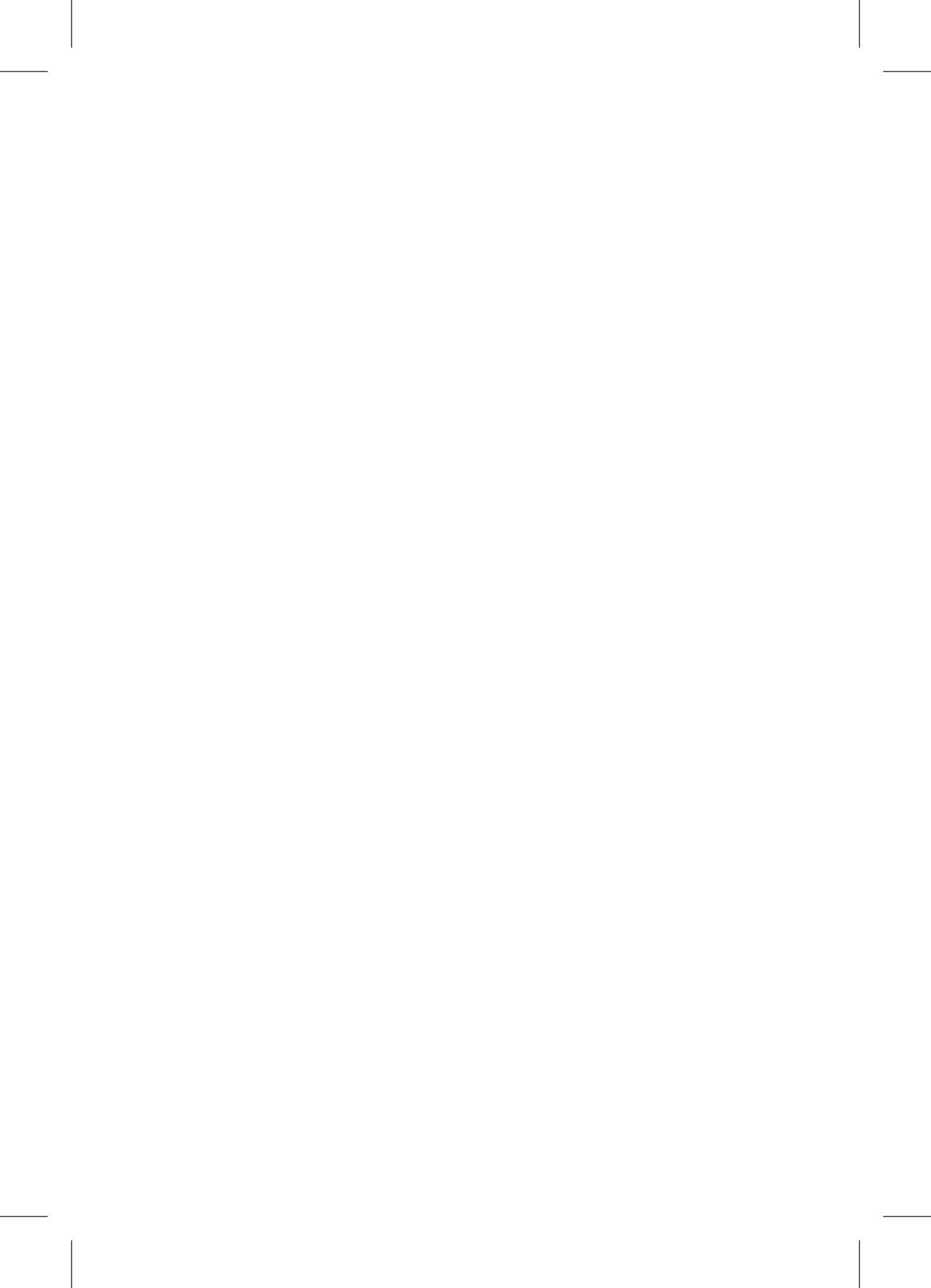


European Democracy in Crisis



EUROPEAN DEMOCRACY IN CRISIS

POLITICS UNDER CHALLENGE AND SOCIAL MOVEMENTS

HAUKE BRUNKHORST, DRAGICA VUJADINOVIĆ AND TANASIJE
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1 INTRODUCTION

In the past ten years, Europe has faced challenges that are unprecedented in its contemporary history. The 2007/2008 economic and financial crisis revealed all the weaknesses in the functioning of the Eurozone, notably the European Union's macroeconomic structure. Various rescue packages were introduced in response, intended not only to provide emergency assistance to the worst-affected countries, but also to forestall the contagion and recover confidence in the Euro area's ability to cope with the financial difficulties.¹ Thus, a new European economic governance was established, parallel to the policies and structures enshrined in the Maastricht Treaty and further developed in the Lisbon Treaty. This governance is manifested in the framework of various institutions, including the European Central Bank, European Commission, the Euro group and Summits of the Eurozone, and mechanisms such as the Memorandums of the Troika, corrective measures required from the Member States within the European Semester etc.² And although the validity of these reforms was upheld by the Court of Justice of the European Union in the *Pringle* case,³ the economic policies created within the given framework do not enjoy any democratic legitimacy.

Hence, another challenge shaking Europe; only, this time, its political and social constitution – the dramatic rise of right-wing populism and Eurosceptic political forces. The reduction of Member States' sovereignty in fiscal and economic policy has had an impact on the democratic legitimacy of the European Union. The electoral success of populist parties bearing nationalist and anti-European rhetoric, in both recipient and assisting states, confirms the relevance of problems of legitimacy.⁴ This poses a grave danger for the future of the European Union, as evidenced by Brexit and constant threats of other 'exits.' The weakness of the European Union's economic and political constitution is making the Union increasingly unpopular. Indeed, the roots of the anti-European sentiments are even deeper and can be attributed to issues of continuous democratic deficit and fears of disappearance of national identities in an ever closer and stronger Union. Nevertheless, the austerity measures imposed by the new European governance also put into danger the appeal of 'Social Europe' on the left wing of the political spectrum, thus negatively affecting the sense of belonging to the EU and its political identity in general.

1 Kaarlo Tuori & Klaus Tuori, *The Eurozone Crisis – A Constitutional Analysis*, Cambridge University Press, Cambridge, New York, p. 85.

2 S. Hennette, Th. Piketty, G. Sacriste, & A. Vauchez, *Pour un traité de démocratisation de l'Europe*, Seuil, 2017, p. 6.

3 Case C-370/12 *Pringle* [2012].

4 Tuori & Tuori, p. 210; Hennette, Piketty, Sacriste, & Vauchez, 2017, p. 8.

The neo-liberal responses to the crisis have proven that the ordoliberal economic theory has become *de facto* the unchangeable eternal clause of all constitutions, both European and national, limiting the sovereignty of national parliaments in macroeconomic matters. For instance, the constitutional entrenchment of the golden budgetary rule, advocated by the ordoliberals, ossifies questions that should be left open for discussion and political decision-making. Since it is not possible to say what the desirable level of public debt in an ideal society is, only a democratic debate could lead to the proper answers, in line with the objectives of the given society and its concrete challenges.⁵ Thus, the crisis has reduced national and transnational polities to their coercive essence. Resisting the inequality and loss of freedom, the social movements across Europe, in the United States, and elsewhere have resorted occasionally to extra-institutional mechanisms and channels.

Violence has indeed become Europe's new normal – not only due to the rise of radical left-wing, but even more so, right-wing social movements. In the past two and a half years, European polities have been hit by a series of terrorist attacks.⁶ Responsibility for these attacks was claimed by the Islamic State, and they were, among everything else, a reaction to Western military engagement in the Middle East. Nevertheless, being committed by local cells, they also reflect deep discontentment of the broader Muslim population (as a religious group) in Western Europe. Even though it is true that the jihadist attacks should not be conflated with other expressions of social dissatisfaction – such as the 2005 uprisings in the Paris *banlieues* which denounced racist prejudice and social exclusion – it is impossible to disregard that the former are also a manifestation of an integration deficit and a violent reaction against the fear of assimilation.⁷ This descent of Europe into a latent (and in moments real) 'state of nature' confirms the ever-growing importance of government by consent.

In contemporary European polities, which are pluralistic, consent implies 'an overlapping consensus of reasonable religious, philosophical, and moral doctrines regulated by it.'⁸ Yet, one of the most prominent causes of the ongoing European crisis lies precisely in the fact that the public sphere, *i.e.* public law, has been usurped by a particular (ordoliberal) economic theory or a traditional (Christian) religion, leaving no space for a quest for consensus.

The notion of democracy is far from univocal, either in the history of political thought or in contemporary democratic discourses and social movements that refer to it. Fundamental problems of political philosophy have arisen ever anew, and particularly, in the

5 T. Piketty, *Le Capital au XXI siècle*, Seuil, 2013, p. 923.

6 In Paris (7 January and 13 November 2015), Brussels (22 March 2016), Nice (14 July 2016), Berlin (19 December 2016), Manchester (22 May 2017), and London (22 March and 3 June 2017), just to mention those with the biggest death tolls.

7 Antoine Garapon & Michel Rosenfeld, *Démocraties sous stress – Les défis du terrorisme global*, Presses universitaires de France, Paris, 2016, pp. 83-85.

8 J. Rawls, *Political Liberalism*, expanded edition, Columbia University Press, New York, 2005, p. 10.

current global and European crisis. One of the focal questions is whether democracy belongs to civil society or represents a form of government. This comes to bear on the most fundamental problems of constituent power and political autonomy. If power of the people and political economy are to coincide (which should be the perspective of democracy as such), what are the concrete political forms and actors responding to this problem? And what does that mean under conditions of accelerated and economy-driven globalisation and Europeanisation? The present crisis of Europe is, at its core, a crisis of modern democracy, caused by globalisation and Europeanisation. Whereas the blackmailing power of the economy has increased dramatically through globalisation, the political power of workers and unions, of peoples and parliaments, largely reduced to national influence, has decreased at the same time.

The question must be examined from both ends: starting from the constitutional conceptions on the one side, and the social movements on the other. Of what kind are the new political movements? What concepts of democracy – from populist issues to democratic participations and self-administration – do they put at the forefront? Which political theories are capable of taking up this challenge?

The contributions to this volume, presented initially at the 2015 Inter-University Center conference in Dubrovnik, are all concerned with the different facets of the European crisis and the possibilities of overcoming it. They do not share a single diagnosis, nor offer the same analysis and conceptions of recovery strategies, but there is some overlap among them all. The strong diversity in diagnosis and therapy shows that there are many open questions. They are at the heart of this book.

The first part of the volume entitled *Polities Under Challenge*, begins with Patrice Canivez's contribution, *The Idea of Transnational Democracy*, in which he takes a broad look at the phenomenon of transnationality and points out the need for it to be based on democratic principles. While it is evident that the nation state cannot act effectively without the support of other states, it is also true that the decisions of a given state affect not only its citizens, but also the citizens of other states, and potentially, of the entire planet. Consequently, if the principle of democracy is that no one should be submitted to decisions in which she or he has no say, democracy can only be achieved in a transnational framework. Canivez also takes a close and critical look at Habermas's concept of transnational democracy that was intended as a model for the European Union.

The theory of the European Union as a demoi-cracy has offered a way out of the Habermasian dilemma of Europe as a Federal state or a Federation of nations. Demoi-crats claim that a contemporary theory of European Union's democratic legitimacy should embrace both the existence of multiple *demoi* and a single *kratos*. In his contribution, *Critique of the Theory of EU as a Demoi-cracy – Lessons from the Euro crisis*, Petar Marković turns to the Euro crisis and shows how it can be looked at as both a cornerstone and a stepping stone of the demoi-cratic predictions. Furthermore, he discusses the methodology

demoicrats have recently chosen on which to ground their EU normative benchmark. Marković argues that it does not correspond to the goals of the research agenda and shows weaknesses of the current state of demoi-cratic literature.

Marković comes to the conclusion that depolitisation through ever greater exclusion of political decisions from democratic self-legislation is one of the main problems of Europe because it leads to demoi-cracy without democracy. In his article *The New Transformation of the Public Sphere – Lessons from Greek/European Crisis*, Hauke Brunkhorst backs this argument indirectly by demonstrating a new structural transformation of the public sphere of Europe. Brunkhorst's principal message is that the crisis has shown that the entire institutional design of the EU is programmed for avoiding any public conflict, for bypassing public opinion and public law, and for making contested decisions exclusively in the arcane sphere of diplomatic negotiations, fireside chats, and the shadow world of hundreds and thousands of commissions.

The origins of the crises and responses to it are further explored by Dragica Vujadinović in her contribution *Causes of the Current Crisis and Ways Out – Seen through the Lens of the European Social Model*. Her principal argument is that the neo-liberal turn in the development of capitalism has caused the Eurozone crisis, and that austerity measures cannot solve the crisis. Thus, a welfare turn, *i.e.* new forms of economic welfare and political strategies of development, is necessary. This is important not only for overcoming the crisis, but also for diminishing overextended inequalities at the global, regional, and nation state levels; and for finding a new balance between economic efficiency and free market mechanisms on the one hand, and welfare systems, human rights protections, and the 'right to a decent life for each individual' on the other.

The inequalities in the public sphere which risk to undermine the stability of European polities by reinforcing the exclusion and isolation of the minority religion (Islam) and buttressing the publicization of the majority one (Christianity) are discussed in Tanasije Marinković's article *Religion in Public Spaces – Controversies in the European Court of Human Rights' Case-Law*. Relying on the premise that contemporary polities are typically pluralistic, and as such, require secularism to preserve the peace and maintain good functioning, Marinković analyses and criticises the case law of the European Court of Human Rights, which has validated a double standard in the approach to multiculturalism and religious diversity.

The first part of the volume closes with Gérard Raulet's contribution, *Disagreement and Recognition*. Raulet reconsiders debates in contemporary political theories related to the dialectic between redistribution and recognition, and articulates his views on the basis of the debate between Honneth and Frazer, and the ideas of Habermas, Rawls, Taylor etc. He agrees with Honneth and Frazer that redistribution and recognition should not be divided at the practical level, but critically remarks that both of them reproduce the mentioned dualism at an analytical level by relegating social injustice to cultural inequalities

and identity politics. Raullet also criticises all multiculturalist attempts to recognise cultural differences within a liberal-democratic constitutional order. He argues that differences should be accepted as disagreements over fundamental values of civilisation, and that ‘respect for disagreements’ should replace claims for ‘weak pseudo-consensus.’

The second part of the volume entitled *Social Movements* begins with Nenad Dimitrijević’s article, *Responding to Crisis of Democracy: Social Movements as Constituent Power*, in which he draws attention to the ever-increasing failure of democracies to perform their constitutionally defined tasks, and the consequent rise of radical democratic social movements (e.g. Spanish *Indignados* and Italian *Beni comuni*). Some of these movements and their theoreticians have proposed to revive the concept of constituent power as a core feature of an alternative social and political constitution of democracy. Dimitrijević’s principal aim is to offer a critical close reading of these theoretical efforts.

In his contribution, *A Rights-Based Justification of the Participation of Civil Society in Europe*, Stephan Kirste starts with the portrait of the participatory democracy in the Lisbon Treaty – the provisions on the horizontal, vertical, and cultural dialogue between the organised civil society and the EU institutions – and often-voiced critique that this model of participatory democracy brings back long overcome conceptions of corporatist governments. Kirste does not deny that some of these critical points are sound, but argues that participatory democracy can be justified nonetheless. The idea is that an individual right to participation gives citizens the competence to influence political processes in proportion to their concernment.

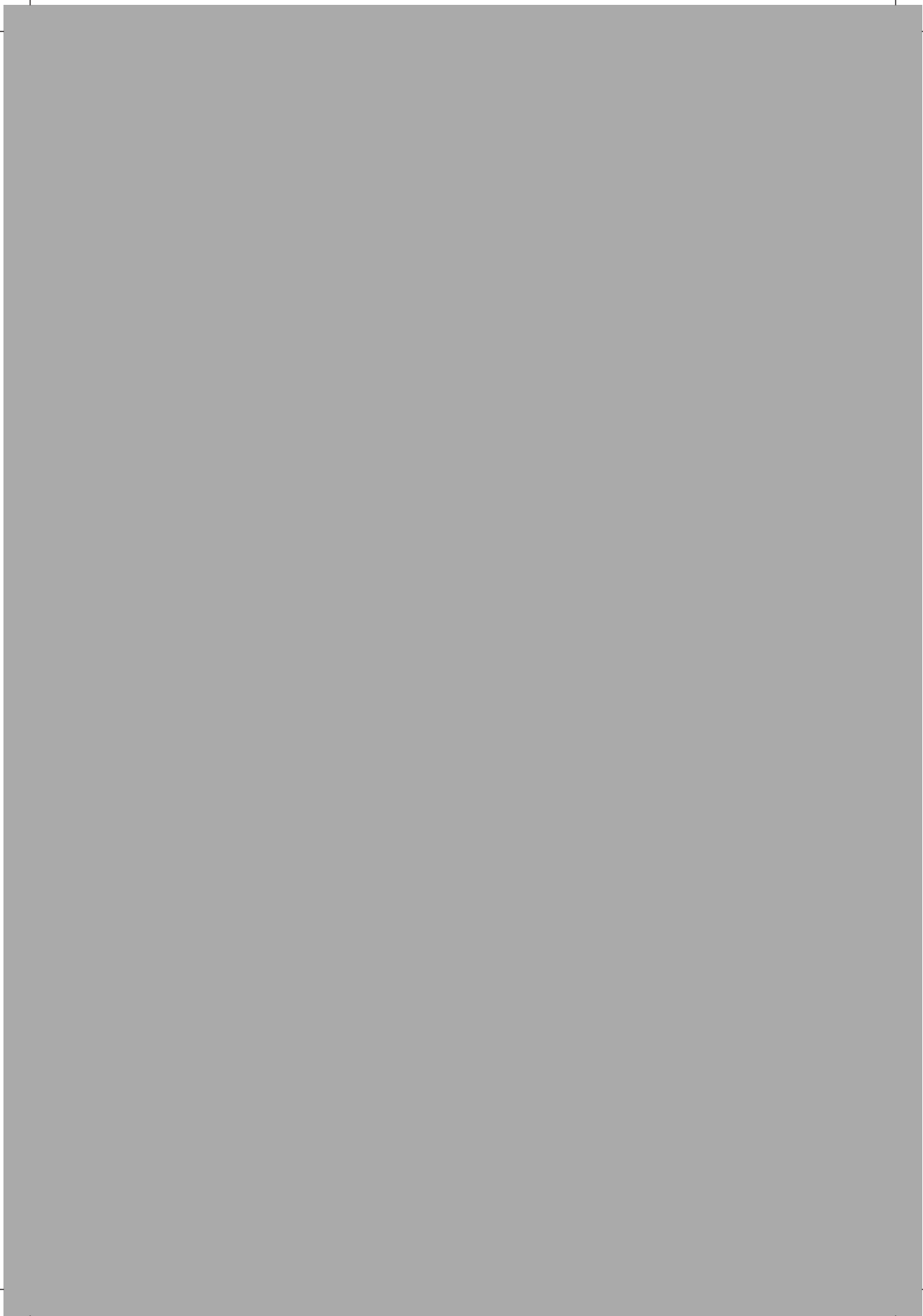
In his article *Democracy against Capitalism*, Hauke Brunkhorst adds that participatory as well as representative government has to first cope with the destructive powers of global capitalism. The response would be the ‘cosmopolitan project of democratic socialism,’ which is possible only if certain problems of societal differentiation are properly resolved: a crisis of motivation and legitimisation, and of secular stagnation; the difference of centre and periphery, which is transformed into the difference between included and excluded populations; the difference of system and environment, which causes ecological devastation; the transfer of real power (‘sovereignty’) to democratically legitimate and controlled transnational governmental structures on regional and global levels.

David Rasmussen’s contribution, *The Second Arab Awakening and the Changing Context of Public Reason*, gives a striking example from the southern, North African periphery of Europe, in which democratic change works to a certain extent. Rasmussen is primarily concerned with the question what it means to label the so-called second Arab awakening a liberal revolution. He tries to answer that question by first framing it in the larger historical context by reference to the origins of the liberal narrative. Second, he attempts to probe the question of why and how the recent events of the Middle East can be put in the context of that narrative. And finally, he turns to evolutionary theory to see what kind of paradigm can be prescriptive for the second Arab awakening.

Finally, in her article *Resentment and Social Transformation: A Rule-Related Argument against Martha Nussbaum's Critique of Anger*, Anne Reichold defends moral and emancipatory resentment as one of the conditions against the classical Aristotelian objections of mistrust of the people. She shows that Martha Nussbaum's analysis of resentment as constitutively bound to payback and not future-oriented, is wrong – or at least, one-sided. On the contrary, the potential of future-oriented moral rationality of moral resentment can make it an important power of social reformism and revolutionary progress.

H. Brunkhorst
D. Vujadinović
T. Marinković

PART I
POLITIES UNDER CHALLENGE



2 THE IDEA OF TRANSNATIONAL DEMOCRACY^{*}

Patrice Canivez

As is the case with Kant's cosmopolitanism, the aim of transnational democracy is to secure peace, promote democracy – in Kant's theory, the republican form of government – and enable each individual to achieve moral autonomy. However, the objective of transnational democracy also includes dealing with global problems – the regulation of finance, the protection of the environment, the fight against terrorism, and so on – by means of common action at the global level. The notion of transnational democracy is opposed to three equally negative prospects: the prospect of a global society without political control or regulation; the idea of a world state that would transpose the nation state model at a global scale; the withdrawal of nation states into themselves.

The notion of transnational democracy is quite complex. It refers to a theoretical field, an object of debate, rather than to a definite concept. Consequently, this chapter focuses on a few points. To begin with, I analyse the notion of transnationality in contrast with the ideal-type of the nation state (I). I envisage two possible viewpoints on transnational democracy, in relation to the opposition between state and society and the alternative between representation and participation (II). Then, I discuss three possible paradigms of transnational democracy (III), and examine their respective limits (IV). I conclude with a few remarks on the evolution of traditions.

2.1 GLOBALISATION AND THE IDEAL-TYPE OF NATION STATES

The very notion of *transnational* democracy invites us to start with the concept of nation. Classically understood, a nation is, at the same time, a society and a community. It is a society, *i.e.* a certain way of organising social cooperation, a system of production, a market. It is also a civil society, a system of civic activities within a network of associations, NGOs, etc. It is a historic community, inasmuch as the sense of belonging implies adherence to the cultural, moral, political traditions of the nation. Finally, a state is a system of interdependent institutions that enables a political community to make and enforce collective decisions. Hence, the ideal-type of the nation state may be defined as the congruence, within the limits of one and the same territory, of a state, a society, and a historic commu-

* A first version of this study was published in French in P. Kemp & N. Hashimoto (Eds.), *Ethics and Politics/Ethique et Politique*, Eco-Ethica, vol. 4, Lit Verlag, Zürich, 2015, pp. 35-48.

nity. In other words, it is the congruence of a nation state, a national culture, and an economic system.

Of course, this is only an ideal-type. With a few exceptions, such an ideal has never been fully achieved, as is witnessed by the variety of types of nation states. There are unified nation states, which nevertheless allow for different regional cultures; there are nation states in which a nation coexists with its minorities; there are nation states of the federative type, etc. In itself, the principle of the 'triple congruence' of the political, economic, and cultural spheres is a potential source of violence. Much depends on the way the cultural unity is conceived: as an innerly differentiated unity or as a strict homogeneity which is, most of the time, grounded in a myth of purity – purity of its origins, of its cultural tradition, etc. When the cultural unity of the nation is understood as demanding such homogeneity, the triple congruence cannot be achieved without violence. It involves the forced assimilation, expulsion or elimination of minorities, or their exclusion from the full exercise of citizenship.

It remains that the ideal-type of the nation state is the congruence between the political, the social, and the cultural spheres within the limits of one and the same territory. It is the congruence between a nation state, a national economy and a national culture or identity. However, in an ever more globalised world, such congruence is no longer possible. While states and national communities remain particular entities defined by delimited borders, modern society is becoming a worldwide, universal society. Such decoupling between the political, economic, and cultural spheres leads to a decoupling between the various functions of the state. On the one hand, the state may be seen as a local, administrative agent of global society; on the other, the state represents and defends a certain idea of national identity, of the historic values with which citizens identify. Regarding citizens, they are torn between their status as members of the global society and their status as members of a national community. Their relation to the state – and to states, in general – is ambivalent. On certain issues, they confront and challenge their own state as well as other states, which they oppose either as members of a worldwide public opinion, or as sympathisers of issues defended by transnational NGOs such as Greenpeace, Amnesty International, etc. On other issues, citizens show loyalty towards the cultural and political traditions that their own state represents and incarnates. This ambivalence leads to political divides within the national public opinion. In some respects, national public opinion reacts as a sector of global public opinion. In others, it expresses the people's attachment to strictly national values.

As regards the range of state and governmental action, the decoupling between the different spaces has a paradoxical effect: for this range of action is limited. At the same time, however, it has cross-border effects. On the one hand, it is now evident that the nation state cannot act effectively without the support of other states. On the other, the decisions of a definite state affect not only the citizens of this state, but also the citizens of other states, and potentially, of the entire planet. Hence the idea of transnational democracy.

From the limits of state action follows a principle of cooperation. From the cross-border effects of this action follows a principle of responsibility. Each state is accountable for its action not only towards its citizens, but also towards all the groups and individuals that are affected by its policy.

Thus, the ‘transnationalisation’ of democracy is inevitable. It is also necessary if we want a true and effective democracy. We are moving from a system where the nation state is the natural framework of democracy to a system where democracy is possible only in a transnational form. The principle of democracy is that laws cannot be enacted without the citizens’ consent. Political decisions cannot be made without the citizens’ participation in the decision-making process. With the globalisation of society, however, citizens are more and more affected by decisions that are made outside the borders of their own state. Even if they live in a democratic state, they have to comply with rules and decisions that stand beyond the control of their own government. This is an ethical as well as a political problem. It means that the conditions for individual self-development depend more and more on circumstances of which nation states have but limited control. Of course, this is more or less true, according to the demographic, economic, and political weight of the different states. However, if the principle of democracy is that no one should be submitted to norms and decisions in which she or he has no say, democracy cannot be achieved but in a transnational framework.

One of the main characteristics of such a transnational framework is that it comprises several levels: local, national, regional, and global. In Europe, for example, transnational cooperation is essential. There are cross-border partnerships – for instance, in the framework of ‘Eurometropoles’ – that illustrate the idea of trans-border democracy. Such experiences change the perception of borders that mostly result from past wars and bargains, which means that these borders are always more or less arbitrary. Cross-border cooperation makes it possible to view borders no longer as limits and obstacles, but as places of exchange and communication. Such practices of cross-border democracy are indispensable in order to overcome certain historic traumas.

2.2 STATE AND SOCIETY. REPRESENTATION VS. PARTICIPATION

Most of the theories and analysis related to political problems express a preference for one of the three spheres: the state, the society, or the community.¹ For instance, the notorious debate between liberals, communitarians, and republicans reflects the tridimensional structure of the political field. This is also the case with the notion of transnational democracy. When considering transnational democracy from the point of view of the

¹ For a more developed analysis, see P. Canivez, *Qu’est-ce que l’action politique?* Vrin, Paris, 2013.

state, the stress is put on interstate cooperation. When considering it from the point of view of society, the stress is put on civic cooperation at different levels, implying associations, NGOs, multinational companies, etc. When considering the issue of transnational democracy from the viewpoint of the community, we are faced with the alternative between multiculturalism and the clash of civilisations. In methodological terms, it is obvious that any reasonable, comprehensive understanding of political problems must articulate these three different points of view. In the following pages, I will focus on the relationships between state and society. I will envisage more briefly the relationships between society and community, which have a bearing on the ethical implications of transnational democracy.

When considering transnational democracy from the perspective of the state, the stress is put on interstate cooperation. When considering such a democracy from the perspective of society, the stress is put on the role of a global civil society. These two possible viewpoints correspond to two possible models. States cooperate through the agency of international institutions such as the United Nations, the World Trade Organisation, the International Monetary Fund, etc., while a network of associations, multinational companies, non-governmental organisations (NGOs), take charge of a variety of problems of public concern. To some extent, the two viewpoints transpose at the global level the two rival theories of democracy – the one insisting on the principle of representation, the other on the principle of political participation. On the one hand, international institutions represent the states; on the other, a variety of actors engage in political, democratic participation within the global society. Both conceptions have their limits. For instance, states are represented in international institutions. Within these institutions, however, they do not have equal say and equal share in the decision-making process. In this view, inequalities in the distribution of wealth and influence – military, economic, cultural, diplomatic – stand in the way of the development of a true transnational democracy. This is the classic problem of a democracy that is formal and not real, a problem that now concerns the international dimension and not only the inner political life of nation states. Second, not all the states that take part in international cooperation and institutions are democratic. A number of states are represented by autocratic governments, which express neither the will nor the problems of their population. Hence, the democratisation of international relations poses two problems. It calls for the democratisation of international institutions – such as the UN, and at its own level, the European Union. It also calls for the democratisation of authoritarian states and for more effective, not only formal, democracy within constitutional democracies.

In the model of interstate cooperation, democracy is transnational in the sense that it transcends the borders of each particular state. In the model of a global social network, global governance implies a variety of non-state actors that intervene at different levels: local, regional, and global. In this view, the notion of ‘trans-nationality’ does not merely

refer to the transversal cooperation between territorial nation states; it refers to a multilevel system of cooperation where the role of the state is relativised. The 'transnational' dimension does not only transcend the borders of the nation state, it transcends the very principle of territoriality. On the one hand, it takes into account the increasing role of non-state actors in the global governance. On the other, the *demos* linked to a delimited national territory no longer plays the central role. At a global level, political participation depends on flows of communication within the global civil society. What is thus questioned is the representativeness of the nation state. The source of political legitimacy is no longer the *demos* that is politically active within the framework of the nation state; the source of legitimacy is defined by the 'all-affected' principle. That is, it lies in all the people that are affected by a given problem, a whole world made up of people that cannot be localised in a unique and homogeneous territory, because they are dispersed all over the planet. Political legitimacy no longer belongs to a sovereign people circumscribed within the limits of a territorial state. It belongs to informal flows of communication within a deterritorialised civil society.

However, such an idea of participation within civil society has also its limits. For NGOs, multinational companies, associations, etc. often turn into lobbies. They do not have the legitimacy that is provided by universal suffrage. Moreover, another problem arises. NGOs, associations, corporations are dedicated to specific issues: health, environment, education, etc. In contrast, the task of governments is to deal with all pressing issues at the same time. All these issues are interconnected; they cannot be isolated from one another. When dealing with anyone of these problems, it is necessary to take into account the consequences or side effects on other issues. This requires the setting up of priorities, the reconciliation between different objectives. For instance, it is necessary to reconcile economic development and the protection of the environment, the fight against terrorism and the guarantee of basic liberties, etc. Civil society plays a decisive role by delivering expertise, by pressing governments to take action on issues that are being neglected by the administration, etc. But it is not the role of civic associations, workers unions, NGOs, corporations, etc. to develop a synoptic view of all the problems that require collective action. Such a synoptic view implies a dialogue between state and non-state actors; it requires a dialogue with civil society. But it cannot develop at the level of civil society. As regards global problems, the synoptic view cannot develop within the framework of the singular nation state either. It develops through the public discussion between states, with the participation and under the control of public opinions.

2.3 THREE PARADIGMS

One of the crucial issues of the reflection on transnational democracy is thus the role of the state. In this respect, we may distinguish between three main paradigms of transnational

democracy. These paradigms may be specified according to the role of the state. States may be: 1) subordinated to a supranational structure; 2) placed on equal footing with the supranational institutions; 3) subordinate such institutions.

2.3.1 *The Idea of a Cosmopolitan Political Organisation*

We find an illustration of the first paradigm in the cosmopolitan model proposed by David Held. The model consists of a hierarchised structure. The general idea is to define a set of fundamental principles, which an overarching cosmopolitan order is meant to enforce. Within this framework, states play a subordinate role. On the one hand, all levels of territorial organisation are taken into account: the local, national, regional, and global levels. A principle of subsidiarity prevents such an organisation from concentrating power at the top levels. But the framework is nevertheless a hierarchised structure. On the other hand, this overarching framework takes into account the growing role of non-state actors and deterritorialised forms of political participation and decision. Thus, a hierarchy of territorial levels along with the overlap of non-territorial communities, which regroup all the people concerned by specific issues, characterise the system. Consequently, citizenship no longer relates to one's belonging to an exclusive territorial community. Citizenship depends on one's adherence to fundamental principles that may be enforced in diverse ways in a variety of contexts. This leads to some sort of constitutional patriotism at a global level, where the adherence to basic rights and principles goes along with multiple territorial and non-territorial belongings. Consequently, individuals would benefit from multiple citizenships, and engage in different forms of political participation, within the diverse communities to which they belong.

In such a framework, the nation state is, so to speak, 'sublated.' It loses its pre-eminence:

Cosmopolitan sovereignty is sovereignty stripped away from the idea of fixed borders and territories governed by states alone, and is instead thought of as a framework of political relations and regulatory activities, shaped and formed by an overarching cosmopolitan legal structure. In this conception, the nation state 'withers away'. But this is not to suggest that states and national democratic polities become redundant [...] States need to be articulated with, and relocated within, an overarching cosmopolitan framework.²

2 D. Held, *Cosmopolitanism. Ideals and Realities*, Polity Press, Cambridge, 2010, p. 100. See also p. 101.

2.3.2 The Habermasian Concept of Transnational Democracy

Habermas has developed a concept of transnational democracy that applies to the European Union. However, the concept is also meant to be a model for a global political organisation. In the 2000s, Habermas spoke of the ‘postnational constellation’ and contemplated the prospect of a European Federation. He now speaks of a ‘transnational democracy’ and insists that Europe is neither a Federal state nor a Federation of nations. In his view, there are two main reasons of concern. First, over the last decades, the ‘intergovernmental method’ has taken precedence over the ‘community method’ in the European decision-making process. Heads of states and governments (the European Council) make the essential decisions, whereas the European Commission plays a secondary role. Such a development leads Habermas to fear that a European Federation might take the shape of a ‘post-democratic’, ‘executive’ federalism.³ Second, the European member states have succeeded in securing a certain level of political and social rights. In this respect, the idea of a European Federation seems to entail the risk of regressing below the level of political and social rights that has been achieved at nation-state level.

That is why Habermas now speaks of transnational democracy. The term suggests the idea of horizontal relationships between the member states, rather than that of a vertical hierarchy between the EU and the member states. Habermas’s concept of transnational democracy implies both a constitutional principle and a series of propositions regarding the functioning of the EU. The constitutional principle is the principle of *pouvoir constituant mixte*. It is a principle of shared sovereignty between the EU and the member states. In other words, the EU has two constitutive powers: the citizens of the EU (as a whole) and the peoples of Europe (the member states). Therefore, the EU member states are not to be subordinated to the EU (in the way member states are incorporated into a Federation). The EU and the member states must be placed on the same level. As regards the citizens, they must consider themselves, at the same time, as citizens of their national states and as citizens of the EU. Again, the two kinds of citizenship must be placed on exactly the same level.

With respect to the functioning of the EU, Habermas draws the conclusion that the community method should retake precedence over the governmental method. It is necessary, says Habermas, to ‘dethrone’ the European Council, *i.e.* the council of the heads of state and government.⁴ The European Commission should play the role of a European government, a government that would be responsible towards both the Council and the European Parliament, *i.e.* towards the representatives of the states and the representatives of the citizens.

3 Cf. J. Habermas, *Die postnationale Konstellation. Politische Essays*, Suhrkamp, Berlin, 1998.

4 Cf. J. Habermas, *Im Sog der Technokratie*, Suhrkamp, Berlin, 2013, p. 95.

2.3.3 *Eric Weil and the Idea of a Global Administration*

The third paradigm focuses on the idea of a global organisation of social cooperation. Such a scheme is developed in Eric Weil's *Philosophie politique*.⁵ The scheme does not focus on global political institutions such as a global parliament, government, etc. It focuses on the notion of a global administration, *i.e.* the administration of social cooperation at a global level. One of Weil's main arguments is that modern society cannot be truly modern, *i.e.* rationally organised, unless it becomes a globally administered society. On the one hand, only a global administration would make it possible to solve the problem of cyclic economic crises that is the plague of capitalism. If the so-called overproduction crises are, in fact, crises of under-consumption, a reduction of inequalities at the local and global levels is at least part of the solution. In particular, the living standards of developing societies need to be raised. Such a reduction of global inequalities will never happen as a result of market mechanisms. Hence, the necessity for a global administration, whose task would be to regulate the market and take measures of global justice, becomes evident. Such an administration should enforce the basic rights of all members of the global society and make sure that they all have their share of the benefits of social cooperation.

The idea of a global administration of social cooperation must be understood in the large, Hegelian sense. It includes the development of 'public services' and the enforcement of basic rights by international courts of justice. As regards the existing, historic states, they would be discharged of the administration of society. However, they would exert political control over such global administration. Since peace would be ensured, the nation state would undergo a radical transformation. States could progressively cease to be what they are at present, *i.e.* instruments of power. Each state could evolve towards true democracy – the democracies of our time being more or less illusory democracies – and become, in reality, what it is according to its concept, *i.e.* the conscious organisation of an ethical community (a *Sittlichkeit*). The result would be a three-leveled structure: a *universal* society (a globally administered organisation of social cooperation) would enable a plurality of *particular* states to develop (a plurality of states corresponding to the pluralism of cultures). Eventually, what justifies the existence of such a plurality of states is the possibility, for each *singular* human being, to reach moral autonomy within the framework of a meaningful form of life.

Such a structure is not a federation. In fact, it is the contrary of federal organisation. The principle of a federation is that the federate states are components of the federation. The federation subordinates the federate states. In contrast, the global administration which Weil envisages is not an all-encompassing whole of which the states would be the component parts. It is not the superior level of a hierarchised structure; it is the *inferior*

5 Cf. Eric Weil, *Philosophie politique*, Part IV, Vrin, Paris, 1996 (1956).

level of the structure. It is not a *super*-structure, it is an *infra*-structure, which is the common base upon which particular states could freely develop. The states would have to conform to the rational norms of the global administration of society. In return, however, this global administration would have to submit to the political control of the states.

2.4 LIMITS OF THE THREE PARADIGMS

Each of the three paradigms should be analysed and discussed in detail. The discussion should also be enlarged and include a range of authors who have significantly contributed to the debate: Daniele Archibugi, Etienne Balibar, Hauke Brunkhorst,⁶ etc. However, it appears that each paradigm has its limits. One of the limits of the cosmopolitan paradigm is that it neglects the specific differences between states and non-state actors (associations, NGOs, workers-unions, multinational corporations, etc.). Most of the time, the question arises in relation to the problem of legitimacy: Who decides? What is the legitimacy of the decision? But, as we have seen above, the problem is also to determine which level of decision and which procedures make it possible to develop a synoptic view of the issues that must be dealt with – an encompassing view incorporating the interconnectedness of all such issues. The idea of relativising or bypassing the states ignores the problem. The real problem is not to find ways to bypass or counterbalance the state; it is to determine the conditions for a radical transformation of the state itself. The integration of the state into a transnational framework must provoke the state to transform itself. What needs precise analysis are the conditions under which the states may engage in such a process of self-transformation.

As regards the Habermasian paradigm, it would also need detailed analysis. Habermas is indebted to Hauke Brunkhorst's distinction between the sovereignty of citizens and the sovereignty of states.⁷ The notion of a shared sovereignty between the EU and its member states corresponds to the distinction between the sovereignty of EU citizens and the sovereignty of each EU member state. Habermas's present anti-federal stance is also inspired by the idea that we do not need state institutions to develop a decision-making process that is both democratic and efficient. Hence, we do not need a European federal state to make the EU work as democratic polity.

6 See D. Archibugi, *The Global Commonwealth of Citizens. Toward Cosmopolitan Democracy*, Princeton University Press, Princeton, NJ, 2008; E. Balibar, *Nous, citoyens d'Europe? Les frontières, l'État, le peuple*, La Découverte, Paris, 2001; *Europe, Crise et fin?*, Le Bord de l'eau, Paris, 2016; H. Brunkhorst, *Solidarity. From Civic Friendship to a Global Legal Community*, MIT Press, Cambridge, MA, 2005; *Das doppelte Gesicht Europas. Zwischen Kapitalismus und Demokratie*, Suhrkamp, Frankfurt/Main, 2014.

7 See, for instance, H. Brunkhorst, "A Polity without a State? European Constitutionalism between Evolution and Revolution", in E. O. Eriksen, J. E. Fossum & A. J. Menendez (Eds.), *Developing a Constitution for Europe*, Routledge, London, 2004, pp. 96-108.

However, Habermas's analysis raises two questions. First, the idea of shared sovereignty and double citizenship runs the risk of transforming one of the main defaults of the European political process into a permanent constitutional structure. In a federative organisation, the subordination of the federate states to the federation itself means that the particular interests of the states are subordinated to the general interest of the federation. In contrast, the idea that the European member states and the EU itself must be placed on the same level means that particular, national interests may counterbalance the general interest of the Union. This is exactly what happens in the European decision-making process, where most of the decisions result from compromises on the lowest common denominator between the national interests of the states and the general interest of the European Union. Habermas's constitutional scheme for Europe entrenches the problem. His concept of a transnational, non-federal democracy is too restrictive with respect to the necessity of common action, especially at the time of crises. If the goal of the EU is to make possible a joint, effective action of its member states, some kind of federal organisation is needed. In fact, it already exists in many respects and is building up, even if chaotically, in the Eurozone – witness the increasing *political* role of the European Central Bank. However, and this is the second problem, there is some discrepancy between Habermas's constitutional model and his recommendations for improving the governance of the EU. For if Habermas rejects the idea of a federal Europe, his recommendations tend to reinforce the federal nature of the EU. The idea of 'dethroning' the European Council and switching over from intergovernmentalism to the community method is typically a federal idea. What the Eurosceptics and the nationalists (in France, the UK, etc.) want to avoid at all costs is precisely that kind of federal move.

As regards Weil's paradigm, it also raises two questions. First, it presupposes that it is possible to substitute the logic of cooperation for the logic of competition. The main argument is that globalisation engenders a network of interdependencies whose correct functioning becomes the common 'social interest' of every state. In practical terms, this means that the states can no longer defend their interests effectively – *i.e.* in the long run – by means of warfare. Apart from the risk of failure and the prospect of massive destruction, a state that resorts to violence in its relations to other states runs the risk of excluding itself from the international society, *i.e.* from the benefits of socio-economic cooperation at the global level. However, states are not pure rational calculators; their policies are also determined by impassioned motives, by national pride, imperial traditions, etc. Second, Weil's model presupposes that a global administration could be ideologically neutral. In other words, it presupposes that technical considerations, *i.e.* a shared concern for greater efficiency in the production and distribution of goods and services, could persuade the most powerful states that it is in their interest to enforce human rights at a global level and promote global justice. If these two presuppositions are not satisfied, the globalisation of

society will proceed in a competitive rather than in a cooperative way, and the result will be one form or the other of global domination.

2.5 CONCLUSION

Since each of the three paradigms has its limits, they will probably combine in such a way as to compensate each other. In the future, transnational democracy will probably develop as a mixed regime resulting from the combination of the three paradigms. However, there is no reason why the combination should be the same at all levels: local, regional, and global. On the contrary, it is probable that transnational democracy will take different forms, according to the different levels of decision and the different regions of the world. For example, we could have, at the same time, a cosmopolitan organisation based on the *pouvoir constituant mixte* and a federal European Union. The EU might well develop its own, specific pattern of federal organisation. It might also end up being a failed federation. More importantly, the pattern of transnational democracy, at all relevant levels, will depend on the institutional creativity of the coming generations, a creativity that is going to be constantly challenged by crises and conflicts – terrorism, imperial policies, etc. – whose development is unpredictable.

Whatever these patterns of transnational democracy may be in the future, they will imply the development of a community of shared values. In this respect, it is necessary to develop a common interpretation of values that are already universally shared, but in an abstract and formal way, *i.e.* without agreement on their meaning and the way to enforce them. Such a common interpretation of shared values presupposes that the different traditions engage in dialogue. This implies what may be called the ‘universalisation of tradition’. In order to engage in an intercultural dialogue, each tradition must develop a self-interpretation that makes it meaningful and reasonable in the eyes of every human being, especially in the eyes of people adhering to other traditions. In other words, each tradition must overcome, through a process of self-reinterpretation, the potential of violence and arbitrariness it entails. For all traditions may be interpreted in a way that leads to violence. Witness the wars of religions in Europe, but also the theories of ‘civilisation’ that were used to justify racism and colonialism.

Such a process of self-reinterpretation is linked to the integration of the different communities of tradition into a globalised society. It is true, as authors such as Axel Honneth insist, that modern society is a society in which individuals are reified, a society in which the lack of recognition engenders diverse forms of social pathologies. In contrast, the ethical, religious, cultural values of historic traditions and communities give meaning to life in modern society and favour intersubjective relationships. However, the potential for recognition inherent to these traditions is ‘blocked’ by the inequalities of status that

they perpetuate: inequalities between men and women, between social groups, etc. Cultural, moral, religious traditions are a source of inter-subjective recognition, provided that, under the pressure of the modernisation of society, they undertake a critical examination of the relations of domination and subordination they reproduce and justify, most of the time, as so-called 'natural' inequalities. The rationalisation of social cooperation raises the awareness that such pseudo-natural inequalities are arbitrary. The process of rationalisation leads to the demand of equal rights and makes possible the reduction of traditional relations of subordination. In this context, moral, cultural and religious traditions undergo a process of self-interpretation that makes possible authentic inter-subjective recognition – authentic inasmuch as it concerns all members of the community. In other words, the 'modernisation of traditions' highlights the ethical value of religious, moral, cultural traditions, because such a process exposes the ideological function of historic traditions to rational criticism. However, the 'modernisation of traditions' is not only the process through which traditions and communities adjust to modernity; it is also the process through which they assimilate modernity. This leads to the emergence of a plurality of versions of modernity. Consequently, the cultural background for the development of the diverse forms of transnational democracy is a process that has two inseparable aspects: the universalisation of traditions on the one side, and the development of 'multiple modernities' on the other.⁸

8 Regarding the ethical and political implications of such a context of multiple modernities, see D. Rasmussen, "Conflicted Modernity. Toleration as a Principle of Justice", *Philosophy and Social Criticism*, Vol. 36, Nos. 3-4, 2010, pp. 339-352.

3 CRITIQUE OF THE THEORY OF THE EU AS A DEMOI-CRACY – LESSONS FROM THE EURO CRISIS

Petar Marković

3.1 INTRODUCTION

The leitmotif of the history of European integration is that the Union was born out of a crisis and has endured all crises thus far, managing to adapt, change, and ultimately, exit them, being ever more stable and attuned to political reality. Demoi-cratic theory now seems to provide such an account with regards to the ongoing Euro crisis. The dramatic changes that occurred as a reaction to the crisis in the EU seem to back up the basic assumptions of the demoi-cratic theory at first glance. Demoi-crats claim that a contemporary theory of EU's democratic legitimacy should embrace both the existence of multiple *demos* and a single *kratos*.¹ In this way, the theory provides a way out of the dilemma between rolling back European integration or pushing forward to a *finalité politique* of a federal state. With regards to the crisis in the EU, the intergovernmental bias in handling its effects seems to provide empirical evidence for this claim. The mechanism-building processes of economic crisis management and future prevention from 2009 onwards, including fashioning intergovernmental treaties (e.g., the Treaty on Stability, Co-ordination and Governance in the Economic and Monetary Union) and striking informal intergovernmental bargains through extensive summitry (including bilateral meetings between Germany and France,² during and after the 'Merkozy' phenomenon and the submission of the EU institutions into supporting and implementing bodies of the political will formulated at the level of European Council) could point to that conclusion. How are we to judge the undoubtedly changed Union and the merits of this school of thought in analysing it? More importantly, why should we, if at all, embrace the democratic postulates of demoi-cracy, and which of those should be revised and reformulated?

1 R. Bellamy & D. Castiglione, "Three Models of Democracy, Political Community and Representation in the EU," *Journal of European Public Policy*, Vol. 20, No. 2, 2013, pp. 206-223, 207; K. Nicolaidis, "European Democracy and Its Crisis: European Democracy and Its Crisis," *JCMS: Journal of Common Market Studies*, Vol. 51, No. 2, March 2013, pp. 351-369, doi:10.1111/jcms.12006, p. 357.

2 J. E. Fossum, "Democracy and Differentiation in Europe", *Journal of European Public Policy*, Vol. 22, No. 6, 3 July 2015, pp. 799-815, doi:10.1080/13501763.2015.1020838, p. 805.

The chapter proceeds as follows: first, the demoi-cratic theory will be located within the larger debate on EU democracy in order to demonstrate why this research agenda has the comparative advantage with respect to other theories in elucidating the prospects of EU democratisation (sections I and II). Democratic theory (and practice), Shapiro noted, has always appeared ‘impotent when faced with questions about its own scope.’³ Nowhere is this more evident than in the case of EU democratic theory and practice. As far as theory is concerned, democracy is contested both in terms of its form and substance. In terms of form, the debate has evolved around the trilemma on whether it should remain within the nation state, be replicated as such on a European scale or go beyond the two. In terms of substance, the array of positions has ranged from aggregate, over deliberative, to republican normative models of democracy.⁴ As the chapter will attempt to show, demoi-crats argue in favour of a transnational and deliberative theory, which gives them the advantage. Second, I will turn to the Euro crisis and show how it can be looked at as both a cornerstone and a stepping stone of the demoi-cratic predictions (Section 3.3) – namely, the crisis-induced turn of the pendulum towards the stronger input of the *demos* in the decision-making suggests they are right. At the same time, the ostensibly executive character of this turn and the contradictions that stem from it suggest otherwise. Therefore, in order to resolve this ambiguity and point to the deficiencies of the current state of the art of demoi-cratic theory that, in my view, prevent it from fulfilling its full potential, I conclude with a discussion of fundamental principles of demoi-cratic theory (Section 3.4).

3.2 OVERCOMING THE EU DEMOCRATIC DILEMMA

The state of the art on democracy in the European Union, and indeed, on the prospects of European integration in general, resemble the divisions and quarrels between the ‘Old’ and the ‘Young’ Hegelians over the true legacy of their teacher’s philosophy. Most notoriously, they disagreed about how to interpret the puzzling idea about the unity of thought and being from Hegel’s *Philosophy of Right* – ‘The real is rational, and the rational is real.’⁵ While the former looked at the first part of the phrase as the basis for an apology of the existing political order, the latter were inspired by the second part of the sentence to seek for ways to realise their rationally conceivable emancipatory political projects in practice. The real attitudes of political elites and contemporary intellectual thought on EU affairs are entrenched in a division that suffers from the same flawed underlying assumption. One camp glorifies the nation state as the still desirable reality and rejects the notion of EU democracy as deeply irrational; the other supports the EU democratic project as the

3 I. Shapiro, *The State of Democratic Theory*, Princeton University Press, Princeton, NJ, 2009, p. 1.

4 Cf. J. Habermas, “Three Normative Models of Democracy”, *Constellations* Vol. 1, No. 1, 1994, pp. 1-10.

5 G. W. F. Hegel, *The Philosophy of Right*, Hackett Publishing, Indianapolis/Cambridge, 2015.

next dialectical stage in the self-realisation of the European *Geist*. Both poles in this debate take the nation state as their frame of reference and discuss the prospects for democracy in the EU in these terms.

An overview of the scholarly approaches to EU democracy reveals two prevailing debates.⁶ One, which has represented the mainstream since the Maastricht Treaty up until recently, revolves around the ideal-type nation-state democracy as a benchmark for the EU, both in terms of empirical feasibility and normative desirability. It is composed of two poles or schools of thought: the first, *nation-state democracy school*, is sceptical about the prospects of EU democracy and argues that a fully-fledged democracy can only exist in a nation state and is, therefore, both inconceivable and ill-advised for the Union.⁷ The second pole of this debate on EU democracy is *supranational democracy school*. For its proponents, the European nation state writ large is the *telos* of the integration project and the current state of EU democracy is often criticised along the same lines of the previous critique, with the important difference being that the latter envision a fully-fledged democracy in a federal state. With a European federal state in mind, they object to the current democratic quality of EU governance from the point of a ‘United States of Europe in-the making.’⁸ The theorists of nation-state democracy tended to bracket the democratic developments at the EU level whilst theorists in the Euro-federalist camp tended to bracket the difficulties and obstacles related to the feasibility of their project.

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- 6 The proposed reconstruction here is based on the similar endeavours in the relevant literature. Most notably, it relies on Lacroix & Nicolaidis’s ‘two axis of debate’ within ‘EU philosophical triangle’, RECON’s three models of European democracy), Bellamy & Castiglione’s ‘three models of democracy, political community and representation in the EU’ and Bohman’s ‘gradualist and transformationalist’ ways of democracy building beyond the state. See: J. Lacroix & K. Nicolaidis, *European Stories: Intellectual Debates on Europe in National Contexts*, Oxford University Press, Oxford, 2010; E.O. Eriksen & J.E. Fossum, “Europe in Transformation: How to Reconstitute Democracy?” *Arena Working Papers*, RECON, 2007; Bellamy & Castiglione, 2013; J. Bohman, “Democratizing the Transnational Polity: The European Union and the Presuppositions of Democracy”, in *How to Reconstitute Democracy in Europe*, 2007a, pp. 65-89; J. Bohman, *Democracy across Borders. From Demos to Demoi*, MIT Press, Cambridge, MA, 2007b.
- 7 R. A. Dahl, *On Democracy*, Yale University Press, New Haven, CT and London 1998; A. Weale and M. Nentwich, *Political Theory and the European Union Legitimacy, Constitutional Choice and Citizenship*, Routledge, London and New York, 1998; D. Miller, *Citizenship and National Identity*, Polity Press, Cambridge, 2000; D. Grimm, “Which Constitution for Europe”, *Quo Vadis Europe. Tubingen.-25*, 1997.
- 8 G. F. Mancini & J. Weiler, *Europe-The Case for Statehood... and the Case Against An Exchange*, Harvard Law School, Cambridge, MA, 1998; J. Habermas & M. Pensky, *The Postnational Constellation: Political Essays*, MIT Press, Cambridge, MA, 2001, p. 99; A. Follesdal & S. Hix, “Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik”, *JCMS: Journal of Common Market Studies*, Vol. 44, No. 3, 2006, pp. 533-562; G. Verhofstadt, *The United States of Europe*, The Federal Trust for Education & Research, 2006; R. Schmalz-Brunns, “Democratic Legitimacy, Political Normativity and Statehood”, in E.O. Eriksen & J.E. Fossum, *What Democracy for Europe*, 2010, pp. 83-114, University of Oslo, Oslo; A. Duff, *On Governing Europe*, Policy Network, 2012; J. Neyer & A. Wiener (Eds.), *Political Theory of the European Union*, Oxford University Press, New York, NY, 2010; J. Neyer, *The Justification of Europe: A Political Theory of Supranational Integration*, Oxford University Press, Oxford, 2012.

The survey of this literature exposes three underlying flawed assumptions that disable an accurate view of EU democratisation within the first debate: *methodological nationalism*,^{9,10} *culturalist fallacy*,¹¹ and *transcendental institutionalism*.¹² Most importantly, neither of the two camps in the first debate can give a satisfactory solution to the democratic deficit problem, since they inevitably end up in a *democratic dilemma*: ‘none of the two options thus can keep the promise of the democratic nation state to be both input- and output-legitimate: the delegation of competences to inter- or supranational bodies leads to a reduced input legitimacy whilst non-delegation implies a limited output-legitimacy. Hence a dilemma that has no way out.’¹³

As the dichotomy of national vs. supranational democracy proved devoid of any realistic practical use and was exposed for suffering from the national biases explained earlier, a more recent school of thought has appeared on the margins of the first debate. It encapsulates ‘ideas about democracy in the EU that deliberately aim at a *third way*, overcome binary thinking, and reconcile unity with diversity’ (emphasis mine).¹⁴ *Transnational democracy school* is hailed as a novel way to justify the EU to its citizens as it breaks through the petrified notions of both state and democracy. First, it involves thinkers who seek to demarcate themselves from either side of the first debate, ‘coming up instead with political

9 M. Zürn, “Democratic Governance Beyond the Nation-State: The EU and Other International Institutions”, *European Journal of International Relations*, Vol. 6, No. 2, 1 June 2000, pp. 183-221; U. Beck, *Power in the Global Age: A New Global Political Economy*, Polity, Cambridge, MA, 2005.

10 The principal objection to these two traditions of thinking about EU democracy is that they are both composed of ‘mainstream analysts’ who have been evaluating the EU democratic governance by means of terms and standards that are ‘direct transpositions of those conceptions (...) that are generally associated with the nation state’ (cf. E. O. Eriksen & J. E. Fossum, *Democracy in the European Union Integration through Deliberation?*, Routledge, London and New York, 2000). The *nationalism* in using this methodology when discussing the EU level democracy then is composed of uncritically taking a nation-state ideal-type democracy as the benchmark for the assessment of the democratic quality of the EU.

11 Both Eurosceptics and Euro-federalists believe in the appropriateness of the traditional conceptions of sovereignty and statehood, according to which, a full-fledged democracy must rest on a ‘thick’ identity that would cement the political community and enable political allegiance and solidarity of a unified demos.

12 Parts of the EU democracy literature suffer from a similar metaphysical problem Amartya Sen has identified within a large part of literature on justice and which, it is argued here, can be detected within the two strands of thought explained above. In the latter case, transcendental institutionalism would imply, first, a theoretical pursuit of perfect democracy rather than of relative comparisons of different feasible levels of democratisation within a given context. To paraphrase Sen, the inquiry is aimed at ‘identifying the nature of “the democratic”, rather than finding some criteria for an alternative being “less undemocratic” than another’ (cf. A. Sen, *The Idea of Justice*, Harvard University Press, Cambridge, MA, 2011, p. 6). Within the context discussed here, the nation-state democracy is the ideal model. Second, in searching for perfection, transcendental institutionalism concentrates primarily on getting the institutions right, and it is not directly focused on the actual societies that would ultimately emerge. The nature of the society that would result from any given set of institutions must, of course, depend also on non-institutional features, such as actual behaviours of people and their social interactions.

13 Neyer & Wiener, 2010, p. 173.

14 U. Liebert, “Contentious European Democracy: National Intellectuals in Transnational Debates”, in J. Lacroix & K. Nicolaidis (Eds.), *European Stories. Intellectual Debates on Europe in National Contexts*, Oxford University Press, Oxford, 2010, pp. 66-67.

designs which neither reify nor deny state-level sovereignty.¹⁵ Second, this line of thought is original in its democratic engineering as well since it stresses that ‘the problem that democratic theory needs to solve is not how to preserve democracy as it is now or how even to promote more of the same democracy, but rather how to establish a different type of democracy.’¹⁶

Since technocratic, or what Beetham and Lord call ‘performance-based’, justifications of the EU are no longer good enough, another part of the literature turned its attention to the analysis of the interplay of transnationalism and democracy. Here, the need not to ‘cross the Rubicon,’ in Kalypso Nicolaïdis’ romanticised words, between the two alternative schools of thought elaborated before, and navigate in the ‘narrow and turbulent third way’ of thinking about EU democracy¹⁷ is central. In this vein, a thriving collection of articles and some volumes focusing on transnational deliberative theories of EU democracy have been published recently in which the following question is discussed from different angles: How can an ‘ever-closer union’ between distinct democratic peoples be democratically legitimate? The scholarship on *EU demoi-cracy*,¹⁸ which attempts to find the answer, is the subject of the next section.

3.3 THE DEMOI-CRATIC CONSTELLATION

The term ‘demoicracy’ is derived from *demoi* (the plural form of *demos*), meaning peoples, and *kratos/kratein*, meaning power/to govern. The peoples are understood both as individual citizens and collectively, as states, that is the separate political units under popular sovereignty which constitute the Union.¹⁹ This neologism most likely was first used by

15 Lacroix & Nicolaïdis, 2010, p. 14.

16 Bohman, 2007b, p. 21.

17 K. Nicolaïdis, “The Idea of European Demoicracy”, in J. Dickson & P. Eleftheriadis (Eds.), *Philosophical Foundations of European Union Law*, 2012, pp. 247-274.

18 K. Nicolaïdis, “The New Constitution as European ‘demoi-cracy’?,” *Critical Review of International Social and Political Philosophy*, Vol. 7, No. 1, 2004, pp. 76-93; K. Nicolaïdis, “The idea of European demoicracy”, in J. Dickson and P. Eleftheriadis (Eds.), *Philosophical Foundations of European Union Law*, Oxford University Press, Oxford, 2012, pp. 247-74; K. Nicolaïdis, ‘European demoicracy and its crisis’, *Journal of Common Market Studies*, Vol. 51, No. 2, 2013, 351-369. 2012, 2013; K. Nicolaïdis, “Epilogue: The Challenge of European Demoi-cratization,” *Journal of European Public Policy*, Vol. 22, No. 1, 2015, pp. 145-153; S. Besson, “Deliberative Demoi-cracy in the European Union,” in S. Besson & J.L. Marti (Eds.), *Deliberative Democracy and Its Discontents*, Ashgate, Hampshire, pp. 181-214, 2006; J.-W. Müller, “The Promise of ‘Demoi-cracy’: Democracy, Diversity and Domination in the European Public Order,” *Political Theory of the European Union*, 2011, pp. 187-204; F. Cheneval, *The Government of the Peoples*, Palgrave Macmillan, New York, 2011; F. Cheneval & F. Schimmelfennig, “The Case for Demoicracy in the European Union”, *JCMS: Journal of Common Market Studies*, Vol. 51, No. 2, 2013, pp. 334-350; F. Cheneval, S. Lavenex & F. Schimmelfennig, “Demoi-cracy in the European Union: Principles, Institutions, Policies”, *Journal of European Public Policy*, Vol. 22, No. 1, 2015, pp. 1-18.

19 Nicolaïdis 2004, 2012.

Philippe Van Parijs in 1998, but to refer to ‘accountability to the separate peoples of Europe,’²⁰ and, therefore implied ‘precisely [what the democrats did not] mean by democracy, merely a nationstate-centric view of indirect democracy’²¹ and was not intended as a theoretical innovation.²² While it briefly went on to denominate the status quo of the EU in transformation from diversity to a unified demos, the next important step in conceptual development has been taken by Kalypso Nicolaïdis, who has (re)conceptualised it as a freestanding normative justification of a transnational deliberative EU:

European democracy is a Union of peoples, understood both as states and as citizens, who govern together, but not as one. It represents a third way against two alternatives which both equate democracy with a single demos: as a democracy-in-the-making, the EU is neither a Union of democratic states as ‘sovereignists’ would have it, nor a Union-as-a-democratic state to be as ‘federalists’ would have it. A Union-as-democracy should remain an open-ended process of transformation that seeks to accommodate the tensions inherent in the pursuit of radical mutual opening between separate peoples.²³

Nicolaïdis is more telling/ clearer in a later article:

The idea of European democracy is seductively simple: a Union of peoples who govern together, but not as one. However much shared /kratos/ or power to govern, we must contend with the plurality of /demoi/; but also crucially, however many demoi, we need a common kratos to define and deliver, through mutually agreed disciplines, the responsibilities we owe to one another.²⁴

How does the notion of democracy perform in relation to the criteria of transnationality and deliberation mentioned in the Introduction? As these definitions hint, the EU democracy concept is *transnational*. In line with this basic definition, attempts to spell out the guiding principles of *demoi*-cracy emphasise the requirement of *co-decision making* of citizens, statespeoples, and possibly functional representatives. This transnationalism operates both at the *vertical* and at the *horizontal* levels.²⁵ In the vertical (or multilevel) dimension, *demoi*-cracy is about the interaction of states-peoples, citizens, and other stakeholders within the context of the common, multilateral institutions that have been

20 P. Van Parijs, *Should the European Union Become More Democratic?*, Springer, Berlin, 1998, p. 298.

21 Nicolaïdis 2012, p. 249, n. 12.

22 Müller 2011, p. 188, n. 2.

23 Nicolaïdis 2012, p. 254.

24 Nicolaïdis 2013, pp. 351-352.

25 Cf. Cheneval, Lavenex, & Schimmelfennig 2015, pp. 6-8.

invested with decision-making authority. In the horizontal (or multicentric) dimension, it consists of transnational connections between these actors in deciding about political issues which are clearly of common concern, but on which no multilateral decision-making competences have been established.

Demoi-cracy is decisively *deliberative* since these authors also stress the need for policy-making through deliberation-based, *non-majoritarian* procedures.²⁶ It is allegedly careful to avoid both the normative pitfalls of thin liberalism technocratic or cosmopolitan on one side, and democratically hazardous ethical surplus of republicanism on the other. Being fanatic only in its moderation, to paraphrase Nicolaïdis, demoicratic theory combines the strengths of the background theories of republicanism and liberalism and should not be reduced to one or the other.²⁷

It is also simultaneously a descriptive and a normative research agenda. It claims the EU *is* a democracy in the making, but is also being developed as a normative standard against which the actual democratic practice of the EU can be assessed in terms of what it *ought to be*. The entire research agenda firmly rests upon the long-standing vision of the EU as a community of ‘Others’ committed to a philosophy of ‘constitutional tolerance’ attained through the ‘constitutional discipline’ of the constituent demoi.²⁸ This communion shorn of unity is deemed both more likely and more desirable. This ‘democracy of democracies’²⁹ ought to be founded on at least two basic principles exported from the domestic to the transnational level: (i) *non-domination* and (ii) *mutual recognition*.³⁰ The former implies a transnationalisation of the republican ethos of ‘democratic freedom by which men are free from one another’s arbitrary power.’³¹ EU politics thus aims, on the one hand, to strengthen the autonomy of the national demoi – through fighting against the negative externalities of national decisions at EU level and by deterring the exercise of arbitrary national power – and on the other, to disband barriers to the autonomy of citizens, be they in their own or another EU state. Strengthening the latter implies the holistic ideal

26 Cf. Besson 2006; Cheneval & Schimmelfennig 2013, pp. 7-13; Nicolaïdis 2013, pp. 12-15.

27 Nicolaïdis 2012, p. 263; Cheneval 2011.

28 See J. Weiler, “Federalism and Constitutionalism: Europe’s Sonderweg”, in K Nicolaïdis & R Howse (Eds.), *The Federal Vision*, Oxford University Press, Oxford, 2001, p. 64. By promoting Weiler’s idea of the ‘Peoples of Others’, the demoi-crats seek to avoid what they perceive as flaws within the postnational account of the EU as a ‘community of strangers’ (Habermas & Pinsky 2001, *op. cit.*; D. Castiglione, “Political Identity”, in J. T. Checkel & P. J. Katzenstein (Eds.), *European identity*, Cambridge University Press, Cambridge, 2009, p. 29) *i.e.* the Euro-nationalism at the expense of the national identities of EU demoi (See: J. Lacroix, “Does Europe Need Common Values? Habermas vs Habermas”, *European Journal of Political Theory*, Vol. 8, No. 2, 2009, pp. 141-156 and Nicolaïdis 2013, *op. cit.*).

29 Cheneval 2011.

30 In the most recent articles, as part of the endeavour to deepen and further ground the demoicratic vision, its most prominent authors have expanded the list of basic principles to four (Cf. Cheneval & Schimmelfennig 2013, pp. 10-13) or even ten (cf. Nicolaïdis 2013, pp. 362-365).

31 Nicolaïdis 2013, p. 358.

of horizontal opening up of democracies in the 'entire realm of social interactions: identities and cultures, political traditions, social contracts, historical grievances and memories.'³²

Therefore, on an axiological level, demoi-crats treat these two principles as the cornerstones of the basic structure of EU demoi-cracy, thus mirroring the political constructivism of the original position of John Rawls for the Union. If applied to the institutional setting of the EU, this means they favour the European Council as the venue where all demoi are represented and the EU's guiding operational principles are legitimately formulated through deliberation to the Commission, and the national parliaments' enhanced role in the decision-making to the European Parliament. At the same time, however, they would enhance these bodies without diminishing the vested roles of the disliked ones, as they believe that the EU is already a demoi-cracy in the making and no thorough Treaty revisions are necessary to make it more so at this point.

3.4 EURO CRISIS AS A DEMOI-STASIS?

The Euro crisis has strained the ability of the European Union governance capabilities and brought into question the long-awaited stability brought about by the renewed legitimacy that had come with the Lisbon Treaty. An amalgam of financial, fiscal, institutional, and constitutional crisis³³ – the Euro crisis and the institutional answers to it exemplify significant *societal* and *political* changes that condition future integration and democratisation.

First, on a societal level, the crisis anew brought to the surface as well as deepened the asymmetries and frictions in the European Union. A structural cleavage that has accompanied the process of integration since the beginning and has been particularly present during the Euro crisis is the one setting the minority of large and medium-sized member states against the majority of small member states.³⁴ The discourse that has amplified this gulf between the large, and coincidentally creditor, and smaller and often debtor countries has been building around the fear of the latter from the potentially authoritarian ways of handling the effects of the crisis by the former and the Union itself. For example, this further

32 Cf. Lacroix & Nicolaïdis 2010; Nicolaïdis 2013 p. 359.

33 A. J. Menéndez, "The Existential Crisis of the European Union' (2013)," *German Law Journal*, Vol. 14, n.d., pp. 453-454.

34 Cf. S. Bunse, K. Nicolaïdis, & E. Jones, "Large Versus Small States: Anti-Hegemony and the Politics of Shared Leadership", in E. Jones, A. Menon & S. Weatherill (Eds.), *The Oxford Handbook of the European Union*, Oxford University Press, Oxford, 2012. 249, 2012, pp. 251-257; S. Fabbrini, *Which European Union? Europe after the Euro Crisis*, Cambridge University Press, Cambridge, 2015. According to conventional thinking, in terms of population and size, 20 out of 28 member states are considered small: Austria, Belgium, Croatia, Cyprus, Czech Republic, Estonia, Finland, Denmark, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Slovakia, Slovenia, Sweden. Spain, Poland, Romania, and Bulgaria are considered medium-sized member states. Germany, France, the UK, and Italy are the large member states.

entrenched the sovereignist mood of countries such as Ireland, Denmark, the Czech Republic, Greece, and Portugal.³⁵ The discourse went on to point to the need to repatriate many of the policies that have emigrated to Brussels, due to the virtues of national (if not subnational) communities where democracy has been preserved by the active participation of citizens.³⁶ Other countries actively looked for ways to roll back their integration level in the Union through greater use of opt-outs and exemptions. The most notable among these, the United Kingdom, went a step further when pleas for renegotiation culminated with the majority voting in favour of the so-called ‘Brexit’ in the recent referendum on EU membership. Consequently, the chosen recourse to the problems posed by the crisis was decisively intergovernmental and not supranational.

Second, and crucially for the consideration of a demoi-cratic reception of the crisis, the institutional and political implications of the crisis-induced changes have to be analysed. The dramatic changes that followed as a reaction to the crisis seem to back up the basic assumptions of the demoi-cratic theory at first glance. The crisis did not lead to outright disintegration. Integration was being deepened. Quite in accordance with the demoi-cratic perspective, the process was not vertical but mostly a horizontal one, happening through ‘sharing and transfer of sovereignty.’³⁷ Shortly, what we have witnessed can be called intergovernmental integration.³⁸ Everything started with ad hoc bailouts for Greece, Ireland, and Portugal once the banks’ liquidity crisis turned into a sovereign debt crisis of the states. Soon after, in October 2010, the European Council agreed to establish a permanent bailout instrument, called the *European Stability Mechanism* (ESM). It turned out to be the first in a series of intergovernmental treaties signed outside the EU framework. Efforts to contain the erupting problems were led mostly by MS government representatives in ECOFIN and the European Council, which negotiated and concluded the treaties. In all of these treaties, the Commission and the Court of European Union (CEU) have but a supervisory role to play. The EP is either invited as not much more than an observer³⁹ or not at all.⁴⁰ Such shifts in inter-institutional balance implies that we are exiting the crisis in an even

35 Fabbrini 2015, p. 86.

36 Cf. Lacroix & Nicolaidis 2010.

37 Nicolaidis 2004, p. 78.

38 This is the term used by Sergio Fabbrini, who discerns between the EU’s *supranational* and *intergovernmental* constitution, in a material sense, embodied in the Lisbon Treaty (Fabbrini 2015). Arguably, this is a much more fortunate expression than ‘executive federalism’ (J. Habermas, *The Crisis of the European Union: A Response*, Polity Press, Cambridge, 2012) because the more informal intergovernmental approach to crisis management appeared to weaken the supranational structure and exemplified MS’s proclivity to handle the crisis through international treaties outside of the EU framework, rather than through strengthening the federal *i.e.* supranational dimension of the EU. Both expressions are, nonetheless, correct in observing the increased role of foremost national, but also EU executive bodies at the expense of the legislative branch.

39 According to the Fiscal Compact Treaty, the EP has no power to sanction the decisions of the Euro Summit since its President can only be present at the Summit deliberations, and subsequently, submits a report about it to the EP (Article 12.5).

40 EP is entirely left out of the ESM Treaty.

more executive-dominated and technocratic system than before. The growing literature on 'executive dominance' in the EU points to this conclusion.⁴¹ *Executive dominance* is a wider phenomenon of the migration of executive power towards types of decision making that eschew forms of electoral accountability and popular democratic control. Peter Mair shows how the very rationale behind the EU, long before the economic crisis, conforms closely to more general thinking about the role and the drawbacks of popular democracy.⁴² He analysed the EU as a deliberate construction by national executives as 'a protected sphere' in which policymaking can evade the constraints imposed by representative democracy at the national level. The growing number of regulatory agencies at the EU level additionally complicates the executive 'order' of the EU. This makes it all the more difficult for citizens and parliaments to follow, monitor, and contest their performance. EU institutions are more susceptible to discretionary decision making in a political setting in which those who would contest it are perpetually liable to be left harried, disorganised, and caught by surprise. This 'operational code' of the Union 'weakens political opposition, and allows it to be easily cast as voicing parochial grievances rather than principled critique of generalizable significance.'⁴³

The demoi-crats do call for a stronger voice to be awarded to the member demoi or statespeoples since demoi-cracy 'is about multi-centered not only multi-level governance, with decisions made not by Brussels but in Brussels as well as elsewhere around Europe.'⁴⁴ While government officials do represent their respective countries, there are at least two problems with these developments. First, fears of the centripetal dynamics in the Union opened the way for *too much centrifugality*. Most of the new intergovernmental accords between the EU demoi actually encompass states that are members of the Economic and Monetary Union – itself an intergovernmental treaty. The fact that the EMU has failed to provide a functioning framework for the vastly different national economies runs against the presupposition that intergovernmental will-formation itself is a panacea against domination and MS' unilateralism.⁴⁵ On the contrary, it would seem that the intergovern-

41 E.g. D. Curtin, "Challenging Executive Dominance in European Democracy", *The Modern Law Review* Vol. 77, No. 1, 2014, pp. 1-32.

42 See further: P. Mair, *Ruling the Void: The Hollowing of Western Democracy*, Verso Books, London, 2013, in particular Chapter 4.

43 J. White, "Politicizing Europe: The Challenge of Executive Discretion", SSRN Scholarly Paper, Social Science Research Network, Rochester, NY, 21 February 2014, <<http://papers.ssrn.com/abstract=2399441>>, p. 7. White's paper deals with the executive discretion of the Union institutions in the context of 'politics without rhythm' or the misalignment of EU level politics with the rhythms of national parliamentary politics (be it those of the electoral cycle or of legislative scrutiny). In this dissertation, the temporal dimension is not of primary concern.

44 Nicolaidis 2004, p. 85.

45 Cf. Duff 2012, p. 18. The history of EMU before the crisis shows both 'small' MS such as Greece and 'large' MS such as Germany and France breaching the Council's rules of fiscal discipline from the Stability and Growth Pact.

mental EMU had triggered a push towards homogenisation which EU decision-making structures in their current configuration are ill-equipped to counter.⁴⁶ In addition, the EU's horizontal mode of authority has not proven to be conducive to the cultivation of tolerance and understanding between the national demoi. On the contrary – it seems to result in nationally self-interested crisis fighting that encourages mutual naming-and-shaming among the demoi. As reactions in, for example, Greece and Germany demonstrate, rather than opening themselves up to the needs of others, the national demoi are more and more inclined to turn away from one another,⁴⁷ along the societal cleavage explained earlier.

Second, the crisis (and how it has been handled) has clearly weakened the democratic thrust brought about by the Lisbon Treaty and created a greater gap between integration and democratisation. On the one hand, the crisis has fostered democratically unaccountable centralisation within the EMU; on the other, it has shifted the centre of gravity to the European Council and a more intergovernmental approach that parliaments find notoriously difficult to hold accountable. We thus see both exclusion and more scope for arbitrary intervention.⁴⁸

This is even being acknowledged by demoi-crats themselves. Cheneval states that 'representation of statespeoples by national governments in the Councils mixes legislative and executive power and contributes to executive dominance in the EU,' rendering current forms of representation suboptimal.⁴⁹ Optimally, demoi-crats would couple intergovernmentalism and restricted supranationalism with the increased role of national legislators in the decision making.⁵⁰ It is worth adding here, since such a discussion is lacking in the

46 Cf. F. W. Scharpf, "The Double Asymmetry of European Integration: Or: Why the EU Cannot Be a Social Market Economy", *MPIfG*, working paper, 2009; F. W. Scharpf, *No Exit from the Euro-Rescuing Trap?*, Springer, Berlin, 2015.

47 D. Gaus, "Can There Be Demoi-cracy without Demos-cracy in the European Union?", in Paper Presented at the ECPR General Conference, Vol. 3, 2014, p. 15.

48 Fossum 2015, p. 806.

49 Cheneval, Lavenex, & Schimmelfennig 2014, p. 7.

50 The Lisbon Treaty has drastically increased the powers of national parliaments in the decision-making process, most notably through the Early Warning Mechanism (EWM). The EWM provides a group of a sufficient number of national parliaments of Member States to intervene in the decision-making process at the EU level when the coalition of parliaments finds that the principle of subsidiarity is in danger of being breached by the legislative act proposed by the Commission. The parliaments 'vote' by issuing *Reasoned opinions* that explain their argumentation on what constitutes the breach of the principle. For the first time, it was used in May 2012 in the case of the Commission's legislative proposal on the right to strike (the so-called Monti II proposal). The Commission withdrew the proposal some months later. In November 2013, national parliaments objected successfully for the second time to the proposal to establish a European Public Prosecutor's Office. Both instances were examples of 'yellow card' subsidiarity check and required more than 1/3 of NPs in order to be triggered. In effect, it requires from the Commission to review its proposal, after which it may decide to maintain, withdraw or amend it. The second kind of subsidiarity check under EWM in Article 12 that has never been used is the 'orange card.' It requires a simple majority of NPs and is more powerful since it does not depend solely on the EC, but calls for an early vote in the Council

demoi-cratic writings, that national Parliaments in the EU do not just represent their respective demoi. In fact, their new constitutional role in the EU is not that of a conservative representative character. Instead, they can be said to be a comparatively rare example of a transnational ‘democratic innovation.’⁵¹ At the outset, it may seem strange to include national parliaments’ action in the pool of transnational democratic innovations. After all, democratic innovations were initially devised as a ‘remedy for the malaises of representative democratic politics’ that parliaments are the perfect embodiment of.⁵² Note, however that, while NPs do perform a representative role domestically, the smart democratic engineering on the EU level has turned them into a participative and deliberative tool transnationally with the aim of correcting the excesses of EU decision making.⁵³ However, the study done by Wenzel and others in the special issue of the *European Journal of Public Policy* devoted to demoi-cracy in February 2015 shows that NPs have not used their upgraded role awarded by the Lisbon Treaty during the crisis.⁵⁴ Hence, the COSAC,⁵⁵ the meeting point of NP representatives in Europe still remains the proverbial ‘sleeping beauty.’⁵⁶

The turn towards intergovernmentalism in foundational matters of an aspirational transnational democratic community, coupled with the marginalisation of the institutions that strive to be representative of the European citizen, makes the EU a suboptimal ‘demoi-cracy without demos-cracy’ (van Parijs 2011).⁵⁷ Unfortunately, the current demoi-cratic theory follows this estimation. While the national Parliaments as the representatives of the *demoi* are mentioned as desirable actors in the Union alongside the European Council, the EP is downgraded while the European Citizens’ Initiative (ECI) as the second democratic

and the EP, either of which may immediately reject the legislative proposal (by a vote of 55 per cent of Council members, or a majority of votes cast in the EP).

- 51 G. Smith defines democratic innovations as ‘institutions that have been specifically designed to increase and deepen [direct or indirect] citizen participation in the political decision-making process.’ See G. Smith, *Democratic Innovations: Designing Institutions for Citizen Participation*, Cambridge University Press, Cambridge, 2009, p. 1.
- 52 K. Newton & B. Geissel, *Evaluating Democratic Innovations: Curing the Democratic Malaise?*, Routledge, New York, NY, 2012.
- 53 During the subsidiarity check, the initial deliberative phase of NPs’ coalition building and mutual consultation about whether to negatively respond to a legislative proposal on the EU level and on what grounds, is followed by the concerted submission of reasoned opinions, which constitutes the participatory phase, and is concluded by the exchange between interested parliaments and the Commission on the acceptability of the complaints.
- 54 T. Winzen, C. Roederer-Rynning, & F. Schimmelfennig, ‘Parliamentary Co-Evolution: National Parliamentary Reactions to the Empowerment of the European Parliament’, *Journal of European Public Policy*, Vol. 22, No. 1, 2 January 2015, pp. 75-93.
- 55 *I.e.* Chairpersons of European Affairs Committees of Parliaments of the EU Member States.
- 56 Neyer 2012.
- 57 Cf. Ph. Van Parijs, *Just Democracy: The Rawls-Machiavelli Programme*, ECPR Press, Colchester, 2011.

innovation in the Lisbon Treaty is not even discussed.⁵⁸ Needless to say, the EP and ECI represent the voice of common concerns of all EU citizens – *i.e.* its *demos*.

Obviously, the crisis has had a tectonic effect on the Union and has put the demoi-cratic perspective in a somewhat ambiguous position. In the aftermath of the Euro crisis, we are faced with a lack of acknowledgement that the crisis has resulted in a convergence between how the demoi-crats envisioned the Union and its institutional and political reality.⁵⁹ This silence on the part of demoi-crats about the descriptive congruence between their theory and the European political practice may be due to the reluctance of the former to accept the dire normative implications of the post-crisis EU status quo. A definite conclusion therefore warrants a discussion of the basic principles of this theory in light of the Euro crisis.

3.5 BACK TO THE BASICS: DEMOCRATIC PRINCIPLES

A special edition on demoi-cracy published at the beginning of 2015⁶⁰ seems to suggest that the demoi-cratic research agenda is now solid enough to advance ‘from theory to praxis’ and explores how the theory can be applied in the day-to-day practice of the EU. Instead, in this article, a call for further theoretical contemplation is made because it may be that there are still problems in the theoretical construction that cause its concurrence with the obviously suboptimal reality.

The two basic demoi-cratic principles of non-domination and mutual recognition have already been introduced. What remains to be discussed briefly is the methodology demoi-crats have recently chosen to ground their EU normative benchmark on. I propose that a careful analysis of their epistemological foundations would reveal that they do not correspond to the goals of the research agenda and show weaknesses of the current state of demoi-cratic literature that, if corrected, would not threaten the innovative potential of the whole theoretical framework. In other words, in the more recent publications, in order to provide more theoretical weight to their arguments, Chevenal and Nicolaïdis have opted to reformulate demoi-cracy in the framework of Rawlsian political constructivism, deriving the abovementioned ‘first principles’ of the EU demoi-cratic basic structure from ‘a hypothetical original position.’⁶¹ Thus formulated for the EU setting, the principles are reached in a ‘merger of Rawls’ separated citizen-based and people-based original positions

58 The *European Citizens’ Initiative* entitles more than one million citizens from a ‘significant number of (seven or more) Member States to take the initiative by inviting the European Commission to submit a legislative proposal within the remit of its competences (Art. 11(4) TEU).

59 In fact, Nicolaïdis was critical about the way the Union or its member states have reacted to the crisis (2013), although without going into further development of the argument.

60 Special Edition on Democracy, *Journal of European Public Policy*, Vol. 22, No. 1, 2015.

61 Cheneval 2011; Cheneval & Schimmelfennig 2013; Nicolaïdis 2012, 2013.

into one demoicratic “original position”.⁶² If we were to provide a critique informed by Amartya Sen’s confrontation with Rawls in the *Idea of Justice*,⁶³ some of the premises of demoi-cratic conception of EU democracy could be exposed to reify precisely the conditions they seek to overcome. It would be unfair to accuse the demoi-cratic lense of suffering from a cultural myopia the theories in the first debate were suspected of. Indeed, their most significant contribution in overcoming the democratic dilemma is the definite dismantling of the *no demos* thesis. Still, the current literature on EU demoicracy faces the danger of falling in the trap of methodological nationalism and transcendental institutionalism. First, it is maintained that behind the veil of ignorance, citizen and people representatives would agree on the principle of non-discrimination of member states and member citizens. A careful review of demoi-cratic literature shows that much more attention has been devoted to elaborating non-domination among states and between the EU and MS than between states/EU and citizens. Bolstering national autonomies through the ‘demoi-cratic ethos’⁶⁴ can conceivably clash with the political empowerment of citizens in cases when the latter’s actions are in confrontation with the former. What do the demoicrats propose in cases when the statist principle of non-domination has to be violated in the interest of domestic non-domination over a MS’s citizens?⁶⁵ While they write extensively on how to prevent EU supranational encroachment of individuals’ and MS’ political rights, demoicrats remain silent on the instances where the democratic quality inside MS is not as salient as they would wish it to be.⁶⁶ Can we really only concentrate on the negative externalities supposedly copiously democratic states unintentionally create? Or is there a case to be made for the EU’s transformative role in giving its citizens a voice on issues beyond the scope of their national political community? A truly transnational approach has to abandon the statist bias of the current interpretation of non-domination. The normative desiderata of a republicanised sovereign equality of member states in the EU makes demoicrats insensitive to the empirical transgressions, the resolution of which has to include a breach of the principles which are left outside political debate. Focusing too heavily on the ‘capacity for each “demos” to defend itself against domination through various representative, deliberative, and participatory channels’ may be at the disadvantage of fostering such channels for EU citizens grouped not (only) along national lines.⁶⁷ The analysis of the crisis shows this clearly. The rise of the political power of demoi left the

62 Cheneval 2013, p. 8. The ‘citizen-based’ original position refers to Rawls’s *Theory of Justice*, while the latter refers to his conception of the original position in *The Law of Peoples*.

63 Sen 2011.

64 Nicolaïdis 2012.

65 Think of, for example, cases such as Haider in Austria in 2000 or Orban in Hungary now.

66 In fact, Cheneval is clear: “Domestically, we see no general claim for democracy.” (cf. Cheneval & Schimelfennig 2013).

67 Nicolaïdis 2012, p. 265.

European interests of citizenry and the interests of the minorities in the opposition in each MS underrepresented.

The key advantage of a transnational deliberative standpoint on the EU is that it breaks free from the idea of exclusively territorially defined structure of governance and reinterprets democratic politics as a justificatory process that rests on a reason-giving practice among all parties affected by a decision, within and beyond state confines. The assumption that national partitioning has a pre-eminent priority over other categorisations (as implicitly presumed in *The Law of Peoples* and quoted in demoicratic literature) renders this school of thought susceptible to the danger of *methodological nationalism*. The closed formulation of the programme of the Rawlsian ‘original position’ extracts a heavy price in the absence of any procedural guarantee that local values of statepeoples will be subjected to an open scrutiny.⁶⁸ Furthermore, if the ‘communities of fate overlap *de facto*, it is regressive to anchor in a static manner a political community to a geographically delimited and in some cases prepolitical “population”.⁶⁹ Without further clarification on the relation between the statepeoples and individual persons as dual *pouvoir constituant* of the EU demoicracy, the project risks to degenerate to a ‘demoi as ethnoi’ picture.⁷⁰ It would turn into a kind of supranational multiculturalism with its communitarian underpinnings precluding true deliberation and transnationalism from anchoring.

As for the second charge for transcendental institutionalism, why can demoicrats be accused of providing a perfectionist conception of EU democracy and focusing too much on the institutional setting? It was just shown how the Rawlsian methodology potentially creates methodological nationalism. Moreover, I submit here, this methodological choice triggers a quest for a perfectly demoi-cratic EU since the principles that apply to the basic normative framework of the institutional design of demoicracy are unchangeable in the postcontractarian times. Although the authors are unclear on this point, it stems from the Rawlsian reasoning that the state-based principle of non-domination should have *lexographic priority* over others *i.e.* complete priority in all instances and over all else. Hence, the demoi-cratic defence of the EU *status quo*, on the basis that it maintains institutional balance between the national demoi, actually undermines the ‘demoi-cratic ethos of transnational engagement and mutual recognition.’⁷¹ The devotion to non-domination can remain a significant contribution to the debate on EU democracy without it being a petrified Colossus the ship of the Union should wreck on. Alternative ways of ranking the primacy of principles must be found.

68 Cf. Sen 2011, p. 128.

69 Besson 2006, p. 188.

70 Müller 2011, p. 201.

71 Nicolaidis 2012, p. 269.

It is reasonable to ask then if ‘the EU’s transformative potential lies not in pursuing an ideal to its extreme,⁷² why would the transformative potential of EU democracy have to be pursued to its extreme by choosing to ground it in a perfectionist political philosophy? Is it not more advisable to turn to a contextual and empirically informed normative reasoning in the fashion of non-ideal and applied political theory of Amartya Sen, which starts with recognising the ways social arrangements fail to do what they are meant to do?’⁷³ In this vein of non-ideal theorising, this article looked at how the EU democratic present falls short of enabling democracy. In conclusion, two kinds of implications can be deduced from the discussion of the democracy as the model for the EU in light of the changes brought by the Euro crisis.

The *transnational dimension* is threatened from two directions: the supranational institutions marginalisation is coupled with the incapability of genuine transnational popular mobilisation of EU citizenry. Since the new intergovernmental treaties are created largely outside the scope of the Lisbon Treaty, the ability of transnational civil movements’ concerted action to challenge them institutionally remains meek.

This twofold marginalisation in reality is echoed in the democratic literature. Paradoxically, the active role of the civil society, national or transnational, has so far not been a priority of the democrats’ research agenda, who remain devoted almost exclusively to the expansion of modalities of expression of the will of democracy. Thus, the whole theory has to pay equal attention to the role of both state peoples and citizens as the dual *pouvoir constitutants* of the EU democracy. It also needs to revisit its two basic principles and reformulate them in a way that accommodates both constituent subjects and dispenses with the flaws outlined earlier. One can allow for channels of expression of common concerns that cut across national borders without having to accept the existence of a demos at the EU level as the Union’s permanent and stable feature.⁷⁴ The *principle of mutual recognition* would still entail horizontal openings of citizens, but interpreted as their acknowledgment of common concerns or differences. In addition to the mutual recognition of the *demos*, a complete fulfilment of the principle would entail horizontal openings of citizens across borders with a view of addressing common concerns in cases when those concerns are

72 Nicolaidis 2013.

73 Cf. Sen 2011.

74 Although Habermas had, for decades, been the corypheus of the federal state solution for the EU democratic legitimacy deficit, in his most recent works, he seems to provide a more coherent democratic model than the democrats themselves. For example, in an essay titled “Democracy or Capitalism,” he writes that a legitimate EU is a ‘trans-state, democratic political community that permits *joint governance*’ in which political decisions are legitimized by the citizens in their dual role as European citizens, on the one hand, and as citizens of their respective member states, on the other’ (italics in the original). In J. Habermas, *The Lure of Technocracy*, John Wiley & Sons, New York, 2015, p. 100. Similarly also in: *op. cit.*, pp. 46-63, and Habermas, 2012, pp. 1-70. These recent interventions leave us with an uneasy question the answer to which deserves a separate future paper: Has Habermas developed into a more authentic democrat than the original democrats?

clearly identifiable and with no prejudice towards the actual existence of the illusive EU *demos*. The *principle of non-domination*, whereby no member state or person would dominate others nor be the object of supranational domination, after the crisis, would also imply safeguards against executive domination found in national Parliaments as well as the supranational resources of representative or direct deliberation.

The *deliberative dimension* is threatened by the executive turn discussed earlier that discourages true deliberation in favour of either bargaining or imposition of rules. The intergovernmental decision-making regime has led to the automatic imposition of rules that undermine the political debate on the policies to pursue. Thus, we have travelled from the starting point that technocracy is no longer enough to the ending point of even more technocracy that is now only more convoluted with political power, less traceable and accountable to a concerned citizen.

When analysing the effects of the crisis on the EU, the demoi-crats should not just proclaim deliberation among the statepeoples as desirable and opt for venues in which it can be more or less authentic. Recent literature on deliberative democracy teaches us that ‘applying deliberative principles to evaluate particular instances of communication in democratic terms does not automatically translate to a concept that is useful in analyzing and evaluating whole regimes or political systems.’⁷⁵ Hence, a proper analysis would entail an estimation of how much the crisis has diminished the ‘deliberative capacity’ of the Union’s political system. In other words – to what extent does the Union, in the aftermath of the crisis, possess and use ‘structures to host deliberation that is *authentic, inclusive, and consequential*’ (italics in the original).⁷⁶ The discussion earlier would suggest that today, the authenticity of transnational deliberation is much less secure because of the coerciveness of the newly adopted measures. It is much less inclusive since the new institutional frameworks exclude some important interests and preferences. Finally, it is also arguably less consequential since non-reflected agreements have been put to motion and non-coercive deliberation cannot easily undo what has already been done.

3.6 CONCLUSION

It can therefore be concluded that the success of the demoi-cratic theory lies precisely in the fact that its normative claims mirror the current empirical accomplishments and setbacks of the EU with respect to democracy. Nevertheless, if it is to be a sound political theory, it still needs to gain independence from its conversation with euro-scepticism and address the epistemological problems of methodological nationalism and transcendental

75 J. S. Dryzek, “Democratization as Deliberative Capacity Building”, *Comparative Political Studies*, Vol. 42, No. 11, 2009, pp. 1379-1402.

76 *Ibid.*

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institutionalism. Otherwise, it risks following the EU on its path to further disintegration, instead of providing a sound normative justification of its democratic preservation in harmony with the democracies of the *demoi*. Only from such a re-established perspective can the demoi-cratic theory be a confident vantage point from which to address the distortions brought about by the Euro crisis.

4 THE NEW TRANSFORMATION OF THE PUBLIC SPHERE – LESSONS FROM GREEK/EUROPEAN CRISIS

Hauke Brunkhorst

4.1 THE DEMOCRATIC CIRCLE

By ‘public sphere,’ I mean both the sphere of *public law* (state, constitution) and the sphere of *public opinion* (civil society). In a working democratic regime, political will-formation is circular, first bottom-up from the deliberative and inclusive formation of public opinion to deliberative and exclusive public legislation, and then, top-down through public ‘concretisation’ (Kelsen) of legal norms (judiciary, government, administration,). I call this the circle of democratic ‘legitimization through legality’ (Habermas), or the *democratic circle*. The process must be open to public deliberation and public intervention at all levels (bottom-up as well as top-down). The bottom-up process of opinion-formation is *inclusive*. It must include equally all the voices available (of all kinds of citizens and non-citizens, foreigners etc. as well as all kinds of voices and other symbolic forms, so-called political as well as so-called non-political).¹ By contrast, the top-down process of legislation and concretisation is *exclusive* and delimited by citizenship, voting rights, delegation, professionalisation etc.² Formally, the European Union (EU) is a democratic federation, and the ‘ever more closely’ united ‘peoples of Europe’ (Art. 2 Treaty of Rome) now constitute a European citizenship, which as a (differentiated) whole is its subject of legitimisation.³ The democratic circle of the EU entails a ‘mixed constituent power’ (Franzius) of EU citizens

1 This process often has been described as ‘civil society’ or ‘public sphere,’ that is, it is political in contradistinction to the Hegelian civil society, which is centred around the functionally differentiated market (see J. Habermas, *The Structural Transformation of the Public Sphere*, trans. Thomas Burger, MIT Press, Cambridge, MA, 1989; J. Cohen & A. Arato, *Civil Society and Political Theory*, MIT-Press, Cambridge, MA, 1994). Recently, Kant’s theory of judgement and Machiavelli’s political theory were used for re-reading the theory of bottom-up egalitarian will-formation, see B. Bargu, *The Problem of the Republic in Marx and Machiavelli*, unpublished manuscript (from a lecture at the Historical Materialism Conference, New York, January 2010). For a similar argument with strong reference to Kant, see M. Vatter, “The People Shall Be Judge: Reflective Judgment and Constituent Power in Kant’s Philosophy of Law”, *Political Theory*, Vol. 6, 2011, pp. 749-776.

2 See recently: Ch. Möllers, *The Three Branches. A Comparative Model of Separation of Powers*, Oxford University Press, Oxford, 2013.

3 See Ch. Schönberger, *Unionsbürger*, Moor, Tübingen, 2005.

and national peoples in ‘personal union’ (Habermas), with double representation, general elections, the ordinary (parliamentary) legislative procedure, national and European basic rights.⁴

4.2 CONTRADICTING SYSTEMS OF POWER

However, in the present system of the EU, the democratic circle has been transformed one-sidedly into a top-down technocratic regime of ‘executive federalism’ (Stephan Oeter).⁵ This results in an (at least partial) *usurpation of the constituent power of the people by the economic system*.

This has been the case since the invention of the European Monetary Unit, the Euro. With the Euro, one dream came true: that of ordo- and neo-liberal economists of an economy without government or legislator.⁶ It was the accidental result of contradictory political interests. In 1988, France wanted a Euro with a full-fledged economic and financial government, while Germany wanted a Euro only after the development of equal living conditions across Europe. What they got was the worst possible compromise – a Euro without equal living conditions and without an economic government.⁷ This was not what the major political actors wanted, but it was what the ordo- and neo-liberals, and the transnational class of investors had never dared dream about – an economy controlled only by judges.⁸ Therefore, the Euro was the keystone that completed the hegemony of the economic constitution of Europe over the legal, political, and social welfare constitution, a process that gradually increased the imbalance between economic and political power, begun as early as the Treaty of Rome.⁹ Having common currency, but not common legislature, reinforced the technocratic politics by establishing *two parallel systems of political power, which contradict one another*.

4 See Habermas, 2012; C. Franzius, ‘Recht und Politik’ in der *Transnationalen Konstellation*, Campus, Frankfurt, 2014.

5 On the concept, see further J. Habermas, “Democracy, Solidarity and the European Crisis”, lecture delivered at Leuven Univ, 26 April 2013, <<http://pro-europa.eu/europe/309/jurgen-habermas-democracy-solidarity-and-the-european-crisis/11/>>. See also Oeter, “Föderalismus und Demokratie,” in A. von Bogdandy & J. Bast (Eds.), *Europäisches Verfassungsrecht*, Springer, Heidelberg, 2009, pp. 73-120.

6 W. Streeck, “Zum Verhältnis von sozialer Gerechtigkeit und Marktgerechtigkeit” (unpublished e-man. of a Lecture Verona 20 September 2012).

7 H. Enderlein, “Grenzen der europäischen Integration? Herausforderungen an Recht und Politik”, Vortrag auf dem DFG-Rundgespräch in Zusammenarbeit mit der Friedrich-Ebert-Stiftung Berlin zum Thema *Recht und Politik in der Europäischen Union* am 25./ 26. Nov. 2011 in Berlin.

8 E.-J. Mestmäcker, “Einführung”, in F. Böhm (Ed.), *Wettbewerb und Monopolkampf. Eine Untersuchung zur Frage des wirtschaftlichen Kampfrechts und zur Frage der rechtlichen Struktur der geltenden Wirtschaftsordnung*, Nomos, Baden-Baden, 2010, pp. 5-14, at 9.

9 Brunkhorst, 2014; see K. Tuori, “The Many Constitutions of Europe”, in K. Tuori & S. Sankari (Eds.), *The Many Constitutions of Europe*, Ashgate, Farnham/Burlington, 2010, pp. 3-30.

The first is the bottom-up system of *democratic self-legislation* with a parliamentary legislative procedure. In a democratic system, it consists of checks and balances between the European Parliament, the Commission, the Council of Ministers (all integrated in an ordinary legislative procedure), and the European Court of Justice (ECJ), activated only by complaint. The *normative* centre of the democratic system is the parliament.

The second system is the technocratic, top-down system of executive federalism. The power of the technocratic system is concentrated in the closely cooperating institutions of the European Central Bank (ECB), the Eurogroup (which has become more and more important) and the European Council, the European Commission, and the ECJ. There is no question that the technocratic system of executive federalism holds the hegemony. Up till now, it has had the final say on every important matter. It has had the formal *and* informal power to shape European as well as national parliamentary legislation and governance, and to bypass national and transnational elections and electoral campaigns.¹⁰

The Eurogroup (of Eurozone finance ministers), the Commission, and the ECJ operate in both systems, and therefore, fulfil the important function of mediating and stabilising the contradictory systems of technocratic and democratic rule. However, they cannot change this hegemonic structure, and therefore, must (seek to) stabilise it, whether they want to or not. To keep the Union functioning and capable of action, the contradiction must be resolved, and here, the bigger power – the technocratic system – is the decisive factor. What we can now see is that since 1957, a gradually increasing amount of national state power ('sovereignty') has been transferred to the Union. Sovereign states (under the legal 'principle of sovereign equality' UN Art. 2, 1) ultimately became member states (under EU law) with a common, mixed constituent power.¹¹ However, only a *small amount of power has been transferred to the institutions at the centre of democratic self-legislation. The lion's share has gone to the institutions of the technocratic circle* – in particular to its centre. This operation was repeated multiple times, giving the technocratic centre not only power over EU's bottom-up process of democratic will-formation, but also over their national parliaments, which have increasingly found themselves in a classic position of being blackmailed – take it or leave it.¹²

The centre of decoupled technocratic, top-down power has become ever more indistinguishable from economic power. It consists of the normatively and factually independent

10 See Brunkhorst 2014; H. Brunkhorst, "How to Make It More Complicated Again? European Constitutional Evolution between Managerial and Kantian Mindset", in C. Joerges & C. Galinski (Eds.), *The European Crisis and the Transformation of Transnational Governance. Authoritarian Managerialism Versus Democratic Governance*, Hart, Oxford, 2014, pp. 379-412.

11 See on the factual side: M. Wilkinson, "Authoritarian Liberalism in the European Constitutional Imagination: Second Time as Farce?", *European Law Journal*, Vol. 21, No. 3, 2015; on the normative side: Habermas (2012).

12 W. K. Dieter, *Die neue Staatsräson – Zwischenstaatliche Kooperation als Demokratieproblem der Weltgesellschaft*, Nomos, Baden-Baden, 2000.

ECB that operates in close cooperation with the Eurogroup and the heads of government of the Eurozone (the latter two acting under the informal leadership of Germany, with its overpowering economy). Through these (highly flexible) institutions, including the much weaker Commission, and occasionally supplemented by global institutions, such as the International Monetary Fund (IMF), the tightly knit United Executive Bodies of Europe (UEB) have replaced the strengthening union of the peoples and citizens of Europe. In this, Europe's factual constitution constitutes a new form of technocracy that clearly contradicts the wording and democratic meaning of the constitutional text, *i.e.* the Treaty of Lisbon. Specifically, the United Executive Bodies exercise direct legislative and executive power through: 1) *intergovernmental treaties*, which are factually beyond national and transnational parliamentary and legal control, just because the intergovernmentally constructed new projects, banks, and mechanisms are too big to fail. They cannot be changed in detail any longer by parliaments or courts because every small change needs state consensus, and as a consequence, again, failure that is too big, such as the European Stability Mechanism (ESM). Parliaments can only take it or leave it, courts can only accept (legalise) it or kill it. 2) United executive power is also stabilised by more or less ad hoc or even completely informal established *transnational special regimes*, such as the Troika (now 'Brussel Group', 'Institutions'), the Schengen regime of border control, and the Eurogroup as an example of a completely informal (hence, legally inexistent) but very powerful institution, and many others (often with a long-standing agenda).¹³ 3) Finally, the binding decisions the ECB holds over a whole range of European legislative measures (Art. 110 TEU), depending only on a simple majority of Eurozone members. Further, the ECB can implement its legislative decisions immediately. Therefore, the ECB's decision-making process is a perfect unity of legislative and executive powers conducted by an executive body. The executive body of the ECB has been legally endowed with exactly the same legislative competencies as the institutions that participate in the ordinary legislative procedure of democratic self-legislation. The decisions of the ECB are only subject to judicial review and very soft and indirect parliamentary control that does not carry much weight. This relationship is completely different from the one national parliaments have with their (in Europe, now disempowered) national central banks. National parliaments can regulate, amend, and even abolish central banks with a *simple majority*. By contrast, the regulation, amendment, or abolishing of the ECB requires a *unanimous* decision of all European member states.¹⁴

13 On the special regimes, see J. Bast, "Einheit und Differenzierung der europäischen Verfassung – Der Verfassungsvertrag als reflexive Verfassung", in *Die Europäische Verfassungsgeschichte – verfassungen in Europa*, Hrsg. Organisationsteam 45, Assistententagung *Nomos*, 43 ff, 46 ff, Baden Baden, 2005; concerning the ECB as "Institution sui generis", see Ch. Gaitanides & S. Kadelbach Iglesias (Eds.), *Europa und seine Verfassung*, FS Zuleeg, *Nomos*, Baden-Baden, 2007, pp. 550-558.

14 See F.W. Scharpf, 'Regieren im europäischen Mehrebenensystem – Ansätze zu einer Theorie', in *Leviathan* 30, 2002, pp. 65-92, at 74.

4.3 HIDDEN AGENDA

European executive federalism now forms a kind of post-democratic *dual state* that combines a *normative state* ('Normstaat') with a *prerogative state* ('Maßnahmestaat').¹⁵ The European dual state constitutes a new regime of *authoritarian liberalism* (Hermann Heller).¹⁶ It has its unique legal basis in the constitutional law of the treaties, in particular because the various treaties since Rome (1957) *constitutionalise a huge amount of economic and social law* that, in a working parliamentary system, would fall under the purview of parliamentary legislation, campaigns, and referenda, which is why the treaties are so long. *They combine the legal form of normal international law with the legal form of constitutional law*, which (depending on the importance of the matter, but at least since the Treaty of Maastricht and Amsterdam) results in the *marginalisation of parliamentary power*.¹⁷ European constitutional law has at its centre not the system of democratic legitimisation, rights, and check and balances, but a *system of competition law*. Claus Offe has rightly called it the 'hidden agenda' of Europe.¹⁸ Due to the *constitutional priority of competition law*, which is reinforced by *the dramatically growing blackmailing power of the globalised economy*, state-embedded democratic class struggle has been replaced by the *disembedded competition of national member states over location advantages*, such as low taxes, flexible employment, cheap manpower, constitutional debt breaks etc. As a result, member states are dispossessed of all their means of *macroeconomic steering*. They are no longer capable of making democratic decisions regarding, for example, neo-classical or neo-Keynesian macroeconomic politics. *Neo-classical/ ordoliberal economic theory has de facto become the unchangeable eternal clause of all constitutions* (and not only European ones), leaving

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- 15 E. Fraenkel, *The Dual State. A Contribution to the Theory of Dictatorship*, Oxford University Press, Oxford, 1941. Dual state theory applies not only on the extreme case of the first five years of German fascism and other 20th-century terrorist regimes, but on broad continuum of cases such as the German (or English) constitutional monarchy of the 19th century which all have reserved certain prerogative powers to the state or the monarch, which have been described by statutory positivist such as Paul Laband or Georg Jellinek as a sphere of 'non-law' (P. Laband, *Das Staatsrecht des Deutschen Reiches, Bd. II*, Laupp, Tübingen, 1877, p. 200); for a critical account, see: D. Jesch, *Gesetz und Verwaltung*, Mohr, Tübingen, 1961, p. 90; Ch. Gusy, "Der Vorrang des Gesetzes", *JuS* 3, 1983, 189 ff; Ch. Schönberger, *Das Parlament im Anstaltsstaat*, Klostermann, Frankfurt, 1997, p. 234 ff; See also, Ch. Schönberger, "Ein Liberaler zwischen Staatswille und Volkswille. Georg Jellinek und die Krise des staatsrechtlichen Positivismus um die Jahrhundertwende", in S. L. Paulsen & M. Schulte (Eds.), *Georg Jellinek – Beiträge zu Leben und Werk*, Mohr, Tübingen, 2000.
- 16 M. A. Wilkinson, "Authoritarian Liberalism in the European Constitutional Imagination: Second Time as Farce?", *European Law Journal*, 24 March 2015.
- 17 H. Brunkhorst, "Beheading the Legislator: The European Crisis – Paradoxes of Constitutionalizing Democratic Capitalism", in M. Jovanovic & D. Vujadinovic (Eds.), *Identity, Political and Human Rights Culture as Prerequisites of Constitutional Democracy*, Eleven International Publishing, Hague, *Democracy and Rule of Law* 2, 2013, pp. 37-54; see D. Grimm, "Die Stärke der EU liegt in einer klugen Begrenzung", *Frankfurter Allgemeine Zeitung*, 11 August 2014.
- 18 C. Offe, "The European Model of 'Social' Capitalism: Can It Survive European Integration?", *The Journal of Political Philosophy*, Vol. 11, No. 4, 2003, pp. 437-469, at p. 463.

voters and elected representatives no choice in any macroeconomic matters.¹⁹ The last Greek elections are paradigmatic. Since then, the German minister of finance, Wolfgang Schäuble, uses the word ‘democracy’ with his face distorted in pain and only to signify an obstacle in that regard. European member states must now remain in the domain of *microeconomic* politics alone, allowing them only a choice of alternatives *within* the neo-classical paradigm of political economy. ‘Great choice!’ they say in the shopping mall once the decision has been made to buy the same thing available everywhere for more or less the same price:

The policy preferences of the Union are constitutionally entrenched. Examples abound: monetary policy is geared towards ‘prize stability’ instead of ‘full employment’, energy policy focuses on competitiveness and energy security instead of democratic access, non-discrimination policy fosters labour market access over dignity in the workplace, the Court’s interpretation of Article 125 TFEU entails that financial assistance must be based on conditionality instead of solidarity, the excessive deficit procedure prefers austerity over Keynesian solutions, and the free movement provisions themselves already express a very particular understanding of the interaction between state and market.²⁰

4.4 WHATEVER IT TAKES

In recent years, ever more *constituent power* has been transferred from the European citizens and peoples of Europe to the *United Executive Bodies of the Euro Zone*. A spectacular case marks the shift of political and constituent power from the public sphere of the people to the economic system. It is exemplified in the three words of Mario Draghi: ‘whatever it takes’. Spoken into the microphone at the height of the Euro crisis on 26 July 2012, at minute 7:14 of his 11 minute speech, he also added, between 7:15 and 7:20, ‘and believe me, it will be enough.’²¹ These three words constituted the prerogative power of the ECB,

19 F. W. Scharpf, “Rettet Europa vor dem Euro”, in: *Berliner Republik* 2, 2012, online <www.b-republik.de/aktuelle-ausgabe/rettet-europa-vor-dem-euro> (January 2014).

20 M. Dawson & F. de Witte, “From Balance to Conflict: A new Constitution for the EU”, *European Law Review*, 1 December 2015, pp. 1-28, at: p. 19.

21 Mario Draghi, President of the European Central Bank, speaking at the Global Investment Conference at the British Business Embassy on 26th July 2012: <<https://www.youtube.com/watch?v=hMBI50FXDps>> (3.5.2015); See <https://www.google.de/#q=leona+lewis+whatever+it+takes&stick=H4sIAAAAAAAAAAG0vznz8BQMDYwQHyyPGS0zcAi9_3BOWOsE0ac3Ja4wHmbi4gjPyy13zSjJLkoU2MXGxQZkCXHxSXPq5-gYpBaYWhlkaDFL9TFxGvBc9Z1sKCRsbGpgYmJkbnZoYmJiYmxqbWhogK4awC9OKU6rKhPS5NPST83NyUpNLMvPz9Ivz89KL4xPzUujzS4szkxNz4otSk_OLUjKBwqLvav7bCZlx6SNrSM7PLcgvzgSxceoLjgLqU-WSQ9aHRZmz-WoMZcmJefl5YIV1qUXFIETejwVW2lkJlmcklqQCxRQySxRKErNTi4OQfjULCgclFg4GAWaeTWxND9Q2HF1XabGec5PrfraF_zwKAFwQaFd1AQAA> (3.5.2015).

exactly 223 years, one month, and ten days after Emanuel Josef Sieyès, speaking in the Assembly of Estates, declared the Third Estate to be the Nation, and the Assembly of States the National Assembly. The implementation of what Draghi's three words meant (macroeconomic monetary policies on the European level), was a clear breach of the treaty-constitution (as were the few words of Sieyès from June 1789). However, *post festum*, the breach legally will have been healed, by tacit consent and (not yet final) court decisions. Here too, the parallel with 1789 is stunning because the King healed the breach of the constitution two months later. Therefore, Draghi's three words are a clear case of the normativity of facticity (Jellinek) that will finally lead to an amendment of the European Constitution.

4.5 STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE OF PUBLIC LAW

Despite the EU-Parliament (and other EU institutions) now for the first time growing in public relevance and visibility, the *United Executive Bodies* – and particularly, their leading national presidents and prime ministers – remain the public face of Europe. Increasingly, of late, it is only the face of the president of the ECB. The intuition of protest groups often reveals secret truths of the system of power: for the first time, protesters no longer address governments, but banks and financial centres ('Occupy Wall Street') who they consider to be really in charge, and rightly so, at least to a certain degree.

The public medium of the *United Executive Bodies* is not debate, contestation, struggle, polemic, and campaigning for political alternatives. Rather, it is the representative statement, the declaration of consent, the announcement of indisputable and immutable decisions. The entire institutional design of the EU is *programmed to avoid any public conflict, bypass public opinion and public law*, and make contested decisions exclusively in the arcane sphere of diplomatic negotiations, fireside chats, and the shadow world of hundreds and thousands of commissions. These commissions, in particular those of the EU Parliament, are often more legally accessible to the public than are national parliamentary commissions, but never truly so. People know next to nothing about their existence. Rights which are unknown to their bearers, the citizens of Europe, are no rights at all. But once the citizens discover them, they can become rights that strike back against those who invented them to stabilise their rule over the citizens.

4.6 SOCIAL INEQUALITY CAUSING POLITICAL INEQUALITY

The transformation of the public sphere is not only due to European executive federalism. The great global transformation *from state-embedded markets to market-embedded states*

strongly reinforces the first structural transformation of the European public sphere that is the transformation of public law.²² The global disembeddedness of markets (with the important exception of China and South-East Asia) has led to a dramatic increase of social inequality worldwide, together with a much less impressive decrease of absolute poverty.²³ However, the absolute decrease of poverty does not matter when it comes to the disastrous political effects of social inequality. Social inequality causes political inequality.²⁴ Nearly all countries that have relatively free and equal democratic elections and legislation, in Europe and beyond, have seen election turnout decreased from election to election – without significant differences among European transnational and national parliaments. However, the *effect of a shrinking turnout is very different at the top and at the bottom of the social pyramid*. Class matters once again, and more than ever in the second half of the 20th century. While the smallest group, the upper class (the richest quarter of the polity) often has a turnout of more than 90%, sometimes close to 100% (as in the former GDR), and vote en masse for the same unity party of neo-liberal austerity politics – the turnout of the most populous lower classes is shrinking towards 30%. The effect for the system of political parties and electoral campaigns is a *timidity trap* (Paul Krugman).

The major parties of the political left lost most of their standing voters, whereas the major parties of the political right retained their standing voters. Therefore, for right-wing parties that sought to stay in power (such as the German CDU and FDP, the American Republican Party, and British Conservative Party), there was no need to change; but parties on the left (SPD, Greens, Socialists, Labour Party, Democratic Party) were forced to. The final destination was *as far right as the parties on the right*, accomplished in Germany with the great coalition of the constitutional debt break of November 2005. ‘Go Right!’ became the hidden agenda of campaigns driven by political inequality. In the language of political propaganda, Schröder, Blair, Clinton called it euphemistically a turn to *the middle*, and their definition of progress became structural reform, hijacked from their own former leftist party programmes of the 1950s and 1960s. Finally, Blair, Clinton and Schröder became the most radical neo-liberal reformers, half-forced, half-fascinated by the blackmailing power of the global economy. The effect was that the increase of social inequality could not be stopped, the formerly left-wing parties lost ever more voters, going further right from election to election, causing the political system to run out of alternatives. So far, the timidity trap still stabilises the first transformation of the public sphere of public law (political institutions). Where does the leader of the German Social Democratic Party

22 W. Streeck, “Sectoral Specialization: Politics and the Nation State in a Global Economy”, paper presented at the 37th World Congress of the International Institute of Sociology, Stockholm 2005.

23 R. Wilkinson & K. Pickett, *The Spirit Level. Why Greater Equality Makes Societies Stronger*, Bloomsbury, New York, 2010; see T. Judt, *Ill Fares the Land*, Penguin, New York 2010; Th. Piketty, *Capital in the Twenty First Century*, Harvard University Press, Harvard, MA, 2014.

24 A. Schäfers, *Der Verlust politischer Gleichheit. Warum sinkende Wahlbeteiligung der Demokratie schadet*, Campus, Frankfurt, 2015.

in 2014 go, to get the voters back to the ballot boxes? – he goes far right to Pegida (Patriotic Europeans Against the Islamisation of the West). In a way, he had to do so if he and his party wanted to stay in power, because the party programme tacitly replaced social equality with the empty formula of political justice, basic rights with basic values, democratic socialism with personal respect, and the socialisation of the means of production with the Sunday sermons of recognition.²⁵

The general result of political inequality is that parliaments, citizens, and trade unions lose power, whereas executive bodies, political and economic elites gain power, and the more dramatic the changes are, the more *all* – the big as well as the small powers – are *running out of political alternatives*. The leeway for alternative action shrinks to the margin, and *the one in absolute charge who has no alternatives, finally has lost all his or her power*.

4.7 STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE OF PUBLIC OPINION

At the same time and for the same reasons (transformation of state-embedded markets into market-embedded states, European executive federalism), the *public sphere of public opinion* is structurally transformed through globalisation, privatisation, a system of private-public partnerships, and last but not least, through the electronic media revolution. High-quality journalism has been completely marginalised, crushed into extinction everywhere under the exponentially growing pressure of electronic global media markets and media groups. And while high-quality journalism is returning somewhat, thanks to the Internet, together with a critical public and vivid opposition, the Internet remains highly fragmented, and its contribution to political will-formation incalculable, more or less accidental, and ever more colonised by capital and secret services (China as example of the tip of the iceberg). Freelance journalists can no longer live on their income from writing. On the contrary, leading journalists make more money than ever before in history, and move up to the class of global political and economic players. Their ever denser networks now shape public opinion nationally and transnationally, and close the system against all surrounding voices, context which the social system increasingly perceives as white noise effects and result of technical manipulation.

Moreover, journalism today mirrors exactly the new social differentiation of society, but does not expose it any longer. The effect in the sphere of public opinion is the same as in the sphere of public institutions. From talk show to talk show, from news show to news show, the audience is shrinking. To recover the high ratings of old, the secret slogan becomes ever louder: ‘go right!’

25 See L. Gerster, “Kampf um Anerkennung”, 26.3.2014; Hamburger Programm der SPD 2007, <https://www.spd.de/linkableblob/1778/data/hamburger_programm.pdf> (3.5.2015); W. Thierse, “Kultur der Anerkennung”, SPD-Ortsverein München, SPD News 31.8.2010.

4.8 CONTRADICTIONS OF THE PUBLIC SPHERE

Given these two transformations of the public sphere, the stunning public effects of empirical research can now be summarily explained.

On the one hand, as the Euro barometers and surveys show, *trust in European and national political institutions has been continuously shrinking* over the last 30 years, coinciding with the decades of neo-liberal reforms. The media coverage of this topic is high and causes mostly helpless and self-pitying critical debates, regularly shown on television, in newspapers, and other mass media.²⁶

On the other hand, in a transnational comparative study, Gerhards and Lengfeld have found that complementary to decrease of trust in political institutions, *feelings of shared commitment, political and social solidarity, and cultural belonging among Europeans have increased dramatically*. The most significant result is that the citizens of the European hegemonic state of Germany (along with a high majority of other Europeans) support not only Europe-wide reciprocal help, support, equality of life-chances in general, but also a European welfare state. Moreover, more than 58% of the German population are in favour of the idea of Europe-wide minimum wage, *even if that means the reduction of their income*. However, in contrast to the findings of shrinking trust in institutions, the findings of Gerhards and Lengfeld have been completely silenced – not only by the mass media, but even within the small community of social sciences, they remain largely unknown (this despite the prominent reputation of the researchers).²⁷

Why is the decrease of trust widely reported in the mass media? And why is increasing civic solidarity not reported, even silenced? My assumption (that needs further inquiry) is the following.

The public sphere of political institutions is still open for manageable problems, which seem to be resolvable by top-down technocratic improvements of efficiency, and the usual means of output legitimisation. This is the tacitly accepted common perspective of the United Executive Bodies of Europe and most of its mass media. However, at the same time, the public sphere (of institutions and media) is nearly entirely closed off to any political alternative. Moreover, it is even *closed against any lasting serious, vehement and passionate*

26 G. S. Schaal, "Vom Vertrauensverlust in die Vertrauenskrise", *Berliner Republik* 4/ 2008, <www.b-republik.de/archiv/vom-vertrauensverlust-in-die-vertrauenskrise> (3.5.2015). See also S. Embacher "Einstellungen zur Demokratie", in: *Demokratie in Deutschland 2011 – Ein Report der Friedrich-Ebert-Stiftung*, <www.demokratie-deutschland-2011.de/common/pdf/Einstellungen_zur_Demokratie.pdf> (3.5.2015); Europäische Kommission, Standard-Eurobarometer 80 – Herbst 2013: Die öffentliche Meinung in der Europäischen Union, <http://ec.europa.eu/public_opinion/archives/eb/eb80/eb80_first_de.pdf> (4.5.2015).

27 J. Gerhards & L. Holger, "European Integration, Equality Rights and People's Beliefs: Evidence from Germany", *European Sociological Review*, Vol. 29, 2013, pp. 19-30; J. Gerhards & H. Lengfeld, *Wir, ein europäisches Volk? Sozialintegration Europas und die Idee der Gleichheit aller europäischen Bürger*, Springer VS, Wiesbaden, 2013.

debate regarding alternatives that could contest and endanger the hegemonic politics of ‘structural reform’, austerity measures, and ‘peaceful improvement’ (Marx) of national competitiveness. If there is no serious bottom-up input legitimisation, that is, legitimisation through campaigns over real (and in particular, macroeconomic) alternatives, and the whole political system is designed to avoid public conflict, then there is no longer any reason for the mass media to pay attention to dissenting opinions of the majority.²⁸ However, even the strongest feelings of civic solidarity can become public and political only in a bottom-up process of transnational deliberative will-formation and (parliamentary) legislation. As long as the bottom-up process within the democratic circle of legitimisation is dried up, the silencing will be successful, and the spiral of silence will not be broken, resulting in the paradoxical effect that I know that I think I am European, but at the same time, I think I know that my neighbour is not. Therefore, we must distinguish between the private expression of public opinion in individualised surveys, and public expression at the pub, on the street, and in the mass media.

4.9 A WORD CAN CHANGE THE WORLD (OR NOT)

There are many studies on European politics, which has replaced the mass democracy of egalitarian decision making with a new and more elitist mode of deliberative democracy without egalitarian decision making. However, if we consider the two structural transformations of the public sphere, it seems that we have no deliberative democracy at all in Europe, and pulling it away from the pseudo-democracy of EU-commissions and back into the streets would be the first step of radically democratising Europe.

Therefore, and despite all its executive concentration of power, the European system of intergovernmental Bonapartism is weak.²⁹ This is the good news, because the top-down system of manipulated will-formation comes into crisis *once there is initiation of a serious debate that cannot be silenced by a combination of official politics and media.*

This came to the fore for the first time in the French campaign for the Ratification of the Constitutional Treaty of 2005. Immediately after the results that rejected the Constitutional Treaty were published on the front pages of all European newspapers, the public debate was successfully silenced by an explicit and publicly announced agreement of the United Executive Bodies not to talk publicly any longer with their children, the citizens of Europe, and wait a couple of years before signing the same treaty in Lisbon, ignoring

28 For the distinction between (democratic) input-legitimisation and (technocratic) output-legitimisation, see F. Scharp, *Regieren in Europa – Effektiv und demokratisch?*, Campus, Frankfurt, 1999, 18ff, 33f, 111, 167f.

29 See H. Brunkhorst, “Collective Bonapartism: Democracy in the European Crisis”, *Reset Doc – The Web Magazine for All Tribes of the World*, pp. 1-28, <www.resetdoc.org/story/00000022418> (last access 24.08.2014); H. Brunkhorst, ‘Unbezähmbare Öffentlichkeit. Europa zwischen transnationaler Klassenherrschaft und egalitärer Konstitutionalisierung’, *Leviathan*, Vol. 1, 2007, pp. 12-29.

completely the C-word and the French referendum. Silencing public debate was challenged for a second time after the last European elections in May 2014, when Angela Merkel said in a press conference that she had never heard of Jean Claude Juncker, but only knows that *pacta sunt servanda*. The next case followed briefly thereafter. The Greek elections in January 2015 brought a leftist government to power, who (as the European executive and media machine immediately alleged) had no professional and economic qualifications, except talking publicly at the wrong places about the wrong things. They talked before the doors were closed about macroeconomic alternatives to austerity measures. They discussed publicly and in the presence of the leaders of the United Executive Bodies the neo-Keynsian solutions of the Greek crisis, suggested the same for the rest of the EU. They argued that electoral outcomes are expressions of the will of the people, and therefore, should be taken seriously everywhere in a democratic union of states and peoples. They simply pointed out that the Emperor stood naked. This was already too much for the post-democratic top-down-system of intergovernmental rule. Finally, Schäuble had to declare an end to the administrative debate. Again, the political class agreed, and stopped talking. However, the debate is not yet over, and there are more elections to come with unpredictable democratic obstacles.

As it seems, the intergovernmental mode of technocratic politics and elitist consent is coming to an end. A word could kill the consent. Unfortunately, until now, there has been no path towards a new transnational regime of bottom-up democracy that would have efficient power to rule, tax, socialise the means of production and make basic social and economic decisions available for democratic deliberation, campaigns and decisions – instead of constitutionalising them. At stake in Europe today is not the constitutionalisation of a leftist alternative to right wing neo-liberal constitutional law, but keeping these alternatives open to electoral campaigns and ordinary legislation, especially given that there is no scientific solution to finding the right or wrong way, or economic and social welfare system. Special interests drive experts as much as the lay person, and experts are as susceptible to generalisable arguments as the people. And while economic and social questions are technically mediated – because they have no technical solution – they are political questions in which everybody is as expert as professors of economy, constitutional jurists, or professional politicians. The ‘only’ condition is political equality, which, it seems, requires a smaller social difference than we have today nearly everywhere in the world (of at least nominally) democratic constitutions.³⁰ Ironically, during the most recent and ongoing, so-called Greek crisis, it was none other than Mario Draghi, the person really in charge at the transnational European level, who argued that we are in need of a *real European government*, and – he added, paying an important bit of lip service – it must be *democratically*

30 On the distinction between normative, nominal and symbolic constitutions, see K. Löwenstein, *Verfassungslehre*, Mohr, Tübingen, 1997, 148ff.

legitimated, directly and on the same level.³¹ To which we should only add: whatever it takes.

31 See M. Zydra, „Draghi’s Mission – Notenbanker sollen sich eigentlich aus der Politik raushalten. Doch der EZB-Präsident fordert: Die Mitgliedstaaten der EU müssen Souveränität aufgeben – sonst zerbricht der Euro’, *FAZ-Wirtschaft*, Nr. 63, 17.4.2015, 15.



5 CAUSES OF THE CURRENT CRISIS AND WAYS OUT – SEEN THROUGH THE LENS OF THE EUROPEAN SOCIAL MODEL

Dragica Vujadinović

5.1 INTRODUCTION

The main idea behind this chapter is that the neo-liberal turn in the development of liberal capitalism caused the current global and Eurozone crisis. Further, it is based on the idea that austerity measures represent the neo-liberal mechanism which cannot solve the crisis, and that a welfare turn, *i.e.* new forms of economic welfare and political strategies of development, is necessary. This is important not only for overcoming the crisis, but also for diminishing overextended inequalities at the global, regional, and nation-state levels, and for finding new balances between economic efficiency and free market mechanisms on the one hand, and welfare systems, human rights protection, and ‘right to a decent life for each individual,’ on the other.

Another important underpinning idea is that the appeal of the European Union (EU) for citizens is based, to a significant extent, on identifying the EU with an ideal-typical concept of ‘Social Europe’ (expectations that already achieved social welfare benefits be kept on and even be further improved in the frame of European integrations). The crisis of the Eurozone and the austerity measures, however, put into danger welfare expectations of the European citizens, and thus, also threaten the sense of belonging to the EU and generally its political identity. The overcoming of the crisis and recovery, as well as improving EU identity and polity, demands revived ideas and practices of ‘Social Europe,’ based on simultaneous processes of reversing austerity measures and undertaking constitutional and institutional attempts towards deeper and stronger political, economic, fiscal and social integration.

This chapter first offers an overview of the link between the crisis of capitalism and the appearance and development of the welfare state. Second, it considers the causes of the current crisis (again, in relation to the welfare model). Third, it places emphasis on the welfare ideas about the ways out of the crisis, *i.e.* ideas about solidarity as the mechanism of public reasoning. Fourth, the paper outlines the possible relevant actors and mechanisms, crucial for overcoming the neo-liberal austerity approach and its replacement with the welfare and solidarity-oriented approach to the crisis.

5.2 HISTORICAL OVERVIEW OF RELATIONS BETWEEN THE CRISIS OF CAPITALISM AND THE WELFARE SYSTEM

According to the statistical data presented by Thomas Piketty,¹ from 1870 to 1910/20, taxes were set at a rate lower than 10% in rich countries (and were only for regalian functions – police, courts, army, foreign affairs, general administration). In the United States of America (USA), greater state intervention in the economy was a successful response to the Great Depression of the 1930. Along with the New Deal, this approach also worked after World War II in the West in a period of significant economic growth and the rise of the ‘welfare state’ model. Between 1920 and 1980, the share of national income that wealthy countries devoted to social spending increased considerably, but started slowing down from the 1970s, and especially, the 1980s. In the USA, the rise went to 30%, but stagnated in the 1970s – with Republican rule and the presidency of Ronald Regan. In Great Britain, the rise went to 40%, but also stagnated in the 1970s, with Conservative Party rule and Prime Minister Margaret Thatcher. In other developed countries, the rise continued until the 1980s, and went up to 50% in France, and 55% in Sweden. In short, as Piketty notes, for 50 years, the share of taxes in national income increased three, four, and even five times. Further, the tax share stabilisation took place at different levels in all welfare states.²

The welfare state is a system of redistribution of the national income for the well-being of the population and social security from risks related to the age, health, education, and invalidity. It is based on wealth redistribution, dominance of a market economy, but within a mixed system. It is based on the principles of equality of opportunity, public responsibility for powerless social groups and general basic welfare. It involves a special combination of capitalism, welfare, and democracy.³

Piketty puts special emphasis on the interrelation of the welfare system, democracy, and human rights protection. He remarks that it is the phenomenon of the twentieth century that covers the development and affirmation of human rights. Modern welfare redistribution, as exemplified by the social states constructed by wealthy countries in the 20th century is based on a set of fundamental social rights: to education, health, and retirement. It represents a social revolution that went along with a fiscal revolution on the one hand, and a revolution in the conception of human rights and international law, on the other. The fiscal revolution of the 20th century made possible three social revolutions related to the access to education, health, and public pensions.⁴

1 Piketty, 2014, pp. 474-478.

2 *Ibid.*, p. 476.

3 See T. H. Marshall, *Citizenship and Social Class; And Other Essays*, Cambridge (England) University Press, Cambridge, 1950; C. Offe, *Contradictions of the Welfare State*, The MIT Press, Cambridge, MA, 1984.

4 ‘Along with access to education and health, public pensions constitute the third social revolution that the fiscal revolution of the twentieth century made possible.’ Piketty, 2014, p. 478.

Piketty also points to the fact that welfare states became the standard of states' modernisation and economic development. He says that whatever limitations and challenges these systems of taxation and social spending face today, they nevertheless did mark an immense step forward in historical and civilisational terms.⁵ A broad consensus was formed around these social systems, and even the poorest countries and those with an intermediate level of development attempted to reach certain levels of welfare.

Piketty further explains that in postcolonial countries and their attempted copies of the welfare model, the taxes played a much smaller role and were at a lower level and percentage of national income. After decolonisation, the poorest countries – in their attempts to follow modern trends of nation-state building – did manage in the 1970s and 1980s to reach 15% of tax levels. However, in the 1990s, they experienced a decrease in tax levels to only a little over 10%, thanks to, on the one hand, the neo-liberal turn in developed countries and their patronising in that direction, and to the economic crisis, on the other.⁶

However, the then established welfare system and the model of state intervention had become expensive and hard to sustain in what turned out to be obvious with the economic crisis of the 1980s and the fall of productivity and national incomes. The 1980s economic crisis in developed Western countries led to an acute crisis of the welfare state. In spite of that, as already mentioned, the achieved social rights have been established as the standard, merit, criterion of quality of life (including the EU, the previous EEC). On the other hand, with a sharpening crisis of the traditional welfare state and with the breakout of the global crisis in 2008, the achieved social rights have been seriously endangered.

With rising economic instability and slowed economic growth on the one hand, and the crisis of the expensive, unselective, and bureaucratised welfare model, on the other, there was a rising counter-trend towards attacking and deteriorating the established state fiscal and social policy. These changes simultaneously meant opting for a neo-liberal turn in economic, fiscal, and social policies on a global, European, and nation-state level. In addition, the neo-liberal turn was enabled by the fall of the Berlin Wall, which released Western democracies from the need to support their legitimacy with strong welfare redistribution.⁷

5 'In all the developed countries in the world today, building a fiscal and social state has been an essential part of the process of modernization and economic development [...] The development of a fiscal and social state is intimately related to the process of state building as such.' *Ibid.*, p. 491.

6 'The process of decolonization was marked by a number of chaotic episodes in the period 1950-1970: wars of independence with the former colonial powers, somewhat arbitrary borders, military tensions linked to the Cold war, abortive experiments with socialism, and sometimes a little of all three. After 1980, moreover, the new ultraliberal wave emanating from the developed countries forced the poor countries to cut their public sectors and lower the priority of developing a tax system suitable to fostering economic development.' *Ibid.*, p. 492.

7 See C. Douzinas, *Philosophy and Resistance in the Crisis – Greece and the Future of Europe*, Polity Press, Cambridge, 2013, pp. 49-63.

Anti-state ideology and neo-liberal capitalist strategy has prevailed since the 1980s, with economic fiscal and market liberalisation. The financial market was held in much less control by the state than previously. Consequently, the logic of privatisation, competition, efficiency, together with over-empowered financial capital and overextended social inequalities⁸ has prevailed over the logic of human rights protection, especially regarding social rights protection and social welfare of common people. However, the welfare state was not dismantled from 1980s until today, although public spending for social security experienced a certain decrease.⁹

5.3 CAUSES AND GENESIS OF THE CRISIS

The response to the 1980s economic crisis and the crisis of the welfare state was the replacement of the Keynesian model of development by the neo-liberal one.

According to Hauke Brunkhorst,¹⁰ hegemony of the managerial mindset (neo-liberalism/ordoliberalism) in the economic sphere¹¹ brought with it the fundamental ideas on stripping the state of control over the market economy and global financial capital, on abolishing monopoly capitalism (proposing competition law as a way to keep economic chances of all market participants equal, market justice being based on competition), of abandoning democratic legislative control, intensifying labour efficiency, maximising labour flexibility, and minimising labour force resistance. 'During the last thirty years of neoliberal global hegemony, the fragile balance between democracy and capitalism has shifted dramatically in favor of capitalism.'¹²

There was a forced privatisation of national resources, along with a rising trend of the financial market's independence and power in relation to the state. There was economic weakening of the state and empowerment of global financial capital. As Brunkhorst notices: 'In thirty years of globalization the most powerful (for good *and* for bad) states of history – Western democracies – have been turned [...] into debt-collecting agencies on behalf of a global oligarchy of investors.'¹³

8 From the 1980s to 2014, there was a progressive rise in inequality on a global scale (world pyramid) and within each country. In the last 25 years, the income of the richest 0.1% has risen 20 times in comparison to an average income. Eighty-five individuals control more resources than 3.5 billion poorest people combined. Nearly a billion people entered the 21st century unable to read a book or sign their names. V. Beširevic, "Is Reducing Poverty a Task of Constitutional Courts", *Strani pravni život*, 2010/1, p. 1.

9 *Ibid.*

10 Brunkhorst, pp. 37-55.

11 Brunkhorst points to the dialectic between the dominance of the 'managerial mindset' in the field of economics on the one hand, and the 'Kantian mindset' in European constitutionalism and protection of human rights, on the other.

12 *Ibid.*, p. 51.

13 *Ibid.*, p. 53.

The point here is that in the context of the welfare state (and late capitalism), the state has taken money from the rich by legal coercion (taxes etc.), and made the rich dependent on the state, while in neo-liberal states and turbo-capitalism, the state borrows the money from the rich, and makes itself dependent on them.

Egalitarian democratic capitalism has been replaced by capitalist democracy, in which previously won workers' rights and social rights have been diminished. Unions no longer primarily protect interests of workers, but rather, their own and those of transnational companies. Brunkhorst remarks that although Treaty-constitutionalism progressed (Kantian mindset), the 'managerial mindset' of EU integration prevailed as early as the 1960s. Therefore, the EU accepted the neo-liberal strategy of responding to the crisis of 1980s without resistance.¹⁴

Brunkhorst remarks that the crisis was most intense in the Eurozone countries because of the EMU (European Monetary Union) and common currency. Eurozone countries lost the possibility to devalue their national currency as the means to compensate for a large trade deficit and budget deficit. They can no longer print their money and thus devalue their debt through inflation. The rise of taxes on income and capital is also prevented because free borders would be used for the flow of capital to the countries with lower taxes.¹⁵ The crisis outbreak was especially acute in the Eurozone's southern countries (Greece, Spain, Portugal, France, Italy). When the bubble economy stopped functioning artificially and the banking crisis broke out in 2008, states bailed out banks in order to save them from bankruptcy, to escape a disastrous situation for millions of citizens.

Implied in Brunkhorst's analysis is that a combination of factors, such as the lack of currency devaluation, bailing out banks by the state budget money – consequently turning banks into ever stronger agencies and states into ever more indebted ones – along with the domination of neo-liberal capitalism over democracy, all led to a necessity of social security restrictions and austerity measures.

Therefore, the state has become susceptible to blackmailing processes [...] Former democratic governments are now in the hands of bankers and their staff technocrats – directly or indirectly. [...] Therefore the national state must

14 *Ibid.*, pp. 39-52.

15 'As long as a modern, functionally differentiated economy (with capitalist markets) is embedded in democratically controlled state power, the parties of the have-nots, either the exploited social classes or the nations who are the losers of the global economic competition between states and regions, have two means to enforce *rough compensatory justice*. They can perform macroeconomic steering in times of crisis: *nationally* by legal regulation and investment, in particular by increasing taxes for high incomes and assets, and/or *internationally* by means of devaluation of their national currency. In Europe today they have lost both. Globalization has transformed tax-collecting states into debt-dependent states, and hence reversed the direction of control between states and capital. The *taxing state* that is in control of capitalism has become a *borrowing state* that is controlled by capitalism.' *Ibid.*, p. 51.

execute the neoliberal programme with microeconomic means and ‘devalue labour and the public sector’, ‘put pressure on wages, pensions, labour market regulations, public services’ – and then sell the whole thing as ‘reforms’, ‘modernization’, ‘new public management’, and ‘individual empowerment’, best served by Third Way labour parties, reformed social democrats and red-green coalitions.¹⁶

Piketty remarks that the main reason why the crisis of 2008 did not trigger a crash as serious as the Great Depression of 1929 is that this time, the governments and central banks of the wealthy countries did not allow the financial system to collapse. They kept the liquidity of banks. ‘This pragmatic monetary and financial policy, poles apart from the “liquidationist” orthodoxy that reigned nearly everywhere after the 1929 crash, managed to avoid the worst.’¹⁷

Piketty states that pragmatic politics of central banks in 2008 did prevent the worst, but did not really provide a durable response for the structural problems that made the crisis possible, including the complete lack of financial transparency and the rise of inequality. He prophetically concludes: ‘The crisis of 2008 was the first crisis of the globalized patrimonial capitalism of the twenty-first century. It is unlikely to be the last.’¹⁸

Regarding the causes of the crisis, Albena Azmanova explains similarly that the current social crisis was not generated by an economic crisis (by a decline in business and prosperity), but by the financial crisis as the outcome of the neo-liberal economy. The reasons for the financial crisis have much to do with the capacity of financial institutions to produce and sell risk to investors – a practice made possible by the privatisation and deregulation of banks that governments undertook in the first decade of this century and the end of the previous one. When the risk accumulated by financial institutions exploded, public authorities opted to avoid an economic crisis triggered by a banking collapse and undertook a publicly funded bank bailout.¹⁹

According to Thomas Palley, after 1980 the Keynesian model was replaced by a neo-liberal growth model, which brought the following key changes: 1) abandonment of the commitment to full employment and the adoption of commitment to very low inflation; and 2) severing the link between wages and productivity growth. Together, these changes created a new economic dynamic. Before 1980, wages were the engine of demand growth. After 1980, finance and idiosyncratic factors became the engine. The new economic model

16 *Ibid.*, p. 52.

17 Piketty 2014, p. 472.

18 *Ibid.*, p. 473.

19 A. Azmanova, “On Social Destitution, Misdirected Protests and the Missing Crisis of Capitalism”, *Open Democracy*, 9 July 2012. <<https://www.opendemocracy.net/albena-azmanova/on-social-destitution-misdirected-protest-and-missing-crisis-of-capitalism>>.

was rooted in neo-liberal economic thought. Its principal effects were to weaken the position of workers, strengthen the position of business, and unleash financial markets to serve the interests of financial and business elites.²⁰

Palley directly links the Eurozone crisis to a ‘toxic neoliberal economic policy cocktail’:

The mixing of that cocktail traces all the way back to the early 1980s, the defining moment being March 1983 when French president Francois Mitterrand initiated a turn away from Keynesian policies of reflation to neoliberal policies of austerity. That fateful turn symbolized the end of Keynesian era in Europe and the beginning of the neoliberal era. The crisis is the culminating logic of thirty years of neoliberal policy. The roots of the Eurozone crisis therefore are deep.²¹

The Keynesian model of development was cast aside in the EU member states and in the EU as such, starting from the 1980 economic crisis, and especially from the 2008 global crisis to the present. A peculiar fact is that Social-Democratic parties have abandoned their previous welfare approach (starting with the socialist President Mitterrand, who conducted austerity measures already in 1983 in France). Palley states that the neo-liberal roots of the current crisis have been globally common, although in Europe, they have had certain specific, ever more complicating features. The creation of the Euro made a monetary system that fosters public debt crises and the political economy of fiscal austerity.²²

The crisis outbreak was serially postponed by a number of developments in the EU, including the stimulus from German reunification and the low interest rate convergence produced by creation of the common currency. Euro prompted a ten-year credit and asset price bubble that created fictitious prosperity and postponed the crisis. Yet, the postponement only sharpened and worsened the ultimate stagnation by creating large build-ups of debt.²³

Palley adds as an analytically relevant factor the fact that during this period of postponement, Germany sought to avoid stagnation via export-led growth, based on wage repression. This created problems with the internal balance of payments within the Eurozone, further impeding the resolution of the crisis.²⁴

He claims that politicians and the general public wrongly consider the Eurozone crisis as caused by the public debts crisis. As a result, a push for fiscal austerity has been widely

20 Th. Palley, “Europe’s Crisis Without End: The Consequences of Neoliberalism run Amok”, *Macroeconomic Policy Institute, Working paper 111*, March 2013, (pp. 1-36) p. 5.

21 *Ibid.*, p. 3.

22 *Ibid.*, pp. 20, 21.

23 *Ibid.*, pp. 11-15.

24 *Ibid.*, pp. 5-13.

accepted as the solution. Such a move, however, only made the crisis worse. The reality is that the public debt crisis is just the latest phase of the crisis, rather than its cause. As already indicated, the crisis began with a sharp turn to neo-liberalism in 1980-85, moving into a period of real estate bubbles in the Eurozone, followed by the financial crash and the private debt crisis, and leading to the current situation of a public debt crisis.²⁵

The crisis started as a private sector debt crisis in both the USA and the Eurozone. However, unlike in the USA, in the Eurozone, it turned into a public sector debt crisis. The fundamental reason for this difference is the Eurozone's lack of a central bank that can act as a government banker. Institutional design of the Euro contributed to the public debt crisis. The neo-liberal design of the Euro prohibits the European Central Bank (ECB) from helping governments finance their deficits and manage their debts.²⁶

The neo-liberal turn led to the persistent erosion of wages and rise of unemployment. However, the unemployment increase, along with a growing structural demand shortage, were obscured by the introduction of the Euro, which also introduced a bubble economy. The bubble economy temporarily filled the demand gap and stimulated employment, but with the bubble burst, the demand gap and unemployment increase came back in significantly sharper form.

This complicated picture, as Palley implies, explains why it has been so hard to counter neo-liberal populist rhetoric that governments and welfare state profligacy are the cause of the crisis. The current crisis in the EU brought with it not only the debt and financial crises, but a European identity crisis, *i.e.* a deepening of the legitimacy crisis. This is closely linked with austerity measures and their leading towards endangering the image of so-called Social Europe.²⁷

The above mentioned 'complicated picture,' which obscures the real causes of the crisis, should be further enriched – according to Ugo Marani and Giuseppe Gaeta²⁸ – by taking into account systemic lobbying for bailing out banks. The neo-liberal model of bailing out the banks was pushed by the numerous lobbyists of the banking and financial community inside the EU's bodies in Brussels:

What may be totally new to European researchers is to realise that in the EU's bodies in Brussels there are 1700 lobbyists working for and more than 700 organizations representing the banking and financial community, such as the British Bankers Association and the German Banking Industry Committee.²⁹

25 *Ibid.*, pp. 7, 16.

26 *Ibid.*, p. 20.

27 *Ibid.*, pp. 7, 8.

28 U. Marani & G. L. Gaeta, "Back To The Future? From Bail-out To Bail-in", *Social Europe*, 10 March 2016.

29 *Ibid.*, p. 2.

Lobbying of banking and financial agents inside EU institutions for bailing out banks represents one of the important reasons for the neo-liberal strategy for solving the crisis being pushed through without previous scrupulous analysis,³⁰ as well as for the fact that in spite of the contradictory effects of a combination of this huge bailout³¹ and austerity measures,³² there was no chance of triggering a ‘Keynesian Resurgence’³³ in favour of a different approach to monetary and fiscal policies and crisis solution.

According to Claus Offe, the Eurozone crisis is the cumulative outcome of a financial market crisis, sovereign debt crisis, and EU integration/democratic deficit crises. These three linked crises are the results of a notable attention deficit, *i.e.* a failure of national and European authorities to regulate the financial industry ‘in ways which might have prevented the chains of banks defaulting and governments stepping in to bail them out.’³⁴ Further, as Offe explains

states are so badly indebted and thus vulnerable to the vagaries of financial markets because they had to bail out their banks, at least those proverbially ‘too big to fail’. In addition, the public costs of saving private banks at the taxpayers’ expense added to the fiscal crisis which then in turn allowed the banks to profit from crediting – a manifestation of the banks’ strike capability that is an obscenity in itself.³⁵

Offe openly says that the Euro was ‘a giant mistake from the beginning.’ Monetary union mechanisms of financial market control – without fiscal union and social union – thus caused structural imbalances, further deepening the heterogeneity of the economies it comprised:

30 ‘The interventions carried out in order to support banking institutions were not characterized by selective evaluations of their work which should have been essential in order to distinguish between illiquid and insolvent banks.’ *Ibid.*

31 ‘According to recent estimates from Mediobanca, European countries allocated net interventions, in the form of (re)capitalization, guarantees, credit and/or loans – net of returned or given up items – equal to more than € 1000bn. Over 253 of these were destined for Spanish banks, 156 for British institutions, 110 for Irish banks and more than 80 for German and Italian banks. This financial transfer has no precedent in the history of our continent: the European Commission estimates that since the beginning of the crisis EU countries have been acting on behalf of 112 national banking institutions.’ *Ibid.*

32 ‘Whatever the role of these lobbies, centrality of and support for the banking system form one of the pillars of the policy mix adopted inside the European Monetary Union; at the opposite end of this spectrum, there are the principles of austerity. These two sides are incoherent, analytically unfounded and socially deleterious.’ *Ibid.*

33 *Ibid.*

34 C. Offe, “Europe Entrapped: Does the European Union Have the Political Capacity to Overcome Its Current Crisis?”, in Jovanovic & Vujadinovic (Eds.), pp. 17-37.

35 *Ibid.*, pp. 23, 24.

Coming back to the question of who can or must be ‘blamed’ for such international power imbalances deepening within the European political economy and the Euro zone, the only ‘agent’ we can point at is the institutional set-up of the EU and the ‘attention deficit’ of its designers. Their design of the Euro zone was a giant mistake from the beginning because of the (further) deepening heterogeneity of the economies it comprises, as was the failure of the Maastricht Treaty to provide effective sanctioning mechanisms for the violation of its criteria as well as the failure of the Lisbon treaty to establish an adequately capable regime at the European level for the implementation of supranational economic, fiscal and social policies.³⁶

A common currency for economies of extremely different strengths – such as Germany and Greece – was favorable for richer countries. Poorer ones lost the possibility to devalue their own currency, and thus, regulate their budget and trade. Like Brunkhorst, Offe remarks that instead of using currency devaluation, weaker countries were forced to cut social, public sector, and labour spending. The trade and budget deficits must be compensated through pressures on wages, pensions, labour market regulations, and public services such as health and education.

In addition, deeply indebted states are mandated by supranational authorities (the ‘Troika’ of ECB, the EC, and the IMF) to privatise state-owned assets, in exchange for financial relief (that mostly serves to recapitalise troubled national as well as international banks anyway). Everything that is financed, provided, and regulated by the state needs now to be liberalised. What makes things worse, according to Offe is that ‘even if the Greek state budget were to be shrunk nearly as much in response to the dictates of the EU, the ECB and the IMF [...], the net effect on the debt-to-GDP ratio would not be favorable, but strongly *negative*.’³⁷

Offe concludes that as financial investors are likely to respond to the worsening debt/GDP situation by either punitively denying credit or providing them at an even greater disadvantage, no economic prosperity is possible.

According to him, austerity is a highly poisonous medicine, an overdose of which will kill the patient (rather than stimulate growth and expand the tax base), in which case, the weakest Eurozone members (and eventually, all of them) become ever more dependent on lenders and allow these lenders to charge ever higher and ever more unsustainable rates.

Austerity continues the neo-liberal logic of development and deepening, instead of resolving, the crisis. It protects the interests of richer classes and richer countries and

³⁶ *Ibid.*, p. 28.

³⁷ *Ibid.*, p. 20.

deprives wide swathes of the population of social security. It disables, instead of enabling economic growth, it is undemocratically imposed and causes a serious increase in Euroscepticism. EU and Troika are to be blamed as proponents of austerity.³⁸

5.4 WAYS OUT – THE WELFARE TURN, SOLIDARITY APPROACH

Offe states that the crisis demands an urgent rescue operation, which would mean more European integration. Empowerment of fiscal and economic governing capacities at the EU level becomes a plain imperative.

Debt mutualisation is needed in the long term and on a large scale, with massive redistributive measures between member states and classes. It would fit the interests of all Europeans, and not only of the citizens either of the debtor countries or of the indebted countries. Debt mutualisation is not a matter of ‘transfers’ or ‘altruistic donations,’ but a matter of *solidarity* in the proper sense.³⁹

It means that austerity measures would have not been put primarily on the debtor nations’ shoulders, and on the lower classes, but the creditor countries and the richer classes would have been strongly and justly affected by appropriate redistributive and austerity measures as well.

Regarding this, Offe mentions also the forward-looking ‘remedial responsibility’:

The moral principle underlying this move is simple: it postulates that the *less* an agent (member state and its economy) has suffered as a consequence of the mistakes collectively made or the *more* it has even benefitted from them having been made (through interest rates that are lower than otherwise they would be, and external exchange rates of the Euro more favourable), the *greater* the share of the burdens the agent must shoulder in compensating others for adverse consequences resulting from the original mistake.⁴⁰

The lack of political will among national elites leaves Europe trapped between what ought to be done and cannot be done. Offe believes that social pressure by Europe-wide protests is necessary in order to push forward political elites towards responsible behaviour for the benefit of the EU and Europeans. In addition, necessary remedies have to be democratically legitimated by the EU parliament and European public. Mutualisation of debts, introduction

38 *Ibid.*

39 *Ibid.*, p. 21.

40 *Ibid.*, p. 28.

of a stable fiscal pact, as well as social pact, necessarily demands political support of the European citizenry.⁴¹

According to Piketty, the way out is in regaining certain control over financial capitalism that has run amok, and in transforming the 'old' welfare state, in the sense of it becoming less bureaucratic and patronising, less unselective, and more market-oriented. It would mean 'less state' in the welfare system, in combination with regaining control over global financial capital, *i.e.* 'more state' in the capitalist economy.

Piketty proposes a reform of the welfare state, plus a progressive global tax on capital. The tax on capital would, besides avoiding an endless inegalitarian spiral and regaining control of the dynamics of accumulation,

also have another virtue: it would expose wealth to democratic scrutiny, which is a necessary condition for effective regulation of the banking system and international capital flows. A tax on capital would promote the general interest over private interests while preserving economic openness and the forces of competition.⁴²

According to Azmanova,⁴³ the way out is in the nationalising of certain sectors of the private economy, or in 'softer' means, such as increased taxation on such businesses. This would begin to remedy the discrepancy between the public absorption of risk and the private accumulation of opportunities, and the state's lack of resources for social policy. However, she remarks that even the radical left does not envisage this necessary step.

Habermas links possible ways out from the Eurozone crisis to the further political, economic, fiscal, and social integration of the EU. In that frame, he also introduces the solidarity approach in which Germany is given a special role.

He points out that the assumption underpinning the building of the EMU:

that permitting unrestrained competition in accordance with fair rules would lead to similar unit labor costs and equal levels of prosperity, thereby obviating the need for joint decision-making on financial, economic and social policies, has proved to be false.⁴⁴

He rather assumes that we are today 'trapped in the dilemma between, on the one side, the economic policies required to preserve the Euro and, on the other, the political steps to closer integration' and that 'path breaking decisions' are thus needed: 'What is necessary

41 *Ibid.*

42 *Ibid.*

43 Azmanova 2012, p. 3.

44 Habermas, 2013, p. 2.

in the first place is a consistent decision to *expand the European Monetary Union into a Political Union*.⁴⁵

The above-mentioned further integration imposes the need for the treaties' revision, and the European Council would have made the initiative according to its competences.

The first step, namely calling for a convention which is authorized to revise the Treaties, must be expected from the European Council, hence from the very institution that is least suited to developing smooth and cooperative resolutions.⁴⁶

The question is how to overcome the institutional hurdle of a change in primary law. The 'first step' problem exists concerning the question – how and who ought to initiate the procedure of the foundational treaties' change.

Habermas thinks that the German government has the duty and the capacity to fulfill this task. It holds the key to the fate of the European Union in its hand, because of being the only government capable to take the initiative for revising the treaties. Germany has to act from the point of solidarity, which is based primarily on civic affiliations and political bonds. Conduct based on solidarity presupposes political contexts of life, hence contexts that are legally organised, and in this sense, artificial ones, instead of ethical conduct in a quasi-natural community.⁴⁷

Habermas considers that Germany has the normative obligation to conduct this task, and not only the interest in a policy of solidarity:

We Germans should have learned from the catastrophes of the first half of the twentieth century that it is in our national interest to permanently avoid the dilemma of a semi-hegemonic status that can hardly held up without sliding into conflicts ... Germany has not only an interest in a policy of solidarity; I would suggest that it has even a corresponding normative obligation.⁴⁸

45 Habermas writes that 'with the establishment of a common economic government *the red line of the classical understanding of sovereignty would be crossed*. The idea that nation states are "the sovereign subjects of the treaties" would have to be abandoned. On the other hand, the step to supranational democracy need not be conceived as a transition to a "United States of Europe". "Confederation" versus "federal state" is a false alternative [...] The nation states can well preserve their integrity as states within a supranational democracy by retaining both their roles of the implementing administration and the final custodian of civil liberties'. *Ibid.*, p. 4.

46 *Ibid.*

47 *Ibid.*, p. 5.

48 *Ibid.*, p. 4.

Germany has had a normative obligation to act in accordance with the solidarity principle, for it to be in solidarity with indebted countries in the shorter term, and to initiate changes of the treaties which would lead to more political unification of the EU. In other words, it ought to pursue economic and political decision making from a position of common interest of the EU in the longer term, that is, from the point of view of EU public reason, which overcomes particular interests of the member states. The leadership role that falls to Germany today shall not lead to 'German Europe,' but to 'Germany *in* Europe.'

Germany has the normative duty to make the first step and initiate the treaties' revision in favour of more political and economic unification, and to act in solidarity with other EU countries, because Germany benefitted from the post-WWII European unification to overcome the defeat of 1945 and the moral catastrophe of the Holocaust, as well as for its economic recovery. In addition, embedding Germany into the context of European unification did help Germany make a crucial shift in a political mentality, to develop a liberal self-understanding for the first time, and to overcome its 'fatal semi-hegemonic status' in Europe.⁴⁹

Habermas does not agree with Offe's reasoning in which Germany necessarily acts in solidarity due to economic benefits, given how much benefit Germany has experienced from the EMU (such as deriving the greatest benefit from the single currency through increased exports, contributing to aggravating economic imbalances within the monetary union with this export surplus, and also profiting from the crisis through crediting the indebted countries and setting high interest rates in the process).

According to Habermas, even if we accept these economic arguments, the normative premise that these asymmetric effects of the politically unregulated interdependencies between the national economies entail an obligation to act in solidarity is not quite easy to explain. He gives priority to the argument of the normative obligation of Germany to act in solidarity, and thus, make the first necessary step in initiating the treaties' revision. Furthermore, the argument of solidarity proposes to the EU countries to act in a way that the richer ones, the debtors, should have accepted certain negative distribution effects, redistribution of crisis effects in favour of indebted countries, in the long-term interest of all member states and the Union as such:

Such an effort would require Germany and several other countries to accept short- and medium-term negative redistribution effects in its own longer-term self-interest – a classic example of solidarity, at least on the conceptual analysis I have presented.⁵⁰

49 *Ibid.*, p. 4.

50 *Ibid.*, p. 6.

Habermas concludes in favour of solidarity and a shared European political perspective that if one wants to preserve the Monetary Union, it is no longer enough, given the structural imbalances between the national economies, to provide loans to over-indebted states so that each should improve its competitiveness by its own efforts. What is required, instead, is solidarity, a cooperative effort from a shared political perspective to promote growth and competitiveness in the Eurozone as a whole.⁵¹

Palley adds complementary ideas in this respect. He says that a way out is possible, but it demands a reversal of the neo-liberal turn, reform of the Euro design, reversal of Germany's export-led growth based on wage repression, and a shift to a domestic demand-led growth strategy, which would also mean an economic growth locomotive for other European countries. And finally, the way out demands an increased fiscal coordination and real wage determination (introducing a European minimum wage, for example).⁵² Succinctly summing up the economic dimension of the welfare turn, Palley says:

The way forward is to replace the neoliberal box with a structural Keynesian box that repacks the policy box [...] The critical feature is to take workers out of the box and put corporations and financial markets in so that they are again made to serve a broader public interest. The key elements are to replace corporate globalization with managed globalization; restore a commitment to full employment; replace the neoliberal anti-government agents with a social-democratic government agenda; and replace the neoliberal market flexibility with a solidarity based labor market agenda. The critical goals are restoration of full employment and restoration a solid link between wage and productivity growth.⁵³

According to John Palmer, measures for reviving Social Europe should encompass new economic strategies articulated by the most respected economists⁵⁴ who refuse an austerity approach and its devastating results. The author continues, the new Labour Party leadership in the UK has already initiated a collective endeavour for that purpose. However, additional measures are necessary, such as forming a European political bloc in favour of Social Europe, a European alliance of left parties and governments, their consulting with trade unions and other civil society agents for creating a better and different Europe. In addition, it is necessary to control transnational capital, to write down Greek and overall debts, to

51 *Ibid.*

52 *Ibid.*, pp. 28-31.

53 *Ibid.*, p. 29.

54 For example, the highly respected economists, intellectuals, and civil society representatives, who refuse neoliberal logic of development and austerity measures take part in the ISI Growth project, which aims at articulating European move beyond austerity and towards more fuelled, sustainable, and inclusive growth. See: <www.isigrowth.eu/2016/06/14/europe-can-move-beyond-austerity/>.

encourage public investment, sustainable growth, and employment, to promote social and green Europe.⁵⁵

In line with already mentioned ideas, this author also pleads for the deepening of the monetary and fiscal union. Among other essential reasons for a deeper economic union are the ones related to mutualisation of debts and to environmental and social policy issues:

Most experts also believe that it is urgent now to begin the process of a truly economic or 'fiscal' Union with a far greater capacity to transfer resources from the wealthier to the poorer economies and to develop a serious strategy for a Green and Social Europe.⁵⁶

Asbjorn Wahl points to an internal connection of the economic and social crisis with both the environmental crisis and the migrants' crisis. All of them have had their roots in the neo-liberal capitalist model of growth and power relations. Fight for redistribution of power is necessary, for combating global warming, austerity, and the inhuman treatment of migrants.⁵⁷

The fight against climate change – against climate catastrophe – is not an extra struggle that the trade union movement must take on in addition to fighting austerity. It is, and will increasingly be, an important part of the same struggle. If climate change is not stopped, or limited to the 1.5 or 2°C target, which is within reach if we act rapidly and forcefully, it will actually become job-killer number one. It will destroy communities and it will lead to enormous social degradation. It will further redistribute wealth from the bottom to the top, hugely increasing poverty and causing emigration crises of unknown dimensions.⁵⁸

According to all mentioned authors of a social-democratic orientation, austerity has been the wrong way out of the crisis. It is the neo-liberal response to the neo-liberal causes of the crisis. It is an approach undemocratic and runs counter to human rights protection. It proposes economic growth as its aim, but does not contribute to shifting towards investment and progress of the economy. It cannot substantially solve the problem, but can at best only postpone new crisis breakouts, and more and more obviously, it has been producing devastating social and environmental consequences. Austerity cannot overcome the crisis because it follows the same neo-liberal logic that caused the crisis in the first

55 J. Palmer, "Programme for a Good, More Social And Sustainable Europe", *Social Europe*, 10 February 2016.

56 *Ibid.*, p. 3.

57 A. Wahl, After Paris: Unify Against Austerity/Climate Change, *Social Europe*, 18 December 2015.

58 *Ibid.*

place. What is necessary not only for solving the crisis, but for keeping the EU alive, is acting in solidarity, mutualisation of debts, redistribution of costs and benefits of the crisis, a strategic welfare oriented turn towards building a model of so-called Social Europe, which at the same time, is inclusive and oriented towards sustainable growth and against global warming.

It is necessary to act from the point of European public reason, in favour of better, more inclusive, solidary, social, and green Europe. This demands further political and economic, but also social, unification of the EU. It consequently imposes the need for the treaties' revision. The problem is that there is a large discrepancy between what ought to be done and the lack of readiness of political and economic elites of member states and the European nomenclature to allow it to be done. Or, put differently, a discrepancy exists between the need for decision making oriented towards EU common interests and factual decision making, which has been dominated by compromising nation states' interests (in the European Council, inter-parliamentary committees, and even the European Parliament).

5.5 POTENTIAL AGENTS OF CHANGE

Political elites of the Eurozone have to decide to change the solutions for overcoming the crisis, to abandon the unsuccessful austerity measures and bank bailouts. Traditional parties of the member states, however, do not want to decide in a way unpopular for their national electorate. They behave in the frame of the nation state, seeking electoral victory. This is true even in the case of traditional welfare-oriented social-democratic and socialist parties across Europe. All traditional parties more or less accepted the neo-liberal turn in the 1980s, and left-oriented parties have had difficulties in acknowledging that they too behaved against their ideological profiles. And they have missed their historical chance of promoting and fighting for the new model of Social Europe.

European technocrats in the European Commission and Council, as well as the European Central Bank (together with the IMF) accepted the neo-liberal strategic responses to the crisis. Traditional parties, as well as European governments will not voluntarily agree to put aside the austerity measures and neoliberal approach. They are bound to the neo-liberal response to the crisis and they are linked to, and dependent on, strong financial centres of power at the global and European level.

Financial centres of power and governing political elites have been disturbed by the various emerging anti-neo-liberal, welfare-oriented voices (through civil society, anti-austerity protests, and current political changes in certain countries, such as Greece and Spain) that have pledged against austerity measures and the neo-liberal model of development. However, despite the (increasingly) dangerous level of social inequalities created by the devastating effects of the strict austerity programs (for example, in Greece), the financial

powers have still not been shaken enough by the social protests resulting from these measures on either the nation-state or European levels, nor by pressure coming mostly from indebted countries. Centres of financial and political power have not yet felt seriously endangered either by the current deep crisis or the agents fighting against them.

What has been at stake is the question of potential agents of change needed for a turn towards a welfare strategy of development and further political and economic unification of the EU. When speaking about agents and factors of influence whose cumulative pressure could initiate a new path, what is required, above all, are bigger anti-austerity European civic protests, followed by rising pressure resulting from devastating negative consequences of austerity and of new waves of crises that would further sharpen inequalities in the EU and also put the richest countries into danger. A further requirement is media coverage of the welfare turn and a focus on the orientation towards European public reason and common interests.

An EU-wide alternative is needed among certain political parties and elites whose convergence and coordination could lead to a systemic strategy for overcoming austerity and neo-liberal model of development, as well as for articulating a new European welfare model of recovery.

Along these lines, Palmer speaks about potential EU-wide political agents of change in favour of different and better Europe:

The European political scene is not, however, all bleak. There are progressive counter trends emerging in response to doctrinaire austerity and growing inequality. Syriza, the radical left government in Greece, has been battered and forced to retreat by arrogant and ignorant austerity zealots running policy in the Euro area. But it clings to power even as it is left to handle almost single-handed the tidal wave of asylum seekers arriving on Greek islands. In Portugal the centrist Labour Party has formed a government with the support of the Radical Left Bloc and the Communist Party on an explicitly anti-austerity platform. In Spain a coalition of the Spanish Labour Party (PSOE) and the radical new left PODEMOS (“We Can”) movement is reportedly close to forming a government backed by pro-independence, left wing Catalan parties. These developments are raising the profile of those fighting for a Better Europe and should encourage the Jeremy Corbyn-led Labour Party in the UK.⁵⁹

A united front for better Europe would consist of left and left/centre governments and political elites, civil society, and trade union representatives and initiatives, together with MEPs of the democratically reformed European Parliament (which should gain, along

⁵⁹ Palmer 2016, p. 1.

with the European Commission, the right to propose new legislation, instead of only having the right to approve and/or amend EU law).

5.6 CONCLUDING REMARKS

The EU needs a green and social alternative, as well as coalitions on the EU level of political and civil society agents who could essentially reform the EU in economic and political terms.

What is necessary is to raise awareness and work at improving articulation and understanding the causes of the crisis and ways out, as well as the understanding of the importance to overcome the crisis through a new turn to welfare and a new model of social Europe, which also includes a solidarity approach, mutualisation of debts and writing out certain debts. Also of crucial importance is to raise consciousness about wrong ideological responses and biased stereotypical ideas of ‘lazy Greeks’ and ‘Nazi Germans.’ Path-breaking insights about wrong responses of the European nomenclatures and/or the ‘Troika’ have also been of the utmost importance; wrong in a sense that they do not even act in the interest of the agents which they represent.⁶⁰ Yet, equally crucial is the empowerment of public opinion and development of a European public space – as the space for expressing these necessary new insights and pressures, and thus developing the European public reason.

‘A Speech Of Hope For Greece’, given by Yanis Veroufakis⁶¹ on 5 June 2015, could contribute to the needed path-breaking insights and European public reasoning:

On 6 September 1946 US Secretary of State James F. Byrnes traveled to Stuttgart to deliver his historic Byrnes’ address marked America’s post-war change of heart *vis-à-vis* Germany and gave a fallen nation a chance to imagine recovery, growth, and a return to normalcy. Seven decades later, it is my country, Greece, that needs such a chance [...]

Prior to Byrnes’ speech, and for a while afterwards, America’s allies were not keen to restore hope to the defeated Germans. But once President Harry Truman’s administration decided to rehabilitate Germany, there was no turning back. Its rebirth was underway, facilitated by the Marshall Plan, the US-sponsored 1953 debt write-down, and by the infusion of migrant labor from Italy, Yugoslavia, and Greece.

60 See S. Wren-Lewis, “Why Amartia Sen is Right about What is Being Done to Greece”, <www.social-europe.eu/2015/06/why-amartya-sen-is-right-about-what-is-being-done-to-greece/>.

61 Y. Veroufakis, “A Speech of Hope for Greece”, *Social Europe*, 5 June 2015.

Europe could not have united in peace and democracy without that sea change. Someone had to put aside moralistic objections and look dispassionately at a country locked in a set of circumstances that would only reproduce discord and fragmentation across the continent. The US, having emerged from the war as the only creditor country, did precisely that.

Today, it is my country that is locked in such circumstances and in need of hope. Moralistic objections to helping Greece abound, denying its people a shot at achieving their own renaissance. Greater austerity is being demanded from an economy that is on its knees, owing to the heftiest dose of austerity any country has ever had to endure in peacetime. No offer of debt relief. No plan for boosting investment. And certainly, as of yet, no 'Speech of Hope' for *this* fallen people ...

A 'Speech of Hope' for Greece does not have to be technical. It should simply mark a sea change, a break with the past five years of adding new loans on top of already unsustainable debt, conditional on further doses of punitive austerity. Who should deliver it? In my mind, the speaker should be German Chancellor Angela Merkel, addressing an audience in Athens or Thessaloniki or any Greek city of her choice. She could use the opportunity to hint at a new approach to European integration, one that starts in the country that has suffered the most, a victim both of the euro zone's faulty monetary design and of its society's own failings.

Until now, there has been no 'Speech of Hope for Greece,' there has been no debt relief, no stimulus for boosting the Greek economy and overcoming devastating austerity.⁶²

Public reasoning in the EU, among the political and economic centres of power has not been developed yet. Public space, as based on public reasoning, has not yet been developed either. The media do not contribute to developing the European public reasoning, but rather, play further on the same neo-liberal austerity card. For example, the recent polls⁶³ show that high proportions of the population in Germany and other EU countries

62 John Weeks remarks that the Troika did not have any intention at all to negotiate, but rather, attempted to impose its own solution, which would be easier done after five months of exhausting the Greek economy and manipulating the Greek negotiators, in an effort to weaken Greece. J. Weeks, "Grexit: When Not If", *Social Europe*, 15 June 2015. <www.socialeurope.eu/2015/06/grexit-when-not-if/>. James Galbraight similarly says that the aims of the Troika are not reforms of the educational, economic, health care etc. system in Greece, but keeping an austerity and patron state at the costs of further devastating Greek society. See J. Galbraight, "What is Reform? The Strange Case of Greece and Europe", *Social Europe*, 15 June 2015, <www.socialeurope.eu/2015/06/what-is-reform-the-strange-case-of-greece-and-europe/>.

63 See the poll published on 13 March 2015 by public broadcaster ZDF. <www.bloomberg.com/news/articles/2015-03-15/germans-tired-of-greek-demands-want-country-to-exit-euro>.

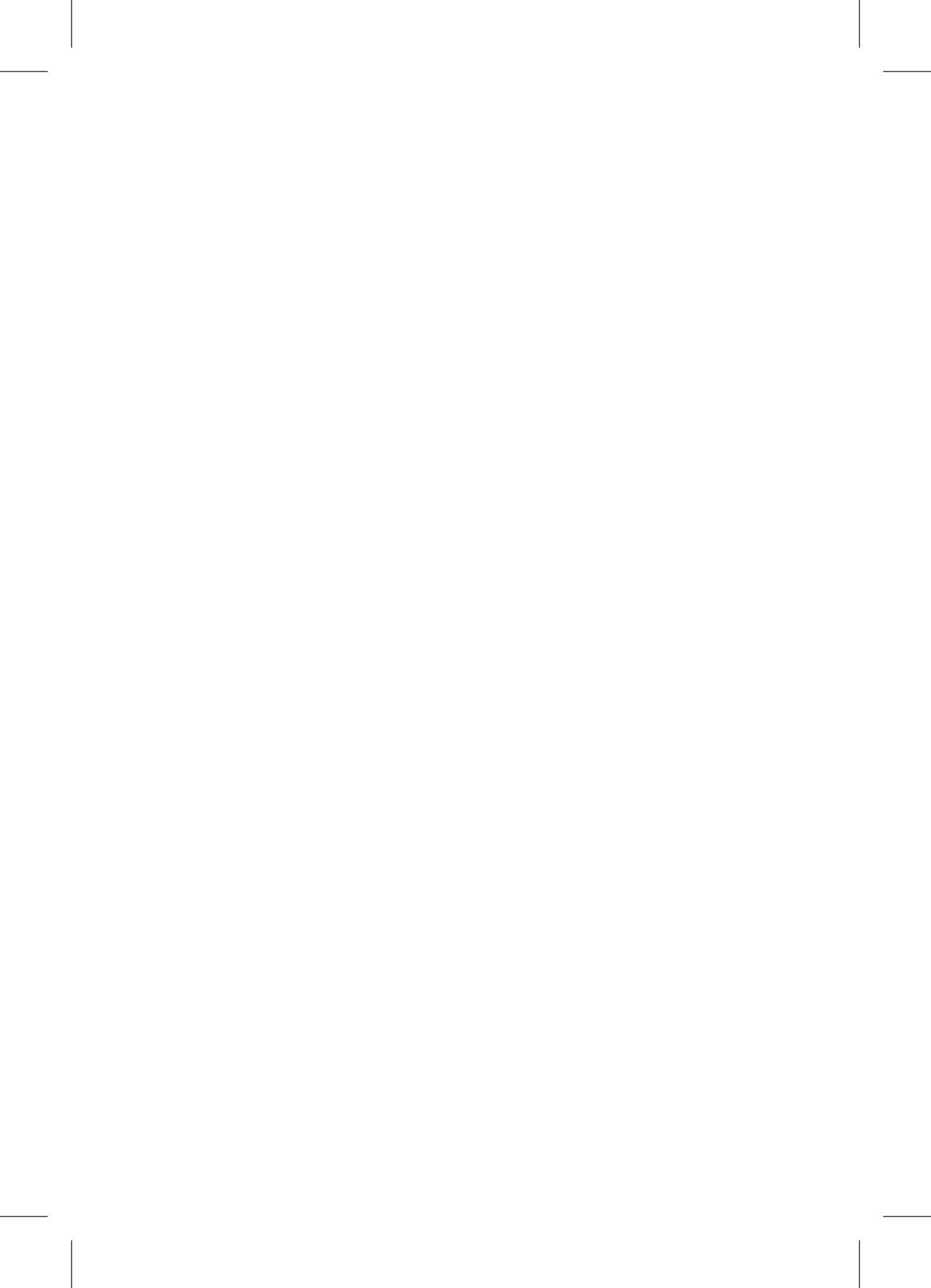
do want a Greek exit from the EU and do not blame anybody else but the Greeks alone for the sharpest outbreak of the crisis in that country.

There is a lack of awareness among political elites and common people about deep causes of the crisis or the importance of not only protecting the European project, but making it stronger and more comprehensive through building a better and more integrated EU.

People forget or do not want to know, or political and media elites do not want to let them know, that the break-up of the EU would certainly have unforeseeably huge costs and might lead to ‘tsunami-like’⁶⁴ bad consequences for all and not only for the most vulnerable EU member states. Politicians and common people forget that peace was the main motive for initiating and promoting the post-WWII European integration project. Putting into danger the project of the EU might put into danger the peace as well.

Public reasoning at the European level is needed against neo-liberal logic, and in favour of a new welfare model of development, which will secure a green, social, and more inclusive Europe, including much more inclusive and proactive strategy of the EU towards the migrants.

64 ‘The dissolution of the Eurozone and, as an inescapable medium-term consequence, the EU would be equivalent to a tsunami of economic as well as political regression.’ Offe 2013, p. 18.



6 RELIGION IN PUBLIC SPACES – CONTROVERSIES IN THE EUROPEAN COURT OF HUMAN RIGHTS’ CASE LAW*

Tanasije Marinković

6.1 INTRODUCTION

Contemporary liberal democracies emerged out of a certain understanding of man and of the appropriate political institutions that should govern human society. Their intellectual ancestry can be traced back to the 17th and 18th century social contract theories, which shifted the philosophical focus from a *good* state to a *legitimate* state, placing legitimacy in a government which is the ‘artificial product of the voluntary agreement of free moral agents.’¹ It was Hobbes who had already affirmed ‘the principle that the legitimacy of government stems from the rights of those governed, rather than from the divine right of kings, or from the natural superiority of those who rule.’² Indeed, he insists in *Leviathan* (1651) that ‘the Right of all Sovereigns is derived originally from consent of every one of those that are to be governed.’³

Hobbes formulates the principles of a legitimate government on the basis of a certain understanding of man’s life in the state of nature. And that life, according to him, is ‘solitary, poor, nasty, brutish and short.’ The primary social reality is not love or concord, but extreme violence: a war of ‘every man against every man.’ From the fear of death and the instinct of self-preservation emerges the social contract under which all men agree to ‘lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himself.’⁴

* This article is a result of the work on the Project “Constitutionalism and Rule of Law in Nation-State Building – the Case of Serbia”, funded by the Ministry of Science of the Republic of Serbia.

1 P. Riley, “Social Contract”, in D. Miller (Ed.), *The Blackwell Encyclopaedia of Political Thought*, Blackwell Publishers, Oxford, Malden, MA, 2000, p. 478.

2 F. Fukuyama, *The End of History and the Last Man*, Penguin Books, London and New York, NY, 1992, p. 154.

3 T. Hobbes, *Leviathan*, Penguin Books, London and New York, NY, 1985, p. 599 (Ch. 42).

4 *Ibid.*, p. 190 (Ch. 14).

The Hobbesian state of nature ‘may never have existed as a general stage of human history, but [which] is everywhere latent when civil society breaks down.’⁵ Recent terrorist attacks in Paris (7 January and 13 November 2015), Brussels (22 March 2016), Nice (14 July 2016), Berlin (19 December 2016), Manchester (22 May 2017) and London (22 March and 3 June 2017) confirm the ever-growing importance of government by consent, *i.e.* of legitimacy of political institutions, based on the most fundamental human values: life and liberty. Terrorism does not only take lives; true to its name, it also instills fear – it takes members of a polity back to the state of nature where their fundamental values are unprotected. According to the French Prime Minister, Manuel Valls, ‘We have entered a new era marked by the long-term presence of hyper-terrorism.’ He qualified it as the end of ‘insouciance.’⁶

What makes the fear of periodic terrorism, as Europe’s ‘new normal’⁷ credible, is the fact that the attacks were committed by local cells.⁸ True, they were claimed by Islamic State, and in that sense, they were a reaction to the engagement of Western countries in the military campaigns in the Middle East. Nonetheless, they also reflect a deep discontent of the broader Muslim population in the West with its status as a religious group. As a matter of fact, the first of the aforementioned attacks was outright revenge for Charlie Hebdo’s publication of cartoons of the Prophet Muhammad.

Needless to say, nothing can justify the murder of journalists (cartoonists) and those who protect them (policemen). However, this and other terrorist attacks do oblige us to reconsider the place of the majority and minority religion – Christianity and Islam – in European societies’ public/private divide, as it appears to be one of the reasons for breaking the social contract. Two things have to be borne in mind in this respect. First, the 20th-century rivalry between liberal democracy and Marxist-Leninism is only a fleeting historical phenomenon compared to the long-standing conflict between Islam and Christianity, meaning that ‘in this new world, local politics is politics of ethnicities,’ while ‘global politics is the politics of civilizations.’⁹ And, second, secularism is at the foundation of our modern polities – tightly interrelated with the principle of popular sovereignty – providing the best means to preserve peace and maintain good functioning of pluralist societies.¹⁰

5 Fukuyama 1992, p. 154. Fukuyama gives example of ‘places like Lebanon after that country’s decent into civil war in the mid-1970s’.

6 *The Economist* (26 March to 1 April 2016), p. 26.

7 *Ibid.*, p. 25.

8 They followed the pattern set by al-Qaeda with the 2004 Madrid train bombings and 2005 London subway and bus bombings.

9 S. P. Huntington, *The Clash of Civilizations and the Remaking of World Order*, The Free Press, London, 2002, pp. 28, 209.

10 M. Rosenfeld, “Introduction: Can Constitutionalism, Secularism and Religion be Reconciled in an Era of Globalization and Religious Revival”, *Cardozo Law Review*, Vol. 30, No. 6, 2009, p. 2367.

On the basis of these premises, this chapter examines the recent European Court of Human Rights' (hereinafter the 'Court') judgements – *Lautsi v. Italy* [GC] (2012)¹¹ and *S. A. S. v. France* [GC] (2014).¹² These rulings, compared to an earlier Court's decision – *Dahlab v. Switzerland* (2001)¹³ – seem to question the principles of state neutrality and religious pluralism, privileging the dominant religion and marginalising the non-traditional one. The Court's case law is considered particularly important in the context of the broken social contract, as it contributes to the development of the transnational constitutional identity,¹⁴ and therefore, is able either to contribute to the social cohesion or to undermine it.

The introduction to this chapter is followed by the section in which the values of secularism are reaffirmed, in particular, as a response to the challenges of multiculturalism and globalisation. The third section portrays the controversies in the Court's case law concerning the use of religious symbols in public space. Finally, the fourth section places the Court's rulings in a contemporary multireligious context.

6.2 SECULARISM AS A RESPONSE TO THE CHALLENGES OF MULTICULTURALISM AND GLOBALISATION

Multiculturalism has been described as the 'challenge of our time'.¹⁵ The same can be said of globalisation, all the more since the two processes are intrinsically interwoven through worldwide migration. And although multicultural polities are as old as group identities, the extent to which worldwide migration, particularly triggered by globalisation, has changed social life almost everywhere is unprecedented.¹⁶ With the major wave of migrants to Western countries in the late 1950s ('guestworkers'), and especially since the fall of the Berlin wall, symbolising the end of the bipolar world, multiculturalism has radically undermined modern constitutional concepts, even posing a threat to the stability of states and the international community. In other words, the size and diversity of the migration created a problem, as people with fundamentally different religious and cultural back-

11 *Lautsi and others v. Italie* [GC], no. 30814/06, 18.3.2011.

12 *S. A. S. v. France* [GC], no. 43835/11, 1.7.2014.

13 *Dahlab c. Suisse*, no. 42393/98, 15.2.2001.

14 Cf. M. Rosenfeld, *The Identity of the Constitutional Subject – Selfhood, Citizenship, Culture, and Community*, Routledge, London and New York, NY, 2010, pp. 202-203.

15 T. Fleiner & L. R. Basta Fleiner, *Constitutional Democracy in a Multicultural and Globalised World*, Springer-Verlag, Berlin, Heidelberg, 2009, p. 511.

16 P. Bosset, A. Gamper & T. Ohlinger, "Multicultural Societies and Migration", in M. Tushnet, T. Fleiner & C. Saunders (Eds.), *Routledge Handbook of Constitutional Law*, Routledge, London and New York, NY, 2013, p. 443.

grounds came to live together.¹⁷ In addition to this, the old intra-state cleavages and conflicts, which were frozen during the Cold War, suddenly re-emerged.¹⁸

Exemplifying these developments, tolerance for the other has, in both Christian and Muslim societies, declined sharply in the late twentieth century. In his seminal work, *The Clash of Civilizations* (1997), Huntington points out a mixture of factors that have contributed to this decline. First, Muslim population growth has generated large numbers of unemployed and disaffected young people. They migrate to the West, while at the same time, being recruits for Islamist causes that have recently undergone resurgence. Second, the 'West's simultaneous efforts to universalize its values and institutions, to maintain its economic and military superiority, and to intervene in conflicts in the Muslim world' have increased resentment among Muslims. Third, the 'intermingling of Muslims and Westerners stimulate in each a new sense of their own identity and how it differs from that of the other,' and 'also exacerbate differences over the rights of the members of one civilization in a country dominated by members of other civilization.'¹⁹

A response to these challenges of multiculturalism and globalisation, in the national contexts, can only be constitutionalism and its corollary – secularism. The modern constitutionalism developed out of political liberalism, the expressions of which were also social contract theories. The first modern constitutions, enacted in the late 18th century in the United States and France, were based on the premise that the public sphere had to be neutral in relation to different religious, philosophical, and moral values, precisely a response to 'this fact of (reasonable) pluralism.'²⁰ Political liberalism 'offers no specific metaphysical or epistemological doctrine beyond what is implied by the political conception itself,' aiming 'for a political conception of justice as a freestanding view.'²¹ Accordingly, the constitution is to be understood in the content-free and value-neutral terms as:

a just procedure satisfying the requirements of equal liberty; and [...] it is to be framed so that of all the feasible just arrangements, it is the one more likely than any other to result in a just and effective system of legislation.²²

17 W. Heun, "Towards a New Constitutional Politics of Citizenship, Identity and Minority Protection", in L. R. Basta Fleiner & T. Marinković (Eds.), *Key Developments in Constitutionalism and Constitutional Law*, Eleven International Publishing, The Hague, 2014, p. 28.

18 Fleiner & Basta Fleiner 2009, p. 512.

19 Huntington 2002, p. 211.

20 Rawls, 2005, p. 36.

21 *Ibid.*, p. 10.

22 J. Rawls, *A Theory of Justice*, revised edition, Oxford University Press, Oxford, 1999, p. 194.

For instance, when it comes to church-state relationships, the Enlightenment project implies the removal of religion, as the glue which binds together the polity, from the public sphere, displacing it into the private sphere.²³

In line with the neutral and secularised state, modern constitutionalism recognises only popular sovereignty, where political authority is derived from the will of the people, composed of equal individuals. The democratic and liberal state is premised upon idea that

all people have the capacity to use their reason to acquire knowledge, to make rational judgments based on their knowledge and insight, and to act accordingly. [...] Without insight into basic human equality there would not be a secularized democratic state.²⁴

It follows that in contemporary polities, which are typically multiethnic, multicultural, and religiously diverse, 'secularism, at least in its inter-communal dimension, provides the best means to preserve the peace and to maintain the good functioning of such pluralistic societies.'²⁵ This premise may be buttressed, as Rosenfeld puts it, by either a lesser evil prudential argument and/or a more positive normative argument deriving from a pluralistic conception of the good.

The former argument is predicated on the conviction that unless a standoff among competing ideologies is maintained, a serious threat to the public order would ensue. The latter more positive argument relies, for its part, on the premise that pluralism is good and worthy of pursuit because it multiplies and enhances every person's opportunities for self-realization and self-fulfillment.²⁶

6.3 STATE NEUTRALITY AND RELIGIOUS PLURALISM UNDER QUESTION

Article 9 (1) of the European Convention on Human Rights (hereinafter the 'Convention') states that 'everyone has the right to freedom of thought, conscience and religion,' and that this right includes a *forum internum*, 'freedom to change [...] religion or belief,' and a *forum externum*, 'freedom, either alone or in community with others and in public or private, to manifest [...] religion or belief, in worship, teaching, practice and observance.'

23 S. Mancini, "Strong Religions and Weak Minorities: A Cautionary Tale from Europe", in L. R. Basta Fleiner & T. Marinković, 2014, p. 34.

24 Fleiner & Basta Fleiner 2009, p. 513.

25 Rosenfeld 2009, p. 2367.

26 *Ibid.*

However, the Convention also stipulates that ‘freedom to manifest one’s religion or beliefs’ may be subjected to limitations under conditions ‘prescribed by law’ and ‘necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others’ (Article 9(2)).

Relying on these Convention provisions, the Court developed important case law. While, according to the Contracting States, ‘a wide margin of appreciation in deciding whether and to what extent a limitation of the right to manifest one’s religion or beliefs is “necessary”,’ it also ensures that ‘this margin of appreciation [...] goes hand in hand with a European supervision embracing both the law and the decisions applying it.’²⁷ And that supervision is based on a number of principles, notably: ‘that freedom of thought, conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention,’ and that in its religious dimension, it is ‘one of the most vital elements that go to make up the identity of believers and their conception of life,’ as well as that ‘it is [...] a precious asset for atheists, agnostics, sceptics and the unconcerned’; that the pluralism is indissociable from a democratic society and it depends on it; and, that the State is ‘the neutral and impartial organiser of the exercise of various religions, faiths and beliefs,’ that ‘this role is conducive to public order, religious harmony and tolerance in a democratic society,’ as well as that ‘the State’s duty of neutrality and impartiality is incompatible with any power on the State’s part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed.’²⁸

However, the recent Court’s judgements – *Lautsi v. Italy* [GC] and *S. A. S. v. France* [GC], when compared to an earlier Court’s decision, *Dahlab v. Switzerland* – seem to call these tenets into question, especially the principles of state neutrality and religious pluralism. In order to demonstrate the inconsistencies in the Court’s reasoning, these cases will be presented in this section in their chronological order.

6.3.1 *Dahlab v. Switzerland*

The applicant in this case, a Swiss national, born in 1965, was, at the material time, a primary school teacher appointed by the Geneva cantonal government. After a period of spiritual soul-searching, the applicant abandoned the Catholic faith, converted to Islam, and began wearing an Islamic headscarf in class, towards the end of the school year in which she had been appointed. Her intention was to observe a precept laid down in the Koran whereby women were enjoined to draw their veils over themselves in the presence of men and male adolescents. Five years after her appointment (of which she was on a maternity leave for

²⁷ *S. A. S. v. France* [GC], no. 43835/11, 1.7.2014, §§129 and 131; *Leyla Sahin v. Turkey* [GC], no. 44774/98, 10.11.2005, §107.

²⁸ *S. A. S. v. France*, §§124 and 127.

two years), the school's inspector informed the Canton of Geneva Directorate General for Primary Education that the applicant regularly wore an Islamic headscarf at school. He also noted that she had never had any comments from parents on the subject. After a series of meetings held between the Director General and the applicant, and formal letters addressed to her requesting that she stop wearing the headscarf as it constituted 'an obvious means of identification imposed by a teacher on her pupils, especially in a public, secular education system,' the applicant challenged, in an administrative review, the decisions of the cantonal authorities. The Federal Court considered that what was at issue was 'the wearing of a powerful religious symbol by a teacher at a State school in the performance of her professional duties' and it upheld the administrative ban. In reaching this holding, the Swiss Federal Court particularly took into account:

that the measure prohibiting the appellant from wearing a headscarf that clearly identified her as a member of a particular faith reflects an increasing desire on the part of the Geneva legislature [...] to ensure that the education system observes the principles of denominational neutrality [...] and of separation between Church and State.²⁹

Arguing for the principle of denominational neutrality in schools, which has constitutional value (cf. Constitution of Switzerland, Article 27(3)), the Federal Court emphasised that 'it seeks both to protect the religious beliefs of pupils and parents and to ensure religious harmony.'³⁰ Otherwise, 'schools would be in danger of becoming places of religious conflict if teachers were allowed to manifest their religious beliefs through their conduct and, in particular, their clothing.'³¹ In this context, the Federal Court added that 'religious freedom cannot automatically absolve a person of his or her civic duties – or, as in this case, of the duties attaching to his or her post.'³² Furthermore, it held that it was 'difficult to reconcile the wearing of a headscarf with the principle of gender equality.'³³

In her application to the Court, Ms Dahlab claimed that 'the measure prohibiting her from wearing a headscarf in the performance of her teaching duties infringed upon her freedom to manifest her religion, as guaranteed by Article 9 of the Convention.'³⁴ However, the Court found the application to be manifestly ill-founded within the meaning of Article 35(3) of the Convention, and rejected it. Thus, it considered that the applicant's right to freedom of religious expression was not infringed upon as it

29 *Dahlab c. Suisse*, no. 42393/98, 15.2.2001.

30 *Ibid.*

31 *Ibid.*

32 *Ibid.*

33 *Ibid.*

34 *Ibid.*

appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.³⁵

The Court based its decision on the arguments that the applicant's pupils were of a young age – between four and eight – ‘at which children wonder about many things and are also more easily influenced than older pupils.’³⁶ In those circumstances, the Court was concerned that the wearing of a headscarf, ‘a powerful external symbol,’ could have had ‘some kind of proselytizing effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which [...] is hard to square with the principle of gender equality.’³⁷

6.3.2 *Lautsi and Others v. Italy [GC]*

While the Swiss Federal Court held in *Dahlab* that it was ‘scarcely conceivable to prohibit crucifixes from being displayed in State schools and yet to allow the teachers themselves to wear powerful religious symbols of whatever denomination,’ when the displaying of crucifixes in State schools came to its agenda, in *Lautsi and Others v. Italy [GC]*, the Court found no violation. In particular, it dismissed the argument that ‘in the context of public education, crucifixes, which it was impossible not to notice in classrooms, [...] could [...] be considered “powerful external symbols” within the meaning of the decision in *Dahlab*.’³⁸

Lautsi concerned the judgement of the Italian Supreme Administrative Court that the presence of crucifixes in state school classrooms had legal basis and that, regarding the meaning that should be attached to it, it was compatible with the principle of secularism.³⁹ It held, in particular, that the crucifix had to be seen as a symbol capable of reflecting the religious origins of values, which defined secularism in Italy's present legal order:

tolerance, mutual respect, valorisation of the person, affirmation of one's rights, consideration for one's freedom, the autonomy of one's moral conscience vis-à-vis authority, human solidarity and the refusal of any form of discrimination.⁴⁰

35 *Ibid.*

36 *Ibid.*

37 *Ibid.*

38 *Lautsi and others v. Italie [GC]*, §73.

39 *Ibid.*, §16.

40 *Ibid.*

The application was brought to the Court, by a mother and her two sons. They were born in 1957, 1988, and 1990, respectively. The applicants complained of the infringement of the right to education, guaranteed by Article 2 of Protocol No. 1 to the Convention,⁴¹ on the basis that the crucifixes were affixed to the wall in the classrooms of the state school attended by the second and third applicants. They also contended that these facts infringed on their right to the freedom of thought, conscience, and religion under Article 9 of the Convention.

In adjudicating that there was non-violation of Convention rights, the Court indeed did not take the position as to whether the crucifixes had a secular symbolic value in addition to their obvious religious connotation.⁴² However, it did accept that the decision whether or not to perpetuate a tradition, including the one which identifies the crucifix affixed to the school classroom walls with 'the principles and values which formed the foundation of democracy and western civilization,' fell, in principle, within the margins of appreciation of the respondent State.⁴³ In that respect, the Court particularly took into account that Contracting States generally enjoy a margin of appreciation in their efforts to accommodate religious and philosophical convictions of parents in education and teaching, and that there is no European consensus on the question of the presence of religious symbols in state schools.⁴⁴

Nevertheless, the Court did not disregard its long-time standing that the reference to a tradition and margin of appreciation cannot relieve a Contracting State of its Convention obligations. Accordingly, it reminded that the State was 'forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions,' and that it also must 'take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner, enabling pupils to develop a critical mind.'⁴⁵

While admitting that the crucifix affixed to the school classroom walls conferred 'on the country's majority religion preponderant visibility in the school environment,' the Court did not consider that it was, in itself, sufficient to denote a process of indoctrination.⁴⁶ Starting from the premise that 'a crucifix on a wall is an essentially passive symbol' and that 'it cannot be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities,' the Court was satisfied that the presence of crucifixes is not associated with compulsory teaching about Christianity and that Italy

41 'No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.'

42 *Lautsi and others v. Italie* [GC], §66.

43 *Ibid.*, §§67-68.

44 *Ibid.*, §§69-70.

45 *Ibid.*, §§62-69.

46 *Ibid.*, §71.

opens up the school environment to other religions (e.g. it was not forbidden for pupils to wear Islamic headscarves or other symbols having a religious connotation; the beginning and end of Ramadan were 'often celebrated' in schools; and optional religious education could be organised in schools for 'all recognised religious creeds').⁴⁷

The Court's reasoning in *Lautsi* does not appear very convincing. Although it is true that the a crucifix on a wall cannot be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities, and that it can be regarded as a passive symbol, in that sense, it is also true that it cannot be compared to the opening up of the school environment to other religions. Being affixed to the walls in all classrooms, it becomes publicly recognised and institutionalised, and therefore, ceases to be just a passive symbol in the way headscarves and other objects with religious connotation worn by school children are. Furthermore, it transpires neither from the Strasbourg Court's nor the Italian Administrative Court's judgement that a secular meaning of the crucifix is conveyed and explained to the children, leaving its presence in the classrooms to the various interpretations, among which the religious becomes the most obvious. This also brings up the *forum internum* of freedom of thought, conscience, and religion, in the sense of a negative right – right not to be indoctrinated.⁴⁸

Equally unconvincing was the Court's attempt to distinguish this case from *Dahlab*. The Court reminded that the former concerned the measure prohibiting the applicant from wearing the Islamic headscarf while teaching, with the intention 'to protect the religious beliefs of the pupils and their parents and to apply the principle of denominational neutrality in schools enshrined in domestic law.'⁴⁹ Nevertheless, it was undisputed in *Dahlab* that there were no objections to the teaching provided by the applicant, 'who does not appear to have sought to gain any kind of advantage from the outward manifestation of her religious beliefs.'⁵⁰

6.3.3 S. A. S. v. France [GC]

While *Dahlab* was about the wearing of a headscarf by a school teacher who, as a civil servant, was bound by certain discretion in the exercise of her duties, the *S. A. S. v. France* concerned ordinary citizens – women who wished to wear the burqa and niqab in public

47 *Ibid.*, §74.

48 Judge Bonello rightly points that the Convention does not provide for a secular state, but it does guarantee a *forum internum*, and it seems that he does not take into consideration that aspect of freedom of thought, conscience, and religion. See *Concurring Opinion of judge Bonello* to this judgment, §2.4-2.6., and especially §2.8.

49 *Lautsi and others v. Italie* [GC], §73.

50 *Dahlab c. Suisse*.

places.⁵¹ Also, unlike *Dahlab* and *Lautsi*, which involved school (teacher)–pupils relationships, *S. A. S.* was independent from the public education context. However, when compared, the reasoning in *Lautsi* and *S. A. S.* discloses the double standard of the Court when approaching the place of religion in the public-private divide.

The case originated in a law stating that ‘no one may, in public places, wear clothing that is designed to conceal the face,’ which the French legislator adopted, in summer-autumn 2010.⁵² The Constitutional Council validated the law, finding that it reconciled, ‘in a manner which is not disproportionate, the safeguarding of public order and the guaranteeing of constitutionally protected rights.’⁵³ However, the explanatory memorandum, accompanying the bill, offered a more nuanced set of reasons for the ban. It argued that the concealment of one’s face in public places could be dangerous for public safety and that it failed to comply with the minimum requirements of life in society, as well as that the full veil, worn only by women, breaches the dignity of the person and represents the public manifestation of a conspicuous denial of equality between men and women. Among these arguments, the Memorandum emphasised the French concept of ‘living together’ (*vivre ensemble*). It denounced the wearing of the full veil as ‘the sectarian manifestation of a rejection of the values of the Republic,’ while admitting that the phenomenon at present remains marginal. The Memorandum interpreted the concealment of the face in public places as ‘symbolic and dehumanising violence, at odds with the social fabric,’ which is “quite simply incompatible with the fundamental requirements of ‘living together’ in French society”. Furthermore, contrary to the ideal of fraternity, it ‘falls short of the minimum requirement of civility that is necessary for social interaction.’⁵⁴

Of all the arguments advanced by the French Government – public safety, prevention of discrimination of women, and minimum requirements of life in society concept – the Court found that the impugned ban could be regarded as justified in its principle solely insofar as it sought to guarantee the conditions of ‘living together.’⁵⁵ According to the Court, the principal aim of the ban was not to protect women against a practice which was imposed on them or would be detrimental to them,⁵⁶ while the public safety argument was disproportionate, since ‘a blanket ban [...] can be regarded as proportionate only in a context where there is a general threat to public safety’ and ‘the Government has not shown that the ban [...] falls into such a context.’⁵⁷ Instead, the Court upheld the ‘living together’ argument, linking it to the legitimate aim of the ‘protection of the rights and freedoms of

51 Burqa is ‘a full-body covering including a mesh over the face’, and the niqab ‘a full-face veil leaving an opening only for the eyes’.

52 Law no. 2010-1192 of 11 October 2010 ‘prohibiting the concealment of one’s face in public places’.

53 *S. A. S. v. France* [GC], §30.

54 *Ibid.*, §25.

55 *Ibid.*, §142.

56 *Ibid.*, §137.

57 *Ibid.*, §139.

others.⁵⁸ The Court justified its position by approving ‘that the face plays an important role in social interaction’ and ‘that individuals who are present in places open to all may not wish to see practices [...] there which would fundamentally call into question the possibility of open interpersonal relationships.’⁵⁹ In other words, the Court accepted that the barrier raised against others by a veil concealing the face could be perceived ‘as breaching the right of others to live in a space of socialisation which makes living together easier.’⁶⁰

The Court backed up its reasoning by acknowledging that ‘France had a wide margin of appreciation in the present case.’⁶¹ Although the reference to the margin of appreciation of a member state is a usual and legitimate strategy for the Court to deal with hard cases whenever there is little common ground among the member states on an issue, it is difficult to understand what further European consensus the Court would expect, given that only one other country (Belgium) opted for such a restriction on the wearing of the full-face veil in public.⁶² This approach of the Court is all the more problematic since it is not clear how the ‘living together’ argument squares with the legitimate aim of the ‘protection of the rights and freedoms of others,’ especially when it is reinterpreted in such a vague way – as a ‘right of others to live in a space of socialisation which makes living together easier.’⁶³ This argument becomes even more unconvincing when contrasted with the other right which was the object of balancing – freedom to manifest one’s religion, considered to be ‘one of the most vital elements that go to make up the identity of believers and their conception of life.’⁶⁴

6.4 CONVENTION CASE LAW IN THE CONTEMPORARY MULTI-RELIGIOUS CONTEXT

Constitutionalism requires secularism, which presupposes some form of separation of state and religion, *i.e.* relegation of religion to the private sphere. The interrelationship between the two principles – constitutionalism and secularism – became apparent with the first constitutional documents adopted in the late 18th century, although its origins are much older and can be traced back to the medieval fights between the papacy and secular rulers, and the rise of modern, sovereign states. Thus, the First Amendment to the US Constitution, ordained and established by the people (‘We the People...’), begins with

58 *Ibid.*, §121.

59 *Ibid.*, §122.

60 *Ibid.*, §122.

61 *Ibid.*, §155.

62 *Ibid.*, §156. Cf. *Joint Partly Dissenting Opinion of Judges Nussberger and Jäderblom* to this judgment, §19.

63 Cf. *Joint Partly Dissenting Opinion of Judges Nussberger and Jäderblom*, §§3-12.

64 *Kokkinakis v. Greece*, no. 14307/88, 25.5.1993, §31.

the guarantee that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.' And the French Declaration of the Rights of Man and of the Citizen affirms that 'the principle of any sovereignty resides essentially in the Nation' (Article 3) and that 'no one may be disturbed for his opinions, even religious ones' (Article 10).

However, the 'separation age' and privatised religions were possible only insofar as the State was strong enough to ensure social cohesion without or even against the latter. In the past 30 to 40 years, there has been a revival of religions, manifested in 'the spread of "strong" religion and the deployment of several different fundamentalist religions, ranging from Protestant fundamentalism in the US to Islamic fundamentalism with global aspirations.'⁶⁵ The 'deprivatisation' of religion, since the 1980s, has involved two interrelated processes: 'the "repoliticization of the private religious and moral sphere"; and the "renormativization of the public economic and political spheres",' as witnessed by the Islamic Revolution in Iran, the rise of Solidarity movement in Poland, the role of Catholicism in political conflicts throughout Latin America, public re-emergence of Protestant fundamentalism as a force in American politics.⁶⁶ Consequently, 'religions regain their role of factors of social cohesion or of fragmentation and States cannot be indifferent towards them.'⁶⁷ In today's Europe, two religions – Christianity and Islam – play a very particular role with different dynamics.

While Christianity is experiencing a vaporisation of its cohesive role in the private sphere, it now plays the cohesive role of the public – especially institutional – sphere. On the contrary, Islam appears as the religion of a private-communitarian cohesion and is perceived as playing a strong fragmenting role in the European public sphere.⁶⁸

Due to the (perceived) opposition of Islam to the pre-constitutional (cultural) and constitutional (secular) identity of European nation states, it has become their natural adversary. It has been observed that individuals and groups present in Europe as a consequence of immigration and globalisation, do not recognise the primacy of individual religious liberty as it has been established in European history: 'in different ways, they are in favour of communitarian approach that questions the centrality of individual rights and therefore

65 Rosenfeld 2009, p. 2334.

66 *Ibid.*, pp. 2334-2335.

67 A. Ferrari, "Religious Freedom and the Public-Private Divide: A Broken Promise in Europe?", in S. Ferrari & S. Pastorelli (Eds.), *Religion in Public Spaces – A European Perspective*, Ashgate, Farnham and Burlington, VT, 2012, p. 72.

68 *Ibid.*, pp. 72-73.

the distinction between the public and private sphere.⁶⁹ Contrary to this, the French constitutional model, as one of the models of the European nation states, is 'thoroughly individualistic and leaves no room at the constitutional level for recognition or deployment of group or national identity.'⁷⁰

Faced with an Islamic threat, nation states are tempted to cross the borders between spheres, reducing pluralism, and supporting a double-standard secularism (a very discretionary and sometimes discriminatory).⁷¹ Indeed, the constitutional secularism

becomes very supportive and inclusive towards traditional religions [...] spreading their influence in civil society and absorbing its values. At the same time, it is very harsh and exclusionary towards non-traditional religions and, above all, towards Islam, which is perceived as against the Western public-private divide.⁷²

Accordingly, the publicisation of religion in Europe has been selective: 'It is at the same time fiercely separatist and totally inclusive, depending on the degree of the presumed assimilation of religious actors into Nation States' mainstream orientation.'⁷³ Being unable to manage the multicultural challenge with the usual tools available in the human rights' store, European nation states oscillate

between the impulse to confine religion more strictly to the private sphere, excluding it from the process of building the national identity, and the desire to strengthen national identity through revitalization (and therefore re-publicization) of the majority religion(s) only. In the first case, the arsenal of human rights is rigorously applied without fear of marginalizing and alienating a substantial part of the population and, in certain cases, of obtaining the illiberal results. In the second case, a limited application of human rights (particularly when equal treatment is at stake) is adopted with the aim of maintaining the privileged status of the majority religion(s).⁷⁴

The sensitivity towards religion, especially the mainstream one, is noticeable in the Convention case law too, in the sense that the Court reduces religious pluralism when the rights of believers of non-traditional religion (Islam) are in question, and it supports

69 S. Ferrari, "Religion in the European Public Spaces: A Legal Overview", in S. Ferrari & S. Pastorelli 2012, p. 145.

70 Rosenfeld 2010, p. 156.

71 A. Ferrari 2012, pp. 72, 73-75.

72 *Ibid.*, p. 75.

73 *Ibid.*, p. 73.

74 S. Ferrari 2012, p. 145.

double-standard secularism when the position of the traditional religion is under scrutiny (Christianity).

Thus, in *Dahlab v. Switzerland*, it upheld the Member State's understanding of denominational neutrality in such a way as to exclude wearing of a religious symbol by a school teacher – an Islamic headscarf. The Court particularly took into account that wearing a headscarf was 'a powerful external symbol' and that it could have had 'some kind of proselytising effect' upon school children of a young age. Accordingly, the human rights of children and parents are rigorously applied, out of fear that schools would become places of religious conflict, even though there were no complaints from parents on the subject. However, the Court did not limit itself to these conclusions, but it went further, by somewhat stigmatising Islamic headscarf, and thereby, marginalising and alienating the Muslim population even more. It found 'difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance' as it appeared imposed on women by a precept that was laid down in the Koran and that was hard to square with the principle of gender equality.

Nevertheless, in *Lautsi v. Italy*, which also concerned the presence of religious symbols in primary schools – a crucifix affixed to the walls of all classrooms – the Court upheld a different understanding of secularism. It did not openly take the position in the debate as to whether the crucifix had a non-secular value, in addition to its obvious religious meaning, but it did support the former view by considering it to be only a passive symbol. The contrast with *Dalhab* could not be greater. While wearing a headscarf by one school teacher was 'a powerful external symbol' that could have had 'some kind of proselytising effect' upon school children of a young age, the crucifix affixed to all school classrooms was a passive symbol since 'there [was] no evidence [...] that the display of a religious symbol on classroom walls [could] have an influence on pupils.'⁷⁵

Although it is undisputed that the two Contracting States – Switzerland in *Dahlab* and Italy in *Lautsi* – had a significantly different understanding of concepts of denominational neutrality/secularism, and that in the context of the overall lack of consensus among European states regarding the issue, the Court had to accord a certain margin of appreciation, the rulings were passed at the cost of departure from its long-standing positions on state neutrality and respect of religious pluralism. Accordingly, there was a limited application of equal treatment with the aim of not only maintaining the privileged status of the majority religion, but also of strengthening national identity through its revitalisation and re-publicisation.

⁷⁵ *Lautsi and others v. Italie* [GC], §66.

S.A.S. v. France is yet another case of confinement of non-traditional religion (Islam) to the private sphere, which is, in this ruling, understood particularly narrowly,⁷⁶ and of its further exclusion from the process of building of the national identity. Wearing a burqa or niqab becomes unacceptable in all public places, meaning ‘the public highway and any places open to the public or assigned to a public service.’⁷⁷ The argument advanced by the Court was that this behaviour is incompatible with the ‘right of others to live in a space of socialisation which makes living together easier.’⁷⁸ Thus, the arsenal of human rights is, once again, forcefully applied, to the point of identifying such a vague and legally dubious concept of ‘living together’ with the legitimate aim of the ‘protection of the rights and freedoms of others’; while, at the same time, the right to observance of one’s religion (by wearing the required clothing),⁷⁹ recognised as such both by the Convention and the Court’s case law, loses its weight, inasmuch as the principle of equality in this context.

6.5 CONCLUSION

This chapter relies on the premises that: constitutionalism requires some form of secularism (both concepts being the result of the Enlightenment project), *i.e.* the public-private divide – separation of state and religion; and, contemporary polities are typically pluralistic (ethnically, culturally, and religiously diverse), and as such, require secularism, at least in its inter-communal dimension, to preserve the peace and maintain good functioning.

In Europe today, two religions play a particular role: Christianity and Islam. While Christianity appears to be losing its cohesive force in the private sphere, it is reaffirming itself in the public domain. In contrast, Islam seems to be more effective in generating a private-communitarian cohesion, and is not only excluded from the public space, but is also being limited in the private domain. In other words, generally speaking, there has been a more frequent breach of borders between the two spheres – public and private – whereby the traditional religions have been deprivatised and the non-traditional ones have been relegated to the private domain, which is becoming ever narrower.

This trend finds its confirmation in the case law of the European Convention on Human Rights. Departing from the Enlightenment project, the European Court of Human Rights has validated this double standard approach to the multicultural challenge and religious

76 The Court is of the view that personal decisions as to an individual’s desired appearance, including a choice of clothing, ‘whether in public or in private places, relate to the expression of his or her personality and thus fall within the notion of private life’. *S. A. S. v. France* [GC], §107.

77 Article 2(1) of French Law no. 2010-1192. Here, it is the case of common space in contrast to political and/or institutional space, as also types of public space, which ‘from a normative point of view [...] must be kept as accessible as possible to avoid segregating in their homes people who do not feel able to enter it without manifesting their religion or belief’. S. Ferrari 2012, p. 150.

78 Cf. *Joint Partly Dissenting Opinion of Judges Nussberger and Jaderblom* to this judgment, §§3-12.

79 *Commentary no. 18*, ICCPR.

diversity, reinforcing the exclusion and isolation of the minority religion, and buttressing the publicisation of the majority one, potentially undermining the stability of European democracies.

It is against this background that Convention case law is analysed, in particular, *Dahlab v. Switzerland* (2001), *Lautsi v. Italy* [GC] (2011), and *S. A. S. v. France* [GC] (2014). This chapter does not argue that the Member States' margin of appreciation should be narrowed down in the given field, nor that the Court should take the role of a constitutional adjudicator in the matters of freedom of religion and belief. Nevertheless, the Court's reasoning and the type of message it conveys to the relevant national partners (both the governments and citizenry) raises serious concerns. It influences public discourse and values (including stereotypes) in the member states, contributing to the profiling of the constitutional identities of contemporary European democracies.



7 DISAGREEMENT AND RECOGNITION*

Gérard Raulet

'Je kontrastierender die Erscheinung, desto größer die Freude des Wiedererkennens.' (Novalis)

What I will try to sketch here is a sort of marginal remark on the debate between Nancy Fraser and Axel Honneth for the following reasons, on which I believe we all agree. Maintaining the ambition of Critical Theory implies the refusal of the division of work between a moral philosophy attributed to philosophers and diverse social theories responsible for specific sociologists' or political scientists' 'fields of research'. It is therefore necessary to (re)connect moral philosophy with social theory and – above all – with political philosophy, which has been evicted by moral philosophy under the pretext that it would be disqualified by its compromise with the practical philosophies of history (in other words, Marxism).¹ At this price, one can see the reappearance of crucial questions highlighted by the discussion between Fraser and Honneth on redistribution and recognition. It remains to be seen if we comprehend the dualism in the same fashion, and if we adhere to the monism proposed by Axel Honneth (*'a normative monism of recognition'*) in the same terms. In this respect, I must concede immediately that on the practical level, neither Fraser nor Honneth intend to stick to what Fraser calls the 'false antithesis' of redistribution and recognition although, on the analytical level, they both reproduce the classic opposition to socio-economic exploitation and domination, thus at least allowing the diagnosis of different scenarios of injustice.² 'Neither redistribution alone nor recognition alone can suffice to overcome injustice today.'³ As Fraser summarises it, we must avoid reducing the one paradigm to the other and start from their interlacing in order to overcome both of them.⁴

The purpose of my remarks is of the same nature. However, I would propose to substitute the notion of difference with that of disagreement. One can certainly object that it is a solution of facility, that this notion is not specific enough because it actually covers the

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1 In 2003, I dedicated the program of the research center 'Contemporary Political Philosophy' (CNRS / ENS LSH / Paris 10 / Paris 8) to this question.

2 N. Fraser & A. Honneth, *Redistribution or Recognition. A Political-Philosophical Exchange*, trans J. Golb, J. Ingram & C. Wilke, Verso, London and New York, 2003. This debate has been first published in German: *Umverteilung oder Anerkennung? Eine politisch-philosophische Kontroverse*, Suhrkamp, Frankfurt/M., 2003 [suhrkamp taschenbuch wissenschaft], p. 11.

3 *Ibid.*, p. 9.

4 *Ibid.*, p. 48.

refusal of universal recognition as well as the refusal of individuality (*distinctiveness*).⁵ But it is no less of a utility since it refuses the dualism that Fraser reintroduces on the pragmatic level by saying that these problems call for different responses, which have as a consequence that the aforesaid problems seem regulated and the refusals overcome from the moment that one provided the appropriate recognition. Yet, that amounts to leaving things as they are and sustaining the *fact* of being different, rather than triggering dialectics between difference and universality. This is what I understand by ‘crucial question’: *the state of existing things, the liberalism* (which is always in league with positivism). Fraser would probably agree since she immediately evokes that the conflict between the two paradigms is, in itself, an avatar of the end of egalitarian utopias and of the collapse of communism as well as the triumph of the market economy.⁶ In the paradigm of recognition, she even acknowledges, perfidiously (since it is also the basis of her own ideas), the pertinence of answering to a context in which the ‘grammar of social conflicts’ relegates the fights for the redistribution in the margins, and on the contrary, conveys the struggles for recognition in the forefront.⁷ A diagnosis, which in fact I do not share, and that one will have difficulties having it shared by the female workers of *Lejaby*⁸ or by the steelworkers of Lorraine, who expect nothing from political recognition and whose struggle for *existence* quite simply comes down to *one* alternative: keep their job or win the lottery. One is no longer there in the category of ‘fights’ for recognition of differences or cultural, ethnic, or even ‘imagined’ identities. One is at risk. And, frankly speaking, the oversimplification of status and material equality – as ‘ideal typical’ as it may have been – which is common in the debate between Honneth, Fraser, and Taylor, is completely outdated. Axel Honneth elsewhere rightly protested:

Charles Taylor [...] supposes a highly misleading chronology. According to his central historical thesis, while the history of liberal capitalist societies has hitherto been marked by struggles for legal equality, today their place has largely been taken by the struggles of social groups demanding recognition of their culturally defined difference.⁹

5 Fraser correctly distinguishes this by pointing out that they are called different pragmatic responses. Fraser & Honneth 2003, p. 46.

6 *Ibid.*, p. 8.

7 *Ibid.*, p. 48; see also p. 89.

8 An underwear factory emblematic for female employment which has been in the focus of the French social actuality in 2013 and 2014.

9 Fraser & Honneth 2003, p. 122. ‘Charles Taylor [...] unterstellt, eine äußerst irreführende Chronologie: während die Geschichte der liberalkapitalistischen Gesellschaften bislang von Kämpfen um rechtliche Gleichstellung begleitet war, [...] sind heute an deren Stelle Kämpfe von gesellschaftlichen Gruppen getreten, die die Anerkennung ihrer kulturell definierten Differenz einklagen.’ (*Umverteilung oder Anerkennung? Eine politisch-philosophische Kontroverse*, p. 144).

Yet, it is still on this basis that Nancy Fraser leads the debate: ‘I have assumed that the category of status remains relevant to contemporary society.’¹⁰ Even if she significantly asks herself a lot of questions regarding the pertinence of these categories and concludes, rather correctly, that questions of status are very material questions.¹¹

What matters to me is not the dualism of exploitation and domination – which is almost academic; it is the quest for a theoretic model which allows bringing forth and *affording satisfaction to a discourse which is both excluded from the political register and from the socio-economic register*. And in this respect, the intention of surpassing this dualism is indeed present in the works of the two authors. But Fraser objects to Honneth that the monism of recognition is ill-adapted for covering this double exigency, and she proposes on her part a model of integration which continues to treat questions of recognition as questions of identity and difference (*‘identity politics’*).¹² At the same time, she stops her own attempt of truly surpassing what she characterises as antinomy between culturalism and economism.¹³ One even observes an exaggerated confidence, in my opinion, in the capacities of the ‘cultural order’ to contain, compensate, and offer alternatives to the domination by the market. So, when she writes that ‘partially market-resistant cultural value patterns prevent distributive injustices from converting fully and without remainder into status injuries’¹⁴, we must ask ourselves to whom is this confidence directed. To the steelworkers of Lorraine? There is nothing less certain than the dualism of the cultural redistribution and the material redistribution, in the way that it finally extricates itself from Fraser’s argument – with the intention of replacing the argument of formal justice and distributive justice – might be able to break free of the logic of redistribution, which is only culturalised, and if necessary, ‘immaterialised’ by liberalism. The indistinction that Nancy Fraser has against ‘post-structuralist anti-dualism’ – against which she opposes her ‘perspectival dualism’ – could become *liberal indistinction*, finally assimilating everything to the market model (as we construct Beaubourg galleries in Lorraine and Louvre museums in the former mining region of Pas de Calais). One of the blind spots of the Fraser–Honneth controversy, in fact, comes from the question what should be understood by ‘cultural.’ In this respect, Honneth certainly scores a decisive point when he rejects the dualism of economy and culture in addition to opposing her approach in terms of the shared concept of ethical life.¹⁵

10 Fraser & Honneth 2003, p. 54.

11 *Ibid.*, p. 67.

12 Honneth does not contest the analytical pertinence of this diagnosis. Fraser & Honneth 2003, p. 111. It remains to be determined if it is justified to consider it as a pretext for changing the paradigm.

13 *Ibid.*, p. 50.

14 *Ibid.*, p. 53.

15 ‘It remains completely unclear why the capitalist social order is now to be investigated specifically from the two perspectives of “economy” and “culture”, when it would seem equally possible to analyze the object field from other perspectives, such as “morality” or “law”.’ *Ibid.*, p. 156.

At this point, we shall take a step back to try to understand *why it is so difficult to invent a discourse other than that which is inexorably imposed*. Contrary to what it may seem, the question of *disagreement* does *not* have its place in liberal conceptions, particularly in Rawls's double trigger model (the two principles of justice), and it is envisioned by Michael Walzer only in accordance with the fight of groups of individuals for recognition of community rights.¹⁶ The reason for this absence is that it implies a dimension other than the formal (egalitarian) justice dimension and the (equitable, and therefore differential) repartition dimension, something like a 'third principle' which goes beyond the typical liberal disjunction of politics and economics. Simply put, the first principle of Rawls ensures an agreement on the requirement of egalitarian justice. Alone, it is clearly insufficient and powerless since it is, according to its proper definition, purely idealist, solely concerning the individual returned in the position of original contractor before all rights. The second principle applies it to real conditions. Here is where problems begin because it is also the source of compensatory excesses. 'Maldistribution directly entails misrecognition'¹⁷ – we are indeed in agreement on this diagnosis, though not on the manner of coping. There cannot be any 'redistribution' of recognition.

Despite the highly relative reliability of their evaluation, policies of positive discrimination are certainly not to be brought into question. They constitute part of the field of intervention of every social state worthy of the name, but they do not necessarily say anything on the options of this state *on the matter of citizenship* since they can be developed in an integrationist perspective as well as in a multicultural perspective. The problem with these policies becomes manifest when multiculturalism acquires 'the status of a new credo and a new crusade,'¹⁸ when the realist argument according to which 'multiculturalism as a fact, or as the characteristic problem of our societies sets up multiculturalism as a value or a solution,'¹⁹ when the multiculturalist policy becomes a resolutely differentialist policy,

a policy whose orientations, choices and justifications repose on the explicit taking into account, official recognition, projection and valorization within the public space of historically crystallized cultural differences, with the attribution of specific 'cultural rights' to groups or communities, indeed a 'prefer-

16 Cf. G. Raulet, "Justice et/ou tolérance?", in T. Andréani & M. Vakaloulis (Eds.), *Refaire la politique*, Syllepses, Paris, 2002, pp. 167-178.

17 Fraser & Honneth 2003, p. 52.

18 E. J. Hinz, "What is Multiculturalism? A 'Cognitive' Introduction", in E. J. Hinz (Ed.), *Idols of Otherness: The Rhetoric and Reality of Multiculturalism*, University of Manitoba, Winnipeg, 1996, p. XIII.

19 J. C. Forquin, 'L'école et la question du multiculturalisme: approches françaises, américaines et britanniques', in A. van Zanten (Ed.), *L'école. L'état des savoirs*, La Découverte, Paris, 2000, p. 152.

ential treatment' collectively accorded to some of them for the sake of a compensatory or reparatory justice.²⁰

At this point, we leave the state's sphere of legitimate action, the sphere of its obligations, and we enter an undefined zone where it is precisely the state's legitimacy as a constitutional state which is brought into question. The constitutional state is enjoined to conclude a new social contract on the basis of Rawls's *second* principle.

The negative effects are obvious. The conception of a multicultural society on the unique basis of the second principle is utopian because positive discriminations encourage the hardening of communitarian mechanisms of identity. It leads to the naturalisation of difference and alterity, 'closing each individual within a singular identity straitjacket' which brings 'the danger of a reification or an ethnicization of culture.'²¹

Considered abstractly, independent of context, affirmative strategies have at least two major drawbacks. First, when applied to misrecognition, affirmative remedies tend to reify collective identities. Valorizing group identity along a single axis, they drastically simplify people's self-understandings – denying the complexity of their lives, the multiplicity of their identifications, and the cross-pulls of their various affiliations.²²

Manifestly, there are two side effects that work simultaneously. On the one hand, multiculturalism focuses on immigrant culture instead of taking a referential basis in the political constitution of the host society; thus, without needing to, it undermines the republican principle, before even being able to assess to what extent the host society, by virtue of its political constitution, is truly welcoming and to what extent the confrontation with this society induces within immigrant communities new phenomena of socialisation. On the other hand, this approach systematically turns immigrants into foreigners and reifies the social condition that they assume at the moment of their arrival. In the end, we might wonder whether the active maintenance of a credo of formal political equality would not be preferable to this *goodwill ghettoisation*. For it is obvious that the consequence of founding the entire problematic of the articulation between civil society and the state on 'identities,' as multiculturalism does, is to valorise demands in the political sphere which belong, rather, to the private sphere, even if the latter is 'communitarian.' We are not playing off the individual against the state here, but *communitarianism against citizenship*, and we are playing the game of ethnicism, which in the worst-case scenario is also the

20 *Ibid.*

21 *Ibid.*, p. 155.

22 Fraser & Honneth 2003, p. 76.

game of the enemy, who clearly was only waiting for this legitimation of his discourse. Simply put: this logic is congruent with the strategy of the *Front National* and the ‘uninhibited Right’ (*la droite décomplexée*, as it names itself). This has nothing to do with Rawls’s rational pluralism and rational citizenship, which rest on the overlapping of reasonable world visions, not even with the rather naïve solution suggested by Fraser regarding ‘*l’affaire foulard*’ as she calls it: ‘to include minorities – without requiring assimilation.’²³

In this respect, the French social state is no longer secured from drifting away from its republican tradition because in delegating the tasks which were its own to local authorities and civil society, it renders itself unable to maintain a unitary vision of citizenship and indirectly encourages minority policies. And this is true even though (or precisely because) the welfare state limits its interventions to a zoning. This practice of zoning (‘free zones’,²⁴ ‘priority education zones’ – French: *ZEP*) goes in the same direction as the ‘recognition’ of specific social (and political) statuses: handicaps, etc., which are substituted for the true socio-economic structure of society.

With respect to these dangers of compensatory policies, we must address the same critique to both liberalism and multiculturalism: they both respond to the demands of liberty and equality established as law, but no affirmative action, no positive discrimination, measures up to the principle of fraternity and solidarity because it undermines the principle of the republican social state even while using it to the profit of particularistic claims. The question is the following: how to produce social dignity (that is to say, citizenship) ‘without falling into the excess of a communitarian expression which will distance us from the common good and reinforce inequalities.’²⁵

The process of ‘cross redressing’ proposed by Fraser attempts, in a completely pragmatic manner, to escape this dilemma. This means ‘using measures associated with one dimension of justice to remedy inequities associated with the other – hence, using distributive measures to redress misrecognition and recognition measures to redress maldistribution.’²⁶ She recognises its limits nevertheless because it can never have ‘redistribution’ of recognition. In concrete terms, only a notion of social recognition indivisibly linking participation to national wealth *and exercise of citizenship* constitutes a real alternative to ‘zoning’ in the measure in which it aims to reconstitute the democratic space as a space for recognition and not only, as in the Anglo-Saxon approaches, as a space for redistribution. It is why it does not grasp (does not *want to grasp*) that *liberalism confuses obstinately difference and disagreement*.

23 *Ibid.*, p. 82.

24 Areas where shops and industrial companies pay reduced taxes in order to prevent economic desertification and ghettoization.

25 J. P. Payet, ‘L’ethnicité et la citoyenneté dans l’espace scolaire’, in Van Zanten (Ed.) 2000, p. 395.

26 Fraser & Honneth 2003, p. 83.

According to Walzer's optimistic scenario,²⁷ globalisation favours the rupture of individuals with their community affiliations. But, it likewise favours their disinterest in the national republican State as a framework of political and human emancipation. This evolution, in principle, benefits individuals, who can come up with new modes of integration and emancipation with regard to their communities of origin. 'Post-modern' society is, in this respect, the laboratory for forms of new socialisations. But, the 'teleological' optimism²⁸ which we can draw from this observation should not blind us to the risks.

Walzer hopes to put traditional and community identity references in perspective. As soon as individuals are denied certainty on which they found their relationships, tolerance is, in fact, 'the most rational policy.'²⁹ In Rawls's terms, tolerance becomes, although *a posteriori*, the 'first principle.' It indeed corresponds with the first rational decision to which subjects cannot escape. At the same time, it is the good for which individuals unquestionably yearn and that they 'decide' to translate into the foundation of justice. In the form of an overlapping consensus men and women, even though things would separate them, reckon that what is only the subject of a reciprocal tolerance of the differences constitutes a 'common commitment.'³⁰

Walzer and Rawls share the diagnosis that in liberal societies, the normative orientations – and therefore, the notion of good as well – multiply. It is precisely to escape this division that he bestows justice with the priority on representations of good. However, at the same time, Walzer pronounces himself against all a priori construction of law and criticises republicanism because it focuses on the outdated belief, or at least uniquely valid for small homogenous communities, that there can be a shared idea of the public good. Walzer tries to use the subversive reassessment of traditional links to encourage forms of post-traditional life – it is the liberal moment of his construction – but, at the same time, he attempts to contain division and uprooting, because without 'community correction,' they would lead to an individualist atomism which would render all democratic ethics impossible and would make some fundamental rights completely abstract.

Even if one may be sceptic towards the optimism of overlapping consensus, it seems to me that the common point upon which we finally can agree is the necessity of building on real forms of interaction and inscribing the problematic of recognition and citizenship in the practical order that I consider in line with Kant's philosophy of history as '*teleological*' (in order to oppose it as clearly as possible to any *normative* approach).

27 M. Walzer, *On Toleration*, Yale University Press, New Haven, CT, 1997.

28 Cf. G. Raulot, *Apologie de la citoyenneté*, Editions du Cerf, Paris, 1997.

29 Walzer 1997, p. 81. (The page numbers refer to the French translation *Traité sur la tolérance*, Gallimard, Paris, 1998.)

30 *Ibid.*, p. 79.

Envisaging the question of social normativity in terms of *Sittlichkeit*, that is to say, in terms of the political validity and efficiency of morality, the essays which Axel Honneth has collected in the volume *Das Andere der Gerechtigkeit* (Justice as Other)³¹ bear witness, first of all, to his intention to begin from real communicational interactions (an intention of which I can only approve, for, since the publication of the *Theory of communicative action*, I have been preaching in the desert along the same lines)³² and ‘no longer to conceive the communicational paradigm in the narrow sense of a conception of rational harmony, but in the sense of a conception of the conditions of recognition.’³³ As soon as the question is posed in this way, the ‘pathologies of recognition’ unfold on the theory of communicational action. On the one hand, Honneth breaks with both the liberal disjunction of the political and the economic and with Habermas,³⁴ while overhauling the labour paradigm as the major axis about which actual social experiences and political conscience are organised.³⁵ On the other hand, he does not hesitate to revive issues which I would qualify as Marcusian³⁶ (and which today are regarded as out of date), notably by reaffirming that ‘behind the facade of advanced capitalist integration there may well be hidden a field of moral and practical conflicts in which the old confrontations between classes are reproduced in new forms, socially controlled on one hand, individualized to the extreme on the other.’³⁷

The quest for social recognition (*soziale Wertschätzung*) allows us to bring out some of the reactive and counter-productive phenomena as what nowadays we call the ‘protest vote,’ and of course, also the falling back on gang or ghetto identities.³⁸ Honneth sees here the effect of the growing discrepancy between the representations of law and justice by those who are party to the system and those who are marginalised or rejected outright.³⁹ But the decisive element of these representations is their nature: in distinction from the *elaborate representations* of justice (including the Rawlsian theory of justice), the ‘complex of reactive demands for justice’ takes the form of ‘negative judgements which are not

31 A. Honneth, *Das Andere der Gerechtigkeit. Aufsätze zur praktischen Philosophie*, Suhrkamp, Frankfurt/M., 2000.

32 See, for instance: ‘Habermas und der philosophische Diskurs der Postmoderne’, in G. Schmid-Noerr (Ed.), *Metamorphosen der Aufklärung*, Tübingen, Diskord, 1988; English translation: ‘Habermas and the Philosophical Discourse of Postmodernity’, in *Thesis Eleven*, 23/1989, pp. 64-84. Cf. also: ‘Critique de la raison communicationnelle’, in R. Rochlitz & C. Bouchindhomme (Eds.), *Habermas, la raison, la critique*, Ed. du Cerf, Paris, 1996.

33 Honneth 2000, p. 103.

34 Perhaps this reveals the unavowed consensus between them.

35 *Ibid.*, pp. 104-105.

36 It is perhaps not by chance that one finds in this passage by Honneth a reference to Barrington Moore, one of the co-authors, with Marcuse, of the *Critique of Pure Tolerance*; cf. Honneth 2000, p. 115.

37 *Ibid.*, p. 113.

38 *Ibid.*, p. 108.

39 *Ibid.*, p. 114.

generalized in a positive system of principles of justice.⁴⁰ In short, in place of a ‘theory of justice.’ Critical Theory must depart from the ‘consciousness of injustice’ – a consciousness strongly marked by traumata related to the real world, and at the same time, too closely linked to individual or particular situations to be subsumed in a theoretical approach reposing on the premise of a ‘consistent moral consciousness’ (the one which in Rawls’s theory is supposed to be separate from the choice of inviolable values in action in the fictitious original position of the ‘veil of ignorance’).

The representations of justice by means of which social groups evaluate and judge a social order can be revealed, in the case of oppressed social strata, rather in the typical feelings of injustice than in normative principles susceptible to a positive formulation.⁴¹

The question to which Honneth’s approach leads is the following:

Of what order must the moral culture be in order to give victims, the despised and the excluded, the individual strength to articulate their experiences in the democratic public space instead of walling them up in counter-cultures?⁴²

This way of asking the question, starting from the negative presence of conceptions of justice in the consciousness of the despised and excluded, radicalises both Rawls and Habermas at once. Of course, what radically distinguishes Habermas from pluralism, as much from Rawls as from Walzer, is the demand for a revitalisation of public debate, as much in quantity as in quality. Habermas sees the right to equal participation in democratic debate as the fundamental principle of justice. For Habermas, this right precedes even the fundamental liberal rights which constitute the basis of the Rawlsian construction. For democratic debate is not merely a right anchored in these fundamental rights; it actualises them and it is only through this right that they become effective. Thus, the (obviously essential) difference between Rawls and Habermas consists in Habermas’s objection to the moment of abstraction by means of which Rawls imagines an original scene bringing together free and equal citizens who, independently of their diverging conceptions of the Good, opt for a common concept of the Just. Although this is supposed to be a fiction, Habermas refuses to abstract from democratic debate. Rawls starts from the principle that

40 *Ibid.*, p. 115. Cf. also the introduction to the debate with Fraser, where he speaks of a ‘phenomenology of the social experiences of injustice’ in order to take into account the inchoate or immature forms. Fraser & Honneth 2003, p. 114. In the first part of his answer – which has this title – he refers to Bourdieu’s *La misère du monde*.

41 *Ibid.*, p. 118.

42 *Ibid.*, p. 108.

ideas of the good can be true or false, and therefore, cannot provide a solid base for a theory of justice. Habermas agrees with this premise for one cannot, in fact, found a universally valid theory of justice on a 'world-view,' even if it is 'reasonable.' But he objects that Rawls's a priori construction of fundamental liberal rights relegates democratic debate to the back seat and that, at the same time, citizens no longer recognise this as 'their business,' their practical project ('*ihre Sache*' in Hegel's *Philosophy of Right*), but in the best-case scenario, the framework in which they will have to make their claims heard.

As for Honneth, he expresses doubts about the very possibility of bringing experiences and feelings of injustice into the democratic debate, both for structural political reasons and for more fundamental reasons, which stem from the very nature of the consciousness of injustice. One reason is that the politico-mediatic order is structured in such a way that it necessarily and immediately limits the chances for feelings of social injustice to enter the public political sphere and it is by no means certain that the established sociopolitical or political groupings are apt to echo it.⁴³ Another reason is that the feeling of injustice constitutes a social pathology which is expressed in an infra-discursive register or in a mode which does not have a place in the dominant communicational register. The fact that this is the actual step forward (which he shares with Bourdieu), and at the same time, the improvement of Honneth's theory is confirmed by Nancy Fraser's reaction: 'Honneth grounds his recognition monism in a moral psychology of prepolitical suffering.'⁴⁴ This is indeed the sore point.

It is at this point that, objectively speaking, injustice begins: by *the fact that there is no follow up – before there is even a question of rights* – to the expression of the feeling of injustice, and therefore, not at the level of Rawls's second principle, but indeed at the level of the first and/or at the level of the Habermasian postulate of participation in debate. For

if a moral norm can only be considered to be valuable on condition that all persons who may be concerned adhere to it, one must anyway be able to depart from the principle that each person has to the same extent had the opportunity, without constraint, to take position. [...] But in this way the possibility of relating the validity of moral norms to a process of discursive training of a will must be linked to the transcendental idea of a discussion free of all domination.⁴⁵

And it is at this point that Honneth also, in the essay which gives his work its name, 'Das Andere der Gerechtigkeit,' must take into account the relevance of Lyotard's denunciation of the domination, 'in our society, of certain kinds of discourse, the first among which is

43 *Ibid.*, p. 119.

44 Fraser & Honneth 2003, p. 203.

45 *Ibid.*, p. 141.

that of the positive right and economic rationality,' the effect of which is that 'other kinds of language games are deprived of social articulation on a long-term basis.'⁴⁶ In these conditions, as Honneth sums it up nicely, like Lyotard, political philosophy finds itself confronted with a dilemma: either to develop an ethics of testimony, entrusting to media other than political debate the task of preserving the victims' memory, or to open the public debate to language games which are almost excluded by the system.⁴⁷

I do not hold to Honneth's restriction, according to which, one can only judge if one is dealing with a 'true' difference if 'all the parties in a practical conflict have been able effectively to articulate their interests and their views.'⁴⁸ It seems to me that this restriction is itself open to the criticism that Honneth addresses at the same point to the 'responsibility to act,' that is to say to the fact of also assuming the responsibility of one's acts erected as a criterion of the receivability of discursive expressions. For the defining characteristic of disagreement is precisely that it occurs within heterogeneous kinds and – according to Honneth himself – in kinds which are heterogeneous, that is to say, by their nature incapable of accessing the sphere of public debate which allows us to recognise them as defensible positions. This is obviously not a mere detail: the problematic of recognition implies the taking into account of *disagreement as the constitutional dimension of social interaction*.

Taking disagreement into account allows us to put the problem of difference back in a political context, while the cult of difference and the affirmative action which follows constitute an economic approach to the social and, as Herbert Marcuse emphasised as long ago as 1965 in his *Critique of Pure Tolerance*, are the other side of the economic liberalism.

It is important to return this political impact to the problematic. It is the condition so that the differences are recognised as *disagreements* instead of being confined to the cultural sphere and 'treated' by economic measures in a compensatory manner, like *differences*. Returning this political dimension to them allows for stopping them from being isolated, or ghettoised, because they subscribe to a global evolution of sociality.

Beginning with the most diverse domains, going back and forth from the religious revival to the NICT's⁴⁹ own communication practices while, of course, passing by politics,⁵⁰ one observes a tribalisation of social connections; the breaking up of civil society coincides

46 *Ibid.*, p. 139.

47 *Ibid.*

48 *Ibid.*, p. 142.

49 The new information and communications technologies. Cf. J. Jouet & Y. Toussaint, *Rapport d'activité du GDR Communication*, CNRS, Paris, 1989, p. 61.

50 Cf. M. Walzer, 'Das neue Stammeswesen. Erörterungen über das Zusammenleben der Völker', *Lettre internationale*, No. 16, 1992, pp. 8-11.

with the emergence of new forms of communities which distinguish themselves from traditional organic communities – communities based on common practices or a desire to life in common and resting especially on the affirmation of difference. Behind the so-called Islamic veil affair, there may be a similar community claim and the ghost of a collection of collectivities which, under the pretext of making their differences known, only fight for their ‘ghettoisation’ in the end.

It was a matter, for those who aligned themselves with a particular faith, of benefiting not from the ensemble of right and responsibility that the Republic bestows upon all citizens, but from opposing its difference, for example, in the ultimate laic space that is the public school, by affirming a confessional affiliation [...]. One no longer refers to the nation, to the host society or to the society of departure which no longer responds to the significant application of identity, but rather to this new community identity that one will construct and try to spread as wide as possible [...]. These tribes establish their community frontiers around projects and not around that to which one ordinarily likens to the tribe, namely common inherited affiliation, whether it is ethnic, racial or other.⁵¹

In order to prevent from such a communitarian drift, Habermas suggests that it is necessary, to respond to the more and more frequent conflict between the moral invocation of Human Rights and citizens’ rights, to begin by distinguishing between

morally-founded *Human Rights* and *Human Rights* which acquired a positive validity by means of our constitutions, and therefore imply the guarantee, in the existing judicial framework, of being enforced by a state sanction.⁵²

So, Habermas reaffirms resolutely that only guarantees of the rule of law⁵³ can mediate between Man and the subject, thus as the framework of citizenship. But this reaffirmation does not really take into account the fact that the recourse to constitutional courts reflects the proceduralisation of human rights as well as of civil rights and that such a recourse cannot be confused with their founding principles. The proceduralisation reveals instead a permanent confusion between universalism and particularist aims, a confusion which Habermas, for instance in ‘Volkssouveränität als Verfahren’ (1988), shares with Michael

51 G. Kepel, in *Religions, laïcité, intégration*. Proceedings of the colloquium organized by Centre Georges Pompidou and Centre Galilée (25 May 1991), Les Cahiers du Centre Galilée, Paris, 1993, p. 52 & p. 78.

52 *Ibid.*, p. 157.

53 As it is confirmed on the following page by the invocation of constitutional courts.

Walzer.⁵⁴ For both of them,⁵⁵ civil society is a network of associations that ‘besiege’ the public authority, but do not envision renouncing its mediation.⁵⁶ Walzer calls this permanent state of siege ‘democratic socialism’ and works to draw out of it a reinstatement of popular sovereignty. The assumption is correct; the conclusion is much more problematic.

If the citizen must be the subject of judgement and if the current evolution drifts towards a jurisprudentialisation growing from the link between law and morals, citizen’s rights and human rights, *the crux of the problem remains unsolved as long as the citizen is not the author of the jurisprudence* – without anticipating the eventuality that the citizen *can no longer be* its author. In Kant’s conception, the citizen was the mediator between the individual subject and Man, the individual only reached liberty as a citizen. In contrast, the convergent statements by Michael Walzer and Michael J. Sandel reveal the sidelining of this mediation and of the representative authorities which realise it; in order to defend their personal liberty instead of parliaments and parties, the citizens call on courts and administrations,⁵⁷ and we shall add, on associations displaying community tribalisation tendencies since they are created in the purposeful goal of asserting differences. Paradoxically, the individual dispossesses himself of the liberty to which he acceded as a citizen by claiming it in a particularist manner. By defending his cause as an immediate interlocutor of bureaucratic and jurisdictional authority (which is also the case when he is represented by ‘tribal’ associations), he replaces himself in the situation of a subjected person and plays the game of refeudalisation. Habermas analysed the evolution of the social state of advanced capitalism as inhabited by a tendency of refeudalisation. He targeted not only bureaucratisation and the invasion of civil society by state intervention, but also, as a parallel phenomena and reasonable consequence, the privatisation of the public domain which replaces the formation of a political public opinion in the wake of the struggle between private lobby interests in the middle of the public sphere. As a whole, the analysis remains correct. One can simply add that the more there are specific communities, the more the tendency to refeudalise worsens. This begins, in the current crisis of the French republican model, by the multiplication of intermediary, infra-national powers, created by decentralisation. And this persists in the incredible lack of democracy which hangs over the construction of European Union and the forced movement towards a unique money since the Treaty

54 J. Habermas, ‘Volksouveränität als Verfahren. Ein normativer Begriff von Öffentlichkeit’, *Merkur*, No. 484, 1989, pp. 465-477. On Walzer cf. H. Brunkhorst, *Demokratie und Differenz*, Fischer, Frankfurt/M., 1994, p. 130.

55 Cf. J. Habermas, ‘Faktizität und Geltung. Ein Gespräch über Fragen der politischen Theorie’, in Habermas, *Die Normalität einer Berliner Republik*, Suhrkamp, Frankfurt/M., 1995, pp. 138-139.

56 M. Walzer, *Zivile Gesellschaft und amerikanische Demokratie*, Berlin, 1992, p. 89.

57 M. J. Sandel, ‘The Procedural Republic and the Unencumbered Self’, *Political Theory*, Vol. 12, No. 1, 1984, pp. 81-96; German translation: ‘Die verfahrensrechtliche Republik und das ungebundene Selbst’, in A. Honneth (Ed.), *Kommunitarismus. Eine Debatte über die moralischen Grundlagen moderner Gesellschaften*, Campus, Frankfurt and New York, 1993, p. 34.

of Maastricht was imposed on the public opinion with all the technocratic-mediated arguments and all of the plebiscitary manipulations of the national public opinions to which it was possible to appeal.

Walzer's approach is completely different. From the start, he integrates pluralism in his assumptions. For him, patriotism resides in the citizen's capacity to 'approve social diversity' more than in the fact of swearing fidelity to one 'single and indivisible Republic.'⁵⁸ Starting from the premises of 'inevitable conflicts of commitments and loyalty,'⁵⁹ Walzer reckons that 'it is only when the discussion affects a certain continuity and mutual understanding becomes denser little by little that we obtain something that resembles a moral culture.'⁶⁰ Walzer certainly counts on a corpus of inherited values – if he does not believe in the immutable reality of a national character, he believes in shared values which are amassed in history⁶¹ – but they do not have any validity for him other than updated by the discussion in a way that it is rather the argument that is the key in his approach. Walzer does not even seek, as Apel and Habermas did, to at least postulate that the fact that one can debate supposes an 'ideal community of communication.' He only holds back the moment of the discussion, which likewise becomes a moment of validation, but only has the value of a provisional *judgement*.

What is certainly radical in the American neo-communitarian approach is therefore the attempt – a very problematic attempt, as we can see – to recreate the same bases of republicanism beginning with the (liberal) statement of difference. An extreme tension between the consideration of difference and the attachment to republican virtues result from it. The classic problem of the transformation of individual desires and the general desire of everyone as a whole is apparently only augmented by 'bottom up' socialisations, namely by the bias of neo-communities of all types. In the radically pluralist version of Walzer, the formation of this general desire is, in principle, unfinished and unable to be completed.

Since the proceduralisation, which replaces the formation of a collective desire, enforces individuality and difference against the public sphere, the question seems to be to conceive publicity integrating disagreement and accepting in its principle that one cannot refer to *an* emphatic Idea of Good. Even the concept of a communication without violence does not exclude the disagreement, but, on the contrary, rests on the respect of disagreements, which supposes their public identification and excludes their camouflage under weak pseudo-consensus. And, even if the price to pay is the recognition of a lasting conflict

58 M. Walzer, "What Does It Mean to be an American", *Social Research*, Vol. 57, 1990, p. 603.

59 M. Walzer, "The Idea of Civil Society", *Dissent*, Spring 1991, p. 298.

60 M. Walzer, *Interpretation and Social Criticism*, Harvard University Press, Cambridge, MA, 1987; quoted from the German translation: *Kritik und Gemeinsinn. Drei Wege der Gesellschaftskritik*, Berlin, Rotbuch Verlag, 1990, p. 35.

61 M. Walzer, *Sphären der Gerechtigkeit*, Campus, Frankfurt/Main and New York, 1994, p. 61.

between the rational identity of subscription to the Republic and the ‘natural’ or neo-community identities.

It is, without a doubt, one of the questionable points of Honneth’s theory. Developed with an elsewhere extremely suggestive and productive reinterpretation of Hegel, this theory seems to come up against the status of the *telos*. If Honneth considerably emancipated himself from the communicational *a priori* of Habermas, the reality of effective processes of recognition – in other terms: *the real interaction* which constitutes ethical life (and which are, since my work on new technologies at the end of the eighties and the beginning of the nineties, the only ‘normative’ reference I recognise⁶²) – remains affected in his theory by a strong normative pathos,⁶³ as if reconciliation should not only be one of the four primordial functions of political thought, as it is the case in Rawls, but also his *telos*, as in the works of Hegel. It is as disappointing as in the course of corrections brought to his project since the 1990s, Axel Honneth recognised the importance of the approach which I call teleological. So, he asks if the demands of recognition expressed by minority cultures would not finally be likely to outline a ‘fourth and new principle of recognition’ (beyond the three forms that he develops from Hegel). At the same time, he admits that relativism which results from recognition of divergent values of different culture is not compatible with the normative exigency of his conception of recognition.⁶⁴ Yet, so the teleological approach can be effective, it must maintain the questions of individual autonomy and collective identity unresolved. (Kant, in his teleological texts, keeps on applying the formula of the antinomy, which consists of keeping the solution in suspense by distinguishing the individual plan and the species plan.) I am therefore unsure if the problem is posed correctly if one poses it in terms of the old debate on historicism, namely, if one reduces it to the alternative of fixed and supra-historic values, on the one hand, to the normative predominance of cultures which are, more than others, on the path of ‘autonomy or self-realization as a *telos* including our form of human life.’⁶⁵

Yet, we do not have any *moral* need for reconciliation. If there is a common law, we do not have any *moral obligation* to accept exceptions from it – as, for instance, veiled women in public functions. We can only accept their difference as an *unresolved disagreement* over fundamental values of civilisation: equality of beings, their equal participation

62 In spite of the intention, it is not certain that Honneth is, in this respect, more concrete than Habermas. Georg Bollenbeck noted in a report of *Sozialwissenschaftliche Literatur-Rundschau* (Heft 56, 2008): “Honneths Studie bietet keine Pathographie der Verdinglichung. Den größten Raum nimmt der Versuch ein, den Anerkennungsbegriff zu begründen und mit ihm eine sozialontologische Erklärung für Verdinglichungsphänomene zu finden. Aber die benannten Verdinglichungsphänomene bleiben ohne gesellschaftstheoretischen Bezugsrahmen diffus.” (p. 47)

63 “moralische Aufladung”, “Überbetonung der normativen Komponenten des Anerkennungsbegriffs” (C. Hennig, ‘Über einige Unklarheiten in Axel Honneths Anerkennungstheorie und ihren systematischen Grund’, *Allgemeine Zeitschrift für Philosophie*, Vol. 37, No. 1, 2012, p. 95).

64 A. Honneth, *Kampf um Anerkennung*, Suhrkamp, Frankfurt/Main, 1994, pp. 323-324.

65 *Ibid.*, p. 339.

in the democratic debate, *et cetera*. We accept that they put their inherited and imported beliefs in touch and in conflict with those of the host society which they chose, but we do not have any valid reason to consider that their *inherited and subjective* beliefs are worth more, as much as or more than the rational consensus that the Republic took more than 200 years to establish. We accept the argument, nothing more. It seems to me that one could make use of the distinction introduced by Bart van Leeuwen between *autonomy respect* and *difference respect*. In the present case, it concerns a respect for difference that in no means prejudices that this difference here has autonomy value. Respect of difference focuses on social and community ties of the other *without leading to any normative consequence*.

In the same sense, Axel Honneth duly noted a weaker concept of recognition, that which Stanley Cavell put forward under the neutral name of ‘acknowledgement.’⁶⁶ Cavell purposefully underlines that this ‘acknowledgement’ does not imply any form of support and it can even be accompanied by negative feelings. It raises a common participation to a lived reality but in no way presumes that the participants conclude any form of behavioural, qualitative, *a fortiori* rational entente. The only community that they share is their affiliation to humanity and the fact that they are potentially partners in a communication. What specifically matters to me here is that a moral exigency and an exigency of identity are not surreptitiously reintroduced, but that the identity can, on the contrary, empirically constitute itself from experiences that are not necessarily positive.⁶⁷

Once again, we shall try as a conclusion to change some references and to reconsider a neglected perspective: a problem that was envisioned already by Schiller in his *Letters on the Aesthetic Education of Man*. In the ‘intermediate state,’ also known as the ‘aesthetic state’ (with a small *s*), the two components of sensitivity and reason must be active, but in a way, put on standby in order to not assert one against the other. This model of *active disagreement*⁶⁸ went down in history. Whether it was or was not inspired by Schiller, we find it also in the works of the thinkers whose models originate from the 18th century and who seek to ‘civilise’ the domination of reason. In the works of Schiller, that is made clear (at least it is my interpretation) in terms of English and Humboldtian liberalism. It is possible that the conservative thinkers of the Historic School wanted to escape to it although

66 ‘A more elementary form of recognition than that which I broached until presently in my thoughts on this question.’ (A. Honneth, *Verdinglichung. Eine anerkennungstheoretische Studie*, Suhrkamp, Frankfurt/Main, 2005, p. 60).

67 S. Cavell, ‘Wissen und Anerkennen’ [1976], in : *Die Unheimlichkeit des Gewöhnlichen und andere philosophische Essays*, hrsg. mit e. Einl. und Einf. von Espen Hammer Frankfurt/Main, Fischer, 2002.

68 There is a complete reflection in the works of Schiller on the fact that it is a matter of an *active state*.

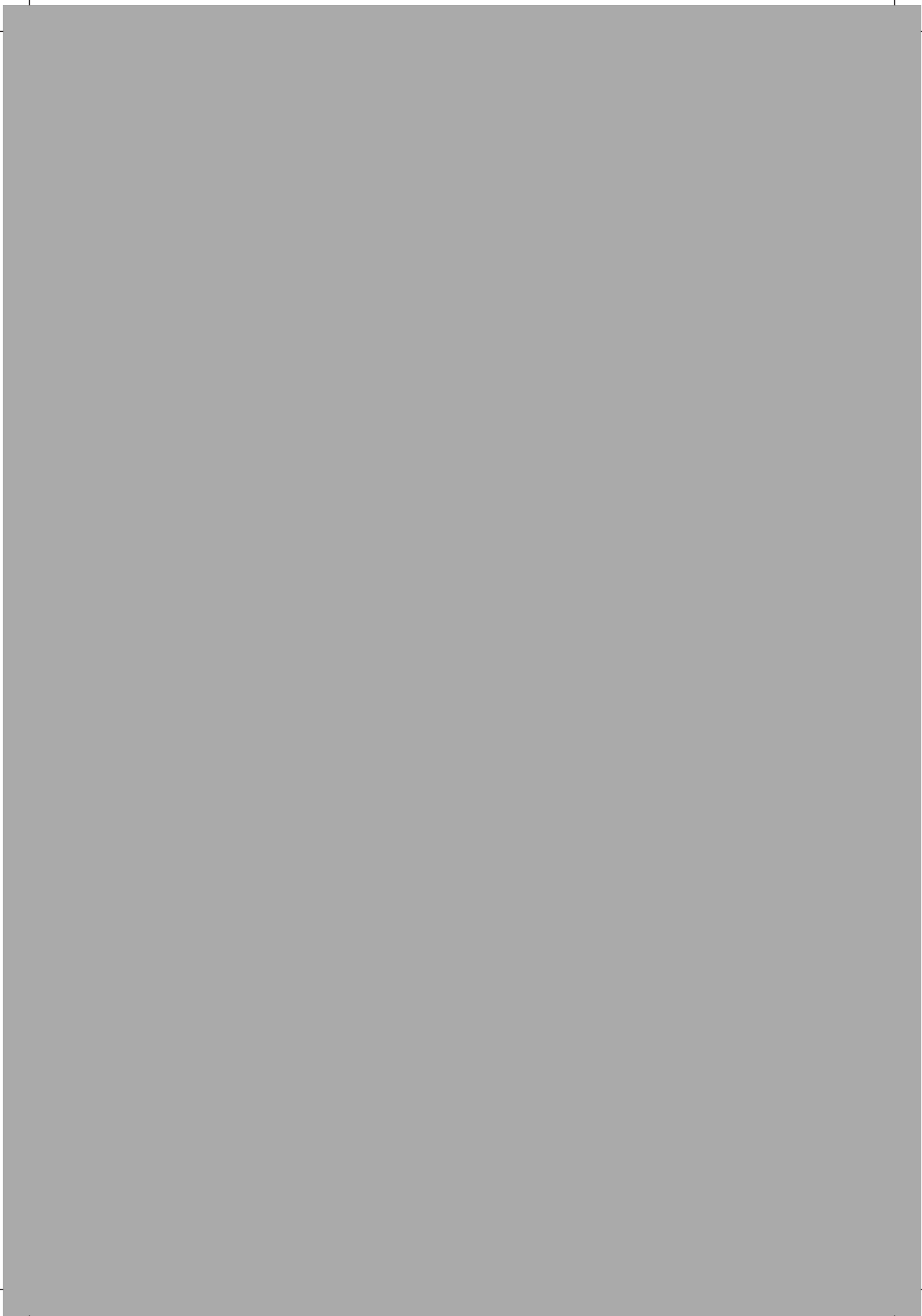
(or even because) it was the most promising model of thought at the transition from the 18th to 19th century.

It is that same dialectical model of a *recognition of disagreement* that thinkers such as Ernst Troeltsch or Max Scheler have then promoted with the concepts of ‘cultural synthesis’ or ‘re-equilibration’ (*Ausgleich*). The correct translation of what covers this definition is most difficult. *Ausgleich*, *Kompromiß*, *Kultursynthese*, etc. – in the works of Troeltsch, Scheler, and Mannheim, these concepts, today neglected and however innovative, were created in order to master what was already at stake: *the rupture of normative frameworks*. Of course, I do not ignore the context in which they arose, nor the affiliation of their authors to a political culture inherited from the German Empire. It is, on the contrary, in this first respect that I studied them for themselves. One of the stakes first consisted in suggesting a true inventory of the democratic and republican political culture of the Weimar Republic – an inventory emancipated from schematic polarisations and seeking to retrospectively evaluate the theoretic improvements which came about among those who specifically refused polarisation and defended a pragmatic vision of the constitution of a politically republican culture. It seems to me that it is not by chance that such an inventory can only be established today, in a context in which polarisation no longer has normative consistence and which, at the same time, obliges the political philosophy to elaborate new categories.⁶⁹

⁶⁹ The *Groupe de recherche sur la culture de Weimar* at the Foundation Maison des sciences de l’homme is nowadays the only research institution which has covered for years this whole field of political philosophy, including the confrontation between the German ‘Weimarian’ tradition, the Anglosaxon liberalism, and the French Republicanism.



PART II
SOCIAL MOVEMENTS



8 RESPONDING TO CRISIS OF DEMOCRACY – SOCIAL MOVEMENTS AS CONSTITUENT POWER

Nenad Dimitrijević

8.1 INTRODUCTION

Democracy is in crisis. The crisis affects democratic values, institutions, and processes. In normative terms, democracies appear incapable of affirming the core principles of political legitimacy. Institutionally, we can still identify equal citizens, democratic institutions, political organisations, and legal rules that shape politics. However, the formal quality of institutional architecture is becoming increasingly formalistic. Democracies fail ever more in performing their constitutionally defined tasks. Political actors look simultaneously all-powerful and powerless. Formal institutions, strong enough to ignore their citizens, are defenseless against intrusion of the social power. While paying lip service to democratic procedures, governments often use their considerable capacities of control and repression to advance the factional corporate interests. A parallel structure of invisible and uncontrollable power has been formed behind the façade of official politics. The crisis is further deepened by globalisation, which changes the political, legal, and social qualities of modern states and societies. New stateless sources of law and power, established by poorly visible global actors, have been imposing their authority at the expense of the state supremacy. The classical modern interplay of political community, democracy, and law is no more. In consequence, human dignity, justice, citizens' rights, the rule of law, and limited government appear to be at the mercy of nontransparent structures and their unpredictable actions.

In short, democracies are unable or unwilling to limit power, empower citizens, and provide services we traditionally associate with this regime type. In such a situation, citizens occasionally use extra-institutional channels to resist loss of freedom, inequality, social injustice, and silencing. Events of resistance differ in ideological preferences, goals, organisational forms, methods and instruments of resistance. This text focuses on radical democratic social movements, as forms of collective action that contest the status quo in the name of a different reading of liberty, equality, justice, and self-rule. Protest movements of the 2000s – in Iceland, Spain, Portugal, Greece, Italy, the United States, and elsewhere – shared one important feature: they radically denied legitimacy of liberal representative democracy. Some of these movements and their theoreticians have proposed to revive the

concept of constituent power as a core feature of an alternative social and political constitution of democracy. The principal aim of this chapter is to offer a critical close reading of this theoretical effort.

This introduction is followed by four sections. Section Two introduces main categories: social movements, constituent power, crisis, and political legitimacy. Section Three shortly describes two recent social movements – Spanish *Indignados* and Italian *Beni comuni* – and identifies their novel reading of democracy. Section Four focuses on the theoretical arguments. The point of departure is the critique of the existing regime. Radicalism of the critical evaluation raises the question of alternative. Some authors reject this question as illegitimate. Others accept that rebellion against the regime calls for a positive outline of alternative ideas of politics, law, and democratic agency. Some authors in the latter group introduce a radical democratic interpretation of the idea of constituent power. I will present this interpretation and juxtapose it shortly to some more conventional readings of constituent power. Section Five concludes the chapter with some critical remarks on the theory offered.

8.2 CONCEPTS

8.2.1 *Social Movements*

This chapter follows the classical definitions of social movements offered by Charles Tilly and Sidney Tarrow:

A social movement consists of a sustained challenge to powerholders in the name of a population living under the jurisdiction of those powerholders by means of repeated public displays of that population's numbers, commitment, unity, and worthiness.¹

Social movements are ... collective challenges, based on common purposes and social solidarities, in sustained interaction with elites, opponents, and authorities.²

Social movements are types of collective action. They are complex forms of social interaction. Interaction takes place both within the movement, and between the movement and those outside of it. In terms of the content, these actions are challenges. Tarrow uses the

1 C. Tilly, "Social Movements as Historically Specific Clusters of Political Performances", *Berkeley Journal of Sociology*, Vol. 38, 1993-1994, p. 7.

2 S. Tarrow, *Power in Movement. Social Movements and Contentious Politics*, Cambridge University Press, New York, 2011, p. 9.

metaphor ‘strangers at the gates’³ to point that social movements defy the existing normative and institutional boundaries of what the regime and the dominant culture prescribe, sanction, or tolerate. The politics of social movements is contentious.

What justifies this sustained action of collective challenge? Typically, we find a declared intention of righting a wrong. The action is presented as responsive, or reactive. Its declared focus is on restoring or establishing justice for a specified population. Response focuses on a situation presented as one of inequality, oppression, or unjustifiable denial of certain social, political, economic, or cultural goods or demands.⁴ It follows that social movements are both highly contextualised and contingent: their appearance, existence, and the type of action depend on the problems to which they react.

Social movements react by addressing the outside world. Tilly calls this address ‘a WUNC message.’ It tells potential supporters that participants in the movement are *worthy, unified, numerous, and committed*.⁵ Tilly adds that there can be tensions among these four elements. However, this does not equal falsehood. Rather than being factual, these are symbolic claims. Actions are performative. While other types of collective actions can also be contentious, the core feature of social movements consists in performing in order to interact with non-members: silent or uninterested population, opponents, social elites, and political authorities.

Social movements take place as conversations... The most elementary set of parties consists of a claim-making actor, an object of the actor’s claims, and an audience of having a stake in the fate of at least one of them.⁶

... Although the internal lives of social movements are important in themselves, activists choose their repertoires and frame their appeals in the light of their relations to a broader map of both contentious and routine politics.⁷

I will return to these points later. Here, I just note that this preliminary identification of social movements is only analytical: it aims at telling us what we have when we have this type of collective action. Nothing in the identification offered implies that it is good to have social movements, that they all necessarily fight for right causes, or that they are intrinsically linked to democratisation.

3 S. Tarrow, *Strangers at the Gates. Movements and States in Contentious Politics*, Cambridge University Press, New York, 2012.

4 Anonymous, *Social Movements: Evolution, Definitions, Debates, and Resources*, <<http://socialmovements.bridge.ids.ac.uk/sites/socialmovements.bridge.ids.ac.uk/files/07.%2020.%20Social%20Movements.pdf>>.

5 C. Tilly, “Social Movements and (All Sorts of) Other Political Interactions – Local, National, and International Including Identities”, *Theory and Society*, Vol. 27, No. 4, 1998, p. 467.

6 *Ibid.*

7 Tarrow 2012, p. 10.

8.2.2 *Constituent Power*

Many contemporary radical social movements insist on reclaiming constituent power. The concept denotes both the source of the constitution (the constitution-making power), and the capacity to create or reconstitute polity. It points to a new beginning in law and politics. Theories of constituent power ask: who makes the first rule, on the basis of what authorisation, when, and how? They assume that identification of this capacity and its agent is relevant for the character of political order, and for legitimacy of a democratic order in particular. If the original power and its rules are not legitimate, the regime will lack the basis of justification, since it derives its formal authority from the original expression of political will and its first norm. But, given the peculiar position of the original norm-maker, what is the source of its own legitimacy? The classical modern expositions of the concept sometime respond by introducing the substantive, pre-legal notion of the people as the holder of the constituent power.

One challenge asks what happens with the original sovereign once the constitutional order is established. Theories of constituent power rest on a problematic dualism between the constituent and constituted powers, and they often assume that the constituent power of the people remains beyond the limits of the established constitutional order. On the other hand, the concept of constitutionalism presents the people as the legally established and constrained entity. This ambiguity in the identification of the sovereign leads to the problem of the circular reasoning ('the paradox of constituent power'): the author of the constitutional order is the constitutional creation. Such and related uncertainties present formidable difficulties for constitutional theory and theory of democracy. The study of the radical democratic social movements testifies to the lasting theoretical and practical-political importance of the question.

8.2.3 *Crisis*

The interplay between social movements and constituent power unfolds in the condition of crisis. *Oxford Dictionary* defines crisis in three steps: '1. A time of intense difficulty or danger; 1.1. A time when a difficult or important decision must be made; 1.2. The turning point of a disease when an important change takes place, indicating either recovery or death.'⁸

Crisis is a condition that requires making an arduous choice. The necessity to choose is prompted by an imminent threat. Failure to decide and act accordingly would result in an irreparable loss. But, who shall decide that there is indeed danger requiring action, who shall act, and how? These questions are especially pertinent in the condition of the social

8 <www.oxforddictionaries.com/definition/english/crisis>.

and political crisis. Which actors should assume responsibility to identify and fight the crisis? The predicament is simple: it is often the case that the most powerful social and political institutions of the regime have decisively contributed to the crisis condition. Their rules, policies, and actions are the primary source of danger that calls for ‘a difficult or important decision.’ The regime that has produced threats and uncertainties is incapable or unwilling to address them. Its measures do not meet the requirements of efficacy, consistency, procedural transparency, and normative rightness. The crisis requires a deep change *in* the regime. It may even require a change *of* the regime.

8.2.4 *Crisis of Political Legitimacy*

The crisis of democracy implies a severe threat or even a breakdown of political legitimacy. Legitimacy is a particular type of the relationship between rulers and ruled. The rulers-ruled divide is both an empirical fact and a normative challenge. The fact of power translates into legitimate political authority only under certain normative conditions. While the object of the legitimacy question is the right of the public authority to require the surrender of private judgement, this question should always be approached from the perspective of the individuals and collectives who are the addressees of coercion. As members of a democratic polity, we are entitled to ask under which conditions we owe loyalty to political authority. More precisely: in what kind of the state we live, what is the character of our relationship with political authority, does this relationship meet certain normative criteria, and why is it important that these criteria are met?⁹ This is the entitlement to demand reasons for obedience. Scrutinising those reasons should tell us whether those in authority rule with right, and consequently, whether they can justifiably demand our loyalty to their commands.

I proceed by summarising shortly Ronald Dworkin’s reading of political legitimacy and political obligation. Dworkin does not believe in relevance of the concept of constituent power. He argues that the normative rightness of political rule has nothing to do with its source.¹⁰ His conception of partnership democracy does not have much to do with popular sovereignty or representative democracy. However, his early thinking about civil disobedience was focused on the question of whether the state can rightfully punish the members of social movements who refuse to obey the law.¹¹ This question raises a more general issue: can there be situations in which citizens can rightfully challenge political legitimacy

9 J. Kis, “State Neutrality”, in M. Rosenfeld & A. Sajo (Eds.), *The Oxford Encyclopedia of Comparative Constitutional Law*, Oxford University Press, Oxford, 2012, p. 329.

10 For an analysis of Dworkin’s position on constituent power, see D. Dyzenhaus, “Constitutionalism in an Old Key: Legality and Constituent Power”, *Global Constitutionalism*, Vol. 1, No. 2, 2012, p. 250.

11 R. Dworkin, “On Not Prosecuting Civil Disobedience”, *New York Review of Books*, 6 June 1968 Issue, <www.nybooks.com/articles/1968/06/06/on-not-prosecuting-civil-disobedience/>.

by refusing to obey the law?¹² This is the question about the limits of political obligation, which leads us to the heart of our problem. In his late book *Justice for Hedgehogs*, Dworkin revisits his argument that political obligation is legitimate only if it can be identified as moral obligation. We have the moral duty to obey a coercive order only if it respects the two principles of dignity:

Social practices create genuine obligations only when they respect the two principles of dignity: only when they are consistent with an equal appreciation of the importance of all human lives and only when they do not license the kind of harm to others that is forbidden by that assumption.¹³

Dworkin says that political legitimacy requires the authority to demonstrate equal concern and equal respect for each citizen. This is the ultimate source of the authority's right to create and enforce obligations, and of the citizens' duty to obey.¹⁴ But, Dworkin also tells us that legitimacy is different from justice. We will sometimes find a particular law or command unjust. Still, the claim of illegitimacy does not necessarily follow. As autonomous citizens, we realise and acknowledge that in our pluralist society, an agreement over the substantive core of justice is unlikely. How shall we think and act when we perceive a policy as unjust? Our reasoning is complicated by the fact that some of our co-citizens find the same policy just. Instead of simply denying legitimacy of the regime that produced the policy, we should resort to a double reflection of the situation. One question asks what a particular act of injustice means for each of us, for groups to which we belong, and for the community as a whole. Another question asks whether such an injustice has shattered political legitimacy. In this interplay, legitimacy becomes a matter of interpretation, and a matter of degree. Dworkin offers two possible scenarios for citizens who think of legitimacy in the context of policies they observe as unjust:

These particular policies may stain the state's legitimacy without destroying it altogether. Its legitimacy then becomes a matter of degree: how deep or dark is that stain? If it is contained, and political processes of correction are available, then citizens can protect their dignity – avoid becoming tyrants themselves – by refusing so far as possible to be party to the injustice, working in politics to erase it, and contesting it through civil disobedience when this is appropriate. The state remains legitimate, and they retain political obligation... If the stain

12 R. Dworkin, *Law's Empire*, Fontana Press, London, 1991, p. 191.

13 R. Dworkin, *Justice for Hedgehogs*, Belknap Press, Cambridge, MA, 2011, p. 315.

14 *Ibid.*, p. 330.

is dark and very widespread, however, and if it is protected from cleansing through politics, then political obligation lapses entirely.¹⁵

If we deem a policy unjust, we will evaluate its legitimacy by asking whether the government did its best to meet the requirements of equal respect and equal concern. Our reflection does not remain focused on the policy in question only. We need to assess the policy against the background of a comprehensive institutional, historical, and moral analysis of our democracy. In the first step, we identify the institutions that comprise the political regime: basic rights, the separation of powers, political pluralism, independent judiciary, free media, free economy, and the like. Next, we look at our history, and we find that the record of those institutions is maybe not spotless, but it could be still regarded as decent enough in the perspective of the two principles. The policy we oppose adds another spot. Still, we may conclude that there is a hope that – if we as the citizens insist strongly enough – the state might stop erring and return to the right track, which is the track of respect for human dignity.¹⁶ However, the second scenario is also possible. Our reasoning and deliberation may lead us to conclude that the accumulated stain is too widespread and dark; the government is not legitimate anymore. If this is the result of our considered judgement, our political obligation dissolves.

8.3 SOCIAL MOVEMENTS IN ACTION: INDIGNADOS AND BENI COMUNI

Dworkin's choice for citizens confronted with injustice in the condition of crisis is ultimately simple: either give your government a benefit of doubt and fight for justice *within* the system, or stand up and fight *against* the system. Some of the most visible social movements of the recent years opted for the latter. They did so because they found 'the stain dark and very widespread.' Injustice has become so pervasive that it requires rejecting the legitimacy of constitutional democracy altogether and abandoning political obligation. Let us consider two examples.

8.3.1 *Indignados*

The Spanish association of social movements, called the *Indignados (The Outraged)*, emerged in the mid-2000s as a combination of different actions of protest against the way the European Union and Spanish government dealt with the economic and social crisis

¹⁵ *Ibid.*, p. 323.

¹⁶ *Ibid.*, p. 322.

in the country.¹⁷ One of the *Indignados*' constituents was *The Platform for Mortgage Victims*. The *Platform* movement was formed to resist the evictions of people who could not pay the mortgages on their homes. It speaks for hundreds of thousands of victims of Spain's housing crisis.¹⁸ For analytical purposes, it is worth observing shortly the dynamics of the movement's actions. It first tried to talk to government, requesting the change of the Spanish draconian mortgage laws. It failed. Then, it tried to negotiate with the banks. It failed again.¹⁹ In response, the movement engaged in different actions of civil disobedience, organizing '*escraches*' ('unmasking') campaigns, which consisted of protests in front of the homes and offices of bankers and MPs of the ruling Popular Party.²⁰ The government reacted by denouncing the actions as 'pure Nazism,' 'ETA bullying,' and 'the worst totalitarianism in history.'²¹

The pattern that led to the core political position of the movement is easy to identify. Attempts to change a deeply unjust policy fail because the regime keeps defending that policy. When confronted with the citizens' perception of injustice, the regime prefers increased coercion over dialogue. The regime strategy produces two major consequences. First, it further deepens the sense of injustice among the affected population and the citizenry. Second, by refusing to deliberate with citizens on the points of contention, the regime rejects the core demand of democratic political legitimacy. In consequence, the *Indignados* argue that the regime illegitimacy is irreparable, which leads them to reject political obligation. Originally, this rejection entailed the refusal to confront the government, in favour of a 'parallel polis' of a sort, which would follow its own principles, rules, modes of organisation, and directions of action.²² The regime's accusations of the movement's violation of the law were rejected as irrelevant – 'strangers at the gate' saw their position as a-legal.²³

Recall that challenging the government is not the sole strategy of social movements. It is equally important to spread the message to fellow citizens. While the confrontation with the regime typically combines the claim of injustice with the denial of the regime's legiti-

17 E. Castaneda, "The Indignados of Spain: A Precedent to Occupy Wall Street", *Social Movement Studies*, Vol. 11, No. 3-4, 2012, p. 309.

18 J. Sunderland, "Spain's Attacks on Fighting Back", *Open Democracy*, 17 May 2013, <www.opendemocracy.net/judith-sunderland/spain%E2%80%99s-attacks-on-fighting-back>.

19 E. Romanos, "Evictions, Petitions and Escraches: Contentious Housing in Austerity Spain", *Social Movement Studies*, Vol. 13, No. 2, 2014, p. 297.

20 E. Goatt, "Performing Popular Justice: From the Disappeared to the Outraged", *Open Democracy*, 19 December 2014, <<http://www.opendemocracy.net/elliott-goat/performing-popular-justice-from-disappeared-to-outraged>>.

21 CIDOB, "Profile: The Mortgage-Affected Citizens Platform, a Grassroots Organization at the Forefront of the Social Protests", <<http://creativecommons.org/licenses/by-nc-sa/3.0/deed.es>>.

22 The movement's attitude to politics will later change, leading to the creation of the *Podemos* party. I return to this dynamic in Section Four.

23 Castaneda 2012, p. 312.

macy, the address to the rest of the population appeals to solidarity and integration around the right and just causes. The *Indignados Manifesto*²⁴ opens with a strikingly simple claim that points to the interpretive core of the socially constructed shared identity: ‘We are ordinary people. We are like you.’ It concludes by pointing to the interplay between individual and collective identity: ‘I am outraged. I think I can change it. I think I can help. I know that together we can.’ This identity-based call for solidarity of the *Manifesto* can be decoded along the lines of Tilly’s ‘WUNC’ message.

‘We are worthy,’ reads:

We are anonymous, but without us none of this would exist, because we move the world.

‘We are united,’ reads:

We are all concerned and angry about the political, economic, and social outlook that we see around us: corruption among politicians, businessmen, bankers, leaving us helpless, without a voice.

‘We are numerous,’ reads:

Democracy belongs to the people, which means that government is made of every one of us.

‘We are committed,’ reads:

These are inalienable truths that we should abide by in our society: the right to housing, employment, culture, health, education, political participation, and free personal development.

These are the symbolic claims of unity, commitment, relevance, and rightness. Social movements first have to demonstrate that they oppose injustice. Second, they have to act against injustice. When acting against the unjust and illegitimate regime, they have a difficult decision to make. It concerns the question of whether their refutation of the existing regime should be followed by explicating the contours of an alternative. I will return to this problem in Section 4.

24 *Manifesto*, <www.democraciarealya.es/manifiesto-comun/manifiesto-english/>.

8.3.2 *Beni Comuni*

The Italian movement *Beni comuni* (the Common Goods, or the Commons) offers an attempt at a normative, socio-economic, legal, and political articulation of dissent. The movement emerged from the concerted action of citizens, civil society groups, and scholars, who came together to protest against the practice identified and denounced as the reckless neo-liberal privatisation.²⁵ Even the government realised the gravity of the problem created by the rampant privatisation of traditionally public services. In 2007, Prime Minister Romano Prodi established Rodota commission,²⁶ a body of legal scholars charged with the task to propose reforms to the Civil Code that would better define public property and protect public interest. The commission came up with a radical proposal: to establish the common goods as a legal category different from both private and public property, and to give it a special legal protection. The proposal was shelved, but the concept survived. The core claim of Rodota lawyers is simple: the commons are the resources that should be equally accessible to all. Think of water, forests, or clean air. They should belong to everybody, and to no one specifically. Property is not the appropriate legal category for handling the commons. Garret Hardin was wrong: the commons do not necessarily end up in tragedy.²⁷ Elinor Ostrom was right: the commons require self-government that would focus on the common work and distribution of its rewards.²⁸

The regime persisted in the privatisation program. In 2009, the government of Prime Minister Silvio Berlusconi issued a decree ordering privatisation of all services provided by local governments: public transportation, garbage collection, water services, and nurseries.²⁹ Social movements, acting in concert with Rodota scholars, responded with a referendum initiative. One of the referendum questions was ‘water referendum,’ which proposed abolishing the governmental decree on the privatisation of water services. It took much legal and political struggle before the Constitutional Court finally approved the questions. In June 2011, 54% of registered voters went to polls, with 95% of them rejecting the privati-

25 Between 1992 and 2000, Italy was the world leader of privatisation, the privatised assets in that period being worth roughly € 140 billion. For the period between 1979 and 2008, Italy comes second worldwide (after Great Britain) in the value of privatisations. See S. Bailey & U. Mattei, “Social Movements as Constituent Power: The Italian Struggle for the Commons”, *Indiana Journal of Global Legal Studies*, Vol. 20, No. 2, 2013, p. 970.

26 This body was named after its chair, law professor Stefano Rodota. See U. Mattei, “Protecting the Commons: Water, Culture, and Nature: The Commons Movement in the Italian Struggle against Neoliberal Governance”, *The South Atlantic Quarterly*, Vol. 112, No. 1, 2013, p. 368.

27 G. Hardin, “The Tragedy of the Commons”, *Science*, Vol. 162, No. 3859, 1968, p. 1244.

28 E. Ostrom, *Governing the Commons. The Evolution of the Institutions for Collective Action*, Cambridge University Press, Cambridge, 1990, pp. 25-26: ‘What is missing from the policy analyst’s tool kit – and from the set of accepted, well-developed theories of human organization – is an adequately specified theory of collective action whereby a group of principals can organize themselves voluntarily to retain the residuals of their own efforts.’

29 Mattei 2013, p. 371.

sation of water services.³⁰ The idea of the commons made its inroad into the social and political reality. For *Beni comuni*, the referendum vote meant more than successful resistance to privatisation; it signified the creation of a new type of political and social solidarity among citizens and their associations.³¹

On 14 June, a day after the referendum, employees seized Rome’s oldest theater, Teatro Valle. The theatre was in financial difficulties, and the municipal government planned its privatisation. The first message of the occupiers to the outside world was that culture is the common good, just like water or air. Although the occupation was originally envisaged as a symbolic act of protest and support for referendum, it soon developed into a much more ambitious practice. A new movement was born, *The Occupied Teatro Valle*, which embarked on transforming Teatro Valle into a new form of commonality: *The Foundation of the Commons*. *The Foundation* proposes a radical societal and political alternative:

The Foundation Teatro Valle as Commons is an economic and juridical alternative model based on the self-government of the workers of art and culture and the citizens and on a direct democratic system.³²

Observe first the bottom-up direction of the envisioned process. Observe also that it is supposed to start as a self-rule within a narrowly identified field of culture. In the next step, it should spread horizontally to the citizens. The principal means of such horizontal societal integration would be direct democracy. This choice requires a complete ‘economic and juridical alternative.’ In the rest of the chapter, I focus on the questions of the meaning, agency, and reach of the alternative.

8.4 LAW, POLITICS, AND CONSTITUENT POWER

8.4.1 *The Critique of Capitalism*

Social movements responded to the crisis by requesting more than remedy to injustices. Departing from a radical critique of the context, they required abandonment of the existing social and political regime. The core interpretive stance is simple. Liberty, equality, justice,

30 Bailey & Mattei 2013, p. 967.

31 D. Gentili & A. Mura, “The Austerity of the Commons: A Struggle for the Essential”, *Open Democracy*, 24 February 2014, <www.opendemocracy.net/can-europe-make-it/dario-gentili-andrea-mura/austerity-of-commons-struggle-for-essential>.

32 *Teatro Valle Occupato. One Year and a Half of Commoning*, <www.teatrovalleoccupato.it/teatro-valle-occupato-one-year-and-half-of-commoning-english-version>.

and true democracy are destroyed by the joint efforts of liberal states and private corporations:

The sovereign State and corporate private ownership... share a model of concentration of power and of exclusion that has incrementally squeezed the public interest outside of constitutional law by an imbalance favoring the guarantees of private property over those of democracy.³³

The crisis has stripped liberal constitutional democracy to its coercive essence. The apparatus of formalised violence works in concert with unrestrained global economic and financial forces, to affirm social and political status quo. Private and public properties contribute jointly to shaping the alienated and corrupt rule of the capital. Consequently, the classical liberal distinction between the private and public realms has become irrelevant:

In this post-crisis landscape, the very distinction between the public and the private sectors is becoming all but senseless, as visible in ... conflicts of interest that reveal the blatant collusion between state actors and the global ruling elite who profit from privatizations.³⁴

Individuals – taken severally, or as members of classes, groups, and political communities – are the primary victims of this constellation. In a colorful phrase of Michael Hardt and Antonio Negri, human beings are made into a mass of subjects who are ‘indebted, media-tized, securitized, and represented.’³⁵ Capitalist collectivisation has deprived individuals of their subjectivity. This critical claim is followed by an interpretive question: how to understand the consequences of the vanishing of the self-governing individual agency? Does the capitalist alienation require forsaking personal autonomy and constitutional rights as useless illusionary foundations of the democratic life together? This seems to be a point of contention among social movements, which reveals differing views of alternative law and politics. The *Indignados*’ moralism stopped short of questioning the normative foundations of democracy. As the above quotes from the *Manifesto* suggest, their account of agency combines respect for individual autonomy, new interpretation of genuine collective interest, and a radical critique of the institutional performance of Spanish democracy. This stance made it possible for the movement to overcome relatively painlessly its original

33 Anonymous, “Commons & Constituent Power: Notes from the Social Movements and the Struggles in Italy”, 7 November 2013, <www.globalproject.info/it/in_movimento/commons-constituent-power-notes-from-the-social-movements-and-the-struggles-in-italy/15667>.

34 Bailey & Mattei 2013, p. 973.

35 M. Hardt & A. Negri, *Declaration*, 2012, p. 13, <<https://antonionegriinenglish.files.wordpress.com/2012/05/93152857-hardt-negri-declaration-2012.pdf>>.

anti-political attitude and to participate in the EU elections of 2014 and Spanish local elections of 2015, without compromising its values and goals. In this regard, *Indignados* remain largely unaffected by the radical critical position that rejects the legitimacy of political representation and the constitutional state as a whole.³⁶

The interpretation of reality offered by *Beni comuni* is more radical. The old Marx's diagnosis apparently still holds: liberal rights are nothing but constitutional juridical illusions that serve to mask the power relations.³⁷ Ugo Mattei, the leading scholar of the movement, draws a drastic inference. The concept of individual autonomy and the core modern institution of individual rights should be discarded:

The commons are radically incompatible with the idea of individual autonomy as developed in the rights-based capitalistic tradition.³⁸

This is a bold attempt to revisit the normative underpinnings of democracy – its core values, agency, and the relationship between political and social. Mattei distinguishes between strategic choice and genuine goals of the movement. On the one hand, the point is to break the law in order to challenge the regime and to demonstrate to the wide public why the movement holds the regime illegitimate. On the other hand, the movement's 'attitude towards institutions of the state is often strategic, contingent and opportunistic.'³⁹ Mattei specifies this attitude as 'the enforcement of national constitutional protections ... through counter-hegemonic uses of the law.'⁴⁰ The rejection of the authority of the state and law is coupled with the claim of fidelity to the basic normative premises of the constitution of the regime that is being opposed. The strategy is exemplified in the *Vale Statute*:

The Commons are a new legal category, independent from ownership, directly linked to the values enshrined in the Constitution...

36 In 2012, while the *Indignados*' stance was still firmly anti-political, Alan Badiou criticised their demand for 'real democracy' as 'too internal to the established democratic ideology'. At the same time, he praised the movement's proclamation of 'the utter vacuity of the electoral phenomenon, and hence of representation.' – A. Badiou, *The Rebirth of History. Times of Riots and Uprisings*, Verso, London, 2012, p. 99.

37 For an analysis of theoretical disputes regarding 'the day after', see C. Douzinas, "Radical Philosophy Encounters the Uprisings", in R. Celikates *et al.* (Eds.), *Transformations of Democracy: Crisis, Protest and Legitimation*, Rowman & Littlefield, Lanham, MD, 2015, p. 65.

38 U. Mattei, "The State, the Market, and Some Preliminary Questions about the Commons", 2011, <http://works.bepress.com/ugo_mattei/40/>.

39 Bailey & Mattei 2013, p. 978.

40 *Ibid.*, p. 1012.

A public authority that seeks to privatize the Commons, betrays its constitutional mandate. Occupation is a justified response in light of the Italian Constitution.⁴¹

But, for a movement that aims at a deep change, strategic use of constitutional essential and existing institutions can be only an intermediary step. Justifying the break from the reality of the existing law and politics requires a principled stance. This is where the question of novelty arises.

8.4.2 *Denying the Relevance of the Alternative*

It is possible to identify two broad approaches to the question of novelty. Some scholars reflect on the positive contours of a genuine democratic politics. They ask about the character of a new political community, its agents, institutions, norms, and processes. Others insist that these are not the legitimate questions for social movements. Let us explore shortly the latter approach. Alan Badiou writes:

The movement is forever being asked: What is your programme? But the movement does not know... It subordinates the results of action to the value of the intellectual activity of action itself, not to the electoral categories of a programme and results.⁴²

Badiou combines militant philosophical anarchism with a metaphysics of action. First, he denies any possibility of establishing and upholding state legitimacy. The state, regardless of its governmental form, is the site of denial of humanity:

Let us call these people, who are present in the world but absent from its meaning and decisions about its future, the *inexistent* of the world... The state is an extraordinary machine for manufacturing the *inexistent* through death (the history of states is essentially a history of massacres), but not exclusively so. The state is capable of manufacturing the *inexistent* by imposing a figure of identitarian normality, 'national' or otherwise.⁴³

41 *Statute of Teatro Valle Bene Comune*, <www.teatrovalleoccupato.it/teatro-valle-occupato-one-year-and-half-of-commoning-english-version>.

42 Badiou 2012, p. 99.

43 *Ibid.*, pp. 55, 71.

Second, the protest is essentially the return of the *inexistent* to the world, or the affirmation of their existence through an unmediated and clearly visible presence on the sites of the protests.⁴⁴ The protest is a collective performative action in the shape of an *event*, which reveals the repressed truth of the existence of those whom the state rendered invisible.⁴⁵ The event ‘gives a determinate existence to something that inheres as a pure power or capacity to exist in and through expression.’⁴⁶ The movement has nothing to say about the future order. It lives only through its presence here and now, revealing ‘what is true in the situation.’⁴⁷

A comparable view is defended in a volume that explores the lessons of the *Occupy* movements:

Notions of individual freedom, creativity, personal fulfillment and work-life balance now service capital, while concepts of disorganization and lack of clear ends might be genuinely resistant.⁴⁸

Diversity is a strategy, a methodology and an objective; any attempt to impose a master narrative is seen as a type of violence done to the myriad micro-struggles represented in the lived struggles of the movement’s members. The question often put to the occupiers, ‘What exactly do you want?’, is thus viewed as illegitimate, an attempt to delegitimize, belittle and close minds.⁴⁹

This interpretation says: we do not identify and confront the crisis in order to establish or restore any type of tomorrow’s normalcy. Specifying a future-looking goal would imply succumbing to the recognition of the finite realm of reality. This would be wrong, because only performance counts.⁵⁰ The intention is to remain in the uninhibited self-referential present: this is why diversity can be ‘a strategy, a methodology, and an objective’ simultaneously. In difference to Badiou, who insists on the centrality of the event-specific truth, this reading denies the legitimacy of any attempt to reconstruct the substantive normative core of resistance. Identifying the movement’s truth regime would come down to closing

44 *Ibid.*, p. 57.

45 *Ibid.*

46 S. Gillespie, *The Mathematics of Novelty. Badiou’s Minimalist Metaphysics*, Re-Press, Melbourne 2008, p. 27.

47 Badiou 2012, p. 59.

48 C. Colebrook, “Resistance to Occupy”, in A. Conio (Ed.), *Occupy. A People yet to Come*, Open Humanity Press, London, 2015, p. 129.

49 A. Conio, “Introduction”, in Conio (Ed.), 2015, p. 36.

50 ‘...Direct democracy means producing a body politic whose semantic (“we are the people, we are equal, free, and deserving of respect in our precarity and solidarity”), pragmatic (the act of respecting and supporting each other the assembly performs), and affective (the joy felt in collective action) registers resonate in spiralling, intermodal feedback.’ – J. Protevi, “Semantic, Pragmatic, and Affective Enactment at OWS”, in Conio (Ed.), 2015, p. 94.

down its inherent openness. However, this implies that the very critique of capitalism becomes impossible. If the question ‘what do you want?’ is discarded as a bad ideology, the insistence on the exclusivity of the performative process is equally ideological.⁵¹

These theories, with all their internal discrepancies, remain focused on protecting the purity of own-doctrinaire utopian militancy at the expense of the analytical scrutiny of its subject. They fail to see that resistance is not a virtue in itself. To pass the legitimacy test, social movements have to turn to the old Hannah Arendt lesson: liberation from the chains of a discredited regime should be followed by the new constitution of freedom.⁵²

8.4.3 *Novus ordo saeculorum*

Some authors share Arendt’s concern for the new order of freedom. A challenge to the old world makes sense only if it is accompanied by an idea of what ought to be done once the chains are broken. The movements are forms of *constituent action*. They should create something new. One important question asks whether we should distinguish acts of resistance as ‘constituent moments’ from the subsequent constitutional processes.⁵³ The question does not concern only the distinction between constituent and constituted powers. Dualism between constituent moments and constitutional processes implies also the possibility of differentiating between the radical revolutionary action, on the one hand, and lasting fidelity to the constituent principles within an *order* that follows the change, on the other. This is Arendt’s position. She argues that balancing the principled character of the new beginning and lasting fidelity to ‘the revolutionary tradition’ is the only way to overcome the tension between the constituent moment and the stabilised regime with its constituted powers.⁵⁴ I will return to this point. Before that, I will examine the argument that the essence of novelty should consist in the ongoing activism of constituent power.

A critique maintaining the irreparable breakdown of social justice and political legitimacy has to come up with a right understanding of the social relations, politics, law, and democratic agency:

[...] A community of individuals or social groups are linked by a horizontal mutual connection to a network where power is dispersed; generally rejecting the idea of hierarchy (and competition, produced by the same logic) in favor

51 S. Žižek, *The Year of Dreaming Dangerously*, Verso, London, 2012, pp. 83-86.

52 H. Arendt, *On Revolution*, Penguin Books, Harmondsworth, 1973, pp. 31-32.

53 G. Ciccariello-Maher, “Constituent Moments, Constitutional Processes: Social Movements and the New Latin American Left”, *Latin American Perspectives*, Vol. 40, No. 3, 2013, p. 127. See also U. Baxi, “Preliminary Notes on Transformative Constitutionalism”, in O. Vilhena *et al.* (Eds.), *Transformative Constitutionalism*, Pretoria University Press, Pretoria, 2013, p. 23.

54 Arendt 1973, p. 232.

of a participatory and collaborative model, which prevents the concentration of power in one party or entity, and puts community interests at the center.⁵⁵

The alternative points to all-encompassing solidarity. Solidarity is a collectivist and horizontal process of the life together that affirms genuine liberty, equality, social justice, mutual respect, and care among interconnected actors. This process refuses to be structured into a legal and political order. The ‘we-perspective’ ought to enjoy primacy, but this new collectivism would not repress individuality. We who are oppressed and liberally-capitalistically individualised (‘indebted, mediatized, securitized, and represented’), first have to comprehend the necessity of rebelling against the unjust condition. Next, we have to realise that both rebellion and positive alternative are possible only if we learn to communicate in a new way, as equals joined into an alternative ‘singularity.’ This is the first meaning of the term *the multitude*: true individual freedom and equality work only in the condition of genuine commonality.⁵⁶

More questions follow: ‘How does a plurality form? ... Who enters this plurality, and who does not, and how are such matters decided?’⁵⁷ The formation of the multitude happens in a public space taken from the regime. The place of protest is the space of appearance.⁵⁸ The agency is identified in the course of rebellion, which is the first stage of the revolutionary constituent process. Similar to Sieyes’ Third Estate, the new agency is composed of those who are ‘inexistent,’ ‘unreal,’ or ‘excluded’ under the capitalist regime. At work is the process of ‘empowering collective experience... in which plurality and creativity come together in the emergence of new political subjectivities.’⁵⁹ The multitude differs from the people, whom liberal theory and practice recognise either as a group with a pre-political substantive identity (ethnos), or as a group with a legal identity (demos). In both cases, the people are wrongly presented as being composed of individuals. Once the category of the autonomous individual is rejected as the corrupt modernist notion, the concept of the

55 Mattei 2011.

56 ‘A singular subjectivity discovers that there is no event without a recomposition with other singularities, that there is no being together of singular subjectivities without rebellion. A process of singularization is thus incarnated: a self-affirmation, a self-valorization, and a subjective decision that all open toward a state of being together. All political movements are born this way: from a decision of rupture to a proposition of acting together.’- Hardt & Negri 2012, p. 32.

57 J. Butler, “Bodies in Alliance and the Politics of the Street”, Lecture held in Venice, 7 September 2011, <www.eipcp.net/transversal/1011/butler/en>.

58 *Ibid.* Butler relies on Hannah Arendt. See H. Arendt, *Human Condition*, University of Chicago Press, Chicago, 1958, p. 199: ‘The space of appearance comes into being wherever men are together in the manner of speech and action, and therefore predates and precedes all formal constitution of the public realm and the various forms of government, that is, the various forms in which the public realm can be organized.’

59 R. Celikates, “Learning from the Streets: Civil Disobedience in Theory and Practice”, in P. Weibel (Ed.), *Global Activism. Art and Conflict in the 21st Century*, MIT Press, Cambridge, MA, 2015, p. 70.

people has to be deserted as well.⁶⁰ In difference to the modern vision of political emancipation of the nomadic abstract individual, the formation of the multitude is a bottom-up process that begins and proceeds as emancipation of the genuine commonality composed of concrete human beings.

The constitution of politics follows from here. Instead of the fake rule of law and the ritual separation of powers, the power would be dispersed in complex networks of unmediated human interactions. The hierarchical order of liberal law and politics would be replaced by the organisational principle of 'horizontalism.' Instead of political representation, which truly represents only the socially privileged tiny minority, there would be direct democracy.⁶¹ Solidarity, horizontalism, and self-government of the multitude imply that 'social movements are expanding our understanding of politics as something more than a set of actions taken in formal political arenas.'⁶² This is yet another contribution to the idea of dejuridification of politics. Politics is not reducible to a set of processes unfolding within a given institutional framework, where rules and decisions would be made following the pre-established procedures. New politics would not be about pluralism, deliberation, competition, and decision making within the known and accepted rules of the game. The true politics, according to Antonio Negri, comes down to an unhindered ability of the multitude to engage in an uninterrupted creation of the new life. Or, politics is a 'dynamic, creative, continual, and procedural constitution of strength.'⁶³

What can we learn from here? First, the new democratic politics equals the self-governing existence of the multitude. Second, it does not simply produce a new life; it *always* produces a new life. The democratic politics is continually constituent. To constitute does not mean to create the highest act in order to proceed living under its terms. It, rather, means to live in the permanent constituent process. Democratic politics is the constituent power at never-ending work. Constituent power is free, self-organising, unmediated, and the permanent ability of the multitude to define the terms of their life together. This radical democratic self-organisation of society looks almost like a permanent revolution.⁶⁴

60 For a detailed analysis of this argument, see R. Day & N. Montgomery, "Letter to a Greek Anarchist: On Multitudes, Peoples, and New Empires", in A. Kioupiolis & G. Katsambekis (Eds.), *Radical Democracy and Collective Movements Today: The Biopolitics of the Multitude versus the Hegemony of the People*, Ahgate, Farnham, 2014, p. 46.

61 The question of legitimacy of political representation remains a matter of disputes among scholars who study radical democracy. See e.g. M. Prentoulis & L. Thomassen, "Political Theory in the Square: Protest, Representation and Subjectification", *Contemporary Political Theory*, Vol. 12. No. 3, 2013, p. 168; A. Azmanova, "The Right to Politics and Republican Non-Domination", *Philosophy and Social Criticism*, Online First, 2015, pp. 5-6, <<http://psc.sagepub.com/content/early/2015/12/29/0191453715623394.full.pdf+html>>.

62 Bailey & Mattei 2013, p. 976.

63 A. Negri, *Insurgencies. Constituent Power and the Modern State*, University of Minnesota Press, Minneapolis, MN, 1999, p. 334.

64 R. Geenens *et al.*, "The 'Co-Originality' of Constituent Power and Representation", *Constellations*, Vol. 22, No. 4, 2015, p. 517.

How to make sense of these appealing slogans? Maybe we can try a fast-track comparison with the theories of constituent power that are considered radical-democratic. For instance, the theories of Emmanuel Sieyès, Carl Schmitt, and Bruce Ackerman differ in many crucial respects, but their approaches to constituent power qualify as radical democratic, because they do not allow for the domestication of constituent power in the constitutional regime. These writers insist that constituent power cannot be lastingly tamed by legal rules, or ‘juridified.’ However, in view of the argument we explore, the radical democratic potentiality of these readings is fatally damaged by several flaws, which a truly democratic constituent power has to avoid. The first error is in their conditional acceptance of the interplay between constituent and constituted powers. Second, the fact that they see normalcy and its politics as a legally defined (‘constituted’) condition implies that the activation of the people as the constituent power is an extraordinary event. Constituent power remains a one-time affair, which signifies a new beginning and which is active only in times of an acute crisis. Third, they all rely on political representation as the embodiment of the constituent power of the people: the constituent assembly in Sieyès,⁶⁵ the sovereign in Schmitt,⁶⁶ or any institution that identifies and seizes the constitutional moment in the time of crisis, in Ackerman.⁶⁷ Constituent power becomes mediated.⁶⁸ Fourth, they wrongly retain the concept of sovereignty. Sovereignty has to be abandoned altogether: in a society of equals based on horizontalism and solidarity, there cannot be room for the highest power. These writers further err in ascribing the ultimate power to the people, which is the category that has to be discarded in favour of the multitude.⁶⁹ Finally, Sieyès, Schmitt, and Ackerman accept the constitution as the highest act, while insisting that it cannot and should not constrain the holder of the constituent power.

The theory of the multitude differs. It rejects normal politics within the constitutional framework altogether, and it insists on the constant presence and unquestionable primacy of constituent power. It discards liberal limited government under the rule of law not only because constitutionalism is revealed as a formalised embodiment of the capital. Centrally,

65 E. Sieyès, “What is the Third Estate?”, in his *Political Writings: Including the Debate between Sieyès and Tom Paine in 1791*, Hackett Publishing, Indianapolis, IN, 2003, p. 143.

66 C. Schmitt, *Constitutional Theory*, Duke University Press, Durham, NC and London, 2008, pp. 75-80, 125-132.

67 B. Ackerman, *We the People. Foundations*, Belknap Press, Cambridge, MA, 1991, pp. 3-33.

68 This also holds for many among contemporary radical-democratic theories of constituent power. See e.g. J. Colon-Rios, *Weak Constitutionalism. Democratic Theory and the Question of Constituent Power*, Routledge, London, 2012; A. Kalyvas, *Democracy and the Politics of Extraordinary. Max Weber, Carl Schmitt and Hannah Arendt*, Cambridge University Press, New York, 2008; A. Kalyvas, “Constituent Power”, *Political Concepts. A Critical Lexicon*, Vol. 3, No. 1, Winter 2013, <www.politicalconcepts.org/constituentpower/>.

69 ‘... Designation of a unified political entity of the “people” is instrumental to the nullification of the pre-political subjectivity of the “Multitude” and the conflation of the popular political will as the will of the sovereign; robbing the “Multitude” of their ongoing constituent role in the constitutional process.’ Bailey & Mattei 2013, p. 971.

to limit government by law means to illegitimately constrain democracy. The legal constitution and its constitutionalist principles are unacceptable because they personify the closed legal hierarchy of the order and its constituted powers.

This theory suffers from a mechanical dualism between perceived state rigidity and self-assumed spontaneity.⁷⁰ This dualism seems to be amplified by the ambiguity in defining the agency: the commons reject any essentialism and they cannot be perceived as a clearly identifiable body.⁷¹ *Beni Comuni* and Negri do not stop at the critique of the system that forces false (re-)presentation of the real people, which is the problem that Marx readily addressed in the *Critique of Hegel's Doctrine of the State*.⁷² They do not merely reject the concepts of an autonomous individual as the right holder, and the people as the sovereign collective subject. Their stance has a deeper foundation: projected dynamism of the new lifeworld makes it impossible to identify agency in the received modern sense. We should not try to understand this claim by referring to the context dependence and contingency that feature heavily in social movements. This theory does not aim at justifying social movements, but at reconceptualising society and politics. A deep commitment to the revolutionary project that strives to build a fully novel human condition does not emerge primarily from a contextually-shaped reactive attitude to a historically-socially contingent challenge. Contingency is just a trigger of the change.

At this juncture, we can return to the Arendt claim outlined at the beginning of this section. Both the constitutional moment and constitutional life of the multitude would be guided by principles. Hardt and Negri in *Declaration* argue that 'the multitudes, through their logics and practices, their slogans and desires, have declared a new set of principles and truths.'⁷³ The practices of the movements 'provide a series of constitutional principles that can be the basis for a constituent process.'⁷⁴ This is problematic. Arendt's cryptic reference to the principles in the closing pages of *On Revolution* aims at conceptualising a new beginning capable of overcoming the circularity problem ('the paradox of the constituent power'). What saves the act of the beginning from arbitrariness 'is that it carries its own principle with itself, or to be more precise, that beginning and principle are not only related to each other but are coeval.'⁷⁵ This first means that the act of revolutionary liberation from the chains of the old order has to be a principled action. In other words,

70 I borrow this from P. Canivez, "The Idea of Transnational Democracy", Chapter 2 in this volume.

71 V. de Lucia, "Law as Insurgent Critique: The Perspective of the Commons in Italy" <<http://criticallegalthinking.com/2013/08/05/law-as-insurgent-critique-the-perspective-of-the-commons-in-italy/>>.

72 'Democracy is the solution to the riddle of every constitution. In it we find the constitution founded on its true ground: real human beings and the real people; not merely implicitly and in essence, but in existence and in reality. The constitution is thus posited as the people's own creation. The constitution is in appearance what it is in reality: the free creation of man.' – K. Marx, "Critique of Hegel's Doctrine of the State", in K. Marx (Ed.), *Early Writings*, Penguin, London, 1974, p. 87.

73 Hardt & Negri 2012, p. 5.

74 *Ibid.*, p. 13.

75 Arendt 1973, p. 212.

the very act of overthrowing the old order should unfold as the political action, as an exercise of public freedom of those who are politically equal.⁷⁶ Principles are *immanent*, as values internal to action.⁷⁷ Second, Arendt does not reject legal and political order. She insists on the new criterion of their normative legitimacy and proposes a strategy of continuity. Legitimacy of an order hinges on its continuous affirmation of the same principles of action that justified the revolutionary change. The legal constitution matters. Its task is to constitute the realm of freedom as the realm of public communication among peers committed to public good.⁷⁸

Hardt and Negri insist on a different strategy of overcoming the paradox of constituent power. The strategy comes down to the continuous presence and activism of the multitude. This idea remains somewhat frustratingly elusive. How shall we understand a polity based on the demand that the constituent power of the multitude should be acknowledged and sustained as the essence of the new type of social and political commonality? What does it mean to say that all politics must equal constituent power at work? Why legitimacy of democracy hinges on the permanent affirmation of the multitude?

8.5 CONCLUSION: CRITICAL REMARKS

Here is where I stop my search for a conceptualisation of the alternative. I could not find it. Thus, I turn to a critical summary. I tried to offer – an admittedly sketchy – close reading of a very interesting interplay of practice and theory. The core originality – and, at same time, the core weakness – of this approach is twofold. First is its apparent inability to formulate a positive stance beyond utopian claims, or to articulate an alternative that would have a clear social, legal, and political shape. To say that law and politics have to be different does not suffice, unless one is capable of stating what it really entails.

Second, we can perhaps identify the source of this deficit in the insistence on the continuous dynamism. Activism is indeed one of the central features of social movements: they live as long as they act. Still, movements typically have clearly demarcated definite goals. Besides, their action cannot be taken as a blueprint for the common life in society. Apart from the exalted episodes of extraordinary action, the life together is an interplay of dynamics and stability. It means, on the one hand, that society can never be fully open. On the other hand, a democratic order does not strive towards clearly specified goals: it is open-ended. However, the analysed theory raises the stakes. Its insistence on the continuous dynamism implies giving up stability of the order. We, the multitude, exist only

⁷⁶ Arendt 1958, p. 175.

⁷⁷ 'Principles of action are immanent as they emanate solely from the constitutive practice.' – A. Kalyvas, "Popular Sovereignty, Democracy, and the Constituent Power", *Constellations*, Vol. 12, No. 2, 2005, p. 68.

⁷⁸ Arendt 1973, p. 229.

through action. This continuous action is also presented as the core condition of the very possibility of freedom.

This is a vision of unbroken self-government beyond the state and sovereignty. The latter point is once again Arendtian: she argued that sovereignty should be abandoned as something that belongs to the repository of the used-up political concepts. But, Arendt was aware that this move would require a reconceptualisation of political authority. In this theory, however, the question of the character of authority remains unclear. Arendt also distinguishes between a new beginning guided exclusively by the authority of principles, on the one hand, and normal politics in which both authority and the citizenry are supposed to demonstrate fidelity to these principles in political action under valid legal rules, on the other hand. The distinction between a new beginning, or a foundational act, when constituent power is at work, and the constitution of political life guided by the right values and principles and framed by the legal rules, has to be preserved.

The idea of dismantling the rulers-ruled divide is a noble dream indeed, but no more than that. We have all the good reasons to despair over the fallacies of modern democracies, and to be disgusted over the cynicism of combined economic and political power. And we have all the good reasons to ask what is to be done. Our approach should be both analytical ('What we have when we have crisis and injustice?' 'What can we do about the crisis?'), and normative ('What is the right thing to do?'). Responding to these and related questions requires identifying both the right principles, and the criteria of right and wrong ways of doing things. In political communities, this question rides on the back of another one: what types of legal and political arrangements are most conducive of the identification and implementation of the right choices? The ultimate justification of any authority, state or post-state, remains consequentialist: to protect and create room for the advancement of moral equality and dignity of every human being. The meaning of democratic authority cannot consist in creating a sustainable arrangement that would approximate or in any feasible way do justice to the ideal of the rule of the people, or of the multitude. There is nothing intrinsically right in the unmediated rule of those whom conventional theory identifies as subjects. The mere fact that we are the people, or the multitude, or ruled, does not make us morally superior. We as subjects are morally superior only if our stance is right and the government's stance is wrong. If, today, reestablishing moral equality requires completely denying the legitimacy of government, then let us do it. But this revolutionary act would not solve the riddle of moral rightness. The theory of the multitude may be formidable in its resistance to the cynical might of the powerful. But it fails to address the question of what it means to live well.

9 A RIGHTS-BASED JUSTIFICATION OF THE PARTICIPATION OF CIVIL SOCIETY IN EUROPE

Stephan Kirste

9.1 INTRODUCTION

Participation belongs to the European cultural and political heritage from which the EU draws inspiration, which it respects and to which it is committed.¹ Although the Lisbon Treaty did not adopt the full-fledged conception of ‘Participatory Democracy’ from the Treaty establishing a Constitution for Europe (Art. I-47), both the Treaty on European Union and the Treaty on the Functioning of the European Union contain elements of this principle. The treaties present a number of organisational and procedural rules institutionalising this principle. Art. 11 I TEU outlines the ‘horizontal dialogue,’ in which the European institutions are obligated to give European ‘citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action’ by appropriate means. Art. 11 II TEU obliges the institutions in the ‘vertical dialogue’ to ‘maintain an open, transparent and regular dialogue with representative associations and civil society.’ A ‘cultural dialogue’ is envisaged in Art. 17 III TFEU. In recognition of their identity and their specific contribution for a European culture, European Institutions are required to ‘maintain an open, transparent and regular dialogue’ with churches, religious associations or communities, philosophical and non-confessional organisations with a certain status acknowledged by the laws of the member states. Whereas the horizontal, the vertical, and the cultural dialogue concern the organised civil society, the popular initiative in Art. 11 IV TEU opens up the European Union towards an element of direct democracy. These organisational provisions are accompanied by procedural rules, providing the openness and transparency of these dialogues (cf. Art. 11 II TEU, 15 TEU). It adds to the recognition of the participatory impact of civil society that the treaties institutionalise the influence of participation in the European Economic and Social Committee and the Committee of Regions (Art. 300 and 302 TFEU). The fundament of all this is Art. 10 III TEU: ‘Every citizen shall have the right to participate in the democratic life of the Union.’ This right does not only encompass the democratic participation through votes (Art. 39

1 For an overview cf. H. Reinau, “Die Entdeckung der bürgerlichen Verfassung”, in J. von Ungern-Sternberg & H. Rainau (Eds.), *Politische Partizipation. Idee und Wirklichkeit von der Antike bis in die Gegenwart*, Walter De Gruyter, Berlin, 2013, pp. 69 *et seq.*

ChFR; Art. 20 II lit b TFEU); but ‘democratic life’ has to be understood in a much broader sense, which includes other forms of participation.

This chapter reconstructs the elements of participatory democracy in the European Union from this basis of an individual right to participation.

9.2 EUROPEAN PARTICIPATORY DEMOCRACY

9.2.1 Potentials

Art. 11 TEU intends to improve the participation of citizens or groups particularly concerned with the decisions of European institutions. The dialogue encourages European institutions to develop their policies and helps the aggregated interests of individuals and groups within civil society in the horizontal dialogue. These interests should be articulated, aggregated, balanced, and expressed. The vertical dialogue requires the European institutions to listen and communicate with citizens and organisations within this dialogue (Art. 11 II TEU). The cultural dialogue (Art. 17 III TFEU) intends to include particularly relevant actors in civil society in a dialogue with European institutions on value questions of European politics. This is all intended to mobilise citizens to communicate their personal and group interests, and at the same time, to improve the European common good and European values (Art. 6 TEU). Since civil society does not merely aggregate interests, but also expresses particular knowledge of professional and experts groups, it has the potential to make European decisions more rational. If European citizens learn to articulate their interests with respect to European politics, the dialogues could also help create the European public that is necessary for the improvement of the legitimation of European politics.²

Expectations towards European participatory democracy are high. Both civil society and European politics are supposed to profit from these dialogues. The chance of participating in a political dialogue mobilises people for their political concerns and contributes to their political self-determination. As Alexis de Tocqueville put it, for a state, it is not enough to have an elected government; only local and other forms of political autonomy encourage people to make use of it. Accordingly, participation has an educative function.³ It involves intermediate associations and gives voice to minorities.⁴ From these debates, a

2 C. Calliess & M. Ruffert, *EUV/AEUV. Kommentar*, 5th edn, C.H. Beck, München, 2016, Art. 11, m.n. 3.

3 A. de Tocqueville, *Democracy in America*, B. Frohnen (Ed.), Regnery Publishing, Washington, 2002, p. 46: ‘Town meetings are to liberty what primary schools are to science; they bring it within the people’s reach, they teach men how to use and how to enjoy it. A nation may establish a free government, but without municipal institutions it cannot have the spirit of liberty.’

4 Commission’s White Paper on Governance of 25 July 2001, in COM (2001) 428 final, 2001/C 287/01, p. 11: ‘Civil society plays an important role in giving voice to the concerns of citizens and delivering services that meet people’s needs.’

political European public and a respective opinion that is a prerequisite for any political community could emerge. This could initiate agenda-setting of the European institutions. This political process could again spread and improve knowledge about political procedures and organisations and their identification with the respective political community.⁵ To this educative function belongs the possibility that conflicting political groups mutually adopt their perspectives and provide convincing reasons in the political process. This could mediate between the formalised general elections and other forms of democratic participation by national parliaments on the one hand, and citizens on the other. Channels of information could work in both directions – from civil society to the European institutions and also back from these institutions to society. Civil society associations as well as citizens in general could facilitate the enforcement of European politics and laws and ‘create more confidence’ in European institutions and their decisions.⁶

9.2.2 Critique of Participatory Democracy

Given these high expectations, it is not surprising that there also is critique of the conception of participatory democracy.⁷ The model of participatory democracy is being questioned for bringing back long overcome conceptions of corporatist governments.⁸ In reality, this model would open the European political decision making to particularistic voices. Not every citizen or all groups would have access to the respective procedures and actually have voice, but only those supported by powerful financial elites. Participatory democracy would be only a euphemistic label for the old problem of lobbying and obstruction of political decision by powerful interest groups. The interests behind the relevant groups would be way too heterogeneous to be integrated by procedural mechanisms.

5 C. Lindner, *Kritik der Theorie der partizipatorischen Demokratie*, Westdeutscher Verlag, Opladen, 1990, pp. 192 *et seq.*

6 Commission’s White Paper on Governance, p. 7, n. 4.

7 E. Lombardo, “The Participation of Civil Society in the Debate on the Future of Europe: Rhetorical or Action Frames in the Discourse of the Convention?”, in Castiglione *et al.* (Eds.), *Constitutional Politics in the EU. The Convention Moment and its Aftermath*, Palgrave MacMillan, Basingstoke, 2007, p. 154: ‘the Convention’s emphasis on civil society was a rhetorical device to gain legitimacy rather than a genuine move towards a more pluralistic EU democracy capable of complementing representative democracy through mechanisms of active participation of citizens and social actors in the policy-making process.’

8 H.-G. Dederer, *Korporative Staatsgewalt. Integration privat organisierter Interessen in die Ausübung von Staatsfunktionen. Zugleich eine Rekonstruktion der Legitimationsdogmatik*, Mohr Siebeck, Tübingen, 2004, p. 614; Calliess & Ruffert, 2016, Art. 11, m.n. 12, n. 2.

9.3 JUSTIFICATION OF PARTICIPATORY DEMOCRACY BASED ON INDIVIDUAL RIGHTS

It is possible that some of these critical points are sound but that participatory democracy can be justified nonetheless. I will provide such a justification based on the concept of individual rights. The idea is that an individual right to participation gives citizens the competence to influence political processes. However, not all instances of influences need to be equal; according to the impact political decisions have on different groups and individuals, in some parts of political decision making and some channels of influence, the influence may be asymmetrical with regards to the respective concern. Only democratic participation itself needs to be equal.

In order to motivate and concretise this idea, we have to look at the concept of civil society first.

9.3.1 *Civil Society*

Civil society consists of voluntary, non-profit associations⁹ of private natural or legal persons¹⁰ as mediators between public authorities and society.¹¹ Being voluntary and not mandatory public associations, their activities and their organisation are expressions of the wills of their members. This encompasses oligarchic organisation altogether, in which only few members take the liberty to determine the organisation. They are driven by religious, communicative, political, or economic interests of their members – or at least of some of their members. Examples are unions, employers' organisations, non-governmental organisations, professional associations, charities, grass-roots organisations, community-based organisations, churches, and religious communities.

Since they are voluntary organisations, they are private in the sense that they are facing political authorities like other subjects of individual rights too: all of them are subject to public authorities and not, as such, part of it. They are not private in the sense that they are a-political. As Habermas describes civil society:

Rather, its institutional core comprises those nongovernmental and noneconomic connections and voluntary associations that anchor the communication

9 This is the difference between the concept of civil society and classical concepts of bourgeoisie society like Hegel's, J. Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg, Polity Press, Cambridge, MA, 1996, p. 367.

10 B. Kohler-Koch & C. Quittkat, *Die Entzauberung Partizipativer Demokratie. Zur Rolle der Zivilgesellschaft bei der Demokratisierung von EU-Governance*, Campus Verlag, Frankfurt/Main, 2011, p. 10.

11 E. Grabitz, M. Hilf & M. Nettesheim, *Das Recht der Europäischen Union*, 57th edn, .Art. 11, m.n. 15, München, 2015. C.H. Beck; Kohler-Koch & Quittkat, 2011, pp. 44 *et seq.*, n. 10.

structures of the public sphere in the society component of the lifeworld (“Lebenswelt”). Civil society is composed of those more or less spontaneously emergent associations, organizations, and movements that, attuned to how societal problems resonate in the private life spheres, distill and transmit such reactions in amplified form to the public sphere.¹²

By expressing their particular interests or their particular concept of the common good,¹³ civil society associations are directed at influencing social and political actions.

Civil society organisations and movements represent the aggregated interests of their members or of the organisation itself. Some of them merely look for their particularistic interests. Many of them are directed at furthering the common good, however, from their particular perspective or by pursuing the individual interests further in a dialectical process towards the common good.¹⁴ They often concentrate on issues not represented by political parties.

9.3.2 Participation

According to normative theories, participation is a broad concept for the inclusion of individuals and groups in certain forms of communication.¹⁵ In the following part of the chapter, the concept shall be restricted to participation in the political discourse, will-formation, and decision making.¹⁶ Subjects of political participation are citizens and groups such as associations and parties.¹⁷ Objects of political participation are public deliberation, consultations¹⁸ with public authorities, preparation of political decisions, and finally, taking part in particular political decisions such as elections or forms of direct democracy. The

12 Habermas 1996, p. 367; 1994, p. 443.

13 S. Kirste, “Die Realisierung von Gemeinwohl durch verselbständigte Verwaltungseinheiten”, in M. Anderheiden, W. Brugger & S. Kirste (Eds.), *Gemeinwohl in Deutschland, Europa und der Welt*, Nomos, Baden-Baden, 2002, pp. 363-377.

14 Benjamin Barber emphasises this transformation of private or particular interests into public goods: ‘strong democracy in the participatory mode resolves conflict in the absence of an independent ground through a participatory process of ongoing, proximate self-legislation and the creation of a political community capable of transforming dependent private individuals into free citizens and partial and private interests into public goods’, B. R. Barber, *Strong Democracy. Participatory Politics for a New Age*, California University Press, Berkeley, CA, 1984, p. 132.

15 M. G. Schmidt, *Demokratiethorien*, Westdeutscher Verlag, Opladen, 2000, p. 253.

16 A classical definition is given by Verba/Nie/Kim: ‘By political participation, we refer to those legal activities by private citizens that are more or less directly aimed at influencing the selection of governmental personnel and/or the actions they take’, S. Verba, N. H. Nie & J. Kim, *Participation and Political Equality*, Cambridge University Press, Cambridge, 1978, p. 46.

17 For the identifying criteria for participation cf. V. M. Haug, “Partizipationsrecht” – Ein Plädoyer für eine eigene juristische Kategorie, *Die Verwaltung*, Vol. 47, 2014, p. 224.

18 It does not help to call consultations mere “pseudo-participation”, Lindner, 1990, S. 15, n. 5.

act of participation accordingly reaches from mere information gathering to communication in the public sphere, marketing for individual and group interests or particular contributions to the common good, lobbying, informal or formal consultations with public authorities, voting or deciding about political issues. The effectiveness of participation depends on the impact the participant has on the agenda-setting and decision making. This is potentially problematic for the European Union with its overarching deciding institutions that are not merely local, federal, or national.¹⁹

In general, the act of participation is voluntary. Citizens and associations are free in their decision whether or not to participate and about the agenda they want to pursue. If a public duty to 'participate' is imposed on them, this duty needs justification. Although this is no logical or natural necessity, voluntariness of participation means that taking part in public deliberation is open to everybody and every organisation feeling concerned about the matter in question.

The impact of participation does not need to be equal. In fact, in different discourses, the share of each individual citizen or group can vary, depending on its financial, intellectual, charismatic, and other powers. Since these powers do not necessarily reflect the objective importance of the represented issue, this influence can exceed the importance and may need balancing. It can also suppress legitimate opposite opinions.

Some authors confine the concept of participation to an objective principle that closes the gap between public authorities and society by permitting the citizen to take part in the realisation of the common good.²⁰ Without denying this function, I think that this does not get to the core of participation. Participation reaches to the fundamentals of political legitimation. This comes into sight only if we take it as an individual right.

9.3.3 *Individual Rights*

This correction and balancing can be accomplished by law, and namely, by individual rights. Individual rights are normative permissions of persons.²¹ These permissions impose a duty on others to respect the actions of the beneficiary of the permission.

To distinguish different kinds of individual rights, we can refer to Georg Jellinek's Status Theory, which analyses four forms of status as general positions of rights: negative,

19 *Ibid.*, p. 16, n. 5.

20 W. Schmitt-Glaeser, "Partizipation", in *Staatslexikon der Görresgesellschaft*, Vol 4, 7th edn, Herder Verlag, Freiburg, 1995, pp. 318-322.

21 See R. Alexy, *Theorie der Grundrechte*, Suhrkamp, Frankfurt/Main, 1995, pp. 171 *et seq.*, 183 *et seq.*; S. Kirste, §204. Die naturrechtliche Idee überstaatlicher Menschenrechte, in P. Kirchhof & J. Isensee (Eds.), *HbStR*, Vol. 10, C.F. Müller, Heidelberg, 2012, m.n. 2 *et seq.*

positive, active, and a state of subjection.²² They are the basis for freedom against the state, freedom through the state, freedom in the state, and a general duty towards the state. Freedom means both negative freedom as liberty and positive freedom as self-determination. Self-determination, again, can be autonomy, if it means determination of the self through self-imposed laws, be they private or political.

Jellinek developed his Status Theory of individual rights at the end of the 19th century in Germany and Austria with their monarchical legitimation of the state.²³ It is not surprising that he focused on rights with respect to the state. In the constitutional state, all public authority is based on the law, however. If the state and his power are founded on law, the state is no defining element of law or of individual rights anymore. We can rather define law as a norm, the enactment, interpretation, and enforcement of which is founded and limited by norms (concept of law). Insofar as the state institutionalises the enactment, interpretation, and enforcement of law, it is subjected to norms. This structure requires two modifications in Jellinek's theory, although it remains largely intact: First, the individual rights do not follow the status, but the other way around: the status is itself an expression of the individual rights attributed to a subject. Second, in order to be able to communicate legally, both the individual and the state have to be subjected to law. Otherwise, the relation of the individual towards the state would, at least in part, be a factual one of authoritative submission. Modified and generalised in this way, the four status are different relationships of legal subjects towards each other.

Based on these modifications, we cannot only analyse the four status, but also put them into an order: Most fundamental is the *status subjectionis*. Whereas Jellinek thought of it as the subjection of the individual under the state, under the rule of law²⁴ and with respect to the just-mentioned concept of law, it is the status of both the state and individuals being subjected to law. This state expresses all individual rights, guaranteeing the individual to be treated as legal subjects and not merely as objects of power or force. After World War II, human dignity grants this right.²⁵ It secures the *potential* legal freedom as opposed to

22 W. Brugger, §8. Georg Jellineks Statuslehre: national und international. Eine Würdigung und Aktualisierung anlässlich seines 100. Todestages im Jahr 2011, in H. Brugger & S. Kirste (Eds.), *Integration, Kommunikation, Konfrontation in Recht und Staat*, Duncker & Humblot, Berlin, 2013, S. 237 *et seq.*; Alexy, 1995, pp. 229 *et seq.*, n. 21; S. Kirste, "Vom Status Subiectionis zum Recht auf Rechtssubjektivität. Die Status-Lehre Georg Jellineks und der normative Individualismus", in L. Kähler (Ed.), *Normativer Individualismus*, Mohr Siebeck, Tübingen, 2014, p. 177 *et seq.*

23 G. Jellinek, *System der subjektiven öffentlichen Rechte*, 2nd edn, Mohr Siebeck, Tübingen, 1905, pp. 81 *et seq.*

24 Insofar equal with the concept of the legal state, cf. S. Kirste, "Philosophical Foundation of the Principle of the Legal State (Rechtsstaat) and the Rule of Law", in J. R. Silkenat, J. E. Hickey & P. D. Barenboim (Eds.), *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)*, Springer Verlag, Amsterdam, 2014a, pp. 29 *et seq.*

25 S. Kirste, "A Legal Concept of Dignity as a Foundation of Law", in W. Brugger & S. Kirste (Eds.), *Human Dignity as a Foundation of Law*, Franz Steiner, Stuttgart, 2013, pp. 63 *et seq.*

all other individual rights that guarantee the actual use of freedom. The legal subject is, here, the human person.²⁶

The negative status encompasses all individual rights that prohibit the addressee from infringing upon the action of the beneficiary of the right within the scope of the right.²⁷ Typical negative rights are the liberal fundamental rights against the state. They leave the individual a realm of freedom without involuntary legal obligations or factual influence of others. In this status, the legal subject is (mostly) the economic man or bourgeois, the independent person.²⁸ The freedom protected here is the freedom *against* the laws or rights and legal competences of others.

Rights attributed to the positive status oblige the addressee to help the beneficiary of the right, should he not be able to make use of the permission based on his own abilities. Examples of rights could be claims in the social state towards public aid or parts of the human rights of the ‘second generation.’ The legal subject is taken here as a dependent person, particularly as a client of the social state. Here, freedom is guaranteed *through* legal duties of others.²⁹

Whereas Jellinek conceptualised the fourth status – the ‘active status’ – as the foundation of mostly duties of the individual within the state, the reinterpretation based on the universality of law understands it as the expression of all rights to the establishment, interpretation, and enforcement of individual rights and duties and other legally binding norms. We do not only want to be subjected to rights and duties, benevolently imposed on us by others, but also to be the authors of our rights and duties, and also, the application of them. One could also call this status the republican status, since rights are not directed against other legal subjects, but aim at some form of cooperation.³⁰ The legal person in the active state is the citizen³¹ or citizen.³² This status expresses the freedom *within* the law.

26 S. Kirste, “Human Dignity and the Concept of Person in Law”, in M. Welker (Ed.), *The Depth of the Human Person: A Multidisciplinary Approach*, Eerdmans Publishing, Cambridge, 2014, pp. 291 *et seq.*

27 Alexy 1995, pp. 174 and 233 *et seq.*, n. 21.

28 Brugger 2013, p. 252, n. 22.

29 *Ibid.*

30 Habermas, 1996, p. 270, n. 9: ‘According to the republican view, the status of citizens is not patterned on negative liberties to which these citizens can lay claim as private persons. Rather, civil rights – preeminently, rights of political participation and communication – are positive liberties. They guarantee not freedom from external compulsion but the possibility of participating in a common practice through which citizens can first make themselves into what they want to be.’

31 Brugger 2013, p. 273, n. 22; C. Pateman, “Participatory Democracy Revisited”, *APSA*, Vol. 10, No. 1, 2012, p. 15: ‘the conception of citizenship embodied in participatory democratic theory is that citizens are not at all like consumers. Citizens have the right to public provision, the right to participate in decision-making about their collective life and to live within authority structures that make such participation possible.’

32 J. Habermas, “Paradigms of Law”, *Cardozo Law Review*, Vol. 17, 1995-1996, p. 776.

Status	Status subjectio- nis	Status negativus	Status positivus	Status activus
Right	Right to be acknowledged as a legal subject	Right against other laws or rights	Right towards support by others	Right to take part in the foundation, interpretation, and enforcement of rights and duties
Personification	Legal person	Private citizen	Needy person	Citoyen

9.3.4 *The Right to Participation*

From these distinctions, one can conceptualise the right to participation as a legal permission to contribute to legal communications. For the reconstruction of the model of participation in Europe, we limited participation on political participation.

Defined in this way, the right to participation belongs to the active status. The permission refers to the establishment, interpretation, and enforcement of individual rights and duties and the law itself. Since this participation requires that we have the education, and sometimes, the financial means to consciously take part in the political process, positive rights can be preconditions to this right. It also encompasses rights against public authorities to provide the procedural and organisational preconditions for realising individual rights.³³ Furthermore, since we have to consciously take part, we need the freedom to form our opinions uninfluenced by others in the negative state. The use of communicative freedoms (opinion, speech, assembly, association, coalition, etc.) creates new identities that produce new rationalities and outreaches these communities. The negative state also permits to collectively realise and develop one's individual rights. It guarantees a pluralism of self-determined, autonomous organisations.³⁴

The mere definition of such a right does, of course, not entail its justification. Are there reasons to acknowledge such a right to participation? I suggest legal freedom and human dignity as justificatory reasons for this right.

As shown before in the interpretation of the status theory of Georg Jellinek, individual rights guarantee liberties as freedom against the laws and rights of others, and also freedom through legal duties of others. The goal of individual rights is to protect legal freedom in the largest sense. With respect to law, I understand individual freedom as the ability of a person to make itself the one it wants to be, unimpaired by third persons. Accordingly,

33 For the development of these rights to participation in European administrative law, cf. F. Bignami, "Three Generations of Participation Rights Before the European Commission", *Law and Contemporary Problems* Vol. 68, No. 1, 2004, pp. 62 *et seq.*

34 As Habermas, 1996, p. 368, n. 9, puts it: 'The constitution of this sphere through basic rights provides some indicators for its social structure. Freedom of assembly and freedom of association, when linked with freedom of speech, define the scope for various types of associations and societies.'

freedom has a positive dimension and a negative dimension.³⁵ In the negative dimension, it means freedom from infringements of any kind (independence). In the positive dimension, it means self-determination. The individual can determine itself either by ways of general norms (autonomy) or in other, individual ways. Self-determination through norms, again, can be private or political autonomy.³⁶

Freedom	
Negative Freedom (Independence)	Positive Freedom (Self-Determination)
Existential Self-Determination	Autonomy (self-determination through norms)
	Private Self-Determination Political Self-Determination

The legal protection of freedom would be incomplete though, if the form of protection would be granted to us by a benevolent – or malevolent – legislator. We would be free in an unfree form, because we would have liberties and would be assisted in making use of them, if we cannot provide the means to do so by ourselves, but this guarantee would be donated to us without our consent. To avoid this autonomy in a heteronomous form, the subjects of legal rights and duties also have to be their authors. Only then is law a form of freedom – if it does not only protect it, but is also an expression of it. This requires the participation of the subjects in the formulation of their legal convictions. From this follows that neither the negative nor the positive state is more important than the active, but that all three are necessary, if law should be an expression of freedom.

Human dignity as a legal principle requires that all men are treated as legal subjects and not as legal objects. Someone or something becomes a legal subject when it is attributed legal rights and duties. However, in this sense, we are only subjects with respect to the permission to make use of the right, not with respect to the articulation of the right itself: to its foundation, interpretation, and enforcement. Without a right to participation in the establishment of our rights and duties and the law, we would also be mere objects of them. The citizens would be treated as immature beings without the capacity to make ourselves the ones they want to be in the realm of law. Since rights are permissions, we would be recognised as subjects of rights that could potentially make use of them; but at the same time, as mere objects in the formulation of these rights, we would be deprived of the

35 This traditional distinction (overview of the history of this distinction: E.-W. Böckenförde, *Freiheit und Recht, Freiheit und Staat*, in *Recht, Staat, Freiheit*, Suhrkamp, Frankfurt/Main, 1991, pp. 42 *et seq.*) was later popularised by I. Berlin 1969.

36 In more detail: S. Kirste, “The Human Right to Democracy as the Capstone of Law”, in Galuppo et al. (Eds.), *Human Rights, Democracy, Rule of Law and Contemporary Social Challenges in Complex Societies* (ARSP-Beiheft 146), Franz Steiner, Stuttgart, 2015, pp. 11 *et seq.*, 20.

potential to articulate these rights. The status *subjectionis* would be recognised with respect to the form of rights and their content, but not with respect to their origin and the origin of law. Our claim to be recognised as subjects of our legal autonomy could insofar only articulate itself outside of the law. With respect to this origin of rights, duties, and the law itself, persons would not enter into a legal relationship with each other and with the legislator. The goal that all power relationships should be turned into legal relationships would be violated.

Thus, both freedom and human dignity justify our participation in the establishment of rights, duties, and the law itself.

The establishment of law is not exhausted by its enactment. Law, rights, and duties are expressions of convictions. The underlying interests have to be evaluated and balanced. Once established, they have to be interpreted. Finally, the application of them is not a mere technical adjudication or the use of force, but a procedure with own procedural rights guaranteeing the autonomy of all concerned by this. Fundamental rights are not only material protections of certain interests. Sometimes, the range of protection may depend on the procedures in which they are claimed. Accordingly, fundamental rights have an active, procedural dimension.³⁷ Since the enactment, the interpretation, and the enforcement of law can concern the freedom of the individual, the right to participation should include the affected persons in all procedures realising laws, rights, and duties.³⁸

Rights and duties are not only general permissions established by general norms such as human rights declarations, constitutions, or statutory laws. Associations, public corporations, and other forms of legal persons have their laws, providing rights and duties to their members or users. Contracts establish individual rights and duties for the parties concerned. The right to participation should then include all persons affected into all these forms of legal action. Only then can it guarantee positive freedom as autonomy or self-legislation. The right to participation guarantees both private and political autonomy. In the right to the participation of civil society, however, we focus on political autonomy.

Since the goal of the right to participation is to secure the individual, that his rights and duties and the law does not only regulate his freedom, but that they are, at the same

37 E. Denninger, 'Staatliche Hilfe zur Grundrechtsausübung durch Verfahren, Organisation und Finanzierung', in J. Isensee & P. Kirchhof, *Handbuch des Staatsrechts*, C.F. Müller, Heidelberg, 2011, m.n. 2 *et seq* and 8.

38 "Concern" is not limited to the effect on legal rights and duties, but on freedom in general, although I confine myself here on the concern on individual rights. For a narrower concept of participation, cf. Haug 2014, p. 228, n. 17, who limits participation to the concernment in non-legal matters. Hereby, he decidedly wants to exclude questions of procedural law. Although I do not underestimate the differences between concerns in political participation and legal concerns, I think it helpful to begin with a concept of concern that encompasses both. In the case of a formally protected legal freedom, just as in the case of a concern in freedom in a larger sense, the political order is incomplete if it is good; it also has to be an expression of the freedom of its subjects. If we include both forms of concerns, it is also easier to show a scheme of different forms of participation ranging from all forms of communication to legally formalised forms of direct or indirect democracy.

time, expressions of his autonomy, this right is in place, whenever his freedom is concerned or affected. The range of effect may be different though, if we consider norms of general (laws), particular (e.g. bylaws), or individual nature (i.e. contracts). General laws concern all citizens equally, by laws or statutes of an association concern only the members of this association equally, and provisions of a contract, in principle, affect only the contracting parties. This shows that the right to participation can be asymmetrical, depending on the form of norm and its effect on the freedom of the persons. Accordingly, following the conception already expressed by Gratian in the 4th century, '*Quod omnes tangit ab omnibus approbetur*,'³⁹ equal participation is only required as far as norms have or should have equal effects. In all forms of participation that influence legislation, equality has to be obeyed.⁴⁰ This is the case of laws. Groups such as minorities may be particularly affected by laws though, because their content discriminates them. In this case, they should have an asymmetric influence with respect to their concern. Other laws may be formally general, but still have particular impacts on certain professional groups, businesses etc. In these cases, the right to participation requires that these groups be heard, although not all groups in society have a legal hearing in such legislation. This permits a scale of different forms of participation, ranging from informal asymmetrical (with respect to the society as a whole) influences over formal asymmetrical influences (e.g. in legal procedures), to formal and symmetrical or equal influences in democratic participation.

Since the criterion for the right to participation is the concern of the legal act with respect to the freedom of an individual or a group, asymmetric participation can be justified. If all people are concerned by norms in the same way, they should have the same impact on them. The right to democracy then is only one form of the right to participation – namely, the right to equal participation.⁴¹

9.4 THE EUROPEAN RIGHT TO PARTICIPATION

Art. 9 TEU requires the observation of the principle of equality of its citizens by European institutions. All citizens shall receive equal attention by them. This especially applies to forms of representative democracy – despite the problems of the elections to the European parliament. The other dialogues refer to the 'parties concerned' (Art. 11 III TEU) and religious and philosophical organisations because of their 'specific contribution,' although

39 A. von Müller, "Spätbürgerliche Partizipation im Hoch- und Spätmittelalter", in J. von Ungern-Sternberg & H. Rainau (Eds.), *Politische Partizipation. Idee und Wirklichkeit von der Antike bis in die Gegenwart*, Walter De Gruyter, Berlin, 2013, pp. 147 *et seq.*

40 Habermas 1996, p. 127, n. 9, 'Hence the desired political rights must guarantee participation in all deliberative and decisional processes relevant to legislation and must do so in a way that provides each person with equal chances to exercise the communicative freedom to take a position on criticizable validity claims.'

41 For this right *cf.* Kirste 2015, pp. 11 *et seq.*

their equal status under national laws is respected (Art. 17 TFEU). This shows that the right to participation in the European Union can open even asymmetrical influence. To avoid lobbyism and protectionism, all of these dialogues have to be organised in a transparent and open fashion (Art. 11 II TEU). The dialogues should be pluralistic, giving the parties a chance to come up with alternative conceptions. These procedures should be neutral with respect to the participating organisations and not privilege one or the other. Finally, they should be open towards the result of the dialogue.

Asymmetric influence is permitted in open and transparent consultations only and not in the decisions that affect all citizens equally.⁴² Thus, these civil society ‘actors can acquire only influence, not political power.’⁴³ Minorities should have a chance to participate and be protected in their participation.⁴⁴ Consultative influence is framed and bound by the equal democratic participation of all citizens – at the moment – mostly through their national parliaments. It is a form of deliberation and not of decision making, but a prerequisite of it.⁴⁵ Other rights, such as the free access to documents, have to be respected.⁴⁶

Addressees of the rights to participation thus reconstructed as individual rights from the concerns of freedom are the different institutions – in Art. 11 TEU, explicitly the European Commission; in Art. 14 III TFEU, more broadly ‘the Union’, meaning not only Commission, Parliament, and Council,⁴⁷ but also the ‘organized Civil Society’ (Art. 300 TFEU): The European Economic and Social Committee.

9.5 CONCLUSION

Participation of citizens and organisations in civil society in Europe can be justified on the basis of an individual right to participation. This right is affected when individual freedom is concerned. Together with the European Charter of fundamental rights, participation guarantees a procedural minimum of an effective protection of fundamental rights. Apart from this formal participation for the procedural protection of individual rights by information, consultation, remedy, etc., the right to participation comes into play when interests or individual or group contributions to the common good are concerned. In this sense, the right to participation does not only have a liberal, but also a republication aspect. This

42 Calliess & Ruffert 2016, Art. 11, m.n. 13, n. 2.

43 Habermas 1996, p. 371, n. 9.

44 Denninger 2011, m.n. 77, n. 37.

45 Pateman 2012, p. 8, n. 31: ‘Deliberation, discussion, and debate are central to any form of democracy, including participatory democracy, but if deliberation is necessary for democracy it is not sufficient’.

46 Art. 42 ChFR: ‘Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium.’

47 In this limited sense P. R. Schnabel, *Der Dialog nach Art. 17 III AEUV*, Mohr Siebeck, Tübingen, 2014, p. 218.

conception does not exclude other instrumental or normative justifications of participation that refer to participation as a means of inclusion or the improvement of political decisions. The right is indeed an instrument of activation of citizens for European issues, and thereby, also serves the further political integration and identity-building. However, as a right, their participation is permitted and not required. To justify the participation of civil society in Europe as an individual right means to limit a republican or, as John Rawls calls it, a position of 'civic humanism' and advocate a liberal conception of this right.⁴⁸ The freedom promoted by this right is 'not freedom from external compulsion but the possibility of participating in a common practice through which citizens can first make themselves into what they want to be.'⁴⁹ The performative function is also this: to build up their European Identity. And this, in turn, improves democracy in Europe.⁵⁰

48 J. Rawls, *Justice as Fairness*, Harvard University Press, Cambridge, MA, 2001, pp. 143 *et seq.*, 'To reject civic humanism (in the sense defined) is not to deny that one of the great goods of human life is that achieved by citizens through engaging in political life. Yet the extent to which we make engaging in political life part of our complete good is up to us as individuals to decide, and reasonably varies from person to person.'

49 Habermas 1996, p. 270, n. 9.

50 C. Calliess, "Optionen zur Demokratisierung der EU", in H. Bauer, P. M. Huber & K.-P. Sommermann (Eds.), *Demokratie in Europa*, Mohr Siebeck, Tübingen, 2005, pp. 311 *et seq.*

10 DEMOCRACY AGAINST CAPITALISM

Hauke Brunkhorst

The first part of this chapter is on the rise and fall of national democracy (10.1), the second on post-national alternatives (10.2), the third, the shortest one, on the future of the European Union (10.3).

10.1 DECAY OF THE NATIONAL STATE

Democracy is as little dependent on capitalist relations of production as capitalist relations of production are dependent on democracy. Moreover, democracy and capitalism are driven by communicative principles that are not only different, but *incompatible*. But there are alternatives to capitalist modes of production within modern society, and the social evolution of the last one and a half centuries has experimented with many of them. Within the formation of modern society ('Gesellschaftsformation'), the modes of production ('Organisationsprinzip') can be changed.¹ However, there is no modern democracy beyond functional differentiation. This implies that as long as society is functionally differentiated, it cannot preserve itself without growth and enlargement.² Further, a modern society that is democratic and based on socialist relations of production has no alternative to growth and enlargement because it cannot go beyond functional differentiation. This is not only due to factual, but normative reasons as well. There is at least one ethical premise of good life shared by all modern societies and it is general and negative: *nobody* really wants to

1 On the distinction between 'Gesellschaftsformation' and 'Organisationsprinzip', see J. Habermas, *Legitimationsprobleme im Spätkapitalismus*, Suhrkamp, Frankfurt, 1971.

2 I agree here with L. Herzog, "The Normative Stakes of Economic Growth", *The Journal of Politics*, Vol. 1, 2015, pp. 50-62. Growth and enlargement must not mean capitalist (or bureaucratically organised) growth and imperial enlargement (*see below*), and economic growth must not be measured in monetary units such as the gross domestic product (GDP). Together with the *Organisationsprinzip*, the measure of growth can be turned from exchange value-oriented measures into use value-oriented measures. However, as Durkheim, Parsons, and Luhmann have shown, not only the efficiency and viability of the economy (whether capitalist or non-capitalist), but also the efficiency and viability of all important social systems depends on growth – such as medicine, science, education, political power, and law (but also art, sports and so on). By all means, the successful solution of problems, for example of health care, regularly has unplanned side effects, causes succession related problems, and also reflexive problems such as medically induced epidemics. Their solution needs ever more medical and therapeutic technologies and inventions, and that means growth not only in medicine, but also in other systems (in this case especially of science, economy, administrative power, sport and traffic) – and *vice versa*, growth effects of other systems such as scientific inventions, industrial diseases, doping scandals, war injuries and car accidents stimulate medical growth and enlargement. I thank Regina Kreide for a controversial discussion of this point.

live *without* the five Great Inventions of the second technological revolution that owe their existence to functional differentiation. These five (and only five) inventions are: electricity, running water, the internal combustion engine, chemical rearrangements of molecules (including pharmacy), and mass communication. All of them were created between 1870 and 1940.³ This premise, that nobody wants to live without them any longer, could be called the negative Aristotelianism of modern life.

There is also, as John Dewey rightly explained from an evolutionary perspective, an internal relation between democratic solidarity and quantitative growth and enlargement. On the road to the Great Community, growth and enlargement are unqualified goods, because they must be kept open for democratic self-determination any time.⁴ This is what Dewey called 'democratic experimentalism.'⁵

The communicative principle of democracy combines truth-oriented discursive struggle and conflict with egalitarian procedures of legislation. It finally pushed the bourgeois constitutionalisation of representative government (established after the Atlantic revolutions in America and France) towards democratisation. Beginning in Europe, with the failed revolutions of 1848, this push made the incompatibility of capitalism and democracy immediately manifest. The first great defeat of democratic parliamentarism in Europe and its neutralisation in the United States, which stabilised bourgeois class rule until the 1930s, coincides with the biggest industrial growth ever measured.⁶ It marked the turn from the age of globalisation to the global age, and it was accompanied by a hundred years (1848-1945) of authoritarian, sometimes fascist liberalism, bloody class struggles, imperial wars and atrocities, global revolutions, world wars, and genocides.⁷ Only in the aftermath of the global economic crisis of 1929 and World War II did the national state become a *democratic social welfare state*. It was – for a period that lasted half a century from about 1940 to about 1990 – the first successful realisation of a politically and socially inclusive democratic regime with a kind of mixed economy. The relations of production were regulated by constitutionally enabled democratic class struggle (Art. 14 vs. Art. 15 in combination with Art. 20 German Basic Law).⁸ The one and only form of private

3 See R. J. Gordon, *Rise and Fall of American Growth: The US Standard of Living since the Civil War*, Princeton University Press, Princeton, NJ, 2016.

4 And this, the principle of democracy is no longer Aristotelian but Kantian or deontological.

5 H. Brunkhorst (Ed.), *Demokratischer Experimentalismus*, Suhrkamp, Frankfurt, 1998.

6 See only the two most significant decisions of the Marshall Court: *Fletcher v. Peck* (1810) and *Dartmouth College v. Woodward* (1819), later restabilised again and again. In the 20th century, particularly by *Lochner v. New York* (1905) to *Citizens United v. FEC* (2009).

7 Ch. Bright & M. Geyer, "Benchmarks of Globalization: The Global Condition, 1850-2010", *Blackwell Companion to World History*, Blackwell, Oxford, 2012.

8 W. Abendroth, 'Zum begriff des demokratischen und sozialen Rechtsstaats im Grundgesetz der Bundesrepublik Deutschland', in E. Forsthoft (Ed.), *Rechtsstaatlichkeit und Sozialstaatlichkeit*, Wissenschaftliche Buchgesellschaft, Darmstadt, 1968 (1954), pp. 114-144. Abendroth's interpretation of the German Basic

property that was established by the Code Civil in 1804 became a borderline case (§903 BGB⁹) and was broken up into hundreds, if not thousands, of forms of property between private and public.¹⁰ Social differences declined. The rich could no longer maintain their palaces in Newport and Long Island, so they were used as schools and universities. The still huge class differences were compensated by mass consumption and a quickly expanding educational system that allowed greater social mobility than ever before.¹¹ The worker drove a small car; his boss, a big car; both getting stuck in the same traffic jam, driving to the same coast on holiday, sending their kids to the same public school. The Fordist motto: 'With a growing pie, one could give to the poor without taking too much from the rich.'¹²

However, from the outset, this solution suffered from two problems. National welfarism was white, male, and heterosexual.¹³ Egalitarian democracy everywhere ended at the colour and gender line. The revolutionary victory of democratic egalitarianism was largely at the expense of the vast majority of the world population – in particular, the former colonies.¹⁴ For a regime that claimed universal 'exclusion of inequalities',¹⁵ this finally posed a serious problem of legitimisation, and it came to the fore in the civil rights movements and the global protest against the Vietnam War in the 1960s.

The second problem is secular stagnation – a challenge never before faced by modern capitalism. Between 2000 and 2016, real investment in Germany decreased by 20%.¹⁶ Secular stagnation, first and foremost, occurs due to the (temporary) finalisation of the great

law was exceptional and far left in the 1950s, but has become a mainstream in constitutional law. See C. Mollers, *Staat als Argument*, Beck, München, 2000, p. 141.

- 9 BGB & 903: 'The owner of an object can do what he wants with it, and exclude all others from any effect or action on it, as far as it is not prohibited by law or the rights of third parties.'
- 10 M. Bellomo, *The Common Legal Past of Europe 1000-1800*, Catholic University of America Press, Washington, 1995, pp. 25-31; E. Denninger, Von der bürgerlichen Eigentumsgesellschaft zum demokratischen Rechtsstaat, in Karl-Otto Apel, Dietrich Böhler und Karl-Heinz Rebel (Eds.), *Funkkolleg Praktische Philosophie/Ethik. Studententexte*, Band 3, Beltz, Weinheim/Basel 1984, pp. 814-844.
- 11 Rawls argues rightly that the class differences and the factual power of the elites over the people (see C. Wright Mills, *The Power Elite*, Oxford University Press, Oxford, 1956) are not compatible with the two principles of justice, see J. Rawls, *Gerechtigkeit als Fairneß – Ein Neuentwurf* (2001), Suhrkamp, Frankfurt, 2003, 214f.
- 12 L. Herzog, "The Normative Stakes of Economic Growth; Or, Why Adam Smith Does Not Rely on "Trickle Down"", p. 57, <www.journals.uchicago.edu/doi/abs/10.1086/683428?journalCode=jop>.
- 13 I. Katznelson, *When Affirmative Action was White: An Untold History of Racial Inequality in Twentieth-Century America*, W.W. Norton, New York and London, 2005.
- 14 See G. K. Bhambra, "Postcolonial Europe, or: Understanding Europe in Times of the Postcolonial", in C. Rumford (Ed.), *The Sage Handbook of European Studies*, Los Angeles, Washington, DC, London, New Delhi & Singapur, 2009, pp. 69-86; H. Brunkhorst, 'Für eine demokratische Neugründung Europas. Die »Flüchtlingskrise« als Rückkehr des Verdrängten', *Bätter für deutsche und Internationale Politik* 9, 2016, pp. 63-74.
- 15 R. Stichweh, *Die Weltgesellschaft*, Suhrkamp, Verlag, Frankfurt/Main, 2000, p. 52.
- 16 C. Offe, "The Dynamic of Secular Stagnation", paper presented at the conference on the topic Jenseits des Kapitalismus, in Wuppertal, 4 February 2016 (forthcoming).

industrial inventions in 1940,¹⁷ and second, to the secular increase of inequality since the late 1970s. It is now back to its peak in 1900.¹⁸ The great electronic inventions of the present, the internet, the mobile phone, and the personal computer, are at best, all low-growth inventions with dramatically negative effects on the future, especially of academic employment.¹⁹

Secular stagnation is strongly reinforced by the direct effects of the neo-liberal turn in the global economy since the mid 1970s, in particular, by rising debt rates for households and governments, and the dramatic growth of inequality. Rising inequalities end social mobility, cause ill health, higher crime rates, mental illness, and shorten life expectancy.²⁰

However, while the national welfare state was not fit for globalisation, neo-liberalism was. It destroyed welfarism and globalised the neo-liberal state, together with an ever denser network of transnational civil law regimes, which (as a law of coordination of the interests of the ruling classes) finally marginalised international public law. The state was subverted by private-public partnerships, and – together with the turn from the debating and disputing temple of the General Assembly to the executive police of the Security Council – ever more power was transferred from the legislators to transnationally united executive bodies.²¹ Legal formalism was replaced by legal dynamism, and legally bound formal rule by legally unbound informal rule.²² The invention of the Eurogroup at the end of this period is paradigmatic. At the height of the Greek crisis, the Group decided to expel the Greek minister of finance from an ongoing session. The minister asked for legal legitimation, the chief of the Group called for his lawyers, they told him that the Group did not exist legally; hence, everything they did was legal.

Neo-liberal globalisation and reform have turned the relations of dependency between public power and private money upside down. First, the tax state that has taken the money away from the rich was replaced by the debt state, dependent on the generosity of the rich. Then, the workers lost their right to strike factually, and in exchange, got unlimited credit at the expense of a new form of debt slavery. Finally, state-embedded markets turned into market-embedded states.²³

17 Gordon 2016; R. J. Gordon, “Is US Economic Growth over?”, *Working Paper 18315*, <<https://www.nber.org/papers/w18315.pdf>>; R. J. Gordon, “The Demise of U.S. Economic Growth: Restatement, Rebuttal, and Reflections”, *NBER Working Paper 19895*; N. Crafts, “Is Secular Stagnation the Future for Europe?” *CAGE Working Papers Series 225*, University of Warwick, Warwick, April 2015.

18 T. Piketty, *Capital in the Twenty-First Century*, Harvard University Press, Cambridge, MA, 2014.

19 R. Collins, “The end of middle-class work: No more escapes”, in I. Wallerstein, R. Collins, M. Mann, G. Derluguian, & C. Calhoun (Eds.), *Does Capitalism Have a Future?* Oxford University Press, Oxford, 2013.

20 Wilkinson & Pickett 2010; see T. Judt, *Ill Fares the Land*, Penguin Books, New York, 2010.

21 M. Koskenniemi, “The Police in the Temple. Order, justice, and UN – A dialectical View”, *European Journal of International Law*, Vol. 6, 1995, pp. 325-348.

22 M. Koskenniemi, *The Gentle Civilizer of Nations*, Cambridge University Press, Cambridge, 2002, p. 500 ff.

23 Streeck, 2005; see W. Streeck, *Gekaufte Zeit: Die vertragte Krise des demokratischen Kapitalismus*, Suhrkamp Verlag, Berlin, 2013.

Within the neo-liberal political-economic regime, high profit rates can be maintained only at the expense of growing social differentiation. However, this has deadly consequences for growth *and* democracy. Growth comes under permanent threat of under-consumption.²⁴ Increasing social inequality causes increasing political inequality, and democracy runs out of alternatives.²⁵ Not absolute poverty, but relative inequality discourages people, resulting in a crisis of motivation that explains the dramatic 30% decrease in the turnout of lower and lower-middle classes, while the upper class turnout has risen close to 100%.²⁶ Leftist parties have lost their voters, moving further right with each passing election. Finally, we are left with the gloomy alternative between right parties of market fundamentalism plus a culture of political correctness²⁷ and far right parties of market fundamentalism plus a neo-conservative cultural background that is nationalist, racist, and religiously fundamentalist.

Again, this trend is stabilised by the constitutional treaties and the institutional structure of the European Union. Macroeconomic decisions are determined in advance by the treaties.²⁸ Prize stability trumps full employment, labour market access trumps democratic class struggle, financial conditionality trumps solidarity, austerity trumps Keynesian solutions, market imperatives trump democratic decisions, and competitiveness trumps everything. In Europe, macroeconomic choices 'are taken in an institutional setting that provides near-perfect protection against the interference of input-oriented political processes and of democratic accountability in the constituencies affected.'²⁹ The final touch

24 As in Paul Sweezy's theory of under-consumption (P. A. Baran & P. M. Sweezy, "Monopoly Capital, An Essay on the American Economic and Social Order", *Monthly Review Press*, New York, 1966, pp. 76-111) prices are decoupled from markets, profits are stable, their increase rates are predictable and can be planned, the cyclic (sinus like curve) fall and rise of profits suddenly comes to an end, and the profit margins of the 500 biggest US firms remain consistently high after 2008 – to the horror of Goldman Sachs (Joe Weisenthal, "Goldman Sachs Says it may be Forced to Fundamentally Question How capitalism is Working. The profit margins debate could lead to an unsettling conclusion", *Bloomberg Markets*, 3 February 2016.) <www.bloomberg.com/news/articles/2016-02-03/goldman-sachs-says-it-may-be-forced-to-fundamentally-question-how-capitalism-is-working>). At the same time, middle and lower classes do not have enough money to buy the most basic consumer goods, such as good education, sufficient health care, decent housing, healthy food, and so on. The result is a crisis of under-consumption, as Marx already described in *Capital*: 'The ultimate reason for all real crises always remains the poverty and restricted consumption of the masses as opposed to the drive of capitalist production to develop the productive forces as though only the absolute consuming power of society constituted their limit.' (K. Marx, *Das Kapital*, Bd. 3, Dietz, Berlin, 1968, 501, English translation quoted from <<https://www.marxists.org/archive/marx/works/1894-c3/ch30.htm>> (1.05.2016).

25 Schäfers 2015.

26 The typology of crises in J. Habermas, *Legitimationsprobleme im Spätkapitalismus*, Suhrkamp, Frankfurt, 1972, is still actual.

27 From Clinton's Democrats and Blair's Labour Party over Schröder's Social Democrats and Merkel's Christian Democrats to Hollande's socialists.

28 Dawson & de Witte 2015.

29 F. Scharpf, *Political Legitimacy in a Non-optimal Currency Area*, MPlfG, Cologne, 2013, p. 23. <www.mpifg.de/pu/mpifg_dp/dp13-15.pdf>.

of this institutional setting is, as Jelena von Achenbach has shown, the Trilog procedure that precedes the ordinary legislative procedure of the three European powers of Parliament, Commission, and Council, and allows the leaders of these institutions to bypass the parliamentary public and the constitutional law of the parliament, depriving *en passant* parliamentary minorities of any influence.³⁰ There is a historical irony that former American neo-liberals now apply Keynesian political programmes (at least during the Obama era), whereas European social democrats still stick with the neo-liberal agenda. This irony reveals that a parliamentary regime that first is *continental*, and, second, led by one president still disposes over fundamental economic and political alternatives, which do no longer exist in the European technocratic (and at best, half-parliamentary) continental system that is led by five presidents. If societal facts are running out of alternatives, legal normativity becomes fiction.³¹ Marcelo Neves has described such a process of fictionalisation of public law in a case study on Brazil as a regression from normative to nominalist constitutions.³² Brazil is no longer an exception.

10.2 POSTNATIONAL ALTERNATIVES

If there is a future of global capitalism with market-embedded states, the likelihood is extremely high that it will be a new formation of authoritarian liberalism.³³ We are already approaching a hypermodern double state of authoritarian prerogatives and rule of law.³⁴ It consists of a strong tendency towards legal over-integration of the ruling classes and under-integration of the lower classes and excluded populations.³⁵ Prerogative law and the declared or undeclared state of siege are normalised. When in doubt, send in the Marines. Paradigmatic, in this case, is the emergence of smart and flexible border regimes, which – in case of the United States – *are relieving all citizens living in the border region of their constitutional rights*. In the United States, these are already two-thirds of the entire

30 J. von Achenbach, 'Verfassungswandel durch Selbstorganisation: Trilogie im Europäischen Gesetzgebungsverfahren', *Der Staat* 55/ 2016, pp. 1-39.

31 Ch. Möllers, *Die Möglichkeit der Normen*, Suhrkamp Verlag, Berlin, 2015.

32 M. Neves, *Verfassung und positives Recht in der peripheren Moderne*, Duncker & Humboldt, Berlin, 1992.

33 H. Heller, "Authoritarian Liberalism", *European Law Journal*, Vol. 3, 2015, pp. 295-301; see I. Wallerstein, "Structural Crisis, or Why Capitalists No Longer Find Capitalism Rewarding?", in I. Wallerstein *et al.* (Eds.), *Does Capitalism have a Future*, Oxford University Press, Oxford and New York, 2013, pp. 9-36; H. Marcuse, *Der Kampf gegen den Liberalismus in der totalitären Staatsauffassung*, in H. Marcuse, *Kultur und Gesellschaft I*, Suhrkamp, Frankfurt, 1965, pp. 17-55.

34 The double state is a mix of (inclusive) normative state (or *Rechtsstaat*) and (exclusive) prerogative state (or police state), and there are more formations of the double state than pre-war fascist regimes. For a paradigmatic case of the latter, see E. Fraenkel, *The Dual State*, Octagon, New York, NY, 1969.

35 Still paradigmatic: Neves 1992; see M. Neves, 'Zwischen Subintegration und Überintegration: Bürgerrechte nicht ernstgenommen', *Kritische Justiz*, Vol. 4, 1999, pp. 557-577.

population (coastal regions and the Great Lakes).³⁶ Alternative für Deutschland (AfD), Front National, Victor Orban, and Donald Trump are the logical consequence of market fundamentalism in permanent crisis.

The only realistic alternative is the almost impossible cosmopolitan project of democratic socialism.³⁷ It is almost impossible because of the cumulative four crises of societal differentiation:

(1) Under postcolonial conditions of market-embedded states, the increasing social difference causes a crisis of motivation and legitimisation, and enhances secular stagnation. To save growth and democracy in times of secular stagnation, massive redistribution of wealth to the lower and middle classes is the only realistic perspective, simply because only these classes buy consumer goods. Massive redistribution would kill two birds with one stone: the threat of economic collapse through stagnation, and the threat of democratic collapse through political inequality. Unfortunately, there are more birds in the air than over Bodega Bay.

(2) The difference of centre and periphery is transformed into the difference between included and excluded populations. Since 2000, the national exclusion rates alone have increased by 22% and 40%.³⁸ The only promising potential cure is massive investment in educational and socialisation agencies together with a basic income, high enough, for example, to pay tuition in the United States.³⁹

(3) The difference of system and environment causes ecological devastation. The only solution for the environmental problems (if there are any) is green growth. The enormous proportions of the problem come to the fore once we take into account that even CO₂-reduction troughs carbon capture and storage is only possible through far-reaching infringements on land ownership worldwide, while globally, there is no well ordered continuum between private and public property.

In principle, all this is possible through parliamentary legislation. However, it seems illusory to think that such radical changes (which must be enforced against the nationally, regionally, and globally well organised power of money, connected power elites, and the hegemonic managerial mindset) could be realised through coordinated intergovernmental action.

(4) Functional differentiation has gone global, and if we only take the most dangerous system of capitalist world economy, there seems to be no other means against the black-

36 See A. Shachar, "New Border and Citizenship Constellations: Implications for Law and Justice", paper presented at the WZB Workshop *Critical Theory and Constitutionalism*, Berlin 11.12.2015, pp. 12, 32-35 (on file with the author).

37 Concerning the first three points, I broadly follow in the model of diagnosis and therapy: Offe, forthcoming.

38 Offe (forthcoming).

39 For well calculated models, see: B. Ackerman & A. Alstott, *Die Stakeholder-Gesellschaft. Ein Modell für mehr Chancengleichheit*, Campus, Frankfurt am Main, 2001. G. Grözinger, M. Maschke & C. Offe, *Die Teilhabegesellschaft. Modell eines neuen Wohlfahrtsstaates*, Campus, Frankfurt am Main, 2006.

mailing power of global capitalism, except the transfer of real power – still designated by the outdated term ‘sovereignty’ – to democratically legitimated and controlled transnational governmental structures on regional and global levels. Intergovernmental governance without government is over. Governance is the cure that makes the ailment worse, and output-democracy is not democratic.

To conclude, if there is a potential solution to the four problems through parliamentary legislation at all, it must be done through transnational parliaments within federally tiered systems of electorates and representative bodies of at least continental measures.

10.3 EUROPEAN DEMOCRACY?

What is good about the European Union is that there is already a unique invention of a democratically elected transnational Parliament. Articles 9-12 of the Treaty of Lisbon constitutionalise by far the most advanced internationally organised democracy.⁴⁰ The Treaty already contains nearly everything needed for an at least partial continental solution of the four crises. The ordinary legislative procedure that binds together the three European powers – the Parliament, the Commission, and the Council – comes, as Jürgen Bast has shown, very close to a full-fledged constitutionalisation of European democracy, since, as Franzius and Habermas have shown, it represents both the national peoples and the citizens of the Union.⁴¹

Unfortunately, at present, Art. 9-12 are constitutional kitsch (Koskenniemi) – because, as we have seen, the institutional setting of the EU ‘provides near-perfect protection against the interference of input-oriented political processes and of democratic accountability in the constituencies affected.’⁴² The European legislator is not the legislative procedure, but semi-formal and entirely informal groups such as the European Council and the Eurogroup. Recently, since the so-called Greek crisis, the perfect protection of the united executive bodies of Europe is under public attack from both the right and the left.

With each passing day of the crisis, it becomes more evident that the only way out is, as Brendan Simms and Benjamin Zeeb have suggested, the derogation of the Treaties, the abolishment of the European Council and the Eurogroup, and a new constitutional foundation of a Union of the Eurozone, equipped with a legislative procedure that has compre-

40 A. von Bogdandy, “The European Lesson for International Democracy: The Significance of Articles 9–12 EU Treaty for International Organizations”, *European Journal of International Law*, Vol. 23, 2012, pp. 315–334.

41 J. Bast, ‘Europäische Gesetzgebung – Fünf Stationen in der Verfassungsentwicklung der EU’, in C. Franzius, F. C. Meyer & J. Neyer (Eds.), *Strukturfragen der Europäischen Union*, Nomos Verlag, Baden-Baden, 2011, pp. 173–180; C. Franzius, *Recht und Politik in der Transnationalen Konstellation*, Campus, Frankfurt, 2014; Habermas, 2012.

42 Scharpf 2013.

hensive jurisdiction (*Allzuständigkeit*) on the federal level, and administrative power to enforce it. The final decision must rest with all the citizens of Europe *and* its individual peoples.⁴³

As empirical research shows, a majority of European citizens favours a federal union that returns choice of political, economic, and social questions to the people.⁴⁴ Moreover, there are surprisingly large majorities even in favour of a transfer union and a European social welfare state. More than 70% of Germans would support such a union, even if it resulted in lower incomes.⁴⁵ However, because the institutional setting of the EU provides nearly perfect protection against any movement of input-democracy, the option for a European democracy with real choices has literally become utopian, and the commodified old mass media have become desensitised to anything that does not fit the existing political system. Therefore, everybody thinks, ‘I prefer a European social welfare state, but none of my neighbors does.’ However, the legitimisation crisis has now begun to break the spiral of silence. The far right winners of the European elections have at least *one* democratic achievement to their name, presenting the European power elites with a choice: either watch their own agony passively and lose the majority in one parliament after another to authoritarian liberalism, or take the bull by the horns and let the people themselves decide. The greater the chances of democratic growth and enlargement, the better. And even if they decide against Europe, it would be their own deliberative and democratic choice.

43 B. Simms & B. Zeeb, *Europa an Abgrund*, Beck, München, 2016.

44 Eurostat 2015, quoted in B. Simms & B. Zeeb, *Europa am Abgrund*, Verlag C.H.Beck oHG, Munchen, 2016, p. 116.

45 Gerhards & Holger, “European Integration, Equality Rights and People’s Beliefs”, 2013, pp. 19-31; Gerhards & Holger, *Wir, ein europäisches Volk?* 2013.



11 THE SECOND ARAB AWAKENING AND THE CHANGING CONTEXT OF PUBLIC REASON

David Rasmussen

11.1 INTRODUCTION

I was struck by the first sentence of the recently published book, *The Second Arab Awakening and the Battle for Pluralism*, by Marwan Muasher. ‘Liberal revolutions have come to the Arab world before.’¹ This characterisation makes two assumptions: not only that the first Arab awakening can be defined as a liberal revolution, but also that the second awakening can be described as liberal as well. This means that in the relatively short time from 2001 to 2014, we have moved from characterising recent events in the Arab world not under the rubric of ‘clash of civilizations,’ but rather, by the choice of the word ‘awakening’ as a synonym for a liberal revolution.² One must also note that the use of the term ‘awakening’ rather than ‘spring’ denotes a terminological change from a temporal metaphor to a more historical one. Awakenings are associated with events that occur over significant periods of time, rather than the seasonal and immediate reference associated with the designation ‘spring.’

What does it mean to call the so-called second Arab awakening a liberal revolution? In the following lines, I shall try to answer that question by first framing it in the larger historical context by reference to the origins of the liberal narrative. Second, I will attempt to probe the question of why and how the recent events of the Middle East can be put in the context of that narrative. And finally, I will turn to evolutionary theory to see what kind of paradigm can be prescriptive for the second Arab awakening.

11.2 THE LIBERAL NARRATIVE AND THE EMERGING DOMAIN OF THE POLITICAL

The origin of the first liberal revolution stems from the attempt to resolve the problem of stability. A brief look at Hobbes will suggest that he was trying to construct a narrative that goes beyond what we know now as the ‘crisis of civilization’ narrative, which in recent

1 M. Muasher, *The Second Arab Awakening and the Battle for Pluralism*, Yale University Press, London, 2014, p. 1.

2 See S. Huntington, *The Clash of Civilizations and the Remaking of World Order*, Simon & Schuster, New York, NY, 2011.

times, with the help of Bernard Lewis and Samuel Huntington, was adapted to explain the post-9/11, 2001 events whose origin was associated with the Arab world.³ In the language adopted by Hobbes, the task was get beyond the state of nature described as a war of all against all, *bellum omnium contra omnes*.⁴ As Leo Strauss points out in his rejoinder to Carl Schmitt's, *The Concept of the Political*, Hobbes's attempt to get beyond this graphic description of the state of nature amounts to classifying Hobbes as a liberal.⁵ Liberalism, of course, has many meanings and there are those who would find this classification offensive because it associates liberalism with authoritarianism, resulting from Hobbes definition of and preoccupation with sovereignty. However, my point is quite simple – liberalism can be construed as that attempt to define politics as overcoming the war of all against all. One might call this the project of liberalism. Looking at the liberal project from an historical perspective, the great problem has been to keep the project alive.

I will not give a full account regarding the manner in which Hobbes comes to the conclusion that we can overcome the state of nature. Suffice it to suggest that empirical evidence for this conclusion is the behaviour of nations towards one another.⁶ The way to overcome this fate is to appeal to our basic rational self-interest. He seems to think that on that basis alone, we can achieve sufficient peace and harmony to keep us from destroying each other. However, in a world dominated by pluralism, Hobbes's attempt to establish stability was not enough. It would be necessary to have stability for the right reasons.

The phrase 'stability for the right reasons' is derived from Rawls's later work.⁷ Centring his political philosophy on the development of a theory of social cooperation formulated in the social contract tradition initiated by Hobbes, Rawls would come to realise that the fact of pluralism would significantly affect the very possibility of achieving 'stability,' as he put it, 'for the right reasons.'⁸ Clearly, the problem of stability forced him to reconsider the entire project he developed in *A Theory of Justice*, and although I cannot go into detail regarding the manner in which his project changed, allow me to list six consequences of what he came to see as the fact of pluralism. They are: (1) the turn from the metaphysical to the political, (2) the distinction between the comprehensive and the political, (3) the idea of overlapping consensus, (4) the subordination of reason to reasonability, (5) the elaboration of the domain of the political, and (6) the development of the idea of public

3 See B. Lewis, *What Went Wrong? The Clash Between Islam and Modernity In the Middle East*, Oxford University Press, Oxford, 2002; Huntington 2011.

4 Th. Hobbes, *Leviathan with Selected Variants from the Latin Edition of 1668*, ed. and trans. Edwin Curley, Hackett Publishing Company, Indianapolis, IN, 1994, p. 76.

5 L. Strauss, "Notes on Carl Schmitt, *The Concept of the Political*", *Carl Schmitt and Leo Strauss: The Hidden Dialogue*, trans. J. Harvey Lomax, The University of Chicago Press, Chicago, 1995, pp. 98-102.

6 See Chapter xiii in Thomas Hobbes, 1994.

7 J. Rawls, *Political Liberalism, expanded edition*, Columbia University Press, New York, 2005.

8 *Ibid.*, Introduction, xxxvi-xxxviii, pp. 140-144.

reason. The first major transition from his earlier work was marked by the publication of the paper 'Justice as Fairness: Political not Metaphysical' (1985) that constituted a point of departure from the epistemological justification of justice as fairness, the principle idea of *A Theory of Justice*.⁹ His realisation was that given diversity, one could only sustain the idea of justice as fairness on the basis of an interpretation of democratic culture. However, having succumbed to diversity, how could he account for unity sufficient for social cooperation? Rawls's answer to this question depended upon a division of labour between the comprehensive and the political. Indeed, there is a significant conflict between comprehensive doctrines in democratic culture; however, his assumption was that acquiescing to the domain of the political could accommodate conflict. To be sure, comprehensive views, as in the case of various religious or secular orientations, can be incommensurable. However, in most cases, they have reconciled themselves to the emerging domain of the political.¹⁰ How is this done? The answer is overlapping consensus.¹¹ Rawls always intended that overlapping consensus should not be understood as a mere overlapping of similar elements within various comprehensive doctrines, but rather, as an inclusion of the values of the political within comprehensive doctrines. However, what remains to be explained is how comprehensive doctrines could or should be tolerated in a democratic culture. The answer to this question occurs in terms of the distinction between pluralism and reasonable pluralism, based on the distinction between the reasonable and the rational.¹² To be rational is to be concerned with one's own good while to be reasonable is to take the other into account. A reasonable person is one who can simply understand and articulate the claims of a comprehensive doctrine not her own. A reasonable comprehensive doctrine is one that has accommodated itself to the domain of the political. To say that pluralism exists simply means that the modern culture is characterised by having a multitude of comprehensive doctrines. To say that reasonable pluralism exists is to say that comprehensive doctrines exist, which have accommodated themselves to the domain of the political and can be conceived as reasonable. As a consequence, subjects within a modern culture characterised by diversity who can distinguish between the reasonable and the rational are able to view other comprehensive doctrines as not necessarily true, but as reasonable.

Now, the integration of these new elements within the Rawlsian scheme results in a special form of justification. First, justification, the property of moral theory and epistemology, would hereafter be confined to the freestanding political domain. Second, political

9 J. Rawls, "Justice as Fairness: Political not Metaphysical", in S. Freeman (Ed.), *Collected Papers*, Harvard University Press, Cambridge, 1999, pp. 388-414.

10 See D. Rasmussen, "The Emerging Domain of the Political", *Philosophy & Social Criticism*, Vol. 38, No. 4-5, May, 2012, pp. 457-466.

11 Rawls, 2005, pp. 133-172; Also see J. Rawls, "The Domain of the Political and Overlapping Consensus", in S. Freeman (Ed.), *Collected Papers*, Harvard University Press, Cambridge, MA, 1999, pp. 473-496.

12 J. Rawls, "Kantian Constructivism in Moral Theory", in S. Freeman (Ed.), *Collected Papers*, Harvard University Press, Cambridge, MA, 1999, pp. 303-358.

justification would seek a wide berth, *i.e.* it would constitute a forum for the public in which agreement or disagreement could be expressed. Finally, justification would occur in accord with the liberal principle of legitimacy which Rawls articulated in the following manner: ‘our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may be reasonably be expected to endorse in light of principles and ideals acceptable to their common human reason.’¹³ Finally, public reason contextualises political justification by creating a public discourse in which political justification can be expressed.

11.3 THE SECOND ARAB AWAKENING AND THE EMERGING DOMAIN OF THE POLITICAL

If I were to condense the argument of *The Second Arab Awakening*, it would come to the following: Arab societies are essentially diverse. This diversity has increased in the last 200 years. If Arab societies are to succeed on a political level, they must accommodate the pluralism that constitutes them in an affirmative way. If they are to achieve stability, they must achieve stability for the right reasons. The argument is both historical and normative. On the historical side, the virtue of the historical view is that it provides the possibility of framing our perspective not only of the present situation, but also most importantly for the future. As Marx intimated, we study history not so much to learn about the past, but to learn about ourselves. The argument is normative in the sense that it sets out to define a set of principles that can define a new political order. The sub-text is that as these principles were latent in the first Arab awakening but left dormant, they can be resurrected to serve a certain political goal in the second.

The argument has three components: first, a reconstruction of the Arab past; second, a reflection on the present state of affairs; and third, by implication, a consideration of the possibilities for the future.

Following *The Second Arab Awakening*, the fundamental developments of the Middle East can be traced to the Napoleonic invasion of Egypt (1798-1802). The liberal revolution that ensued began when Muhammad Ali sent his subordinates to Paris to learn modern European statecraft. Significant attempts to adapt Islam to modern political society can be dated from that period. The most important event that was to shape the Middle East was the decline and fall of the Ottoman Empire and the carving up of the Middle East into colonial fiefdoms. From this, we can date the rise of pan-Arabism and Arab nationalism. The rather astute observation is that this attempt at liberation from colonialism was not accompanied by claims for democracy, which incorporated the affirmation of diversity

13 Rawls, 2005, p. 137.

and pluralism. Finally, with the breakout of the 1967 war, so-called political Islam emerged with its negative as well as positive manifestations. The end result has been the split between Islamists and secularists, neither of which has been able to achieve stability for the right reasons. So, the question remains: how is it possible to achieve stability for the right reasons?

11.4 FROM HISTORY TO EVOLUTION: CONSTITUTIONALISM

Certainly, in parts of the Arab world, achieving stability for the right reasons is an open question. However, if we switch from the historical to the evolutionary perspective, the situation could look much more promising. First, a word about the difference between history and evolution. Heretofore, the argument for stability for the right reasons, *i.e.* adaptation to reasonable pluralism, has been formulated from an historical perspective. Hence, the great moments were the Protestant Reformation, the Treaty of Westphalia (1648), and the series of crises that led to the formation of the modern nation state and the development of constitutionalism. Modernity, whatever its form, has led to increasing diversity and reasonable pluralism with the result that no single theory of the good nor a single conception of justice could predominate. With the development of the emerging domain of the political, the link between modernisation and secularisation could no longer be sustained in light of the rise of religion in modern society.

The descriptive metaphor for the Second Arab Awakening may well be *crisis*, a crisis of legitimation that, from an historical perspective, is not yet resolved.¹⁴ However, if we switch from history to evolution, the case may be different. What I mean by evolution can be signaled by a phrase taken from a recent paper by Jürgen Habermas, referring to a potential democratic transformation of the European Union through an understanding of mixed constituent power. In this paper, what looks like a legitimation crisis ‘the *taming of brute political power*’ from the point of view of political science is ‘*transformation in the composition of the medium of law*’ from the point of view of legal theory.¹⁵ The point is what, from the perspective of political theory, looks like an historical dilemma is from the point of view of legal theory, a stage in evolutionary development. Such a development in constitutionalism has occurred in Tunisia with the ratification of a new constitution in January 2014. It could be the beginning of the end of a revolution that began in Tunisia several years before, which marked beginning of the second Arab awakening.

As stated earlier, one of the significant achievements in the project to keep the liberal narrative alive was to separate the comprehensive from the political. Interestingly, the Tunisian constitution confronts this issue head on in Articles 1, 2, and 6. Article 1 states,

14 See J. Habermas, *Legitimation Crisis*, trans. Thomas McCarthy, Beacon Press, Boston, MA, 1975.

15 J. Habermas, “Plea for a Constitutionalization of International Law”, *Philosophy & Social Criticism*, Vol. 40, No. 1, 2014, p. 6.

‘Tunisia is a free, independent and sovereign state. Islam is its religion, Arabic its language, and the republic its system.’¹⁶ Article 2 states, ‘Tunisia is a civil state that is based on citizenship, the will of the people, and the supremacy of law.’¹⁷ Both of these articles are entrenched. Article 6 states,

The State shall protect religion, guarantee freedom of belief and conscience and religious practices, and ensure the impartiality of mosques and places of worship away from partisan instrumentalisation. The State shall commit to spreading the values of moderation and tolerance, protecting sanctities and preventing attacks on them, just as it shall commit to preventing calls of *takfeer* [calling another Muslim an unbeliever] and incitement to hatred and violence and to confronting them.¹⁸

Taken together, the three articles suggest an essentially different orientation to the liberal separation between the comprehensive and the political in the sense that the comprehensive is conceived as part of the political. Inasmuch as articles 1 and 2 are entrenched, presumably one cannot take precedence over the other. So, while Islam is defined as the religion of Tunisia, the civil state is based on citizenship. There could be, and perhaps will be, conflict between these two articles; however, what might be of concern to those interested in the further development of the liberal paradigm is whether this is a new step in the historical and evolutionary development of the liberal paradigm. If it is, it signifies a slightly different way to accommodate pluralism. Article 6 adds to the complexity of the issue of the relationship of the comprehensive and the political by making the assertion that ‘the state shall protect religion,’ but goes on to state that it will ‘guarantee freedom of belief and religious practice,’ which is to suggest that, while at the same time as affirming a particular religious practice (Islam), it is affirming ‘freedom of belief,’ which would signify an affirmation of pluralism.¹⁹ The upshot of a somewhat cursory reading of these three articles is that they affirm Islam, a particular religion, while at the same time, they affirm pluralism.

Clearly, Tunisia is not the only example of the attempt to integrate comprehensive doctrines within the domain of the political; however, it is probably the most recent one. Other examples include nation states that have affirmed a particular religious orientation as part of the definition of citizenship. No doubt Rawls was influenced by the first amendment to the constitution of the United States, which separates the state from established religion, reflecting the Virginia statute for establishing religious freedom drafted

16 Jasmine Foundation, *Constitution of the Tunisian Republic*, accessed 10 May 2015, <www.jasmine-foundation.org/doc/unofficial_english_translation_of_tunisian_constitution_final_ed.pdf>.

17 *Ibid.*

18 *Ibid.*

19 *Ibid.*

by Thomas Jefferson and adopted in 1786. The document states that ‘our civil rights have no dependence on our opinions any more than our opinions in physics or geometry.’²⁰ The first amendment to the United States Constitution follows that principle by stating that ‘Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof.’²¹ In other words, it makes Jefferson’s point without the philosophical justification of it by reference to civil rights. The Tunisian Constitution would suggest that there is a different mix between the comprehensive and the political, which the original articles attempt to embody. It attempts to extend the bounds of legitimacy through making the comprehensive part of the political. This would be problematic for the secularist, the classical liberal, one who endorses *laïcité*, *i.e.* all who endorse an enlightenment view of the transition from religion to secularism. On one reading of the relationship between the comprehensive and the political, which is achieved through overlapping consensus, it would be up to the citizen to establish her own understanding of the relationship. Further, if we are committed to the proposition that the problems for modern democratic society stem from democratic culture, the ethos of a particular community must be accounted for. The so-called proviso, as Rawls modified it in his last reflections on public reason, would have to be modified again in order to account in some way for the comprehensive. Yet, the interesting thing about articles 1, 2, and 6 of the Tunisian Constitution is that they do not deny pluralism; rather, they attempt to accommodate it.

20 <www.encyclopediavirginia.org/Virginia_Statute_for_Establishing_Religious_Freedom_1786>. Jefferson’s argument in the statute was mainly based on natural law; an argument that does not appear in the first amendment.

21 <www.law.cornell.edu/constitution/first_amendment>.



12 RESENTMENT AND SOCIETAL TRANSFORMATION – A RULE-RELATED ARGUMENT AGAINST MARTHA NUSSBAUM’S CRITIQUE OF ANGER

Anne Reichold

12.1 INTRODUCTION

This chapter intends to defend the thesis that resentment can play a future-oriented, transformative role in processes of societal and political change. My argument rests on a rule-related interpretation of Peter Strawson’s reactive attitudes in *Freedom and Resentment*. Resentment is regarded as an expression of the perceived violation of certain rules or norms by some agent. Resentment is not primarily an emotion, but a reactive attitude towards the violation of certain rules and norms by someone’s action. In his article, Strawson focuses on agents and actions within a frame of given social or moral rules. I want to extend this approach to cases of societal and political transformation in which not only single actions violate given norms, but in which resentment might be a first step in identifying unjust rules and norms. Resentment in cases of societal transformation might call for change of legal, political, or moral rules, and thus, can express the perceived injustice of social systems. Resentment can initiate critical discussions of rules and norms and can thus be a good tool for societal change.

On the basis of a rule-related interpretation of resentment, I want to discuss and partly reject Martha Nussbaum’s criticism of anger in *Anger and Forgiveness*.¹ Nussbaum’s criticism of anger rests upon the thesis that anger – and as one of its species, resentment – is conceptually bound to a wish for payback. She rejects anger and resentment for all social spheres, especially on normative grounds. I agree with Nussbaum that resentment has a conceptual content and can be well-grounded. But I do not agree with her thesis that resentment is constitutively bound to the wish for payback or revenge, and is thus not future-oriented. On the contrary, I want to defend the thesis that resentment is future-oriented, especially by its constitutive reference to rules as reasons for normative evaluation. A normative interpretation of resentment reveals the constitutively future-oriented character of resentment in its standard case. Furthermore, I doubt that payback cannot be

1 M. Nussbaum, *Anger and Forgiveness. Resentment, Generosity, Justice*, Oxford University Press, Oxford, 2016.

rationally or morally justified, as Nussbaum suggests. Strawson presents a rule-related way of justifying punishment that Nussbaum does not take into account.

To say it right from the beginning: I do not want to argue that resentment is legitimate in itself or forms a legitimisation for certain rules or norms. On the contrary: resentment can be defeated and it calls for justification and legitimisation itself. Resentment reveals the subjective or collective view of certain agents and groups on certain actions and rules or norms. It expresses an acceptance of certain rules that allows to make these rules explicit and to put them into public discourse and critique. Resentment is the expression of outrage about the perceived violation of rules or norms that are considered to be legitimate by the resenting person. A rational discourse about the rationality and legitimacy of the resenter's view can start here and might lead to a modification or rejection of resentment. Wolfgang Iser, an author from the *Frankfurt School*, emphasises that expressions of indignation point to standards of justice that are not yet justified or legitimate.² To count as indicator of injustice, indignation needs justification itself. One example can be the nationalist *Pegida movement* in Germany. Indignation or resentment is a core phenomenon here – as well as in other right-wing movements – and points to standards of nationalism and racism that are accepted, reinforced, and publicly articulated by these groups, but that are by no means justified or legitimate. With reference to Strawson, Iser argues that philosophical critique of society is reflexive validation or verification of indignation.³

Resentment does not, in itself, give an answer to the question of how to react to the perceived violation. Resentment helps to identify the responsible agent, the type of action, and the rules or norms that are perceived to be violated by the action. This identification is not done from an observer's external perspective, but by an internal view on rules and an emotional and attitudinal reaction to the violation of norms and rules. This way, resentment has an action-guiding function.

The question of *what* to do with regard to the resented actions and situations is a different normative question, which is not answered, but raised by resentment. Contrary to Nussbaum, I argue that payback or punishment might be one of the rational or justified options. But there are several others, and they all have to be justified by reference to norms that are not themselves given by resentment. The expression of reactive attitudes in general, and of resentment in particular, is the expression of an internal view on social or moral rules that are regarded and accepted as binding by the person experiencing and expressing resentment about the violation of a certain rule. Questions of payback, punishment, or retribution are themselves normative questions that have to be conceptually and normatively distinguished from the expression of resentment and indignation. A normative interpre-

2 M. Iser, *Empörung und Fortschritt. Grundlagen einer kritischen Theorie der Gesellschaft*, Campus, Frankfurt & New York, 2009, p. 8.

3 "Gesellschaftskritik [...] im Kern die reflexive Überprüfung der Empörung ist". Iser 2009, p. 8.

tation of resentment allows this distinction, and thus, reveals the future-oriented potential of resentment. And since resentment can help to focus on unjust structures, institutions, norms, or laws and can initiate a public discourse on new and better rules and institutions, it can be a good tool for societal transformation.

12.2 STRAWSON'S CONCEPTION OF REACTIVE ATTITUDES

The term 'reactive attitude' was famously introduced by Peter Strawson in *Freedom and Resentment* (1962).⁴ The text is a contribution to the philosophical discussion about the compatibility of freedom and determinism. This philosophical question is important since a certain idea of freedom is implied by interpersonal and moral concepts and practices like the ascription of responsibility, the concepts of shame and guilt, and the practice of punishment. Strawson's text thus explores the conceptual, social, normative, and linguistic backgrounds of interpersonal, and especially, moral concepts and practices.

Strawson identifies three different positions: 1) the Optimist is a utilitarian who argues for the compatibility of freedom and determinism; 2) the Pessimist is a metaphysician (Strawson calls his kind of metaphysics 'panicky metaphysics'⁵) who fears that freedom, and with it, morality, is not justified if a general thesis of determinism is true. The falsity of determinism is a precondition of morality; 3) the Sceptic says that morality is internally contradictory and that it is not justified, be determinism true or false.

Strawson's own position lies somewhere between the Optimist and the Pessimist. He adopts from the Optimist the thesis that morality is compatible with the truth of determinism, but he criticises the way how the Optimist justifies this thesis.

The Optimist points to the instrumental utility of moral practices as the main reason for justifying morality. Strawson calls this justification 'one-eyed utilitarianism'⁶ and he argues that the utility of practices is not the right kind of reason for morality. The core of the justification of moral practices does not lie in its utility, in its power to design society in a certain way, but moral practices are justified by shared, general social rules that are expressed in practices such as the ascription of responsibility. To explore his idea of an internal, participant, normative way of justification of morality, Strawson analyses the reactive attitudes.

Before describing the general structure of reactive attitudes, I will sketch the Pessimist's position that Strawson partly rejects and partly includes in his position. He accepts the Pessimist to rightly point to the weak side of the Optimist: the instrumentalism. The Pes-

4 P. F. Strawson, "Freedom and Resentment", in P. F. Strawson (Ed.), *Freedom and Resentment and Other Essays*, Routledge, London, 2008, pp. 1-28.

5 Strawson 2008, p. 27.

6 *Ibid.*, p. 25.

simist is not satisfied with an instrumental idea of morality. To take moral practices as means to reach certain social aims takes away the central justification of moral claims: the normative idea that someone did something wrong and the demand that he should have done otherwise. According to the Pessimist, this normative way of justifying morality presupposes a libertarian conception of freedom which is not compatible with determinism. Thus, according to the Pessimist, a metaphysical rejection of determinism is needed. Strawson agrees to the critique concerning instrumentalism and utilitarianism: it is the wrong way of justifying not only moral practices, but also many other intersubjective human practices and concepts. He rejects the argumentative strategy that the Pessimist accepts himself, though: the Pessimist holds it necessary to justify a metaphysical thesis about the falsity of determinism. According to the Pessimist, the justification of morality and related topics of responsibility needs as a premise a metaphysical thesis that determinism is false. Strawson himself develops a way of justifying moral and other intersubjective human practices that neither takes the lines of instrumentalism (Optimist) nor the lines of metaphysics (Pessimist). In sharing the idea that morality can be justified, he, furthermore, rejects the Sceptic's position. Strawson's own justification of morality goes an interesting way: he leaves the battlefield of determinism in saying that he does not even know how the general thesis of determinism could be properly formulated. A general thesis of determinism does not matter in his justification of morality or other interpersonal practices. Instead, Strawson starts from 'the facts as we know them'⁷ – from social practices and ordinary language. Here, the reactive attitudes come into the picture. In our ordinary life, we react to the actions of others in certain emotional and linguistic ways. Strawson points to love, resentment, indignation, and shame as examples of reactive attitudes and reveals a web of reactive attitudes at the core of human social life.

According to Strawson, reactive attitudes rest upon and reflect general normative demands on one another. They are experienced and expressed from a participant perspective. Strawson uses the example of resentment: resentment is a reactive attitude not only reacting to physical violation, but to the violation of a normative claim or demand. The normative background does not necessarily exist prior to the expression of the violation, but in expressing resentment, one refers to a norm or standard. In central parts of human practice, we speak and feel in front of a background of general demands on others for others. For example, when we feel resentment because someone shouted at us, we do not just causally react to the action of the other, but we feel justified in doing so, we accuse the other of having done something wrong. The action is evaluated according to generally accepted standards and the reactive attitudes reflect this evaluation. In this sense, social actions of others are seen or described or experienced in a context of general demands that are reflected by reactive attitudes.

⁷ *Ibid.*, p. 22.

Human life cannot be conceived without this general structure of reactive attitudes that rest upon general demands on one another. Therefore, normativity is nothing that comes into the picture on the grounds of a descriptive basis of human nature, but it is already reflected in core concepts and interpersonal practices, feelings, and social interactions. Strawson points out that the general framework of human life cannot, as a whole, be questioned or rationally justified. Justification and critique take place internally from a participant perspective that itself relies on general demands. In *Social Morality*, Strawson links general demands and rules in a way which gives rise to the rule-related interpretation of reactive attitudes in my account. 'I spoke of rules in this connection; and the rules I meant would simply be the generalized statements of demands of this type.'⁸ The reactive structure shows that morality is a social phenomenon that points back and refers to socially accepted rules. These rules change during history but they constitute society, and as a consequence, the human framework of life. A very general rule underlying or constituting morality expresses the equal and respectful treatment of all men by all men.

The generalized [...] reactive attitudes [...] rest on or reflect [...] the demand for the manifestation of a reasonable degree of goodwill or regard, on the part of others, not simply towards oneself, but towards all those on whose behalf moral indignation may be felt, i.e. as we now think, towards all men.⁹

Moral discourse always contains reference to mutually accepted rules and norms that can only be grasped from an internal perspective of participation. The presupposition and reference to a mutually shared normative background is constitutive for moral discourse. Whereas morality as a whole cannot be justified from an external standpoint, Strawson leaves room for internal justification, criticism, and modification. He discusses in detail, e.g. the modification of resentment because of excuses or other reasons: if an agent turns out to have been in a schizophrenic period while acting and violating demands, resentment can or should be modified, since the person acting was not able to act according to demands. Resentment is open to rational, internal justification, or modification.

Whereas Strawson mainly talks about the modification of reactive attitudes, he also talks about the justified modification of the general demand of goodwill. Exactly this happens in cases of justified punishment. At first glance, punishment does not seem to be justified, since punishing someone is not treating him according to the general demand of goodwill. The institution of punishment in Strawson's account is legitimate in cases of a justified modification of the general demand of goodwill as a reaction to the offender's violation of the demand of goodwill. Given that the rule-violating action was committed

8 P. F. Strawson, "Social Morality and Individual Ideal", *Philosophy*, Vol. XXXVI, No. 136, 1961, p. 7.

9 Strawson 2008, pp. 15-16.

by a rational person that understands and accepts the general rules, punishment is an expression of taking the person as responsible and expressing the acceptance of the violated rule. Not punishing could mean not accepting the rules and not treating the person as being a responsible and even a rational agent. In cases of just punishment, Strawson argues that the offender himself should be able to agree to the punishment: he should not react with resentment, because he should accept the punishment as just. Punishment, though, in no way takes a special conceptual place in Strawson's analysis of resentment. It is a moral or legal social practice among others that can be justified or criticised like other practices as well.

12.3 CONCEPTUAL CLARIFICATION: RESENTMENT, INDIGNATION, ANGER

Before discussing Nussbaum's account and critique of anger and partly rejecting her criticism, I want to clarify how the concepts of anger, resentment, and indignation relate to one another and how I will use them in this chapter. This is especially important since Nussbaum uses the term 'resentment' in a different way than Strawson. Nussbaum discusses resentment as well as indignation as falling under the generic term of anger and she rejects a clear-cut distinction between moral and non-moral emotions.¹⁰ In contrast to Strawson's distinction between resentment (personal) and indignation (vicarious analogue, moral), she argues that resentment as well as indignation are sometimes used in moral, and at other times, in non-moral cases.¹¹ Nussbaum applies her analysis of the generic term of anger also to 'its species,¹² among them resentment and indignation: the bundle of attitudes, emotions, and practices collected under the generic term of anger in Nussbaum's analysis cover resentment and indignation. Even though I will propose an interpretation of resentment as reactive attitude based on Strawson's account, I agree with Nussbaum that a clear-cut conceptual distinction between moral and non-moral cases is hard to find and not convincingly given by the concepts of resentment and indignation. Though I do not agree with Nussbaum's short analysis of Strawson's concept of indignation being an attitude of an 'observer,' and thus not being applicable to 'wrongs done to me,'¹³ I follow Nussbaum's broad use of resentment in the sense that it can designate cases of wrongs done to me and to others. In my analysis, 'indignation' will fall under the broad use of 'resentment.'

Why do I focus on resentment in this chapter and not on Nussbaum's main topic: anger? I base my analysis and criticism of Nussbaum's approach on a rule-related interpretation of Strawson's reactive attitudes. Strawson mentions anger among other reactive

10 See Nussbaum 2016, p. 262.

11 *Ibid.*, p. 291.

12 *Ibid.*, p. 261.

13 Nussbaum 2016, p. 291, n. 3.

attitudes in interpersonal relationships, but he focuses his analysis on resentment and its vicarious analogue, indignation.¹⁴ My thesis is that the general features of resentment and indignation given by Strawson can help to formulate an argument against Nussbaum’s overall thesis that anger in general, and resentment as one of its most prominent kinds, form a morally and conceptually flawed and wrong basis for personal, political, and revolutionary strategies to deal with injustice and wrongdoing. This turns out to be closer to Nussbaum’s approach than it looks at first sight: whereas Nussbaum hardly mentions resentment in her conceptual analysis of anger and names resentment and indignation as species of the generic concept of anger, she seems to use the terms of anger and resentment interchangeably, especially in her chapter about *revolutionary justice*. She starts this chapter with a quote of Mohandas Gandhi’s: ‘But when I say we should not resent, I do not say that we should acquiesce.’¹⁵ Some of her main spokesmen for a rejection of anger talk about a rejection of resenting or resentment. Nussbaum herself does not comment on this; she just uses quotes about resentment as paradigmatic examples of her criticism of anger. Since Nussbaum’s criticism of anger turns out to be also a criticism of resentment,¹⁶ it seems reasonable to address her account by a different interpretation of resentment. At least her criticism of resentment can be addressed by that (especially since I use a broad concept of resentment). In how far this critique addresses Nussbaum’s account of anger shall be left open here. Since she herself draws close connections between resentment and anger, a criticism of her critique of resentment seems to affect at least parts of her discussion of anger. An alternative interpretation of resentment that disentangles resentment and payback conceptually hits Nussbaum’s criticism of resentment, and by this, at least parts of her critique of anger. For the purpose of my chapter, it is enough to show that there is an interpretation of resentment that allows a separation of resentment and payback and what is even more: it might form a legitimate basis for future-oriented strategies to deal with wrongdoing.

12.4 NUSSBAUM’S CONCEPTION OF ANGER AND RESENTMENT

At the beginning of *Anger and Forgiveness*, Martha Nussbaum describes two significant transformations in the relationship between anger and law that took place in the ancient world of Greece in the 5th century B.C. Referring to Aeschylus, she presents the furies as animal-like evil beasts that look for revenge, pain, and irrational violence. Anger, as Nussbaum sees it, has its roots in this irrational violent structure. The first important transformation in ancient Athens consists in the development of legal institutions that

14 Strawson 2008, p. 10.

15 Nussbaum 2016, p. 211.

16 See, e.g. Nussbaum 2016, p. 218.

replace, as a third party, the violent revenge structures of the furies. Legal institutions rose out of the furies and transformed their place in society: the furies lost their function of revenge without being fully expelled from society. Instead, they are honoured by a place outside earth.¹⁷ The coming into being of legal institutions entailed a second transformation of the furies themselves: they changed their character, became open to reasons, and transformed their evil character into a mostly friendly one. Law and the transformation of anger were bound to one another: law institutionalised punishment and irrational violence changed into a form of emotion that is open to reason.

Systematically, Nussbaum analyses anger as an emotion with a ‘conceptual content’ that ‘includes the idea of a wrongful act against something or someone important to the self’ and that ‘includes, conceptually, the idea of some sort of payback, however subtle.’¹⁸ If the information about ‘who has done what to whom, that it was wrongful, and also about the magnitude of damage’ is correct, Nussbaum calls the anger ‘well-grounded.’¹⁹ Anger has a cognitive character that entails a normative judgement about actions committed by actors within a normative frame. The normative standard of wrongfulness in Nussbaum’s account is mainly a consequentialist, welfarist one. The cognitive and normative features of anger will play a crucial role in my discussion of Nussbaum and Strawson later on. Nussbaum herself does not focus on this normative part of anger.

The components of Nussbaum’s account of anger are the following:

a Anger as a generic term

Anger, in Nussbaum’s view, is not only one emotion among others, but it is treated as a generic term that can take the forms of resentment, indignation, or outrage; it can be a moral or non-moral emotion. ‘My strategy in the book is to work with a generic notion of anger, to define it as a genus, and to introduce pertinent variations through descriptions of cases.’²⁰ In general, she is not interested in drawing a distinction between anger, resentment, and indignation, but in pointing to a similar retributive structure that all these phenomena share with the generic emotion of anger.

17 See Nussbaum 2016, pp. 1-5.

18 *Ibid.*, p. 93.

19 *Ibid.*, p. 93.

20 *Ibid.*, p. 261.

b Anger contains the idea of a wrongful act

Anger contains 'a judgement of wrongfulness.'²¹ Anger, thus, is not an irrational emotion, but contains a normative judgement about the wrongfulness of an action. Anger judges about actions; for this reason, a normative standard of right and wrong seems to be necessary, even though Nussbaum does not focus on this element in her analysis.

c Anger against offences of someone important to oneself

Anger arises not in all instances of wrongful acts, but it does so when the act offends someone important to oneself. The personal element in anger shifts the focus from the purely normative wrongfulness of the act to an interpersonal structure. The relationship of the offended person to the angry person is of importance.

d Anger includes a wish for payback

Nussbaum's thesis is 'that anger involves, conceptually, a wish for things to go badly, somehow, for the offender, in a way that is envisaged, somehow, however vaguely, as a payback for the offense. They get what they deserve.'²²

It is not important that the angry person him- or herself fulfills the revenge, but the wish that something bad happens to the offender is treated as a conceptual element of the generic concept of anger. Only in one case – Transition-Anger – the wish for payback is lacking.

e Anger is an attitude

Especially in the chapter on revolutionary justice, Nussbaum describes anger as an attitude.²³ Not only the emotional part, but also the action-guiding and practice-forming feature of anger is taken into account here. The fact that Nussbaum calls anger an attitude is important within the context of this chapter, since Strawson calls resentment a reactive attitude and Nussbaum relates her position explicitly to his account.

21 *Ibid.*, p. 262.

22 *Ibid.*, p. 23.

23 See Nussbaum, 2016, p. 228.

On the basis of this conceptual analysis, Nussbaum points to a ‘twofold reputation’²⁴ of anger and resentment in recent moral and political thought: on the one hand, anger is regarded as a core concept in morality, social movements, and the ideas of freedom and responsibility, and on the other hand, anger is rejected as normatively or morally problematic. According to Nussbaum, the first position gives anger a central role in social, moral, and political life. As one of the highly influential proponents of resentment, Nussbaum mentions Peter Strawson’s analysis of reactive attitudes in *Freedom and Resentment*.²⁵ On the other hand, Nussbaum identifies famous critiques of anger and resentment, especially in the political field: Gandhi, King, and Mandela are cited with statements against resentment as an appropriate attitude in social movements.²⁶ Nussbaum clearly positions herself on this side of the discussions of anger.

12.5 NUSSBAUM’S CRITIQUE OF ANGER

On the basis of her general account of anger, Nussbaum rejects anger for several social spheres (intimate relationships, the sphere of daily life that she calls ‘middle realm,’²⁷ everyday justice, and revolutionary justice). She rejects anger on normative and rational grounds and calls it ‘inappropriate’²⁸ and ‘ethically doomed.’²⁹ Nussbaum uses different formulations to state her thesis throughout the book. The general direction of her arguments is to show that there are good reasons to reject anger in all social spheres and that it should be changed or transformed into non-anger or generosity. My aim in the following part is to give a broad argumentative sketch of Nussbaum’s critique of anger. What exactly is Nussbaum arguing for? How can her main thesis be reconstructed? And what are the premises?

12.5.1 *The Main Thesis*

A reconstruction of Nussbaum’s main thesis can start with some quotes that show the broad range her argument takes: she claims that ‘anger is a central threat to decent human interactions.’³⁰ At another point, she says that anger is ‘normatively problematic’³¹ and in her reaction to the critique of payback, she says that ‘a rational person will [...] rapidly

24 *Ibid.*, p. 14.

25 See Nussbaum 2016, pp. 14-15.

26 *Ibid.*, p. 212.

27 *Ibid.*, p. 137.

28 *Ibid.*, p. 140.

29 *Ibid.*, p. 93.

30 *Ibid.*, p. 14.

31 *Ibid.*, p. 31.

move toward what I call the Transition, turning from anger to constructive thoughts about future welfare.³² The nominal term ‘anger’ leaves it open if Nussbaum claims that anger should not occur at all, that we should not be angry (a), or if she claims that we should not stick to anger for too long and should modify anger into something else (b), or if she states that anger should not lead our actions or should not define the aims of future actions (c). In (a), the having of emotions itself would be normatively guided, would be an object of normative evaluation. If one looks at Nussbaum’s cases, this does not exactly seem to be the point. Nussbaum focuses more on what to do in cases of anger: one should move on to a future-oriented stance, one should transform anger into Transition-Anger, or one should purify one’s consciousness. The occurrence of anger itself is not normatively regulated in Nussbaum, but the role anger plays in the mental and personal, social, political, and legal spheres in fact is. Hence, I interpret Nussbaum rather in the direction of (b) and (c): anger should be modified into non-anger and anger should not guide our actions. Since emotions and attitudes are constitutive forces in guiding and motivating our actions, one has to change the mental sphere and at least modify one’s feelings and attitudes and either leave anger behind or modify it.

An interesting picture concerning the connection between emotions, attitudes, and actions arises: anger as an emotion has an in-built action-motivating power and an action-guiding aim: the wish for payback. In connecting the emotion of anger with an intentional, action-guiding, and motivational structure of the wish for payback, Nussbaum establishes a conceptual connection between anger and action-guidance. The normative evaluation of anger turns out to be partly an evaluation of the wish and aim in-built in anger: payback. By rejecting payback, she rejects the whole phenomenon: anger. Since the nominal formulation of ‘anger’ in Nussbaum covers the aspects of an emotion, an attitude, as well as an action-guiding wish for payback, I want to call the phenomenon rejected by Nussbaum an *Anger Framework*.³³ The topic of anger covers more than single occurrences of being angry by individuals, but it targets a whole philosophical, political, and cultural tradition, its practices, attitudes, and its normative evaluations. This also fits to the broad account of targeting several social spheres in each of which anger occurs in different formations and practices. In contrast to the *Anger Framework*, I will call the bundle of practices, attitudes, and emotions, Nussbaum aims at a *Framework of Non-Anger*. Nussbaum argues on normative and instrumental grounds for a transition from an *Anger Framework* – which she sees dominating in the philosophical and political cultures of the West – to a *Framework of Non-Anger*, paradigmatically realised in the thinking and practice of Gandhi, King, and Mandela. In the revolutionary sphere, Nussbaum talks about ‘a set of psychological and behavioral practices that need to be both accepted and deeply internalized by the move-

³² *Ibid.*, p. 29.

³³ Nussbaum herself uses the term “frame of mind”. *Ibid.*, p. 221.

ment's members.³⁴ Her claim that anger should not guide our practice points to an 'inner transformation involved in replacing resentment by love and generosity.'³⁵ Interestingly, she here uses the term 'resentment' interchangeable with 'anger'.

Therefore, her main thesis (T) shall be summarised like this:

T: The *Anger Framework* should be transformed into a *Framework of Non-Anger*.

12.5.2 The Premises

The main premises for her main thesis (T) can be summarised like this:

P1: The *Anger Framework* is not rationally justified.

P2: There are good reasons for transforming the *Anger Framework* into a *Framework of Non-Anger*.

In the following, I will discuss the premises successively.

P1 is itself a conclusion from an argument in which Nussbaum states that anger is conceptually connected to a wish for payback and that the wish for payback cannot be rationally justified. She reconstructs two ways of justifying the wish for payback and argues that they are either morally, or, in a broader sense, rationally problematic.

The argument that leads her to P1 can be reconstructed as follows³⁶:

p1: The *Anger Framework* is based on a payback mentality.

p2: The payback mentality is not rationally justified.

p3: There are no good reasons for payback mentality.

p4: If there are no good reasons for payback mentality and the payback mentality is not rationally justified and the *Anger Framework* is based on a payback mentality, then *the Anger Framework* is not rationally justified.

C: The *Anger Framework* is not rationally justified.

The reconstruction of Nussbaum's argument for P1 is based on a premise stating the conceptual connection between anger and payback and on an analysis of two (in her view, both problematic) justificatory strategies for the wish for payback. One is called the *road of status* and rests upon the idea that all injuries and violations are regarded as problems

34 *Ibid.*, p. 218.

35 *Ibid.*, p. 218. See here one example for the replacement of anger by "resentment".

36 Premises of the argument that leads to P1 are named: p1, p2, p3 and p4.

of the relative status of the respective persons. Following this strategy, payback shall be justified by the idea of rebalancing or restoring relative status positions by payback or retribution. Nussbaum regards this strategy as 'morally flawed' and as a 'narcissistic error,' because it regards every injury and offence as an offence of the own vulnerable self that shall be restored by payback. Payback from this point of view is an expression of the desire of 'domination and control.'³⁷ This focus on one's own relative status is seen as 'moral error' because it supports 'narrow and defective values.'³⁸ The wish for payback is morally wrong, since it aims at defective values.

The other strategy to justify the wish for payback is called *road of payback*; it rests on a form of 'magical thinking' assuming a form of 'cosmic balance' that is restored by practices of payback.³⁹ This strategy is 'objectionable in a different way.'⁴⁰ Nussbaum describes the idea of payback as 'counterbalancing the injury'⁴¹ as an evolutionary inheritance that often has a psychic function. This does not give it a normative legitimisation, though, since projects of payback in Nussbaum's view do not restore and they do not create better futures. Nussbaum's objection in this case is not that the wrong values are supported, but that restoring a balance is a cognitively defective aim, since there is no balance that could be restored. The strategy rests on a wrong premise of cosmic balance of whatsoever form. Seen from this perspective, the wish for payback is rationally wrong, since it presupposes a questionable principle of cosmic justice. Nussbaum seems to conclude from the two problematic ways of legitimising payback that the payback mentality cannot be justified, but should be transformed. This only holds when Nussbaum assumes that there is no other way to justify payback, even though she does not explicitly argue for that. This part in her argument is quite confusing, since it is far from obvious that there could not be other justifications for the wish for payback or practices of punishment. Strawson indeed points to another way of justifying the wish for payback in his paragraphs on the justification of punishment. Nussbaum herself does not reject the institution of punishment as a whole; she seems to be very programmatic at this point, highlighting a general direction of thought and practice more than giving a strict argument against possible justifications of the wish for payback. As the rejection of payback seems to entail a broad range of thoughts and practices, it seems reasonable to replace the term 'wish for payback,' which suggests to denote single occurrences of a certain wish, by the term 'payback mentality,' which points to a set of mental, attitudinal and justificatory elements.

The two premises p1 and p2 lead to the conclusion C, if one adds p3 and p4. Hence, if there are no good reasons for the payback mentality and the payback mentality is not

37 Nussbaum 2016, p. 29.

38 *Ibid.*

39 *Ibid.*

40 *Ibid.*

41 *Ibid.*

rationality justified and the *Anger Framework* is based on a payback mentality, then the *Anger Framework* is not rationally justified. The conclusion of this part of the argumentation is taken as P1 in Nussbaum's main argument: the *Anger Framework* is not rationally justified (P1).

After having shown the argument that leads to P1, I want to sketch the argument that leads to P2 in Nussbaum's account:

P2: There are good reasons for transforming the *Anger Framework* into a *Framework of Non-Anger*.

Nussbaum's advice to transform the *Anger Framework* into a *Framework of Non-Anger* does not only rest on the arguments against payback discussed earlier. She gives a positive account of a future-oriented strategy, especially in cases of social change and revolutionary justice. Anger in the context of revolutionary justice needs special consideration, because, in contrast to other social spheres, here, the legal and normative context itself is regarded as unjust. Proponents of anger – and I will argue for a type of this position later in this chapter – claim the following:

When the basic legal structure of society is sound, people can turn to the law for redress; [...] But sometimes the legal structure is itself unjust and corrupt. What people need to do is not just to secure justice for this or that particular wrong, but, ultimately, to change the legal order. That task is different from the task of preserving daily justice, albeit continuous with it. It seems to require anger, even if daily justice does not.⁴²

Nussbaum tries to show that 'the idea of "noble anger" as signal, motivator, and justified expression is a false guide in revolutionary situations and why a generous, even overgenerous, frame of mind is both more appropriate and more effective.'⁴³ Anger is rejected as a guide, which fits well with the above-mentioned general thesis that the *Anger Framework* is not rationally justified and should be transformed into a *Framework of Non-Anger*. This framework is based on an inner transformation, a getting rid of anger and resentment, and aims at freedom and justice. Nussbaum describes a 'new attitude'⁴⁴ that is characterised by active bodily actions that occur after self-purification, by a demand for freedom and justice, by breaking unjust laws, and by moving towards legal and social change. What is important for the above-sketches main argument is the fact that there are not only good

42 *Ibid.*, p. 212.

43 *Ibid.*

44 *Ibid.*, p. 221.

reasons lacking for the justification of the *Anger Framework*, but on top of that, Nussbaum tries to present good reasons for a *Framework of Non-Anger*. This is summarised in the formulation of P2: there are good reasons for transforming the *Anger Framework* into a *Framework of Non-Anger*.

Based on P1 and P2, Nussbaum's main argument can be summarised like this:

A: The *Anger Framework* is not rationally justified and there are good reasons for transforming it into a *Framework of Non-Anger*, therefore we should transform it into a *Framework of Non-Anger*.

12.6 RESENTMENT: A GOOD TOOL FOR SOCIAL CHANGE

Whereas Nussbaum states that the *Anger Framework* is not rationally justified and that it should be transformed into a *Framework of Non-Anger*, I will argue that there are good reasons for a web of reactive attitudes including resentment and that resentment is a good tool for Social Change (T). In the following, I will argue, first, for the thesis that there are good reasons for a web of reactive attitudes which necessarily includes resentment (1), and second, for the particular importance of resentment for societal transformation (2).

12.6.1 *Reasons for a Web of Reactive Attitudes Including Resentment*

The reasons for a web of reactive attitudes including resentment lie in constitutive connections between reactive attitudes, rules, and social life. Following the rule-related interpretation of reactive attitudes, I see one of the defining features of reactive attitudes in their internal relation to general demands and rules. Rules are not approached as abstract entities or statements, but by their use in judging, giving reasons, criticising, or accepting. By their use as a standard within a web of attitudes, rules are approached from an internal point of view. Reactive attitudes refer in different ways to rules as reasons or general demands. This rule-related character holds for all reactive attitudes. According to Strawson, a web of reactive attitudes forms the general framework of human life. Following Strawson in *Social Morality*,⁴⁵ human social life is constituted by rules in one form or another. An internal account of rules can especially be found in Hart, who mentions Strawson as one of his commentators and correctors in the Preface to *The Concept of Law*.⁴⁶

⁴⁵ Cf. Strawson 1961, pp. 1-17.

⁴⁶ H. L. A. Hart, *The Concept of Law*, 2nd edn, Clarendon Press, Oxford, 1994, p. vi.

[...] if a social rule is to exist some at least must look upon the behaviour in question as a general standard to be followed by the group as a whole. A social rule has an 'internal' aspect, in addition to the external aspect which it shares with a social habit and which consists in the regular uniform behaviour which an observer could record.⁴⁷

The rule-oriented, normative character of human social life is closely linked to the web of reactive attitudes, with resentment and indignation being among them. They form the internal way of relating to, perceiving, accepting or opposing rules as guides to actions. Without this inner relation to rules that has epistemological, motivational and even emotional character, rules and norms would just be abstract entities without clear relation to human actions and practices. A close connection between Strawson's account of *reactive attitudes* and Hart's *critical reflective attitudes* can be found:

What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of 'ought', 'must', and 'should', 'right' and 'wrong'.⁴⁸

Normative activities such as evaluating, discussing, accepting, or criticising are conceptually linked to a form of reactive attitude that internally relates to social rules. According to Strawson, human life without these reactive attitudes is 'practically inconceivable'.⁴⁹

Could there not be a web of reactive attitudes without resentment, though? Nussbaum seems to suggest a general transformation of resentment when she promotes the transformation of the *Anger Framework* into a *Framework of Non-Anger*. She does not only talk about modifications of particular occurrences of anger or resentment, but she states a general transformation from one framework into another. The *Framework of Non-Anger* entails love and generosity, but does not entail resentment, indignation, and anger.

Contrary to Nussbaum, my thesis is that there *are good reasons for resentment to be part of the web of reactive attitudes*. The term 'resentment' is used here in a broad sense for different kinds of reactions to a perceived violation of accepted rules or norms, it can designate moral and non-moral cases. If one accepts Strawson's and Hart's idea that social life is normative in the sense of rule-governed and rule-creating, then deleting resentment

47 *Ibid.*, pp. 55-56. I am grateful for the numerous discussions I had with Karl Christoph Reinmuth about the connections between Strawson and Hart concerning the concept of rules.

48 *Ibid.*, p. 57.

49 Strawson 2008, p. 12.

from the web of reactive attitudes would mean deleting a central critical attitude towards the violation of rules. Violations of rules are not only observed as irregularities from the outside, but seen as reasons for resentment from an internal point of view – '[...] the violation of a rule is not merely a basis for the prediction that a hostile reaction will follow but a reason for hostility.'⁵⁰ By taking away critical reactions towards violations of rules, an important aspect of rules as normative standards seems in danger: namely, the reference to rule violation as a reason for actions or attitudes. The normativity of rules as standards partly consists in a normative reaction to the violation of accepted rules. A critique of resentment as a type of attitude questions a core normative attitude within human life. Resentment is not just one contingent reactive attitude, but one of the attitudinal reactions to perceived violations of norms. To call for a web of attitudes without resentment means deleting a certain kind of attachment to rules. Hereby, not only a set of emotions or certain practices are changed by that, but a central internal feature of rules is deleted: the reactive attitudes to their violation by other people's actions.

The thesis that there *are good reasons for resentment to be part of the web of reactive attitudes* is perfectly compatible with the fact that certain instances or occurrences of resentment might be illegitimate and are expected to be changed or transformed. All reactive attitudes can be objects of modification or critique under certain conditions. These kinds of modification do not delete the whole phenomenon from the web of attitudes, though. Whereas Nussbaum claims that anger and resentment should be transformed into non-anger in general, I argue that it might be modified, transformed, or overcome under certain conditions and in certain situations. Resentment, like all the other reactive attitudes, is prone to reasons and has a defeasible character. Relevant changes and modifications of resentment thus take place within a web of reactive attitudes. The web is not changed as a whole by these internal modifications. Resentment as a type of attitude, thus, is not transformed or deleted from the web of reactive attitudes by the modification or change of single instances of resentment.

One of Nussbaum's main reasons to argue against an *Anger Framework* is the connection she perceives between anger and payback. From a Strawsonian perspective, Nussbaum's claim of a conceptual connection between anger and a wish for payback is not convincing. The wish for payback is by far not the only action-guiding aim intended by expressions of resentment. Examples would be the expression of resentment by such statements as 'I resent this' or 'I'm angry' or 'That's outrageous.' These expressions are not actions of payback and they do not necessarily aim at a form of payback. They express a felt injustice or perceived violation of a norm and demand for change. Also, forms of protest, social movements, or no-statements against political decisions or certain laws can be expressions of resentment that neither are actions of payback nor call for payback, but they can clearly

50 Hart 1994, p. 90.

be expressions of resentment. From the expression of resentment to the action and decision about punishment is at least one step to go, possibly more. Punishment is not implicated in the expression of wrongdoing, but it is a further decision and action to take, which is in need of justification itself and cannot be directly inferred from the expression or feeling of resentment. One can identify a wrongdoing and the norm independently from sanctions or payback. It is a further normative question if and how certain wrong actions should be punished.

12.6.2 *Future-Oriented and Transformative Character of Resentment*

Until now, I have been arguing for the thesis that *there are good reasons for a web of reactive attitudes including resentment*. But what about Nussbaum's claim that resentment is backward-looking and hinders societal transformation towards more social justice? Maybe resentment stabilises an unjust society and reproduces unjust payback activities? How does resentment contribute to social change or even to societal transformation? In contrast to Nussbaum's thesis that anger and resentment hinder *societal* transformation since they focus on payback, and thus, do not focus upon social justice for a future society, I will try to show that resentment can be a good tool for societal transformation. The reasons lie in a future-oriented character of rules in general as well as in a special transformative potential of resentment. In the following section, I will, first, argue for the thesis that rules in general have a future-oriented character (12.6.2.1), and afterwards, for the thesis that resentment can be a good tool for societal transformation (12.6.2.2).

12.6.2.1 **Future-Oriented Aspects of Rules**

What about Nussbaum's judgement that resentment is a backward-looking stance? 'Backward' can mean that present actions taken were caused or even necessitated by actions or events in the past. If viewed like this, the past would always determine the present and hinder to look into the future and to make a new start. Whereas Nussbaum focuses on the aspect of payback as a defining feature of an *Anger Framework*, the rule-related interpretation of reactive attitudes focuses on a future-oriented feature not only of resentment, but of reactive attitudes in general. The future-oriented character of rules lies in the character of rules as generalised statements that form reasons for actions. Rules as action-guiding principles, on the one hand, form normative standards to evaluate past actions, but they are, on the other hand, future-oriented exactly because of their action-guiding, general character. A norm or rule is forward-looking in the sense that it provides a standard for the guidance of future actions. Discussions about new laws, for example, focus especially on their impact to design and guide future actions and a future society. In a normative interpretation of resentment, the opposition between a backward- and forward-oriented

stance is a wrong dichotomy. When one looks at the ways how rules might be justified, the reasons are often future-oriented, *e.g.* by pointing to the improvement of certain social practices or by reference to more social justice. Consequentialist and instrumentalist arguments can play an important role in justifying rules.

Especially in cases of societal change, rules play a future-oriented role in directing not only single actions, but in designing and changing institutions and laws. The future-oriented character of rules becomes especially obvious in cases of societal transformation and changes of entire legal systems. Take the preamble to the UN Declaration of Human Rights: outrage about the enormous wrongs done during the Holocaust functions as a reason for the formulation and expression of the UN Declaration of Human Rights. Is this kind of resentment a payback? Is it backward-looking? On the contrary, the expression of resentment or outrage has a reason in the enormous violations of rules of humanity and raises the question of what to do regarding these enormous wrongs. The question of 'what shall we do' arises in front of a background of identified injustices and wrongdoing. And the wrongs are pointed to and normatively partly identified by resentment. And the action taken is the implementation of a set of new rules: the UN Declaration of Human Rights.

12.6.2.2 Resentment and Societal Transformation

As explained earlier, the future-oriented character of rules lies in their character of being general propositions and action-guiding principles. In the last part of my chapter, I intend to show that resentment as a reaction to the violation of rules can be a good tool for societal transformation. My argument rests on the assumption that societal transformation partly consists in a change of rules themselves. Societal transformation is a transformation of institutions, laws, and other sets of rules within a society. Until now, it has been argued that resentment expresses the perceived violation of a rule by the action of an offender, and for this reason, is a way of reacting to an action violating a rule. This characterisation seems to presuppose a certain framework of accepted rules and norms that form the standards for evaluating actions and resentment, which are integrated in this framework of rules. The arising picture might be rather conservative: resentment presupposes a set of existing practices that are normatively regarded as a standard or rule.

In cases of societal transformation, the situation is different, as Nussbaum rightly points out: the normative framework itself is regarded as unjust and the expressions of resentment in the form of protest is not directed against single actions within an accepted normative frame, but against unjust institutions and laws as such. The analysis of resentment can focus on violating actions and actors under accepted rules, as Strawson does in *Freedom and Resentment*; structurally, the rule-related interpretation of resentment can also focus on a rule-transforming potential of resentment. The rule-oriented conception resentment helps to also judge cases in which resentment is directed against an unjust institutional or even legal structure that justifies, allows, or produces actions that violate moral rules or

norms that are not implemented or generally accepted in a certain society. The demand for change expressed by this kind of transformative resentment is not only directed upon single actions within an accepted frame of rules, but against a set of rules itself that are judged as unjust. Resentment in these cases demands for the general change of rules and institutions and calls for the acceptance and implementation of new rules. Since resentment calls for a general change or transformation of social, political, or legal rules, and thus, demands for basic changes in the societal structure I call this kind of resentment *Transformative Resentment*.

Like resentment in general, *transformative Resentment* is not justified in itself, but it has to be justified with reference to the rules underlying the transformative demands. To give reasons for this kind of transformative resentment means to refer to and make explicit new rules and demand for their social acceptance and implementation. By expressing resentment, people protest against the violation of certain rules or norms that, in case of social and political change, might not even have been legally or culturally implemented yet. Therefore, resentment might spark the demand for a change of rules, laws, and institutions in public consciousness and discourse and might introduce new rules in justifying this demand. To give reasons for transformative resentment, among other things, means to express and make explicit the rules which are regarded as being violated by the criticised institutions or laws. Next to the motivational power to call for societal change or transformation, resentment is a good tool for initiating public discourse since it helps to make rules explicit and to bring them into public discourse.

Let us once again take the case of the UN Declaration of Human Rights: the outrage about the enormous wrongs of the Holocaust leads to the demand to make new rules and give them the form of rights. The normative standards that were violated are given a different rule format, with a different performative power and status. The exact formulation of human rights has been a difficult and changing process until today, but the critical form of resentment pointing to rule violations can be a starting point for publicly and politically demanding, and bringing into being, new rules.

In cases of societal transformation, a common ground of socially accepted rules cannot be presupposed. Expressing felt resentment is itself a means of formulating demands or pointing to demands that should be accepted from the viewpoint of the resenting person or group. The struggle might concentrate on the formulation and acceptance of the very rules and normative demands themselves and resentment is one way of expressing and referring to norms. In the presented rule-oriented interpretation of resentment, one does not have to presuppose a transcendental structure of demands or social norms, but the acceptance and the formulation of accepted and internally justified demands and rules is a social, political, and judicial task. Resentment surely is not the only feature in this process of transformation, but it is a reactive attitude that makes people express their critique and the reasons for this critique in a way internally referring to rules and their justification.

Resentment is a driving force for identifying, and making explicit, social rules and normative demands that justify the resenting attitude; hence, it identifies and publicly expresses rules that should be accepted from the viewpoint of the resenting person or social group. Therefore, resentment with its defeasible character pointing to felt violations of rules can be a good tool for social change and societal transformation.



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