

# **Claus Offe and the Late Democratic State Theory**

Antonio J. PORRAS

Universidad de Sevilla

Working Paper n. 16  
Barcelona 1990

# 1. DEFINING THE SUBJECT: THE LATE DEMOCRATIC STATE

## 1.1. Transformation of the State and reference models

Theoretical representation of the State in a paradigm able to combine its main structural and functional parts should have a certain capacity to harmonize potentially opposing factors within a state position of reference that undergoes the changes imposed by history.

The "anti-theory", that is to say the possibility to criticize the paradigm established strengthening its potentially contradictory parts, is of course the first and simplest way to renew the conceptual ideals of the Theory of the State, particularly after the considerable reductionism imposed by legal positivism at the beginning of the century. From Forsthoff onwards, the arguments to explain the tension between the macro-model "State of Law" and the historical model of the interventionist "Social State", are well enough known. Their line of argument (partly continued in Spain by Carlos de Cabo, from other ideological premises) was to show the first theoretical expression of the concept of "State crisis".

However, contemporary constitutional development has until now made it possible to accept a general formulation of the paradigm "Social State of Law" as a historically balanced model, despite the dynamic forces of tension that coexist within it. This harmonization involves, as a positive element, a certain methodological enriching of the model, which should be considered henceforth as a "dynamic model", undergoing processes of change throughout history. These "dynamics" of the Social State of Law (SSL) would make it possible to gain an understanding of the harmony of interactions between a static-formal support (that resulting from the State of Law model) and dynamic-material elements (those resulting from public interventionism and its medium and long-term consequences). A system of interrelations, a key to whose internal harmonization would, in accordance with the most topical doctrine, be located in the political circuit of the system (the axis parties-parliament-government), and would have its best-known expression in the generalized category of Italian origin which is "indirizzo politico". The political process appears, then, as a genetic-causal support for the State (through suffrage) and at the same time as a key to its dynamic orientation, through its function of "impulse".

Alternatively, the element of tension (and as a result of potential change or transformation of the model) should be sought in interventionist dynamics, which begins its historical development as an "unlimited" process, linked to the extensive logic of the "welfare state", and thrusting towards a constant growth of public spending and towards progressive penetration of public authority over civil society.

For a long time, this contradiction was interpreted in terms of a dichotomy of method, that is to say as a tension or confrontation just between the two levels SOCIAL STATE/STATE OF LAW. That is, without giving way, as an independent dynamic variable to the sub-concept "democratic state", which is until now interpreted on a fairly traditional representative mode, and understood as reaching its absolute historical maximum with universal suffrage.

## **1.2. Fiscal Crisis of the State as an Overload Crisis**

From this point of departure, the following contemporary concept of "crisis of the State" was formulated in the sixties and seventies: that is, the James O'Connor's "fiscal crisis". The fact that this concept of crisis was formulated from sources relatively far removed from a legal viewpoint has led to a relatively "externalized" view of it. In principle, it would be a phenomenon affecting exclusively either State "output" (public spending) or else financial "input" (income from taxes), but without directly influencing its core structure, nor of course the central mechanism of representation. Its derivation to the strict concept of "welfare" repeats this relatively peripheral, non-core nature of the phenomenon, at least inasmuch as the concept of welfare initially lacks the ability to influence the basic sphere of the level "State of Law".

The theories on the fiscal crisis of the State have meant an original renewal of the Theory of the State, reintroducing new methodological paradigms to understanding the contemporary State, and renewing the fundamental point of the Society/State interconnection as a key to explaining the latter's processes of crisis and its transformation. For Lester Thurow, it seems obvious that both the cause and the effects of the fiscal crisis of the State should shift from the reductionism position, where the problem was found within the financial doctrine, to the system as a whole. The fiscal crisis of the State is not a crisis of the State's financial system, but rather a real "crisis of the State", that is to say, of the whole system of relations between society and State.

Therefore, the so-called fiscal crisis would just be the specific manifestation of a more general phenomenon: the "the overload crisis" of the State-system; and its major result would be the relative loss of public authorities' capacity for control and leadership. We should also note how at the point of arrival, the relative loss of capacity for leadership by the State involves a denial of the supports that were implicit at the point of departure: the Social State, understood as "manager State" or overall director of the economic cycle (sometimes incorrectly defined as "planner" State).

Analyzing the effects of this concept of crisis on the current constitutional doctrine of the State, we can see how there is a clearly insufficient perception of the phenomenon: the "fiscal crisis" is conceived as a peripheral process that does not affect basic understanding of the State from a constitutional approach. The consequences of this crisis do not have direct influences on the "central structure of the State": a State where Parliament continues to legislate, the Government to develop its political leadership, and the judges their jurisdictional function. Might anyone immediately ask the basic question about the crisis? What crisis? In fact, the "structural" and reductionism perception of the State would give rise to a non-conflicting feeling of continuity in the development of the DSS, far-removed from the impulses of change that would be created in the inter-communicating spaces between society and State; spaces that should be conceived as "peripheral" (and therefore secondary). This would explain, among other things, why the treatment of some of these problems has been of greater interest to specialists from other fields, such as some sociologists, financial experts, economists, labor experts, etc.

It seems clear that the only way to introduce the routine structural-reductionism concept of the State of Law into the new intercommunicating sphere of Society/State, would be the concept of "Democratic State". Certainly, the use of this concept, at an operational level in constitutional doctrine, seems at present rather limited. The application of its legal consequences on the State is fragmentary and with barely systematic effects (cf. a recent notable effort in this respect in Aragon), and this, despite the considerable potential that (undoubtedly) is contained in the Declaration of Rights of Constitutions.

This is probably a consequence of a taboo-proposition in western Political Law, whose restrictive effects for understanding the State of "Spätkapitalismus" were described a long time ago by Habermas: the proposition that universal suffrage, conceived as genetic support for the demoliberal State (and historically conquered over half a century ago) marks the absolute maximum limit of integral State democratization. We must note how, in other peripheral legal areas, this proposition has long since ceased to appear as a taboo. In recent labor doctrine, for example, it is generally accepted that periodic elections are not enough within the framework of social relations in an advanced democratic State (cf. recently Giugni, in A. Ojeda, coord.). The same happens in other areas of civil or trade law, such as consumer law and cooperative law, etc.

Of course, references to the advanced democratic State should not imply an ambiguous lapse into the stale discourse of "participationism", or into a renewal of old Rousseaunian reminiscences. The issue is more the rigorous

systematic repositioning of such a concept in the dynamic-historical process of the social State. This then, places before us a problem of method.

### **1.3. Problems of Method: Instrumentalism Versus Functionalism**

The problem, then, would be how to make a more or less structural view of the State compatible with a desire for more open communication, which can be deduced from the concept of the advanced democratic State.

Recent theories use a new methodological point of view, close to a functional approach where the "crisis of overload" is conceived as a forthcoming inability of the State to fulfill the "functions" demanded of it. However, this crisis would not produce immediate substantial changes in its structure.

From this new point of concern, the concept of "democratic State" might enable a more reasonable opening up of perspectives: the functions of the State would then not be the functions that the State itself formally assigned to itself, but those that at every historical moment society, or rather the system as a whole, demanded according to circumstances. In the same way as, since the appearance of the "Social State", the existence of interventionist responses by public authorities is conceived as a historical process in constant transformation and expansion (that is to say as a "dynamic" model), so understanding of the democratic State should mean the appearance of new links of intercommunication that will affect its functional transformation.

In short, the historical-systematic sequence that describes the State in its consideration of the paradigms (successive and overlapping) of the State of Law, Social State and the advanced democratic State, should also mean a "methodological expansion" of the theoretical paradigms applicable at the same time it involves a progressive complexity of reality used as a reference. In this way, theory is coming back to the original dichotomous projection of the "classical" theory of the State: the concern for the interconnection between Society and State as a basic frame for understanding it. It does not seem, however, that until now this task of expanding our methods has been achieved, and so it is clearly a task that still needs to be carried out.

Claus Offe clearly adopts a categorical position in favor of releasing the Theory of the State from the straitjacket imposed by the "instrumentalist" methodological current, used basically to provide a genetic-structural explanation of the State, both from the old liberal-representative viewpoint and in the neo-Marxist approaches. The idea is that the (democratic) State is explained "causally" by suffrage, or by the grouping of dominant economic forces (monopolist capitalism, or oligopolic sector of the economy, cf. Baran,

Sweezy, O'Connor, etc.). Unlike this implicit renouncement of the genetic-causal explanation of the State, the new approach introduces an added difficulty that however, helps towards understanding the contemporary democratic State: the proposition of the "relative autonomy" of the state system (although, as we shall see, the term "relative autonomy" may, if not viewed in all its complexity, produce some difficulties). This basic idea of the relative autonomy of the State will be particularly useful when it comes to analyze the processes of establishing Law, and in particular the basic Law of the State.

In the pages that follow, we do not try to analyze possible long-term limitations of this approach on the Theory of the State. It is enough to say that it seems to be a fashionable approach, and one that offers clear advantages for explaining current problems of the modern State:

(1) Thus, first of all, it would permit an innovative view of the representative link, which explains the relations system between Society and State, by focusing on the function of "legitimation". In a social milieu conditioned by the culture of image and the predominance of mass media, the "legitimizing function" of political process through the reproduction and visualization of pluralism in a simplified form, plays a decisive role in the processes of interconnection between society and the public authorities. It is, then, a concept that, far from leading to a false view of representation, affords rather an enriching and clear-cut understanding of the real position as it is now.

In the same way, the functional criterion of democratic "legitimation" makes it possible to accept as valid, in a harmonized way, both the "mercantilist" theories of democracy (in Schumpeter's sense, the appointment of "elites" in a framework of competition between parties), and the legal concepts of representation (mere appointment of State bodies, cf. by all, Mortati).

In short, we may say that the legitimating or functional view of representation in political process (and not an instrumental-causal view) would lead to a non-evaluating and therefore advanced idea of democracy, in Sartori's sense.

However, constitutional doctrine rejects the "function of legitimation" as a category in its own right, capable of directing interpretation of the law that protects representation itself. Thus, when examining the limits of parliamentary inviolability as a means of protecting the function of deputies, judicial review maintains a strict view of inviolability as a means to serve the free process of forming the will of the State, within the Congress. There may arise, then, the paradox of the deputy who repeats to the media contents of a parliamentary speech (not a shorthand version of it), projecting on public opinion the

legitimizing function of reproducing pluralism. In this case, according to Spanish constitutional jurisprudence, the instrument of inviolability would cease to operate. In this way, it confirms a restrictive view of the basic law regulating the political process, that should be directed exclusively towards the process of internal formation of the will of the State, within a well-limited area (Parliament), and not towards legitimating it before public opinion as a whole.

In the same way, from this functional point of view, the organic-formal limits that define the "political arena" as a place in which the political process of forming the will of the State is devised, cease to be important. In fact, the repeated problem of the supposed centrality of Parliament, or the attempts to "reinvent" Parliament, would cease to have immediate interest, since the legitimating function, projected through the image, would form an intercommunicating space not limited to a specific seat, but conditioned from a much wider functional viewpoint. A simple image, for example, of a political leader on television, may have more importance in the process of functional representation-legitimation of the system than the most serious speech delivered in an obscure session of a parliamentary commission. The organic seat of this function would not be Parliament, but rather the whole of the "McLuhan world", a transmitter of the functions of legitimation that actively assumes the political subsystem.

(2) Second, the functional approach helps to resolve the old and long question of the "class nature" of the State. While an understanding that is relatively "separate" from society is postulated, it is impossible to investigate a possible direct relationship between the State and society dominated by a class or class sector. Of course, this does not mean that there is a new kind of answer, but rather a non-question, in the sense of considering the State as a mechanism for self-reproduction or self-preservation of the existing system - according to the neo-cybernetic method cf. Luhmann, whereby it would be valid for any kind of system. At a moment in history when the radical barriers between the eastern and western blocks appear to begin to break down, there is no doubt as to the operability and usefulness of such an approach. Although at the expense of understanding it as a more or less restrictive approach, or as a simple renouncement of the formulation of certain terminal problems of the Theory of the State.

#### **1.4. The Theory of the State in the Post-Modern World**

Of course, the functional current creates not only this, but other new problems of apparent "non-identification" of the subject, in exchange for accepting a wider and more up-to-date view of the intercommunication process between Society and State.

Such intercommunication, according to Habermas leads to the intensification of a dual transforming process: the politicizing of society and the socializing of the State. The first is expressed basically from Keynesian interventionist policies; the second, from the increasing penetration of actively organized Society in the State. Now, this process of interpenetration should not be considered as an attempt to provide a causal-structural type of explanation of the State, but as a mere process of transforming it.

This dual phenomenon will produce a growing loss of self-rationality and self-accountability on both Society/State levels, which would be subject to an increase in the number of intercommunicating processes. This would mean that finally, Civil Society, understood as a pure concept, would tend to disappear, in the same way as the restricted idea of the State as producer of Law of legal positivism.

It is worth further examining the first of the postulates, in view of the growing relatively neo-liberal offensive, and in view of the aggressiveness of certain postulates formulated from sociology. In this context it could be rigorously asserted that "Civil Society does not exist", because it has ceased to be an autonomous unit, and becomes a subsidized, dependent society, physically conditioned, subject to directions of monetarist policies, to processes of exchange and consensus prompted by the public authorities, etc. It is not, then, a unit which has its own fully autonomous self-accountability, except as an ideal concept.

Theoretically, this phenomenon tends to have a possibly much more serious effect: the disappearance of the concepts of reference that support both points (market logic or State legal-political rationality): that is to say, an absence of instances of rationality to refer to both spheres.

Inevitably, this tends to show an overall loss of state rationality. That is to say, the impossibility to accede to a "rational" construction of social and political order, and consequently to the State itself. Thus, then, this would mean that from now on, we are entering a historical phase of post-modernity, with all its consequences. (This should not be understood at all as the end of History, but rather as a progressive acceleration of it, up to the point of limiting our chances of formulating "stable" rational paradigms for complete understanding and interpretation of reality).

In Constitutional Law, this has a clear and initial defensive reflex, reinforced by a self-restricting and vertically-oriented trend, which attempts to unite the vertex of rationality of the system in a sphere that is far-removed from

the political and social order. This is but the culmination of a trend implicit in European Public Law since the initial attempts to formalize, in German doctrine, the concept of State of Law (cf. Perez Royo). It would be a matter, then, of accepting an autonomous sphere of self-rationality, that of the monopolistic interpretation of the Constitution by the Constitutional Court (a trend which became evident in Spain in the famous STC on the LOAPA), as the only instance capable of ensuring a final rationality of the system.

Naturally, the initial impact of these phenomena on the Theory of the State can only be seen negatively. That is, in the sense of an anti-theory (absence of reference paradigms) or critical theory, confronted with the reconstruction of the traditional schemes of the demo-liberal State, which appear like elements of an ideological discourse defending representative democracy (the sovereignty of the people, Parliament as a dynamic center for the system, government as a guide for directing the political process, etc.). This could be intellectually explained by the stated absence of structural changes in the basic hierarchical organization of the State.

Observation of the overall rationality crisis of the system or the lack of traditional constructions on the demo-liberal State should not, however, mean renouncing to an attempt at systematic reconstruction of existing reality, although this reconstruction should be initiated in a merely partial or fragmentary way. Precisely the fragmentary nature of Claus Offe's work, and its incomplete nature, constantly being revised, clearly show the patterns from which theory should unite with reality, to be a "scientific" expression of it, and not a mere ideological construction not confirmed by the facts.

## **2. - STRUCTURE OF THE STATE: (I) THE BUREAUCRATIC SYSTEM**

This new kind of approach imposes upon the traditional framework of the Theory of the State a threefold line of analysis explaining the different processes of intercommunication between Society and State:

(1) First, the active projection of state mandates on the social milieu going through the basic nucleus of the State, the legal-bureaucratic system (that is to say, projection from within the State).

(2) Second, the creative projection of the politically organized society into the state system, through the representative process (or projection towards the inner State).

(3) Third, the direct projection of organized society on the sphere of political authority, relatively outside the political system (or projection from outside the State).

These are, the three major points in the attempts to reconstruct the Theory of the advanced democratic State: the crisis of the legal-bureaucratic organization; the changes in the system and in the political process; and finally, the changes coming from the active organization of society -corporatism- and from implementation of new kinds of demands on the sphere of public authority.

The first of these brings us to the best-known reference of social sciences, the Max Weber model, that taken as a point of departure for placing the study of the internal structure of the State, has a set of advantages. Basically, it is the possibility of obtaining a single position of reference from different viewpoints, in which we can place the concern for the principle of legality, structural analysis of the Government and even analyses of the efficacy of the various "policies".

The changes in the legal-bureaucratic organization are analyzed, following Offe's approach, throughout three series of overlapping and/or successive logico-historical models: action of public authorities adapted to legal regulations; action adapted to definite goals; and action adapted to more or less extensive processes of political or social consensus.

Each one of these three levels represents in some sense the paradigm of the mechanisms of action of the public authorities according to each one of the three successive State sub-models: State of Law, adaptation to regulations; Social State, adaptation to goals; advanced democratic State, adaptation to processes of consensus.

This succession would explain, in an overlapping logico-historical order, the progressive lack of adaptation of the former model to the functional demands that are deduced from the latter one. However, their simultaneous integration in a single real complex situation tends to create increasing cases of breakdown between the action of the public authorities and the actual demands and functional needs of an advanced democratic society, giving rise to a series of maladies and growing contradictions in the system.

Evidently, the problem is that each one of these three levels responds to one specific and inescapable type of demands, that overlap in the contemporary framework of Society/State relations: subjection to regulations as a guarantee against arbitrariness; adaptation to objectives as a guarantee of active efficacy;

consensus as a guarantee of acceptance and, at the same time, of fulfillment of public policies.

Therefore, in recent analyses of public management, we find the defense of a strategic position of the manager as an active and relatively independent mediator among different levels that would overlap and would be managed according to criteria of opportunity not sufficiently definable beforehand. (cf. Lax-Sebenius; Jepperson-Mayer; and recently in Spain, Barzelay-O'Kean).

For the legal-constitutional view of the State, the so-called Max Weber model would, however, have a special significance, because it is the expression of the inner rational order of the State-Law, that is to say, of constitutional regulations. In such a way that the examination, on a strictly bureaucratic note, of Max Weber's scheme has consequences of probably greater importance, when the approach is directed towards the legal order, the final theoretical support for bureaucratic rationality itself.

From the Theory of the State, there are two basic elements of projection of the legal system, understood as state order on the level of society. First, the "principle of verticality", a dynamic part of the system of sources, that, at the same time as it determines the logic of the bonds of validity of legal regulations, it involves an adaptation of the social organization, that is to say of reality, to the mandates of the State (which would, then, be an expression of the process of society becoming a State). Second, the "principle of rationality", according to which state mandates provide a model of organization of social reality adapted to criteria of justice, which are an expression of the very internal self-rationality of the regulations, and not of its temporary political supports. Both principles create an overall framework of security that is translated into the postulate of "calculability" or predictability of the final effect of state decisions (Gozzi) expressed in the form of regulatory mandates.

The final coherence of this rationalizing model of the State of Law (therefore, strictly, "Rational State of Law") is directly connected to the well-known Kelsen's fallacy that is expressed in the postulate of identification between the validity and efficacy of the norms. Consequently, this involves the presumption that rational order proceeding from the State (legally "valid") ends up really shaping the existing social order (legal "efficacy" of the regulations). That is to say, the presumption that rational social organization is actively "created" by the State.

The process of bureaucratic change imposed by development of the interventionist State, with its model of "management adapted to final aims", involves an initial restriction on the plans to bring the legal order into effect.

Garcia Pelayo has described this historical change as the passage from bureaucracy to "technocracy", introducing, in the criteria of Government decisions, elements of technical-functional rationality relatively distant from the legal order. Luhmann himself stressed the changes that are created with the passage from conditional to final imposition of regulations, that would give a greater degree of independence in decision-making to the peripheral spheres of Government. In this way, the final reality shaped by the positive action of the State ceases to be the direct result of the process of applying the law, and involves a notable degree of restriction in the final social efficacy of the regulations.

On the subject of public management expressed through processes of consensus, characteristic of the advanced democratic state, what is occurring already is a clear reversal of the principle of verticality (or projections downwards on the social system of the rational order of the State). The resulting situation will tend to adapt to principles of diversity and to impulses proceeding from the organized social framework itself.

The impact on the traditional legal world, although operating throughout a process initially released in the periphery of the system, has a great importance: reversal of the postulates of verticality and rationality demands a profound long-term examination of the actual position of the legal order.

This inevitably opens up the way to a new understanding of the legal system, that would be expressed by means of the so-called "legalism" method. This method should involve a non-instrumental view of the legal world, understood now as a simple framework of action, within which active subjects, -both public and private- implement, in an open process of intercommunication, their respective aims.

The legal system, then, would lose its capacity to form its own identity directly, and would become simply an instance of determining its rules of play. This would impose: (i) first of all, a necessary "de-legalization" of public policies inasmuch as they no longer proceed inevitably from a rational legal order, but are strategic formulations of aims, objectives and instrumental means, proceeding from the political system; but (ii), secondly, in joining a process of establishing consensus with organized society itself, the same political subsystem would end up losing its own relative independence and become a receiving or mediating unit.

It would then be a transfer, on the legal sphere, of the methodological postulate of overcoming instrumentalist ideas: the set of laws neither understood as an instrument of final action for the interventionist aims of the

social State, nor as an element of vertical-rational regulation of the bureaucratic system, but as a framework of open play for the active aspirations of the various subjects in the system.

Inevitably, this question reduces aspirations of integral rationality in the understanding of the legal-social world, and at same time breaks down the strict barriers between the spheres of Public Law and Private Law. Hence, the urgent search of the doctrine of a new kind of rationality (the lost paradise), that has one of its most original answers in the fundamental work of Gunther Teubner and his idea of "reflective rationality".

Therefore, the crisis of the inner core of the vertical rationality of the State (that was described in the bureaucratic order by the theoretical model of Max Weber's, and in the legal order by that of Kelsen) involves, as a clear phenomenon of post-modernity, the break from the principle of calculability or from the bond of rationality, understood as a cause/effect relationship between state action and social result.

For the bureaucratic order, this means a greater degree of independent decision-making in the peripheral areas of public management, because they are more able to produce or implement extensive processes of social consensus (which would be operated, however, in coexistence, with an inert centralization of the system's financial circuits).

For the legal order, the result appears to lead towards centralized restriction of the mechanisms of legal rationalization of the system that will now become subsequent control processes, basically jurisdictional in nature, and therefore having a relatively limited or fragmentary sphere of operation.

### **3.- STRUCTURE OF THE STATE: (II) THE POLITICAL SYSTEM**

Using these analysis patterns, a theoretical examination of the political subsystem "stricto sensu" (that is to say the axis parties-parliament-government) could be approached by taking into account the division between the two phases or instances that determine the dynamic projection of the political sphere of the State, namely:

(1) The idea of the political system as a process of projection/representation of the system from the outside inwards (from society to the State), through the mediating link of political associations or parties.

(2) Its idea as a process of politico-interventionist projection from the inside outwards (from the State to society), through the government's political and programmatic action.

It is a duality of processes that is shown in the well-known conceptual category of "indirizzo politico", so pleasing to the parliamentary tradition of European doctrine.

For Claus Offe, the first aspect should be found in the study of the representative system and basically that of the parties; the second, in the study of what is known as KWS (Keynesian Welfare State) or interventionist social State.

### **3.1. The Representative System and Political Parties**

We have already discussed how, starting with Habermas, the function fulfilled by the politico-representative system undergoes a shift from its traditional idea as an instrumental/causal link, towards its consideration as a functional instance of "legitimation" of the system. This shift would be the result of historical tension between structural limitation of the amount of state democratization (universal suffrage) and the constant increase in the processes of intervention and penetration by public authorities in society. All this is accompanied by the impossibility of finding additional supports for traditional legitimation, since historically an irreversible secularization of the bourgeois society has taken place.

Of course, the argument for legitimation may be accused of a relative ambiguity, at least on a legal-political note, despite the efforts at development made by Luhmann (which would explain, as we have suggested, the resistance of constitutional doctrine in accepting it as such a category and endowing it with possible legal effects).

On the other hand, Offe offers a much more direct approach to the problem: that of the tension or potential incompatibility between political democracy and market society. A contradiction that is designed clearly in the historical beginnings of the democratic state, both in the Marxist tradition and in the liberal-democratic tradition since Stuart Mill.

For this, he develops an interpretation of the modern theory of parties that leads to the shaping of the political subsystem as an instance of "stabilizing" the system, that is to say, as an element designed to ensure historical compatibility between democracy and capitalism. It is a line of argument that has well-known precedents, among others, in the works of

Schumpeter and MacPherson, and would be centered on the consideration of the party system as a mediating balance for the process of political interconnection between Society and State. One instance, then, that should be outlined as "relatively independent", endowed with sufficient capacity to organize and develop itself according to an impetus of its own: the logic of "political market".

Most notable in Offe is the categorical introduction of Otto Kirchheimer's idea of "catch all" party, as a type of party definitely overcoming the old conceptual schemes of parties of notables or parties of masses, up to Duverger. That is to say, the doctrine on parties based on an "instrumentalist" idea of relations between society or social classes, and political parties.

In practice, this type of "catch all" party produces effects of reducing or softening underlying social conflicts, in its projection on the State, thus ensuring not only a greater ideological neutrality of the political sphere of the State, but also a greater integrating pragmatism in the action of government. This is achieved, also, together with a share of symbolic legitimation achieved and projected through the mass media. In fact, the type of "catch all" party is historically a clear instance of the stabilization of the advanced democratic State.

On our part, we believe that Offe's line of argument, centered on the "type" of party, may be supplemented with Sartori's work on party "systems", particularly with his idea of party-center, within its original and well-known model of polarized pluralism. This would show more clearly than the old two-party system, the characteristic trends of advanced democratic States. Both sub-models ("catch all" party and center-party or party in government) in fact have points in common: ideological ambiguity, strong leadership, internal centralized and operational structure, strategic discourse with extensive capacity for projection, etc., and of course an excellently-proven degree of final efficacy: their real capacity to win elections.

In opposition to this positive interpretation of the functions effectively undertaken by the political system, its counterpart would naturally appear: the system's self-denying trend, as a result of the growing contradiction between this unification (selective) of the process of representation, and the progressive dismantling of the vital units of attribution and its consequent loss of identity.

It is certainly the result of a historical process inherent to the very development of the western democratic State: the rise of the citizens to subjects of the sovereign will of the State, while at the same time the bonds of union or

attribution between the vital social spheres and generalized public life are broken.

After the crisis of the last great idea of unified explanation of social pronouncement (belonging to a social class defined on the basis of objective interests), there basically seem to be two reactions:

a) On the one hand, the relatively paranoid use of the vote in the electoral process: as Offe says in "Competitive Party and Collective Identity", the representative process would be directed through "ad hoc" utilitarian calculations that may give rise to a variable and unstable behavior on the part of the electors. One votes once as a taxpayer, the next time on behalf of one's children at school, the time after that in reaction to acute conflicts of foreign policy, etc. (to which we should add the variations imposed by the various territorial, regional or local spheres, which play such a significant part in the Spanish political process).

b) On the other hand, the trend towards the formation of new organizational movements that are projected on immediate social units, relatively outside the political process, and becoming specified in a policy of protest against attacks on their very identity and independence.

The suggestion (put forward by Offe) that a new type of party may appear, capable of integrating this sector of social movements into the parliamentary sphere by offering them reciprocal interconnections, sufficient public projection and means of political self-accountability, is for the present a logical way out from the theoretical point of view, but probably has little empirical force.

### **3.2. The Political System and Government Action**

Now, historically, this political instrument for stabilizing the structure of the democratic State has undergone a process of tension resulting from the very interventionist impetus of the KWS. That is to say, it is a new type of political structure that should create a set of active political responses to civil society.

Offe's analysis in his "Competitive Democracy Among Parties.." is found here within this typical, predominantly socioeconomic approach characteristic of the doctrine of the "welfare state". It is an analysis of economic problems, stabilization of demand, a study of the relative inability of the KWS to resolve some of the new emerging problems that interventionism itself is causing (unemployment, financial deficit, environmental problems, etc.).

From a more classical (and perhaps more traditional) viewpoint of strictly "political" analysis, it would be more a question of examining the capacity for dynamic response of the structure of the advanced democratic State (and of its parliamentary system, in Europe) to the demands created by the system. In conventional doctrine, this capacity for dynamic response by the system's politico-representative sphere is expressed through the well-known concept of "impulse" or "indirizzo". On the one hand, it shows the penetration of Society in the State through the tentacles of communication of the parties; and on the other the active response of public authorities through the programmatic link that, from the parliamentary majority, influences government action. That is to say, the government's program, shaping reality from above (output), stems from the democratic representative process developed from below (input), by the political parties.

A study of the advanced democratic state appears to increasingly demonstrate the existence of considerable "breaks" in this traditional circuit of explanation of state dynamics:

- As far as the "input" phase is concerned, stress should be placed on the reasonable doubts about the degree of internal democracy in the parties which, although declared constitutionally, clashes with the strong centralization imposed by the logic of the "catch all" party. On the other hand, the trend towards electoralism and the consequences of intensifying political competition through image, tend to shape the party's "Program" as a mere strategic item serving the seductive or cosmetic needs of the campaign, and in no case as an objective part of a theoretical contractual or mutually binding relationship between citizens and parties.

- More important, however, in the "output" phase, is the overload of demands for intervention, which produces a collapse of the response circuit, due to a breakdown in the capacity for managing State regulations. It would lead to "do nothing" as a paradigm of government action, or what is the same, to the exclusively cosmetic and legitimating direction of government policies, renouncing the development of deep-seated policies for changing the social reality. This "non-action" (or absence of interventionist action in the traditional sense) would be a consequence arising equally from other factors. In Sartori's scheme of polarized pluralism, the center position was in fact considered as a creator of retroactions, because of the risk that conservative or progressive policies would end up being absorbed or taken over as their own, by right or left-wing opposition forces. Equally, analysis of the real capacity for innovative, or non-compromised, budgetary availability of governments shows that it is in practice, according to Rose's analyses, fairly limited.

On the other hand, the growing complexity of the system tends to shape the possible responses of public authorities as mere actions of adaptation linked to a changing, and progressively mediated, situation, and not as results of a "Program" (rational and "a priori") that would preside over government action. In Offe's words, "State regulation in many of the spheres in which it is applied (from education policy to energy policy) is faltering with decisions that do not meet the problems, that lack intelligence, and are scarcely able to assimilate the experiences already gained, which are necessarily inadequate, since they lack the relevant knowledge and/or capacity to acquire it rapidly" (cf. "of neocorporativism").

For contemporary political theory, this phenomenon should be emphasized with all its importance: the overload of the governmental system appears to create, as an initial logical response, its collapse, and as a result a relative deficiency in the ability to lead the system as a whole from the political center. For Luhmann, this phenomenon leads to the risky negation of the very existence of a "center" of the system, that would be replaced by a theoretical functional balance between functionally separate or independent subsystems (cf. his "Political theory in the Welfare State").

Except for those elements that configure the system's security in an immediate way (both security in its traditional strategic sense, and also monetary stability and control of inflation, etc.), the political "center" of the State would effectively be losing its capacity for leadership or active shaping of the real social situation, at least immediately.

Or, in other terms, the projection of the political sphere towards a predominantly legitimating/stabilizing function, ends by blocking its instrumental function, as a transmitter of unified class interests or projects. The system is stabilized, then, at the expense of blocking the communicating function of the political subsystem: both the social and political processes run the risk of becoming henceforth completely separate spheres.

Claus Offe's answer to this dilemma is one of the most innovative contributions towards understanding, from a different point of view, the process of implementing decisions in the advanced democratic State. His theory of "selective mechanisms", (although it is just barely developed, and has not even been continued in subsequent works) nevertheless offers an important reversal in the overall model of understanding the process of intercommunication between Society and State. The State-government would lose its active position as "creator" of the social-rational order proceeding from public mandates, and would assume a passive, receptive position, absorbing the active aspirations

arising from society as a whole, that would be filtered through a different selection framework.

The advantages of this new approach to understand the political process in advanced democratic States are obvious. First of all, active participation of the social framework as a transmitter of demands on the State would not be conditioned by exclusions "ab origine", in the sense that there is no reason for social demands to be monopolized in their procedural implementation, by the party system. Secondly, the central instances of the system may responsibly assume, and without risk, a position of effective ideological neutrality, in the security that, finally, the demands actually implemented will be those which more effectively ensure the reproduction/adaptation of the system. Thirdly, the separation between the various levels of selection, by causing a fragmentation of the circuits of exclusion, or of negative selection, ensures non-interference among different functional subsystems. This allows a less wear or a fragmentation of the critic-negative attributions on the whole, which would then ensure a greater final stability of the system ("entropy" as a factor of dynamic stability of the whole).

In conclusion, we would have before us a phenomenon of complete reversal of the idea of direction. Strictly speaking, the advanced democratic State would thus show a lack of active direction of its own, in the traditional sense of the function of impulse (except, we repeat, in the functions inherent to security). Therefore, the historical meaning of its political projection can only now be deduced from the process resulting "a posteriori": "a priori" rationality, characteristic of the context of modernity is, then, being replaced by a limited "a posteriori" rationality, functionally adapted to the new complex situation. The idea of the Planner State -the supreme expression of the ideal of the rationalizing "a priori" State-, is suffering a radical reversal as a result of the historical impact of the specific cases created by the development of the advanced democratic State, on the social interventionist State. This would show that, logically, we are entering a model of "Post-social State".

Naturally, it is clear that the transforming process has a twofold meaning for the "political system". On one hand, it means the loss of its instrumental capacity for impetus, or a crisis of rationality for the center of the system (in Luhmann's sense). On the other, it means the strengthening of its functional stabilizing/legitimizing function. Therefore, the phenomena of "re-politicization" of the system, or of an increase in the presence of the political subsystem over the whole of society, in practice bring about contradictory, and in some measure dysfunctional results, at least in the sense that the "re-politicizing" effect (in its stabilizing/legitimizing function) should, in theory, coincide with a parallel "de-politicization" in the instrumental/active sense. However, this does not usually

happen in practice, but rather demonstrates a disturbing effect of the re-politicizing process. Frequently, tensions finally rather develop through circuits outside the legal-political system itself; that is to say through a half-submerged underworld of relations between society and public bodies, of networks of clients or mechanisms of corporate connection.

#### **4. ORGANIZED SOCIETY AND CHANGES IN THE STATE**

We have now reached the third level of understanding of the changes occurring in the advanced democratic state, those that arise from the phenomena of active organization of society itself, and its non-mediated influence on public authorities.

There are two variables through which the processes of change imposed by organized Society on the structure of the State could be established:

(1) First, the "position" adopted by the organized group, from the point of view of its "status", in front of public authorities. In particular, the possibility that in undertaking a function of direct mediation or transmission of demands on the State, it ends up developing substitute functions of the political parties. This, of course, would mean, firstly, renewing the demand for internal democracy in groups and associations, as elements of the democratic State itself, and secondly, devising a sphere of unrestricted pluralist responsibility on the oligopolic fringe of the political parties, which would be directed towards a kind of decentralized macro-regulation.

(2) Second, the "type of demand" that is projected towards the public sphere, which would involve a certain kind of "function" to be fulfilled by the State. Functions that would be shaped not in an autonomous form, but in accordance with a certain type of receptive position of the public authorities.

Both variables could in turn be formulated in a double logical-historical series, one relating to the active phase of the Social State and the other belonging to the subsequent moment of development, that of the advanced democratic State.

I) The first moment (that would correspond roughly with the period when European social democracies were at their height) would become the selective attribution of a certain type of public "status" to social agents capable of acting as unified mediators of the social process (that is, basically employers and trade unions, despite the contradictory functional imbalances that this creates). It would also involve a certain kind of clearly inflationary demands, that is to say

demands generating a State-induced growth, by being transmitters of demands for intervention, for welfare, or for positive action by the "welfare state".

In this context, which is relatively classical within the general KWS framework, the social doctrine involved in the analysis of the "welfare state" has underlined basically two processes of change or development. On one hand, the gradual consolidation of the new paradigm of "complex societies" (cf. Pasquino), involving a relative de-monopolization of the capacity for representation of employers and trade unions, and the logical trend towards progressive fragmentation of organized groups and the associated processes of consensus. On the other hand, a trend towards "monetarization" of the contents of public services which, as a result, would now cease to generate an institutional growth of the State machine, considered to be an active supplier of services, and would become a channel for public financing and subsidy that, in the end, feeds certain sectors of the private market itself. In this case, then, the growth of the State would be confined basically to its more or less centralized fiscal and financial system.

II) Offe's contribution regarding the changes taking place in the context of the second moment, that relating to the phase of the advanced democratic State, has a twofold interest:

(1) First, the identification of a new original type of demand, proceeding initially from new social groups, that would not create a trend towards the induced growth of the State but rather the opposite, towards a non-growth of the State, inasmuch as what they attempt to protect are certain spheres of life from State intervention. They involve, then, a "negative" idea of politics, pursuing the defense of a physical and/or moral territory, the integrity of which is essentially non-negotiable. The "neo-liberal" results that this would entail for the legal sphere of the State are obvious: from this point of view Law should, once again, be an instrument for limiting State intervention, guaranteeing the autonomy of certain socio-territorial spheres of life.

(2) Secondly, in Offe's discourse there is an inevitable approach in his argument towards the well-known scientific current known as "corporatism". Nevertheless, it is true that, as a basically sociological current, corporatism at present lacks sufficient theorization on the State, and only in some recent works by Schmitter's emphasis is placed on the phenomenon of the dismantling of state government monopoly.

Of course, the study clarifying the meaning of these new social movements is at present extremely complex: confrontation between the psychological approach and the structural approach, an analysis of their

processes of expansion, deepening and irreversibility, etc. One possible scheme for coming close, from the point of view of the Theory of the State, would, of course, be to examine the effects on the state sphere, with its self-paralyzing consequences in the use of power, and the hindrances to the capacity for learning it (the "learning Process"). This would be an example of a certain type of critical theory. Thus, Offe emphasizes the confrontation between new basic values of "autonomy", "identity", "authenticity", "peace", "environment", which entail categorical rejection of the dynamics of military, economic, technological and political rationalization of the State. This involves discrediting formal adherence to any rules of play, inasmuch as traditional institutional mechanisms are considered to be too rigid to detect and absorb these problems of advanced industrial societies.

The coincidence between both two phenomena (new social movements/corporatism) shows, then, a clear line of development that clashes head-on with the established paradigms of the Theory of the State. On one hand, there would be a trend towards the generalization of demands for autonomy, or non-intervention by the public authorities, which would, on the other hand, coincide with the drive towards forming units of independent management for social/territorial spheres themselves.

If sufficient stress has been made on the initial effect that this series of phenomena would bring about in dismantling the State (particularly in the economic field with re-privatization of the public sector), other consequences of the process appear to be more confusing at present. We basically refer to two: the trend towards an original process of "socialization" (as an added and/or alternative process to that of privatization) of areas of public management connected with the "public service" sector (or with the consumer goods market, as Offe calls it); and the trend towards a parallel increase in the system's new and original "regulatory" requirements.

The first of these, that of socializing State action in certain sectors of intervention, should be seen as a phenomenon of direct penetration of organized or self-represented society in public spheres. It is, however, a phenomenon that operates in a context of deep fragmentation of the social structure that acts as a reference, and so, strictly speaking, it could only happen properly in societies with a vigorously formulated or organized social fabric (if not, it would give rise to interpenetration between processes of political hegemony and networks of clients).

From a structural point of view, this process would result in the formation of institutional spheres (semipublic, semiprivate) of defense and management of social interests perfectly defined (either from a sectorial point of view, such as

health, consumer affairs, culture, etc. or from a social/territorial point of view). There would be an area of coincidence between the formation of the so-called PIGS ("private interest governments") as a result of the active organization of society; and the phenomenon, which is in principle alternative, but at the same time parallel and/or additional to those, of the so called QUANGOS ("Quasi non-governmental organizations") that would be the result of a process of institutional-autonomous development of the State itself: public firms, independent companies, corporations, etc. (cf. Nonet, Selznick).

From the legal point of view, there would be a demand for each institutional management unit to provide one type of service or product for the citizens/consumers, and to take over an ad hoc representative organization in which those actually concerned, considered as clients, would take an active part, together with the suppliers and managers themselves. This representative organization may exist beforehand, as a result of social self-organization, or if not so, it should be "created" by the public authorities. The problem in this case would be that this creation would arise from a parallel attempt to gain politicized control, in which case a malady consisting of politicized client control from above of the social process would be generated.

We must stress again that there is no reiteration of an amorphous "participationism" such as the one repeatedly advocated at micro-political levels by certain forces of the left, but an effective capacity for formulating representation adapted to the new really existing social processes. Of course, the disadvantage would be that top organizations with a potential capacity to control or manipulate these microstructures of participation/representation would not only be political parties, but actual social macro-organizations, such as trade unions or employers associations.

This difficult shaping of the socializing process logically helps to hinder resolving the legal change of the system. As a general criterion we could say that the new interventionist Law would cease to be "interventionist" in the classical sense, and would become a type of Law that we might define as "statutory". That is to say, a law that creates institutions ("institutional design" in Nonet-Selznick's sense) endowed with full functional autonomy and a strong social focus. As a meeting point between the institutional decentralization of the State and the active formulation of organized society, there would be a Law endowed with clear "contractual" contents. That is to say, there would be, to a certain point, a "receptive" Law, that would undertake, albeit only partially, claims by organized social or professional sectors to organize themselves. Finally, inasmuch as these semi-corporate agreements give rise to semi-public institutions that receive budgetary awards from the State, the demands both for guarantee "erga omnes" and for budgetary award, as well as plural legitimation,

would lead to a preference for the "form of Law" giving rise then to a trend towards the "re-legalizing" of the system.

The structural features of the process, that would take place in a fragmented way, and demanding close proximity of intercommunication between society and State, would make regional or autonomous Parliaments appear as the most strategic potential protagonists of this phenomenon. In the end this would lead to a new type of interventionist Law, that would be legal, statutory contractual and receptive in nature.

In any event, apart from the provisional ambiguity of these trends, it would be clear that the responses from the legal system cannot be established in terms of determining new values. As Offe has categorically demonstrated, it is not strictly a question of new values, but of the same values of the advanced modern age, established even in a relatively "conservationist" fashion. Therefore, the only coherent stance in terms of method, from the legal point of view, would consist in an appropriate "legal opening" to the complex context of the new situation which is undergoing change.

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