative, the disaster, being realised.

These worries were twofold. On the one side, the appearance and subsequent reputational and political damage had to be kept under control that negative economic consequences for Greece were caused by the pressure exercised by the majority of Eurozone members and of Germany<sup>8</sup> in particular. On the other, a 'Grexit' (or, even more so, a 'Graccident' in the form of an unregulated implosion of the Greek banking system and economy with all its unpredictable spillover effects) might have consequences that affected, through contagion or a domino effect, other members of the Eurozone, thus bringing the entire Euro system into jeopardy – an outcome and potential self-inflicted damage for which the protagonists of a tough approach to the bailout conditions imposed on the country would have had to anticipate blame. Given this dilemma, and also given the fact that the vast and deepening problems of the Greek economy could not possibly be

solved, for legal reasons and because of the statutory irreversibility of the common currency,<sup>9</sup> by simply expelling the country from the Eurozone, the actual pressure used against the Greek negotiators had to be *disguised*.

For it is these two worries that appear to have motivated the German Minister of Finance to draft and circulate among Eurogroup negotiators (as well as leaking it to the media), one day prior to the negotiations scheduled for the evening of July 12th, the unprecedented suggestion to resolve on a procedure of a ‘temporary Grexit’, i.e. the creation of an option for Greece to leave the common currency zone for a period of five (or more) years with the (entirely unrealistic) option of re-entry at a later point.<sup>10</sup> Greece’s making use of this option was actually incentivised in Schäuble’s proposal so as to make it tempting and to create the appearance of a completely *voluntary* move. This was done by the promise attached to it of technical, humanitarian and other assistance, as well as other gestures of ‘generosity’ extended to the country once it accepted the leave offered to it.

Had the Greek government actually accepted this poisonous gift, it would have instantaneously relieved Schäuble and the other negotiators of the two above worries: It would have endorsed the appearance of German generosity, confirmed the narrative of a voluntary exit, and insulated the Euro system as a whole from the Greek crisis and the menace of spillover effects. Moreover, it would have taught a lesson to whoever might be tempted to emulate the Greek mistake of ‘excessive’ indebtedness. It would also have camouflaged the exercise of power, making its outcome appear as a freely adopted mutual agreement. Yet it would also have been an act, on the part of the Greek authorities, of causing near-suicidal damage to their country: For a ‘voluntary’ exit would have cut off the country from European structural funds (worth transfers of five billion Euros p.a.) and it would have necessitated the adoption of a heavily devalued national currency with the effect of substantially increasing the country’s – Euro-denominated and hence entirely unsustainable – debt burden. Given this configuration of alternatives, the choice Greek negotiators made was understandably and rationally the option of submitting to blackmail.

In retrospect, this outcome is criticised on two counts: for being *illegitimate* as to its mode of coming into being and for being *ineffective* concerning its promise to solve the problems of the Greek economic, fiscal and debt crises in a durable fashion. As to its legitimacy (its capacity to oblige compliance on normative grounds), the following objections continue to be raised.<sup>11</sup> In response to its request for ‘stability support’ addressed to the European Stability Mechanism on July 8th, the Greek government was offered a third ‘Memorandum of Understanding’ (MoU) that specified, on its 32 pages, the legislative measures the Greek authorities would have to adopt by which month and year during the period of 2015 to 2017. This ‘extraordinarily detailed list’<sup>12</sup> implied that legislative powers in the areas of fiscal policy, the financial system, economic policy, and the modernisation of all major branches of public administration and the judiciary were practically to be ceded to the Commission and agencies (such as the International Labor Office and the OECD) which the Commission has endowed in the Memorandum with advisory and supervisory roles. In general, the Greek government must ‘commit to consult and agree with the European Commission ... on all actions relevant for

the achievement of the objectives of the Memorandum ... before these are finalised and legally adopted'.<sup>13</sup>

Unsurprisingly, this wholesale usurpation of Greek law-making authorities by EU institutions met with the objection, in Greece itself and far beyond, that it amounts to a massive violation of the democratic principles on which the EU is supposedly built. Moreover, the politically non-accountable EU agencies who have authored the list of conditions that Greece must fulfill in exchange for a loan of 86 billion Euro for a period of three years vindicate themselves, by implication, with the wisdom that established two interrelated truths, the practical implications of which are to be paternistically enforced. First, the truth that the fully compliant implementation of the letter of the MoU will be compatible with *political* stability within Greece; second, that such implementation will be conducive to the *economic* recovery of Greece and its social, economic and fiscal viability. Both of these propositions, however, are heavily contested.

As to the first, it relates to the issue of legitimacy. The MoU is criticised for being in outright violation of the Greek people's sovereignty and self-determination. Given the political will expressed in the referendum of July 2nd, it is deemed 'inconceivable that any circumvention of the referendum outcome can ever be "in the interest of the Greek people"'.<sup>14</sup> Moreover, an implied violation of human rights (such as the right to health services) is seen by critics in the specification of the MoU concerning fees to be collected by hospitals. Legitimacy complaints have also been raised concerning the attempted blackmail stemming from members of the ECB Governing Council concerning a discontinuation of the ECB's emergency assistance as well as the threats of a 'temporary Grexit' coming from the German minister of finance. At the level of principle, the question is being raised as to why, in case a debtor turns out to be insolvent and the respective loan 'non-performing', the problem must be solved at the expense of the *debtor*, while the *creditor* (who quite arguably has entered into an evidently risky lending transaction expecting that he would be bailed out at a third party's expense) does not suffer any damage. To the extent this argument from fairness is valid, it would result in a justified demand for debt repudiation.

Finally, as to the issues of effectiveness, the assumed conduciveness of legislative measures imposed upon Greece (austerity, deregulation, reforms, privatisation of state-owned assets) to the economic recovery of the country is wide open to question. The primary budget surplus required – 3.5 per cent of GDP by 2018 – obstructs the possibility of stimulating growth by means of fiscal policy. Being the third MoU since 2010, one might have expected the Commission and its experts to have learned from the plain counter-productivity of the two previous editions of a trade of loans for austerity measures. The above-quoted indicators of the condition the Greek economy finds itself in, in 2015, should have provided ample evidence of the counterproductive effect of the previous programmes. According to Christine Lagarde, the IMF's Managing Director,

Greece's debt has become unsustainable ... Greece cannot restore debt sustainability solely through actions of its own. ... Greece's debt ... is expected

to peak at close to 200 per cent of GDP in the next two years. ... Greece's debt can now only be made sustainable through debt relief measures that go far beyond what Europe has been willing to consider so far.<sup>15</sup>

If that is so, the very term 'debt' as a designation of the funds that have been transferred to Greece by private and public lenders must rather be seen to be nothing but a mendacious misnomer, invented and used for the purpose of demolishing the economic fates of an EU member state while buying (at most) three years worth of time before the issue will be on the table again.

Our second case of the EU's violation of its own core commitments relates to its *policies of asylum and immigration*.<sup>16</sup> The Arab Spring of 2010/2011 which had elicited many hopes for the liberation of the Arab societies from their authoritarian yokes – hopes which had been praised and applauded by northern neighbours on the European continent – in fact ended in a genuine political and humanitarian nightmare, not to mention the proliferation of state failure in Yemen, South Sudan, and Somalia and the long term consequences of the US-initiated interventions in Iraq and Afghanistan. Civil wars in Libya, Syria and Iraq and a harsh quasi-military dictatorship in Egypt triggered a huge flood of refugees which has already turned into a major challenge to the small neighbours of Syria, Jordan and Lebanon, and even to Turkey. But Europe was affected as well. Substantial numbers of these war refugees tried to escape to Member States of the EU.

The EU's reaction to the plight of refugees from civil wars and their desperate attempts to reach European soil is in no way consistent with its and its Member States' commitment to the protection of human rights. The competence for asylum and immigration was transferred from the Member States to the EU in 1997 through the Amsterdam Treaty. What this transfer of sovereign rights of Member States envisaged was a European policy of asylum and migration which recognized the right to asylum 'with due respect' for the rules of the Geneva Refugee Convention of 1951<sup>17</sup>. This Convention includes, *inter alia*, the prohibition of *refoulement*, i.e. the expulsion or return of a refugee 'to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'.<sup>18</sup> But in the legal framework of the EU an important qualification applies: the EU commits itself to the protection of refugees 'in accordance' with the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).<sup>19</sup>

These treaties establish, as a key condition for the exercise of the right to apply for asylum in the EU, the physical presence of the applicant in the territory of one of the EU Member States, as now the new EU-Directive on the procedural requirement of asylum application explicitly specifies.<sup>20</sup> Hence, the actual chances of refugees to reach the border of an EU member state and to cross it in order to apply for asylum determine the extent of the protection of asylum-seekers' rights to which the EU has committed itself. Obviously the EU can influence those chances of refugees, either by facilitating the entry into its area of protection or by erecting obstacles to access. A cursory glance at the treaties and the implementing provisions clearly display the EU's dominant concern to prevent refugees from

entering the territory of an EU member state and thus to avoid the applicability of the *refoulement* prohibition as far as possible.<sup>21</sup> Rights are being guaranteed on paper, but access to places where they can be claimed is barred. Refugees and asylum seekers experience the EU as 'Fortress Europe'.

But this 'Fortress Europe' is far from internally solid and cohesive. Consisting of a plurality of 28 'independent duchies', each of which is interested in minimising the costs of the humanitarian obligations which they regard primarily as a burden, it is not easy to develop a common asylum and immigration policy in the spirit of 'solidarity and fair sharing of responsibility, including its financial implications, between the Member States'.<sup>22</sup> In fact, the fairness of the rules and mechanisms which determine the responsibilities for taking charge of the refugees who seek protection in the EU is questionable. According to the so-called Dublin rules the Member States with external borders are charged with hosting the arriving refugees and processing their asylum claims. This principle is underpinned by two complementary elements, namely, the Member States' determination of, first, safe third countries, in which the application of the Refugee Convention is considered to be assured to the effect that anybody who enters a EU Member State from such a state does not qualify for the right to asylum, and, secondly, of safe countries of origin of an asylum applicant actuating the rebuttable presumption that an applicant from such a country is not supposed to be subject to persecution on the grounds laid down in the Refugee Convention. These rules were devised as an incentive for the border countries of the EU to efficiently protect the external borders of the Union and thus to limit the number of asylum claimants in the EU.

The implementation of these rules does neither satisfy the standards of the decent treatment of applicants for international protection laid down in a separate EU Directive, nor does it fulfill the mutual promise of solidarity among the EU Member States. Quite to the contrary, the dispute about every Member State's fair share of the burden to receive refugees gave rise to mutual resentment among the Member States of the EU.

As regards solidarity among Member States, the state responsible for the processing of the asylum applications is largely left alone. Once a refugee has entered an EU Member State, this state can never get rid of this responsibility without the consent of the other Member States (which is normally denied). If a refugee leaves this country and travels to another EU Member State, be it because his or her application has been rejected, be it that (s)he withdrew it or did not await the end of the procedure, the state that is responsible must take him or her back on the request of the Member State into which the refugee moved. As the vast majority of refugees to the EU take the route via the Eastern Mediterranean Sea, its coastal states Malta, Greece, and Italy have to bear the lion's share of taking charge of them, including the obligation to take back those who left the coastal state for another EU Member State – an obviously unfair scheme of burden sharing. True, in 2010 the EU established a European Asylum Support Office (EASO) which should provide adequate support to the relevant services of the Member States responsible for implementing first-entry principles. But it is restricted to facilitating, coordinating and strengthening practical cooperation

between Member States, while relocation within the Union is only possible on an agreed basis between Member States.

The Dublin system is not only unfair to some Member States. It also affects negatively the rights of the asylum claimants. It presupposes an EU-wide common and relatively high standard of dealing with immigration; but, as the *European Council on Refugees and Exiles* (ECRE) stated in an assessment of the Dublin system, this presupposition 'is demonstrably inaccurate'.<sup>23</sup> The overload for the states that are responsible, merely due to their geographical location, means they cannot always provide decent accommodation, food and clothing, nor an appropriate duration in the proceedings about the outcome of the asylum seeker's application. Living conditions in the reception facilities, the quality of the application procedures and the acceptance rates diverge extremely between Member States. In several cases the European Court of Human Rights had to judge that asylum seekers in Greece – a country whose infrastructure has been on the verge of collapsing under the pressure of mass immigration for a long time – are 'likely to be subjected to a humiliating process, given the known procedural shortcomings of the asylum system'.<sup>24</sup> Some countries, like Germany, waived temporarily their right to send asylum seekers back to Greece on the ground that this country could not guarantee compliance with the EU standards for the reception of asylum-seekers.

Obviously, in September 2015 the Dublin system collapsed and definitively revealed the critical condition of the EU. It all started again – with Hungary, an almost ironic repetition of this country's triggering role in the great sea change of 1989. Since the beginning of 2015, Hungary, a country of less than ten million people with borders on non-EU-Members, Serbia and Ukraine, had experienced an inflow of nearly 150,000 asylum seekers at its border with Serbia which increased up to 3000 applicants per day in the first week of September – the fourfold of the numbers of 2014. The vast majority intended to migrate to Germany and hence refused to register as asylum claimants in Hungary. In June, the Hungarian government began with the construction of a border fence which did not only close its borders to Serbia, but, contrary to the Schengen Conventions, also to its fellow Member State Croatia. On the 6th September, 'after intense communication' between Budapest, Vienna and Berlin, the German Chancellor declared that Germany would respond to the humanitarian crisis in Hungary in the spirit of compassion and opened its borders for thousands of refugees that were jammed unsheltered in Budapest. However, the German government insisted that this act was a unique response to an exceptional situation of 'acute' distress which did not mean the suspension of the binding force of the Dublin rules.

Chancellor Merkel's magnanimous gesture opened the floodgate for an unmanageable mass entry of asylum claimants arriving via the 'Balkan route'. The opening of the borders of Germany, the target state of the vast majority of refugees, boosted the pressure on the borders of the upstream countries of the Balkans and triggered a considerable pull effect on the migration into the EU in general and to Germany in particular. Moreover, this flow of refugees has been self-augmenting as a conflict between EU Member States and signalled to potential refugees a 'now-or-never' condition. Largely defenceless against the upsurge of an unending flow of

## Chapter Two

# The Significance of Cognitive and Moral Learning for Democratic Institutions<sup>\*</sup>

Ulrich K. Preuss

The idea that power is legitimate only when it is granted by the will of the ruled demonstrates the normative superiority of democracy above all other forms of governing. The basic idea that freedom and authority are reconciled with each other is constitutive only for democratic models of power and indicates their uniqueness. Other concepts of political rule may make manifold promises of salvation in order to justify the individual's subordination under the requirements of their respective pledges; only democracy is a model of self-rule of the people.

This unique quality makes democracy also, in a specific manner, vulnerable to the weaknesses of human nature. There are other forms of government, such as theocracies, monarchies, aristocracies, dictatorships, and rule through specially qualified individuals (holy persons, the Lord's anointed, warriors, the initiated and the like). In a democracy, it is the ordinary citizen who rules. That is, the functioning of democracy is founded upon the intellectual and moral ordinariness of people. It is then either by chance or because of a skillful institutional arrangement that democratic power is exercised by outstanding political leaders. The omnipresent complaints about the deficits or even failure of democracy can essentially be reduced to the basic argument according to which democracy has until now not found reliable mechanisms for the selection of the persons most able to exercise democratic rule. That is a serious problem, on which I, however, will not elaborate here, because there exists a graver problem, namely how democracy can perform its mission of both effective and legitimate rule despite the uncertainties about the appropriate qualities not only of the democratic leaders but of the people themselves, whose will in the last instance determines the course of democratic politics. In other words, does democracy dispose of equipment that protects it against the weaknesses and failures of the *demos*? This is, of course, a question about the relationship between persons and institutions in the democratic system.

In what follows, I start with a brief reminder of one classical answer to this problem in democratic theory, Rousseau's claim that the identity of the rulers and the ruled ensures the good quality of democratic decisions, and its fallacy (I). In a

---

\* 'The Significance of Cognitive and Moral Learning for Democratic Institutions', in I. Shapiro, S. Skowronek and D. Galvin (eds), *Rethinking Political Institutions: The art of the state*, New York – London, New York University Press, 2006, pp. 303–321.

second step of the argument, I show that modern complex societies are increasingly confronted with cognitive and moral problems, which require methods of solution for which the democratic means of problem solving appear insufficient (II). I then turn to the issue of learning as a problem-solving method used not only by persons, organisations, and institutions but also by political systems (III). Thereafter, I deal with the relationship between learning and power. If, according to the famous statement of K.W. Deutsch, ‘power is the ability to afford not to learn’,<sup>1</sup> the question arises whether democracy – the form of government in which the people possess the supreme power here includes the right of the people not to learn. I make the claim that the legitimacy of democratic institutions in modern societies requires openness for generating, preserving, and enhancing both cognitive and moral knowledge (IV).

### **I. A democratic answer to a democratic problem, and why it fails**

When we reflect on the possibilities of increasing the quality of democratic governance, we always have to take into account two discrepant elements: the moral and cognitive qualities of the people who rule themselves and the impersonal functioning of institutions – rules of action that impose themselves upon the subjectivity of the individuals and that protect the people against their inclinations toward myopia and irresponsible behaviour.<sup>2</sup> It is the well-known tension between *ratio* and *voluntas* that is particularly relevant in democracies. The core element of democracy – the people’s will as the source of supreme authority – embodies a deep tension: the people’s will in its purest and most authentic quality requires its immediate presence, and, if this is not possible, its utmost mirror-image representation.<sup>3</sup> However, the popular will in its quality as the source of supreme authority requires the willingness of the people to mediate their more or less spontaneous intuitions, to launder, as it were, their preferences, to reflect on the effects of their will power on others who are not present but who are affected by their decisions; that is, to assume responsibility for their actions. In other words, while the former element – outwardly more authentically democratic – is prone to foster irrational and irresponsible behaviour,<sup>4</sup> the latter – at first glance less democratic – is likely to be more beneficial to the people.

As we know, Rousseau and all democratic theorists who follow his line of reasoning deny this kind of tension. For them, the centuries-old question of what the ideal of a good and just government demands and by which criteria of justice the rule of one person over another should be evaluated has an amazing, simple, and suggestive solution. Since the end of the eighteenth century, democracy has been recognised as the form of just rule because it is tantamount to the self-rule of the people, that is, a political order in which those who are subject to the rule are at the same time its authors. Rousseau was the first who gave this answer of seducing simplicity: when all decide over all collectively, that is, when all give the laws to themselves, then no injustice can be done to anybody. In such a case the general will is always correct, because ‘there is no one who does not take that word “each” to pertain to himself and in voting for all think of himself’.<sup>5</sup> What comes into being is a complete mutuality among the members of the community,

which prevents any kind of preference or discrimination whatsoever. In a strictly secular understanding of justice, this means nothing other than full identity of the people with itself, which signifies perfect self-determination as the means for perfect justice; one cannot be unjust to oneself. In this situation, the people ‘[are] in the position of a private person making a contract with himself’.<sup>6</sup>

Unfortunately, this conclusion suffers from a serious flaw. It does not take into account that the formation of the general will does not mean only self-binding but also binding others and being bound by others. Those who bind themselves through agreement within a collective resolution cannot unbind themselves without the agreement of all others. Collective self-determination is much more heteronomy than autonomy. If this is so, then the idea of responsibility comes into the fore; while in a framework of self-determination responsibility is irrelevant, ruling over others requires a minimum of concern for their welfare. This in turn requires that the rulers’ decisions be appropriate in terms of their problem-solving capacity, that is, they must be based on both the knowledge of the relevant information and the alternatives that are available and the consciousness of principles that serve as criteria for the choices among those alternatives. In other words, responsibility demands cognitive and moral qualities of the rulers. Rousseau offered only a theory that explained why the general will was inherently just; for this theory, the cognitive and moral truth of the general will was of no systematic importance, because even a cognitively and morally deficient decision would not impair the legitimacy of the rule of the general will. It was the authorship of the people and not the quality of the decisions of the general will that created the legitimacy of democratic rule. Moreover, and this was of utmost importance for Rousseau, it was this perfectly mutual character of the general will that safeguarded individuals’ freedom even under the condition of social dependence. For Rousseau and his contemporaries, living under the despotism of a feudal-absolutist regime, the protection of individuals’ freedom was certainly the essential criterion for the evaluation of the quality of the collective will of the people. Today, however, we value democracy not only because it embodies the best available conditions of individual freedom but also because it is a political system that embodies the most favourable conditions for the inducement of collective reason, wisdom, and morality.

Rousseau himself suspected that these different requirements for the quality of democratic resolutions do not always stand in harmony with one another. A just collective decision that does not violate anybody’s individual autonomy may still be wrong and damaging for the community.

How can a blind multitude, which often does not know what it wants, because it seldom knows what is good for it, undertake by itself an enterprise as vast and difficult as a system of legislation? By themselves the people always will what is good, but by themselves they do not always discern it. The general will is always rightful, but the judgement which guides it is not always enlightened. It must be brought to see things as they are, and sometimes as they should be seen; it must be shown the good path, which it is seeking, and secured against

seduction, by the desires of individuals; it must be given a sense of situation and season, so as to weigh immediate and tangible advantages against distant and hidden evils. Individuals see the good and reject it; the public desires the good but does not see it. Both equally need guidance. Individuals must be obliged to subordinate their will to their reason; the public must be taught to recognize what it desires.<sup>7</sup>

Rousseau speaks here about wrong collective resolutions in a twofold sense: with respect to both their cognitive weaknesses and their moral faults. A decision is wrong in a cognitive sense if the people make a decision in the absence of a more enlightened account of what would be good and just ('the public desires the good but does not see it'). On the other hand, resolutions are morally insufficient when they have been made in a situation where the people have succumbed to the temptations of passions, where, in other words, the citizens recognise what is normatively correct but reject it. In the former case, the cognitive capacity is wanting; in the latter the control of reason over pure will is lacking. As we know, Rousseau pulls from this error-prone collective will the conclusion that a people actually require a superior intelligence that could safeguard the inherent cognitive and moral quality of the law, who 'could understand the passions of men without feeling any of them, whose happiness was independent of ours, but who would nevertheless make our happiness his concern'.<sup>8</sup>

Had Rousseau been less preoccupied with the idea that the people had to be physically present rather than being represented (e.g., in a parliament) in order to form a collective will, he might have been able to find a solution to this problem in the concept of institution. Institutions allow the conservation and the transfer of a person's knowledge and will to future generations. Just as much as, for instance, patents can be understood as private stores of knowledge<sup>9</sup> that continue to exist after the death of the person who created this knowledge, the constitution is a store of public knowledge in that it objectifies the will of the constituent powers for the use of subsequent generations.<sup>10</sup> Given that modern law (including modern constitutions) can be amended any time according to the very rules of the constitutions thanks to its positivity, constitutions can be regarded as the stores of the knowledge and experience of the chain of generations that lived under the same, if more or less, frequently amended constitution.<sup>11</sup> Depending upon the anti- or pro-institutionalist character of a political system, a people is doomed to gather experience for each generation anew or it can build upon the past experiences of its predecessors. Obviously, the former method is much more resource-consuming than the latter, which may account for the relative economic lag of some societies if compared with others that are more institution-friendly in their system of government.

It is plausible to assume that this correlation between knowledge and institutions, in particular between knowledge and the constitution, escaped Rousseau's attention because, for him, the question of how political power could be justified stood clearly in the foreground of his political philosophy. Since the rise of the modern European state in the seventeenth century, coercive power of

the sovereign state had become the pivotal means of societal integration,<sup>12</sup> and political philosophers from Hobbes through Locke to Rousseau had developed systems of reasoning that aimed at limiting and legitimising the state's sovereign power through the natural rights of its subjects. Hobbes was primarily interested in the unconditional supremacy of state power over a chaotic plurality and a conflict-ridden society; Locke aimed at restricting state power firmly to its purpose to protect the natural rights of the individuals; and Rousseau, most ambitiously, claimed to have reconciled sovereign power and individual freedom in the idea of the general will emanating from the collectivity of the ruled who had turned rulers.

Yet, beyond these stark differences among them, these three philosophers converged in one particular point: power was the essential social and political energy whose quality determined the nature of the polity. When they argued for their respective conception of a good polity, they argued for or against a particular kind of power, which in their framework was, positively or negatively, the strategic resource for the shaping of the polity. In a political community whose social integration is mainly organised through the medium of power, the limitation and legitimating of this very power is the central concern. Hobbes was concerned about its supremacy, which he deemed necessary for the sake of imposing social discipline upon the society. Rousseau aimed at its preeminence because it secured the integrity of the general will. Locke, conversely, sought to limit it for the sake of the individual's freedom.

## II. Problems that cannot be solved by power

Yet, power, understood in the Weberian sense of the 'probability that one actor within a social relationship will be in a position to carry out his own will despite resistance',<sup>13</sup> is not a resource that is able to solve all problems of a modern society. In particular, an increase of power does not mean an upsurge of problem-solving capacity, just as a reduction of power is tantamount to the weakening ability of the polity to cope with its problems. Unlimited power undermines sovereigns' authority because they cannot make credible promises, making them unable to allocate trust and, consequently, to engage in long-term social relations,<sup>14</sup> while self-limited power, as the case of Ulysses and the Sirens shows, can increase the range of options of the self-bound person.<sup>15</sup>

Moreover, coercive power has ceased to be the major force that ensures the social discipline of the individuals and the coherence of society. The basic conflicts of advanced contemporary societies cannot be understood in the conceptual framework of 'individual freedom versus sovereign power'.<sup>16</sup> The functional differentiation of modern societies; the acceleration of technological innovations and socioeconomic transformation; and processes of globalisation, with its shifting patterns of production, trade, financing, migration, environmental use, cultural orientation, and political domination,<sup>17</sup> have changed the character of conflicts and problems with which these societies have to cope. Although the traditional conflicts around socioeconomic status and cleavages, distribution and social justice, persist (though in different modes),<sup>18</sup> a new class of problems has

turned up that follow a different logic. These conflicts include the relationship of humans to nature and to humankind's own technology; the globalisation of risks caused by people; the relationship between living generations as well between living and future generations; and the relationship between the two sexes, between various ethnic groups, and the like.

It is difficult to recognise a common positive attribute in these conflicts, but there is a negative one: none of these relationship problems can be solved with the characteristic and successful means of the modern constitutional state, namely power, law, and money.<sup>19</sup> Rather, we cannot fail to see that complex societies and their constituent parts exhibit a distinct functional need for responsible and ethical mass orientations, which can neither be compensated for by an ethic of responsibility on the part of elites and experts nor satisfied by falling back on the routinised, everyday moral orientations of the 'ordinary citizen'.<sup>20</sup> More and more, the individuals' sociability is induced less by the coercive authority of the state and built instead upon their self-regulatory capacity, that is, their own reasonable view and judgement. Political communities, in which those capacities of citizens are valued or at least seen as important, can be denominated as primarily guided by morality and knowledge.

Of course, this does not mean that previous societies, regulated mainly through power and obedience, did not require cognitive and moral capacities of their members. No social and political system could survive without a minimum standard of intellectual and moral qualities of its members. This is why, after the establishment of the absolutist state in the seventeenth and eighteenth centuries in Europe, the princes set up compulsory education in order to safeguard elementary cognitive abilities among their subjects, whereas the moral qualities were created by the churches.<sup>21</sup> The objective was mainly the learning of obedience as commanded by the state and its officials. Yet after the transformation of the absolutist into the constitutional state, of the subaltern subjects of a statist power machine into the citizens of a democratic republic, and after the change of the agrarian into the industrial, urban, individualised, and interdependent modern mass society, the requirements on the moral autonomy and the intellectual judgement of the individuals had considerably increased.

In the postindustrial society, whose productivity is dependent on individuals' knowledge and their ability for methodic acquisition of knowledge and information, these demands have undergone a further transformation. The modern and knowledge-based society values the disciplined acquisition and application of knowledge about industrial machinery and processes, as well as the ability for cognitive and moral orientation in extremely expanded, specialised, and complex patterns of action. The chains of action in which the individual is involved are so long and complicated that it has become ever more difficult to evaluate the social effects of one's actions according to the logic of a linear causality. To live a responsible personal life increasingly requires an almost scientific attitude and reflection of everyday life observations and experiences and the capacity and readiness to refer complex, uncertain, and often litigious connections to one's own moral constitution and, finally, to draw practical consequences from it.<sup>22</sup>

## Chapter Three

# Democratic Institutions and Moral Resources<sup>\*</sup>

*Claus Offe and Ulrich K. Preuss*

### **Modes of production versus modes of participation**

It has been observed that ‘democracy’ has become a universal formula of legitimation for a broad range of radically different societies and their respective modes of governance and political participation.<sup>1</sup> By the mid-1970s, there was virtually no regime between Chile and China that did not rest its claim to legitimacy upon being ‘democratic’ in some sense, or at least upon its being in the process of some transition to some version of democracy. Thus the term ‘democracy’ seemed to have lost its distinctiveness: it failed to highlight significant differences between socio-political arrangements. To be sure, one still used to add qualifiers such as ‘liberal’, ‘authoritarian’, or ‘people’s’ democracy in order to distinguish specific types and structural particularities of governments; but these, important as they may be, were often considered to be of minor significance compared with other dimensions of comparative analysis.

It has become common in the twentieth century to characterise societies with respect to *their socio-economic system* and, particularly, to the economic and technological rank they have achieved within the world economy. It has become much more common and respectable to divide the world conceptually into the ‘First’, ‘Second’, ‘Third’ and sometimes ‘Fourth’ worlds than to divide it into its ‘democratic’ and its ‘non-democratic’ parts, as the latter categorisation basically presupposes an authoritative definition of the contested notion of ‘democracy’. Differences concerning various *forms of government*, and particularly specific variants of ‘democracy’, seemed to belong to the superstructure of societies – and to the arsenal of ideological weapons in the worldwide conflict between ‘capitalism’ and ‘socialism’. What tended to be considered objectively distinctive – and the most basic dimension of which political variables were merely derivatives – were socio-economic and technological characteristics, or ‘modes of production’.

Evidently, or so we wish to argue, this conventional and convenient ‘materialist’ way of portraying societies is currently losing much of its plausibility. There are a number of reasons for this. First, the notion that national societies can be unequivocally tied as a whole to some clear-cut ‘mode of production’ or ‘stage

---

\* ‘Democratic Institutions and Moral Resources’, in D. Held (ed.), *Political Theory Today*, Cambridge, Polity, 1991, pp. 143–171.

of development' is clearly obsolete. There are as many and as diverse varieties of 'capitalism' (ranging from Austria to Singapore) as there are of 'socialism' (ranging from Norway to North Korea); as far as 'underdevelopment' as an umbrella category is concerned, the analogous point has been made by Brazilian intellectuals who refer to their country as 'Belgindia', meaning 'Belgium within India'. It appears to us to be of great and not yet fully perceived significance that it is precisely the 'socialist' (Comecon) countries, i.e. those in which Marxist-Leninist party doctrines form the basis of the official self-identification, which now are in the process of undertaking major reforms starting with fundamental changes in the *political* organisation of their societies – an approach which, in terms of the hitherto official party doctrine of these countries, amounts to putting the cart before the horse. President Gorbachev has started the reform of the Soviet economy with a substantial reform of the constitution. Poland strives for a way out of its chronic economic decay by organising a new social contract in the literal sense of this term, the most important stipulations of which aim at the establishment of democratic representation and of a more responsive government. Hungary has become the first socialist country to introduce a multi-party system, with elections free by the standards of the liberal democracies, and to abolish the 'socialist' character of the country as it is laid down in the constitution. And these changes seem indeed to be experienced by the people of these countries as decisive and liberating ones – much in the same way as the people of Greece, Portugal and Spain (to say nothing of those of Argentina, Brazil and Uruguay) perceived their respective 'transitions to democracy' as constituting profound change both more significant than even a major step towards economic development and as a sign of hope that such steps might take place in the future. Clearly, the demand for political democracy is undergoing an unexpected renaissance.

Quite at variance with most versions of Marxist doctrine, it is no longer the 'autonomous' development of the forces of production which gives rise to new institutions and new forms of popular government; on the contrary, democratic institutions and procedures are being discovered as liberating and 'productive' forces *sui generis*, considered capable, apart from their political aspects, of energising the economic system and paving the road towards social and economic progress. Now it is again the political and constitutional axis along which societies are seen – and see themselves – to differ most significantly (both from other societies and from their own past), and not primarily the axis of the forces and/or relations of production. Moreover, the latter are increasingly perceived as being derivative of the former, instead of vice versa.

All this should not be mistaken for the final triumph of the Western model of liberal democracy – whatever that may be, given the widely divergent manifestations of democratic regimes even among the Western countries. After the Second World War the European countries had a fair degree of success in mitigating and taming class conflicts by making capitalism and democratic mass politics compatible with each other through the establishment of the Keynesian welfare state. However, the paradigm by which democratic capitalism reconciles individual and collective rationalities wears thin. Within this paradigm, military strength, security achieved

through bureaucratic control, ‘instrumental’ knowledge and economic growth are all considered essential factors in the comprehensive progress of society and in the solution of all major social problems. The rationality of action will eventually contribute to the perfection of the ‘system’. This equation has evidently lost its persuasiveness. It is rightly questioned whether the more that actors – be they states, be they individuals – accomplish according to the standards of these sectoral rationalities, the more they will promote their collective well-being (whether or not the ‘relations of production’ happen to be socialist). What is called for under this condition is, as we shall argue, a design of adequate or ‘appropriate’ institutions<sup>2</sup> that modifies the rationality of action in ways which make it more compatible with and conducive to the requirements of collective well-being.

One might suspect that the relatively comfortable and so far generally successful experience that the West European democracies have had with the constitutional arrangements adopted after the Second World War is now tending to put them in a comparatively disadvantageous position, as the ‘learning pressure’ to renovate institutional arrangements in the face of new conflicts and cleavages<sup>3</sup> has subsided much more than has been the case with many of the ‘newly democratising countries’.

As a consequence of some of the structural changes taking place within modern societies, the ideal of ‘progress’ – technological, economic, military, social and cultural – which was the underlying and powerfully energising force for the democratic optimism of the nineteenth and, notwithstanding the barbarous regression of fascism, also of the twentieth century, has faded away. The ‘limits of growth’ refer primarily to physical problems such as ecological damage, changes of climate or overpopulation; but their implication is basically a social and political one. They challenge the inherent rationale of our industrial civilisation and its political institutions, throwing their basic assumptions and their almost religious certitude into fundamental doubt. The basically ‘modern’ vision that the use individuals make of their rational capabilities will, if mediated through the right kind of economic and political institutions, contribute to their collective progress and well-being, is being contested. At the very least, those political institutions and procedures which supposedly serve the purpose of mediating the rationality of actors and the desirability of outcomes are increasingly open to question.

### **The theological foundations of modern political theory**

‘Democracy’ is arguably the only formula in the modern world which is able to legitimise all kinds of political regimes. Theorists as different as Carl Schmitt and Joseph A. Schumpeter were probably right in pointing out that the modern creed of democracy is to be understood as a secularised version of the most elementary tenets of Christian theology.<sup>4</sup> According to them, the democratic omnipotence of the people and of the legislator has become the substitute for the Almighty Will of God, whose commands are the ultimate sources of order in this world, and the equal value of each and every individual in modern democracy reflects the Christian belief that ‘the Redeemer died for all: He did not differentiate between

individuals of different social status'.<sup>5</sup> In view of current political conflicts in Ireland, Poland, Latin America, Lebanon, Israel, Iran, the Soviet Union and many other countries, it is plausible to assume that the intimate connection between religion and politics is not an exclusive property of the Christian world and that the striving for political order bears many attributes of a sacred cause throughout the world.<sup>6</sup>

If we realise that the conception of the common good is the secularised version of the 'divine order' and hence itself a religious idea, we can understand why the political principle to which it has the closest affinity is democracy: religion is dedicated to the realisation of the plenitude of human life by linking it with the divine order, and politics in its most demanding version is committed to making man the creator of his destiny in this world. It is therefore not surprising that the sole alternative to the democratic legitimation of power is the theocratic one. Despite many deep and irreconcilable differences, both theocracy and democracy make the claim that the destiny of mankind requires justification through the will of a creator that binds humankind in a 'good' order, whether divine or secular.

This reference to the concept of political theology (or, as it were, to the idea of an 'immanent transcendence') may help us to understand the tension between the claim of the political order to be 'good' and 'just' and the omnipotence of its sovereign – a tension which can only arise where we cannot resort to the authority of any external norms and principles of justice. If we ourselves are the creator of the just order, on behalf of what principle could we conceivably oppose it? The history of Christian theology gives much evidence for manifold doubts as to whether the Will of God must be regarded as omnipotent because it is inherently just or, conversely, that it cannot but be considered inherently just, because it is omnipotent.

The Rights of Man could not really protect the individual in his or her natural nakedness; they were rather the expression of isolation than its remedy, because they did not tell individuals to which community they belonged. Nor could the people's sovereignty *per se* save them from the uncertainties of their new status as an atomistic master of him- or herself, because the individual's participation in the omnipotence of the sovereign does not tell that individual what is right. Hence from the very beginning of democratic theory, theorists had to deal with the question how to secure not only the omnipotence of the new 'mortal God' – this could be deduced from the autonomy of individuals and their natural freedom and equality – but at the same time its wisdom and justice. In other words, how can we assure that, since people are not gods, although they have replaced divine commands with their own, their commands are not only the expression of a sovereign will but also of the common good? It was a difficult task to justify popular sovereignty and self-government as the consequence of individual freedom and equality; it is far more difficult – probably impossible – to justify popular self-government if it is known to be prone to fall prey to the inherent weakness and wickedness of humans.

### Interests, checks and the general will

In the history of democracy we find appeals to a variety of moral capabilities in citizens which are deemed to motivate them to fulfil their civic obligations vis-à-vis the body politic and their fellow-citizens. The most prominent among these moral capabilities are virtue, reason and self-interest.

However, the framers of the American constitution did not, in the last analysis, put the decisive weight on either virtue or reason as the solid foundation of the republic.<sup>7</sup> And they were positively sceptical about reason as a power to rule the common will of the people. Madison himself was suspicious about the very notion of a common will: he believed it impossible that such a will could freely emanate from within a united civil society, and that it could only be espoused by a hereditary or self-appointed government. Nor did he deplore the inability of civil society to generate a united will from within, but rather saw in that fragmented and disunited nature a guarantee of the preservation of individual freedom. In other words, he relied on the fact that

different interests necessarily exist in different classes of citizens' and that/ whilst all authority ... will be derived from and dependent on the society, the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority.<sup>8</sup>

Thus the American democratic model relieved the sovereign people from the heavy burden of a nearly sacred task to define and implement the common good. Instead, the model restricted itself to the task of devising institutions (such as the natural right to private property and the division of powers) which (a) allowed the individuals to pursue their diverse interests and their particular notions of happiness, thereby at the same time (b) avoiding the danger of an omnipotent government imposing its notion of collective happiness upon the people. Instead of 'unifying' the people on the basis of some collective will, it seemed more promising to the framers to move in the opposite direction of promoting the diversity and fragmentation of interests. In a way, these *institutions* were designed to play the role of 'congealed' or 'sedimented' virtue, which thus made the *actual practice* of these virtues, such as truthfulness, wisdom, reason, virtue, justice and all kinds of exceptional moral qualities, to some extent dispensable – on the part of both the rulers and the ruled. This ingenious machinery is evidently far less demanding in moral terms than what would be required of citizens in a different type of democracy, one which comes close to aspiring to the secular redemption of the people through a more or less permanent revolutionising of those social conditions which expose the people to social and economic conditions of suffering, poverty, oppression, humiliation, dependence, ignorance and superstition.

This latter kind of aspiration was in fact what inspired the French Revolution. Above all, it was a sequence of social revolutions – successively the revolutions of the nobility, of the bourgeoisie, of the urban masses, and of the peasants<sup>9</sup> – in which

the fate of each individual was seen to be inescapably tied to the fate and action of every other individual. It is no accident that this revolution took place in a Catholic country; the conviction that every soul is equal before God, that salvation is not earned through personal excellence and superiority but is the expression of God's mercy towards the miserable and the unfortunate, if secularised, nourishes the idea of collective liberation through *social* revolution. (The impact of a political theology which is energised by the concept of social revolution, i.e. of collective emancipation, is particularly vigorous in Catholic countries of the so-called Third World, especially in Latin America.) Hence the notion of popular sovereignty was from the very beginning associated with the indivisible will-power of a collective body, be it the nation, the republic or the united people, while institutional mediations and machineries were considered to be of minor importance. 'No matter how a nation will, it is sufficient that she will; all forms are good and her will is always the supreme law'<sup>10</sup> proclaimed Abbé Sieyès, a Catholic theologian, on the eve of the French Revolution.

Undoubtedly Sieyès made the implication that the will-power of the nation is inherently reasonable, because it was inconceivable – particularly in the age of Enlightenment – that an arbitrary will could become the law. No more than God could have an erroneous will could the people err; by virtue of the fact of being the will of the people, this will was 'reasonable', 'right', 'just', 'virtuous'. This equation was evidently informed by Rousseau's *Social Contract* and his construction of the general will (*volonté générale*). When Rousseau stated that 'the general will is always right and aims always at the common good'<sup>11</sup> he did not imply, as some commentators have argued, any inherent goodness or substantive morality in the empirical will of the people. Actually, he had a better argument, namely a more procedural one. For he radicalised – by inverting it – a prescription that Montesquieu had devised to assure the reasonableness of the law. According to Montesquieu, law-givers in a democracy should always be subjected to their own laws. Rousseau turned this principle around: instead of saying 'the author of the laws must be subjected to them' he reversed the sentence, stating that 'the people that is subject to the law must be its author'.<sup>12</sup> What is the implication of this inversion, and what is its significance? According to both of these rules, the law is general in that it applies to both the ruled and the ruler. But Montesquieu's rule does not preclude the possibility that a ruler who is – for instance due to idiosyncratic (masochistic) characteristics or a privileged economic position – incapable of being negatively affected by the content of the law, might impose unjust suffering upon the ruled. Although the law applies to this ruler, it does so with consequences that differ from the way in which it applies to everyone else. This problematic result could only be avoided if the economic conditions, interests, needs, feelings and preferences of the law-giver and the subjects of the law were sufficiently similar as to affect all of them in substantively equal terms. This is precisely the point of Rousseau's rule. As the subject of the law is made its author, as the subject and hence the author are the popular classes, and as each participant in the process of law-making will, in the process of deliberating the content of the law, give primary consideration to