

Democracy and Subjective Rights

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Democracy Without *Demos*

Catherine Colliot-Thélène

ecpr PRESS

ROWMAN &
LITTLEFIELD
INTERNATIONAL

London • New York

Originally published in German as *Demokratie ohne Volk*
© 2011 by Hamburger Edition HIS Verlagsges. mbH, Hamburg, Germany
English edition © Catherine Colliot-Thélène and translated by Arianne Dorval

Published by Rowman & Littlefield International Ltd
Unit A, Whitacre Mews, 26-34 Stannary Street, London SE11 4AB
www.rowmaninternational.com

Rowman & Littlefield International Ltd. is an affiliate of Rowman & Littlefield
4501 Forbes Boulevard, Suite 200, Lanham, Maryland 20706, USA
With additional offices in Boulder, New York, Toronto (Canada), and Plymouth (UK)
www.rowman.com

In Partnership with the European Consortium for Political Research
Harbour House, 6-8 Hythe Quay
Colchester, CO2 8JF United Kingdom
www.ecpr.eu

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British Library Cataloguing in Publication Data

A catalogue record for this book is available from the British Library

ISBN: HB 978-1-7855-2262-8
ISBN: Ebook 978-1-7866-0527-6

Library of Congress Cataloging-in-Publication Data

Names: Colliot-Thélène, Catherine, author.

Title: Democracy and subjective rights : democracy without demos / Catherine Colliot-Thélène.

Description: London ; Lanham, Maryland, USA : Rowman & Littlefield International, Ltd, [2017] | Includes bibliographical references and index.

Identifiers: LCCN 2017032345 (print) | LCCN 2017038980 (ebook) | ISBN 9781786605276 (Electronic) | ISBN 9781785522628 (hb : alk. paper) | ISBN 9781786605276 (ebook)

Subjects: LCSH: Democracy—Philosophy. | Civil rights. | Citizenship. | State, The. | Globalization—Political aspects.

Classification: LCC JC423 (ebook) | LCC JC423 .C653 2017 (print) | DDC 321.8—dc23
LC record available at <https://lccn.loc.gov/2017032345>

∞™ The paper used in this publication meets the minimum requirements of American National Standard for Information Sciences—Permanence of Paper for Printed Library Materials, ANSI/NISO Z39.48-1992.

Printed in the United States of America

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Introduction

Since Hegel, we know that the figures of the subject change with the forms of the community, and that this is especially true of the political subject. The political philosophy of Hegel is to be found not only in *Elements of the Philosophy of Right*, but also, and perhaps most importantly, in *The Phenomenology of Spirit*. The latter was Hegel's first major political work (although it was also more than that), such that any interpretation of *Philosophy of Right* that does not rest on a proper reading of *The Phenomenology* is necessarily reductive. The central problem of Hegelian political thought is not the determination of the relationship between the individual and the state – as was assumed by liberal critics, who remained focused on the sacralisation of the state implied in their view, by Hegel's famous proposition that the state is the 'actuality of the ethical Idea'. For Hegel, the state is but the superior collective that represents, under the conditions of modern society, the last horizon of the individual's participation in the world of human relations. There had been other collectives before it, some of which (for instance, the Greek *polis* or the Roman Empire) are clearly identified in *The Phenomenology of Spirit*. And there were others next to it (families, corporations of civil society, churches, etc.), which, while occupying a subordinate position, contributed for Hegel to determining the identity, or rather, the identities of individuals. The central question of Hegel's philosophy is that of the becoming-subject in its various modalities, and the manner in which he addresses this question rests on the assumption that this becoming-subject is intimately linked to the forms of the collectives to which individuals belong – i.e., in which they are born, grow, live and die. The subject comes to himself through an experience shaped by a world which is a human world, not the world of an abstract humanity encompassing all humans, living and dead, but a historical world – a 'figure of the spirit' – that profoundly determines the subject's consciousness in

both its cognitive and practical dimensions. This is the key point of Hegel's philosophy that the great Hegelian Jean Hyppolite had remarkably grasped. And it is to this truth of Hegelianism that Foucault was alluding, in a manner certainly skewed by the personal journey that had led him to rediscover it, when he concluded a lecture devoted to the 'hermeneutics of the subject' with a remark that must have seemed enigmatic to many of his listeners:

How can what is given as the object of knowledge (*savoir*) connected to the mastery of *tekhne*, at the same time be the site where the truth of the subject we are appears, or is experienced and fulfilled with difficulty? How can the world, which is given as the object of knowledge (*connaissance*) on the basis of the mastery of *tekhne*, at the same time be the site where the "self" as ethical subject of truth appears and is experienced? If this really is the problem of Western philosophy—how can the world be the object of knowledge (*connaissance*) and at the same time the place of the subject's test; how can there be a subject of knowledge (*connaissance*) which takes the world as object through a *tekhne*, and a subject of self-experience which takes this same world, but in the radically different form of the place of its test?—if this really is the challenge of Western philosophy, you will see why *The Phenomenology of Mind* is the summit of this philosophy.¹

My aim in the pages to come is not to interpret Hegelian philosophy; neither is it to deploy the two dimensions of experience – knowledge and ethics – which Foucault rightly considers as inextricably linked in Hegel's thought. The political subject alone will hold my interest. If it is not inappropriate to open this book by referring to Hegel, it is because, more than any other philosopher of the modern era, he reflected on the historicity of the figures of the subject while also relating each of them to successive incarnations of the *community*. Today, *democracy* is the name given to the ideal political community of which contemporary Western societies are generally agreed to constitute approximate forms. The central aim of this book is to identify the figure of the political subject that corresponds to democracy understood in its modern sense. In apparent continuity with Hegel, and even though he did not view himself as a democrat, I argue that the modern state is the collective that granted this subject his specific traits. Contemporary liberal democracies have more in common with the Hegelian state than liberal interpretations are willing to admit, and the democratic citizen may well recognise in the legal person, the subject of moral action, the economic man of civil society or the citizen of the state the various interdependent aspects of a multilayered

¹ Foucault, 2005, p. 487.

identity that is still his today.² The Hegelian inspiration of this book, however, stops here. For if Hegel saw in the state another communitarian form of the collective, the thesis I defend is, on the contrary, that the modern political subject essentially escapes all communitarian assignation. This thesis runs counter not only to Hegel's thought, but also to all the theories that extol the virtues of the 'community of citizens' today. It also runs counter to those that, because they are dissatisfied with the social and political reality of contemporary liberal democracies, are concerned with the possibility or impossibility of a new form of community that might meet the latter's unfulfilled promises.

After having spent time, along with many of his contemporaries, dreaming of restoring something analogous to the 'beautiful ethical totality' of Greek antiquity, Hegel took note of the irreversible character of the ideological and socioeconomic transformations that shaped the modern world. The modern individual could not give to the collectives in which he belonged the full and immediate adhesion that Antigone had given to the family, or that Creon had demanded citizens to give to the *polis*. The complexity of modern societies manifested itself in the plurality of the collectives in which the individual was socialised, each of them contributing to determining a part of his identity. Yet what remains of the ideal of Hegel's youth in his work of maturity is an understanding of the different social inscriptions of the individual in terms of belonging. Both the legal sphere and the sphere of socio-economic relations based on work and exchange (what Hegel terms the 'system of needs') are insufficient precisely because they are ill-suited to the latter interpretation. Right in the strict sense (that of jurists) is qualified as 'abstract' because the identity it confers on the individual is purely exclusive (*PhR*, §34). As for socio-economic relations, they constitute the 'system of ethical life, lost in its extremes' (*PhR*, §184), by which Hegel means that the collective they produce appears merely as a means for individuals fully absorbed by their particular interests. Nevertheless, the ultimate subordination of these various spheres of action to the state allows for encountering, within modernity, a functional equivalent to the 'beautiful ethical totality' of old. In other words, it permits us to think of sociality as belonging, in spite of the difference introduced by the development of the different – legal, moral, economic – dimensions of the 'principle of subjective particularity': for Hegel, it is the 'highest duty' of individuals 'to be members of the state' (*PhR*, §258).

While one might hear echoes of the ideal of Hegel's youth in the conception of the state laid out in *Philosophy of Right*, this conception is by no means archaic; nor is it reactionary or authoritarian. If one is willing to admit that the Hegelian rational state grants most of the rights demanded by

² See Hegel, 1991, *Elements of the Philosophy of Right*, §190. Hereafter I refer to *Philosophy of Right* in the text as *PhR* with mention of the paragraph.

liberalism to the legal person, the moral subject and the ‘rational individual’ of modern political economy,³ then the affirmation of the primacy of the state merely translates in philosophy an ethics that was embraced by all the nation-states of the 19th and early 20th centuries. One commonplace interpretation, concerned mainly with highlighting the alleged characteristics of German political thought, has portrayed Hegel as the instigator of a state nationalism that, once relayed by the historians Ranke and Treitschke, could only end in the militarism of Wilhelm II’s Empire and the charnel house of the Great War. In this perspective, the passage in *Philosophy of Right* that affirms the ‘ethical moment’ of war⁴ has been widely denounced. Yet the type of nationalism defended by Hegel, which was remarkably devoid of any ethnic or cultural connotation, was not confined to Germany. It was nothing other than the nationalism in whose name ‘dying for the fatherland’ was considered in 1914, in Germany and elsewhere, as a sacrifice for which every good male citizen had to prepare himself. To this day, monuments to the dead in the cities and villages of Europe transmit the memory of this sacrifice, while the annual ceremony in homage to the Unknown Soldier in France attests to the ongoing import, in the symbolism of citizenship, of citizens’ dutiful death on the battlefield.⁵ Hegel, who was not and certainly did not wish to be a prophet, was likely thinking of the soldiers of year II when he evoked the sacrifice made to maintain the conditions of his freedom. Besides, the ethical significance of war is also praised by authors of our time who, without adhering to militarist ideology, associate democracy with the nation form. Thus, Dominique Schnapper, in a vigorous plea in favour of the democratic nation, regards the impossibility of requiring citizens to sacrifice their lives for the nation as a symptom of the erosion of the social bond and of democracy.⁶

The point here is not to criticise this specific form of nationalism, which, for better and for worse, constituted for a time civic virtue *par excellence*. For almost two centuries, the nation-state was one of the main collectives through which the individual could give meaning to his existence. Others vied against it – notably, the proletarian community. These collective identities were a

³ See Kervégan, 2007, pp. 189–195.

⁴ See *PhR*, §324 (Hegel, 1991, p. 361).

⁵ The idea that dying for the fatherland could sanctify men in the same way as Christian martyrdom did first appeared in the 12th-13th century, when political power was beginning to undergo territorialisation. See Kantorowicz, 1951.

⁶ Schnapper, 1998, p. 4 and *passim*. All things being equal, Dominique Schnapper is in agreement with Carl Schmitt when she quotes Benedict Anderson for whom it is absurd to expect anyone to die for the Comecon or the EEC (*ibid.*, p. 60). Indeed, in *The Concept of the Political*, Schmitt notes on several occasions (Schmitt, 1996, pp. 46 and 48) that ‘to demand seriously of human beings that they kill others and be prepared to die themselves so that trade and industry may flourish for the survivors or that the purchasing power of grandchildren may grow is sinister and crazy’.

historically undeniable dimension of the political subject in the modern era. Alois Hahn speaks of ‘participative identities’ in this regard; he also sees in the nation a specifically modern form of segmentary social differentiation that not only coexisted with, but also operated as the necessary complement of functional differentiation – even though the latter had supposedly replaced the former.⁷ Yet as novel as some of these participatory identities (nation and class) were, did they really constitute the specifically modern element of the modern *political* subject? The fact that national patriotism could invoke various precedents – for instance, the civic patriotism of Antiquity or that of the Italian republics of the Renaissance – gives us reason to doubt this assertion. A new reading of the Declaration of the Rights of Man and of the Citizen confronts us with an entirely different determination of the identity of the modern political subject, which ought to be viewed as the true innovation of modernity. This is the identity of the subject of rights, presupposed by the notion of ‘subjective rights’, which, far from referring to any given collective, is attached to the individual regardless of any affiliation. Though the notion of subjective rights has spawned a host of objections, it has played a non-negligible role in the political practices of the last two centuries. There are two reasons why placing this notion at the centre of our understanding of democracy seems necessary today. First, the lasting collective identities of nation and class that crystallised over two centuries in Western societies have lost much of their influence and power of attraction. Second, the fate of subjective rights no longer plays itself out merely on the national scale – a scale that, because the nation itself is a community, permitted to conflate the defence of subjective rights with that of the nation, but also with the defence of the alternative community of class that anticipated the communist society to come.

Regarding the first point, my aim is certainly not to dispute the fact that struggles for rights – for the respect and expansion of acquired rights and for the conquest of new rights – continue to require the formation of collectives that bring together and organise, more or less formally depending on each case, circles of individuals who mobilise *together* to obtain rights of which they feel deprived. Yet insofar as the ‘minorities’⁸ that intervene collectively in the public sphere to demand recognition of their rights are more numerous and more diversified today than they were during the nineteenth and much of the twentieth century, the collectives they form are also generally more evanescent than they used to be. These new collectives do not have

⁷ ‘Partizipative Identitäten’, in Hahn, 2000, pp. 13–79.

⁸ The term is obviously understood here in a political and not a quantitative sense. Among the ‘minorities’ that fought to obtain rights that had long been reserved for a fraction of the population of democratic nations are women, whose ‘minority’ was clearly of a legal and political nature.

the permanence of parties and trade unions; nor do they have the capacity to provide their members with living environments and interpretation grids that would enable them to form small and relatively autonomous societies within the national society, as parties and trade unions did when they believed they could offer a social project opposed to that of the political power in place. Women who mobilised in the 1970s to gain the right to abortion, or women in ‘difficult neighbourhoods’ who mobilise today against obscurantism and the violence of which they are victims, participate in a ‘movement’ in whose service some of them might invest a significant portion of their time and energy, but they do not base their entire lives on their identity as oppressed women. The same can be said of individuals who mobilise for the environment or become involved in various organisations for the defence of human rights. If I hesitate to include here the mobilisations of *sans papiers*, it is because state policies confine irregular migrants to a negative identity from which they can only hope to escape.

The second point is the most decisive argument in favour of thoroughly revising what we mean by democracy when we qualify modern liberal societies as democratic. It is, indeed, a reflection on the implications, for the definition of the political, of changes that have occurred in the place and role of the state within the general economy of places of power in the late twentieth and early twenty-first centuries that drove the investigation whose findings are presented in this book. The point of departure of this investigation was a study⁹ I conducted on the historical significance of the notion of subjective rights, based on my analysis of the chapter Max Weber devoted to this theme in his ‘Sociology of Law’. At the end of this analysis linked directly to the interpretation of the ‘monopoly of legitimate violence’, I suggested that the contemporary erosion of state sovereignty is significantly altering the conditions for the guarantee of subjective rights.¹⁰ Contemporary legal pluralism, which results from the multiplication of supranational legal and judicial organs and the development of quasi-legal norms by private bodies (the *lex mercatoria* being the best-studied example¹¹), entails the proliferation and increasing heterogeneity of the instances of power from which subjects can or must claim recognition of their rights. By the same token, the figure of the subject of right – itself produced, one must recall, by the destruction of the former legal pluralism that characterised medieval Europe’s regime of special rights, under the centralising action of territorial sovereignty that is constitutive of the modern state – is being called into question.¹² I myself

⁹ Colliot-Thélène, 2005, pp. 23–46.

¹⁰ *Ibid.*, p. 46, note 70.

¹¹ See especially the works of Gunther Teubner, 1996a and 1996b.

¹² Colliot-Thélène, 2009a and 2009b.

interrogated this figure in two articles where I defended the thesis that the future of modern democracy (to be distinguished, of course, from ancient democracy, albeit according to criteria other than those of Benjamin Constant) remains tied to the future of the subject of right, despite the erosion of what was the condition for its formation, namely the state's legal monopoly. Yet I also argued that contemporary legal pluralism forces us to discard the classic notion of a *demos* conceived as a united community whose alleged will conditions the legitimacy of power. Indeed, while the plurality of powers does not preclude the defence of subjective rights, the diversity of rights addressees prevents groups of rights-claiming individuals from merging into a unified collective. The latter proposition was met with legitimate objections from some of my listeners and readers whom I could not suspect of being ill-disposed towards democracy, or of being hostile to the idea that democracy, understood in its modern sense, ought to recognise that the subject in and of himself – i.e., not as a member of a particular group – is entitled to claim rights. As I reflected on these objections, I became convinced that one of the main obstacles to understanding the reality of modern democracies lies in the notion of self-legislation. It is a truism that the participation of citizens in the elaboration of laws through the common, indirect method of electing their representatives weighs little in the determination of the content of these laws. Yet few democratic theorists are willing to concede that the control exercised by the 'people' over the actions of those who govern it – i.e., members of both the legislative and executive branches – is a fiction whose historical significance lies in a principle of legitimacy that developed in opposition to that of hereditary dynasties. In fact, this principle never implied that political power could lose its character of domination or that the citizen could cease to be subjected, and this not even in the eyes of the most unquestioned authority in modern democratic theory: Jean-Jacques Rousseau.

'The people, being subject to the laws, ought to be their author': this famous proposition from Rousseau's *Social Contract* is considered by many to be the fundamental axiom of democratic theory. It has since been deployed in various ways. Thus Seyla Benhabib rewrites this axiom in the terms of Habermasian discourse theory by claiming: '[A]ll those who are affected by the consequences of the adoption of a norm [must] have a say in its articulation'.¹³ This, however, constitutes for her a meta-positive norm or abstract principle of legitimacy whose institutional consequences cannot be drawn without mediation. Hauke Brunkhorst translates this principle in a more directly institutional form when he writes that the constitutional norm of democracy is self-legislation, which is synonymous with the identity of

¹³ Benhabib, 2004, p. 218.

the dominant and the dominated and therefore requires ‘the exceptionless inclusion of all persons affected by the law in the process of legislation’.¹⁴ Surely not all contemporary democratic theorists would be ready to claim that democracy tends towards the identity of the dominant and the dominated; as Brunkhorst himself points out, this would amount to the complete abolition of all domination in politics. Yet all consider that democratic power must at the very least be purged of any residue of ‘*violentia*’.¹⁵ The alleged participation of the addressees of the law in the elaboration of the law, it is believed, entails a radical metamorphosis of power, the relative autonomy of which can then be explained only on functional grounds. Few, especially among philosophers, would now accept the brutal equations Max Weber established long ago between politics and power and between power and domination.¹⁶ One speaks more readily today of an opposition between the rulers and the ruled than between the dominant and the dominated, and one stresses that public office is in principle open to all citizens. It is up to political scientists or sociologists to show, with supporting figures, the factual limits to this openness. Most will concede, of course, that the chances of holding a public office – especially the most important ones – are very unevenly distributed depending on the social background of individuals, that the professionalisation of politics leads to the formation of a ‘political class’ which tends to reproduce itself endogenously, that there exist political dynasties, etc. But so long as one remains within a national framework, one can argue that, even though social mobility is limited, ordinary citizens exercise control over those who govern them through voting. Thus, to the extent that this is possible in mass societies, the principle of self-legislation essentially finds its institutional translation in the process of leader selection via election. It is this process that gives political significance to the public sphere, namely the sites of communication – press, radio, television and (today) Internet – where public issues are discussed for the most part by experts or accredited representatives of power, but where ordinary citizens can also sometimes make their voices heard. This communication has political significance only because it is supposed to contribute to forming citizens’ opinion, which determines their choices when they are called upon to elect their leaders. I shall leave aside here the questions that relate to the functioning and oft-emphasised ambivalence of this public sphere: whether it is a site for the elaboration of an informed public opinion emanating from civil society, or, on the contrary, a tool for shaping and even manipulating this opinion by those in power. My concern here is entirely different. Ultimately, the control exercised by citizens over their

¹⁴ Brunkhorst, 2005, p. 73.

¹⁵ See Habermas, 1998, p. 72.

¹⁶ See Weber, 2009, p. 78.

leaders through periodic elections is the only thing that gives a semblance of reality to the principle of self-legislation. Yet this control is effective only over individuals who perform public functions within the framework of the national state. It is nevertheless well known that the rules to which the different spheres of collective activity are subjected are increasingly elaborated by instances made up of individuals who are not subjected to the control of voters. More than the internal dysfunctions of the public sphere on a national scale, it is this reconfiguration of places of power and rule elaboration that reveals the fictitious character of the principle of self-legislation, emptying it once and for all of any real signification. This principle is but a myth comparable to that of the divine origin of power, which in times past justified immutable social hierarchies and hereditary dynasties.

However, unlike divine will, the myth of self-legislation does not merely justify the autonomy of power by concealing its arbitrary character; it also obscures the very nature of power, namely its constitutive dissymmetrical structure. This obscuring is what leads some to imagine that the logic of democratic society tends towards the disappearance, if not of power, at least of domination. It is remarkable that the great figures of political philosophy of the last decades of the twentieth century abandoned the question of power (i.e., the question of the legitimacy of power in general, though not of the particular form of power embodied in liberal democracies).¹⁷ As I will recall later, for Rousseau as much as for the founding fathers of the American Republic, the possibility that an oligarchy might reconstitute itself on the basis of elected representation was viewed as a key problem of modern republican institutions. Today, this question is largely repressed in favour of interrogations about the principles that ought to serve as a regulative idea for the action of leaders. The reality of the separation between the mass of individuals who are subjected to rules and those who elaborate, promulgate and enforce them, seems to become manifest again only when those rules are produced by instances other than legislative bodies and national governments. Democratic deficits are pointed out primarily when discussing the functioning of European institutions or the constraints and pressures that supranational instances of power such as the IMF or the World Bank exert on national authorities. In this regard, we can speak of the paradoxical invisibility of power in the contemporary moment. The more power is on display, the less it is perceived as power, and vice versa. The public staging of (essentially national) politics relativises the *difference of power*, insofar as it fuels the idea that leaders are only ever the representatives of the people and that their action is ultimately determined by the will of the people. Power becomes

¹⁷ I am thinking in particular of Jürgen Habermas and John Rawls. See Colliot-Thélène, 2009c.

manifest as a dissymmetrical structure only in the least visible instances of its exercise: in institutions whose name is well known, yet whose reasons and deliberations (conducted in small circles of experts) escape public knowledge and judgment.

The increasing influence wielded by various kinds of power which, because they are not selected by popular vote, are unaccountable to the populations that bear the effects of their decisions, is causing some to doubt that democracy has a future at all. The latter, they say, can only exist within a national framework.¹⁸ Surely this is true so long as one persists in linking the concept of democracy to that of self-legislation, which, admittedly, tends towards purging power of its character of domination. However, very different perspectives open up when we recognise that the dissymmetrical structure of power is constitutive of what we call politics – the politics of times past, of the more or less absolute monarchies, of the city-states of the Italian Renaissance, or of the ‘democratic’ republics of the nineteenth and twentieth centuries. Modern democracy has only ever been a mode of organising power, that is to say, a mode of organising the relations between the dominant and the dominated. The nation-state was of course the specific territorial framework that set the conditions for this organisation. Must we conclude therefrom that democracy is doomed, in the short- or long-term, by the erosion of state sovereignty? Reading anew the history of the ‘democratisation of democracies’ (I will recall later that the political regimes born of the revolutions of the late eighteenth century were not designated by this term) reveals that the properly democratic component of such regimes owes not to this territorial framework, but to the transformations imposed on them by the claims of those who are excluded from power. By becoming the sole guarantor of rights, the nation-state created an unprecedented link between territory, political authority and rights – a link that has profoundly determined our conception of politics over the last two centuries. Yet as pointed out in particular by Saskia Sassen,¹⁹ with whom I agree on several points, actors who, in this framework, were excluded from the formal organisation of politics nevertheless exerted considerable influence on its development. In particular, they contributed decisively to the formation of democratic citizenship in modern political regimes. This thesis can also be formulated in the terms of Jacques Rancière:²⁰ Disagreement – the claims of those who have no part (*les sans-part*) – is the living element of politics; it demands that we think the democratic ‘people’ not as a constituted community or a community to be constituted, but as the ‘supplement’ that frequently disrupts the always provisional order of all constitutions. I do not,

¹⁸ See Schnapper, 1998, p.165, and more recently, Crouch, 2004.

¹⁹ Sassen, 2006, pp. 279, 292–293.

²⁰ See Rancière, 1998.

however, share Rancière's indifference towards institutions, which he places en bloc alongside the 'police' and the government, by which he means organisation in general, with all that it implies in terms of uneven distribution of places and functions. This indifference leads him to neglect the importance of rights recognition, which is nevertheless clearly the objective of those who have no part when they demand to participate. While a strictly legal conception of subjective rights, whose paradigmatic expression is found in Kelsen,²¹ obscures the role of social dynamics in the history of those rights, Rancière makes the opposite mistake by forgetting that claims are meaningless when they have no addressee. Indeed, the conversion of claims into rights in the proper sense of the term depends precisely on the existence of addressees, as rights necessarily imply some form of guarantee.

From the perspective of the history of subjective rights, the novelty of our time is that state authorities are no longer the sole addressees of the claims made by those who are excluded from power: rights are now subject to negotiations that involve multiple partners. This makes it necessary to rethink the nature of citizenship.²² Clearly, some of the rights guaranteed to individuals today are still linked to the status of citizen, which is itself tied to national affiliation. This is the case above all of political rights – the rights to vote and to stand for election – such that they are generally considered to form the very substance of citizenship in the proper sense of the term. Here we can gauge the influence of the principle of self-legislation, which ultimately leads to the double equivalence between citizenship and political rights and between citizenship and nationality. If we accept that democracy is a form of political organisation whose legitimacy rests on the participation of the people in the elaboration of the law, then the people-citizenry can only be composed of those who enjoy political rights. By the same token, the boundary between those who enjoy these rights and those who do not can never be entirely erased, even when calls are made to facilitate its crossing. Democratic citizenship necessarily excludes – 'passive' citizens yesterday, 'foreigners' today. Now as then, the excluded can only hope to be protected by the law, a protection that is conceded to them and thereby denies them recognition as autonomous political subjects. Neither the integration of universal norms of human rights into national laws, nor the recognition of foreign jurisprudences²³ or rules laid down in international conventions and treaties by national courts can change that fact. Between the citizen legislator and the foreigner (no matter how protected the latter may be) the difference is in kind. The difficulty of finding a satisfactory solution to the problems

²¹ See *infra*, I. 2., p. 7–8.

²² This is what Saskia Sassen attempts to do in chapter 6 of the cited book (Sassen, 2006).

²³ See Allard and Garapon, 2005.

posed by the status of foreigners owes not only to the demagogic and securitarian policies of governments in host countries – though this factor cannot be underestimated – but also to the impasses of a communitarian conception of democracy. The people that purport to instantiate the legitimation of power and to control its own fate through electing its leaders must be able to define itself, and it can do so only by setting its own boundaries.²⁴ Clearly, the territorial organisation of state power is that which permitted the individualisation of the subject of right and made him the fundamental form of the political subject; yet it is also that which nationalised citizenship. The whole question is to know whether these two products of state sovereignty are so intimately intertwined that they can only survive together, or whether, on the contrary, it is possible to invent a non-national citizenship without sacrificing the specific form of political subjectivity that has the subject of right as its core, and hence without relinquishing the emancipatory resources that have been attested by two centuries of history.

It is common today to attribute the contemporary impasses of democracy to globalisation. Yet, one of the great merits of the complex of phenomena designated by this term is to highlight anew the *difference of power*, that is to say, the essential and irreducible otherness of power in relation to those on whom it is exercised. Globalisation forces us to rethink the democratic reality of the political regimes born of the late eighteenth century revolutions. We ought to remember that, from Rousseau to Madison, the great thinkers whose reflection accompanied the mighty upheaval of social order that crystallised in these revolutions did not seek to abolish power, nor even to minimise it. This is why they rarely embraced democracy as such. It is well known that Madison, in particular, conceived the republic as different from democracy, which in his view could only mean the dictatorship of the majority.²⁵ But we often forget that Rousseau did not define himself as a democrat: between the three forms of government distinguished in the classic typology – monarchy, aristocracy and democracy – his preference went to the second.²⁶ The major concern of the theorists of the eighteenth century political revolutions as regards the organisation of institutions was not to eliminate the difference of power, but to prevent the ‘abuse of government’, namely the propensity of those in power to use power to their own benefit, and hence to lose sight of the public interest. For those who admitted the principle of electoral representation, the danger of abuse threatened both legislative bodies and the government understood in a narrow sense. All of them doubted that the possibility of such degeneration could be entirely ruled out; yet many also felt that the

²⁴ See Benhabib, 2004, pp. 45 and 219.

²⁵ See *The Federalist Papers*, 1961, p. 82ff.

²⁶ See *infra*, chapter 2.

periodic and sufficiently frequent election of political leaders by the people was the proper and perhaps the only conceivable means of preventing it.

Some may find that, as long as the rights to vote and to stand for election are no longer subject to restrictive conditions, except for the – ‘natural’ or allegedly inevitable – conditions of age and nationality, power is sufficiently transformed by regular electoral controls to no longer be assimilated to domination. This is the objection concerning self-legislation that I mentioned earlier, an objection whose recurrence requires that I specify what I mean by domination. It is true that the term was not in favour among the authors and theorists of the revolutions. ‘To dominate’, Mirabeau once said, ‘is a tyrannical word that ought to be banished from our legislation’.²⁷ Yet what Mirabeau effectively banished was not the dissymmetry of the relationship between those who command and those who obey, that is to say, domination in the now ordinary sense of the term which is reproduced in Max Weber’s ‘sociological’ definition: ‘the probability that a command with a given specific content will be obeyed by a given group of persons’.²⁸ For Mirabeau, domination was a term from the Ancien Régime, the result of centuries of history during which the distinction established in Roman law between *dominium* and *imperium* was gradually erased, along with the clear perception of the difference between property and political power. By prohibiting the use of the term domination in the vocabulary of revolutionary legislations, Mirabeau did not dispute the need for power, and in particular for a power exercised through command (*imperium*). He simply called for the reconstruction, on new foundations, of the ancient distinction between *imperium* and *dominium*: political power cannot be the property of anyone; it is a public function performed by some in the name of the people and for the people.

As I mentioned earlier, the theorists of the revolutions anticipated the possibility that representation might give birth to a new oligarchy, which is something they wanted to avoid. Yet they also expected the electoral procedure to produce a government of the best, an aristocracy in the genuine sense of the term. According to Madison, the advantage of elections was that they ‘refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country’.²⁹ Rousseau came close to this view when he wrote that: ‘The best and most natural arrangement is that the wisest should govern the many, when it is assured that they will govern for its profit, and not for their own’.³⁰ Unlike Madison and Hamilton, however, Rousseau hesitated to

²⁷ Quoted in *Geschichtliche Grundbegriffe*, vol. 3 (Brunner *et al.*, 1982), pp. 51–52.

²⁸ Weber, 1978, p. 53.

²⁹ *The Federalist Papers*, 1961, p. 82.

³⁰ *On the Social Contract*, III, chapter 5 (Rousseau, 2003, p. 47).

attribute more wisdom to the affluent in general than to the multitude, even as he recognised that wealth does make it possible to devote all of one's time to the administration of public affairs. Yet despite these nuances, it seems obvious that the overwhelming majority of late eighteenth century theorists explicitly or implicitly agreed with what Bernard Manin calls the 'principle of distinction', whereby elected representatives of the people can only be 'distinguished citizens, socially different from those who elect them'.³¹ Their aim was not to abolish power, nor even to purge power of domination understood in the modern sense.

How could it have been otherwise? The task to which these men devoted themselves was the conception and elaboration of a constitution, which is to say, of the fundamental rules that were to govern the administration of the social body. Yet, as Max Weber strongly emphasised, while it is true that every domination manifests itself concretely in an administration, it is also the case that every administration 'needs domination, because it is always necessary that some powers of command be in the hands of somebody'.³² Administration without domination, which is what direct democracy aspires to be, was for Weber no more than a 'typological limiting case' whose conditions of existence were so restrictive (small communities, high levels of social homogeneity, low complexity of the issues to be addressed) that even the oft-cited examples of American townships and Swiss cantons could hardly satisfy them. The interest of this limiting case, which is of so little use for empirical analysis given the lack of fully corresponding examples, lies above all in its exposing domination where it is hidden: in those forms of power that are established according to constitutionalised procedures and exercised in the name of equal law. That the leaders or members of an administrative body present themselves as the 'servants' of those whom they command does not suffice to rid this body of its character of domination. However, there is no need to dwell here on Weber's caustic and disturbing analysis of democracy. For, to repeat, the theorists of the revolutions did not aspire to be democrats. They did not elaborate their constitutional projects based on the idea of a power *exercised by the people*; their sole aim was to ensure the governmentality of a society of free men, that is to say, a society independent of any personal subjection.

All this is well established and well known, and there would be no need to repeat the argument if the myths associated with the notion of self-legislation did not cloud our memory and our understanding. How, one might ask, does globalisation shed a new light on the issue of power? It is difficult to imagine that it will help us raise anew the question of governmentality *as it was*

³¹ Manin, 1997, p. 94.

³² Weber, 1978, p. 948.

asked at the end of the eighteenth century, insofar as one of the most manifest consequences of globalisation is the multiplication of the places and forms of power that influence the fate of all societies in the world, which renders illusory the idea that a state can independently determine the manner in which it organises and administers the ‘social body’. We now know that the question of governance no longer arises merely in relation to the administration of states. Yet, what leads to the rediscovery that democracy is not a feature of the government of men is precisely the fragmentation of governance – the fact that we can speak of governance in large industrial companies, in universities and hospitals, in supranational and international institutions, and even of global governance. Democracy is not an attribute that distinguishes one type of governance from another; it can only be located in the relation of the ruled to the rulers. Government in general tends towards autonomy, and its action – what is now called governance – is exercised from the top down on individuals and populations that are naturally considered as objects to which laws, decrees and other administrative measures are meant to apply. It is in the logic of governance to suppose that wisdom – i.e., knowledge, but also a sense of the public interest along with the skills required to determine where it lies – belongs to an elite, to political leaders or experts recognised or appointed by them, all of whom always know what is in the interest of the people better than the people itself.

Most of these new powers are constituted via appointment or co-optation, and it is to these modes of constitution that we generally refer when we deplore their lack of democratic legitimacy. Does this mean that they are inaccessible to the action of the individuals or populations who bear the weight of their decisions and to whom their rules apply? The significant heterogeneity of these powers does not allow for a univocal answer, and an in-depth study should proceed with differentiated examples. Yet the answer cannot be entirely negative. Supranational legal instances can be formally called upon by individuals or associations, multinational consortia can be subjected to boycotts or campaigns of denunciation by consumer organisations or environmental protection associations, and social forums have been gaining the attention of political leaders. A whole literature has been documenting the emergence and considerable development, over the last decades, of forms of activist practice and organisation that are very different from those of what we might call the ‘classic’ period (from the late nineteenth to the third quarter of the twentieth century) in liberal democratic societies.³³ It is remarkable that this phenomenon occurred in the same years that the rise of voter abstention, the increasing fluidity of the electorate and the drastic

³³ See Soysal, 1994; Sassen, 2006.

reduction in party membership were prompting some to diagnose a depoliticisation of society – the latter being too quickly attributed to the rise of individualism and to the withdrawal of citizens into the private sphere. Political scientists and journalists displayed surprising blindness at the time because of their inability to rid themselves of a narrow and increasingly obsolete conception of politics and citizenship whose sole parameters are partisan membership and electoral participation. They failed to perceive, or perceived only belatedly, the places and forms in which democracy was reinventing itself by adapting to an institutional universe wherein the sovereign state had ceased to be the only rights addressee.

One would be mistaken, however, in thinking that my aim in this book is to deny any democratic significance to representative institutions and to the specific rights that make them possible: the right to elect public officials, freedom of expression, the existence of a public sphere free from censorship, etc. I merely propose to reinterpret these by disconnecting them from the myth of self-legislation. Representative institutions have only ever been a means to compel certain categories of leaders to be *accountable* to the populations over which their power is exercised. Thus, they are a means of controlling power that ought to be included among the diverse set of democratic practices, without being made the exclusive model or even the core of democracy. There are several other means to which the dominated can resort – and indeed have always resorted – to act upon power. This is, in a way, what Pierre Rosanvallon was observing, in the context of French political history of the last two centuries, when he identified and described the different forms of ‘counter-democratic surveillance’, ‘sovereignty of prevention’ and judicial control of power.³⁴ Yet, even as Rosanvallon recognised that these phenomena constitute, along with electoral-representative government and political reflection and deliberation, one of the ‘three pillars of democratic experience’,³⁵ he made the mistake of construing them as forms of ‘counter-democracy’. In his view, these practices must be institutionalised lest they become ‘unpolitical’, by which he means that they might lose the sense of collectivity. No doubt Rosanvallon would like to see these modes of political participation that have developed outside the forms set by constitutions become integral to democracy, but only as a supplement to the other modes, and this to allow ‘progress in self-government’.³⁶ The latter phrase echoes the beautiful passage with which he concluded one of his previous books, and in which he called for ‘a renewed and demanding vision of the nation’ while

³⁴ Rosanvallon, 2008.

³⁵ *Ibid.*, pp. 313–314.

³⁶ *Ibid.*, p. 315.

also predicting a long future for the notion of popular sovereignty.³⁷ I argue, on the contrary, that this idea essentially belongs to the past. I defend the thesis that the development of forms of political intervention aimed at powers other than the nation-state retrospectively illuminates what the reality of popular sovereignty has always been, namely an institutional framework that organises the particular modalities of expressing rights claims when they are addressed to that equally particular form of power: the nation-state. So long as this framework remains in place – and nothing allows us to predict its near demise – the privileged means of controlling the national figures of power (including the public administration) will obviously have to be preserved. The defence of the representative principle wherever it may be applied, the fight for judicial institutions independent of political power, and the struggle for freedom of the press – not only vis-à-vis political power, but also vis-à-vis the large economic consortia on which press organs and radio and television channels increasingly depend – remain timely. Yet because the decisions that determine the fate of populations (the distribution of wealth, the nature and extension of effectively guaranteed rights, etc.) are being made less and less within the framework of the nation-state, the other means of controlling power that have accompanied the vote throughout the history of modern representative regimes, as well as those that are being invented today, will likely play an increasing role in democratic practice. These means of control should not be regarded as a mere supplement to what presumably remains, against all odds, the unshakable core of democratic institutions: representation. On the contrary, they reveal what representation has always been, while also forcing us to engage in a sober interpretation of its meaning and its reach. It may seem painful, in view of modern democracy's normative ideal, to renounce the idea of self-legislation and its related notion of constituent power; yet this is the price we have to pay if we are to perceive and understand the new conditions of democratic citizenship.

There is no shortage of works today that illustrate the ongoing transformation of citizenship and democracy: analyses of the new forms of civic engagement in contemporary megalopolises, investigations of the increasingly frequent cases of plural citizenship (including the addition of European citizenship to the national citizenship of European Union members), as well as a flourishing literature on participatory democracy. The only originality claimed by the present book lies in its invitation to think through the implications of these various phenomena from the perspective of the concepts of citizenship and democracy. At the risk of repeating myself: the more the figure of the subject of rights – i.e., the rights-claiming subject – acquires importance

³⁷ Rosanvallon, 2000, p. 42.

in terms of what we mean by democratic citizenship, the more the fiction of self-legislation loses credibility. Formulated in radical terms: the multiplication of powers to which the subjects of rights must address their claims *un-determines* the *demos* once and for all. The ambiguities of the concept of ‘people’ – which can mean humans considered collectively, the rabble, the body of citizens endowed with political rights, the nation, or groups of individuals who mobilise against an abusive power or a threatening foreign power – have been noted long ago.³⁸ It is only as a constituent power that the ‘people’ takes on an unambiguous political meaning. Thus understood, it does not derive its unity from any pre-political determination, ethnic or otherwise, but only from the unity of state power, which relies on the will of the people to establish its legitimacy. It is precisely this circle – whereby the political people is determined by the state and state power is legitimated by the postulated unity of the people – that is broken when the subjects of right discover that the state is no longer their sole interlocutor. The pluralisation of *kratos* makes the *demos* unidentifiable.

Reinterpreting modern democracy around the notion of subjective rights has required me to confront a long tradition of critique of this notion. In a recent article,³⁹ I tried to highlight the misunderstandings that underlie such critique (especially among jurists), while attempting to justify using subjective rights in a manner completely detached from the idea that the human individual has rights by nature. Chapter One of this book takes up the central argument of that article by inviting the reader to understand the emergence of the figure of the subject of rights in view of the great historical transformation that the abolition of the special rights (or rights-privileges) of the Ancien Régime represented for Western societies. The Weberian analysis of subjective rights is the foundation that underpins my interpretation. This chapter also includes a preliminary analysis of Kant’s legal doctrine, to which I will continually return in the rest of the book while also discussing his political texts. Using Kant as a privileged interlocutor not only to think democracy, but also to propose a concept of democracy that justifies opposing institutionalised powers, will no doubt seem paradoxical – and I will explain later why I chose to do so.⁴⁰ Yet, it is clearly to Kant that we must return if we wish to free subjective rights from their interpretation as status, an interpretation that finds its exemplary legal expression in Kelsen and that, as I hope to show here, is entwined with the communitarian conception of democracy. After briefly recalling some elements of the modern history of the word

³⁸ *Translator’s note*: The range of meanings covered by the term ‘people’ corresponds quite closely to that expressed by the French word ‘peuple’.

³⁹ Colliot-Thélène, 2009b.

⁴⁰ See *infra*, IV.2: ‘Liberal Individualism and Democracy’.

democracy, chapter Two devotes a fairly lengthy analysis to an author whose name is more expected in a discussion of democracy: Jean-Jacques Rousseau. Specifically, I show that the ambiguities of Rousseau's *Social Contract*, notably regarding the concept of 'people', anticipated the difficulties of modern democratic thought. Rousseau then takes us back to Kant, who, I argue, overcame without betraying Rousseau the ambiguities of his political theory by interpreting the original contract as an Idea of Reason, an interpretation that singularly limited the scope of the principle of self-legislation. These first and second chapters also include reflections on some aspects of the political thought of Hegel and the young Marx. The manner in which each revisited the legacy of the Enlightenment and the French Revolution (which Marx received through Hegel even as he opposed him) foretold the dilemmas of the second part of the nineteenth and much of the twentieth century concerning the place of laws and institutions in modern democracy.

After establishing the centrality of the individualisation of rights in the functioning of post-revolutionary forms of political domination, and after noting the difficulty of identifying the 'people' upon whose presumed consent the legitimacy of these forms rest, I interrogate the reasons that led to the designation of modern constitutional regimes as democracies. Chapter Three addresses this question by analysing the different stages of a process that culminated in the statutory conception of citizenship, a conception to which much of political theory and philosophy is still strongly attached. In the middle of the last century, Thomas H. Marshall defined the ideal type of citizenship, translating on the theoretical level the result of a history that had seen both an increase in the number of rights guaranteed by the state and an extension of the circle of rights beneficiaries. These phenomena, which were quite naturally interpreted as a democratisation of constitutional regimes, established a reciprocal link between citizenship and nationality that was not at all obvious for the revolutionaries of the late eighteenth century. From then on, individuals were presumed to enjoy rights based on their membership in a national community of which the state was both the interpreter and the instrument. The foreigner could only be granted minimal rights, human rights, which an anachronistic reading claimed were distinguished from the rights of citizens in the declarations of the revolutionary era. In such a configuration, it was inevitable that the status of foreigner, reduced to being the opposite of that of citizen, would become the focal point of the difficulties of a democracy necessarily attached to its own closure. Hannah Arendt raised this very problem in the aftermath of World War II. Today it is being raised again, with other referents (immigrants rather than stateless people) but in barely modified terms, prompting several contemporary theorists of democracy to try to elucidate the notion – as famous as it is enigmatic – put forward by Arendt: a 'right to have rights'.

In Arendt's view, the 'right to have rights' was at once necessary and structurally aporetic, because it depended on membership in a collective that was not institutionalised, and that she felt could never be institutionalised: humanity. Chapter Four of the present book aims to solve this aporia by resorting to the radical solution that consists in thinking democracy without *demos*, which is to say, by renouncing the idea or ideal of a democratic community, even one extended to the whole of humanity. A brief critical detour via Carl Schmitt will hopefully prevent any suspicion that I seek to break with the ideals of modern humanism in doing so. Here again, I invoke the authority of Kant, proposing an unusual reading of his cosmopolitanism and drawing on his concept of freedom – understood as 'innate right' – to reinterpret the 'right to have rights' in a resolutely individualistic fashion. As Kant himself points out, individualism does not mean egoism, and the importance I assign to the rights of the individual-subject does not imply that I deny the role of collective solidarities in the history of the democratisation of modern societies. Nevertheless, this history is also that of the repeated failure of attempts to establish lasting egalitarian communities, namely communities without domination. From Marx to Rancière through Arendt and Blanchot, I discuss various expressions of this demand along with its impasses, be these recognised or not by the different authors. It is these impasses that Weber addressed, in his own way, by positing the axiom of the impossible 'routinisation' of charisma, which was for him the figure of revolutionary exception.

'Democracy without *demos*' is first of all a reinterpretation of what modern democracy has been – of the history of democracy over the last two centuries. Any definition of democracy that fails to take into account the history that transformed republics and constitutional monarchies into liberal democracies is a dogmatic one, and it is easy to show how much the reality of the societies so designated contradicts the theoretical model that is said to reveal its foundations. The first interest of an interpretation of modern democracy centred on the subject of right is that it justifies using the sometimes disputed name 'liberal democracy' without uncritically accepting its naive or apologetic representations. As I indicated earlier, deconstructing the myth of self-legislation, and with it the communitarian conception of democracy, is made necessary by recent changes in the role of the nation-state within the space of the heterogeneous powers that shape the global world. The second interest of this interpretation is that it propels democracy into the future, instead of mourning its loss or contenting itself with a rump democracy bounded by the limited powers of the nation-state, which would entail abandoning to experts or to bureaucrats the most important decisions that determine the fate of us all. The analyses presented in chapter Five thus develop the points that initiated the reflection laid out in this book. These analyses, which are exploratory and ought to be further developed, draw on a few salient works on post-national

citizenship to show that the denationalisation of citizenship (which is in part the work of nation-states themselves) is not incompatible with the affirmation of the autonomy of the subject of rights.⁴¹ This autonomy, rather than the solidarity often invoked today to save what is left of the welfare state, should be viewed as the major political innovation of modernity, provided we agree that politics consists not merely of institutional arrangements but also of the dispositions and practices of the subject. The subject of right – i.e., the individual who claims equality rather than membership in a particular group to justify his rights claims – is not the entire reality of the modern political subject. Yet were he to disappear, either because of protective tutelage or under the pressure of anonymous constraints, democracy would become no more than an empty word.

⁴¹ As will become clear further on (see chapter Four 4.2), autonomy is understood here as the refusal of tutelage.

