Ideas for a Future Right: The Logical and Temporal Shift of the Social Contract in Kant's Philosophy

Davide Antonio Vicini

The aim of my work is to show how the philosophical position developed by Kant highlights the aporia contained in the modern attempt to give the problem of justice a formal solution. According to Kant, the social contract is, no longer the starting point and source of law fixed in the past, but it is placed in the future, as a regulatory ideal towards which it is necessary to strive. Justice becomes therefore the horizon within which political activity and the production of law must move, not the boundary within which law, due to a pre-existing legitimacy, already develops.

THEORETICAL FRAMEWORK

The Modern Political Theory

First of all, I would like to clarify the more general framework of my work. My analysis of Kantian reception of the notion of social contract is constructed from a specific conception of political history that sees in the the rupture that is brought about by Hobbesian theory, with respect to the political theory that preceded it, the turning point of the modern conception of politics (Chignola & Duso, 2008; Duso, 1988, 2007, 2012). More generally, I think that the whole structure of modern political theory is characterized by a change in the statute of truth with respect to the law. Hobbes' famous motto "*auctoritas, non veritas facit legem*" (Hobbes, 1991), is in fact the clearest expression of a new conception of legitimation that tends to exclude the knowability of a divine truth in favor of a positive mechanism of authorization. The Hobbesian sovereign, legitimized through the "social contract", becomes "absolute" insofar as he is the producer of unquestionable laws (although Hobbes formulate the notion of "law of nature", that is, the law that prescribes the maintenance of one's own life): the sovereign therefore produces somehow at the same time the laws and the truth of them. Laws do not try to follow a "true" concept of justice, that is to say, as objective and pre-existing to the sovereign. The knowledge of justice is not needed anymore: being a good ruler is not a matter of virtue, but rather a mater of legitimacy, of authority in the sense of the result of an authorization.

This new political discourse is easier to understand, if we locate it in his its peculiar historical period. The Hobbesian theorization arises in fact during the civil and religious wars that torn the Great Britain apart: in fact the 1651, the year of publication of Leviathan is also considered the year of the conclusion of the so-called *Wars of the Three Kingdoms*. The Hobbesian theory aims precisely to prevent possible civil wars, through a lifting of the individual from his role as judge. Within medieval law, in fact, there were still structures irreconcilable with modern law, such as the right of "feud" (Brunner, 1990,), which was considered a legitimate legal instrument to solve controversies and followed its own rules. The possibility of "taking justice for oneself" is, for Hobbes, at the very basis of civil wars. The renunciation of the truth of the law, with the consequent dynamics of the transfer of the use of force in favor of the state, is motivated

by the inscrutability of this same divine law. The possibility of "taking justice for oneself" is, for Hobbes, at the very basis of civil wars. The renunciation of the truth of the law, with the consequent dynamics of the transfer of force in favor of the state, is motivated by the inscrutability of this same divine law.

The Break With Traditional Politics and the Role of Social Contract

The so-called Hobbesian absolutism does not aim, in its intentions, to make the position of the sovereign even more solid in order to protect the latter, but precisely to defend the citizens from themselves: to take up the metaphors of Hobbes himself, to prevent the wolves from tearing each other apart. Justice, therefore, tends with Hobbes to become a problem of internal coherence or consistency within the law, i. e. a formal problem. The concept of justice is somehow excluded symbolic field of right (Tomba, 2006). This is done through the notion of "social contract" and the logic that this notion brings with it. This contract in fact produces a new political subject, the sovereign precisely, which will be able to establish what is legal, as such legality will derive from the legitimacy provided to him by the logical mechanism of authorization of the social contract.

The birth of modern "natural law" theories, which comes to replace politics as an Aristotelian discipline (Ritter, 1988), marks the movement towards a formal construction of the state and of legal relationships, which creates a distinction between a properly private sphere and a public one (this distinction indeed has not always been present in this way, and also not in such a dichotomous way, since it used to include in itself a third element which was then gradually eliminated which was that of the "common", as is showed in Zappino, 2014). The private sphere became the sphere of opinions that can be formulated according to one's individual judgment, while in the public sphere the judgment will be left to an authorized political subject. The latter thus becomes a "representer" of people's will (which, moreover [the people], it does not exist as such before the authorization itself, but only as a "multitude"): its decision becomes binding because the citizens find themselves obliged to do so by their own will, having stipulated the so-called *pactum subjectionis* themselves. Due to the solution of order that it proposes, the modern construction of the political form and of the State as the source of law tends therefore to overshadow and neutralize the matter of justice. While on the one hand the political will of the representative is the political will of each individual, on the other, through the mechanism of authorization, it nevertheless appears to be irreparably different with regard to the individuals themselves.

KANT'S ACCOUNT OF THE SOCIAL CONTRACT

The New Rationality of the Contract

What I want to argue here, it is that Kant's reception of this doctrine differs mainly because Kant gives the ideal-regulatory character of the "original contract" a central role. This contract is never conceived as an utilitarian agreement to renounce to a part of one's freedom in order to obtain greater security. In this form, the law would be a hypothetical imperative, since it would fall within the means-end structure: laws would only be an instrument aimed at achieving a certain purpose, that would be individual security. However, for Kant morality and law differ in form, but not in content (Kant, 1797), and this makes it impossible to conceive the law in the utilitarian terms of a renunciation aiming just to obtain a greater good. Submission to the law must therefore be unconditional and rational.

Establishing the law is not an act of convenience: this must not be done following a criterion of subjective interest, but because of a duty that derives from human rationality. Such an act does not in fact aim solely at the construction of "lanes "through which men can develop their lives in such a way as not to prevent others from doing the same, but rather at the realization of Reason itself (Riley, 1999). It is in my opinion very relevant, that the goal of law is not only to preserve my path from the threats of others, but also vice versa. In fact, the law is primarily self-obligation, although this self-obligation is then inseparable from the obligation to others (Kersting, 2000). In this sense, the establishment of the law takes the form of an end, "which is at the same time a duty": renouncing to part of my "negative" freedom is not the price I have to pay to enjoy a peaceful life, but it's part of a positive rational order the men must institute. It is not

a matter of making a little sacrifice to obtain something better, but rather a matter of making the noumenical rationality concrete, to connect it with the phaenomenal world.

It is important to note here how this notion, that of "an end which is at the same time a duty" (Kant, 1797) appears, in the *Metaphysics of Ethics* at the beginning of the section on virtue, and constitutes its essential question. Establishing the right can therefore be thought of as an act of virtue. This is also logical, because it would not be possible to think of the institution of law as a purely legal act, because before the law is established there would not be the conditions for acting in a purely legal manner, because of the absence of a law.. Moreover, the right cannot be thought of starting from the consideration of happiness, because it would represent a purely empirical criterion, which would therefore make the original contract lose its peculiarly ideal character. The exclusion of the eudemonistic aspect within Kantian public right's theory rewrites and recharacterizes the contractual semantics from the point of view of the "originality" [*ursprünglichkeit*] of the contract itself. This is a radical mutation within the political subject that in turn changes the conditions of the pact. According to Kant, justice in fact cannot and must not be the domain of arbitrariness: this implies at least a complication of the conceptuality of modern sovereignty, which is best exemplified in the Hobbesian form of sheer obedience to the law.

The Need for a New Anthropology

The subject of the "original contract" [*ursprüngliche Contract*] (Kant, 1793) is in fact a rational subject, and not the empirical one. Political unity is no longer the product of contractual union, but becomes its condition. The subject is unitary and at the same time multiple in a way that precedes any empirical act. This is why it is neither legitimate nor necessary to think of the contract as something that has been given historically. In this sense, I argue, the Kantian conception reactivates a concept of justice that remained dormant within modern theorization, leading to a reactivation of the mechanism of individual judgement, at the cost of reviving the risk of error and conflict (Tomba, 2006). In its reference to "positive" and not only "negative" justice and freedom (Kant, 1797), which is the one sought by Hobbesian natural law, Kantian right is a duty, precisely in the form of an attempt to reorganize the phenomenal world according to noumenical structures.

This mutation of the subject of the contract is based on a specific Kantian anthropological conception that is quite distinct from the Hobbesian one, which leads to an epistemological insufficiency of the social contract. In fact, it is no longer sufficient in itself as a creative act of the general will, but is subsequent to it and therefore based precisely on the anthropological structure that sustains this general will (understood as "free will"). The problem of the juridical and political order becomes the problem of thinking of an order that precedes its artificial formulation but isn't however a natural, rather a rational one.

For such an order to be conceivable, it is therefore necessary to conceive men as beings capable of thinking through a common rationality and also capable of acting through the practical force of such rational ideas. The Hobbesian mechanistic-atomistic paradigm, which sees the political process as the result of clashes between individuals which then lead to the creation of separate lanes, is therefore unsuitable for the structure of a right whose institution is conceived as a moral duty. The contract does not "happen" starting from the frictions between different human desires and practices. In an even more radical sense, it cannot be said that the contract is a "decision" of individuals: its character of universality precedes any formulation. It is precisely from this logical precedence that the peculiar Kantian expression of "original contract" [*ursprüngliche Contract*] derives (Kant, 1793), which places the contract as an ideal structure that cannot be traced in a precise historical time.

In this way, the contract, as an empirical and arbitrary agreement between the contracting parties, loses its foundational value. No plebiscitary form of consensus and not even a possible collective meeting and decision of a political community can have the value of legitimation proper. This is clear in a passage by Kant, in which he highlights how the original contract must, as a practical idea "compel every lawmaker to enact his laws as they might have been born of the united will of an entire people, and to consider every subject, inasmuch as he wishes to be a citizen, *as if* he had given his assent to such a will" (Kant, 1793).

THE LOGICAL AND TEMPORAL SHIFT

The Rational Nature of the "*als ob*"

What must be carefully considered in this passage is the Kantian "as if" [*als ob*] . Kant does not consider the sovereign as infallible as the Hobbesian one: even he must submit to a "united will" [*vereinigte Wille*] that is beyond him. If in Hobbes this distance disappears, and it is the sovereign himself who constitutes the will of the people in his own person, in Kant the absence of a real process of formal authorization prevents this identification. Within the theorization of Königsberg's philosopher, therefore, it always remains an open gap between the sovereign and the general will, which is not, however, the one opened by Rousseau with his theorization of the inalienability of the general will. For Kant, in fact, what counts is not the people as a concrete subject: what counts is not the vow or the empirical assent of the people to the law, but the possibility, in the formula of *as if* [*als ob*], that this assent be given. Kant can therefore affirm that "every lawmaker [must] enact his laws as they might have been born of the united will of an entire people" precisely because the will, as rational determination of arbitrariness is something common to the *people*, understood as a set of rational beings who participate in humanity and as such also possess the idea of an original contract.

For Kant the empirical will of the people is not crucial: she could also be contrary to what can be judged as right, following the "original contract". There is in this sense an unbridgeable distance of ontological character between the "general will", underlying the original contract and the empirical will, expressed by individuals. The accidental overlapping of several concordant opinions in no way corresponds to the truth of the *original contract* (Kant, 1793). To understand this it is necessary to consider the particular notion of will that Kant specifies at the beginning of the *Metaphysics of Ethics*, where he denies, in a somewhat surprising way, the freedom of will.

The Return of Justice in Social Contract Theory

In its autonomy dictated by moral law, the will can't in fact be defined as free or not: will is the origin of freedom, the very possibility that there is something beyond the simple mechanistic determination of human action (Kant, 1797). Freedom therefore becomes a predicate of arbitrariness, because only of it is it possible to preach whether it is free or not, according to the character of its determination (through a rational will or through a natural inclination). Moreover, arbitrariness is free "negatively" in the sense that it can choose between different options, but it is free "positively" only when it is subject to a determination by practical reason. True freedom is therefore not based on the possibility of choice, but only on being determined by one's own reason. The reason becomes therefore practical through the concordance of will and arbitrariness. Since the will is a faculty of desiring determined by reason, and since reason is a faculty universally shared by humanity (indeed, precisely that determines belonging to a not only biologically understood humanity), it can therefore be said that the will [*Wille*] in a positive sense is identical for each subject (Kant, 1797).

The "general will" is therefore not free, and the contract does not therefore have the capacity to "create" this same will, as Hobbes would like, but can only indicate the way in which it can be implemented, that is to say, to act as a "touchstone of the legitimacy of every public law" (Kant, 1793). The notion of social contract therefore, and this is my main claim, assumes with Kant a logical value, which is quite different from that assumed within the theoretical tradition opened by Hobbes' work. The original contract is no longer something that legitimizes the sovereign for his actions to come, but rather becomes an ideal towards which to strive. This is due to its no longer mechanistic characterization, but rather noumenical, ideal: no longer being a point placed in time (not even on a logical level), it becomes a constant criterion for evaluating the sovereign's work. It is precisely the identity between the general will and the rational will of the individual that keeps the possibility of an individual judgement alive.

This identity, however, does not manifest itself as concluded, but in continuous tension towards its own realization: in this sense the state does not exhaust the autonomy of the citizen, it never reaches, as Hegel would claim, to be a perfect "objectification of the spirit". Autonomy remains a fundamental component, which must be continually renewed through the actions of individuals, who cannot limit themselves to the

mechanism of authorization "once and for all". Justice, then, becomes the horizon within which "true politics" must move: it, being intimately connected with virtue, must "every time start over" (Kant, 1797). In conclusion, the proper temporality of the contract is reversed: the latter is no longer the starting point and source of law fixed in the past, but it is placed in the future, as a regulatory ideal towards which it is necessary to strive, and which will never find a complete realization of its own. Justice becomes therefore the horizon within which political activity and the production of law must move, and not the boundary within which law, due to a pre-existing legitimacy, already develops.

ENDNOTE

1. I referred to the Kantian texts, through the official German version: Kant's Gesammelte Schriften "Akademieausgabe" (KGS), Königlich Preußische Akademie der Wissenschaften, Berlin 1900 (bisher 29 Bände), Reimer, after 1922 de Gruyter. I provided the English translation for the full quotes reported in my paper.

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