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Democracy, Law and Governance

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ASHGATE

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Introduction¹

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

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

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

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Research and Development and by the Interuniversity Attraction Pole Programme (IAP)—
Belgian State—Belgian Science Policy (BELSPO).

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

1 at political philosophy and understand the reasons for the inadequacy of current 1
2 democratic theory. It brings to light the consequences for democratic theory of its 2
3 own failure to attend to the concept of action it deploys and nevertheless inevitably 3
4 presupposes. In fact, the hypothesis we will defend here is that, because of this 4
5 “failure to attend”, the existing approach to democracy has remained dependent on 5
6 an inadequate conceptualization of collective action. This, we maintain, is the case 6
7 at two levels of analysis: that of the construction of the legitimacy of public authority 7
8 and that of the mobilization of the actors concerned with the application of norms. 8

9 This inadequate conceptualization results in a twofold analytic blind spot, or, 9
10 as we call it, blockage, in current theorizing about democracy, including the most 10
11 recent efforts at reformulation. It is these two blockages in current political thought 11
12 that this book seeks to analyse and overcome by engaging with them point by 12
13 point across the book’s two main parts. As a preliminary to this detailed analysis, 13
14 we identify the two blockages in this introduction. In so doing, we hope to make 14
15 clear to the reader the specific nature of our approach to the political; the nature of 15
16 the intellectual shift we propose; and the outline of our contribution to the debate. 16
17 Each of the two blockages relates to an aspect of the social production of the 17
18 generality of power, understood both as a capacity specific to the institutional 18
19 mechanisms of public authority and as a capacity of collective actors themselves 19
20 to participate in establishing this authority through social participation. 20

21 21
22 22

23 **The First Blockage in Democratic Theory** 23 24 24

25 The first blockage in current democratic theory relates to the institutional 25
26 mechanisms by means of which the legitimacy of public authority is thought to 26
27 be guaranteed. We refer to this blockage as the “representationalist belief” that 27
28 persists in applied democratic theory. It takes the form of the ascription of self- 28
29 sufficiency to the reference to public authorities. Thus every drive to broaden 29
30 the conditions for respecting democratic legitimacy has been translated into the 30
31 expansion of the “rights” that may be legally opposed to the authorities’ sway, 31
32 the creation of a new power granted to the authorities, or the creation of a new 32
33 authority. Although democratic theory has thus in effect progressively increased 33
34 the number and scope of the conditions that must be fulfilled for a public action to 34
35 be “rationally acceptable”, it has always been understood that the conditions for 35
36 fulfilment of the normative operation itself (that is, of the effective determination 36
37 of the new norm) reside solely in the final say-so of the public authorities. Thus, 37
38 the process of social transformation has always been understood to take adequate 38
39 shape through the actions of the public authorities themselves. Let us see if we can 39
40 better grasp the nature of this first blockage as it relates to institutional reforms. 40

41 The first analytic blockage relates to the fact that political philosophy has 41
42 usually focused on the question of the “legitimacy of the norm”, that is, on the 42
43 _____ 43
44 arenas” of democracy (Cefaï 2007). 44

1 question of the conditions that must be respected in order for a norm adopted 1
2 by a public authority to be rationally acceptable. The underlying presupposition 2
3 is reflected in the prevalence, at the heart of traditional democratic theory, of 3
4 a political model that privileges a representative form of democracy. The idea 4
5 assumed to be self-evident and left unexamined is that the action by which the 5
6 group acts upon itself—that is, the action by means of which the group adopts 6
7 norms for shaping and transforming reality in the light of its own objectives—is 7
8 performed exclusively through the established public authorities. Let us try to 8
9 pinpoint the implications of this idea. 9

10 Political inquiry has worked hard to define the conditions that a democratic 10
11 theory requires for “establishing” “legitimate” public authorities and accordingly 11
12 for guaranteeing the legitimacy of those authorities’ normative actions. Three main 12
13 forms of condition have thereby been successively identified. 13

14 (1) First, the concept of democratic legitimacy has been defined by reference 14
15 to electoral mechanisms, the notion of universal suffrage, and the progressive 15
16 extension of the franchise to all categories of citizen (with debate continuing in our 16
17 day as to whether it should be extended to non-citizens). Thus, the representative 17
18 form of democracy was, in the first instance, reduced to its “electoralist” version. 18

19 (2) Next, without abandoning this electoralist perspective, political inquiry 19
20 expanded the conditions for political legitimacy by broadening the bases of the 20
21 rights that must be respected by public authorities. The concept of representation 21
22 could not be limited solely to the rights implied by the electoral representative 22
23 mechanism. In association with the liberalism-socialism debate and the more 23
24 recent debate initiated by the communitarian critique of liberalism, the question of 24
25 expanding the basis for rights beyond the civil and political to the socioeconomic 25
26 and the “cultural” (thus allowing for the guarantee of respect for the cultural 26
27 conditions for moral autonomy) has been increasingly studied. 27

28 (3) Last, it is possible to identify a third type of expansion of the conditions for 28
29 democratic legitimacy. As has been suggested by P. Rosanvallon, this consists of 29
30 engaging with the position of impartiality and the reflexivity of the mechanisms 30
31 that back up the actions of the public authority. This type of change has flowed 31
32 from the concern to better ensure the presence of the conditions necessary to social 32
33 representation by rethinking the institutional frame for the practices that enable 33
34 the production of the “general interest”. The establishment of the welfare state 34
35 had already led to a change in the balance among the various public authorities, 35
36 especially the balance foundationally established between the legislative and 36
37 executive branches. It would appear today, however, that even a “true administrative 37
38 power” (Rosanvallon 2008: 12) based on competency is not sufficient to guarantee 38
39 the adequate substantive framing of the general interest, as was seen in the cases 39
40 of the public service model in France and the rational-administration model in 40
41 the USA (Rosanvallon 2008: 12, Lenoble 1994: 7–32). The truth is that the idea 41
42 that a bureaucratic force can ensure fulfilment of the general interest continues to 42
43 rest on a “substantive” presupposition. During the second half of the twentieth 43
44 century, applied democratic theory saw a decline in this perspective. Alongside 44

1 that trend, new methods for “achieving the social generality” were developed 1
2 that corresponded to new forms of democratic legitimacy;³ yet, in our view, the 2
3 analytic blockage we have identified persisted. 3

4 One new method for achieving the social generality is that of the legitimacy 4
5 of impartiality (Rosanvallon 2008: 18), whose clearest manifestation is in the 5
6 development of surveillance and regulatory authorities. These authorities’ 6
7 legitimacy derives from their ability to demonstrate their impartiality. In an 7
8 irreducibly fragmented world, the project of a positive identification of the general 8
9 interest no longer makes sense. Power must take its distance from individual 9
10 interests and transcend them, by appropriating to itself the locus not of a higher 10
11 interest but of an “empty place” (Rosanvallon 2008: 157). With this expression, 11
12 P. Rosanvallon (2008: 157) (who borrows it from C. Lefort) conveys not so much 12
13 the idea that power cannot be “hijacked by just anyone”. Rather, the expression 13
14 conveys the idea that the social subject in which the indivisible property of power 14
15 resides “remains ever virtual; it is never substantially single: it is always traversed 15
16 by the divergent nature of interests and opinions” (Rosanvallon 2008: 158), 16
17 whence the need for a constant reminder of this incompleteness and for organizing 17
18 the production of a social generality in a “negative-procedural” form. 18

19 A second new method of achieving democratic legitimacy consists of the 19
20 reflexive “shaping” of the expression and construction of the popular will. This 20
21 P. Rosanvallon terms “reflexive legitimization”. Whereas legitimization through 21
22 impartiality aimed to embrace the impossibility of a completed substantive 22
23 determination of the “content” of the general interest, here incompleteness relates 23
24 to the conditions for the expression of the general will. It’s a question of becoming 24
25 free of the old myths about the possibility for an immediate expression of the 25
26 popular will. The “social generality” can only be the outcome of a reflexive 26
27 process.⁴ The idea is that the social will must somehow be organized to “enter 27
28 into dialogue” with itself, with the requirements it rests on. Its meaning cannot be 28
29 considered to have been “exhausted” by any one of its representations. The most 29
30 definitive expression of this form of legitimization is observable, as P. Rosanvallon 30
31 shows, in the recent opening up of the accepted role of supreme courts. Contrary to 31
32 what is usually maintained, the opening up of the area of control of supreme courts 32
33 (or constitutional courts) is not so much the logical unfolding of the consequences 33
34 of the regime of the rule of law for the public authorities subject to it. Instead, the 34
35 specific meaning of a development of this kind is above all that, through these 35

36
37
38 3 P. Rosanvallon identifies three such forms of legitimacy: impartiality, reflexivity, 38
39 and proximity. We will initially focus on the first two, which are associated with the 39
40 institutional blockage. The third will be addressed when we come to deal with the second 40
41 blockage (the actantial blockage, that is, the blockage concerning the actors’ capacity to act) 41
42 in current political thought. 42

43 4 As used in this instance by P. Rosanvallon, the term “reflexive” must be understood in 43
44 a comparatively non-technical sense—in the ordinary sense of involving “dialogue with the 44
45 self”. As will be seen, in this book we assign a more technical meaning to “reflexiveness”. 45

1 constitutional courts, a “reflecting third party” (Rosanvallon 2008: 213) is set up, 1
2 by means of which the social will is organized for ongoing assessment of the 2
3 norms adopted, and the actions taken, in its name, in the light of the “principles” 3
4 that define it. By means of this control, a twofold reflexive task is accomplished: 4
5 not only does the body social evaluate its concrete choices on the basis of the 5
6 principles that define its axiological horizons; but through this very control, it also 6
7 continuously redefines the meaning of these axiological requirements. R. Dworkin, 7
8 whose thought we will examine more closely in Part II, has given clear expression 8
9 to this role of the supreme court as a privileged agent of a social hermeneutic. 9

10 As evident, then, from this brief overview of the evolution of democratic theory, 10
11 the very concept of representation has significantly broadened in meaning and in 11
12 so doing has led to an increasing complexity in those conditions that must be 12
13 respected in the organization of the public sphere in order to ensure that the current 13
14 understanding of representation is adequately fulfilled. Nevertheless, with every 14
15 increment in the inclusiveness of the concept of representation, the idea persists 15
16 in the background that, beyond these limitations imposed on the legitimacy of 16
17 normative actions, the actions of the group upon itself can be reduced to the norms 17
18 adopted by the established authorities. The group need only place itself in the 18
19 hands of the established authorities in order to “advance” the cause of the social, 19
20 that is, in order to translate into normative actions the objectives for social change 20
21 that lie behind the collective action. 21

22 Our discussion of the first blockage in terms of the “representative” approach to 22
23 democracy is intended, then, to reflect the existence in current political philosophy 23
24 of this underlying belief. The belief in question is manifested in the self-sufficient 24
25 nature of the reference to the established authorities, which in turn flows, as 25
26 we have just shown, from the self-referential nature of this conception of how 26
27 social authority is guaranteed. The reference to authority is an expression of the 27
28 unending dialogue with itself of the social group, as it undertakes analysis of its 28
29 own divergences and resistances. *The conditions for fulfilment of the democratic* 29
30 *requirement are thus thought to be subject to formalization and integration into* 30
31 *an institutional arrangement of the “reflexive” or self-referential representation of* 31
32 *the sovereign will of the group members.* It is a belief of this nature that accounts 32
33 for how rearrangements in our democratic regimes have usually been conceived of 33
34 in terms of the extending of rights to be granted to individual citizens or groups of 34
35 citizens (groups marginalized by virtue of their culture, their gender, their sexual 35
36 orientation, and so on), or else in terms of the creation of new public authorities. 36
37 These rights expansions and institutional innovations are thought to be able to 37
38 “resolve” the democratic incompleteness they seek to engage with. 38

39 In our view, it is an assumption of this nature that constitutes one of the two 39
40 blockages in existing conceptions of democracy and that undoubtedly accounts for 40
41 the recurring search for new forms of “counter-power” observable in democratic 41
42 regimes today. 42

43 To substantiate this diagnosis and present its foundations, we dedicate Part I 43
44 to a critical analysis of the concept of law. Rightly understood, the representative 44

1 approach to democracy—in the sense we have just given it—rests in the last 1
2 analysis on a specific conception of the meaning of “law”. This conception 2
3 assumes that, as the positivist theorists believe, law is determinable based on the 3
4 social practices of the public authorities alone.⁵ Thus, without taking cognizance 4
5 of the fact, political philosophy endorses the definition of the concept of law that 5
6 is advanced today by positivist theory. We will show that defining the concept of 6
7 law in this positivist manner, by exclusive reference to the practices (often defined 7
8 in terms of the “rule of recognition”) of the public authorities, is problematic and 8
9 theoretically incomplete. It does not allow for an account of all the conditions for 9
10 possibility required to provide the foundations of the operation by which members 10
11 of a social group determine obligatory rules. The hypothesis we will present has 11
12 three components. In one of these components, we are in agreement with current 12
13 thinking and in the other two we diverge from it. 13

14 (1) *The point of agreement.* First, like all the leading current authors in the 14
15 field, we share the perspective well expressed by H. Kelsen: the conditions for the 15
16 definition of law are internal to social practices and thus cannot be defined by an 16
17 assumed substantive definition of a reality “external” to a given social convention, 17
18 such as (to take one example) the ideal of justice. The perspective we adopt is 18
19 thus purely conventionalist and internalist. The conditions for possibility of the 19
20 normative operation are internal to the social practices by virtue of which the 20
21 operation is carried out. As will be seen, those authors who are most representative 21
22 of current research in philosophy of law, be they positivist (for example, H. Hart 22
23 and J. Coleman) or critical of positivism (for example, R. Dworkin) subscribe to 23
24 this epistemological requirement. Nevertheless, the implications of this internalism 24
25 remain to be clarified. And it is here that our twofold divergence from the current 25
26 state of research arises. 26

27 (2) *The first point of divergence.* The first aspect of this divergence relates 27
28 precisely to the issue of taking account solely of recognition by the public authorities 28
29 in determining what constitutes law within a given social group. We will show 29
30 how other authors conceive of this practice of recognition and, in that light, how 30
31 little relevance there is to the hermeneutically based critiques of it, foremost 31
32 among them R. Dworkin’s. We will also show, however, that the mere fact of 32
33 recognition by the public authorities is not sufficient to account for the obligatory 33
34 dimension characteristic of normative practices. On this score, it could be said that 34
35 our argument is in accord with a critique made by H. Kelsen. As he discerned, the 35
36 mere fact of recognition by a public authority—even when correlated with the 36
37 legal system’s effectiveness as a whole—cannot “on its own logically account for 37
38 the normative operation”. Such a way of understanding the “conditionality” 38
39 of the normative operation—that is, the ability to produce the norm’s normativity, 39
40 its validity or obligatory nature, its nature as a necessary condition for something 40
41 41

42 5 See Part I for a more explicit and rigorous articulation of this positivist thesis. In 42
43 reality, this thesis does not exclude reference to citizens’ behaviour. But this reference is 43
44 conceived solely in terms of a general habit of obedience. 44

1 else—is incomplete. Reference to the practices of the public authorities requires 1
2 turning to something external to them, in a sense a second-order recognition. As 2
3 H. Kelsen demonstrated with rigorous logic, a “condition cannot be identical to 3
4 what depends on it”.⁶ True, being a good Kantian, H. Kelsen then conceives of 4
5 this “exteriority” along the lines of an “assumed norm”, which he calls a “basic 5
6 norm”. But this solution is easily seen to be problematic: whence comes it that the 6
7 assumed norm circumvents the stipulation H. Kelsen has himself just articulated, 7
8 namely that a “condition cannot be identical to what depends on it”? By assuming 8
9 that the “hypothesis of a transcendental logic” is always-already given within a 9
10 social group, he “mentalizes” this second-order conditionality. 10

11 Positivist authors subsequent to H. Kelsen grasped the difficulty associated 11
12 with this mentalization of the internalist requirement. To speak in terms of an 12
13 “assumed” norm (and thus one that is always already inscribed in the “heads” of the 13
14 social group’s members) is to err in regard to the internalist project of conceiving 14
15 the conditions for carrying out a normative operation in terms of a social operation, 15
16 a social practice that must be organized. Thus, those authors sought to correct 16
17 H. Kelsen’s position and reinterpret the hypothesis of a fundamental norm in terms 17
18 of a practice of recognition. Moreover, they progressively increased the complexity 18
19 of their account of this practice of recognition of criteria for legality by the public 19
20 authorities. On this score, as will be seen, the contribution made by pragmatist 20
21 philosophy has proven crucial: the practice of recognition must be analysed as a 21
22 cooperative practice. 22

23 Our own hypothesis (which is internalist and genetic) will allow, as will be seen, 23
24 for fulfilling both the requirements⁷ that the positivist position would thus appear 24
25 unable to accommodate simultaneously. Besides reference to a cooperative practice 25
26 of recognition of criteria for legality by the public authorities, the existence of law 26
27 also requires, as we will show, a condition of “practical acceptance” by the norm’s 27
28 citizen-addressees. *A norm’s normativity does not depend only on its compliance 28*
29 *with a norm of recognition that results from a cooperative practice by the public 29*
30 *authorities charged with its application. It also depends on its being recognized 30*
31 *and practically accepted by the citizens who constitute its “private” addressees.* 31

32 (3) *The second point of divergence.* The second point of our twofold divergence 32
33 from current thinking flows directly from the first. The first point of divergence 33
34 makes it possible to see how the concept of law includes in itself a “normative” 34
35 requirement that the positivist approach contributes to obscuring. True, as was said 35
36 above, this normative dimension is not to be understood along the old lines of the 36
37 “substantive” approach to a given ideal of justice. The debates of the past about 37
38 38

39 _____ 39
40 6 “Eine Bedingung kann mit dem von ihr Bedingten nicht identisch sein” (Kelsen 40
1960: 219).

41 7 Let us recall the two requirements. The first is that reference to the practices of the 41
42 public authorities necessitates turning to something external to them, that is, it entails a 42
43 second-order recognition. The second is that of avoiding the “mentalist” trap implicit in the 43
44 hypothesis of a fundamental norm. 44

1 natural law have, in that sense, been definitively laid to rest. But what is revealed by 1
2 a reconstruction of the conditions for possibility of the collective action by which 2
3 the members of a social group aim to regulate themselves and adopt obligatory rules 3
4 is that such an operation carries within itself the requirement for “attention to the 4
5 necessary practical acceptance” of the norm in process of adoption, by those who 5
6 are to be its citizen-addressees. The norm’s “end purpose”—its “regulatory” aim, 6
7 its internal teleology—thus necessitates that there be inscribed within the rule’s 7
8 development attention to the forms of cooperative action by which the norm’s 8
9 addressees will be able to cooperatively construct their normative expectations 9
10 and thus to participate in the shared construction of this norm. Thus, the concept 10
11 of law bears within it a requirement that makes it possible to measure, depending 11
12 on the level of attention paid to the condition of practical acceptance, the capacity 12
13 of a normative operation to fulfil its “internal teleology”, or, put in more familiar 13
14 terms, its capacity to satisfy to the extent possible the normative expectations of 14
15 the actors concerned. 15

16 This second point of divergence has important consequences. We will mention 16
17 two that are of direct concern at this point. 17

18 First, it makes it possible to grasp why inquiry on law must incorporate 18
19 inquiry on political philosophy, that is, open itself up to the question of the 19
20 conditions for organization of cooperative participation by the norm’s addressees 20
21 in the norm’s construction. 21

22 It also makes it possible to grasp, however, how important it is for inquiry on 22
23 political philosophy not to stop—however great the gains already made—with 23
24 inquiry into the investigation into the conditions for “rational acceptability” of the 24
25 norm, that is, with the various conditions that democratic theory has progressively 25
26 illuminated in defining the conditions that action by public authorities must fulfil if 26
27 those public authorities are to be deemed legitimately representative of the public 27
28 will. And with this we arrive at the second blockage in current political thought. 28

29 29
30 30

31 **The Second Blockage in Democratic Theory** 31

32 32

33 The second blockage in current democratic theory relates to the other aspect of 33
34 the production of the social generality, namely, recourse to citizen participation 34
35 in order to guarantee the acceptability of norms. P. Rosanvallon defines this 35
36 mode of production of generality as that of legitimacy through proximity. In this 36
37 context, participation is now a means of government (Maesschalck 2008: 182– 37
38 94). The dynamic at work is that of an effort to improve society’s “reflexive” 38
39 power by improving the task of interaction between power and society. From 39
40 here on in, the question is not so much that of challenging the governing with a 40
41 view to replacing them to the extent possible with the governed. On the contrary, 41
42 the issue is based on the assumption of the need for a governed-governing duality 42
43 and consists of how to enhance the quality of the interaction between governed 43
44 and governing parties. 44

1 Judged by its engagement with “participation”, recent political philosophy has 1
2 not remained wholly the prisoner of the “representative” approach to democracy. 2
3 True, as we have just seen, the process of going beyond the electoralist frame has 3
4 been largely dominated by the belief that it was sufficient to create new institutions 4
5 to ensure better respect for the requirements of the democratic project. But it 5
6 was not limited to this belief. Since the 1990s, the will to organize more direct 6
7 relations between citizens and the public authorities has been manifested: “[A] 7
8 flowering of original initiatives—establishment of neighbourhood committees, 8
9 experiments with citizen juries, consensus conferences, public forums, public 9
10 inquiry procedures, participatory budgets, etc.—has given rise to an imperative in 10
11 this vein in many countries” (Rosanvallon 2008: 319). 11

12 The democracy of interaction is not limited, however, to these new forms of 12
13 participation and deliberation, whose actors are essentially from “the activist world 13
14 of associations, whose movement traces out a kind of cooperative and contradictory 14
15 double of power” (Rosanvallon 2008: 329). It also includes the development of 15
16 more diffuse forms of democracy associated with the “multiple more informal 16
17 or more individualized manifestations of involvement in the life of the city”.⁸ 17
18 What is important to note, however, is that in these two forms (formal innovations 18
19 to enable participation and diffuse citizen involvement), the emergence during 19
20 the 1990s of this democracy of interaction cannot be viewed as the resurgence 20
21 of traditional demands for the narrowing or the abridgement of the distinction 21
22 between the governed and the governing. 22

23 Thus since the 1960s, the will has been manifested to raise anew and in a 23
24 transformed version the old critique regularly levelled, somewhat quixotically, by 24
25 advocates of direct democracy against the “representative” strand of democratic 25
26 theory. But the more recent development of new participatory and deliberative 26
27 forms of democracy are distinct in two ways from the “self-management” and 27
28 “participatory” demands made, in the USA as well as in Europe, by the student and 28
29 activist movements of the 1960s. 29

30 (1) First, the development of these new forms of “governance”, unlike 30
31 those older demands for “self-management” and “direct democracy”, does not 31
32 aim to “increase the influence of citizens at institutions’ and parties’ expense” 32
33 (Rosanvallon 2008: 323). The participatory innovations developed since the 1990s 33
34 aim essentially either to facilitate the handling of new, controversial sociotechnical 34
35 35

36 36

37 37

38 8 “The interest in public issues can also be measured in terms of newspaper readership, 38
39 interest in political programming on radio and television, discussions with friends and 39
40 colleagues, information searches on the internet, and contributions to associations. One 40
41 of the rare studies on the subject, conducted by the Electoral Commission of the United 41
42 Kingdom (Bentley 2005: 31), did suggest the importance of this form of involvement, 42
43 estimating that close to 15 million political conversations are held daily in that country. 43
44 The forms taken by what might be called *diffuse citizenship involvement* merit attention 44
44 however” (Rosanvallon 2008: 327). 44

1 issues⁹ or to “organize better developed information-gathering channels to facilitate 1
2 decision making in a universe where the potential for blockages is multiplying” 2
3 (Rosanvallon 2008: 324). “That is why the terms governance and functional 3
4 democracy are probably those best suited to designating what is happening” 4
5 (Rosanvallon 2008: 325). 5

6 (2) Then, the development of a “democracy of interaction” precisely reflects a 6
7 dynamic at play at an entirely different level than the more traditional one of the 7
8 effort to “narrow” the gap between the governed and the governing. What is at issue 8
9 with the advent of a democracy of interaction consists precisely of no longer focusing 9
10 on the question of the “mandate” under which the “representatives were simply the 10
11 extension of those represented” (Rosanvallon 2008: 328), and instead on enhancing 11
12 the quality of the interaction between the represented and the representatives. 12

13 In this light, it could be said that this reflects a sort of recognition of the first 13
14 blockage we identified. The idea is emerging, both in the transformations that affect 14
15 the reality of our societies and in political thought about democracy, of the need 15
16 to strengthen the forms of citizens’ participation in the exercise of power. Often, 16
17 however, the purport of the term “participation” is left vague. Moreover, even 17
18 when analysis is more precise, the requirement the term points to remains more of 18
19 a black box than a theoretically constructed operation. This defect in theoretical 19
20 construction not only accounts for what we have identified as a blockage; it also 20
21 justifies the detour we will take in Part II via current social-scientific research into 21
22 “theory of governance” in order to better grasp the requirement for participation 22
23 and its limitations, so that the theoretical implications of the hypothesis we are 23
24 presenting may be better understood. 24

25 In effect, on the view usually adopted in political philosophy, it would appear 25
26 that everything happens as if the generalizability of the “social” were always- 26
27 already given, that is, as if the mere summoning together of groupings or even 27
28 individual citizens as individuals could instantly give a “form and substance” 28
29 to society in its task of reflecting on itself. The reflexivity that would be thus 29
30 expressed through the process of interaction presupposes as given the two parties 30
31 to this task of interaction; that is, it presupposes that each of the terms placed in 31
32 interaction with each other—society and power—is transformed by the sole fact of 32
33 their having been brought together. 33

34 In other words, the question of the conditions for generating this “social 34
35 whole” is not posed: it is assumed to have been resolved by the mere bringing 35
36 together of either the “activist” actors involved in the associative process that is 36
37 part of the new forms of participation or of the diffuse and informal expressions 37
38 of citizen involvement. But whence comes it that we can assume this bringing 38
39 together immediately enables the construction of this collective expression? Thus, 39
40 things appear to unfold as if the mere summoning together of the actors, their 40
41 41

42 9 “The ‘hybrid forums’, or citizen conferences, set up to explore possible responses 42
43 to issues surrounded with radical uncertainty (as in the case of GMOs, nuclear waste, and 43
44 health problems with no precedent) have this role” (Rosanvallon 2008: 323–4). 44

1 multiplication or mere aggregation, sufficed to ensure the production of the most 1
2 adequate possible representation of the social interests at the table and thus, by 2
3 the sole effect of an encounter with power's propositions, to ensure, through a 3
4 kind of spontaneous reflexive capacity, the ever-evolving construction of the 4
5 collective representation of the common will. What is at work here is a kind of 5
6 ontological presupposition according to which the conditions for the construction 6
7 of the social are always-already given, that is, according to which the issue of 7
8 the necessary construction of the capacity to construct the common will could 8
9 be assumed to be always-already resolved. This presupposition must, on the 9
10 contrary, not be presupposed but be examined by research. It is this presupposition 10
11 that constitutes the second usual blockage in democratic theory, leaving beyond 11
12 reach the conditions for the internal transformation of society and of power that is 12
13 necessary to the interaction of society and power. 13

14 This "un-thought-through" element of democratic theory accounts for that 14
15 theory's "indifference" to, and relative misapprehension of, the internal debates of 15
16 which current social-scientific research on theory of governance consist. Rightly 16
17 understood, the true impact of this current research is to open up a black box, that is, 17
18 to construct a "theory of collective action" and better define the conditions necessary 18
19 for the generalizability of the social—that is, the construction of an action that allows 19
20 for "maximizing to the extent possible" the normative expectations of its members. 20

21 While, as P. Rosanvallon has written, it is true that, for all the considerable 21
22 volume of the works published over the past 20 years on the question of governance, 22
23 there remains "a feeling of a certain residual conceptual vagueness", the value of 23
24 these works is not to be sought in their ability to delimit a field of inquiry or define 24
25 a typology of regulatory practices.¹⁰ The real issue of interest in these works goes 25
26

27 _____ 27
28 10 However, there is no doubt that the issue termed the issue of "governance" is 28
29 broached in our day in diverse ways depending on the disciplinary tool being used 29
30 (economic, legal, political scientific, etc.) and the analytic level of the question addressed. 30
31 In fact, it is striking to observe that the studies in this area are difficult to incorporate into 31
32 a homogeneous inquiry, the questions examined being so diverse and occurring at such 32
33 distinct levels. How are we to integrate economic analyses of the reform of the management 33
34 of common goods with analyses by political scientists or jurists of "multilevel governance" 34
35 or with analyses of new modes of governance inspired by the theories of deliberative 35
36 democracy? Thus under a single rubric—that of research in common on the question of 36
37 governance—may be observed an aggregation of studies that are highly divergent as to 36
38 both the kinds of questions examined and the methodological approaches used. Besides 37
39 this, however, even when these studies deal with similar questions, dialogue appears to be 38
40 impossible because the disciplinary approaches have often been designed in ignorance of 39
41 research on governance based on other approaches. That is, no interdisciplinary dialogue 40
42 is being organized with regard to the theoretical models deployed by various disciplinary 41
43 approaches to the theory of governance. A salient example of this compartmentalization is 42
44 that of the neo-institutionalist economic approach, which, while it deploys a specific theory 43
45 of learning, remains under-informed about recent inquiry into theory of learning conducted 44
46 in the field of political science and above all in research on organizational theory. 45

1 beyond the variety of questions of collective organization they broach (reform to the 1
2 public service, reform in the design of public policy, reform of enterprise governance, 2
3 reform of market organization, reform of international regimes). The deepest issue 3
4 in this interdisciplinary social-scientific research on theory of governance becomes 4
5 clear only if it is interpreted from an “epistemological” perspective on theory of 5
6 action. True, numerous participants in this research do not themselves define the 6
7 object of their study in terms of a theory of action. Nevertheless, as we will show in 7
8 detail, the true implications of this whole area of research as developed in the past 8
9 30 years or so are that it brings back to the drawing board the question of a theory of 9
10 collective action, that is, the question of the conditions for possibility that must be 10
11 in place for a collective action to “maximize to the extent possible the satisfaction” 11
12 of its members’ normative expectations. 12

13 Moreover, in taking cognizance of an inadequacy, as regards this objective, in 13
14 both the traditional forms of hierarchical regulation by the welfare state and the 14
15 decentralized forms of coordination by the market alone advanced by neoclassical 15
16 economists, this research on theory of governance takes as its point of departure a 16
17 position contrary to that of the presupposition at work in current political thought. 17
18 As has already been said, the idea that the question of the construction of the 18
19 social cannot be assumed to be a given underlies this research. Thus, the task is 19
20 to open the black box of the conditions that must be set up in order to construct 20
21 the common will. To assume, as is usually done in political thought, that merely 21
22 summoning together associations and individual citizens ensures the construction 22
23 of the collective subject whose “reflexive” encounter with power will guarantee the 23
24 self-adjustment of our normative expectations is to err as regards the conditions 24
25 for possibility required for the “success” of this operation of construction. 25

26 That is why it appears to us necessary today to incorporate into any inquiry 26
27 on political philosophy a detour via this current social-scientific research on the 27
28 question of governance. The question of theory of action cannot be ignored or 28
29 left un-thought-through in this context. To engage, then, with this second analytic 29
30 blockage in political thought, we seek to provide an overview reconstruction of 30
31 current discussions of governance in the social sciences. And in so doing, although 31
32 we share the view that democracy requires reflexive governance of collective action, 32
33 we here propose, in order to avoid the “conceptual vagueness” that continues to 33
34 surround “reflexivity”, speaking of a “genetic approach” to governance. The shift 34
35 suggested by this expression is directly linked, as will be seen in detail in Part II, 35
36 to the lessons yielded by the process we have used to reinterpret current debate 36
37 in theory of governance. This process consists of examining the “background 37
38 theory” of the various positions taken and comparing the different theoretical 38
39 approaches to collective action deployed, often only implicitly, by research in 39
40 different disciplines.¹¹ This reconstruction of the theoretical presuppositions about 40
41 the theory of collective action contributes to three theoretical findings. 41

42 _____ 42
43 11 Recall how we understand a theory of collective action: it is a theory of the 43
44 conditions that the organization (that is, the provisions for governance or regulation) of a 44

1 (1) The first finding is that this reconstruction brings to light a shared 1
2 presupposition of the various trends in current social-scientific research on 2
3 governance, despite their apparent differences. As will be seen below, it is at the 3
4 level of this presupposition that we situate the “reflexive” dimension that must 4
5 characterize any organizing of a collective action to guarantee the best possible 5
6 satisfaction of its members’ expectations. 6

7 (2) The second finding is that this shared advance in current social-scientific 7
8 research, because it often remains obscure and under-illuminated by the various 8
9 current trends in theory of governance, is not the object of sufficient “attention” 9
10 in this research. Now if a proper reconstruction of current debate on theory of 10
11 governance brings to light a shared awareness of the need for the “reflexive” 11
12 organization of governance, it also brings to light a different approach to this 12
13 “reflexivity”. That is, any advance in theory of governance entails the elucidation 13
14 of the question of this reflexive dimension on which the “success” of a collective 14
15 action depends. 15

16 (3) A third finding is that, in reconstructing the various current approaches 16
17 to theory of governance from the perspective of how they conceive reflexivity, 17
18 one observes that the differences among these approaches are less reflective of 18
19 deep divergences or antagonisms than of the growing recognition of the need to 19
20 progressively expand the conditions that must be set up to ensure the success of 20
21 this reflexive operation. It could be said that the main theoretical currents that make 21
22 up the core of recent research in theory of governance¹² are in fact complementary 22
23 with each other and reflect the increasingly acute recognition of the precise nature 23
24 of the conditions necessary for the success of this operation. Our own research, 24
25 which brings attention to bear on this dimension that has too often been left in the 25
26 shadows by current debate on governance, even suggests a way of deepening the 26
27 most recent findings as to the success of this reflexive operation. 27

28 The reconstructive method we adopted to engage with current debate in 28
29 theory of governance has thus resulted in two decisive advances in how reflexive 29
30 governance can be conceived. The first consists of bringing to light the point of 30
31 integration that unites the four approaches to reflexive governance. This is the 31
32 commitment, found in all four approaches, to expanding the conditions for success 32
33 of learning operations in such a way as to guarantee those operations’ effectiveness 33
34 as a normative process from the perspective of the expectations of the actors 34
35 concerned. The second advance consists of the identification of a specific issue 35
36 which, on one hand, is obscured by attending to the requirements for expansion of 36
37 the conditions for success in learning, but which, on the other hand, only emerges 37
38 on the express condition that this point of integration on which attention is focused 38
39 is brought to light. This issue consists of the persistent indeterminacy surrounding 39

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41 _____ 40
42 collective action must fulfil in order to ensure the best possible satisfaction of its members’ 41
43 normative expectations. 42

43 12 In Part II, we identify four such currents: neo-institutionalist, relational- 43
44 collaborative, pragmatist, and genetic. 44

1 the role that reflexivity is to play within the collective action itself. On this score, 1
2 one minimalist option consists of viewing reflexivity as a property by which 2
3 we can identify mechanisms designed to favour and incite the use of collective 3
4 learning capabilities that are viewed as already given. The maximalist option 4
5 consists of “dementing” the approach to the operation of reflexivity in order to 5
6 isolate its genetic features and discerning therein a specific type of operation on 6
7 collective capabilities. This operation would make it possible to articulate, in the 7
8 process of action, the potential for a return along the trajectories of action already 8
9 described, along with the needed projection of new positionings. The result of 9
10 our reconstruction consists of showing that all the approaches that differentiate 10
11 themselves from the minimalist option have no choice but to progress towards the 11
12 maximalist option if they are to envisage their conditions for fulfilment in a fully 12
13 coherent manner. 13

14 The meaning we give the term “reflexive governance”, and the meaning we 14
15 give the genetic perspective for which we wish to provide the foundations in 15
16 order to allow this epistemological option for reflexivity in collective action its 16
17 full scope, are to be understood in the light of this reconstruction. The expression 17
18 “reflexive governance” does not in itself designate a unique and specific form of 18
19 governance. Often the expression is used in an ambiguous manner. This ambiguity 19
20 consists of defining reflexive governance (rightly) through reference to the idea of 20
21 learning but of allowing it to be believed that, so defined, it consists of a specific 21
22 and determinate form of governance that allows for precisely determining the 22
23 forms of institutional organization that a collective action must take in order to 23
24 best satisfy “public interest”. 24

25 Such a definition, while not inaccurate, risks giving rise to more indeterminacy 25
26 than precision. It hinders seeing what differentiates the four main current 26
27 approaches to governance—in Part II, we will term them “neo-institutionalist, 27
28 relational-collaborative (or deliberative), pragmatist, and genetic”—from each 28
29 other, once recognition is given to their common commitment to avoiding the 29
30 fallacious assumption of a process of natural selection that guarantees ongoing 30
31 adaptation of our collective actions towards a “social optimum”. And what 31
32 differentiates them from each other is precisely their conceptions of the learning 32
33 operation (and thus of the reflexive operation implied by any learning operation). 33
34 A comparison of the main approaches to governance as regards their conception 34
35 of the learning operation reveals, as we will show in Part II, a gradation. What 35
36 emerges is that these four approaches reflect an ever more “expansive” conception 36
37 of the conditions that must be set up to ensure the success of learning operations. 37
38 When they are examined through the prism of the learning operation, it appears that 38
39 these four approaches reflect four stages of a single inquiry, with each successive 39
40 stage working to broaden and expand the conditions needed so that the mechanism 40
41 of governance can allow the actors to produce the best possible solution to the 41
42 problem of collective action they are working to solve. 42

43 This is why we can speak of a furthering and progressive “expansion” in the 43
44 conception of the conditions for success of the learning operation that the governance 44

1 mechanism must take into account if optimal satisfaction for the actors involved 1
2 in the learning operation is to be guaranteed. When taken separately, the three first 2
3 main approaches to reflexive governance betray a pragmatic inadequacy. It is in 3
4 order to take account of this pragmatic inadequacy that, with our genetic approach, 4
5 we propose to expand the conditions for success of the learning operation. What 5
6 is at stake in this expansion is the aim to go beyond the taking account only of 6
7 actors' "ability-to-do", as with approaches centred on actors' enablement, and to 7
8 subordinate this enablement to the self-transformation of the resistances that lead 8
9 the actors to repeat past blockages. In this way, the genetic approach puts forward 9
10 an epistemological shift from one type of attention, a rational attention focused 10
11 on actors' "ability-to-do", to another type of attention, which could be called 11
12 "geneticizing", focused on actors' "collective identity making". The idea is that 12
13 such a capacity for "collective identity making" depends on a specific operation: it 13
14 requires the identification and transformation of resistances to take place through 14
15 the construction of a relation with exteriority by means of a type of "terceisation" 15
16 (Maesschalck 2009: 19–36). 16

17 Only this operation makes it possible to prevent the change in representation 17
18 associated with learning during a process of reflexive governance from remaining 18
19 the prisoner of a kind of "unconscious repetition". Such an "unconscious 19
20 repetition", through the "defensive strategies" that are its traces, restricts the 20
21 field of the shifts required for solving the problems the actors face. Lacking 21
22 an engagement with the need for this "self-enabling" operation, the three first 22
23 main approaches to reflexive governance are unable to surmount the twofold 23
24 analytic blockage in current conceptions of democracy. Neither through 24
25 external reference to new government processes that are more "impartial" and 25
26 more "reflexive", more "responsive", nor through internal reference to greater 26
27 proximity to the actors concerned through increased participation and even 27
28 social experimentation in the search for solutions, does this dual movement of 28
29 "enablement" succeed in guaranteeing, on its own, the real self-transformation 29
30 in the identities of action in the democratic space or in the conditions of access 30
31 to new role production that are integral parts of the process of the social 31
32 generalizability of the collective interest. 32

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