

The Paradox of Politics from a Constitutional Perspective.

The Constituent Power of the People and the Representation of the General Will

Gerhard Hoogers*

‘Der Legislator steht außerhalb des Staates, aber im Recht, der Diktator außerhalb des Rechts, aber im Staat. Der Legislator ist nichts als noch nicht konstituiertes Recht, der Diktator nichts als konstituierte Macht. Sobald sich eine Verbindung einstellt, die es ermöglicht, dem Legislator die Macht des Diktators zu geben, einen diktatorischen Legislator oder einen verfassunggebenden Diktator zu konstruieren, ist aus der kommissarischen die souveräne Diktatur geworden. Diese Verbindung wird bewirkt durch die Vorstellung, die inhaltlich die Konsequenz des Contrat Social ist, die er aber noch nicht als eine besondere Gewalt nennt, den *pouvoir constituant*.¹

1 Introduction

In her article ‘Between Decision and Deliberation’² political theorist Bonnie Honig attempts to find a solution for one of the classical problems of political theory: the seemingly unbridgeable gap between, on the one hand, the theory of democratic deliberation, as advocated by (amongst others) Jürgen Habermas, a theory that tries to transcend the difficult origins of every democratic society through an orientation on respect for human rights, hierarchy-free deliberation between democratic agents and good procedures, and on the other hand, a more decisionist approach, of which German constitutional theorist Carl Schmitt is perhaps the most important advocate, that embraces these difficulties and the paradoxes that result from them as an inescapable or even fecund aspect of every democratic society. Honig does not choose between these opposing views, but suggests that

* Associate Professor of Constitutional Law, University of Groningen.

1 C. Schmitt, *Die Diktatur: Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf*, 7th ed., Berlin: 1994 (1921), p. 126.

2 *American Political Science Review* (101) 2007, p. 1-17, p. 3-27 of this issue. References that are to the original article only are marked (ARSP).

they may be overcome through a third approach that she identifies with the position of Jean-Jacques Rousseau in his *Contrat Social*: this third approach, according to Honig, is one in which the dichotomy between decision and deliberation is overcome through the acceptance that the paradox of politics is not a paradox of beginnings, but one of the state and society as such. This being the case, she suggests that it should be neither solved nor affirmed, but simply accepted as a way of 'reorienting democratic theory: toward the material conditions of political practice, the unavoidable will of the people who are also a multitude, and the not only regulative but also productive powers of the law'.³

In this essay, no attempt will be undertaken to question Honig's presentation of the paradox of politics as such, nor the consequences she ties to them. I will instead focus on her interpretation of Rousseau's position from a constitutional law perspective: in the next paragraph, I will first give a short presentation of the paradox of politics as Honig sees it and her interpretation of Rousseau's view on the matter. Taking that as a starting point, I will then set out (in paragraph 3) to show that the paradox of politics, as Rousseau sees it, is indeed an important problem, for which his own political philosophy does not give a convincing solution, although the origins of the solution that was eventually tried can actually be traced back to his own theories. They were only put into action, however, first theoretically by the thinkers of the Revolution (Sieyès being the most prominent among them) and then in the Constitution of 1791 by the constituent assembly itself. For the Kingdom (and after September 1792, the Republic) had to try to solve this paradox, not merely theoretically, but through positive law. The answer that was given (first in theory and then in the Constitution) is the same answer that has been given by almost every constitution since: political representation. The fourth paragraph will then examine what the function of political representation is and has been since 1789, especially when it comes to the problem of the founding of the state and the state's legal order. It will thus lead us back to the question of the origins of law – and therefore to the question of the paradox of politics. In doing so, I will not try to refute Honig's position from a philosophical point of view, but I will argue that, even if she were right in her assumption that the paradox of politics cannot be solved logically or philosophically, and that this is a good thing, it is not, nor can it ever be, a good thing from the point of view of a functioning legal order that claims legitimacy (or at the very least binding legality) and some form of permanence.

3 Honig (ARSP), p. 1.

2 The paradox of politics: Honig and Rousseau

What then is this paradox of politics that Honig ascribes to Rousseau and that, to her, is a way out of the conflict between deliberation and decision? In the seventh chapter of Book II of *Du Contrat social*, Rousseau states the problem in unequivocal terms. He writes:

‘Pour qu’un peuple naissant pût goûter les saines maximes de la politique et suivre les règles fondamentales de la raison d’État, il faudrait que l’effet pût devenir la cause, que l’esprit social qui doit être l’ouvrage de l’institution présidât à l’institution même, et que les hommes fussent avant les lois ce qu’ils doivent devenir par elle.’⁴

In other words: in order to be legitimate and stable, society, the state, needs just and proper laws. These laws are needed to shape and reform the inhabitants into citizens, to mold them from a multitude of autonomous individuals into a real people.⁵ In order to be able to do so, these laws need to be just. In order to be legitimate, on the other hand, they need to be promulgated by the very same individuals that need them to become a people in the first place. Honig suggests that most commentators claim that Rousseau’s solution to this problem is the *Grand Législateur*, the semi-divine Lawgiver that is able to show a people the laws that it needs in order to become the sort of people capable of enacting such laws.⁶

She then states that this is only a partial solution, however, because he (or she) might perhaps be able to solve the original problem of the just state, but no political genius, not even a Moses, can solve the problem that societies, that states, mature and develop and that the problem of the ‘virtuous

4 J.J. Rousseau, *Du Contrat Social ou Principes du Droit Politique*, Paris: 1992 (1762), Book II Chapter VII.

5 In Rousseau’s words: ‘Celui qui ose entreprendre d’instituer un peuple doit se sentir en état de changer, pour ainsi dire, la nature humaine; de transformer chaque individu, qui par lui-même est un tout parfait et solitaire en partie d’un plus grand tout dont cet individu reçoit en quelque sorte sa vie et son être: d’altérer la constitution de l’homme pour la renforcer; de substituer une existence partielle et morale à l’existence physique et indépendante que nous avons tous reçue de la nature. Il faut, en un mot, qu’il ôte à l’homme ses forces propres pour lui en donner qui lui soient étrangères et dont il ne puisse faire usage sans les secours d’autrui. (...) En sorte que si chaque citoyen n’est rien, ne peut rien, que par tous les autres, et que la force acquise par le tout soit égale ou supérieure à la somme des forces naturelles de tous les individus, on peut dire que la législation est au plus haut point la perfection qu’elle puisse atteindre’ (my italics – HGH): Rousseau, *Du Contrat Social*, Book II Chapter VII (supra note 4).

6 Honig, p. 119.

citizen' is repeated over and over again.⁷ Honig does not explicitly say so, but she strongly suggests in her analysis of the democratic paradox that Rousseau shares her view on the inevitability of the chicken-and-egg-problem – or at the very least, that it can be traced back to his own thinking. She states, for instance, that the rather frivolous description Rousseau gives of the way in which the *volonté générale* is formed through the *volonté de tous* ('(...) mais ôtez de ces mêmes volontés (the will of all – HGH) les plus et les moins qui s'entre-détruisent, reste pour somme des différences la volonté générale')⁸ is not meant as an affirmation of the difference between these two but as a sign of their hopeless entanglement.⁹ She also points out that the Lawgiver's project is entirely dependent on the acceptance of the people: he can suggest, threaten, invoke the Gods – in the end, it is up to the people to either accept or reject his legislative proposals.¹⁰ Furthermore, it is difficult for a people to decide with any certainty whether or not it is dealing with an actual, *bona fide* lawgiver, or with a trickster, a charlatan.¹¹ In the end, Honig states,

'Rousseau illustrates for us, time and again, the mutual inhabitation of general and particular will, people and blind multitude, lawgiver and charlatan, properly durable institutions and those stabilized by force'.¹²

It is, indeed, not very difficult to concede that Rousseau is constantly reminding his readers of the fallibility of human nature and of the vulnerability of man's political creations. It should not come as a surprise, then, that he finds it hard to solve the problem we are dealing with: how *does* a blind multitude, in fact, become a people? What *can* lead to this 'changement très remarquable' in each of us, the transformation from man to citizen? Things would have been much easier if Rousseau were to admit that a system in which every citizen votes on every proposed law is not the most practical, nor the most logical system of making just and lasting laws. Rousseau never hesi-

7 Rousseau, *Du Contrat Social* (supra note 4). Indeed, the relative pessimism that permeates later parts of the work (such as his claim in the XIth chapter of Book III 'le corps politique, aussi bien que le corps de l'homme, commence à mourir dès sa naissance et porte en lui-même les causes de sa destruction') clearly suggests that Rousseau realized that the paradox does not simply 'go away' after the founding of the state.

8 Rousseau, *Du Contrat Social*, Book II Chapter III (supra note 4).

9 'Might this be the lesson of Rousseau's fuzzy math – that the general will is inhabited by the will of all and that we cannot know for certain when we have disentangled them and cannot hope, therefore, to guide our politics by such knowledge?', Honig, (ARSP) p. 4.

10 Honig, (ARSP), p. 6.

11 Honig, (ARSP), p. 6.

12 Honig, p. 124.

tated to acknowledge that the system he proposed could only function in societies of very limited territory and population. But, as he proudly writes, 'Il ne faut pas objecter l'abus des grands États à celui qui n'en veut que des petits'. It may be so that the majority of peoples in this world live in states of great expanse and large numbers: but that can only lead to the conclusion that such nations cannot be governed in a republican fashion, can therefore not be called free. The objection of proposing impractical solutions is therefore not very hard to refute for Rousseau: it may be impractical, but it is better to be impractical than to be unjust.

The second objection, however, is more difficult to answer. Is it logical to create the laws by general and (preferably unanimous) voting, if one can never be entirely sure of the moral quality of the citizen? Might it not be wiser to let the laws be made by the best or the most wise of the citizens, or better yet, by the Lawgiver himself? After all, if there is such a fundamental difference between the *volonté générale* and the *volonté de tous*, why then let the *volonté générale* be expressed through the *volonté de tous* at all?¹³ The answer Rousseau gives is well known – it is a *right* of every citizen to partake in the creation of the laws.¹⁴ Only when a citizen has had the chance to vote on a proposed law can he be said to remain free when he is bound by it. But, as Honig correctly observes, this makes the semi-divine Legislator less of a solution to the problem at hand than is often suggested. For as we have already seen, even his legislative proposals are nothing more than proposals – completely dependent on the individuals they are trying to mold into citizens, to come into force. Thus, we are brought back to square one: who can transform a multitude into a people? And what procedure is needed to do this?

3 The legislator as dictator: sovereign dictatorship and the exertion of *pouvoir constituant*

As we have already seen, much of Rousseau's problem in founding and maintaining a state could be solved if the enactment of the social contract and the laws made in pursuance thereof would not be the privilege of the citizens themselves, if in other words, the Lawgiver would actually be a Lawgiver instead of just a law-proposer. For the law-proposer to be an actual Lawgiver, he would need to have the power to effectively enact the laws that

13 As he wrote in the first maxime of his *Discours sur l'Économie Politique* of 1755: 'Il n'est pas sûr que sa décision (of the people assembled to vote on a proposed law – HGH) soit l'expression de la volonté générale', in: B. Groethuysen, *J.-J. Rousseau*, Paris: 1949, p. 95.

14 'La souveraineté ne peut être représentée, par la même raison qu'elle ne peut être aliénée (...). Toute loi que le peuple en personne n'a pas ratifiée est nulle; ce n'est pas une loi', *J.-J. Rousseau, Du Contrat Social*, Book III Chapter XV (supra note 4).

he proposes. He would, therefore, need the powers of a dictator. The dictator (*Dictateur*) is a public office acknowledged by Rousseau. He appears in Book IV, Chapter VI of *Du Contrat Social* ('De la Dictature'). Rousseau describes him in rather traditional terms: he is a commissary, nominated for a limited task and a limited period of time and his grand powers are only negative: he

'(...) fasse taire toutes les lois et suspende un moment l'autorité souveraine: (...) (d)e cette manière la suspension de l'autorité législative ne l'abolit point; le magistrat qui la fait taire ne peut la faire parler, il la domine sans pouvoir la représenter; il peut tout faire, excepté des lois'.¹⁵

Rousseau never makes the connection between the Legislator and the Dictator. And yet, as Schmitt has rightly pointed out in his *Die Diktatur* (as quoted above), there is an interesting relationship between them. Both are in a way *hors-la-loi*: the Legislator because the law has not yet been promulgated, because he acts *before* there is a legal order, in a pre-constitutional state of nature: the Dictator because he can *suspend* the laws and (one might assume) even the social contract itself that is the state's constitution ('il peut *tout faire*') and can thus recreate, so to speak, a temporary state of nature. The legislator is pure right, but without the might to turn it into laws: the dictator is pure might, has the power to suspend each and every law, probably including the supreme ones, but can never create or even promulgate a law: he can make them silent, but cannot make them speak. But if these two functions were to be combined, if a Dictator could propose and enact the laws, if a Legislator could make binding decisions, the paradox of politics could be solved. It would have to be accepted that not every law needs to be ratified by the people itself in order to be binding: but if that sacrifice could be made, the paradox of politics is solved – perhaps not empirically, but at least from the point of view of the legal order itself.

It may come as a surprise that Rousseau himself was actually prepared to make this sacrifice. In his *Considérations sur le Gouvernement de Pologne*, he accepts that the national laws are made by a parliament that is empowered by the people to express the *volonté générale*. Poland is too large a state with too large a population to make it practical or even possible for the people to enact the laws themselves. Therefore, Rousseau proposes a number of local popular assemblies where the local population decides on a number of delegates to be sent to a national assembly, and, on the mandate to be given them, to discuss and decide the national laws. This mandate is to be binding and the local assembly should punish any transgression of his or

¹⁵ Rousseau, *Du Contrat Social*, Book IV Chapter VI (supra note 4).

her mandate by a delegate.¹⁶ Here we find the figure in which the people do not enact the laws themselves, although their representatives are bound by popular orders.

The logical step to give the legislative assembly legal independence and thus dictatorial powers (in the sense that they can discuss, decide *and* enact the laws independently from the people) was never taken by Rousseau himself: he never fully envisioned an assembly of representatives, nominated by the people, but independent from their views and opinions, that could not only propose the laws to govern the state but also enact them. If such an assembly only decides and enacts the laws, it is a parliament: but if it also frames and enacts the constitution, if the legal order itself originates from it, then that assembly comes very close to a combination of Rousseau's Legislator and his Dictator. If such an assembly is brought into existence (by individuals not yet citizens) it is more than just a parliament: it is a constituent assembly possessing *pouvoir constituant*.

The idea of exactly such a 'dictatorial' constituent assembly, such a sovereign dictator, finds its most eloquent and profound elaboration in the works of Joseph Emmanuel Sieyès.^{17, 18} In his *Qu'est-ce que le Tiers État?* he describes the way in which the sovereign French nation can actually be said to act and to form its political will within the political structure of the state. Sieyès makes it very clear that the nation's will is the sole source of all legitimate power, because the state and its constitution emanate from

16 See for an excellent and still relevant discussion of Rousseau's proposals for the Polish national assembly: Richard Fralin, *Rousseau and Representation: A Study of the Development of his concept of Political Institutions*, New York: 1978, p. 173-193. See also my *De verbeelding van het souvereine. Een onderzoek naar de theoretische grondslagen van politieke representatie* (diss. Groningen), University of Groningen 1999, p. 60-69 and my 'Considérations sur le Gouvernement de l'Europe. Enkele gedachten omtrent politieke representatie in de Europese rechtsorde', in: J.L.W. Broeksteeg, N.S. Efthymiou, H.G. Hoogers & C.W. Noorlander (eds.), *De Nederlandse democratie in de 21e eeuw* (forthcoming).

17 Sieyès was born in the Provence in 1748. A Priest by training, he rose to prominence through his immensely popular and influential *Qu'est-ce que le Tiers État?* of 1788. He was elected to the States-General, became the president of the National Assembly and played an important part in the drafting of the Constitution of 1791. He took part in Bonaparte's Coup d'État of the eighteenth Brumaire and wrote the Constitution of the Year VIII (1799). During the Empire, he was president of the Sénat conservateur. He had to leave France after the Restoration of 1814 and lived in Brussels until 1830. After the July Revolution, he returned to France and died in Paris in 1836.

18 Sieyès did not invent the idea of a constituent assembly, although he sometimes claimed otherwise: the Constitution of the United States of America came into force through its acceptance in the several states by constituent assemblies.

the nation and are empowered by the nation's will.¹⁹ The same holds for the ordinary laws, made on the basis of the constitution.²⁰ But precisely *because* the nation is the only source of all legitimate power, precisely because all the laws find their legal foundation in the constitution and the constitution emanates from the will of the sovereign nation, the nation itself is not within the boundaries of the legal order, but outside of it, in a state of nature, so to speak.²¹ Where the nation is, the constitution is not: and where the constitution is, where the laws are, the state and all its organs and functionaries, there the nation is not. In other words: the nation transcends the legal order and all it stands for, because the legal order originates in and from the nation.

But how, then, can such a transcendent nation will, speak and act? How can it be made present within the legal order, and through what procedures can a legal order be brought forth from the sovereign, yet amorphous will of the nation?

The answer that Sieyès gave is: through representation. The nation cannot will – but through representation. Only when representatives are nominated, independent from their emissaries and constituents, who can speak, act and decide in complete freedom, can a nation's will be said to be brought to light.²² Sieyès then, makes a principled choice: the nation is sovereign, and precisely because of its sovereignty it is not within the boundaries of the legal order, but (conceptually speaking) in a state of nature. Therefore it can only be brought to act, its will can only be made visible and concrete through representatives, and these representatives act in the name and on behalf of the nation, both in the making of ordinary laws and in the extraordinary procedure of making a constitution. In the latter quality, the

19 'Sa volonté (the will of the nation – HGH) est toujours légale, elle est la loi elle-même. (...) Si nous voulons nous former une idée juste de la suite des lois *positives* (italics Sieyès – HGH) qui ne peuvent émaner *que de sa volonté* (my italics – HGH) nous voyons en première les lois constitutionnelles (italics Sieyès – HGH) (...)', Emmanuel Sieyès, Qu'est-ce que le Tiers État?, Paris: 1988 (1789), p. 127.

20 Sieyès, Qu'est-ce que le Tiers État?, p. 128-129 (supra note 19).

21 'Il serait ridicule de supposer la nation liée elle-même par les formalités ou par la constitution, auxquelles elle a assujéti ses mandataires (...) La nation est tout ce qu'elle peut être par cela seul qu'elle est (...) De quelque manière qu'une nation veuille, il suffit qu'elle veuille; toutes les formes sont bonnes, et sa volonté est toujours la loi suprême. (...) Une nation ne sort jamais de l'état de nature et au milieu de tant de périls elle n'a jamais trop de toutes les manières possibles d'exprimer sa volonté. Ne craignons point de le répéter. Une nation est indépendante de toute forme (...), Sieyès, Qu'est-ce que le Tiers État?, p.131-132 (supra note 19).

22 'Le corps représentant est toujours, pour ce qu'il a à faire, à la place de la nation elle-même', Qu'est-ce que le Tiers État, p. 189 (supra note 19); 'Je sais qu'à force de distinctions d'une part, & de confusion de l'autre, on en est parvenu à considérer le voeu national, comme s'il pouvoit être autre chose que le voeu des Représentants de la Nation; comme si la Nation pouvoit parler autrement que par ses Représentants. (...) Ce voeu, où peut-il être, où peut-on le reconnoître si n'est dans l'Assemblée Nationale elle-même?', Oeuvres de Sieyès II, 12, Paris: 1989, p. 9-10, 17.

representatives of the nation share the nation's own special nature in one respect: they are unbound by any legal provisions – in other words, they have dictatorial power.²³ And because the nation's will is not their will, yet can only be brought to light through their actions and through their decisions, there is no need to let the people themselves ratify their decisions. Thus, Sieyès's constituent assembly is capable of proposing *and* enacting the constitution that is the legal foundation for the state and its functionaries and originates in the people's will. It is the solution to Rousseau's paradox of politics: it is a dictatorial legislator.

4 The representation of the nation's will as a solution to the paradox of politics

And yet, is it indeed a solution? How can we know that the decisions the constituent assembly (and the parliament replacing it, once the constitution comes into force) make are indeed a manifestation of the nation's will? For one has to realize that not even Rousseau himself denied the necessity of representation as such: the debate between him and Sieyès is not a debate on the merits of political representation as such, but a debate on the best way to organize it in a legitimate state.²⁴ But as we have seen, the only legitimate way of organizing it is through the whole body of citizens. Thus, the paradox of politics can only be seen as solved when it can be argued that the decisions taken by a representative body, be it a constituent assembly in a

23 'Un corps de représentants extraordinaires supplée à l'assemblée de cette nation.(...) Il ne lui fait qu'un pouvoir spécial, et dans des cas rares; mais il remplace la nation dans son *indépendance* (italics Sieyès – GHG) de toutes formes constitutionnelles', Sieyès, *Qu'est-ce que le Tiers État?*, p. 135 (supra note 19).

24 As was already stated above, Rousseau accepts in his *Considérations sur le Gouvernement de Pologne* that a parliament can be necessary in a large state in order to enact the national will. But even in *Du Contrat Social*, the idea of political representation always looms large. The key to understanding this is not to analyze what Rousseau writes about what he considers political representation as such, but rather in understanding the two natures Rousseau describes to the sovereign, the legislative popular assembly. For Rousseau claims that the sovereign is, on the one hand, unbound by any law, even the social contract itself (for example in Book I, Chapter VII) and yet he also seems to claim that its laws and decrees are bound by the social contract and can be declared null and void if they contravene it (for instance in Book IV, Chapter V). When we assume that Rousseau does not simply contradict himself, the only feasible solution to this enigma seems to be to adopt the idea that Rousseau describes the same legal body in two different settings (or two different bodies with the same name and of the same composition): the first sovereign is a constituent assembly, the second a parliament. The first is a truly constituent assembly, the second a legislative assembly. The first is a 'true' sovereign, a *pouvoir constituant*; the second is 'only' a *pouvoir constitué*. They both consist of all the citizens with voting rights – but the sovereign-constituent assembly remains outside and before the constitution, in a state of nature, whereas the second, the sovereign-legislative assembly is its representative body within the state. Thus, the debate between Rousseau and Sieyès is not a debate on the question whether or not representation is necessary. Rather, their dispute focuses on

state of exception or a parliament within an already established constitutional framework, are indeed a legitimate expression of the nation's will – or perhaps even the only legitimate way of expressing the nation's will. As we saw above, this was in fact the case for Sieyès. And that leads us to the question: how influential was Sieyès's thinking?

At least for the first French constitutions, the answer is: very much. Already the first Constitution, that of 1791, declared that the French monarchy was a representative state. Article 2 of the third title of the Constitution made this very clear:

'La Nation, de qui seule émanent tous les Pouvoirs, ne peut les exercer que par délégation. – La Constitution française est représentative: les représentants sont le Corps législatif et le roi.'

Article 7 of the third section of the first chapter of the Constitution draws the only logical conclusion (in Sieyès's theoretical thinking, at least) from this:

'Les représentants nommés dans les départements, ne seront pas représentants d'un département particulier, mais de la Nation entière, et il ne pourra leur être donné aucun mandat.'

Most of the later French constitutions contained articles with roughly the same content, and from France, the theory defended by Sieyès and introduced by him in French constitutional law spread throughout (western) Europe with the French revolutionary armies. The great majority of modern European constitutions contain provisions stating the idea that the will of the sovereign nation is made manifest within the state through an elected body of representatives not bound by any mandate.²⁵ And although, as a matter of course, a constitution usually does not contain a provision dealing with the way in which it can be replaced by another one,²⁶ it is far from

the question who should be the representative of the nation: the citizens themselves – or an elected body of representatives. See for a more detailed elaboration of this idea my 'De verbeelding van de rede en de Europese Unie. Over politieke representatie in Nederland en haar toekomst', in: J.W.M. Engels & M. Nap (eds.), *De ontwikkeling en toekomst van de vertegenwoordigende democratie*, Deventer: 2004, p. 61-89.

25 See, e.g., article 38 of the German Basic Law, art. 42 of the Belgian Constitution, art. 3 in conjunction with art. 27 of the French Constitution, art. 67 of the Italian Constitution, art. 104 of the Polish Constitution. The Dutch Constitution is an exception in this respect: although it states *expressis verbis* that parliament (the *Staten-Generaal*) represents the entire nation (art. 50) and that, consequently, its members are not bound by any mandate (art. 67 par. 3), the Dutch Constitution does not acknowledge the sovereignty of the nation – nor of anyone else, for that matter. Dutch constitutional law is simply silent on the subject of the ultimate source of political power and the ultimate foundation of the legal order.

26 The German Basic Law being the exception to the rule here, see art. 146.

uncommon that a constitution is being debated and enacted by a constituent assembly – or by a parliament or parliaments acting as one.²⁷

Generally speaking, since the French Revolution, modern constitutional democracies entrust the expression of the will of the sovereign nation to a representative assembly of elected citizens who are to express and enact that sovereign will completely independently from their constituents. But they do more than just that. As Leibholz already explained in his classic 1929 study on political representation:

‘Die politische Einheit eines Volkes wird nicht erst durch einen integrierenden Vorgang “geschaffen”. Vielmehr wird die ständig sich als Einheit neu erlebende, aber doch in jedem Moment real vorhandene Volksgemeinschaft durch die Repräsentation lediglich noch einmal in der Wirklichkeit produziert. (...) Kann das Volk nach dem Gesagten nur als politisch-ideelle Einheit repräsentiert werden, so wird auch die allgemein verfassungsrechtliche Bedeutung der Repräsentationsfunktion deutlich. Der Sinn dieser Funktion ist, die als geistige Einheit *existentiell vorhandene*, konkrete Volksgemeinschaft *in der Realität empirisch greifbar* zu machen, die Herrschaft des Volkes als Einheit über das Volk als Vielheit sicherzustellen, das Volk zu staatlichen Einheit zu integrieren.’²⁸ [italics, HGH]

What is conceptually only an idea, the will of the nation, its unity, its capacity to will and act, is made empirically manifest in (and through) representation. Only the nation’s representatives can bring it to visibility and transform a blind multitude into (at least the *image* of a) unified people, and only their decisions, their actions, can be acknowledged as the decisions and actions of the nation. In this manner and form, the classic chicken-and-egg problem that Rousseau never quite solved, is settled under the constitutional law of the vast majority of western states.

5 The necessity of permanence

Can we now safely lay the persistent questioning by Rousseau and Honig to rest? From a logical point of view: hardly. For what guarantee do we have that the decisions, the laws, or even the constitution itself that our repre-

27 The Italian Constitution was enacted by a constituent assembly, the Spanish Constitution by the *Cortes Generales* (followed by a referendum, a combination of the ideas of Sieyès and Rousseau), and the French and Polish Constitution in the same manner. The German Constitution of 1919 was enacted by a constituent assembly, the Basic Law of 1949 by the parliaments of the West-German *Länder* on behalf of all Germans.

28 Gerhard Leibholz, *Das Wesen der Repräsentation und der Gestaltwandel der Demokratie im 20. Jahrhundert*, 3rd ed., Berlin: 1966 (1929), p. 46-47, 58.

sentatives have enacted are indeed a manifestation, the *empirisch greifbare Realität* of our nation's will? How can we know that they in fact *do* reveal the *volonté générale* that constantly threatens to elude us in any other way? Rousseau's and Honig's doubts seem as persistent and pertinent as ever. And yet, from the perspective of the constitutional framework of every state, the question *is* answered, the dilemma overcome. As Derrida has pointed out in his essay on Kafka's famous parable *Vor dem Gesetz*,²⁹ the law is in need of permanence: every statute presents itself as independent from its maker, eternal, constant. And whenever it is replaced, amended, nullified, its successor immediately commands the same beliefs.³⁰ And what holds true for an ordinary statute is even more true for a constitution. Precisely the acknowledgment of its own origins in the will of the sovereign that brought it into existence contains also the claim of its own permanence *and* the legitimacy of its superior status. The state's legal order is built upon the foundations of the nation's sovereign will as made manifest and brought to realization in the constitution: and thus, this constitution has to be (or at least has to *seem* to be) permanent in order for the entire legal framework to be more than a fleeting dream. It is, therefore, from the point of view of the constitution and the legal framework it buttresses an axiom that the constitution *is* in fact the legitimate manifestation of the nation's will. From Honig's point of view, it may be a very fecund condition that the paradox of politics is never fully resolved and that the dichotomy between decision and deliberation is thereby overcome; however, for a legal order to function, we need resolution, because the laws are binding, irrespective of our beliefs concerning the legitimacy of their origins or content. If we want to maintain the correlation between legitimacy and coerciveness we cannot afford the permanence of the paradox of politics. We need a *decision*: the decision that this legal order is in fact a legitimate legal order because its constitution and its laws reflect the genuine will of the sovereign nation. Through their adherence to a representative system of government, the constitutions of Europe's democracies have, in fact, made precisely such a decision. As Carl Schmitt already stated: 'Es gibt also keinen Staat ohne Repräsentation, weil es keinen Staat ohne Staatsform gibt und zur Form wesentlich *Darstellung* der politischen Einheit gehört. In jedem Staat muß es Menschen geben, die sagen können: L'État, c'est nous.'³¹

29 J. Derrida, 'Préjugés, Devant la loi', in: J. Derrida e.a. (eds.), *La faculté de juger*, Paris: 1985, p. 87-139.

30 'Pour être investie de son autorité catégorique, la loi doit être sans histoire, sans genèse, sans dérivation possible', J. Derrida, *Préjugés*, p. 109 (supra note 29).

31 C. Schmitt, *Verfassungslehre*, 8th. ed., Berlin: 1993 (1928), p. 207.