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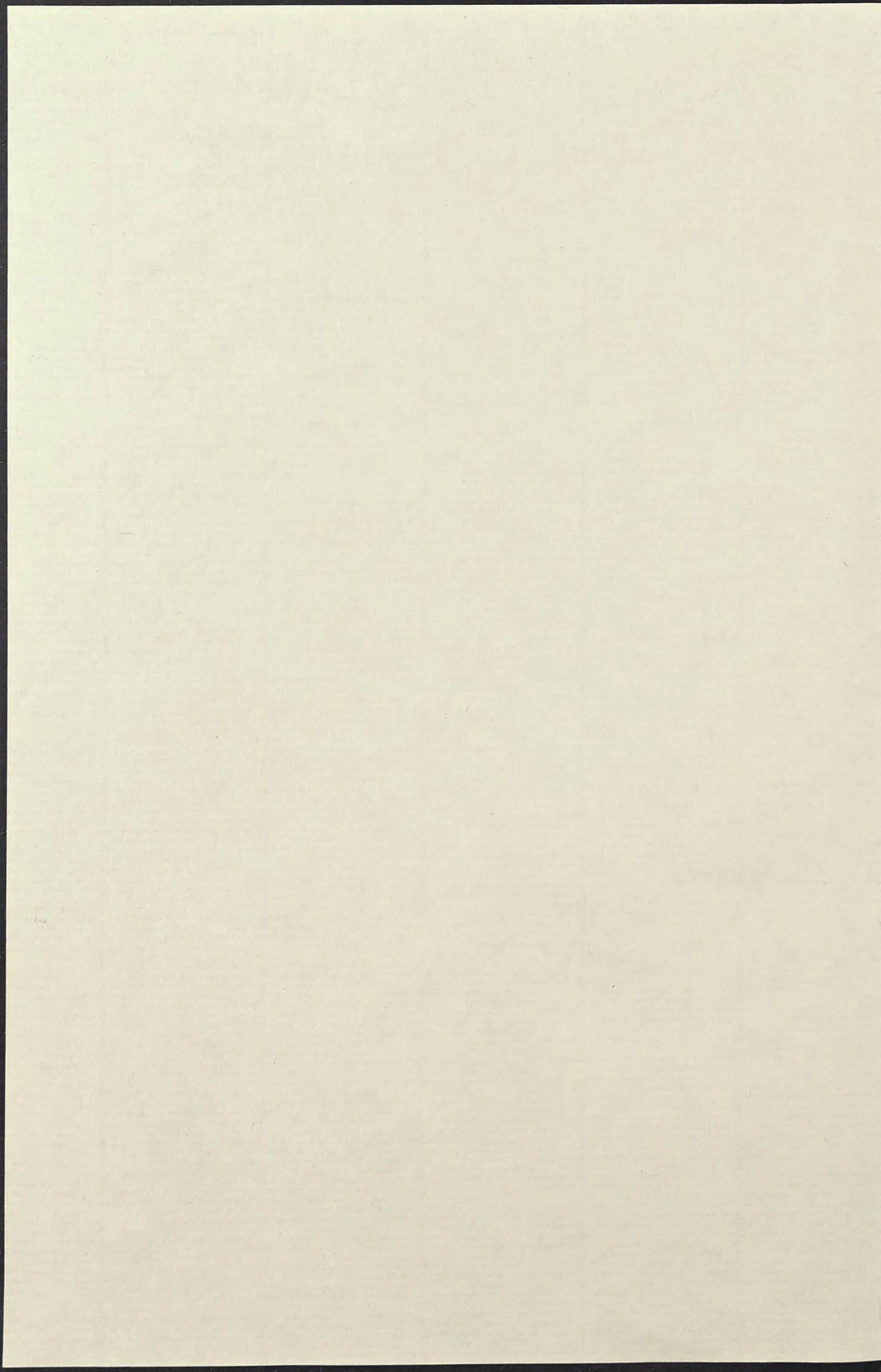


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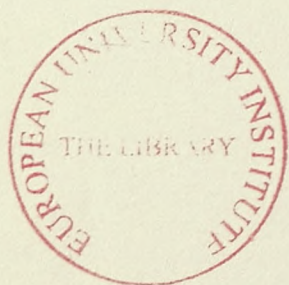
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Introduction

ATHANASIOS MOULAKIS
European University Institute, Florence

We become aware of many things, when we are in danger of losing them. The air we breathe is taken for granted until we gasp. In a similar fashion the interest in legitimacy is aroused by a sense of crisis. Many authors and publicists suggest that our western societies are in, or are about to enter, a state of acute crisis. For this they adduce several reasons. We are told, for instance, that the legitimacy of the 'political system' is undermined by a 'manipulation' of democratic procedures, by means of controlling institutions capable of forming opinion and putting their stamp on consciousness, such as education, the press, etc. There are many variations on this theme of false consciousness as *idea ideans*. Conversely, the delegitimising distortion of consciousness is also attributed by some to an iniquitous, inhumane, alienating social structure, resulting in a crooked perspective on reality and giving rise to false consciousness as *idea ideata*. To complicate matters, these two views may be 'dialectically' combined in the idiom of 'systemic contradiction'. Empirical sociologists, on the other hand, are more likely to point out the emergence of new class patterns, in the form of a vast network of particularistic entitlements as an outgrowth of the welfare state. The welfare state as an instrument of social accommodations and as such a force 'legitimising' social and political institutions in a period of economic growth, reveals a dangerous inflexibility at a time of economic stagnation — a stagnation incidentally which many believe the welfare state has been largely responsible for bringing about. The 'crisis of the welfare state' is compounded by the exclusion of significant portions of the populations situated above or below its system of guarantees. Transposing the problem to the political sphere proper, many political scientists see government assuming ever more and ever larger tasks thus leading to what they call governmental 'overload'.

Some thinkers go beyond functional considerations and raise normative objections to what they perceive as an usurpation by the state of tasks properly belonging to other agents, such as voluntary associations, families or private individuals.

One could easily extend the list of sources of dissatisfaction leading as it is suggested, to a delegitimisation of established institutions. The problems raised by rising expectations, for instance, can be seen as a contrast or as an aggravation of those presented by economic stagnation. The legitimacy of national institutions suffers if they are not seen to be the *loci* where significant decisions are taken and executed. An awareness of international interdependence takes various forms and is expressed in terms of centre-periphery theories, of a critical attitude toward multinational corporations, in attempts to take stock of an 'integrated world economy', in concern about 'imported inflation' or involvement in a 'world strategic balance'. To all this are added contingent elements of distrust towards particular governors which are seen as reflecting on the institutions themselves.

In the light of all this, it would be useful to identify the subject or subjects of legitimacy. This is no easy task. Different things can be called legitimate or criticised as illegitimate. Even if we can identify them, it is difficult to discuss them singly. Legitimacy can be predicated on the state, on the régime, the dynasty, the particular persons in office, the manner in which such persons gained access to office, the manner in which government is conducted. Legitimacy can be attributed or denied to the social order, to the market, to types of ownership, to modes of production, to patterns of association, to modes of expression, to goals and structures of education. The terms can be extended even to the fields of thought, art, research etc. Even if we restrict ourselves to public authority and government, legitimacy remains an essentially complex concept.¹ It is neither merely a matter of fact nor is it just a normative postulate. It is also not simply an analytical category. Its reality, where it exists, is constituted in a particular historical conjunction of logically and ontologically disparate elements, and it is never a permanent and inalienable achievement. It can be lost, adapted, distorted or maintained.

There is, firstly, a formal aspect of legitimacy. Any human society lives by rules. In the absence of a social instinct like that of ants and bees, human beings can only be held together in peace by rules that are

accepted as binding. These rules are legitimate to the extent that they are accepted as binding. At this formal level, the content, the origin and the principles behind the rules are unimportant. What matters is that the existence of any human group is inconceivable without rules of conduct — rules that can be implicit or explicit, merely habitual or elaborately articulated. Such rules fashion the group's togetherness, and they constitute its formal legitimacy, which draws what value it has from the existence and identity of the group itself. This first, formal consideration suggests that legitimacy is founded on opinion. I am not certain that Hume was necessarily right in saying that *all* government is founded on opinion. It would depend on the outlook and motivation of the Mamelukes invoked by Hume on whose opinion even an oriental despot's position depends or of their counter-parts in any particular case. Governments can be tolerated by inertia, by distraction, by coercion or simply by fear that worse might befall. But one could certainly argue that all *legitimate* government is founded on opinion, legitimacy being nothing but the regard in which a polity is held by its members: the extent to which that polity is thought to be worthy of support. Such support, I suggested above, need not be explicitly articulated. It can be constituted by a web of habits, predispositions and, over time, by prescription. Furthermore, such sets of rules as there are need not be — and in fact rarely are — logically coherent. Within certain bounds, incoherence may in fact help societies function. This is another way of saying that toleration may well be good policy not just on moral but on functional grounds. We need not explain away all incompatibilities as 'latent functions'. We should not sacrifice the contingent riches of historical life to the logical structures of a notion, such as 'system', however heuristically useful it may be in other respects.

In order to elicit and obtain support, a government must exist. No ruler can claim legitimacy unless he is in fact in power or has a good chance of obtaining it. The appeal to the highest principles, the embodiment of the most admirable virtues, the possession of the most venerable titles will be of no avail to a government unable to actually obtain obedience.

Government can, of course, obtain obedience through fear and coercion. It would be fair to say, however, that obedience cannot be regarded as legitimate where it exists only to the degree in which it is

forcibly extracted. The *ultima ratio* of governments is not their justification.

Governments are also thought to be legitimated by being effective in a different sense: by providing rewards for the obedience they receive. Maintaining the public peace, providing for the common defence, assuring the administration of justice etc., being the tasks proper to government are obviously general benefits derived from a properly constituted government. But the argument can also be advanced in terms of particularistic advantages. For instance, as in the Tudor reform, redistributing the confiscated lands of the church to powerful supporters strengthens the king's position in a manner that redistributing them to the population at large would never have done. This is 'legitimation' in a strictly sociological, not to say machiavellian, sense. Its modern counterparts take the form of pressure group politics and in some respects of social policy. If the essentially particularistic pursuit of wealth is expressed in terms of the 'general welfare', concern for the economy emerges as a major task of government. The danger from the point of view of legitimacy is that a slogan like 'you never had it so good' becomes an argument not in favour of a particular policy but a supposed justification of government itself; 'delivering the goods' becomes the main rationale for the existence of government.

We have already seen that legitimacy and illegitimacy can be predicated on a variety of possible subjects. The problem becomes even more difficult if we consider that the most significant among the likely subjects of legitimacy are not simply given. We can easily identify a man, a ruler, as a distinct entity, endowed with qualities, passions, skills etc. It is less easy to determine what constitutes a recognisable, discreet social unit, acting in history in a way that binds or at least significantly involves its members. This is to raise the question of integration. To what political unit do I know that I belong, to what do I owe a primary political allegiance? The quest for the subject of legitimacy leads to the problem of sovereignty. The answers will vary, depending on time and place. Movements of transnational cooperation seem to transcend the nation-state, whereas outbursts of regionalist feeling appear to detract from the validity of the nation-state as the standard form of organisation to which primary allegiance is due in our days. These considerations lead us on to a further aspect of legitimacy, on a different level from that of domestic sociological or normative pat-

terns: it is not enough for a polity to enjoy the support of its members; its legitimacy also requires the recognition of similar units outside itself. The system of formal recognition, accompanied by diplomatic immunities and exchanges is a manifestation of this requirement. The Holy Roman Empire is a different symbolic form under which justified, legitimate jurisdictions have been subsumed in the past. The homogeneity within the 'Concert of Nations' may well be less than the one postulated by Kant, but there does seem to be a tendency of interacting political units to make sense of each other and of themselves in mutually recognisable terms. It would also appear that there are distinct fashions as to what will pass as respectable — as legitimate — among its fellow political units. Thus at a certain time in history it seemed essential to have a monotheistic religion. Now we must present a plausible claim of being 'democratic' and 'modernising'. The differences in content covered by such formulae are, of course, as great now as then.

Democracy would seem nowadays to be universally seen as conferring title to rule. What is disputed is what can be considered 'truly' democratic. Thus we have 'direct' or 'participatory' democracy confronting 'representative democracy', 'arab democracy', 'popular democracy', 'guided democracy', 'industrial democracy' and so on, democracy, the legitimising noun being qualified by the adjective that suits the user. Could not one argue that democracy, taken seriously makes the very notion of legitimacy redundant? If democracy is taken to mean the government of the people by the people and for the people there would, at first sight, seem to be no scope for legitimacy. The ruler and the ruled being identical and the exercise of such rule being automatically in the interest of the ruled — on the assumption that people are the best judges of their own interest — all problems of entitlement or justification disappear. The only thing to consider would be how to bring about this blissful state of affairs which, by enlarging the group of rulers to include all the ruled seems to abolish the difference at a stroke, thus changing quantity into quality. The problem is, (leaving aside the role of minors, lunatics etc.) as Aristotle has already pointed out, that even perfect democracy does not mean the rule of everyone over himself but the rule of all, as the constitutional body of citizens, over every one. The matter becomes clearer if we put Lincoln's formula back into medieval terminology. The word 'people'

stands for different things: The government of the people, that is the government of the realm, by the people, that is by the king or by the crown; for the people, that is for the subjects. Thus as long as the government of the people, by the people and for the people remains a *government*, the problem of legitimacy retains its vigour in reference to title, manner and effect.

We have said that legitimacy is founded on opinion. Such opinion, where it exists, is a fact. However, it is a fact containing an evaluation. Legitimacy, as a fact of society or social psychology can be measured by the methods of the social sciences, assuming that the right questions are asked in the first place. But legitimacy also has an intrinsically normative character. We can affirm that opinion as such supports a régime, but we cannot say that it justifies it. It is always qualified, 'reasonable' or 'free' opinion, the *volonté générale* rather than the *volonté de tous* that is seen as justifying policies and institutions. One can go further and suggest, that since legitimacy is founded on opinion, on 'mere' opinion, it can never be adequately established in terms of reason, human dignity or human right. And yet legitimacy is nothing if it is not informed by value. The obligation can only be freely self-imposed for no other reason but the desire to be just and — where justice is neutral — in view of utility. There are no formulae that establish what being just means in changing historical circumstances. It is not an eternal or absolute rule that we follow, but an earth-bound idea of such a rule. The desire to follow such a rule is undoubtedly often dormant or clouded but it is given as a potentiality to all men as men. The basis of true legitimacy is not to be found in any list of commands, however brief, but in the constant and perpetual will to give to each his own.

The theme of legitimacy has a sufficient degree of generality to make it a suitable object of philosophical investigation, for it is hard if not impossible to find any human community in history not seeking, if not actually enjoying legitimacy. On the other hand the historical particularity of the patterns in which the desire for legitimacy is expressed and the multiplicity of real or supposed sources of legitimacy compel us to relate general ideas to particular circumstances and practical affairs. It is obvious that our own circumstances and our own affairs are of particular interest. This is not because our times have some privileged position in an overall development, however conceived, but simply because they are *our* times. The philosophical investigation of

legitimacy cannot of course, expect to come up with patent solutions to problems in the field of social and political action. Such solutions are best left to the politicians who have to answer for them. But our investigation can help achieve an understanding of the terms in which courses of action can be reasonably discussed. Philosophy can contribute to practical conduct to the — doubtless limited — extent that decisions are in fact determined by deliberation.

Note

- ¹ I am greatly indebted to the treatment of legitimacy by Raymond Polin, 'Analyse philosophique de l'idée de légitimité' in *L'idée de Légitimité*, Institut International de Philosophie Politique; Annales de philosophie politique, Paris 1967, pp. 17—28. See also Sergio Cotta, 'Eléments d'une Phénoménologie de la légitimité', *Ibid*, pp. 61—68.

La raison d'être de la soumission au pouvoir

KONSTANTINOS DESPOTOPOULOS
Académie d'Athènes

Chers collègues, notre séminaire étant une recherche en commun, je me bornerai ce matin à exposer quelques unes de mes réflexions sur son objet, et je me réserve le droit d'intervenir dans la discussion pour compléter cet exposé par mes réponses à vos remarques et par mes remarques sur vos exposés.

D'abord, il faut dire que le choix de l'objet de notre séminaire est bien justifié. Certes la légitimité constituait depuis longtemps un problème essentiel de la philosophie politique, mais la contestation portait plutôt sur la personne ou les groupes qui devaient exercer le pouvoir politique, que sur le pouvoir politique lui-même, sauf dans des cas extrêmes, telle la doctrine anarchiste. Aujourd'hui, c'est le pouvoir politique lui-même qui est souvent contesté, sinon la société politique en tant que telle. Autrefois, par exemple, on discutait sur la *summa potestas* et sur la question de savoir si le *pactum subjectionis* avec le monarque était révocable ou non, ou sur les qualités et les défauts comparatifs de la monarchie, de la démocratie etc. . . , voire sur la valeur du régime représentatif et parlementaire dans un cadre démocratique ou républicain monarchique.

Or, aujourd'hui on prétend que seule est légitime l'assemblée générale des citoyens, ou, dans un autre domaine, des ouvriers d'une usine, et on explique cette légitimité uniquement par des considérations telle la suivante: le pouvoir de l'assemblée générale a pour signification immédiate l'abolition de la division de la société entre dirigeants et dirigés, en éliminant en particulier la prétendue mystification politique régnante, qui veut que la démocratie équivale à la représentation. On estime que la représentation est une forme d'aliénation politique, la forme juridique des élections périodiques ne faisant que masquer cette expropriation. On vise la déprofessionalisation de la politique, sa suppression en tant que sphère séparée d'activité et de compétence. On en-

visage, réciproquement, la politisation universelle de la société — ce qui est l'opposé de la définition de la justice donnée par Platon, c'est-à-dire que l'on ne se mêle pas des affaires d'autrui et que l'on effectue son propre devoir. On conclut que la bureaucratisation, au sens péjoratif du terme, commence quand les décisions touchant les affaires communes sont soustraits à la compétence des organes de masse, et qu'elles sont, sous le couvert de différentes rationalisations, confiées à des organismes spécialisés. Ces considérations ont été énoncées parmi d'autres, par un éminent penseur contemporain, Kastoria-dis, dans son livre "Le contenu du socialisme" (1979, pp. 390,392,393).

Or, dans cette contestation radicale et totale de tout ce qui, dans la société, n'est pas autodétermination — c'est-à-dire non pas seulement de la bureaucratie, au sens étroit, mais de l'administration en général: du gouvernement et de la législation — il n'y a plus lieu de discuter de la légitimité; son objet même étant supprimé. IL y a donc beaucoup à faire pour fonder la question même de la légitimité du pouvoir politique en général ou d'un certain genre de pouvoir politique.

Il est vrai que la question de la légitimité du pouvoir politique présente des difficultés de par sa nature même. La légitimité tout en étant quelque chose de plus que la simple légalité, présuppose cependant une certaine idée de la loi: loi morale, loi historique, loi sanctionnée par la religion, et il faut donc tout d'abord établir la validité d'une telle loi. Or, nous croyons que cette loi ne subsiste qu'en fonction des nécessités inhérentes à la société, et même à la nécessité d'existence de la société.

Pour admettre la raison d'être du pouvoir politique, source de la légitimité de tel pouvoir politique et de tels porteurs de ce pouvoir politique, il faut d'abord découvrir la raison d'être de la société politique.

Aristote déjà, après Platon, trouvait la raison d'être de la société politique dans le fait qu'elle était indispensable pour assurer aux gens "le vivre" et "le bien vivre". Cette conception classique de la raison d'être de la société politique est également valable aujourd'hui, au moins pour l'essentiel. Nous nous permettons ici de citer à cet fin quelques phrases que nous avons publié ailleurs:

L'importance de la société pour l'existence de l'homme rend évidente à première vue la question: quelle est la raison d'être de la société? En effet deux raisons convergentes semblent fonder moralement l'existence de la société. C'est d'abord, que chaque individu, pour conserver sa vie — ce qui répond à

l'impératif moral de la liberté — a inéluctablement besoin d'une multitude de situations interhumaines, surtout pour la sécurité de sa vie, et de possibilités d'actes, ou encore d'actes d'autrui, et que cette multitude de situations, d'actes et de possibilités d'actes, ne peut effectivement être établie, préparée et attribuée à chaque individu que dans et par la société, grâce à ses ressources techniques, économiques et autres, et grâce aussi à la répartition du travail sur son terrain global. C'est ensuite que l'individu aspire et doit aspirer, d'après l'impératif moral de la liberté, non seulement à vivre, mais à bien vivre; c'est-à-dire en jouissant aussi des œuvres de culture (de poésie, d'art, de philosophie), et de quelques sentiments exquis. . .¹

Cependant, tout en étant décisifs, ces apports de la société à l'existence de l'homme, ne constituent pas, à eux seuls, sa raison d'être morale au sens propre et intégral du terme.² Ils constituent deux raisons d'être de la société moralement insuffisantes, sinon déficientes. La société conçue sur la base de ces deux seules raisons, serait une société d'individus marqués par l'utilitarisme égoïste, demeurant donc en deçà de la moralité intégrale. En effet, dans le cadre d'une telle conception de la société, tout individu est censé être employé comme un simple moyen au service de l'individu donné. Du reste la réciprocité, en ce sens même la plus effective, de tous les individus, ne suffit pas à dissiper la déficience morale de l'attitude de chacun d'entre eux. La raison d'être de la société n'est donc authentique et intégrale qu'en raison de la moralité approfondie et totalisée dans la conscience de chaque individu. En effet, si chaque individu doit conserver sa propre vie et même la mener de la meilleure façon possible, ce devoir existe, non pas du simple fait que chaque individu y aspire, mais en vertu d'un objectif moral valable en soi, fondé sur la valeur intrinsèque de la potentialité que cet individu possède en tant qu'être humain. Tel étant donc son fondement, cet impératif moral recouvre non seulement l'individu donné, mais également tout autre individu: il exige que la vie de tout autre individu soit conservée et même vécue de la meilleure manière possible, et autant que celle de l'individu donné. Or, si un individu, ne se souciant que de lui-même, agit exclusivement dans le but de conserver sa propre vie et de la mener à bien, en se bornant à poursuivre en plus de sa subsistance, des jouissances à travers ce qu'il y a de beau et de noble dans le domaine de la culture et de la nature, dans les rapports d'amitié et d'amour, même s'il évite d'entraver une pareille attitude chez des autres individus, il est inévitablement voué à l'échec quant au meilleur accomplissement de sa propre vie. Cela paraît évident si l'on opère une

appréciation morale de cette vie en tant qu'ensemble algébrique, c'est-à-dire ensemble d'actions et d'omissions. En effet toutes précieuses que soient les actions contenues dans une telle vie, elles ne peuvent contrebalancer le poids moral négatif de leurs corrélatives: les omissions; celles-ci concernent le même impératif moral que celles-là, c'est-à-dire la conservation et l'accomplissement optimal de la vie humaine, mais portent sur la potentialité existentielle de tous les individus autres que l'individu donné. Le poids moral négatif de l'ensemble des omissions de celui-ci pèse donc immensément plus lourd que le poids moral, supposé positif, de l'ensemble de ses actions, puisque ce n'est que dans un seul cas que ces actions réalisent l'impératif moral global, alors que c'est dans un grand nombre de cas pareils que ces omissions ne le réalisent pas. Pour ces raisons, l'individu ne parvient à mener sa vie de manière optimale, c'est-à-dire moralement satisfaisante, que s'il poursuit la réalisation de l'impératif moral global, non seulement dans le cas de sa vie propre, mais aussi dans le cas de la vie de tous les autres individus. Or, à cause de cette tâche immense, ainsi imposée à lui, l'individu se trouve au point de vue moral, dans une impasse: il est d'une part chargé d'un devoir inépuisable, il ne dispose d'autre part que de possibilités d'agir restreintes. Face à cette impasse morale, donc, il n'y a pour l'individu qu'une issue: contribuer par son travail, par ses ressources, par une part de son existence, voire par son existence entière, à la constitution et au fonctionnement de la société politique; pourvu que celle-ci ait pour objectif final de procurer et d'assurer à tout individu les conditions nécessaires à ce que sa vie soit conservée, et même vécue de manière optimale. En outre, l'individu, en contribuant à l'existence d'une telle société, s'acquitte de son devoir moral comprenant cette tâche inépuisable, de sorte qu'il puisse alors se retourner vers la dimension privée de sa vie, sans trahir sa vocation morale.

Telle est donc la raison d'être morale de la société: la société politique est la condition nécessaire pour que l'individu puisse vivre et qu'il puisse aussi, en contribuant à elle, mener sa vie de manière optimale, non pas dans le sens d'une plénitude de jouissances, mais dans le sens surtout d'une solidarité active à l'égard de tout être humain, celle-ci ne pouvant être efficace que dans et par la société politique.

Telle étant la raison d'être — moralement intégrale — de la société politique, il en résulte que la vraie politique n'est pas simplement la technique de conquérir et conserver le pouvoir suprême, mais elle a pour

objectif de contribuer à la réalisation continue de la vraie société politique, par la participation active aux fonctions les plus importantes de celle-ci. En d'autres termes, la vraie politique consiste en la prise de décisions pour la gestion des affaires communes, et en général comporte l'exigence de faire face à des problèmes pratiques, qui ne sont pas susceptibles d'être affrontés par la seule initiative privée. En outre, dans une telle conception de la raison d'être morale de la société politique, se trouve déjà également donnée la raison morale de l'engagement politique personnel.

J'aborde maintenant ce qui nous intéresse plus particulièrement, c'est-à-dire, la légitimité du pouvoir politique. Quelle est la composition essentielle de la société politique? Quelles en sont les institutions constituantes, en tout moment de l'histoire et en tout pays, et donc indépendamment du régime social ou politique?

Je me permets de les énumérer: la première institution est celle qui établit la sécurité de toute personne. C'est une erreur de Montesquieu de mettre en tête de son catalogue la liberté. La liberté-autonomie de chaque personne n'intervient qu'en second lieu. Si ces deux institutions, c'est-à-dire d'une part la sécurité de chaque personne et, d'autre part, la liberté-autonomie — en d'autres termes le droit global de tout être humain raisonnable de mener sa vie d'après sa volonté — étaient suffisantes, alors la doctrine anarchique serait tout à fait correcte. Mais il arrive que ces deux institutions, toutes précieuses et indispensables qu'elles soient, ne sont pas suffisantes. L'institution de liberté-autonomie ne parvient pas à constituer une solution intégrale du problème total du droit. Une telle insuffisance se manifeste surtout dans le cas des êtres humains dépourvus des qualités requises pour l'acquisition du droit de liberté-autonomie, dans le cas par exemple de tous les êtres humains durant leur enfance. En outre, c'est aussi la sécurité de tout être humain contre les dangers provenant d'actes humains qui dans sa forme abstraite, se montre bien souvent insuffisante. Or, du fait de l'insuffisance de ces deux institutions, le droit ne peut que recourir à d'autres institutions. C'est une nécessité inéluctable pour le droit. Ces autres institutions sont: la législation et l'administration au sens large dans sa forme abstraite. Vous voyez, l'hétéronomie est une chose nécessaire pour la composition de la société politique. A mes étudiants, d'habitude, je présentais l'exemple suivant: tant que les voitures étai-

ent en nombre restreint, le conducteur d'une voiture pouvait faire usage de son autodétermination pour conduire sa voiture, mais dès qu'il y a une affluence de voitures, alors le feu rouge et le feu vert, c'est-à-dire un signal qui est un acte administratif, deviennent indispensables pour que le conducteur de voiture puisse se déplacer. L'administration, donc, ne comporte pas seulement des restrictions, mais aussi des possibilités d'agir inexistantes sans elle. Sans le feu rouge, le conducteur est privé de la possibilité de se déplacer. Or les trois institutions: législation, administration — au sens large — et encore convention, ne font défaut à aucun régime social. En outre, pour réagir au délit, c'est-à-dire à un comportement contraire aux règles de droit établies par la législation ou l'administration ou même par un contrat, il existe la fonction "sanctionnatrice" du droit, donc la police, le droit de défense, et d'autres institutions. Enfin pour éviter l'abus de la contrainte dans le cadre ou sous le prétexte de la fonction "sanctionnatrice" du droit, il y a la fonction judiciaire. Vraiment il n'existe aucun régime social sans les institutions que j'ai énumérées. C'est seulement le degré d'efficacité de chacune d'entre elles qui peut changer. Dans un régime socialiste intégral, par exemple, la part du contrat est affaiblie, alors que l'administration a un domaine d'application très étendu. Par contre, dans un régime économique libéral, c'est-à-dire dans une économie de marché, c'est le domaine d'application du contrat qui est très étendu. Il y a, d'autre part, des régimes sociaux où la loi est très minutieuse, réglant les moindres détails de la vie, et il y en a d'autres, où la loi se borne à quelques principes généraux, et où c'est le contrat ou l'administration qui fait face aux détails des problèmes de la vie sociale. En tout cas, le contrat, la loi et l'administration, ne peuvent faire défaut à aucun régime, même là où aucun homme ne commet jamais de délit. Si Rousseau disait que la démocratie est le régime optimal, ce qui présuppose des hommes d'une moralité exquise, nous disons que même dans la société des hommes d'une moralité exquise, l'administration, la législation, et la convention sont nécessaires à côté de la liberté-autonomie et de l'institution fondamentale de la sûreté.

Etant ainsi donné que la législation et l'administration, donc le gouvernement, sont indispensables, le problème se pose: qui exercera le pouvoir, ou, si vous voulez, le devoir, tous les deux, pouvoir et devoir, innés dans l'activité gouvernementale et administrative? Et voici notre

problème de légitimité, qui apparaît dans toute sa splendeur: qui exercera la fonction administrative, à ses divers échelons?

Il y a un domaine dans lequel il n'y a pas de grands problèmes: par exemple: que les parents doivent s'occuper de leurs enfants, les élever et même les éduquer, c'est quelque chose que l'on peut facilement admettre. Mais si l'on peut ainsi admettre la légitimité du devoir et donc du pouvoir, en quoi consiste la dite autorité parentale? On pourrait à peine affirmer que la source de l'autorité politique et des compétences qui en résultent se trouve dans le peuple, et en lui seul, sans référence à aucune valeur transcendante. Pour Platon, admettre l'autorité politique du peuple, ne serait que la solution du problème politique, la meilleure possible dans la réalité historique, au sens de la solution la moins mauvaise; la légitimité suprême de l'autorité politique dépendrait de l'attachement à la valeur transcendante de justice.

Notes

- ¹ *Etudes sur la liberté*. Paris, Marcel Rivière et Cie, 1974.
- ² Monsieur Despotopoulos résume ici un argument plus élaboré par lui dans: *Philosophie et Politique*, Annales de l'Institut de Philosophie et de Sciences Morales, Bruxelles, 1980-81, pp.102-106.

Légitimité et pouvoir

VITTORIO MATHIEU
University of Turin

Mr. Chairman, I have no written paper and I was rather disconcerted to discover, the day before yesterday, that I had to read for an hour and a half. There was a mistake in the first program, which stated that I even had to read during the coffee break. So, I have adopted a compromise by putting my question in English and developing it in French, since it will be easier for me.

The problem of legitimacy and power has two faces. The first one is: "No legitimacy without power"; because, if power is a service, a duty, you must have the means to perform it. Therefore you do not have a legitimate power, if you do not have real power. But the problem also has a more paradoxical face: "No real power without legitimacy", provided that this power is sufficiently great, sufficiently powerful. The research to test if a power is a legitimate power becomes an empirical research: but this research in this case will result in a war, because sometimes you have no other means to test if a power is a "real" power or not. That is a very annoying aspect of the question.

Je vais maintenant développer ce problème, et je vais le faire en français. Je crois que nous nous trouvons dans une situation *sceptique* à l'égard de la légitimité. Cette situation pourrait être expliquée par le bon mot, — qui n'est pas un bon mot, à mon avis — de Pascal; il est très sage que le pouvoir légitime soit exercé non pas par le "meilleur" — celui qui serait en mesure de l'exercer le mieux — mais par *l'aîné de la Reine*; parce qu'il est très difficile d'établir qui est le plus apte à exercer le pouvoir, tandis qu'il est très facile d'établir qui est l'aîné de la Reine, (et notez bien qu'il ne dit pas "l'aîné du Roi", ce qui serait une chose plus difficile à vérifier). Je crois que ce scepticisme est partagé par chacun de nous, maintenant. Il n'y a pas de moyens sûrs pour distinguer un pouvoir légitime d'un pouvoir qui ne l'est pas, sauf par cette recherche empirique, qui peut déboucher sur une guerre. La guerre en effet, extérieure ou civile, est parfois un moyen empirique, pour

établir quel est sur un certain territoire, le pouvoir légitime. On peut en principe essayer deux voies pour distinguer un pouvoir légitime d'un pouvoir quelconque: la voie a priori, la voie *vers* le pouvoir, et la voie a posteriori, c'est-à-dire, la voie par les *effets* du pouvoir. Pour ce qu'il est de la voie a priori, on peut encore distinguer deux principales tentatives d'établir la légitimité du pouvoir: la tentative qui descend vers le bas, et la tentative d'en bas vers le haut; c'est-à-dire: "omnis potestas a Deo", (même le pouvoir dynastique, en quelque sorte, relève d'un pouvoir divin, la descendance biologique n'étant que le signe de la dérivation de ce pouvoir de Dieu); et la légitimation d'en bas, c'est-à-dire la légitimation de la part du peuple, de la Nation, du consensus, de l'unanimité ou, au moins de la majorité de la population, qui serait la source de la légitimation du pouvoir. Ces deux voies ont été reprises par ce très beau livre de Guglielmo Ferrero, *Le pouvoir*, qui a été récemment réédité en Italie, par une maison d'édition inspirée par le parti socialiste, même si c'est un livre que l'on pourrait au fond taxer de "réactionnaire" aujourd'hui. Mais je crois que ce même livre de Ferrero nous encourage dans un certain scepticisme, car aucune des deux voies tentées par Ferrero ne mène jusqu'au bout. Lui-même laisse tomber la voie traditionnelle du pouvoir légitime, "omnis potestas a Deo"; et il ne réussit pas à établir, d'une façon satisfaisante, une légitimité démocratique, c'est-à-dire les moyens pratiques pour tester, pour vérifier cette légitimité; Ce sont des moyens très difficiles à suivre. Mais il y a aujourd'hui d'autres tentatives pour établir une légitimité, à l'égard desquelles, à mon avis, on devrait être sceptique. On est déjà sceptique, à l'égard des tentatives traditionnelles, mais on n'est pas toujours sceptique à l'égard de certaines tentatives nouvelles, qui pourtant dérivent de certaines théories traditionnelles.

Il y a à mon avis, aujourd'hui deux autres formes de *dogmatisme du pouvoir*, c'est-à-dire de prétention d'établir une légitimité du pouvoir, qui ne soit pas purement une légitimité de fait, mais également un légitimité de principe, ces deux dogmatismes pourtant, ne résistent pas à une critique pertinente. D'une part il y a la tentative de dire que le pouvoir découle de la "Nation", et je crois que cette tentation, même si elle se développe pendant la Révolution Française sur un terrain apparemment classique, même si elle devient, ensuite, une doctrine typiquement romantique, (car toutes les doctrines du romantisme dérivent des doctrines pré-romantiques), je crois qu'elle découle d'une concep-

tion plus ancienne, c'est-à-dire de la doctrine du "peuple de Dieu", qui est devenue une doctrine presque officielle dans les milieux ecclésiastiques pour justifier *d'en bas* le pouvoir de l'Eglise: Eglise comme expression du peuple de Dieu. Même dans la tradition des Juifs, il y a parfois la doctrine du salut qui vient de l'ensemble du peuple d'Israël. Cette doctrine, au cours de la sécularisation, devient la doctrine de la Nation comme source du pouvoir. Pourtant je crois qu'il est très dangereux de faire d'une Nation une entité politique. Traditionnellement la Nation est une entité *culturelle*, et je crois qu'elle doit garder tous ses droits en tant qu'entité culturelle, mais que la prétention de faire d'une Nation la source du pouvoir politique est autant dangereuse, — et peut-être plus — que le dogmatisme du pouvoir par le pouvoir d'origine divine.

Le dernier éclatement entre une conception traditionnelle, une conception qui ne dérive pas l'idée de pouvoir de celle de la Nation, et celle au contraire qui la dérive de la Nation, a eu lieu pendant la Première Guerre Mondiale; elle a eu pour conséquence la destruction de l'Empire autrichien, qui était précisément un pouvoir qui ne relevait pas de la nationalité (même si il y a encore en Europe quelques pouvoirs qui ne dérivent pas de la nationalité, comme par exemple la Suisse, qui reste encore un modèle républicain). Malheureusement on a vu un rattachement total du pouvoir politique au concept de la Nation, et le principe de la nationalité a envahi complètement tout le terrain du droit interne et du droit international. Ce n'est pas une chose qui en est restée là.

Le concept d'un peuple de Dieu, d'un peuple privilégié n'est pas le même que dans l'Ancien Testament, il n'est plus le même que dans le romantisme, où il y a le peuple-guide. Mais il reste toujours cette prétention d'une certaine conception d'un peuple de Dieu, et d'une alliance avec un peuple choisi par un *Dieu différent*, qui n'est plus le Dieu des Juifs, mais qui est plutôt le "Dieu futur", le "Dieu de l'avenir", le "Dieu de l'humanité"; non de l'humanité telle qu'elle est aujourd'hui, mais de l'humanité telle qu'elle pourra être demain.

L'on passe alors de la justification du pouvoir par le peuple, à une légitimation du pouvoir *par le futur*, qui présente aussi des dangers de despotisme, plus grave que le despotisme traditionnel de tout pouvoir. C'est-à-dire qu'au nom du futur, on mesure le pouvoir, on prétend avoir un pouvoir absolu sur les sujets — qui sont tous les hommes, tous

les individus — et même sur les administrations *de facto*: sur ces Etats qui ne relèvent pas du futur, mais du passé. C'est pour cela, je crois que les étudiants n'admettaient pas le droit de l'administration dans la question du feu vert et du feu rouge: ces feux ne s'inspirent pas d'un pouvoir futur, mais d'un pouvoir traditionnel, et l'administration n'a aucun pouvoir légitime véritable, du fait qu'elle dérive simplement du présent, et d'un présent qui est le résultat du passé. Elle ne dérive pas du futur qui est la seule source légitime du pouvoir.

Même si cette théorie n'est pas toujours exprimée de façon très explicite, je crois qu'elle est encore très vivante dans la conscience de beaucoup de jeunes (même si aujourd'hui elle recule par rapport à une certaine réaction face aux inconvénients, face aux dangers, que sa manifestation pratique a montrés au cours des dernières années). Je crois que là aussi il faut établir, ou rétablir, un certain scepticisme à l'égard de toute justification théorique absolue, et non empirique du pouvoir.

Quelle autre possibilité pourrait-on alors envisager? S'il y a la possibilité de justifier ce pouvoir, ou bien par ses effets, ou bien par des signes conventionnels, comme celui de Pascal, alors on assume une justification tout à fait traditionnelle, mais on l'assume d'une façon sceptique. Mais il y a aussi d'autres signes conventionnels du pouvoir que celui de Pascal. Par exemple, dans certaines tribus de la Polynésie il y a, semble-t-il, des groupes de tribus où le signe du pouvoir est la possession des autels: la tribu qui s'empare de l'autel du dieu, a le droit d'exercer le pouvoir sur les autres. L'on n'a pas bien compris comment cela se passe, mais quoi qu'il en soit, les autres respectent ce signe. Les autres tribus se soumettent à celle qui s'est emparée de ce symbole. Je crois qu'il y a là aussi une sorte de légitimation formelle, et par conséquent, sceptique, parce que l'on admet qu'il n'y a pas de moyens pratiques réels pour vérifier à qui revient le pouvoir véritable et légitime. Mais on pourrait choisir une autre voie dangereuse, soit la voie *a posteriori*. Voyons alors quels sont les résultats des effets du pouvoir; et voyons si ses résultats justifient ou non le pouvoir lui-même. Si ces résultats sont bons, le pouvoir sera légitime, quelle que soit son origine. Toute origine du pouvoir est violente, on le sait, mais si cette violence donne lieu à un pouvoir dont les résultats sont bons, alors ce pouvoir deviendra légitime. Mais la difficulté n'est pas ôtée pour autant, car, qui va juger si les résultats sont bons, acceptables, ou non? Même la contestation de '68 nous a enseigné que les critères du jugement peuvent vari-

er, à cet égard, complètement; il n'y a aucune base commune entre nous, qui nous considérons "raisonnables", et les autres que nous considérons comme "déraisonnables", sans pouvoir donner de raison valable pour démontrer qu'ils sont déraisonnables, parce que toutes nos raisons s'appuient sur des présupposés, et ce sont précisément ces présupposés qui sont repoussés par ces gens-là, que nous appelons déraisonnables.

Alors, si il n'y a pas de base pour juger si les résultats du pouvoir sont acceptables ou non, la question devient apparemment insoluble. On peut quand même encore chercher une autre voie. En effet l'on ne peut juger de la *substance* des résultats, c'est-à-dire, juger s'ils sont bons, ou s'ils sont mauvais; mais nous pouvons juger acceptable les résultats d'un pouvoir qui, au contraire, n'a pas la prétention d'établir la substance de la valeur absolue de ce que nous devons chercher: d'un pouvoir qui se borne à établir une telle *forme* de coexistence, qui permet à chacun et à chaque groupe, de chercher à son gré la substance de la valeur. Celle-ci, à mon avis, est la seule voie qu'il y ait pour essayer d'établir, de vérifier la légitimité d'un pouvoir: le pouvoir légitime est celui qui permet à chacun, et aux groupes sociaux de chercher à leur façon ce qu'ils jugent être la valeur de la vie. Par conséquent, le pouvoir légitime est un pouvoir qui doit se borner à établir le *moyen minimal* pour que la liberté de chacun soit compatible avec la liberté de tous. Merci.

Legitimacy and the Problems of Governance

MARGHERITA CIACCI
University of Florence

In these brief remarks on legitimacy I will start from what in sociology is regarded as one of the most useful conceptualisations of the term which represents our present focus of interest. In doing this I will use some of Max Weber's contributions, namely the ones which he has developed around legitimacy in the various parts of *Wirtschaft und Gesellschaft*. In defining and identifying the basis of legitimacy of an order, Weber maintains that it is an ascribed quality which may be granted to that order by those subject to it in different ways. That is by virtue of tradition — and I think we have just been hearing something relevant to this point — the belief in the legitimacy of what has always existed *ex titulo*, by virtue of affectual, emotional attitudes thereby legitimising the validity of what is new or represents a model to imitate it. Next, by virtue of a rational belief in an absolute value, this giving the validity of an absolute and final commitment. And finally because it has been established in a manner which is recognised as being legal.

Perhaps I should recall briefly what Weber meant by the term 'order'. When he dealt with the fundamental concepts of sociology he put social action at the centre of his analysis and defined it as that type of action which takes into account the behaviour of others by virtue of the subjective meaning attached to it by the acting individuals. I wish to stress this point — the point of meaning and interpretation — because I think that it is quite important in terms of the further development of Weber's ideas about legitimacy. Thus the term 'social relationship' is used to denote the behaviour of a plurality of actors in so far as in its meaningful content the action of each takes into account that of the others and disorientates it in these terms. What is implied here is

that there should exist at least a minimum of mutual orientation of the action of each person to that of the others. What frequently underlines such social relationships is the concept of what Weber called 'legitimate order'. Social action, especially when it involves social relationships, may be oriented by the actors by a belief in the existence of a legitimate order.

The probability that the action will be *de facto* oriented, Weber called the validity of the order in question. In other words, Weber meant by order the existence of a normative order and for our purpose we may enlarge the meaning so as to incorporate in it also the notion of a system of law. In fact, in contemporary western societies, the most usual basis of legitimacy of an order rests upon the belief in its legality. If we now shift our attention to another part of *Wirtschaft und Gesellschaft* we shall find it useful to keep in mind the distinctions that Weber drew between power and probability. By probability he meant that an actor within a social relationship will be in a position to carry out his own will despite resistance and therefore again here, there is an implicit concept of violence. He also distinguishes 'Herrschaft' which I have translated into English as 'imperative control'. 'Herrschaft', Weber thought, would represent the probability that a command, not the will but a command, with a specific content will be obeyed by a group of individuals. Thirdly he mentioned 'discipline' which represents the probability that by virtue of habit a command will receive prompt, automatic obedience in stereotyped forms on the part of given groups of people. Elsewhere Weber remarks that every true relationship of imperative control entails a minimum voluntary submission, that is to say, an interest in obedience. Such interest or motive actually represents the basis of the different types of power which of course, as everybody knows, Weber developed. Of course, obedience to command springs from many and diverse motives: custom, affectual or emotional ties, a complex of material interests or purely ideal motives. Each one of these elements is capable, alone or combined with the others, of guaranteeing the stability of a given system of authority.

There is in fact a further element which is even more important: the belief in legitimacy. No system or authority deliberately submits itself to only material, affectional or ideal motives as an adequate basis for ensuring its continuation in time. Therefore, every system strikes to establish and to cultivate the belief in its own legitimacy. Yet, depending

on the type of legitimacy that is being claimed, the type of obedience and the kind of administrative staff develop accordingly in order to guarantee its functioning. The mode of exercising authority will always cause radical differences regarding the type of system or authority involved. The final outcome of the operation of each such system of authority will vary according to the type of legitimacy being claimed. We know that Weber tried to distinguish the claims to legitimacy made by different types of power on different grounds.

I will start with the claims to legitimacy based upon traditional grounds. When legitimacy is claimed by virtue of an established belief in the certainty of immemorial tradition and of the status of those exercising authority, we have an obedience which is due to the person who occupies the traditional position of authority. Obedience seems to be due as a matter of personal loyalty within the area of obligations. Then there is the legitimacy claim that is based on charismatic grounds and which rests, in a way, upon the devotion to a specific and exceptional character, to a person and on the normative patterns revealed by him. In such a case, charismatic authority, is obeyed as such by virtue of personal trust in him or in what he represents. But in this case I think that, whereas traditional grounds may be always relativised and shifted, charismatic grounds are never quite surpassed by history. They always represent themselves in the course of history through the appearance of some leader that has this quality or through mechanisms such as mass media, manipulation, etc. that may build up the image of such a person. There is always the possibility that charismatic authority might appear.

Finally, Weber considers those claims to legitimacy which are based on rational grounds. In this case the claim to legitimacy is based upon a belief in the legality of patterns of normative rules and the right of those elevated to authority under such rules to issue commands. That is legal authority. In this case obedience is due to the legally established impersonal order and extends itself to the persons exercising the authority of office under them, only by virtue of the formal legality of their command and only within the scope of the authority of the office.

It is, of course, hardly thinkable that submission to a command or the recognition of the legitimacy of a specific order can be founded on just one of the above mentioned grounds. We think, instead, of the wide range of possible mixtures with regard to the grounds of claims

to legitimacy on the one hand and the willingness to submit to a given order on the other. If we now go back to a formal definition of 'Herrschaft' we will realise that power is rooted in the most diverse and individuated usages with regard to obeying those very commands.

Such attitudes comprise culturally and historically rooted habits, charismatic elements as well as rational considerations inherent in the goal, latent or manifest, which the command demands should be obtained. Every power relationship seems to entail some kind of willingness or interest — at least in Weber's analysis — to comply with the command being issued. Here we are dealing with types of willingness and interest which can, of course, be interpreted as being forced or conditioned, but which can also develop out of the rational interpretation of the situation at hand. We may also agree with Weber when he declares that the validity of the claims to legitimacy by legitimate authority increasingly seem to rest on rational grounds. Although this is perhaps a statement that may be open to great criticism, I am simply referring to Weber's analysis. I am deliberately stating here the legal rational elements inherent both to legal authority and to the belief upon which the claims to legitimacy expressed by legitimate authority are grounded or should be grounded. The whole of Weber's theory of social action seems indeed to emphasise the relevance of interpretative behaviour and the intentional conduct on the part of the individuals involved in social relationships. That is to say, it underscores individuals who take into account the action of the others in their meaningful content and direct their pattern of behaviour accordingly. Thus, if the meaning and intentions of participants in a social relationship is accorded such importance in Weber's theory, it is highly surprising that he should stress the rational nature of the grounds upon which the claim to legitimacy rests, expressed by legitimate authority also with regard to legal authority.

In closing this brief section I would like to bring to your attention the essentially illuministic climate which seems to qualify much of Weber's thinking. By illuministic, I mean the primacy given to rationality, both when he is discussing the types of legitimate authority — he declares that it seems to rest increasingly upon rational grounds — and when he analyses patterns of social actions in general as being rationally oriented.

I believe that at this point it might be profitable to introduce the other class of problems around which this presentation has been organised: I mean the investigation into the kind of relationship said to exist or not to exist or thought to exist to a certain extent in contemporary western societies between legitimacy and the problems of government. I will pay particular attention to Italy. In other words, I hope to suggest some possible interpretations regarding the privilege which seems to exist between legitimacy and the exercise of legal authority. This is because we have become aware of the increasing challenge that has been expressed by different circumstances and different forces against contemporary western governments. In the following exposition I will be referring mainly to the Italian case, but I believe that a number of remarks will be pertinent also to the case of other European countries.

When we talk about a challenge to governments, politologists seem to refer to problems inherent to the over-loading of governmental function. The overload is itself considered a possible element of a government's failure. Of course, over-loaded governmental functions do not deal just with the enlarging of the spheres of governmental jurisdiction on a purely administrative basis, but include also the expansion of government initiative in the economic, social and fiscal domains through public and welfare state measures etc. In Italy we have the *partecipazioni statali*. Such an increasingly large number of functions requires an adequate and equal increase in the level of governmental effectiveness. Professor Matthieu was talking earlier about the judgement *de facto* of the consequences that government is able to reach. I think that in a way effectiveness may be some kind of judgement expressed on the capacity of the government to reach the effects or the commitments it has promised. By effectiveness, I understand a capacity of mediating successfully between the government's often divided policy commitments and the availability of national resources.

Yet, on the other hand, we are all aware of the equally great importance — with regard to the problem of governance — of the legitimacy which people are willing to bestow upon the ways in which they are ruled. That is to say, we have to have a political authority grounded upon effectiveness on one side and popular consent on the other. What we must try to clarify is the relative weight of each of these two elements in creating the increasing difficulties for western

governments, what has come to be known under the rather abused term of ungovernability.

After World War II and for a certain time even in Italy the growth of national income — particularly towards the end of the fifties and the beginning of the sixties — encouraged the belief that there would always be a positive qualitative and quantitative correlation of inputs in the shape of public expenditure, feeding into the economic system and into society's structure and the corresponding output represented by economic growth, social progress, political consent and so on.

But as everyone knows, the fifties and the sixties saw an unprecedented economic growth, accompanied by a great expansion of public expenditure and a constant increase in families' incomes and therefore the growing propensity towards new types of consumer behaviour. Those were the events that were, along with other factors, preparing for the present inflation. Yet the cost of public policy over the 1950—60 period had been growing in Italy at a faster rate than the gross national product; one growing by +7%, the other just by 4.2%. We may take as an instance the rate of profits in industry which dropped from 5% to 2% over the period 1966—1975 whereas costs for hospitalisations — I am merely giving you an example of the negative correlation existing between the increase of the GNP and public expenditure — rose during the period 1970—1975 from 4% to 7% of the GNP. Or we could consider the sector of public enterprises which is so organised as to create in every increase a deficit spending policy. As a consequence of the negative correlation just mentioned, governmental effectiveness may be seriously challenged, because it is no longer able to sustain the kind of commitments it has undertaken. As a further example political consent may shrink giving rise to the descending values.

Now after the distinction that has been drawn between opposing said values, I am rather embarrassed when I read this. I did not think about this kind of distinction and I think this expression can also be used as 'opposing values'. No one is easily socialised to the idea of losing those benefits which have been considered first as a conquest and then as a part or a routinised pattern of life. It is true that both the Italian party system which reflects a highly fragmented system of political subcultures and the trade union policies have tried to mediate between individual expectations and collective benefits on the one hand and gov-

ernment action on the other. That is why no massive withdrawal of consent has taken place in Italy — at least no open withdrawal of consent. No individual or social group has ever relinquished the individualistic faith in particularistic advantages being obtained by supporting this or that party or union fraction. Yet the growth of public expenditure does not in itself threaten governmental effectiveness. Much of this expenditure is channelled under the headings of Health, Education, Social Security programmes, so it is not this that is really affecting the effectiveness of government.

What is perhaps more ineffectual in this regard is the ever-growing network of coordinating organisations which necessarily have to be created in order to cope with new fields of public intervention. In fact, over the last century, a shift in governmental goals seems to have occurred, a shift which in turn generates a sort of organised over-complexity which at times turns into a real paralysis. Once elementary needs have been more or less satisfied — national defence, primary education — more complex needs seem to have been induced. They pertain to the sphere of what is generally referred to as the 'quality of life' or to the justification of increased governmental interventions both in civil society and in the economy. Legal authority has had to offer new and more appealing dividends to the population in terms of welfare programmes, social security measures and so on.

However, because of the growing incapacity of governments to fulfil the expectations generated by specific commitments, one might foresee that claims to legitimacy manifested by legal authorities might very likely be faced with a loss of consent. This process, at any rate in Italy, is far from automatic. In fact people's expectations and demands vis-à-vis governmental programmes are very often activated just around specific issues on a rather particularistic basis, not having the common well-being and that of the nation in sight but just the professional and occupational advantages of that particular social category. This happens partly because people seem to be more confident of achieving their personal goals through a 'do it alone' bargaining ideology which political parties seem to foster in order not to alter, excessively, their ideological heritage and political strategies.

If you are familiar with the Italian allocation of political ideologies and strategies, for instance, I think all this becomes clearer. In Italy, the referendum for or against the republican régime in 1946 may re-

present an instance on non-bargainable conflicts whereby claims to legitimacy on the part of the legal authorities — the Royal House in this one case — tended to be annulled. In countries with strong racial, linguistic, minority groups, these characteristics themselves may represent the basis for a nonnegotiable conflict.

I am not sure that the example of the referendum on the republican-monarchic régime in 1946 really is equivalent to these non-negotiable conflicts generated by racial/linguistic minorities for example, but I still think that in the referendum there was a non-negotiable issue at hand. What often seems to take place is not so much the repeal of consent but a growing indifference both towards governmental policies and the exercise of legal authority in the field of economic activity, social welfare and the like. One can say that in the early seventies we saw the appearance of silent majorities all over Europe. Yet citizens' indifference somehow always hampers political authorities through the withdrawal or the shifting of votes; highly conspicuous consumption patterns substituting a preference for saving, strikes, work absenteeism etc. The increasing rate of high school drop-outs may also be listed under this kind of indifference towards established rules that tend to underline the social conflicts. But how does such indifference develop? Where are its main roots? Classical sociologists would find the answer in the waning of organic solidarity or in a shift beyond the 'Gemeinschaft-Gesellschaft' dichotomy suggested by Tönnies.

However, I wish to suggest that none of these interpretations fits entirely our problem. The indifference often tinged with highly visible colourings of criticisms expressed by millions of Europeans over the last 15 years towards legitimate authorities is in fact a phenomenon which should be studied in conjunction with an enormous increase in social participation which took place in the same period of time and of course through different social agents. I believe one might interpret the massive participatory phenomena as an explosion of subjectivity which developed within a general dissenting or opposing framework.

The period of economic efforts characterising in various degrees the representative democracies of western Europe came to a close more or less at the end of the sixties. The rise and fall of revolutionary models as well as the disappointments with capitalist economies and ideologies, along with the process of industrialisation and its outcome

in terms of modernising trends within a given society, represent the general conditions which are likely to favour a process of secularisation.

I believe that it is the lack of a sedimentation of meaning, and the lack of a stock of knowledge at hand through which to interpret one's own past, present and future that has radically deprived people of a meaningful framework by means of which it might be possible to make sense of reality, of authorities' commands, of their originality, their legitimacy, and of social life in general. Max Weber suggests that rationally grounded behaviour is a distant shadow of past participation, however not of a collaborative type, but rather of a conflictual character, involving conflict with legal authorities that represents the outcome of people's efforts in interpreting and making sense of their own 'Lebenswelt'. The search for personal identity independently of meritocratic standards of evaluation and therefore the refusal of any given solution to the problems of everyday life; the exaltation of personal contexts, familiarity, closeness as an exorcism against the impersonal routinised practices prevailing in social relations; mass criticism against any type of authority: these are some of the main aspects which characterised and still characterise the participatory movements of the seventies.

The over-load of non-integrated democratic participation has been identified as one of the other possible causes of the present crisis of governments being accompanied by growing indifference and diffidence towards institutionalised channels of political participation. The indifference I was referring to above is often understood as a refusal of delegating the job of representing one's own values to legal authority.

The alternative search for new meanings does not represent a threat to the concept of legitimacy itself which is somehow always relative, but rather suggests that new types of rationality have to be empirically agreed upon in order to allow the identification of those perhaps new, legal, rational grounds that Max Weber was talking about. So, there is on the one hand this massive indifference towards legal authorities, but on the other hand also very strong social participation — these counter-culture movements that we are all familiar with — that seem to create a problem to governments.

Recent Trends in American Legal Theory

CHARLES FRIED
Harvard University

I am delighted to be included in a conference on legitimation because it turns out that new currents in American legal philosophy which are such a challenge are in fact concerned with the problem of legitimation. One could go back quite a long way in talking about the current state of American legal philosophy. I would like to go back for quite personal reasons to the early 1960's, because it was in 1961 that I began teaching at Harvard. At that time the American jurisprudential scene was dominated by two Harvard figures Henry Hart and Lon L. Fuller. They represented a very strong desire to move beyond what the American legal realists had accomplished or destroyed in the 1930's. It was an excessively destructive and negative movement. Today's young men, who are in fact ageing young men, since they were young in 1968, would refer to it as a 'trashing'. The legal realists in the 1920's and 1930's were also engaged in trashing, that is to say a kind of a destructive activity. By the time Fuller was writing the work which I believe most of you know, he was seeking to go beyond that negative expression. What he was specifically trying to do — and this is the theme I would like to start with in this little dialectical story — was to go beyond the critique of formalism, which is what the Realists in the 1930's revolted against, to a recognition of the fact that law does after all structure and constrain, that there is something distinctive and special about law and that it does do something. It has a kind of power, a kind of force. It has an energy and an influence. It is not merely a pretext for the exercise of naked political power, in the name of a myth. He was seeking to talk about what it is that law does distinctively.

His notion was that what it does is the enterprise of subjecting human activities to rules. It is here that one might speak of Fuller as a neo-

naturalist. Many people picked up on the idea that he was a reviver of natural law thinking and he rather liked that idea himself. It attracted him, it was very satisfying in the 1950's to be accused of causing a scandal, a rather respectable scandal; to be a natural lawyer at Harvard. The naturalism was the notion that law does have certain natural features, in a sense that the very conception of law implies certain things and he sought to derive it from this notion of subjecting human activity to rules. He made two proposals. One was what he called 'the internal morality of the law'. This is the idea that the enterprise itself implies some limits and constraints. It is really not possible to realise any activity, any purpose, no matter how wicked and barbaric, in lawful forms. The very attempt to embody a purpose in a law implies some limits. The idea is that to make the maximum use of rules is to leave people a certain discretion, because the persons who use rules must be allowed to use their discretion in order to use them; that the coordination is the coordination not of a computer, but the coordination of intelligent persons sharing a purpose. Unless the individuals who use law do in fact share this purpose then law will not work and you lose the substantial benefits of law — if you will, the efficiency gains of law — but the price you pay for using law is that you must use it in the context where the purposes are — at least in some very broad sense — shared. This to him implied some kinds of limits, some kind of morality which could not be overstepped by the very fact that you are using law. And that relates to a second point: the method which is proper to law is the method of purposive interpretation. Rules of law can only be understood if the makers of the law and the addressees of the law both share a purpose and therefore would know how, in new situations, to apply general terms. Moreover the interpreters are not just the policeman or the officials, but basically the individual citizens to whom the rules are applied. So you get this picture of rules entering a community of shared purposes. You can see how this conception connects very nicely with our concerns which are concerns of legitimacy, because the crucial assumption was that of a shared purpose. This orientation was extremely influential in the 1950's and 1960's in the United States. A whole generation of lawyers, professors, and judges was formed by it and the concrete expression that it took was the method of policy analysis.

The way in which law was developed, interpreted, understood was in terms of policy analysis. That is the practical implication of the Fullerian analysis and it was the dominant intellectual mode in the United States not just of legal philosophy, but of working lawyers and working law professors in a large number of concrete fields. It was a method which was neither formalistic, nor was it the method of the realists (which was of course not a method, but an anti-method). Nevertheless it is interesting that Fuller and his disciples had their critics, particularly Hart and curiously Professor Ronald Dworkin of Oxford. In those days Dworkin joined those who were criticising Fuller and in a sense it was not fair to have writers as philosophically sophisticated as Hart and Dworkin taking after Fuller who was to my mind a brilliantly imaginative and intuitive man, but quite unschooled philosophically and therefore unable to defend himself with those particular weapons. I myself was on the scene at that time and I found the philosophers ganging up on Fuller as neither productive nor attractive. They did not seem to do what participants in philosophical debates should do, which is first of all to try and discover the wisdom of your opponent and then seek to defeat that.

However, we went beyond this stage with a sociological development. That is, that American academic law by the late 1960's and early 1970's was simply flooded by people with quite sophisticated academic backgrounds. Graduate studies in the United States became in those days less and less attractive and many young men and women who would in earlier periods have become students of political science or philosophy went into law and law teaching instead: people with sophisticated philosophical backgrounds and people with a great interest in continental philosophy, continental political theory and indeed people who would describe themselves as one or another kind of Marxist joined the profession. I think that law teaching had never seen this before in the United States.

In my own institution there has been a Marxist study group for some years. This made an important change in our intellectual climate and one of the important institutional manifestations of it was something called 'the critical legal studies group' which has been going on for six years. What I am identifying is obviously an important movement. Intellectually, what this movement did was to get together a number of themes, themes which I suppose are quite familiar to Europeans.

There was a strong emphasis on what I call Kuhnean subjectivism. It seems that membership to this group requires almost total recall of Thomas Kuhn's *The Structure of Scientific Revolutions* plus the infinite willingness to apply it to matters of social history. There was an attempt to show how all terms are in fact the product of a particular historical occasion and, more importantly, how terms which appear to be the same from one period to another are mere homonyms of each other; that the word property meant something wholly different in the 1920's, not to say in the non-western experience. Kuhn argued that words like gravity or electron in different times have a totally different meaning. Well, that is one thrust. Another thrust is that this movement is highly epistemological. This again says that words, general terms and concepts really have no constraining force, they do not do any work. This goes beyond Kuhn who says they do do work, they just do different work at different times. Finally of course, you get a power analysis which connects the particular intellectual structures of a particular moment with the interests of a dominant group at that time. The connection can be quite simplistic or subtle and interesting. This connects up to what I call neo-naturalists in the following way. The neo-naturalists were also very concerned with epistemological problems, and they also denied the mechanical power of legal concepts. But as I said Fuller sought to reinstate the power of concepts through this notion of shared purpose. It is that notion which the critical legal studies group enjoyed trashing. Because they enjoyed saying 'Look, whose purposes are these?'. And in fact, do the groups within the society, do blacks and whites really share the same purposes, do men and women really share the same purposes, do the lower class and the privileged class share the same purposes? Or worse, if they do share the same purposes that is because some of these groups are deluded or betrayed into sharing purposes which, if they knew their own interests, they would not share. That is a criticism which is very frequently made. One of the most interesting examples of this is a paper by Professor Kennedy called 'Form and Substance in Private Law: Adjudication'.

Ordinary law professors were a bit surprised and even hurt by all this. I am concerned here to point out what the excesses of this most recent group were. A good place to start is the fascination with the work of Thomas Kuhn. The conception which Kuhn put forward and which

was so influential and intoxicating to social scientists, was so because if it were the case that something as objective as science is indeed historically determined, then the social sciences must be doubly so. The trouble is that Kuhn's account of the sciences did not last very long and is probably taken very seriously by very few philosophers and historians of science at all.

The notion that the terms that Newton uses and the terms which Einstein uses are simply homonyms of each other is preposterous. What working scientists believe is that indeed there *was* progress, which is something that Kuhn denies. There is progress: Einstein's formulae are indeed improvements on Newton's and Newton's formulae can be shown to be a special case of Einstein's which are actually quite good approximations within limits. This is hardly the picture one would get if one read Kuhn for all he was worth. What we had in the philosophy of science is something which I think has applications to law.

There was a time when among some philosophers of science — particularly Rudolph Carnap — there was a hope of creating a true formalism of science, a kind of mechanical method which, if you really knew it, would tell you what a good scientific theory was. It could indeed mechanically generate good scientific theories. You could develop algorithms of what a good scientific theory is. You could probably get your computer to generate theories on a random basis and then filter out those which were not any good. That is a preposterous suggestion. Nobody would accept it. But what is striking is that the rejection of Carnap's project for science did not mean that scientists abandoned the notion of objectivity in science — not for a moment. But rather, objectivity in science was something which was thought to exist, an extremely fruitful working hypothesis, even though the objectivity was not one which could be reduced to some kind of mechanical formalism. I think you can see how there is a parallel to the kind of tensions, theses and antitheses that develop in law. The formalists would correspond to Carnap's project in science and the celebration of subjectivism would correspond to the work in the philosophy of science of people like Kuhn and Feyerabend.

The actual fact of science, the daily working hypothesis, corresponds much more closely to the hypothesis of lawyers and judges and lower level legal scholars who do not imagine that the method of law

can be formalised and reduced to some kind of a mechanical algorithm on one hand, but who are also not plunged into a kind of despair of subjectivism. There are many men and women who go about performing tasks which are then criticised in terms of quite particular objections, just as scientific theories are criticised. But they are not criticised as follows: 'Well, it is true, all your data are correct, but I don't like your theory'. That is not a valid objection to a scientific theory and it should not count as a valid objection to a legal argument. So, my interest is to try and excavate from this practice of law what constitutes the presuppositions of the activity of lawyers and judges and serious legal scholars. How is it that they are in fact able to operate?

The title of the paper I have submitted — 'The Artificial Reason of the Law' (60 *Texas Law Review* 35 (1981)) — is a part of a quotation from Lord Cook, responding to the King — James I — who was asserting that he really should be able to tell the Courts what to do because the law is governed by reasons and his reason is as good as the judges' reason. And Cook said 'Yes, your reason is very good, your Majesty, but the law is governed by the artificial reason of the law.' The question is: what is that artificial reason or what is it that lawyers know? My answer is that what lawyers know is the law and my project is a project to discover, to arrive at some kind of useful statements about what it is that allows us as lawyers to function and that allows the law to perform the work that it does. I do not think that my project is very different from Fuller's project. It is incidentally the project which Dworkin is pursuing (I hope he is slightly embarrassed having been so ungenerous to Fuller, because he is continuing Fuller's work).

The question which I ask myself and to which I do not know the answer is: What will be the form of the results that one is able to produce? What will be the answers that one gives? Well, there is one kind of answer and that is counter-trashing. To destroy the destructive power of the cynical or sceptical critique and to show by good philosophy how the scepticism about the law is in fact founded on bad philosophy, on bad epistemology. That is a useful task. At the end it would lift some of the despair which these very clever, not-so-young men and women have succeeded in instilling. If you can lift that despair then you can act like a psychoanalyst allowing his patient to go about his work. That is a very honourable task. Can one do more? Is there in fact some sort of general things that one can say about how the law

works? What is the method which allows serious lawyers to do their work? Is there a hermeneutics of law? I must admit that I am somewhat doubtful about being able to discover one. This is because I have never seen any good examples in the general area of hermeneutics which would be the inspiration of this enterprise. In fact I think the best hermeneutics consist of two things. First, a statement that interpretation is possible and then actual, concrete interpretations. Second, the task of actual concrete interpretations strikes me as itself both so various and so interesting that it may be that the best that we can do is just go about our business as lawyers. The task of the philosopher then would be to consider the background notions not now of epistemology, but of political philosophy which underlie the actual legal structures one works with. In a recent book I try to do just that. I wrote a book on Contract which seeks to show what some of the philosophical underpinnings of that subject are. But I was not aware then and I guess I still do not know of any general hermeneutic principles of my work.

From Legitimism to Legitimacy

MAURICE CRANSTON

London School of Economics and Political Science

'Legitimism' was a word much heard after the French Revolution and the fall of Napoleon, when it was found necessary to make a case for limiting the sovereignty of nations to persons of royal descent, qualified for thrones by the fact of being the lawful heirs of earlier kings in recognised dynastic succession. The great merit of this system from the practical point of view, is that it removes from the realm of controversy (except in cases of uncertain succession within a royal family) the choice of the head of state. Other, less prosaic arguments can of course be advanced in favour of legitimism, but it is not my intention here to consider them. My purpose is rather to contrast it with other conceptions of legitimacy, established in political thought well before the French Revolution, as a means of judging the legitimacy of a regime.

Hobbes delivered in the middle of the seventeenth century the most forceful of theoretical blows against legitimism, devastating as much by the timing as by the content of what he published. Hobbes introduced a new set of criteria for recognising a sovereign. The method is not to ask whether the claimant is the heir, in an acknowledged line of succession, to the headship of a family of kings to whom a particular throne has at some time in the remote past been assigned by God's will and man's lawful institution, but to ask rather: does the claimant enact the role of sovereign; does he exert supreme authority over the commonwealth; is he the commander of a given political society, holding its members together in common obedience and the bond of tranquil submission?

This cuts out all talk about whether or not the man in question is the lawful heir; for law, for Hobbes, is either natural law or positive law: natural law is discerned by reason (and explained by philosophy);

positive law is defined by Hobbes as the 'command of the sovereign': so the man who enacts the role of sovereign becomes the lawful head of state by the simple act of proclaiming the necessary laws. Or to use an ugly expression which has become fashionable: he 'legitimizes' himself. The Hobbesian sovereign is the fountain of his own lawfulness: but, of course, the proclamation of it is really a very limited exercise: it is the *doing* that counts for Hobbes: ruling the country and getting himself obeyed — that, is the Hobbesian sovereign's title to sovereignty.

The timing of Hobbes's utterance was important because his *Leviathan* was published in London in 1651, soon after Oliver Cromwell had made himself, by force of arms, dictator of England, Protector, as he like to call himself, of the Commonwealth: while Charles, the royal claimant to the throne, was powerless and almost penniless in exile. Inevitably, Hobbes's book was read as a justification of Cromwell's claims, or an attempt to 'legitimise' his rule and the author, who had always been supposed to be a royalist, and was in exile in Paris with Charles, was repudiated as a traitor by his old royalist friends, and forced to return to England, and bow to the triumph of Cromwell, whom he detested.

Ironically Hobbes had written *The Leviathan* with the idea of giving the Stuart Kings a more rational and scientific theory for exercising undivided sovereignty over the state than the doctrine of the Divine Right of Kings to which the Stuarts subscribed and which Tory ideologists like Sir Robert Filmer defended in their writings.¹ The defeat of the king's army in the Civil War enabled the victor to use for his own purpose theoretical arguments which had originally been tailored to fit the vanquished. In the event, of course, Cromwell did not want to adopt the Hobbesian argument.

The Hobbesian concept of legitimacy did not satisfy him. The Hobbesian sovereign is *de jure* by the mere fact of being a *de facto* sovereign. But Cromwell wanted more. He wanted to be the lawful head of state in England in a more traditional sense of the word 'lawful'. His first wish was to be crowned King — for England had been a Kingdom since time immemorial and the Stuart Kings derived their title from a dynastic succession which dated as far back as 1066. Cromwell dreamed of being another Duke of Normandy, a conqueror enthroned. But the fellow officers of the Army told him briskly that he

was not a Duke of Normandy, and that if he put a crown on his own head, they would promptly 'remove the crown, and the head with it.' Cromwell was a disappointed man. He disapproved of Hobbes, but a Hobbesian sovereign was all he was allowed to be. 'Legitimism' was too strong a sentiment for him to achieve anything more.

Later in the same century, the radical Whigs, Shaftesbury, Russell and company, found that 'legitimism' was still deep rooted in England when they tried to put the Duke of Monmouth on the throne as the successor to Charles II. They discovered that the nation would not accept an illegitimate son as a lawful prince: for while Charles II could make his bastard a duke in the sense of giving him the title of Duke, he could not make him the heir to the throne. And indeed Charles II refused to entertain any thought of doing so — for the old principle of legitimacy was engraved in the heart of that most royalist of Kings.

What the word 'legitimacy' means in this context is perhaps the simplest of its meanings: what is in accord with formally recorded laws and procedures. A legitimate heir, like a legitimate son or a legitimate wife, is the person registered as such in the official documents or records. A legitimate son need not be a natural son: Albert of Saxe-Coburg, the Consul of Queen Victoria, was the natural son of his mother's bourgeois lover, but he was registered and regarded as the son of his mother's husband and that is what he was in the eyes of the law: a legitimate son, a legitimate heir, a legitimate prince. His situation was the reverse of that of the Duke of Monmouth, who was the natural son of a King, but whose mother was not that Kings' wife, which meant that the son was illegitimate; and had no right of succession to his father's throne. Perhaps if the Duke of Monmouth had succeeded in his attempt to invade England in 1685; if he had repeated the achievements of the Duke of Normandy, and subdued the country by force of arms to a greater extent than Cromwell succeeded in doing, and persuaded his fellow soldiers that he was an eligible prince, he might have made himself King of England. Even so he would have invoked the Hobbesian concept of law and proclaimed, as his own command, the law which would bestow on him the rights of a King of England.

Hobbes never claimed that legitimacy rests on force alone: it rests on the recognition which force exacts. Recognition has to come not only from those who submit, but also from other external states. Here the situation is rather paradoxical. In international law and diplomacy,

a sovereign, a government, or régime is recognised by other nations if it is legitimate and it is legitimate if it is recognised by other nations. Recognition not only 'sees' legitimacy: it also confers it.

The 'legitimist' would perhaps want to deny this. The King of France, for example, is King by Divine Right and ancient prescription, and nothing any living person does or says can alter or affect that reality. The King is not King because he does anything, or because he is thought to be something, but because he is something. The participation of other persons has only ever been needed for the purpose of lawfully marrying his parents and lawfully registering his birth as their son: duties wisely entrusted by tradition to the Church, source of the laws as well of the procedures of matrimony. However, since the time of Hobbes and Cromwell, 'legitimism' has been in retreat, and other criteria of legitimacy have had to be formulated, for the purposes of international recognition of foreign states — sovereigns, republics, governments, régimes, or whatever they are to be called — régimes, the least pleasing sounding name, is perhaps the best all-purpose one. When the United States seceded from the English Crown and set itself up as a republic, requiring to have diplomatic relations with other states, it could not logically, having rebelled against its own King, adhere to the legitimist concept of legitimacy.

Jefferson was called upon to formulate another one. He produced what is sometimes called a *de facto* theory of recognition, which was not in truth a pure *de facto* theory but a *de facto* theory which had a distinct democratic addition. Jefferson wrote: 'It accords with our principles to acknowledge any government to be rightful² which is formed by the will of the people, substantially declared.'³ On a later occasion, Jefferson wrote:

We surely cannot deny to any nation that right whereon our own Government is founded — that every one may govern itself according to whatever form it pleases, and change these forms at its own will; and that it may transact its business with foreign nations through whatever organ it thinks proper, whether King, convention, assembly, committee, President, or anything else that it may choose. The will of the nation is the only thing essential to be regarded.⁴

Jefferson was doing two things. He was setting out the *de facto* doctrine in what came to be standard form in diplomacy, namely proposing that a regime should be recognised:

(1) if it was in effective control of the territory recognised as its natural territory.

(2) if it was willing to comply with treaty obligations and international law so far as international law can be said to exist.

In addition to this Jefferson demanded:

(3) that the regime should rest on the will of the people, 'substantially declared'.

This third criterion had very rapidly, even in American practice, to be watered down to the 'will of the people' not necessarily substantially declared, and then 'will' reduced to 'consent', and 'consent' reduced to acquiescence, measured by the bare fact of the absence of open popular revolt.

But in spite of all this dilution of Jefferson's principle of the people's will, it does contain something which any concept of legitimacy applied to a state, or a regime, must require, as Hobbes himself would be the first to admit; though I suppose it was the main purpose of Hobbes to say not that the people do positively consent to the laws of the sovereign but that they ought to, since they have (through the social contract which institutes the commonwealth) invested their will in his will.

The difference between Hobbes and Jefferson is that for Hobbes, the sovereign having been brought into existence by the will of the people, then confers legitimacy on himself by pronouncing the necessary laws: for Jefferson, the people legitimate each sovereign by a substantial declaration of their own will. And yet we are bound to ask: how may regimes in the world in Jefferson's time, or since, can seriously be said to rest on the people's will 'substantially declared'? How could American governments base their recognition policy on this, living in the same hemisphere as the Latin Americans where since the hand of Spain was removed, *coup d'état* has succeeded *coup d'état* and despot has snatched power from despot with such regularity that the word 'usurper' no longer has any meaning and the people become impotent spectators, invited to cheer but seldom to choose their ever-changing rulers.

From an early stage, according to our historians, Jefferson's demand for 'substantial declaration' was set aside: "Thus, for practical purposes U.S. recognition policy was virtually automatic, turning solely on a question of fact — did the government have effective control? if it did, recognition was granted. Whatever its democratic sympathies, the

United States normally followed the simple formula that the government *de facto* was equally *de jure*.⁵

When the United States entered the twentieth century, and especially when a political scientist, Woodrow Wilson, became President, American recognition policy became less Hobbesian and more Jeffersonian. Woodrow Wilson could see that diplomatic recognition actually confers legitimacy on a regime, and he was not willing to do this indiscriminately. On assuming office, he said on the subject of recognising foreign states: 'We hold . . . that just government rests on the consent of the governed, and that there can be no freedom without order based upon law and upon the public conscience and approval. We shall look to make these principles the basis of mutual intercourse.'⁶ In effect, Wilson made 'constitutionalism' the basis of legitimacy, much as the European monarchies had once made 'legitimism' the basis of legitimacy, they to discourage democracy, he to promote it, by recognition policy.⁷ Wilson did not wish (any more than they had wished) to confer legitimacy on what he regarded as inherently illegitimate regimes.

However, in the real world of diplomacy, Wilsonian principles fared little better than Jeffersonian principles or legitimist principles: the United States refused for years to send an Embassy to the Soviet Union or to Communist China, even though there was no logic in the policy, since American diplomatic recognition was given to many other equally revolutionary and non-constitutional regimes, different only in being smaller: in such places Wilsonian tests were not applied, although sometimes such foreign governments were asked to guarantee, in return for recognition, the security of American property and interests. As Roosevelt put it in 1933: 'The maintenance of constitutional government in other nations is not a sacred obligation devolving upon the United States alone.'⁸

Once more, it seems, we are back to Hobbes, who is, if nothing else, surely the most twentieth-century of philosophers, except that he is so much better than the philosophers we do have in the twentieth century. For do not let us pretend that the principles we invoke for the diplomatic recognition of legitimate regimes are any nobler or more exalted than those Hobbes laid down: in our humanitarian age, the odious Pol Pot regime, which massacred millions of its subjects and failed to maintain its authority over more than a fraction of Cambodian terri-

tory, is regarded, in the United Nations and elsewhere, as the legitimate government of that state; Hobbes would not authorise this, because the Pol Pot regime violates natural law, as Hobbes understands it.

Hobbes never banished natural law from his philosophy as so many contemporary theorists have done. Therefore he does not put himself in the somewhat absurd predicament of much modern philosophy, which wants to have legitimacy, or which wants to know 'how to legitimate', on the basis of legal positivism or existentialism or ethical emotivism, all of which systems repudiate natural law.

But this is something that cannot be done. Natural law, in however minimal, or Hobbesian a form, is a necessary ingredient of any concept of legitimacy.

There are some uses of the word which do not have any direct connection with the idea of law. Examples of this are 'legitimate curiosity', 'legitimate criticism' or 'legitimate expectations' — which are only another way of speaking of justifiable or justified curiosity or criticism or expectations. I have never heard the expression 'legitimate belief', but the title of Ernest Gellner's book *The Legitimation of Belief* seems to entail some such usage, although I would have considered *The Justification of Belief* a more suitable, less mysterious title, considering what Gellner has to say in the book.

The most important uses of the word legitimate do, however, embody the notion of 'rightful': 'Legitimate self-defence'; 'legitimate possession', 'legitimate claim', 'legitimate title', 'legitimate objection'. What is rightful, has of course, to be explained in reference to some sort of law.

The legitimacy of the legitimate child or the legitimate wife is derived from a system of written, or positive law. But the legitimacy of 'legitimate self-defence' or 'legitimate possession' may well have to be derived from something other than written law, since we often use these expressions to refer to situations in the state of nature, or in other contexts where no positive law operates, such as in the relations between states. Here the only law that can be invoked is that of 'higher law' beyond the edicts of 'earthly rulers' which has traditionally been known as natural law.

Notes

- ¹ King James I also wrote a book expounding the same doctrine, *The Trew Law of Free Monarchies*.
- ² A word interchangeable here with 'legitimate' (M.C.).
- ³ *Works*, III, p. 500.
- ⁴ U.S. Department of State, *Problem of Recognition*, p. 7.
- ⁵ L.T. Galloway, *Recognizing Foreign Governments*, 1980, p. 16.
- ⁶ Hackworth, *Digest of International Law*, I, p. 181.
- ⁷ See Galloway, *op. cit.*, p. 28.
- ⁸ Dept. of State, *Problem of Recognition*, pp. 57—58.

L'obligation politique: Hobbes et Kelsen Une lecture croisée

FRANCESCO GENTILE
Université de Naples

Au sein d'une discussion portant sur la politique et la jurisprudence, d'une part, et sur l'historiographie et la philosophie politique, d'autre part, le thème du rapport entre *devoir* et *pouvoir* a tout à fait sa place. Il pourrait toutefois paraître surprenant de tenter, à ce sujet, une lecture croisée de deux auteurs tels que Hobbes et Kelsen, étant donné la décision avec laquelle celui-ci prend ses distances par rapport à celui-là. "It is evident — écrit Hans Kelsen, dans son essai *The Natural-Law doctrine before the Tribunal of Sciences*,¹, justement à propos de Thomas Hobbes — "that the Natural-Law doctrine has no other function than to justify the positive law, say positive law established by an effective government". Dans cette perspective, le philosophe anglais du XVII^{ème} siècle apparaît au juriste mitteleuropéen du XX^{ème} siècle comme le plus radical des champions de la doctrine du droit naturel, car il aurait fait du droit positif un droit naturel, ou plus exactement car il aurait prétendu justifier le droit positif en tant qu'exigence de la raison, et par là même du droit naturel. Rien de plus éloigné de la théorie pure du droit au succès de laquelle Kelsen a prodigué tous ses efforts intellectuels, engagé comme il était contre le syncrétisme méthodologique dominant, à son avis, la science juridique traditionnelle, et dans la constitution d'une science ayant le droit pour seul objet, et ignorant tout ce qui ne répond pas strictement à sa définition (*Th.P.D.*, I, 1). Comme tout le monde le sait, le qualificatif de "pure" indique l'indifférence, et par là même la neutralité de la véritable science juridique par rapport aux intérêts, aux idéologies, aux croyances. En faisant le commentaire des maintes accusations portées contre sa théorie, rejetée comme libérale-démocrate par les fascistes, ou comme fasciste par les démocrates, libéraux ou socialistes; comme capitaliste par

les communistes, ou comme bolchevique et anarchique par les partisans du capitalisme nationaliste; comme apparentée à l'esprit de la scolastique catholique ou comme dérivant de la conception protestante du droit et de l'Etat, parfois même comme athée, Kelsen s'exclame: "Bref, il n'est aucune tendance politique dont on n'ait accusé la théorie pure du droit. Cela prouve, mieux qu'elle ne pourrait le faire elle-même, qu'elle a su conserver son caractère de théorie pure". (*Ibid.*).

Parmi les auteurs de l'école du droit naturel, Hobbes aurait, toutefois, un signalement particulier. En appliquant une méthode analytico-rationnelle, il aurait admis, à côté des Etats naturels, nés historiquement des rapports de force, et s'appuyant sur ces rapports, un Etat purement rationnel, la *civitas instituta*, dont il aurait ramené la fondation à un contrat, non pas historique, mais "idéal". En d'autres termes, Hobbes aurait été conscient de la nette différence qui existe entre une considération explicative et une considération normative (*J.S.M.*, II). Cependant, cette conscience ne lui aurait pas ôté l'idée de justifier le droit positif, et en particulier le droit de la monarchie anglaise, au moyen de la raison, c'est-à-dire d'une considération explicative, destinée à corrompre, par une inconcevable confusion méthodologique, la pureté de la science juridique. En effet, cette "pureté" n'est pas seulement une neutralité par rapport aux intérêts, aux idéologies, aux croyances, mais aussi, et surtout, un barrage à toute tentative de connaître "le droit en soi", c'est-à-dire l'être du droit (*N.R.*, IV, B, c).

Voilà donc l'embarras dans lequel se trouve immédiatement une lecture croisée des deux auteurs. Mais déjà l'admission kelsenienne de la présence, dans l'outillage logique de Hobbes, d'une distinction entre arguments explicatifs et arguments normatifs, ouvre une fente où l'on peut pénétrer critiquement. En effet, l'historiographie, depuis quelques temps, est venue proposer aux côtés d'un Hobbes théoricien du droit naturel, un Hobbes partisan du positivisme juridique. Tout d'abord timidement, et d'une façon indirecte, comme Stephen², Capitant³, ou Verdross⁴; puis soulignant le paradoxe d'un Hobbes qui appartient *en fait* à l'histoire du droit naturel et *en droit* à celle du positivisme juridique, selon Fuller⁵, et Bobbio⁶. Enfin, avec Schmitt⁷, Bianca⁸, Cattaneo⁹ et surtout Raymond Polin¹⁰ et Michel Villey¹¹ qui, par des chemins différents mais avec le même résultat, ont ponctuellement démontré comment les fondements du positivisme politico-juridique

“furent établis quelques vingt ans après le système de Grotius, à l’âge encore de Descartes, par Thomas Hobbes”¹².

La lecture que je propose se situe dans cette ligne, ayant toutefois comme point dominant, et comme spécificité, le souci de mettre en évidence la continuité méthodologique existante entre Hobbes et Kelsen, d’où le fait que l’on insiste sur le croisement et non sur le parallélisme des deux arguments, à partir de l’intention d’origine d’envisager une géométrie du phénomène politico-juridique.

Ce serait Galilée, rencontré à Arcetri au temps de son troisième voyage sur le continent¹³, à avoir poussé Hobbes dans l’entreprise d’étendre à tous les domaines du savoir, y compris la morale, la politique et la jurisprudence, l’interprétation mécaniste que le savant avait appliquée à la physique. Ce qui est certain, c’est que dans la dédicace du *De Cive*¹⁴ le philosophe anglais¹⁵ impute le retard des sciences morales au manque de “géométrie” dans leurs règles. Tout ce qu’il y a de bon dans les bâtiments, de solide dans les forteresses, de merveilleux dans les machines; tout ce qui fait la différence entre les temps modernes et l’ancienne barbarie, est presque entièrement un effet bienfaisant de la géométrie. Si les philosophes moralistes avaient développé leurs études de la même façon que les géomètres, l’esprit humain n’aurait pu mieux contribuer au bonheur de cette vie. (*De Cive*, ded.).

Mais en quoi consiste-t-elle, cette méthode merveilleuse?

Elle se fonde sur la conscience originaire que la connaissance scientifique, dans le sens strict du mot, ne vise pas l’essence des choses, mais elle s’occupe de leurs noms. Elle se structure de façon hypothétique et déductive, comme un calcul cohérent avec des mesures ou principes hypothétiques. Elle se caractérise par l’efficacité opérationnelle de ses règles qui livrent aux hommes les instruments de la puissance.

On a très bien tracé¹⁶ l’itinéraire spéculatif qui a conduit Hobbes à la conscience du conventionnalisme scientifique en partant de la *annihilatio mundi* (If we conceive the world annihilated. . .); la célèbre hypothèse se trouve dans *The elements of law, natural and politic* (1640), mais aussi dans le traité *De motu, loco et tempore*, cité par Mersenne dans sa *Ballistica* (1644) et enfin dans le *De corpore* (1655). Quant à la structure hypothético-déductive, les textes hobbiens sont si nombreux et évidents, que l’on n’a que l’embarras du choix. On peut fixer l’attention sur trois formules laconiques. “*Omnis ratiocinatio est computatio*”, que l’on trouve textuellement dans le *Léviathan* (V) et dans le *De*

corpore (I,I,2) mais qui constitue un "leitmotiv" de toute l'œuvre du philosophe anglais. "Principia. . . scientiae, omnium prima, sunt phantasmata sensus et imaginationis, quae quidem cognoscimus naturaliter quod sunt" (*De corpore*, I, IV, 1), d'où l'on peut déduire l'importance des définitions premières, qui forment les principes des démonstrations scientifiques, et qui n'ont pas à être démontrées scientifiquement. (Hobbes, qui déjà à Oxford avait nourri son esprit du nominalisme de Occam, se rapporte à cette structure explicitement chaque fois qu'il commence un traité). Et encore, un de ces "principia prima" de sa science euclidienne du droit et de l'Etat: "Jus et lex differunt ut libertas at obligatio" (*De Cive*, XIV, 3), qui réunit synthétiquement deux mots, et donc deux concepts cardinaux de la politique et de la jurisprudence positives, c'est-à-dire: droit naturel comme "jus in omnia" (El., I, 10; *De Cive*, I, 10; *Lev.*, XIV) et loi comme "mandatum ejus qui cohercere potest" (*D.Ph.S.*, II).

Quant à la qualification opérationnelle, elle est sanctionnée par la formule, dans laquelle on peut reconnaître l'orientation baconienne¹⁷: "Scientia propter potentiam: Theoremata. . . propter problemata, id est propter artem constituendi; omnis denique speculatio actionis vel operis alicujus gratia instituta est" (*De corpore*, I, I, 6). Polin en a très bien montré le fonctionnement dans le domaine juridique et politique,¹⁸ il suffit ici de rappeler l'argument hobbesien à propos des avantages de la loi par rapport au droit: l'efficacité. Avec la loi ce que l'on a perdu en volume, on l'a gagné en efficacité. Et si l'on ne perd pas de vue que le *jus in omnia* n'est pas une réalité mais seulement un "phantasma sensus et imaginationis", tout revient.

Voilà donc pourquoi avec Hobbes commence à s'imposer l'idée que, si l'on connaissait les règles de l'action humaine avec la même certitude avec laquelle on connaît celle des grandeurs en géométrie, l'humanité jouirait d'une paix constante (voir *De Cive*, ded.).

"Mit Rücksicht auf ihren formalen Charakter aber kann die Jurisprudenz mit einem freilich nicht in allen Punkten zutreffenden Gleichnis als eine Geometrie der totalen Rechtserscheinung bezeichnet werden" (*H.S.*, I, 3).

La proposition de considérer la jurisprudence comme une géométrie des phénomènes juridiques est avancée par Kelsen pour repousser la critique de formalisme portée contre sa théorie pure du droit. En réalité cette critique le pousse à définir plus exactement le sens du qualifi-

catif "formel" rapporté à la science juridique, et qui est connexe à sa fonction spécifique: créer les instruments conceptuels au moyen desquels on s'empare théoriquement d'un droit donné (*J.F.,I*). Qu'un système conceptuel assume un caractère formel apparaît comme assez naturel à toute personne qui n'est pas étrangère à la méthodologie scientifique. C'est le commentaire de Kelsen. En effet l'immense quantité de matériel juridique positif ne peut être maîtrisée que par un système de concepts. Or, personne ne peut mettre en accusation cette structure formelle puisque la connaissance scientifique du droit, comme toute connaissance scientifique, doit formaliser son propre objet. De plus cette formalisation vise justement à opposer, comme vertu à vice, la positivité au tristement célèbre "formalisme". "Seulement ce qui est formel est positif" (*Ibid.*). Plus une méthode est formelle, plus elle tend à la positivité. Dans l'approfondissement d'une recherche, pour réussir à formuler positivement un problème, il faut que les bases de l'argumentation soient d'autant plus formelles.¹⁹ Qui aurait la bonne idée de combattre une théorie physique en tant que formelle?

Le texte kelsenien est sans équivoques. Il y transparaît la conscience originaire du conventionnalisme du savoir scientifique, quel que soit son objet. Le juriste revient sur ce sujet au cœur de la *Reine Rechtslehre*, lorsqu'il distingue entre règle de droit (*Rechtssatz* ou *Soll-Satz*) et norme juridique (*Rechtsnorm* ou *Soll-Norm*). "Par règle de droit, nous entendons les propositions par lesquelles la science juridique décrit son objet, celui-ci étant constitué par les normes juridiques telles qu'elles ont été créées pas des actes juridiques" (*Th.P.D.,I, 3, d*). Dans la deuxième édition, la question est approfondie et intégrée, au souci de séparer la science du droit des sciences de la nature, y compris et en particulier de la sociologie. Or cette distinction-ci est opérée au moyen d'une définition plus précise et radicale de cette séparation-là, de sorte que le conventionnalisme de toute science apparaisse de façon plus nette, et sa structure hypothétique et déductive de façon plus évidente. En effet, pour expliquer les phénomènes, les sciences de la nature recourent à la causalité, alors que la science du droit recourt à l'imputation. Mais de même que la loi naturelle, formulée par la science de la nature, est une assertion descriptive de la nature que l'on ne doit pas confondre avec l'objet de la description, c'est-à-dire qu'elle n'est pas une loi de la nature; de même la règle de droit, formulée par la science du droit, est une assertion descriptive du droit que

l'on ne doit pas confondre avec l'objet de la description, c'est-à-dire qu'elle n'est pas une norme (R.R.1960,III,18). Il ne faut pas oublier non plus que, en faisant usage du langage hobbesien, *l'être*, décrit par la science de la nature, aussi bien que le *devoir*, décrit par la science du droit, ne sont que des "phantasmata". Ce que, Kelsen, sous l'influence de Simmel²⁰, avait présenté. "Sein et Sollen ne sont que des déterminations générales de la pensée, sous lesquelles on peut comprendre tous les objets" (J.S.M.,I). Ainsi peut-on dire que les deux séries de déterminations, du *Sein* et du *Sollen*, dérivent de deux principes gnoseologiques de la causalité et de l'imputation, et que leur "vérité" dépend de la cohérence dans la déduction qui les a conduites. Ce dont Kelsen a certainement eu conscience, bien qu'il n'ait pas toujours été vigilant, lorsqu'il écrit: "Il n'existe pas, il ne peut pas exister de contraste entre l'ordre naturel et l'ordre juridique, puisque l'un est un système de l'être (Seins-Ordnung) tandis que l'autre est un système du devoir (Soll-Ordnung), et une contradiction logique ne peut exister qu'entre un être et un être, ou bien entre un devoir et un devoir" (R.R.1960, III,23)". Sur le chemin du savoir scientifique, il n'y a que des "vérités" ou des contradictions logiques.

Quant à la qualification opérationnelle de la science du droit, l'attitude de Kelsen est plus hésitante. D'un côté, il semble l'exclure en accentuant la distance de la science, sa "primogenitura", par rapport à la technique (Th.P.D.,XIII,4,i). En effet, il se "fait avoir" par une des plus banales équivoques du scientisme du XIX^{ème} siècle, que l'épistémologie contemporaine a dépassée,²¹ mais qui n'avait trompé ni Francis Bacon, ni Galilée, et qui avait seulement effleuré leur "disciple": Hobbes. D'autre part, une lecture plus attentive des nombreux passages de son œuvre permet de comprendre dans quelle mesure la jurisprudence lui apparaît comme une connaissance opérationnelle. Toujours à propos de la distinction entre formel et formaliste, il prévient ses adversaires que la doctrine pure du droit poursuit le but de comprendre comment "le droit, de notre temps et parmi nous, au sein d'une communauté juridique donnée, est effectivement constitué. Elle est donc une doctrine du droit effectif" (J.F., I.). En faisant curieusement, un usage des mots être et devoir tout à fait incohérent par rapport à la définition conventionnelle des sciences que l'on a vue plus haut, mais conformément au sens commun, Kelsen affirme que la doctrine pure se propose de connaître, dans le domaine du droit, ce qui

est, et non pas ce qui doit être (*Ibid.*). Or, écartée la possibilité d'entendre cet être comme essence métaphysique (*ypokeimenon*), qui, dans le langage commun, et ici dans l'intention kelsenienne, est plutôt représentée par l'expression: "ce qui doit être", il ne reste qu'à constater comment l'être dont on parle ici se place sur le plan du fait, et comment toute connaissance de cet être-ci ne peut avoir qu'une valeur opérationnelle. Un savoir donc, auquel convient parfaitement la formule hobbenne de la "scientia propter potentiam"; une véritable géométrie juridique, c'est-à-dire un savoir opérer au moyen du "schéma qualificatif" des règles juridiques (*R.R.*1960,L,4,a) dans toute société existante. En effet écrivait Kelsen en 1945 (attention à la date), la théorie pure du droit, par rapport à toute autre doctrine juridique, a l'avantage d'apparaître opérationnelle dans toute sorte d'organisation politique, qu'elle soit "démocratique ou libérale, autocratique ou socialiste" (*G.T.L.S.I.*,1,A,b). Ce dernier éclaircissement, dans lequel on a l'impression de reconnaître le même esprit que dans Hobbes, qui se vantait d'avoir élaboré une doctrine du pouvoir efficace indépendamment de la formule de son exercice monarchique, aristocratique ou démocratique (*De Cive*, préf.), cet éclaircissement nous donne l'opportunité d'une réflexion qui ne peut plus être prorogée et dans laquelle l'un et l'autre de nos auteurs sont directement impliqués.

Conventionnalité, structure hypothético-déductive, valeur opérationnelle, tous les caractères de la géométrie politicojuridique, font converger l'attention sur un nœud d'importance capitale pour en comprendre le fonctionnement. Conçue comme système théorique pour maîtriser le phénomène social de la contrainte, cette "géométrie" doit supposer l'objet de sa représentation systématique, c'est-à-dire, qu'elle doit supposer l'ensemble coercitif, auquel on donnera le nom d'Etat. L'existence effective d'un ensemble coercitif, qu'on ne met pas en question, mais qu'on assume dogmatiquement en tant qu'effectif, constitue alors la *condicio sine qua non* de toute rationalisation politico-juridique ayant les caractères de la géométrie.

Tout cela résulte explicitement de la "géométrie" de Kelsen, lorsqu'il définit les conditions de validité de la norme fondamentale d'un système juridique (*Grundnorm*). Ce sont comme tout le monde le sait:

1. — L'existence effective d'un ensemble coercitif, ce que l'on appellera le système juridique dont l'Etat est la personification;

2. — La supposition du principe selon lequel: "Il faut se conduire comme la constitution le prescrit" (R.R.1960,V,34,c), sur la base duquel on établira la hiérarchie (Stufenbau) des normes. "Les normes d'un système juridique positif — précise Kelsen — sont en vigueur *parce que* la norme fondamentale, qui constitue la règle essentielle de leur production, est supposée valide, et non parce qu'elles sont efficaces. Mais elles sont en vigueur seulement *lorsque* (c'est-à-dire jusqu'à ce que) ce système juridique est efficace. Dès que la constitution, c'est-à-dire le système juridique comme ensemble qui se fonde sur elle, perd son efficacité, alors, le système juridique aussi, et donc chaque norme particulière, perd de sa propre validité" (R.R.1960,V,34,g).

Tout cela n'est pas non plus étranger à la "géométrie" de Hobbes, bien que son niveau de formalisation ne soit pas si élevé. On peut toutefois le déduire d'une série d'indices peu équivoques. La définition de Hobbes conservateur, avancée par Raymond Polin, "conservateur par rapport à ce qui est, et non par rapport à ce qui a été",²² nous donne, avec son caractère paradoxal, la clef pour comprendre le sens voilé de la préface du *De Cive*, là où Hobbes avoue avoir composé son œuvre pour pousser ses lecteurs "à maintenir la situation actuelle, bien qu'elle soit imparfaite". On ne peut interpréter cet aveu, naïvement, comme un signal d'approbation pour les têtes couronnées, envers lesquelles, en ce-temps là, le philosophe n'éprouvait aucune sympathie particulière. On ne peut non plus penser que Hobbes puisse prétendre sien, un privilège nié aux autres, et en particulier à Sir Edward Coke. Entre parenthèses, il est curieux que Kelsen n'ait pas perçu l'analogie existante entre les arguments avec lesquels Hobbes faisait face aux critiques des *Students of the common law* et ceux avec lesquels, lui-même repoussait l'accusation de formalisme. "Ce n'est pas la science, mais l'autorité qui crée la loi" (D.Ph.S.,I). Plus encore: "Ce n'est pas la lettre de la loi, mais le pouvoir de celui qui a dans ses mains la force d'une Nation qui rend efficace les lois" (Op.cit.,II). Nous pouvons donc déduire de cela que la "géométrie" hobbenne, comme toute autre science véritable, étant un système de concepts pour maîtriser, *per phantasmata sensus et imaginationis*, l'ensemble coercitif, que l'on appellera Etat, doit en supposer l'existence effective. Ainsi, si l'on dépouille l'attitude "conservatrice par rapport à ce qui est" d'un sens psychologique assez improbable, on s'aperçoit en fait de la conscience cri-

tique, du caractère opérationnel de la science juridique, qui y est implicite.

La présence d'un ensemble coercitif, est donc la *condicio sine qua non* de tout système normatif, que la géométrie politico-juridique ne met pas en question puisqu'elle le suppose comme préexistant à sa rationalisation. Cependant, on ne peut pas dire que cette présence en soit la *condicio per quam*. Un passage très net de la conclusion du *Leviathan* en est une preuve. "The matters in question — il s'agit évidemment des règles de la géométrie politico-juridique — are not of fact, but of right, wherein there is no place for witnesses". La proximité de cela avec ce que dit Kelsen, à propos de la validité des normes d'un système juridique, est extraordinaire. Tout d'abord, il ne met pas en question le fait, c'est-à-dire, l'existence d'un ensemble coercitif, qui est plutôt, je le répète, la *condicio sine qua non* de la systématisation normative. D'autre part, la valeur des normes juridiques n'est pas confiée au témoignage du fait, on pourrait dire avec Kelsen, à leur effectivité. Il s'agit donc de trouver un critère sur la base duquel on peut donner une forme systématique à l'ensemble coercitif existant. On pourrait même dire, toujours avec Kelsen: une norme fondamentale. Les solutions proposées ne sont pas univoques, mais elles ne sont pas non plus contradictoires ou équivoques. Hobbes reconnaît explicitement que dans chaque système normatif, il y a une loi fondamentale, dont l'obéissance conditionne le fonctionnement du système dans son ensemble (*Lev.*,XXVI). De même, il distingue une obligation générale et totale par laquelle, "on s'oblige à obéir, tout simplement, sans connaître ce qui sera commandé" (*De Cive*,XIV, 10 et *Lev.*,XXVI), et une obligation, pour ainsi dire, dérivée de la première. De sorte que chaque norme du système juridique se présente comme un ordre adressé à quelqu'un qui s'est préalablement obligé à obéir selon la norme fondamentale du système (*Lev.*,XXVI). Dans la construction de cette mécanique, on peut facilement reconnaître l'effort hobbesien de réduire le commandement juridique à une structure purement formelle, c'est-à-dire, autant que possible indifférente aux contenus. En effet, si d'un côté, la loi fondamentale du système juridique consiste dans le principe de la raison naturelle, *pacta sunt servanda* (*De Cive*,XIV,10), ce qui a poussé Kelsen, on l'a déjà vu plus haut, à classer Hobbes parmi les partisans de la doctrine du droit naturel, et à lui reprocher l'incohérence de fonder le droit positif par son contenu plutôt que par sa forme

normative; d'un autre côté, le ressort dynamique du système normatif est individuel dans une obligation générale sans contenu, donc purement formelle, qui empêche aux contenus des ainsi nommées lois naturelles de pénétrer dans le droit positif, c'est-à-dire dans la *loi*, la seule loi ayant valeur juridique (*De Cive*, III, 33). "En effet — affirme Hobbes de façon péremptoire — bien que la loi naturelle interdise le vol, l'adultère, etc. . . si une loi civile commande de commettre une certaine usurpation, cette usurpation n'est plus un vol, un adultère, etc. . ." (*De Cive*, XIV, 10). *Auctoritas non veritas facit legem* (*Lev.*, XXVI). Dépouillée de tout contenu, l'autorité hobbiennne n'est pas si éloignée du *Sollen* kelsenien.

Ce qui émerge de cette recherche exaspérée de la structure formelle du droit, et qui domine avec le poids de son effectivité, est le pouvoir. Et on a l'impression étrange de voir une boucle se fermer. *Conditio sine qua non* du système normatif, ce produit raffiné de la science géométrique de l'Etat, le pouvoir en constitue le but et la fin.

Le système normatif en tant que structure formelle n'exerce aucune incidence sur le fait que le pouvoir qui reste, avec son lourd contenu de contraintes, qui sont la seule "réalité" sociale. Dans son style sanguin et énergique, Hobbes fait remarquer comment "les richesses sont un pouvoir. . . , la réputation un pouvoir. . . , le bon succès un pouvoir. . . , la prudence un pouvoir. . . , la noblesse un pouvoir. . . , l'éloquence un pouvoir. . . , la beauté un pouvoir. . . , les sciences un pouvoir. . ." (*Lev.*, X). Dans un style aseptique et décontracté, Kelsen ne dit pas autre chose. Plutôt il renchérit, en soulignant, comme "paradoxe du système de contrainte de l'Etat, le fait que son instrument spécifique, l'acte coercitif de la sanction, est exactement du même genre que l'acte qu'il essaye d'empêcher. . . c'est-à-dire, le fait que la sanction contre un comportement coercitif est à son tour un comportement coercitif" (*G.T.L.S.*, I, 1, B, f). Sur cette base, le but du système normatif est celui de favoriser l'identification du sujet au pouvoir, d'une façon métaphorique, on peut dire, de personnifier le pouvoir. La création hobbiennne de la *personne publique*, au moyen de la théorie du "souverain qui mérite bien d'être nommé *persona civitatis*, *the person of the Common-Wealth* (*Lev.*, XIX et XXVI), puisqu'il est personne fictive, et acteur à la fois effectif et apparent des actes du peuple",²³ en est la preuve; aussi bien que l'est la conclusion kelsenienne

selon laquelle "la norme fondamentale du système juridique transforme le pouvoir en droit" (*N.R.*,IV,B,c). Ce qui ne signifie pas un dépassement de la contrainte dérivée du pouvoir, mais plutôt son organisation au moyen d'un centre unique d'imputation: l'Etat. "L'Etat comme sujet juridique est une personnification de la communauté ou plus exactement est une personnification du système juridique qui constitue la dite communauté" (*G.T.L.S.*,II,1,A,a). N'est-ce pas le *Leviathan* (Hobbes) qui a le monopole (Kelsen) du pouvoir?

Mais de la science géométrique du droit et de l'Etat on tire aussi l'impression que le pouvoir constitue la fin du droit. Cela se voit d'abord dans l'assertion hobbenne que l'"Etat n'est pas tenu d'observer la loi", étant donné que personne ne peut s'obliger envers soi-même, "puisque l'obligé et l'obligeant seraient la même personne" (*De Civ.*,IV,14). Thèse, confirmée et même renforcée par Kelsen, qui met en lumière le non-sens de l'ainsi dite "*auto-obligation* de l'Etat du droit" (*R.R.*1960,VI,41,c). En effet, ou bien on entend par là que les "manifestations extérieures de la puissance de l'Etat. . . deviennent instruments de la puissance étatique dans la mesure où des individus s'en servent dans le cadre d'un ordre juridique déterminé, c'est-à-dire avec l'idée qu'ils doivent se conduire de la manière prescrite par cet ordre" (*Th.P.D.*,XII,2,e), et alors l'expression *Rechtsstaat* est un pléonasme, car tout Etat, est un Etat de droit. Ou bien on prétend, par là, "légitimer le pouvoir de l'Etat en le soumettant au droit" et donc en le limitant (*Ibid.*), ce qui n'a ni de sens ni de valeur par rapport à la géométrie juridique, qui ne met pas en question le pouvoir, mais qui le suppose plutôt comme *condicio sine qua non* de la systématisation normative. En d'autres termes, il n'y a pas de droit qui puisse, raisonnablement, contenir un pouvoir. Mais les indices les plus nets de la "fin" du droit, bien qu'estompés, apparaissent dans la théorie du jugement. "Dans toutes les cours de justice, le juge est le souverain, c'est-à-dire, la personne de l'Etat" (*Lev.*,XXVI). Hobbes n'a pas de doutes à ce sujet. Ce n'est pas la *juris prudentia*, ou sagesse des juges, mais le commandement de *l'homme artificiel*, c'est-à-dire le sujet du pouvoir qui donne valeur juridique aux arrêts. "Ce n'est pas par la sagesse, dont il était plus ou moins fourni, que Sir Edward Coke est devenu juge — ironise le philosophe — mais seulement parce que le roi l'a créé juge" (*D.Ph.S.*,II). L'autorité du juge est donc l'autorité du souverain, c'est-à-dire celui qui détient effectivement le pouvoir, par rapport auquel

le juge se trouve dans une situation analogue à celle des nerfs et des tendons par rapport au corps naturel (*Lev.*,XXIII). Son arrêt semblerait tout-à fait contenu dans la loi, mais "toutes les lois ont besoin d'interprétation" (*Lev.*,XXVI). Conformément à sa prémisse, Hobbes voit alors dans les juges, formellement autorisés par le souverain, les seuls véritables interprètes des lois devant les parties en cause. "Leurs arrêts — précise-t-il, prouvant le potentiel de formalisation auquel était arrivée sa géométrie politico-juridique — doivent être considérés... comme des lois du cas particulier" (*Ibid.*). Cette découverte déclenche une série de réaction en chaîne, dont l'issue n'est pas immédiatement prévisible. Le juge, dont l'autorité formelle dérive de la loi, pour exercer sa fonction d'interprète doit, cependant, avoir recours à sa raison, c'est-à-dire à quelque chose de tout à fait hors la loi et indépendant d'elle. Ce qui fait que, dans le cadre formel de son autorité, le juge est souverain, *legibus solutus*. Et en effet n'était pas au souverain *legibus solutus* le monopole de la loi? Hobbes a senti cela, lorsqu'il a dit que "si la lettre de la loi (mais lettre et sens ou intention de la loi sont la même chose puisque le sens littéral n'est que celui que le législateur entendait signifier par la lettre de la loi), si la lettre de la loi n'autorise pas complètement une sentence raisonnable, le juge doit suppléer avec la loi de la nature" (*Lev.*,XXVI). Le problème brûlant, bien que prévisible, n'est pas véritablement abordé par le philosophe; il joue, en effet, avec l'expression "loi de la nature", dont il connaît le sens purement métaphorique. "Les lois naturelles ne sont pas des lois — avait-il affirmé auparavant — car elles procèdent de la nature et non pas de la volonté de celui qui commande aux autres à juste titre" (*De Cive*,III,33). Ce sera Kelsen qui prendra le taureau par les cornes, dans la deuxième édition de la *Reine Rechtslehre* en particulier. Déjà dans l'essai *Juristischer Formalismus und Reine Rechtslehre*, en prenant ses distances par rapport à la doctrine traditionnelle, il avait reconnu à la théorie pure du droit le mérite d'avoir vu comment la norme à interpréter peut être un ensemble de plusieurs possibilités et comment elle ne décide pas, parmi ces possibilités, celle qui a le plus de valeur. Il faut pour cela un nouvel acte créateur de droit, tel que l'arrêt d'un tribunal. C'est ce qu'il appelait "le double fond du droit" (*J.F.*,II). Entre parenthèses, on pourrait noter comment Kelsen, aussi à ce propos, n'a pas évalué d'une manière adéquate l'œuvre de Hobbes, peut-être qu'il n'en connaissait pas tous les méandres. Mais au moment où il porte aux ex-

trèmes conséquences sa théorie, Kelsen affirme textuellement qu' "avec l'interprétation authentique (c'est-à-dire l'interprétation d'une norme donnée par l'organe juridique qui doit l'appliquer) il peut se réaliser non pas seulement une des possibilités de la norme, révélé par l'interprétation théorique, mais il peut également se produire une norme tout à fait hors du schéma constitué par la norme à appliquer" (*R.R.*, 1960, VIII, 46). Tout commentaire est superflu.

Ainsi finit le droit: le droit comme médiation, mais aussi le droit comme technique d'organisation sociale, puisque celui qui détient le pouvoir, bien que délégué et donc fictif, peut se fier de la loi. Et lorsqu'on pense que le pouvoir du juge dérive d'une norme du système auquel appartient aussi la norme dont il se fie, on peut vraiment conclure que, en prétendant transformer le pouvoir en droit, cette géométrie politico-juridique, en réalité, a posé les bases pour transformer le droit en pouvoir à l'état pur. Le phénomène actuel de la "politisation de la justice" en est un témoignage.

Il n'est pas possible dans le cadre limité de cette présentation d'épuiser la mine que représente une lecture croisée de Hobbes et de Kelsen; pensant toutefois en avoir démontré l'intérêt et l'utilité, pour un bilan critique de l'application d'une méthode géométrique à l'étude des phénomènes juridiques et politiques, il nous reste à présent la tâche d'une conclusion interlocutoire, qui peut se développer à juste titre sur la trace des caractères fondamentaux de la science et donc aussi de la science du droit et de l'Etat.

A propos de la conscience origininaire de la nature hypothétique du savoir scientifique, s'impose la constatation, banale peut-être, mais pas toujours actuelle, de la nature an-hypothétique de la conscience même. En d'autres termes, la conscience de la nature hypothétique de la science ne peut pas être hypothétique sans en compromettre l'authenticité. Il ne s'agit pas ici de refaire le long chemin au cours duquel la science moderne s'est affranchie d'un réalisme mal entendu et déroutant. Mais il faut rappeler comment l'obstacle le plus difficile à surmonter a été justement celui du relativisme provoqué par l'attribution dogmatique d'une valeur "réelle" au conventionnalisme scientifique.²⁴ En effet, on peut faire remonter la plupart des difficultés et des hésitations et même des contradictions, que l'on trouve aussi dans l'œuvre de nos deux auteurs, aux défaillances de cette conscience. Surtout lors-

qu'ils s'embourbent à cause des valeurs, dont ils ont exclu l'incidence dans la vie politico-juridique sur la base de la conventionnalité de leur façon de la représenter. A ce propos, Kelsen semble avoir moins de défense que Hobbes. En lisant *Society and nature* (1953) mais surtout *Absolutism and relativism in philosophy and politics* (1948), on n'a même pas l'impression de reconnaître l'auteur de la distinction entre "formel" et "formaliste", dont on a, plus haut, admiré la lucidité critique. En réalité, la conscience de la nature hypothétique du savoir scientifique, implique ainsi un savoir *an-hypothétique* que seulement la philosophie classique, avec sa problématique radicale et sa tension métaphysique, est à même de promouvoir.

A propos de la valeur opérationnelle du savoir scientifique, s'impose une considération plus attentive de sa neutralité. En effet l'accentuation du caractère formel de la science du droit et de l'Etat (et dans ce sens l'œuvre de Kelsen constitue un progrès par rapport à celle de Hobbes) en a augmenté l'autonomie par rapport aux intérêts, aux idéologies, aux croyances particulières. Mais il ne faut pas confondre autonomie avec indépendance car cette neutralité désigne en effet, nous l'avons vu, l'aptitude de la science juridique à servir indifféremment tous les intérêts, les idéologies, les croyances, sans une vigilance critique, peut même signifier l'aptitude à se vendre au plus fort. Ce qui en résulte certainement, c'est que les objectifs opérationnels précèdent le travail scientifique, et en tant que "fins", ne peuvent pas être déterminés par un calcul instrumental, dont ils sont plutôt les prémisses nécessaires. Ce n'est qu'une ingénuité, celle qui a poussé Kelsen, — qui pourtant à maintes reprises avait exclu la possibilité de choisir sur la base d'un savoir scientifique —, à justifier sa foi démocratique avec sa tournure d'esprit de savant, habitué à considérer comme équivalentes les hypothèses (*F.D.*, I). Argument aléatoire plus que tout autre, qui peut toujours se retourner; comme avaient enseigné, par leurs "raisonnements doubles" il y a longtemps, les Sophistes, envers lesquels Kelsen avait curieusement de la sympathie. En effet, la détermination des fins opérationnelles, qui constituent les prémisses et aussi les conditions de validité de la recherche scientifique, implique une considération globale des différentes possibilités et en exige une médiation dialectique. On retombe ainsi sur un savoir dont la problématique est radicale (non pas conditionnée par une opération) et totale (non pas limitée abstraitement dans un cadre hypothétique donné); un savoir par

rapport auquel la *substantia* (ypokeimenon) ne peut être négligée ni conçue comme un objet à maîtriser, car elle est plutôt le modèle, principe virtuel, point limite, impossible à atteindre et toutefois orientant notre connaissance, quel qu'en soit le domaine. Métaphysique platonico-aristotélicienne, pourquoi pas?

Voilà, à notre avis, le donné le plus stupéfiant et précieux bien qu'inopiné et inattendu de l'application rigoureuse et cohérente de nos deux auteurs à la construction d'une véritable géométrie du droit et de l'Etat: le savoir métaphysique ne survient pas comme exigence ultérieure et opinable par rapport au calcul scientifique car il constitue plutôt la condition théorique de son succès comme savoir conventionnel et opérationnel.

Notes

- ¹ *What is Justice?* California University Press, 1957, p.145. Les principales œuvres de Kelsen dont nous nous servons dans ce rapport sont les suivantes: (Entre parenthèses, le sigle par lequel nous les avons citées dans le texte): *Hauptprobleme der Staatsrechtlehre entwickelt aus der Lehre vom Rechtssatz*, 1910 (H.S.); *Über Grenzen zwischen juristischer und soziologischer Methode*, 1911 (J.S.M.); *Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus*, 1928 (N.R.); *Juristischer Formalismus und Reine Rechtslehre*, 1929 (J.F.); *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik*, 1934 (R.R.1934); *General Theory of Law and State*, 1945 (G.T.L.S.); *Théorie pure du droit. Introduction à la science du droit*, 1953 (Th.P.D.); *Foundation of Democracy*, 1955—56 (F.D.); *Reine Rechtslehre*, 1960 (R.R.1960).
- ² *Hobbes*, London, 1904.
- ³ *Hobbes et l'Etat totalitaire*, "Archives de philosophie du droit et de sociologie juridique", 1936.
- ⁴ *Abendländische Rechtsphilosophie*, Wien, 1938.
- ⁵ *The Law in Quest of Itself*, Chicago, 1940.
- ⁶ *Legge Naturale e Legge Civile nella Filosofia Politica di Hobbes*, (1954), voir du même auteur *Da Hobbes a Marx*, Napoli, 1964, où l'on trouve aussi l'essai *Hobbes e il Giusnaturalismo* (1962).
- ⁷ *Politische Theologie. Vier Kapitel zur Lehre der Souveranität*, München-Leipzig, 1922.
- ⁸ *Diritto e Stato nel Pensiero di Tommaso Hobbes*, Napoli, 1946.
- ⁹ *Il Positivismo Giuridico Inglese. Hobbes, Bentham; Austin*, Milano, 1962.
- ¹⁰ *Politique et Philosophie chez Thomas Hobbes*, Paris 1953 (IIième éd. 1977).

- ¹¹ *Les fondateurs de l'École du Droit Naturel Moderne au XVIIIème siècle*, "Archives de philosophie du droit", 1961.
- ¹² M.Villey, *La formation de la pensée juridique moderne*, Paris 1968, p.637.
- ¹³ F.Tönnies, *Hobbes, Der Mann und der Denker*, Stuttgart 1925, p.16.
- ¹⁴ Les œuvres de Hobbes dont nous nous servons dans ce rapport sont les suivantes (entre parenthèses, le sigle par lequel nous les avons citées dans le texte): *The Elements of Law, Natural and Politic*, 1640 (El.); *De Cive*, 1642 (De Cive); *Leviathan*, 1651 (Lev.); *De Corpore*, 1655 (De Corpore); *A Dialogue Between a Philosopher and a Student of the Common Laws of England*, 1655—56 (D.Ph.S.).
- ¹⁵ On peut continuer à appeler Hobbes philosophe à condition d'avoir bien présent à l'esprit, comme Villey le souligne avec lucidité, que "le mot de philosophie inclut encore à cette époque tout le domaine de la science (à l'exclusion des Belles Lettres et de la doctrine de la foi)" (M.Villey, *La Formation. . .*, *op.cit.*, p.644).
- ¹⁶ A.Pacchi, *Convenzione e Ipotesi nella Formazione della Filosofia Naturale di Thomas Hobbes*, Firenze, 1965.
- ¹⁷ *op.cit.*, p.16 et passim.
- ¹⁸ Voir R.Polin, *op.cit.*, p.26 et suiv.
- ¹⁹ Kelsen fait ici référence à H.Cohen, *Logik der reinen Erkenntnis*; il s'agit de la première partie du *System der Philosophie*, Berlin 1902.
- ²⁰ Kelsen fait ici référence à G.Simmel, *Einleitung in die Morawissenschaft*, Berlin, 1892. Voir à ce propos G.Calabro, *La Giurisprudenza come "Scienza dello Spirito" secondo Hans Kelsen*, introduction à H.Kelsen, *Tra Metodo Giuridico e Sociologico*, Napoli, 1974.
- ²¹ Voir L.Geymonat, *Filosofia e Filosofia della Scienza*, Milano, 1960.
- ²² R.Polin, *op.cit.*, p.150, n.2.
- ²³ *op.cit.*, p.237.
- ²⁴ Voir L.Geymonat, *op.cit.*, p.132.

Enlightenment and Legitimacy

PASCHALIS KITROMILIDES
University of Athens

In approaching the notion of legitimacy the student of political theory must bear in mind certain distinctions, unawareness of which will make one captive of the normative language of political discourse and blur one's analytical clarity. Legitimacy is one of the main moral concepts of political inquiry and presupposes both certain empirical connotations and a basic normative entitlement.¹ The empirical connotations refer to the legal and constitutional context of the accession to and exercise of power while the normative entitlement refers to the grounds on which obedience is claimed by those wielding power. The empirical presuppositions of legitimacy can provide the grounds of criticism in analyses of the exercise of power and in appraisals of political systems. The claims to normative entitlement on the other hand have been the sources of ideologies of legitimation whose philosophical status is at best problematical.² One such ideology of legitimation has been legitimism, the counter-revolutionary reaction to the French Revolution that insisted on the customary rights of monarchs to rule, whereby the legitimate exercise of power became a form of prescriptive possession.³ Although the origins of this theory go back to the arguments for absolutism in early modern thought, its full articulation was attained in the attempt to delineate the counter-revolutionary position against the democratic conception of legitimacy asserted by the Enlightenment's radical wing and inherited by the revolutionaries. It was under these circumstances that the *term* of legitimacy was coined and made an instrument of political debate.⁴

The foregoing prefatory clarifications are essential to make plain the historical character of the concept of legitimacy and its specific ideological origins as a term of political debate and evaluation. As a term of political discourse, accordingly, legitimacy appears to be of

rather recent historical vintage. This conclusion in turn may cast doubt on the very methodological feasibility and analytical justifiability of the attempt to trace the idea of legitimacy and its function in earlier phases of political thought. The project I have set myself therefore, namely to develop a conceptualisation of Enlightenment political thought on the basis of the aspiration of legitimacy, cannot be built on strictly 'philological' evidence. No textual testimonia on legitimacy can be adduced from the literature of the Enlightenment or for that matter from any other previous period in the history of political thought. What I should like to suggest however is that although the term is absent, the idea of legitimacy is there as an agitating quest in the politics of the Enlightenment. Furthermore I want to argue that as such the notion of legitimacy served ideological and moral purposes of quite different import from those to which it was tied when first invented as a political slogan. This I will attempt to do by looking at the varieties of political criticism that can be interpreted as appeals to legitimacy within the broad philosophical and cultural configuration of the Enlightenment. The appeal to legitimacy I am going to argue, can be considered as a common theme in the diversified political creeds associated with the Enlightenment.

Legitimacy is a concept associated with the politics of crisis and as such it is not a normative standard for the purposes of the present analysis, but rather an aspiration and a quest. It is understood not as a component of political morality, but rather as an issue in political psychology. By looking at the political tradition of the Enlightenment through this prism one can arrive both at a critique of the conceptual status of the notion itself and at an understanding of its ideological significance.

The politics of the Enlightenment was a politics of crisis *par excellence* from the initial crisis of the old régime in the early eighteenth century to the final crisis of legitimacy dramatised by the explosion of the French Revolution. In this context the issue of legitimacy was posed by observers of the political scene and political activists alike in terms of a fundamental question concerning the form of government that could be reasonably and lawfully obeyed. Ideologically the crisis of the old régime was a crisis of the legitimacy of traditional authority. This was best illustrated perhaps by the varieties of appeal to history at the beginning of the eighteenth century. The two alternative theses

concerning the origins of the French monarchy, the *thèse nobiliaire* and the *thèse royale*, represented precisely attempts at legitimation of the exercise of monarchical power once political criticism had rendered traditional legitimations of absolutism untenable.⁵ This forms a good point of departure in the consideration of the quest of legitimacy in the politics of the Enlightenment. The first type of response to the crisis of old régime legitimacy was essentially a tactical rejoinder in the shape of enlightened absolutism whereby despotism attempted to justify its continuing existence by evoking the old Aristotelian ideal of monarchical rule in the public interest. In response to the crisis of legitimacy enlightened absolutism proposed the politics of practical reform, theoretically sublimated by the appeal to the Aristotelian conception of monarchy, which pretended to veil the unchanged realities of power.

This turned out to be a very weak theoretical position indeed not only because of the devastating criticism of absolutism by the Enlightenment, but because of two challenges. First, it was the challenge coming from the alternative legitimation scheme of liberalism: in this scheme the legitimacy of authority was made contingent upon an individualist social contract and the consent of the governed. The second challenge was that of practical experience. The historical demonstration of the fundamental incompatibility between absolutism and enlightenment was reflected in the problems encountered by the *philosophes* in dealing with rulers who wanted to appear enlightened. Furthermore absolutism's inevitable vestigial appeal to traditionalism for its legitimation, appeared increasingly incompatible with the needs and politics of the modern age. Thus enlightened absolutism as a response to the crisis of legitimacy in European politics proved a failure. Nothing contributed more in bringing about its discrediting than the influence of Montesquieu's ideas.

Montesquieu can be read to all purposes. In the eighteenth century he was, in a way, all things to all men. His thought was so rich and complex that it could be put, and was put, to many uses. One indisputable contribution of his social theory, however, was the indictment of despotism as the paradigm of illegitimacy. No normative entitlement on the obedience of the governed was left to absolutism after Montesquieu's *Persian Letters* and especially after the *The Spirit of the Laws*. In the place of the absolutist illusion Montesquieu projected alterna-

tive forms of legitimacy in the shape of types of government free of arbitrariness to which the individual citizen could be expected to submit by his own reason and free will. In this sense Montesquieu's contribution was decisive in identifying the politics of the Enlightenment with the alternative theory of legitimation which had its origins in liberalism. Social reform, constitutionalism and the safeguard of basic civil liberties became the essence of the politics of the Enlightenment.⁶ To the extent that legitimacy was made contingent upon the achievement of these goals, it was indeed the Enlightenment's principal political aspiration.

I should like to suggest, however, that in considering the issue of legitimacy we might move a step beyond the political identification of the Enlightenment with liberalism. We might look at an alternative conception of the basis of legitimacy, which forms an integral part of Enlightenment political criticism. This leads us from Montesquieu to Rousseau. The citizen of Geneva was an eloquent critic of the legitimacy of the liberal solution to the problems of modern politics and modern society. Nothing could be more characteristic of this position than the theory of the false contract which concludes the *Second Discourse*.⁷ Rousseau attempted to build where Montesquieu had left off — this incidentally represented one of the greatest among his many psychological problems: to say something that had not already been said by Montesquieu. Rousseau pointed to the limits of a strictly liberal individualist theory of society and politics by extending his problematic to cover a broader sphere of social issues, a sphere that comprised for the first time⁸ the aspirations of those sections of society beyond the social groups that found their form of expression in the voice of liberalism and consequently identified their sense of legitimacy with it. The theory of the false contract, through which the rich deceive the poor into submitting to their dominance in a bourgeois society, pointed at the guile and the concomitant fundamental illegitimacy involved in the liberal solution. On this basis Rousseau proposed his own answer. Theoretically it consisted in the democratisation of Bodin's and Hobbes's concept of sovereignty and in the use of a revived republican theory which he inherited from Machiavelli and civic humanism, in order to depict an alternative context within which both the problem of legitimacy could be solved and the newly recognised social needs could be met. In Rousseau's scheme the legitimacy of govern-

ment and of the exercise of power hinges on participation and citizen activism which make the law one obeys the product of one's will. This answer to the original question about the rational and lawful grounds of political obedience was the Enlightenment's political alternative. It is obvious that there is great theoretical and moral distance between the alternative response to the problem of political obedience and lawful government associated with the thought of the Enlightenment. A careful examination of the political context within which they were articulated however creates the impression that the claims of legitimacy constituted a minimal common denominator to all of them. And if it is admittedly difficult to trace any theoretical lineages between enlightened absolutism and democratic radicalism, yet they shared the contextual preconditions of crisis and criticism which made them components of an evolving psychological climate and inescapable issues of political debate.

The growth of republican radicalism and the articulation of the Rousseauian conception of legitimacy from the middle of the eighteenth century to the French Revolution was the best indication of the continuing crisis of legitimacy. The revival of civic humanism to which Montesquieu's writings greatly contributed, acquired broadened social content in Rousseau's thought. The wider social perspective explains the closeness the French revolutionaries⁹ and the radicals throughout Europe felt to this theoretical position. The social aspirations associated with this position are illustrated by the contribution of the precursors of utopian communism, Mably and Morelly, to this tradition of thought.

I believe that the importance of the eighteenth century revival of civic humanism and republican theory which culminated in Jacobinism, has not been adequately appreciated by historians of political thought. I would like therefore to adduce here three reasons why it is important to consider seriously the theory which encompasses the Enlightenment's political alternative regarding legitimacy. The first reason can be described as an intrinsic theoretical one. The connection between the self, public commitment and collective goals necessary for the survival of a republican polity, poses some critical problems of human existence. The affinities between the conception of the active participatory citizen with a whole range of forms of intolerance and invasions of individuality, make the issues raised by this theory quite pertinent to

the dilemmas of political life in the twentieth century. The second reason is a historical one and it can be best appreciated by scholars working on the history and politics of those regions in central, eastern and southern Europe, where ideological traditions developed largely in response to influences emanating from the major countries of the Northwest. In those areas the ideology of democratic or aristocratic republicanism contributed decisively to the articulation of local traditions of national identity. Finally there is a methodological reason for the importance of republican theory in the history of ideas. Republican theory in the form of late eighteenth century radicalism, is found at the origins of nineteenth century nationalism and socialism. The political attitudes ingrained in these movements cannot be appreciated without an understanding of the psychology and values of the revived civic humanism of the Enlightenment. This fuller understanding will not be achieved so long as republicanism is considered as an eccentric extension of Enlightenment politics or as an early expression of the romantic outlook.

Republicanism did not exhaust the contexts in which discussion of legitimacy surfaced. The politics of crisis allowed the opponents as well as the proponents of liberalism and radicalism to tie their position to the idea of legitimacy. The best evidence comes from the work of Edmund Burke. In attempting to criticise the excesses of the Enlightenment by pointing to the extremities of individualist self-seeking, Burke advanced still another appeal to legitimacy, by returning to the legitimacy of tradition. The claims of abstract reason and individualist rights, Burke warned, threatened to tear apart the fabric of civilisation by destroying the 'pleasing illusions'¹⁰ and the social sentiments on which it rested. Burke's critique opened the way for the enunciation by the French counterrevolutionaries of the argument for prescriptive possession and legitimism which finally coined the term of legitimacy as a political slogan.

The quest of legitimacy set the temper of the political thought and informed the political sensibility of a whole era of European civilisation. A conclusion about the historical and ideological character of the concept of legitimacy can be seen to emerge, I think, from the foregoing. I fully agree with Professor Cranston's description of the concept of legitimacy as in fact a secondary concept contingent upon a prior theory.¹¹ I would go even further. It is fundamentally a context-bound

notion that can be easily associated with alternative forms of political argumentation. It cannot make sense in itself, as part of some form of absolute political morality. It makes sense as a functional ideological concept that can provide a medium of political criticism in periods of crisis and ideological conflict. This does not mean that each one of us cannot have a sense of legitimacy informed by his or her political values and choices, argue for it, fight for it and die for it. In other words we are in sight of a radically historical political concept, that can be invoked by conflicting ideologies in order to articulate their needs and aspirations.

Notes

- ¹ See Felix Oppenheim, 'The Language of Normative Political Inquiry: Problems of Clarification', *The Handbook of Political Science*, (eds.) F.I. Greenstein and N.W. Polsby, Reading, Mass. 1975, vol. I, pp. 321—22.
- ² Cf. The comments of Robert Nozick, *Anarchy, State and Utopia*, New York 1974, pp. 133—37.
- ³ Cf. Ernest Baker, *Principles of Social and Political Theory*, Oxford 1956, pp. 186 ff.
- ⁴ See Stephen Holmes, 'Two Concepts of Legitimacy: France after the Revolution', *Political Theory*, vol. 10, no. 2 (May 1982), pp. 165—68.
- ⁵ See Nannerl O. Keohane, *Philosophy and the State in France. The Renaissance to the Enlightenment*, Princeton 1980, pp. 312 ff. and especially 346 ff. on the two theses.
- ⁶ On this cf. Ernst Cassirer, *The Philosophy of the Enlightenment*, Princeton 1951, pp. 234 ff, and Alfred Cobban, *In Search of Humanity*, New York 1960, pp. 90 ff and 161 ff.
- ⁷ Jean Jacques Rousseau, *The Social Contract and Discourses*, transl. by G.D.H. Cole, New York 1950, pp. 249—52.
- ⁸ With the exception of course of the seventeenth century English radicals especially the Levellers and Diggers of the English Revolution.
- ⁹ See now the recent work by Norman Hampson, *Will and Circumstance: Montesquieu, Rousseau and the French Revolution*, London 1983.
- ¹⁰ Edmund Burke, *Reflections on the Revolution in France*, (ed.) Conor Cruise O'Brien, Harmondsworth 1973, p. 171.
- ¹¹ In the discussions of the Workshop on Legitimacy, European University Institute, Florence, 3—4 June 1982.

Legitimacy: A Utilitarian View

FREDERICK ROSEN

London School of Economics and Political Science

I

Although men generally agree on preferring the rule of law to the rule of men, they often do not agree on which particular form of rule or even on which particular claim to rule is legitimate. Disagreement over legitimacy arises especially when the notion is invoked as a critical principle to determine when a régime should be recognised as possessing lawful authority in a territory. That there is disagreement over claims to legitimacy should not necessarily lead us to be sceptical over its use in practice. We still discuss philosophically concepts such as justice and liberty even though there is little agreement over the use of these terms. Legitimacy, however, perhaps like sovereignty, presents special problems, because the range of meanings and uses takes it into two realms which are not always compatible. On the one hand, legitimacy may refer simply to the status of those who happen to be in power in a state at a particular time and are making the laws; on the other hand, legitimacy is related conceptually to notions such as lawfulness, order and right which imply that not only are the rulers in possession of power but that they use it for 'good' ends or at least do not abuse it. I think one of the interesting things that was brought out in Professor Cranston's paper is the way Hobbes manages in a unique way to keep these different strands together in a notion of legitimacy.

That these two senses of legitimacy may be incompatible is easily recognised when tyrannical rulers claim moral 'rightness' for their 'laws' and 'legitimate' status for themselves merely by force of arms and terror. Although it may be argued that 'legitimacy' is in this instance being devalued, it can also be argued that this tendency is contained within the range of meanings open to the term. Nevertheless,

the notion of legitimacy cannot be dismissed or avoided, as we need it (or similar terms) to conceptualise what is meant by a legal system and indeed, by political society itself.

In this paper I wish to explore one approach to the definition of political society which appears in Jeremy Bentham's *A Fragment on Government*.² The *Fragment*, originally part of the larger, unpublished *A Comment on the Commentaries* (a full critique of Blackstone's *Commentaries on the Laws of England*), was devoted to the examination of one passage in Blackstone's work where in an apparent digression Blackstone presented a brief account of the foundation of government.³ Bentham wrote at length on this passage, and the resulting work was detached from the *Comment* and published anonymously in 1776.

The argument which Blackstone sets forth is a version of social contract theory which, though recognising obvious difficulties in concepts like the state of nature and original contract, nevertheless uses this language to account for the foundation of government.⁴ After discussing difficulties in Blackstone's formulation, Bentham sets forth his own conception of political society in the well-known definition:

When a number of persons (whom we may style *subjects*) are supposed to be in the *habit* of paying *obedience* to a person, or an assemblage of persons, of a known and certain description (whom we may call *governor* or *governors*) such persons altogether (*subjects* and *governors*) are said to be in a state of *political* society (*Fragment*, I.10., *CW*, p. 428).

Bentham distinguishes political society from the negative notion of natural society by saying that the latter is constituted 'when a number of persons are supposed to be in the habit of *conversing* with each other, at the same time that they are not in any such habit as mentioned above'. (*Ibid.*, I. 11, *CW*, pp. 428—9) The two societies can easily co-exist among the same people at the same time insofar as the habit of obedience is or is not present in different relationships. The two states are not mutually exclusive. Nevertheless, what distinguishes political society from natural society is the presence of the 'habit of obedience'. Bentham further defines a 'habit of obedience' in terms of 'an assemblage of acts' of will performed in pursuance of an expression of will by a superior. (*Ibid.*, I. 12n, *CW* p. 429) This obedience may fol-

low either submission (based on consent) or subjection (not based on consent). (*Ibid.*, I. 11n, 13 and n, 16, *CW*, pp. 429—31, 33).

Bentham's notion of a 'habit of obedience', at the heart of his conception of political society, is not fully explained, and it is doubtful that it can do all that Bentham wishes it to do. H.L.A. Hart has argued that the notion cannot account for continuity in sovereignty and legislation, that is to say, a new sovereign coming to power may have a right to legislate though his subjects have not yet developed a 'habit of obedience' to him.⁵ Nevertheless, Bentham's formulation has certain advantages over that associated with the social contract. It introduces a measure of 'realism' into the discussion by insisting on the importance not of sets of principles but of the concrete acceptance of the system by the people governed under it (See Hart, p. 60).

In setting forth his conception of political society based on the habit of obedience, Bentham sticks closely to Blackstone's text and is mainly concerned with exposing inconsistencies, confusions, and logical errors. Nevertheless, we can see in this brief exposition that Bentham has minimised the problem of legitimacy by making the habit of obedience the crucial factor in the definition of political society. In social contract theory principles of natural rights or principles of political obligation guide the individual in defining his relationship with the state. For Bentham, moral principles such as these do not in any sense define political society. In a matter of fact way, the legitimacy of the state depends simply on whether or not the people continue to obey their governors. Although Bentham prefers rule based on submission to that based on subjection (which suggests a bad régime), nonetheless, political society exists so long as the habit of obedience persists. (*Fragment*, I. 12n, *CW*p. 450n)

II

Bentham's reasons for looking at the problem of legitimacy (and sovereignty) in this way are twofold. Firstly, he finds much of the argument and rhetoric connected with social contract theory confused and misleading. What point is there in speaking of a state of nature and social contract as things which have never existed but assume a quasi-historical (or logico-historical) status in a theory? Why speak of obligations based on promises that individuals have never in fact made? Secondly, Bentham has a practical reason for wishing to avoid the impli-

cations of theories of the social contract, sovereignty and natural law which are found in Blackstone. In chapter IV of the *Fragment* he singles out the following passage from Blackstone for special comment: 'However they began, or by what right soever they subsist, there *is* and *must be* in all of them a *supreme, irresistible, absolute, uncontrolled* authority, in which the *jura summi imperii*, or the rights of sovereignty, reside.' (quoted in *Fragment*, IV. 13, *CW*, p. 480). According to Bentham, Blackstone reveals his main concern in this passage to adjust the claims of liberty and government. (*Ibid.*, IV. 15, *CW*, p. 480). On the one hand, he has postulated a doctrine of natural and revealed law which 'no human law should be suffered to contradict'. (Quoted *Ibid.*, IV. 18, *CW*, p. 482). On the other hand, he has set forth a doctrine of absolute sovereignty in the passage quoted above. Although the purpose of the latter is to ensure obedience, the effect of the former is to encourage resistance. In the context of the two doctrines, Bentham believes that no reconciliation of liberty and government authority is possible. But without such notions Blackstone apparently thought that the basis of political society could not be established. For Bentham, however, the habit of obedience forms the basis of political society. Furthermore, the calculation of the 'probable mischiefs' of resistance as opposed to the 'probable mischiefs' of obedience should reconcile the claims of liberty and government authority. And the criterion for judging whether or not submission or resistance is justified is the principle of utility. (*Ibid.* IV. 20—22, *CW*, pp. 483—4).

The principle of utility does not establish the legitimacy of the régime; this is done through the habit of obedience. The principle of utility is the criterion of *good* government. If Bentham minimises the basis of legitimacy, at the same time he elevates the criterion of utility. The utility of an act is, for Bentham, its tendency to produce happiness. In deciding to obey the government each individual should calculate for himself and for society at large the probable mischiefs of obedience and resistance. Such a calculation then enables him to determine whether he *ought* to obey the particular law or decree, and in this he is guided by the principle of utility. To determine whether a régime is legitimate is a factual problem to be resolved by seeing if the people do in fact obey it. Even though a régime is legitimate, it does not follow that the individual *ought* on any given occasion to obey its laws. The fact of legitimacy carries no prescription. The important consequence of Ben-

tham's approach to legislation through the principle of utility is to change the focus from where it tended in social contract theory to be placed, that is to say, on principles of legitimacy and political obligation, to a consideration of what practices and institutions are necessary to maximise the happiness of society. The answer to the question, who should rule, in a particular society is not for Bentham to be whoever possesses sovereignty, but rather whoever will maximise happiness. Thus, the problem of the legitimate régime is replaced by the problem of the good régime.

III

At this point we shall leave the early *Fragment on Government* and turn to Bentham's later *Constitutional Code*, the massive, unfinished work on representative democracy to which Bentham devoted his last years.⁶ Here we see constitutional democracy defended as the best form of government and its institutions justified as those which ought to be adopted by 'all nations and all governments professing liberal opinions.'⁷ At the time when Bentham was writing the *Code* during the 1820's, there was only one successful democratic state in existence — the United States — though clearly constitutional democracy was widely recognised as the form of government which could claim many adherents throughout the world and was looked to as the régime of the future. But Bentham would have to show that a democratic constitution was or could be superior to the established monarchies and aristocracies which dominated the world. As there was only one established democracy, (and to an extent that was established under special circumstances,) Bentham would have to argue abstractly that in general terms democracy was as good as, if not better than, existing régimes. He would also have to oppose the long classical tradition dominated by Aristotle which looked to a ruling class (in monarchy and aristocracy) based on wealth, independence and virtue to rule. For Bentham the cultivation of a virtuous ruling class is replaced by the institutional practices of representative democracy.

Bentham approaches the justification of popular sovereignty (as the basis of the best form of government) through his conception of moral aptitude by which he means the desire to secure to the 'greatest number, the maximum of happiness'.⁸ He sets out to show through several arguments using the language of 'desires' and 'interests' that

the people are morally apt (or are not deficient) for the exercise of sovereignty through a representative system. The people's case consists of two main arguments. Firstly, each person desires his own happiness and endeavours to secure this at the expense of that of everyone else. But as each man tries to achieve this, he runs into the opposition of everyone, and his own endeavours are without success. However, as the pursuit of his own happiness coincides with that of others, or does not thwart theirs, the endeavour of each assists that of all:

In the language of interest, each has a particular interest; all have a common interest: what is by all believed to be the common interest of all is endeavoured to be promoted by all. [E]ach particular interest is opposed by those and those only, by whom it is regarded as adverse to their own.

It is tempting to invoke in this context Rousseau's distinction between the 'general will' and the 'will of all' but Bentham's distinction is not like that of Rousseau. Unlike Rousseau Bentham believes that on all occasions the individual wishes to advance his own interests *at the expense of* those of others. This premise becomes important in his later critique of the moral aptitude of the monarch. Thus, each individual must have some reason or incentive to advance only those interests which coincide with the common interest. The first incentive is that by and large the individual, following his own interest at the expense of others, will encounter the opposition of others and will not be successful.

The second is that in conforming to the common interest he will gain not only by his immediate success, but he will also gain by participating in the aggregate happiness of society. Bentham's second main argument is that in the pursuit of the ends of security, subsistence, abundance and equality, no individual can find a representative who depends on the votes of a number of electors but will satisfy the desires of that individual at the expense of every other individual he represents. Indeed, the representative will find that his success will depend on advancing those common interests of a majority of his constituents where the interests of each individual do not thwart those of others.

Bentham claims only that the sovereign people better serve the greatest happiness of the greatest number than would a monarch as sovereign. His argument against the monarch is that he has the power and is in the position to sacrifice the happiness of everyone to his own

or to those who in turn would augment his happiness. Bentham develops a number of arguments, but once having admitted that each man serves his own interest at the expense of all others, it remains only to show that the monarch, above all, is in the position to do this to the greatest extent. And if moral aptitude consists of endeavouring to secure the greatest happiness of the greatest number, then a monarch must fail in this respect. The people, with incentives to advance the common interest through a representative system, would be more likely to succeed.

Bentham develops his argument a stage further by showing that the representatives in a democracy will be more likely to become morally apt because they need to secure the votes of a majority of electors. The agents of a monarch, however, will be successful only as they sacrifice the greatest happiness to serve the monarch. Thus, the moral aptitude of the people stimulates the moral aptitude of the representatives and *vice versa*.

Having established that the people have the moral aptitude to exercise sovereign power, Bentham then argues that they possess the intellectual aptitude. He admits that the people do not possess the intellectual aptitude for governing but only for choosing their rulers. He argues that by consultation among themselves as to who are competent judges of intellectual aptitude, those who feel unable to make a choice of governors will for the most part do so. He cites the success of the United States as evidence that this way of choosing governors will produce no worse governors than any other, especially in comparison with monarchy.

In turning to the intellectual aptitude of monarchs, Bentham first argues that intellectual aptitude must be related to moral aptitude. Knowledge and judgement are beneficial according to the purposes to which they are applied, beneficial if applied to the advancement of the greatest happiness of the greatest number, pernicious if applied to the happiness of the individual at the expense of the greatest number. The monarch who seeks only his own happiness at the expense of the greatest number will fail with respect to the exercise of appropriate moral aptitude. Bentham's main argument is that the cultivation of intellectual aptitude requires great exertion and self-denial and that the monarch has little or no incentive to exertion. And where accident has combined supreme power and intellectual ability, as in the cases of Na-

oleon and Fredrick the Great, their achievements have been dissipated by the separation of their intellectual ability from moral aptitude, for example, in their embarkation on wars of ambition. But for the most part monarchs have not been noted for intellectual achievement, and, even more, have been noted for widespread incompetence and insanity. Bentham never tires of setting forth a survey of the state of European monarchy in his day.

The final step in Bentham's argument is to establish that the people's representatives possess sufficient intellectual aptitude. Bentham, in part, repeats what he says about the moral aptitude of representatives, that those of the people would be more likely to use their intellects in the service of the greatest number than those of the monarch. In addition, by his ignorance and indolence, the monarch lacks the incentive and intelligence to choose able advisors and agents which further diminishes the likelihood of their possessing intellectual ability.

IV

It would not be too difficult to conceive of counter-arguments to Bentham's position based on different premises. Once he has set forth his conception of moral aptitude and his premise that each person will advance his interests at the expense of those of everyone else, the rest of his argument simply follows. One might also argue that the language of 'desires' and 'interests' does not take one very far in understanding the 'real world of democracy'. Nevertheless, it would be wrong to take these first words for his last words and Bentham himself has numerous additional arguments which develop his position in other contexts. Bentham's argument here simply relates moral aptitude to the representative system. Furthermore, the argument itself is not without merit mainly because the two premises are not unrealistic. Bentham does not assume that people can never act altruistically, but he assumes that in politics generally that they will not. If a benevolent ruling class came to power, he would welcome this development, but he does not depend on its occurrence. He assumes that especially in politics men tend to be both self-interested and self-aggrandising. The conception of moral aptitude is also realistic in not expecting the internal cultivation of virtue. Moral aptitude is developed by reducing the opportunities for those in power to oppress those over whom they exercise their power. The representative system, by allowing the ruled to

remove their rulers and encouraging both rulers and ruled to seek the general interest, tends to enhance moral aptitude in this sense. Bentham does not pretend that the representative system can necessarily defeat despotism; in many respects he regards the system as fragile and easily subverted. Nonetheless, it offers the best prospects of security for the individual both in his person and his property in the sense of reducing opportunities for despotism by ruling élites. Finally, Bentham does not require of the people a high intellectual capacity. They need only make the choice of governors. For Bentham, most people can see where those in power threaten their interests, although he admits that the people may be deluded for a time.

One interesting part of this argument, which Bentham does not develop, is that the people will naturally defer to those among themselves who are able to advise on the best choice of governors. He seems to have faith in the ordinary man that he will seek the best advice before casting his vote, or at least that he will be disposed to do so unless corrupted by sinister interests. This is a limited deference, confined to the choice of governors, but Bentham seems to suggest that a similar deference to intellectual aptitude will take place generally in society in the importance he gives to the press and public opinion in the day to day operations of government. We should note of course that Bentham does not advocate deference to *governors* but rather the contrary, he advocates the maximum distrust of governors by the governed. His acknowledgement of a pattern of deference within the electorate is combined with a confirmation of his view that supreme power should be placed in the people. Unlike J.S. Mill, he can recognise the importance of deference without questioning the aptitude of the people to exercise sovereign power.

It is important to emphasise that Bentham's argument regarding representative democracy does not aim to establish that representative democracy is the only *legitimate* form of government, because every government which is obeyed by the people is legitimate. Yet, the argument nonetheless has an important bearing on the question of legitimacy insofar as it offers an alternative approach to that of legitimacy. It suggests that instead of looking to traditional principles of sovereignty and political obligation to resolve disputes, it is more important to look to the interests and the happiness of the people concerned to see how these can be maximised. Bentham's arguments regarding re-

representative democracy constitute the first steps in this process. We might also note that in the above argument Bentham does not simply equate the satisfaction of individual wants with happiness. The justification of representative democracy as the best form of government does not depend on the people concerned wanting it, although it is fair to say that unless they want it, it will not succeed in practice. Thus, in prescribing representative democracy as the best constitution he does not assume that this is what the people will freely choose. They may be confused and deluded and actually prefer monarchy or despotism. Ideally, they will choose representative democracy, because it alone offers the best security against despotic government in allowing the people themselves to choose and dismiss their rulers. Of course, representative democracy does not stand on its own, and Bentham's theory is also concerned with the organisation of the administration, judiciary, and military and practices such as a free press and free association as well as the representative system itself. The whole theory is proposed as being in the interests of the people insofar as it is designed to realise ends like security, subsistence, abundance (as future security and subsistence) and equality (i.e. equality of suffrage and hence equality of power leading to equality of wealth).

In a recent letter to *The Times* (6 May 1982) on the dispute over the Falkland Islands, Professor Bernard Crick has written:

Invocation of 'sovereignty' as a principle actually limits our power by tying our hands in politics and diplomacy. In terms of 'sovereignty' the problem is, like Northern Ireland, insoluble . . . 'The interests of the Falkland Islanders' is more promising, if taken, indeed, alongside our own real interests and those of the Argentinians. Edmund Burke, speaking of the doctrine of sovereignty, cried out to Lord North in his great speech 'On Conciliation with America', 'I care not if you have a right to make them miserable, have you not an interest to make them happy.'

For Bentham (who would have been sympathetic to these remarks) turning one's attention from the rights of sovereignty to the interest in happiness possessed by the parties concerned, guided by the principle of utility, would be the best way to resolve disputes which have traditionally arisen from conflicting claims to rule particular territories. He would be less concerned to show which claim was legitimate, than to enquire as to which form of rule would make the people happy. In this context, his justification of representative democracy as

the best form of rule as well as his emphasis on security, subsistence, abundance and equality as ends to be sought in legislation would be important guides to practice. In Bentham's principle of utility, we find, therefore, one way of resolving disputes arising from conflicts over legitimacy.

Notes

- ¹ This paper is based on materials incorporated in Chapter III, 'Sovereignty and Democracy' in my *Jeremy Bentham and Representative Democracy*, Oxford, 1983.
- ² See *A Comment on the Commentaries and A Fragment on Government*, (eds.) J.H. Burns and H.L.A. Hart, *The Collected Works of Jeremy Bentham*, London, 1977, pp. 391—501.
- ³ W. Blackstone, *Commentaries on the Laws of England*, 4 vols. Oxford, 1765—9. Although the *Fragment* was published in 1776, Bentham's *A Comment on the Commentaries* did not appear in print until 1928 in the edition edited by C.W. Everett. All previous editions of the *Comment* and *Fragment* have been superseded by the new edition in the *Collected Works*. See note 2 above.
- ⁴ Although Blackstone writes that 'this notion of an actually existing unconnected *state of nature*, is too wild to be seriously admitted', he nonetheless refers to a condition of society without government as existing within such a state. Quoted in *Fragment*, I.2, *CW*, p. 425.
- ⁵ H.L.A. Hart, *The Concept of Law*, Oxford, 1961, pp. 49—76. Hart's discussion is based on Austin's jurisprudence rather than Bentham's, and Bentham attempts to deal with the problem of continuity in his distinction between the family and political society. What distinguishes political society is that it is capable of indefinite duration. See *Fragment*, I.13n, *CW*, p. 431n. Nevertheless, Hart's account of a legal system may be seen as a valuable development in this tradition which takes as its starting point deficiencies in the Bentham-Austin formulation.
- ⁶ See *The Works of Jeremy Bentham, published under the superintendence of John Bowring*, 11 vols., Edinburgh 1838—43, vol. ix, where a full version of the *Constitutional Code* edited by Richard Doane is printed. Bentham published only one volume during his lifetime in 1830 (see Bowring, ix, 146—333). For the new version of this volume in the *Collected Works* see *Constitutional Code*, Vol. I, (eds.) F. Rosen and J.H. Burns, (*CW*), Oxford, 1983. See also F. Rosen, 'The Constitutional Code: The New Version', *The Bentham Newsletter*, ii (1979), 40—3.
- ⁷ *Constitutional Code; for the use of All Nations and All Governments professing Liberal Opinions* is the full title of the 1830 version.

- ⁸ Bentham's argument in this section has only appeared in print in a garbled version in Bowering, ix, 96—8. This discussion is based on the manuscripts in the Bentham Collection, University College London: UC xxxvii. 387—412 (22—24 August 1824), xxxviii. 216—19 (25 August 1824).

The Treatment of Legitimacy in Historical Fiction

INA SCHABERT
University of Munich

I have selected historical fiction for examining the treatment of legitimacy in literature because it seems to me to be especially suited for the purpose. The outstanding works of historical fiction in English literature represent, for a given society, the level of private, individual experience as well as the level of political, institutional life, and they encompass both levels in a symbolic universe which legitimates the institutional order and gives sense to private experience. Fictions of this kind can be read as illustrations and comments to the four-level concept of legitimacy as set out by Berger and Luckmann in *The Social Construction of Reality* (1966). The worlds of the historical fictions are only seemingly located in the past; the past functions as the 'prehistory' of the writer's present (although not in exactly the same sense as Lukács, who coined the term, meant it). It is a past where the structures of the symbolic universe of the society, to which the author and his public belong, show more clearly and completely than in their present time.

I use 'historical fiction' as a label for fictions of history pertaining to the literary genres of drama and novel. Three main periods of historical fiction will be discussed: (1) Shakespeare's histories, (2) the historical novels of Sir Walter Scott, and (3) the European historical novel after Scott.

1. Historical fiction as a means of conveying the legitimacy of a political order: Shakespeare's histories

Fiction is a medium especially apt for the task of legitimating a given institutional order within the framework of the experience and the

selfinterpretation of a society as a whole. According to Berger/Luckmann, the elements which contribute towards legitimation can be seen as structured within four levels: (1) the cognitive level containing the linguistic objectifications of experience, (2) the level of pragmatic norms, (3) the level of explicit theoretisation concerning single institutional sectors, and (4) as an all-encompassing frame of reference the symbolic universe which represents the highest level of integration and plausibility. In fictional literature, the four levels can be brought to a much higher degree of accord and interpenetration than is possible in real life — at least as soon as the homogeneity of primitive society which Berger/Luckmann assume for the sake of their argument has been destroyed. In a work of art, the linguistic objectifications of reality have a representative status: the world of the text stands for the world as a whole. Meaningful relationships within its microcosm therefore suggest the same meanings for the macrocosm of society. What is not mentioned or implied in a work of art, does not exist; insights which would menace the legitimate order can thus be definitely excluded. If — as a famous essay argues — it is absurd to enquire after the possible motherhood of Lady Macbeth, it would be even more inadequate to read the set of experiences pertaining to the idea of *égalité* into the world of a Shakespearean history play. The 'factual' elements of a literary world acquire a normative character; through the sequence and the outcome of events, the selection and juxtaposition of persons, through their association with aesthetic values maxims and warnings are conveyed. The 'factual' elements even tend to become symbolical, to crystallise into a symbolic pattern. In comparison with this concerted indirect message of the cognitive, normative and symbolic levels, the level of theoretical justification is relatively unimportant in fictional literature. Theoretical exposition here may become the weak weapon of the villain who tries, in vain, to attack the legitimate society (cf. Edmund's 'Nature, thou art my goddess' speech in *King Lear*).

Henry IV, Parts 1 and 2 as an example for the treatment of legitimacy in Shakespeare's history plays

A hierarchic structure of reality is stated by the text as a linguistic objectification of experience. The language displays a gradation from

low to high style; the scenes display situations from low farce and comedy to formal tragedy; the *dramatis personae* are conceived as roles within a monarchic, patriarchal system. The normative element is firmly built into the action (cf. the 'poetic justice', in terms of Elizabethan cosmology, of the many deaths in the two plays, including that of the King), and into the constellation of characters (e.g. the contrast between Hotspur, Prince Hal and Falstaff as a statement on the right concept of 'honour').

The main events of the plays are an expression of the reassertion of the institutionalised monarchical order; a conflicting aristocratic idea of legitimacy, which is advocated by the rebels in both of the plays, is shown to lead to disorder and thus to be self-destructive. In the relationship between King Henry IV and his son Hal the problem of transmitting the old order from one generation to another is discussed and solved: the fate of Prince Hal teaches the necessity of self-limitation on the part of the younger generation; the handing over of the crown from the King to the Prince signals the successful act of transmission. The spectacular submission of the new King to the Lord Chief Justice confirms the identity of legality and legitimacy. Whereas the final scenes of *2 Henry IV* with their coordination and subordination of social groups create a vision of the 'horizontal', collective structure of the legitimate order, a meaningful 'vertical', biographical projection of legitimacy is suggested by representing the course of human life as a pilgrimage to a heavenly Jerusalem (from *1 Henry IV*, I, i, 18 to *2 Henry IV*, IV, v, 135 ff.)

How intensely the plays — as pictures of life — bring forth the legitimate world view can only be indicated by the analysis of a few lines. The words, from *1 Henry IV*, V, 1, 1—6, are spoken by Henry IV and Prince Hal at the beginning of the battle against the rebels, near Shrewsbury:

King

How bloodily the sun begins to peer
Above yon bulky hill! The day looks pale
At his distemperature.

Prince

The southern wind
Doth play the trumpet to his purposes,
And by his hollow whistling in the leaves
Foretells a tempest and a blust'ring day.

The surface conversation is about the weather, a red sunrise and an approaching storm. But through the manner in which the speech is handed over from the King to his son, who carries on the rhythm and imagery initiated by his father, the newly achieved consent between the old generation and the young is also stated and — what is most important — the consent is identified with the aesthetic laws of the play as a work of art. Moreover, the references to sun and wind explain and judge the political situation in terms of the symbolic universe which legitimates King Henry's hierarchic order. The sun, with its supreme position among the planets corresponds to the monarch; the southern wind stands for the barons from southern English counties who are going to fight on the side of the King against the Northern rebels. By associating the situation with a process in nature (the tempest which purifies the atmosphere) and with musical harmony ('Doth play the trumpet to his purposes') its legitimacy is implied. On the other hand, the illegitimacy of the rebels' action is hinted at — again in terms of the Elizabethan universe of corresponding micro- and macro-cosmic hierarchies — by the word 'distemperature'.

2. Historical fiction as a medium for solving the problem of contradictory versions of legitimacy: Scott's novels

Both Shakespeare's and Scott's historical fictions frequently portray a situation of civil war, i.e. a conflict of legitimacy within a society. In Shakespeare's plays, the conflict is seen as arising from misinterpretations within one symbolic universe. It is solved by the defeat of the deviant group, either through its conversion or annihilation. Scott's civil war novels — whether placed in the Middle Ages (*Ivanhoe*), the Renaissance (*Quentin Durward*), the English Civil War (*Woodstock*) or in the periods of conflict between Cavaliers and Puritans (*Old Mortality*) or Jacobites and Hanoverians (*Waverley*) in Scotland — deal with societies which are divided between two loyalties, two conceptions of political order, each legitimated by a theology and an anthropology, each with its own version of reality and its own norms. The peculiar aptness of fiction to convey a concept of legitimacy fully and convincingly is used to make the reader experience at the same time the mutually exclusive rightness of each concept on its own terms and

bring home to him the modern insight of the relativity of legitimacy. Annihilation of one version of legitimacy and confirmation of the other are shown to be unacceptable as a solution of the conflict. The novels work towards a compromise. The main narrative vehicle through which the new attitude is expressed is the protagonist in the novel, who, after wavering between the two societies, finds his way into an alternative society where elements of both are blended together on the basis of common sense and tolerance.

Old Mortality as an example for the treatment of legitimacy in Scott's novels

The theme of *Old Mortality* (1816), which is placed in the Scotland before and after the Glorious Revolution, is the conflict between Royalists and Puritans (Cameronians). The Royalist and Puritan societies are described as two opposite worlds; each has a language, a literature, and a history of its own, has its peculiar forms of community life, has its own set of values, its code of behaviour, its laws and institutions, its theological justification and its hagiography. While for the Royalists the Puritans are those who 'would turn the world upside down' (149; page numbering according to the Penguin edition) and act 'contrary to the laws of God, of the King, and of the country', they see themselves 'in arms for a broken Covenant and a persecuted Kirk' (218). In discussions between the main political characters of the novel, the conflicting arguments of legitimacy are stated in theoretical terms:

Argument 1: They [the Royalists] affirm, that you pretend to derive your rule of action from what you call an inward light, rejecting the restraints of legal magistracy, of national law, and even of common humanity.

Argument 2: They do us wrong, answered the Covenanter; it is they, perjured as they are, who have rejected all law, both divine and civil, and who now persecute us for adherence to the Solemn League and Covenant between God and the kingdom of Scotland. (106)

The picture of reality presented by the novel proves both versions of the situation to be inadequate interpretations of reality. The reader experiences the clash between the societies and their contradictory ideas of legitimacy mainly through the eyes of the protagonist, Henry Morton. Because of family ties and a love affair Henry is bound to both so-

cieties yet can identify with none. He feels the deficiencies of both. While the Puritans deny the human values of love, friendship and tradition, the Cavaliers ignore the individual's claim to liberty. The 'pure' representatives of both attitudes reveal suicidal tendencies. On both sides the institutions for rendering justice are experienced by the hero (and the reader) as instruments of extreme injustice. Typical situations from Shakespeare's histories reappear with changes whereby the relativity of legitimacy is emphasised. The military encounter of the parties does not, as in Shakespeare, lead to the victory of the righteous but initiates, through a series of conquests and defeats on both sides, a process of gradual adjustment to one another. The father-son relationship is not controlled by the norm of acceptance of the inherited order; the son, Henry Morton, has to find his own way of harmonising the ideals of a Puritan father and a Royalist step-father.

Seen from the point of view of the historical future — our point of view — it is Morton's situation which is important, his plight of creating criteria of legitimacy in between two symbolic worlds. Scott marks the enterprise as a collective undertaking by associating it with the Glorious Revolution and the reign of King William. The key words by which Morton expresses his plea for the new kind of legitimacy are 'natural humanity', 'common humanity', 'sober reason', and 'liberty and freedom of conscience' (105, 234, 266, 259). He elucidates their political dimension:

My earnest and anxious desire is, to see this unnatural war brought to a speedy end, by the union of the good, wise and moderate of all parties, and a peace restored, which, without injury to the King's constitutional rights, may substitute the authority of equal laws to that of military violence, and, permitting to all men to worship God according to their own consciences, may subdue fanatical enthusiasm by reason and mildness (297).

Morton's ideas are confirmed by Scott through the construction of the narrative; they become associated with the happy ending. But their derivative quality remains a problem. Within the context of the novel we get no criterion for what is 'natural' and 'human', no criterion for the 'good' and 'wise' meant by Morton, except that of moderation, i.e. a toning down and pragmatic adaptation of what is good and wise in the Royalist and the Puritan universe. There is no way of legitimising the King's constitutional rights except in Royalist terms; of legitimising freedom of conscience except within the Puritan creed. No explana-

tion of what is meant by 'equal laws' is found in the novel. The eclectic, parasitic character of the new order is mirrored in the plot. After years of exile the hero reappears in disguise; a place in society is created for him, in a rather awkward way, through an act of renunciation on the part of an idealistic Royalist. The topographic-symbolic landscape where he settles down for the future is a pastoral idyl which gets its charm from the vicinity to Royalist castle and Puritan wilderness.

From a moral-political point of view, critics tend to praise the novel whereas they consider it as aesthetically flawed because of its 'weak' protagonist and its forced conclusion. There is a causal connection between the two observations: the aesthetic flaw results from Scott's inability to visualise the new moral-political message within a new symbolic universe.

It could be argued that the weakness is only accidental: a novel which shows two conflicting parties in full may not have enough room and energy left to do more than hint at the solution of the conflict. In the later novel *The Heart of Mid-Lothian* (later in historical time and in the chronology of Scott's writings) Scott in fact makes a decided effort to define reality in terms of the new principles of legitimation. He creates a myth of the innate goodness of the common people (mainly through the moderate Puritan family of the Deans), he demonstrates the possibility of collective rational action (the disciplined crowd judging Porteous, in contrast to the irrational masses in *Old Mortality*), he envisions a beautiful, economically prospering paradise within everybody's reach in the world of Roseneath which is described at length in the last part of the book. To my knowledge, this is the most consistent attempt to legitimise an egalitarian, liberal, humanitarian order within a symbolic universe. Neither Scott nor any of his followers have carried on the enterprise. Readers find Roseneath unconvincing, i.e. not agreeing with their own concept of reality.

3. The Historical Novel after Scott: the impossibility to legitimise modern norms of political life within an encompassing vision of reality

The historical novel after Scott is characterised by the absence of successful attempts to legitimise norms of modern political life within a

comprehensive vision of reality. In view of the tradition and peculiar aptness of historical fiction concerning this function, we may assume that legitimation in this sense is no longer possible.

On the one hand, historical novels after Scott defend modern postulates of order with reference to a symbolic universe which has become obsolete. In their own way, they carry on Morton's enterprise to salvage norms whose ideological basis is no longer valid. Thus Cooper, in his early novel on the American Revolution, *The Spy*, refers to patriarchal and elitist interpretations of reality as sources of order for the new democratic community. Followers of Scott in England (Ch. Kingsley, R.P. Blackmore) and in the American South legitimise societies held together by a variety of mutual obligations through portraits of reality characterised by medieval, Christian and feudal traits. Perhaps modern authors like T.H. White and J.R.R. Tolkien do basically the same thing, although the anachronistic character of their arguments is concealed and mitigated by elements of fantasy.

On the other hand, we have the historical novel which admits the difficulty, which even may deny the possibility, of fully legitimating the principles of modern society. Statements of this kind are made through the confrontation of Western society with another, homogeneous, more satisfying world. The form was initiated by Cooper's Leatherstocking Novels which show Western civilisation to be deficient in a juxtaposition to the world of the American Indians. The negative argument is continued in contemporary historical novels like Patrick White's *A Fringe of Leaves*, where Western culture is measured against the life of the Australian aborigines, and J.G. Farrell's *The Siege of Krishnapur*, where elements of Western thought have materialised into a bric-a-brac of no other but a doubtful military value in the defence against the Hindus. The bric-a-brac aspect is even more forcefully expressed in parodistic historical novels such as Barth's *The Sot-Weed Factor* and Pynchon's *V*, which make fun of the narrative techniques used by Scott to defend modern ideas of order. As a complementary type a 'Puritan', individualistic historical novel has been developed in texts such as Hawthorne's *The Scarlet Letter* and George Eliot's *Romola*. These novels demonstrate that only in separation from, or even in opposition to the norms of society, can the individual make sense of his/her life.

Divine Descent and Sovereign Rule: A Case of Legitimacy?

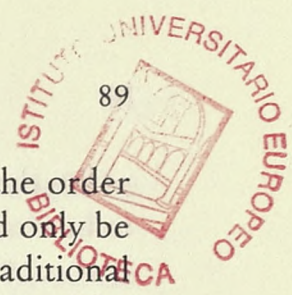
PETER WEBER-SCHÄFER
University of Bochum

The paper presented here was originally scheduled to be held under the somewhat pretentious title: 'Legitimacy and Legality in Oriental Cultures'. As you may have noticed from the change of title, after due consideration of what the subject implied, I felt unable to rise to the challenge imposed by it. While preparing my paper I came to the conclusion that I was unable to cope with the concept of legitimacy in oriental cultures, because there is no such thing as an oriental concept of legitimacy. All that empirical study of theoretical justification of the rule to govern in different oriental civilizations will reveal, is a number of different arguments adduced in order to prove that a certain institution or a certain person has the right to command others and to expect their obedience. For one thing, we are not dealing with a homogeneous oriental civilisation. In the Chinese experience there is very little relation to the Japanese forms of symbolisation of government and on the other hand at the time legitimacy did not seem to be a very clearly defined concept even in the European context. Actually, after having heard so many experts in the field speaking about legitimacy I feel more insecure than before, so I do not know whether I shall be talking about legitimacy at all, because I have lost all confidence in my own knowledge whether there is such a thing as legitimacy. I started from the original assumption that the problem of legitimacy was in some way peculiar to European political thought, more specifically to modern European political thought in which case it would not have any relevance to the political forms of order even of pre-modern Europe, much less to Asiatic cultures of any kind. The question left was: how do you justify rule without regress to the concept of legitimacy? Or do you need something resembling legitimacy in order to justify any kind

of rules? In this case a society of the type commonly designated as a traditional or pre-modern society would be an interesting test case for the general applicability of a concept developed within the European tradition. With this in mind, I would like to make a few remarks on one very special case, hoping it will shed some light on the more general problems we are discussing.

In April 1982 Prince Tomohito, seventh in line in the order of succession to the Japanese throne according to the Imperial House Law, announced his decision to leave the Imperial Family and renounce his right of succession. As a reason for this unprecedented step he adduced his intention to concentrate on social work and sports, in both of which chosen fields of occupation he felt hampered by his exalted position. While the Imperial Crown Council, consisting of seven members of the Imperial family, the Prime Minister and the presidents of both houses of parliament, deliberated on the legal consequences of his decision, the prince started attracting unwelcome attention by boycotting official dinners and other state occasions. When after protracted deliberations the Crown Council finally reached a decision, it turned out that Prince Tomohito's request could not be granted. While the rules and by-laws governing the Imperial House do contain provisions for the expulsion of an unworthy member of the Imperial Family, there is no precedent on which to base a right for leaving the Imperial Family on the applicant's own request. As Prince Tomohito's decision was based on the most pure and unselfish motives, no unworthy conduct could be attributed to him, and there was no legal way of his being relieved of the burden of exalted position. The whole unfortunate affair ended with the prince's wife, Princess Nobuko, suffering a nervous break-down and the prince being taken to hospital with all the symptoms of severe mental exhaustion.

Japan being a parliamentary democracy, in which neither the Emperor nor the Imperial Family have any governmental powers whatsoever, of course the whole affair has no political implications of any kind. On the other hand certain questions of legitimacy seem to be involved, as the mere fact that the affairs of the Imperial Family are governed by a law specially passed by the Diet can only be explained by the former position of the Emperor as an absolute ruler by power of divine descent.



If Prince Tomohito had so strong a claim to his place in the order of succession that he could not renounce his rights, this could only be explained by some peculiarity intimately connected to the traditional claim of the Imperial House to reign over the Japanese Empire. The question then is: can the reasons traditionally given to justify this claim to rule be comprehended under the category of legitimacy?

It is commonly assumed that the concept of legitimacy is peculiar to European political philosophy, more precisely to modern European philosophy and has no application whatsoever to any other framework of thought. Widespread as this assumption may be, I do not think that it can be maintained without modification. As a matter of fact, when we speak about problems of legitimacy in politics, we should be careful to distinguish three inter-connected levels of meaning covered by the term legitimacy. One of these levels of meaning can be found in the field of moral philosophy, where it may be confined to Europe, but not to modern times; a further, closely related level concerns the problem of legitimacy in constitutional theory that defined the framework within which the moral problem was discussed in the eighteenth and early nineteenth century; and on a third level legitimacy may be considered as a problem in social psychology, when we pose the question: why do people tend to obey the enactments of governmental authority?

On the level of moral philosophy the distinction between legality and legitimacy may be described as the distinction between the outward lawfulness of human actions and their moral justification in the light of inner motivation. Probably the first clear terminological definition in this respect was reached in Kant's opposition of legality to morality in the *Metaphysik der Sitten*: 'Mere conformity or non-conformity of an action to the law without regard to its motive is called legality; but that, in which the idea of duty stemming from the law is the motive of action as well, is called its morality' (Met. Sitten, Einl. III, A15). But of course, this does not mean that the problem in itself was new to European philosophy. As a matter of fact it can be traced back at least to Stoic speculation on natural right as a series of basic *axiomata* preceding positive law and determining its legitimate substance. On this level the idea that legal rules are not necessarily legitimate in an ethical sense, even if it be confined to Europe, is not specifically modern.

On the level of constitutional theory the concept of legitimacy seems to be closely connected with the idea of legality as developed in the liberal movement of the nineteenth century. Here legality was used to describe the principle of the rule of law as freedom from arbitrary acts of government and as the demand that laws be framed in accordance with higher principles than those of pure opportunity. If legality, in this context, is a quality that can be predicated of actions within the framework of positive law, then legitimacy can only be attributed to the exercise of governmental power, as long as it has recourse to some higher authority than mere power. In constitutional theory the concept of legitimacy can be used in an attempt to justify the substantial contents of codified constitutions as well as constitutional power by relating the substance of the laws legitimately to be framed, to an underlying political idea integrating the community. 'The concept of legitimacy thus joins the positive order of the constitution and its legality to a definite political philosophy' (H. Hofmann s.v. 'Legalität, Legitimität', Ritter/Gründer, *Historisches Wörterbuch der Philosophie*).

Both of these levels of meaning seem so closely connected to the traditions of European political thought that they cannot be of much help in explaining the claims to rule obtained by being descended from the Sun-Goddess. But if we turn to the meaning legitimacy can have on the level of social psychology, we should expect a more general range of applicability. On this level of meaning legitimacy is a symbol for some kind of quality that will make the ruled willing to obey the commands of the rulers; and this, of course, is the level, on which Max Weber's famous construction of 'three pure types of legitimate rule' should be located. For when Weber speaks of legitimacy as the psychologically supporting factor of stable rule, rulership being defined by the chance of finding obedience for the commands of the ruler, he is not talking about the essence of legitimacy but about the general categories of belief in legitimacy. There is nothing new about the fact that the third type of rule mentioned in this context, namely charismatic rule, is the joker in the deck. Being much too unstable in itself to constitute a genuine chance of stable rule, it actually is a residual category meant to explain incidences that will not fit into the original categories of legal (or bureaucratic) and traditional (or premodern) rule. But as the dichotomy between traditional and modern or developed society is a paradigm much in vogue in the social sciences, a

closer look at Max Weber's 'pure type' of 'traditional rule' might be of interest.

Traditional rule, as defined by Weber, gains its legitimacy 'by virtue of belief in the sanctity of forms of order and powers to rule that have been in existence from the beginning of time (von jeher vorhandene Ordnungen und Herrengewalten)' (*Wissenschaftslehre*, p. 478). This at first glance seems to have some bearing on the traditional grounds of legitimacy of a dynasty that has ruled over Japan as 'a line of Emperors unbroken for ages eternal' (Meiji-Constitution, Art.1), basing its claim to rule on its linear descent from the sun-goddess Amaterasu, who — in the beginning of time, or at least shortly after the creation of the world — commanded the founder of the imperial line to descend from the fields of heaven and rule the land she would entrust to him. When in 1889 Japan was granted its first modern constitution, the first official act performed by the emperor to give the new fundamental law the sanction of authority was not — as might have been expected — its proclamation to the people or the National Assembly, but the ritual notification given to the deified imperial ancestors. On February 11th 1889, the 2550th anniversary of the day Jimmu Tennō became the first human emperor of Japan, his linear descendant Meiji Tennō, the 122nd emperor of Japan, retired to the sanctuary of the imperial palace in order to inform his ancestors of the great event and to swear a solemn oath:

We, the Successor to the prosperous throne of our predecessors, do humbly and solemnly swear to the Imperial founder of our house and to our other Imperial ancestors that, in pursuance of a great policy coextensive with the heavens and with the earth, we shall maintain and secure from decline the ancient form of government

After once more stressing the point that the new constitution can in no way be regarded as a departure from the time-hallowed customs of government, their sole function being to formulate into express provision of law the grand principles of government handed down by the ancestors, the oath concludes by invoking the spirits of the imperial ancestors:

That we have been so fortunate in our reign, in keeping with the tendency of the times, as to accomplish this work, we owe to the glorious spirits of the imperial founder of our house and of our other imperial ancestors. We now

reverently make our prayer to them and to our illustrious father, and implore the help of their sacred spirits, and make to them solemn oath never at this time nor in the future to fail to be an example to our subjects in the observance of the laws hereby established. May the heavenly spirits witness this our solemn oath. (Ito, p. 167/8; TASJ 42, p. 144—5)

Thus the authority of the emperor is not his own as a person, but is inherited from his divine ancestors; and at the same time these glorious ancestors are the only gods their descendant can swear an oath to. All of this sounds very much indeed like the 'belief in the sancticity of powers to rule that have been in existence from the beginning of time' Max Weber is speaking about. But it also does raise the question not posed by Max Weber, what happened in the beginning of time to establish the power to rule. If the human emperors of Japan have a sovereign right to rule by virtue of a mandate they inherited from their divine ancestors, what were the accomplishments by which the divine emperors of the mythical ages gained the power to rule?

The sacred right of the emperors of Japan to regard the empire as a kind of private property entrusted to the imperial clan of the so-called 'heavenly line' goes back to their descent in 'a line unbroken for ages eternal' from the deity Ho no Ninigi, grandson of the sun-goddess Amaterasu, who in the beginning of human history following the command of the heavenly deities descended from the high plain of heaven to Mt. Takachiho on the southern island of Kyūshū to rule the Central Land of the Reed Plains. It is from there that his descendant in the third generation, Emperor Jimmu, the First Human Emperor, started on his march to the east in order to conquer the central province of Yamato. Pacification of the empire, according to the official mythology, was finally accomplished, when the Tenth Human Emperor, Sujin Tennō, joined the old civilisational center of Izumo on the northern coast to his realm. The historical events behind the mythological tale point to the gradual establishment of the overlordship of the so-called Yamato-Clan over other clans of central Japan. Archeological evidence seems to confirm the fact that the imperial clan did not originate in Central Japan, but somewhere to the southwest.

As a matter of fact there is some evidence connecting the ancestors of the imperial family to a group of horse-breeding invaders, who came to Japan via the Korean peninsula early in the fourth century;

but this theory is not very popular among the more nationalist minded Japanese historians.

Everything considered, then, the mythology of imperial descent would agree quite well with the attempt to find a political prehistory giving the sanction of legitimacy to the gradual establishment of rule by conquest. But there are certain peculiar traits to the tale as it is told in the official version of history first codified by imperial command in 712 and shortly afterwards revised once more in the historical compilations of 720 AD. Some of these peculiarities might shed additional light on what it means to be a descendant of the sun-goddess and divinely appointed Emperor of the Sacred Land of Japan.

First of all, the august ancestor of the Imperial house, while of course she plays an important role in the national cult headed by the emperor, is neither the sole, nor the most important deity of the Japanese pantheon. She did not create the world, which probably came into existence on its own anyway; but she is not even the creator of the earth. This honour belongs to the divine couple Izanagi and Inzanami, who created the land of Japan and gave birth to a number of islands and countless deities. The sun-goddess Amaterasu, of course has an important role to play in the scheme of things, but she is not a goddess of the first generation, but only one of the children of Inzanagi, her brethren being the moon god Tsukiyomi, who does not play an important role in Japanese mythology, and the storm-god Susanoo, who is endowed with a number of rather contradictory aspects. On the one hand he is the unruly opponent of his sister, who finally is punished for his many misdeeds and banished from the fields of heaven to the lower world. On the other hand we do find a number of myths, originally belonging to another cycle of tales, in which Susanoo seems to be a kind of creator of order on earth, purveyor of civilisational products like silk, rice, soy beans etc., and protector clearing the earth of dragons and monsters. His descendant Ōkuninushi, in some versions his son, is the land-creator and culture hero in another series of mythological tales centered around the ancient kingdom of Izumo. Here we have the remnants of a religious system of Central Japan before the Yamato-conquest, which had to be integrated into the official mythology of the imperial house. This is accomplished in two ways: First, the victory of Amaterasu over her unruly brother, gives some kind of justification to the Yamato-Clan's conquest of the Izumo Pro-

vince by the literary device of mythological analogy to profane happenings. But then, as if this kind of justification were not enough, we find a second strain of divine history: Shortly, before the imperial ancestor Ho no Ninigi descends to the earth, the son of Susanoo, Ōkuninushi and his descendants appear before the heavenly deities and agree to cede their land to the descendants of the sun-goddess, thus imparting the additional legitimacy of consent to a rule that was established by right of conquest. This land-ceding myth is paralleled on another level, when during Emperor Jimmu's march to the east a great number of earthly deities or 'gods of the land' appear before him in order to make their submission to the descendant of the deities of heaven, cede their claims of rule to him, and accept offices and titles from his hands. Something similar applies to the minor heavenly deities who assist the descendants of the sun-goddess and are rewarded by being assigned a fixed place in the pantheon. Now most of the deities mentioned here are known as the ancestors of the great families of early Japan, whose political relation to the reigning house is fixed by ascribing an official role to their mythological ancestors in the story of the imperial ancestors' endeavour to create order out of chaos. This authoritative ascription of roles can be accomplished in two ways: by the tale of their being rewarded for services rendered to the children of the sun, where the descendants of earthly deities are concerned, or by assigning a fixed place in the genealogy of the imperial family to them, where the descendants of the gods of heaven are concerned. Actually, we do know of a few cases, where the mythological records of the age of the gods had to be rewritten because of shifts in the balance of power between the aristocratic families, whose ancestors were mentioned in mythology.

One final instance: While usually only the descent of the first emperor from the sun-goddess is stressed, when the official genealogy is described, the records actually go to pains to mention the fact that Ho no Ninigi was not only the grandson of the sun-goddess Amaterasu, but on his mother's side a descendant of a deity called Takaki-no-Kami, who forms part of a trinity of gods several generations older than Amaterasu or the creator-couple Izanagi and Izanami. In some variant versions of the tale only his descent from Takaki-no-Kami is mentioned, while Amaterasu does not figure in the story at all. Now we do know, that Amaterasu originally was a local deity of Kyūshū, the is-

land from which the Yamato-Clan started its move to conquer central Japan. If the hypothesis of Korean origins of the conquering clan is correct, this might in fact mean that the now all but forgotten trinity of gods, to which Takaki-no-Kami used to belong, were the original ancestral deities of the rulers of the Yamato-Clan, who were only exchanged for the sun-goddess of Kyūshū after the invaders had reached this more civilised region. Now we all know that Paris vaut bien une messe but changing your god, if he happens to be your own grandfather, is quite an accomplishment in the struggle for legitimacy.

Thus, while basically the Imperial Family in the traditional system of Japan did base its claim to rule on its descent from the sun-godess, the process, by which the ground-work for this claim was laid, was quite involved. The ruling family had to prove its own exalted position by construction of a divine genealogy. The extension of rule by conquest had to be justified *ex post facto* by the myths of land-ceding and consent to a change of sovereignty as an event on the sacred level, where the actions of the gods take place. The delicate balance of power between the Imperial House and the great families of the land had to be stabilised by finding an appropriate place for the ancestors of powerful clans in the narrative of the imperial past. Deities of the conquered regions, which could not simply be forgotten, because a god does not lose his power, when his worshippers do, had to be incorporated into the pantheon of an officially sanctioned system of unified mythology. And, when worst comes to worst, you may have to look for a new set of divine ancestors more accomplished in the arts of civilisation than the ones you were born with, in order to gain the hard earned legitimacy of descent from the gods of the land. Thus 'belief in the sancticity of powers to rule that have been in existence from the beginning' is not a belief that is existent from the beginning. In order to create this kind of belief, you have to invent your own beginnings.

But once this great feat has been accomplished you do indeed possess a kind of legitimacy that — unlike its European counterpart — will reside in your family 'in a line unbroken and for ages eternal'. And this is, where poor Prince Tomohito made his fatal mistake. For the kind of legitimacy your ancestors gained for you by so much toil and endeavour is not something you are free to renounce because it hampers you in your wish to devote the rest of your life to social work and sports.

Power, Legitimacy and Truth: Reflections on the Impossibility to Legitimise Legitimations of Political Order

TILO SCHABERT
University of Bochum

I would like to start with a 'captatio benevolentiae'. I feel somewhat awkward being the last speaker at this conference. I suppose I should strike a constructive tone. But it would be quite illegitimate on my part to pretend that there is a general agreement about the truth of a certain idea of legitimacy. The title of my paper conveys this feeling of disappointment which I felt myself when I prepared the paper. I should like to begin my argument with a quotation from Pascal, from article V in the *Pensées* which is entitled 'La justice et la raison des effets'. This article contains, in a nutshell as it were, my whole argument. There are several parts to the article and the first part conveys the attitude which has already been discussed on the occasion of Prof. Mathieu's paper. Pascal appears to assume that there is only a position of relativism which one could take *à propos* of the problem of justice. He asserts that we have no criteria for knowing what is just or what is unjust. I quote:

Dans la lettre *De l'injustice* peut venir la plaisanterie des aînés qui ont tout. 'Mon ami, vous êtes né de ce côté de la montagne; il est donc juste que votre aîné ait tout.' . . . 'Pourquoi me tuez-vous? Il demeure au-delà de l'eau. Pourquoi me tuez-vous? -Eh quoi! ne demeurez-vous pas de l'autre côté de l'eau? Mon ami, si vous demeurez de ce côté je serais un assassin et cela serait injuste de vous tuer de la sorte; mais puisque vous demeurez de l'autre côté, je suis un brave et cela est juste.' Sur quoi la fondera-t-il l'économie du monde qu'il veut gouverner? Sera-ce sur le caprice de chaque particulier? quelle confusion! Sera-ce sur la justice? il l'ignore. Certainement, s'il la connaissait, il n'aurait pas établi cette maxime, la plus générale de toutes celles qui sont parmi les hommes, que chacun suive les moeurs de son pays, . . . on la verrait plantée par

tous les États du monde et dans tous les temps, au lieu qu'on ne voit rien de juste ou d'injuste qui ne change de qualité en changeant de climat. Trois degrés d'élévation du pôle renversent toute la jurisprudence; un méridien décide de la vérité; . . . Vérité au-deà des Pyrénées, erreur au-delà.

Pascal continues and talks about the remedy which is usually offered, namely the idea of natural law. He has to say the following about it:

Ils confessent que la justice n'est pas dans ces coutumes, qu'elle réside dans les lois naturelles connues en tout pays . . . mais la plaisanterie est telle, que le caprice des hommes s'est si bien diversifié, qu'il n'y en a point. Le larcin, l'inceste, le meurtre des enfants et des pères, tout a eu sa place entre les actions vertueuses.

In view of this general confusion men should realise that justice is a daughter of time. People who act in obedience to political authorities follow but their own imagination. Justice is imaginary:

De cette confusion arrive que l'on dit que l'essence de la justice est l'autorité du législateur, l'autre la commodité du souverain, l'autre la coutume présente et c'est le plus sûr: Rien, suivant la seule raison n'est juste en soi, tout branle avec le temps . . . Rien n'est si fautif que ces lois qui redressent les fautes; qui leur obéit parce qu'elles sont justes, obéit à la justice qu'il imagine, mais non pas à l'essence de la loi . . . L'art de fronder, bouleverser les États est d'ébranler les coutumes établies ensoudant jusque dans leur source, pour marquer leur défaut d'autorité et de justice.

And in the final paragraph of his *Pensée* Pascal speaks about justice in a way that is quite similar to the argument set forth by the contemporary German scholar Niklas Luhmann. If there is any justice or legitimacy it can only be envisaged as a *functional* justice. 'Il ne faut pas qu'il, (i.e. le peuple) sente la vérité de l'usurpation; elle a été introduite autrefois sans raison, elle est devenue raisonnable; il faut la faire regarder comme authentique, éternelle et en cacher le commencement si l'on ne veut, qu'elle ne prenne bientôt fin.' There is a general agreement, undoubtedly, that a political order and its actualisation, political power, need to be legitimised. There is a principal correlation between power and legitimacy. If we examine the general discussion about legitimacy we will find that no one is really in any doubt as to this correlation. Whereas, problems arise if we examine the relation between legitimacy and truth. Our present situation, is characterised by a very strong doubtfulness about this correlation between legitimacy

and truth. There are great difficulties for almost everyone dealing with the problem to formulate what criteria we should allow for making a distinction between political systems that are legitimate on one side and political systems that are illegitimate on the other.

I have chosen a representative case which could serve to illustrate this doubtfulness vis-à-vis the problem of the correlation between legitimacy and truth. This is the article 'Légitimité' which was published in the *Encyclopaedia Universalis* in Paris, in which the author offers three points of reflection. The first point, he says, is that we are in need, obviously, of *critères objectifs de la légitimité*. This is the basic necessity. A government has to be effective yet the author immediately adds that this view is only a presumption and is not a real criterion for knowing whether or not a government is 'legitimate'. As a second criterion he offers what he calls *l'adhésion populaire*, the consent, but again he suggests that we should be aware of the problem of the *grégarisme aveugle des foules*. It might serve as a criterion, but we should be very cautious. Finally he proposes *les droits de la personne humaine* as the third criterion for distinguishing between legitimate and illegitimate 'Régimes', I quote: 'un gouvernement ne devrait être réputé illégitime, au sens matériel et non plus formel du mot, que dans le cas où il contreviendrait ouvertement à des règles morales incontestées qui sont les bases mêmes de toute civilisation.' Now, if we were to apply a test to this criterion and look at all the presently existing independent states of which there seem to be 170, we could evaluate them in the light of our third criterion and we would probably come up with about 8 or 10 which would appear to be legitimate while all the rest would be illegitimate. On a moral level, the three criteria which we briefly discussed might be satisfactory, but on a political level they are more or less useless. In addition, I would argue that those three criteria are intelligible only within the context of western culture.

Hence we have not overcome the problem of Pascal: 'vérité au-delà des Pyrénées, erreur, au-delà'. This situation is sufficiently reflected in the authoritative works concerning legitimacy. Maurice Hauriou's account, for instance, introduced the extremely vague term of the 'idée directrice' as the idea of legitimacy on which constitutions ought to be based. In a recent treatise by Georges Burdeau, *Droit constitutionnel et Institutions politiques*, published in 1967, the vagueness of the term has become even broader. Burdeau links the legitimacy of a régime with

what he calls 'l'idée d'une représentation dominante de l'ordre social.' This idea would serve as a basis for the constitutional and legal order. All laws were contingent expressions of the social ideas prevalent in a society at any given moment, and the functions of power, would satisfy 'les exigences incluses dans cette image de l'avenir désiré.' I think both Hauriou and Burdeau show that in the present time legitimacy is no longer associated with transcendent truth or natural law. The correlation between legitimacy and truth is either passed over in silence or brushed aside by fashionable scepticism, or the impasse is simply described as what it is. Carl Schmitt, the German legal scholar stated that it is just impossible in our time to legitimise legitimations of political order. In this context it is interesting to note that since Max Weber, legitimacy has become less and less a subject of legal and political philosophy and has become more and more a subject of sociology and psychology, which I think is in itself a very significant fact.

Now I would like to continue arguing the point of my paper. I have divided my argument into two parts: an historical and a logical argument. The historical argument takes up briefly the history of the concept of legitimacy. As you know, *legitimus* had been first introduced as a legal term by the Romans. Later on, scholastic philosophy, St. Thomas Aquinas and, his disciples, the Thomists, modified the original christian idea of power, namely St. Paul's doctrine: *omnis potestas a Deo*. St Thomas taught: *omnis potestas a Deo per populum*. This notion of legitimacy has been re-emphasised by later Thomists, in the XVI century by Molina and Suárez particularly. For Molina the power of a ruler ought to be 'in line with both the will and approbation, *arbitrio beneplacito*, of the people'. And Suárez, argues that political power should be granted only by the consent of the people *ex consensu communitatis*. However, according to Suárez the idea of consent is not to be used to establish the legitimacy of what happens in political societies but is solely to be used to explain how a legitimate political society is brought into existence. It is also relevant to note the realism of Suárez who concedes that empires and kingdoms have often been set up even through tyranny and force and he thinks it is quite possible to accept a particular ruler in the course of time. In his view then, legitimacy is a legitimacy *a posteriori*.

In modern legal and political thought the concept of legitimacy became more and more associated with rationalism and natural law. The classical formulation was offered by Bodin. I quote:

J'ai mis en notre définition que les sujets soient obéissants au monarque royal, pour montrer qu'en lui seul gît la majesté souveraine et que le roi doit obéir aux lois de la nature, c'est à dire gouverner ses sujets et guider ses actions par la justice naturelle qui se voit et se fait connaître aussi claire et luisante que la splendeur du soleil; c'est donc la vraie marque de la monarchie royal quand le prince se rend aussi doux et ployable aux lois de la nature qu'il désire que ses sujets lui soient obéissants; . . . Si donc les sujets obéissent aux lois du roi, et le roi aux lois de la nature, la loi d'une part et d'autre sera maitresse . . . Car il s'ensuivra une amitié mutuelle du roi envers les sujets, et l'obéissance des sujets envers le roi, avec une très plaisante et douce harmonie des uns avec les autres et de tous avec le roi: c'est pourquoi cette monarchie doit s'appeler royale et légitime.

This classical harmony was broken after the French revolution and in the Napoleonic régime. There occurred a severe rupture in the Christian scholastic and classical modern traditions of understanding and formulating the problem of legitimacy. This rupture can be observed in studying the great debate about the legitimacy of the Napoleonic régime versus the legitimacy of the Bourbon dynasty. The authors who took part in this debate were Chateaubriand de Staël, Guizot, Tocqueville, Constant, de Maistre, Bonald, Royer-Collard. There were three major consequences of the debate. First a formalisation of the concept of legitimacy or, in other words, a dissociation of the concept from transcendent truths. Guizot gave expression to this dissociation when he said that *légitimité* is nothing else than 'une conformité avec la raison éternelle'. Also Frantz in his study on Louis Napoléon, (1856), argues that legitimacy could be associated with any moral idea. He gives expression to an absolute relativism. Then, as a second consequence of the above-mentioned debate, legitimacy becomes the subject of a competition between *principles* of legitimacy that appear to be equally valid. And, finally, as the third consequence, a new historic understanding of legitimacy emerges. Legitimacy is from now on being understood as a matter of contingency: legitimacy continually modified by time. Von Gentz gave a pertinent statement to that effect: 'The principle of legitimacy, as sacred as it may be, was born in time, hence it should not be understood in absolute but in temporal terms, and it has to be modified, as all human things, by time.' The final for-

mulation of these consequences was undertaken by Max Weber, whose view was that the legitimacy of a state (Staat) can be formulated only on purely negative grounds since it consists in the ability to control the use of violence. It is but the absence of social violence which makes a state 'legitimate.'

The final step with regard to our present situation was taken when legitimacy was associated with public opinion. It was Luhman who introduced the idea of 'undefined decisions formally accepted.' And indeed, this is today the only way to think of legitimacy; the formally accepted decisions which have not really been met. The legitimacy of the political system is judged by the output of the political system. What does that mean? It means that the problem of legitimacy becomes a variable of the political system. Legitimacy is no longer conceived of as being the foundation or the origin of a political society, but an output, a result of the political system. Since, however, the political system itself, in other words, public opinion, is only understood as a variable, we face a contradictory and paradoxical situation: legitimacy becoming part of a variable of a variable. So we have lost all firm ground. We are faced with the impossibility of concluding that there is a way to legitimise legitimations of political order.

However, these results of an historical development have taken place on the level of conceptualisation. On the pragmatic political level a different situation exists.

Societies are still in need of a more complex structure of legitimacy than is offered by contemporary social thought. The solution, I think, on the pragmatic level, is what I would call syncretic legitimacy. In order to illuminate this idea I would like to quote from Tocqueville: 'I regard as impious and detestable that maxim which holds that in politics, the majority of a people has the right to do anything. Yet, I place the origin of all powers in the wills of the majority. Am I contradicting myself?' Tocqueville asks the question of principle, whether the majority of the people decides what is right and what is wrong. To answer his question, Tocqueville maintains that there is a second source of legitimacy, namely the *moeurs*, the general habits, the civil virtues of political culture, or *les croyances communes*, the generally accepted attitudes. So there are two sources of legitimacy and what actually makes society work in the view of Tocqueville are syncretic constructions on

the basis of these two sources. For practical purposes, the 'legitimacy' of contemporary states is drawn from a variety of sources: history, personalities, natural law, the people, tradition, public opinion, God, revelation, revolutions, *moeurs* and, in more recent times, social welfare. To survive, contemporary states operate by means of what I call syncretic legitimacy. But naturally, they cannot, in philosophical terms, come to justify or legitimise those hybrid constructions. If they were to try to do so, we could look at those hybrid constructions or syncretic ideas of legitimacy from a philosophical point of view and we would quickly realize that they are self contradictory.

The second part of my argument is logical. I think the term legitimacy does not denote a substance, an essence. We do not ask what is legitimacy, but how, when and in which circumstances is a structure of political power or political order legitimate. It is only meaningful to speak of legitimacy in terms of a relation, the relation between a government and the respective society or vice versa. I cannot contemplate the legitimacy of a government without considering the views of those who are governed. To establish the legitimacy of a government then, means the establishing of a relationship between the rulers and the ruled. It means to persuade, to unite, to bring together, to enact political society. The test for this then, is not the truth of the philosopher, but the belief of the people. It is not so important that there is a philosophical truth on which the enactment of a political society is based, but that there is a general belief held by the people concerned, that in effect, it is true for *them*. This we may observe when we study the situation of the law-giver, for the pragmatic problem of the law-giver or the founding fathers in the moment of foundation is, I think, in consecutive terms: first, to find the right or adequate syncretic construct of legitimacy and only secondly to introduce a foundation myth which makes this construct a possible object of general belief, of a *consensus universalis*. So I would argue that the consensus is not what comes first but only after the foundation has taken place. The logical problem about legitimacy arises on the level of the social field, and not in terms of the quest for the good or just society which may be sought in the platonic sense in the soul of one man, Socrates. Legitimacy is always a problem of the many, the one and the many. The consequences of this can be brought under five headings. First, social fields are dynamic which means that there is a constant tension between legitimacy

and illegitimacy, or, to put it another way, legitimacy is modified by time. The second consequence is that we have to come to grips with the differentiation in the fields — there are different segments which one might call provinces of legitimacy. There is not just one province of society with one legitimacy, but there are, in any one given society, different segments and provinces of legitimacy which are competing with each other. Which brings me to the third consequence which is that there is a constant tension and a constant conflict between two or several sets of truths. There is always a situation of truth versus truth which cannot be solved by philosophical means, but which in the most extreme case is solved by conflicts or by civil war. Then we face, as a fourth consequence, the problem that there is a separation between the virtues of men qua men in a philosophic sense, and the virtues of citizens qua citizens. Aristotle in his *Politics* already raised this point. Montesquieu also discussed the problem in terms of despotism and paradoxically spoke of the virtue of the despotic régime. So the virtues which make a certain régime work are not necessarily the virtues of the good man.

Finally, the social field which is the basis for the working of any concept of legitimacy is a field of political action, and as such, when we talk about legitimacy or political action we cannot base our argument on truth but only on what Plato called true opinion. There is no discourse in view of finding the truth. There is only a discourse in view of finding true opinions. The prospect, given these two results, leads us to identify two extremes, the first of which would be what I would call the idea of total legitimacy. We could, in order to consider this extremist view, take up the propositions of Durkheim, for instance, who introduced the concept of the *conscience collective* which goes back to the medieval concept of the *intellectus unus*, or we could talk of totalitarian political myth. On the other side the extreme attitude would be to engage or to propose what I call a zero language of legitimacy. I would speak of consent, majority, popular will and so on. But since all these terms would be used only as functional terms, we would work with these concepts, but in the sense of a zero language of legitimacy. Or, we may look at concrete examples of societies and may find some pragmatic solutions in the sense of what I called syncretic concepts of legitimacy. When I prepared this talk one of the three most interesting examples I thought of were the United States of America as a country

with a most secular set of political ideas of legitimacy mixed with the traditions of classic past. Or, as a second case, the France of De Gaulle as a kind of post-modern idea of legitimacy with a personality as a source of legitimacy brought together with the language of the French revolution. And, in the third case, the society of the Federal Republic of Germany where we have this fascinating, but not fully treated or resolved problem, of the uneasy alliance between the tradition of anglo-saxon constitutionalism as it was introduced after World War II — serving as the basis of the 'Grundgesetz' or Constitution — on the one hand, and the traditions of the German state (and the *Staatslehre*) on the other.

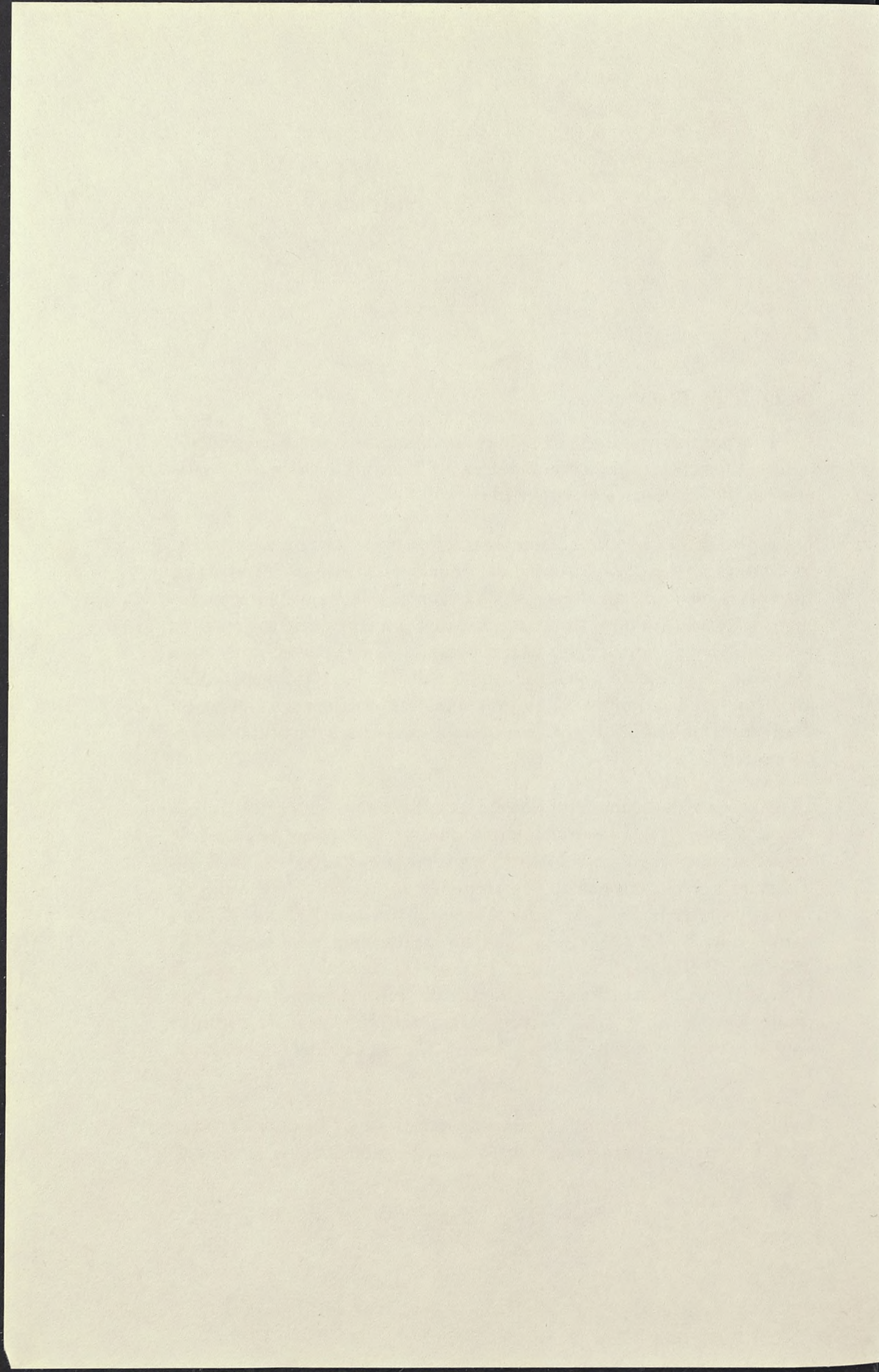
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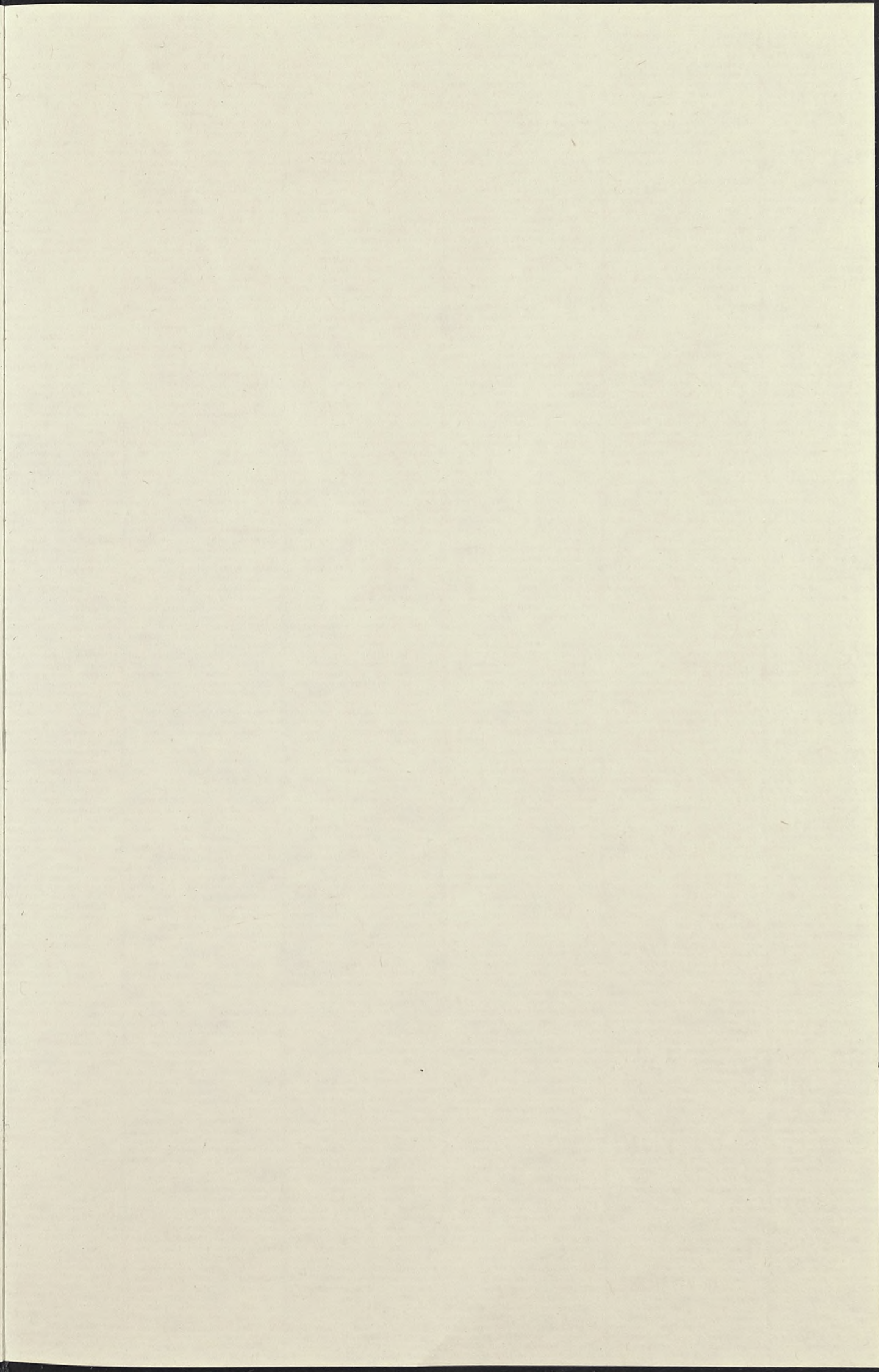
Les contributions publiées dans le présent volume ont été présentées, à une exception près, au colloque tenu à l'Institut Universitaire Européen de Florence les 3 et 4 juin 1982.

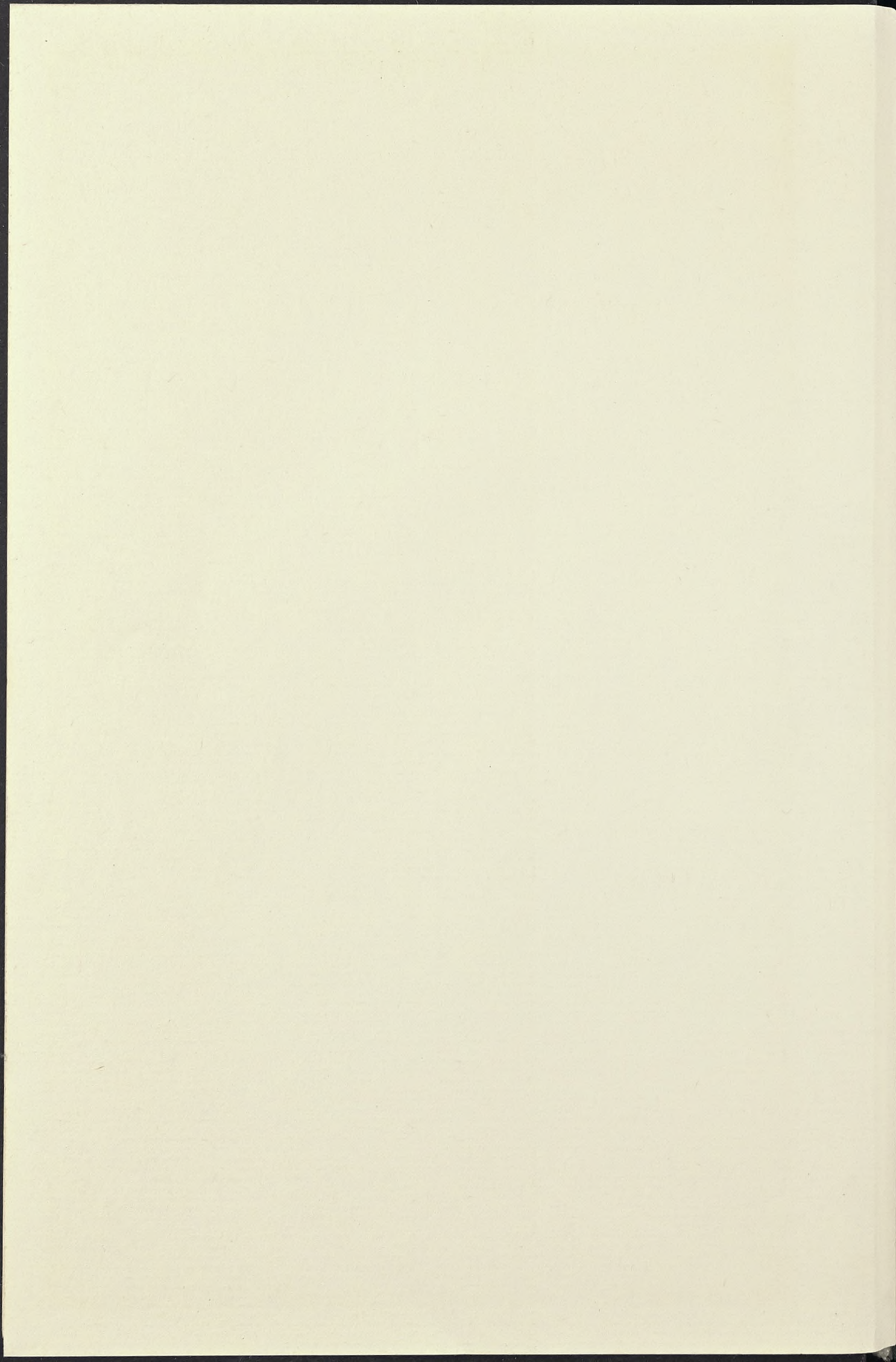
L'essai du professeur Francesco Gentile fut présenté non pas au colloque de juin mais dans le cadre d'un séminaire à l'Institut Universitaire Européen sur le même thème. Il s'harmonise tellement bien avec les sujets traités au colloque qu'il nous a paru dommage de ne pas enrichir notre volume de son analyse fine et perspicace. Par contre nous nous réservons le plaisir de publier le rapport du Dr. G. Ioannides sur les problèmes de légitimité en Chypre à une date ultérieure, à l'occasion d'un contexte moins théorique traitant des crises institutionnelles concrètes.

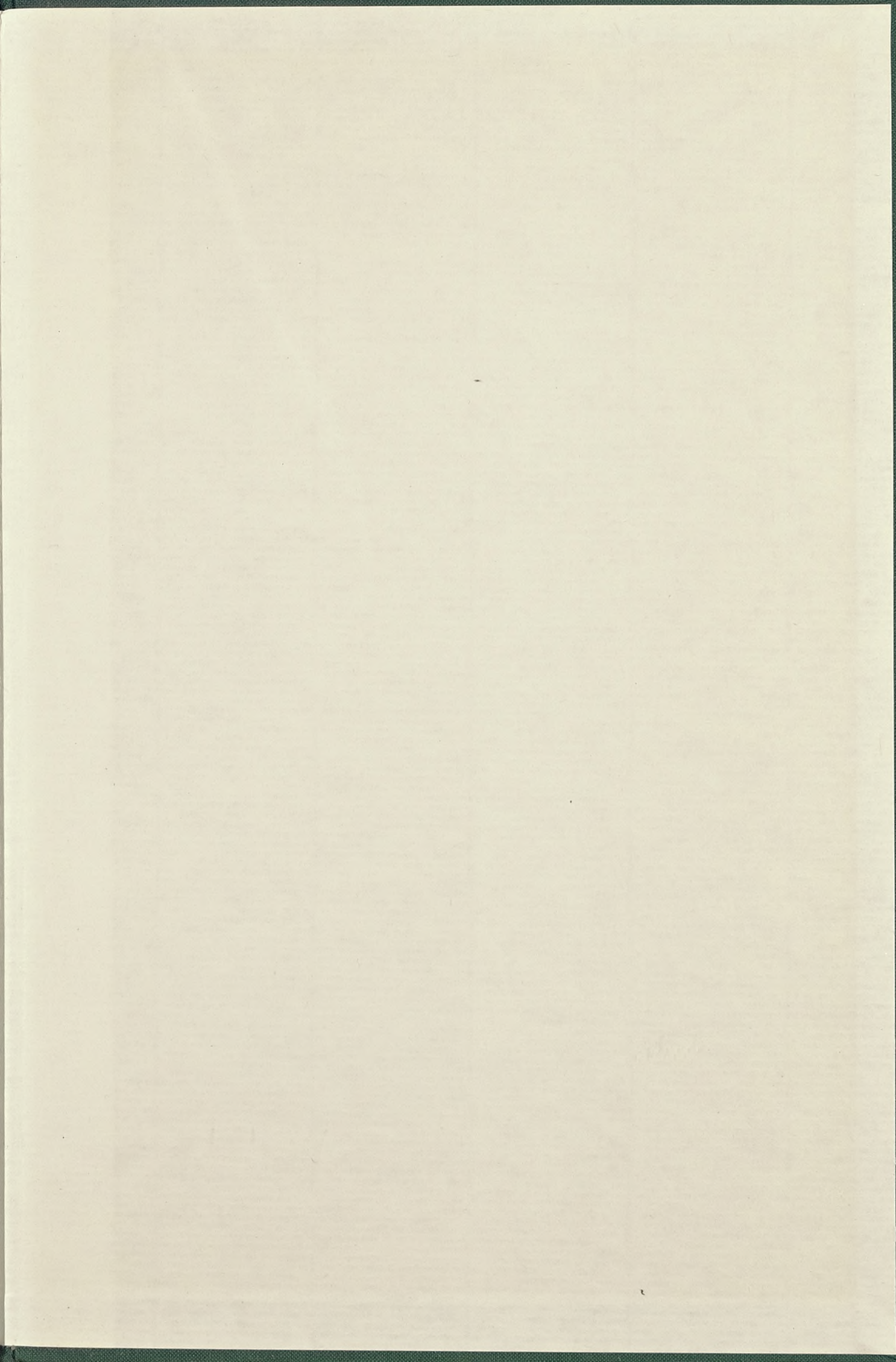
La présidence des séances fut assurée successivement par le Prof. Sergio Cotta, Président de l'Institut International de philosophie politique, le Prof. Gunther Teubner, Institut Universitaire Européen, le Prof. Constantin Despotopoulos, Président de la Société Héliénique de Philosophie, et le Prof. Maurice Cranston, London School of Economics and Political Science. Outre les rapporteurs, sont intervenus: M. Richard Bellamy, chercheur, Institut Universitaire Européen, la Dott.ssa Lea Campos-Boralevi, attachée de recherche, Institut Universitaire Européen, le Prof. Werner Maihofer, Président de l'Institut Universitaire Européen, le Prof. Joseph Weiler, Institut Universitaire Européen.

Mlle Constance Meldrum, attachée de recherche à l'Institut Universitaire Européen a été chargée de la coordination matérielle du colloque.











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