5
Constituent Power and Public Opinion

Introduction

When addressing the laws that matter in a state, Rousseau argued that legislation matters less than customs and especially public opinion. The latter is the genuine constitution of the state, he argued, and it ‘gathers new force’ day by day (Rousseau 1762: book II, chapter 12). His assessment of public opinion reflects the importance it came to have during the seventeenth and eighteenth centuries. Public opinion refers to the third conception of constituent power, a power that exists ‘beside’ the constitution. Unlike the ideas of constituent power being a power above and outside the constitution and a power within the constitution, it concerns less the constituting of the juridico-political order than the ‘unorganized’ forms of politics that take place in (civil) society (Schmitt 1928: 243ff; see also Heller 1934: 201f; Kalyvas 2008: 178ff). As Schmitt stressed, public opinion cannot ‘permit its transformation into an official jurisdiction’ if it is not to lose its character as public opinion (1928 [2008]: 275). This paradoxical quality of public opinion is nowadays often seen as the most interesting feature of this form of constituent power because it seems to promise some way of not getting stuck in the problems of the constitutionalist and revolutionary interpretations.

The importance of public opinion for modern politics has been stressed by several theorists. Foucault (1978b: 95ff) argued that governmental reason was considered under the heading of economy and opinion. The latter concerns beliefs, customs and fears in the population, which can be rationalized through education and campaigns. Habermas (1962) also directed attention to public opinion becoming central to the early modern discussions about governing the state. He focused on the emergence of the public sphere and the underlying societal structure of
its bourgeois variant. He argued that even though the bourgeois pub-
lit sphere was institutionalized in contradictory ways, excluding the
propertyless, women and minorities, it still contains an idea suitable
for emancipatory politics: the dissolution of domination (Herrschaft)
(Habermas 1962: 152ff).

For Habermas, the dissolution of domination through public opin-
on entailed the reversal of Hobbes’s dictum – that authority makes
law – into the idea that truth makes law (veritas facit legem). This shift
towards truth resonates with a long philosophical and political tradi-
tion in which truth and political freedom have been seen as mutually
interconnected. This takes on a specific meaning in modernity because
modern government is, as Foucault stressed, connected to rational-
ity rather than truth. Outlining possible relations between truth and
rationality is, therefore, a challenge and specific problem in modernity.
Truth may be understood in terms of constructing measures such as
criteria of democratic legitimacy, justice or normative rightness. This is
how Rawls, for instance, understood justice, arguing that justice is the
first virtue of social institutions in similar ways as truth is the measure
for knowledge (1971: § 1), or how Habermas has argued that normative
rightness is equivalent to truth when dealing with issues concerning

However, the relation between truth, freedom and politics may also
be understood in other ways than through the articulation of a meas-
ure. It may be conceived in terms of constructing measures such as
the conversion of rationality into freedom. This is an ethical question,
that is, it concerns the relation to self that is central for becoming a
free being who speaks the truth. Foucault’s investigations of this ethical
task involve among other dimensions the practices of speaking frankly
and truthfully in politics. Practising the telling of truth is in particular
addressed in relation to the Greek discussion about parrhesia, telling
truth in politics, and what this entails in terms of risk-taking and
courage (Foucault 1983b; 1984b, d). Foucault’s analysis of parrhesia
can be contrasted with Habermas’s conception of discourse, but also
seen as helpful in deepening the understanding of what Habermas has
called discursive problematization. The latter is the critique of power
structures and the challenge of common sense that is central to criti-
cal speech, to the kind of speaking that has an emancipatory potential
and thus aims at dissolving domination. Foucault’s focus on the taking
of risks in speaking truth, and therefore the courage it takes to step up
in front of others and talk to them in a frank and truthful manner, is
especially important for this deepened conception of critical speech.