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Challenges to the Idea of a Constitutional Polity

Abstract: This essay defends the claim that democracy—the rule of the people—is only possible by means of a constitution. In John Searle’s analytical approach, democracy is based upon the distinction between regulative and constitutive rules; the latter create institutional realities which increase the capacity of human societies to mobilize their resources most effectively for a good social and political order. A case in point is the concept of the “will of the people,” which populist movements in several liberal democracies have been invoking as the truly authentic source of democratic rule. The author raises the question of whether modern-day dictatorships can be based upon the idea of democracy.

Keywords: constitution, constitutional polity, democracy, law and society

Law and Society in the Face of Systemic Changes

I

Law and society are not two items which need an “and” in order to be connected with each other. No—they are inherently associated: think of the wisdom of the Greco-Roman social philosophy summarized in the famous aphorism “*ubi societas, ibi ius*” (where there is society, there will be law).

If law is so omnipresent in all types of society known to us—from ancient Greek through Roman society, from medieval European to modern societies—why then is it so special and, as I will argue, essential for the character of modern society? In what follows I will describe how modern societies are shaped by law and, accordingly, are specifically vulnerable to developments that weaken or undermine its key role. In several constitutional democracies an increasing number of critics are uttering their dissatisfaction with the system of governance because, they argue, it does not reflect the needs of ordinary men and women—the people. They claim that the “will of the people” is a more authentic and hence more legitimate source of democratic rule. I want to defend the idea that appeals to the “will of the people,” as the true basis of democratic rule, are misguided. My argument is not political; rather, it is based on a socio-legal analysis.

II

Legal sociologists and jurists alike distinguish two kinds of rules in their respective analyses of the role that legal rules play in the functioning of modern societies: regulative and con-

stitutive norms. The former influence and direct the natural agency of individuals by way of commands, prohibitions, or incentives; the latter add new capabilities to the individuals' natural ability to act, allowing the individuals to create new social facts, nonexistent in the material world. For instance, a person's power to transfer assets to a successor after death does not ensue from any natural capacity of this person. In reality, it originates in the validity of legal norms, which specify the conditions under which the natural will of a person acquires the status of a more powerful legal will. It is the law which endows the natural will of a person with the power to create rights and obligations of other persons even after death. Due to its generally binding quality, the law can even create artificial persons (for example, corporations) and scarce goods out of mere paper (for instance, money) and hence generate a whole social world having no correspondence to the world of physical facts.

As I said, rules that, due to their generally recognized validity, generate those social facts are constitutive rules. The most important and highest ranking constitutive rule is the constitution, which carries its function in its name. Its function is not restricted to limiting the powers of the state. Nor is it a mere juristic framework for the institutions, functions, and competences of the state. Rather, in our times, the constitution has evolved into a normative structural design of the polity, comprising the different areas of political authority, civil society and its appended public sphere, the field of economic transactions, and even the private sphere of individuals as well. In other words, the constitution generates a whole social world by transcending the horizon of the world of tangible facticity.

This is a world of social facts, as distinct from purely physical facts such as a human body, a tree, or a car. John Searle, the American philosopher and author of the seminal book *The Construction of Social Reality*, realized that social facts created by constitutive rules can exist only through representation. A piece of property like my car can exist as my property—that is, bestowing on me exclusive control over the physical object—only because of the concept and institution of property. Absent this concept and institution, the car is a purely physical item which I “possess” only as long as it is under my physical control. A ten-euro bill would be merely a piece of paper without the institution of European currency created by the constitutive rule enacted by the parliaments of the EU Member States and recognized as generally binding by their citizens and beyond in the international financial markets.

Since institutions have come into existence through constitutive acts it follows that they disappear as soon as the pertinent constitutional rule is annihilated, that is, invalidated. Of course, the practice of the institution created by a constitutive rule may survive in the habits of many people: after the introduction of a new currency people may cling to the old and invalidated money for a certain time, but its generally binding force has vanished, and the functioning of society no longer depends on its existence.

III

After these somewhat abstract considerations of the societal relevance of constitutive rules I will now turn to some important practical implications of society's most important institutions, which are based upon constitutive rules.

In March 1849 a revolutionary German constituent national assembly proclaimed the Constitution of the German Reich with the aim of transforming the plurality of several

mostly minor, absolutist German states into one German constitutional nation state. The German poet Ferdinand Freiligrath, who had actively participated in the revolutionary movements that finally engendered the constituent assembly in the Paulskirche, celebrated this revolutionary political event in a poem equally enthusiastic and clairvoyant: “Yesterday, brothers, you were just a horde; today, oh brothers, you are a people.”¹ What did he mean? He recognized that a multitude of individuals living in a pre-political social state of affairs, “brothers,” that is, a clan, family, or some kind of local primordial community, had transformed themselves into a social entity capable of acting and interacting beyond the constricted boundaries of kinship and local familiarity.

Obviously this transformation of pure facticity—from “a horde” into a “people” or brothers into citizens—was tantamount to the establishment of an entity that can exist only by way of representation. This is not because of the large number of individuals comprised by the concept of “the people”: after all, a horde may well consist of a large number of individuals. No, the reason is that a “people” or a “citizen” are not physical facts that can be experienced by our sensory nervous systems. Rather, as impalpable and invisible entities they exist only by way of being represented, that is, they are rendered present in the guise of an institution. This is the essential meaning of representation. It has roots in different variants of Christian theological doctrine: for instance, Christians recognize the presence of Christ in the celebration of the sacrament of the Holy Communion.

Likewise, the people of “we-the-people” represent the unity and sovereignty of the multitude, which has transformed itself from a mere horde into a people by the exercise of what we call constituent power. By this very quality “the people” is a fact: not a physical but an institutional fact, embodying qualities and capacities that transcend the qualities and capacities of the mere facticity of a horde, that is, a physical multitude of people. Its quality as a people is represented in a great number of symbols (the flag, the state name, the anthem, etc.) and actions.

The act of a horde’s self-transcending opens new horizons of meaning and collective action. The first and most important new potential accruing to members of a former horde that has transformed into a people is the capacity of those members to conceive of themselves as a Self, a status the German historian Reinhart Koselleck termed a “collective singular.” It is a “We” that has a distinct collective identity. This gives the people the potential for self-determination, including the capacity to “establish justice, ensure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity”—these famous words of the preamble of the US Constitution are known to all.

The point I want to make is to draw your attention to the paradoxical structure of the first and truly fundamental sentence of the US constitution. “We, the people of the United States...do ordain and establish this Constitution” seems to presuppose the prior existence of the people as a constitution-making actor—but as a matter of fact the people comes into existence only by means of this very constitution itself, though it appears to have been produced by the people. The people exists only insofar as, to use a formula of John Searle’s, “it is represented as such” (2006). And it is represented as such only by the institution of

¹ “Noch gestern, Brüder, wart ihr nur ein Haufen; ein Volk, o Brüder, seid ihr heut.”

the constitution, which has transubstantiated a horde into a people. Contrary to a widely held assumption, a constitution does not restrain a people; it creates the people in the first place and bestows upon the people the capacity to rule as a collective person.

IV

What does this mean for the merits of the claim that has become conspicuous in a growing number of liberal democracies, namely, that democratic rule should be exercised through the “will of the people”? It is alleged that the rule of the “will of the people” is a more authentic, hence more legitimate form of democracy, than constitutional democracy. This latter form of government is, so the contention goes, a regime of domination over the ordinary people, exercised by alienated elites sitting in parliaments, executive bodies and courts, and especially in constitutional courts.

While we roughly know the basic legitimizing principles of constitutional democracy, we know little about the legitimation of political power by “the will of the people.” Most people believe that democracy is a form of government based upon the “will of the people,” and was somehow in the more or less remote past enacted by the constituent power of the people and represented in the product of the constituent power, the constitution. They are right, although they may not be aware of the paradoxical character of the origin of the constitution. But this is not what the proponents of the “will of the people” mean. They mean the will of the people in its respective current composition, not the will of the founding generation deceased decades ago and whose will is petrified in the constitution. Their idea of democracy requires the presence, not the representation of the people.

How can we conceive of the legitimacy of public authority conferred by the will of the respective current people?

Note that among the three types of legitimation of power that Max Weber famously distinguished, the “will of the people” is not included. According to his typology, “the ‘validity’ of a power of command may be expressed, first, in a system of consciously made rational rules.” It can rest, second, upon personal authority founded upon the “sacredness of tradition” or, third, upon “the very opposite, viz., the surrender to the extraordinary, the belief in charisma, i.e., actual revelation of grace resting in such a person as a savior, a prophet, or a hero.” (Weber 1976 [1922]: 954) Why did he not involve the “will of the people”? After all, this should be the only legitimacy of the “power of command” in a democratic polity, and hardly any other modern social scientist has analyzed democracy in greater depth than Max Weber.

The reason for this omission is that for Weber the legitimation of modern democracy rests on the first principle enumerated in his typology, that is, “a system of consciously made rational rules,” of which a constitution is, as I have tried to explain, the most prominent example. This, of course, is not a satisfying answer for the advocate of the legitimizing principle of the “will of the actual people.”

Let me briefly explain the meaning of “the will of the actual people.” Those who claim that principle speak as follows: We, the people are the real, the genuine people, in contrast to those who occupy the higher ranks of politics, the administration, culture, and other institutions of society—the elites. The elites, alienated from the people, do not understand

the “will of the real people” and do not care about the needs of the “real” people, the forgotten and the left-behind. Therefore, we want the power to go to the real or genuine people and to push the elites out of their power positions. Their power is illegitimate. Whenever we get only a small tail-end of power in this elite-dominated and elite-determined political system we will use—and are fully justified in using—this power to radically change the institutions of the traditional political system and to edge the old elites out of their power positions. After all, we are the real and genuine people.

Lying underneath is a particular view of what constitutes a “genuine” or “real” people, namely, a homogeneous united body which has a uniform will, that is, uniform ideas, emotions, desires, the same friends and enemies, and so forth. This is starkly reminiscent of Rousseau’s almost romantic idea of law-giving in homogeneous societies. In the *Social Contract* he wrote that “The first man to propose... a law is only giving voice to what everyone already feels, and there is no question either of intrigues or of eloquence to secure the enactment of what each has already resolved to do as soon as he is sure that all the others will do likewise” (Rousseau 2006: 149).

The fact that in real life the people in democratic societies are divided by a great number of diverse world views, moral convictions, socio-economic interests, lifestyles, and so forth does not impress the advocates of rule by the “will of the people.” They can attribute all these characteristics preventing the multitude from becoming one united body—the “genuine” or “real” people—to the working of the inherent individualism and anti-communitarian spirit of constitutional democracy.

V

As a matter of fact, there may be some truth in this claim. Constitutional democracy developed first and took roots in advanced Western industrial societies. The basic economic and cultural structure of such societies was largely individualistic and has remained so or has been reconstituted in those countries where constitutional democracy was temporarily abolished. The fitting societal—and especially political—pattern was and has remained pluralist; constitutional democracy rests on the presupposition that a people is always a We, a collective singular consisting of a plurality of very diverse individuals, not an I. Remember the famous definition of a “*nation*”—the French term for “people”—which the Abbé Emmanuel Sieyès coined: “A body of associates living under common laws and represented by the same legislative assembly.” A people/nation is a man-made artifact; it is nothing natural nor “what everyone already feels,” to repeat Rousseau. An important implication is the constitutional principle that each and every individual has the right to equal treatment, but also the right to be treated as an equal—which means the right of very diverse individuals to equal respect and concern.² This is the inherent spirit of the institutional setup of any constitutionally established political power.

So the question is whether the idea of a pluralist system of democratic political power and the concept of the rule of the will of a united homogeneous people are compatible with each other. Unsurprisingly, my answer is no.

² For this distinction cf. R. Dworkin (Dworkin 1978).

The reason is quite simple. It follows from the inherent logic of constitutional democracy and its starting point is that democracy—the self-rule of the people—requires the representation of the whole people in the institutions of government. The government is the guarantor of the welfare of the whole people, which is ordinarily called the common good. The ultimate end of government is not the welfare of a majority or a minority but of the entire people.

If the entire people is split into a plurality of groups holding different ideas about what the common good requires, these groups can either share the power positions of government and find compromises in order to pursue consistent policies—this would be the case of “Grand coalitions”—or they can compete for the exclusive occupation of the power positions of government for a limited period of time (a legislative or parliamentary term). Those who have prevailed in the competition and are authorized to hold the government’s power positions may implement their view of the common good, especially their interpretation of distributive justice. Given the contested character of any distributive pattern which any government may install, there will always be winners and losers. How does that fit with the principle that the government in constitutional democracies has to represent and care for the welfare of the entire people, not just a majority? How can there be winners and losers of democratic rule?

Constitutional democracy’s solution for this unavoidable dilemma of any kind of democracy that recognizes the plural character of the people is twofold: first, constitutional democracies establish institutional guarantees that aim to protect minorities, including those defeated in the last elections, against deprivation of their established conditions of life. The constitution stipulates fundamental rights and their protection by a judicial power which is independent of any control by the political branch of government. Second, constitutional democracy involves the institutional guarantee of the equal chance of all competitors for the democratic conquest of political power by way of recurring and fair elections within not-too-long time spans. In addition, there are institutional precautions against attempts of the majority in power to create competitive advantages for itself in future elections. In other words, even though modern societies and their constitutional systems are inescapably confronted with the fact of the plurality of values, world views, interests, hopes, anxieties, and so forth, of their citizenry, they do not relinquish the basic concept of forming and containing one people. They do not adhere to the Rousseauist tenet that diversity and dissent undermine the general will (Rousseau 2006: 153f) and are pathological deviations from “true” and “genuine” peoplehood.

Still, it cannot be denied that laws which have been enacted by a—possibly very narrow—parliamentary majority do not represent the will of the entire people and yet these laws are binding upon them. Is not the accusation justified that many laws do not express the “will of the people”?

Well, it would be justified if representing the whole people and ignoring its division into plural political forces were possible. In fact, two offers in that sense are before us. The first example is President Trump’s claim to be the voice of the American people. He stated at the Republican National Convention that “My pledge reads: ‘I’m with you—the American people. I am your voice.’”³ Trump was claiming the privilege of knowing and

³ <https://www.politico.com/story/2016/07/full-transcript-donald-trump-nomination-acceptance-speech-at-rnc-225974>.

feeling what the American people as a whole feels, hopes, demands, and so forth, and the ability to give those things expression. Such a claim is obviously and demonstrably false; it was empirically disproven by the result of the presidential elections, in which Trump did not win even the majority of the votes cast, let alone the approval of the American people as a whole.

But Trump's claim to be the voice of the American people was not only empty campaign talk. The practical ramifications of his meaning come to the fore in his self-congratulating assertion that he—in contrast to ordinary politicians—is delivering all the pledges which he made in the election campaign. In other words, he equates the “American people” with his voters and identifies his rights and duties as president with his status as a campaigner. It is needless to remark that campaigners can promise whatever they find useful in order to maximize their votes in elections because they have no power over their fellow citizens. A president, on the contrary, embodies the power of the whole people, including the power to bind all citizens and the nation as a whole. This entails a different ethical and legal standard of political action, especially the requirement to pursue the welfare of the whole nation, not only parts of it. Thus the officeholder-as-campaigner is no proper answer to the question of how to establish the “will of the people” as the truly legitimate source of political power.

The second possible solution to the problem of how to make way for the “will of the people” in sometimes deeply divided societies is the embodiment of the whole people in one person who—as a constitutional president or outright autocrat—involves the entire people in its plurality. He or she is expected to overcome the society's internal fragmentation by the charisma of the office—“the belief in the specific state of grace of a social institution,” as Max Weber defined it (*op.cit.*: 1140)—or by the “gift of grace,” that is, the “quality of an individual personality by virtue of which he is considered extraordinary” (*Weber, ibid.*: 216, 241), as Max Weber defined personal charisma.

Elected presidents need not be charismatic; even if they are, their power rests upon the constitution, which determines the rules according to which they have come to power. A strongman who has come to power outside the rules of the constitution may or may not be charismatic—according to democratic standards his rule lacks legitimacy. But what if he or she is very popular among the citizenry, with the effect that his claim to embody the unity of the people is widely believed? From the angle of constitutional democracy, the principle applies: the proof of the pudding is in the eating, that is, let the people approve of this claim and hold elections.

However, if we look at Turkey, for instance, we can observe to what degree a ruling party or president can shape elections and seize quasi-dictatorial control of the country by legal means. To quote Kim Lane Scheppele's conclusion of her research in the field of comparative constitutional law: “First, they come to power in democratic elections and then they pull up the constitutional ladder after themselves so that no one else can win the next election, or the one after that.” Popular or populist autocracy is not a way to create a united people with one homogeneous will. It cannot overcome the diversity and plurality of “we the people”; it can only render the people's diversity and fragmentation invisible.

This is not merely a theoretical reflection but is confirmed by the empirical fact that autocracies desperately need and ruthlessly apply repression in order to make public dissent,

diversity, or criticism of their regime disappear from the public realm. Once the people in their plurality are deprived of their right to communicate and publicly to challenge the rulers, they are disempowered. Only then is it possible for rulers to maintain the claim that they represent and execute the “will of the people”—which is in fact a disempowered people (the silenced dissenters are more or less openly defined as traitors or agents of foreign powers and not belonging to the people).

Carl Schmitt (2008: 266) famously contended that dictatorship is only possible on the foundation of democracy. For him democracy was the rule of the homogeneous national people, not the “we the people,” but “I the people.” He was right: the “will of the people” as the basis of democratic rule is only possible if the fictitious “I the people” is produced by all means of repression, persuasion, or seduction. The result is any type of dictatorship. If we believe in “we the people,” that is, a discursive form of collective self-determination, we must reject any variant of “I the people.” And this, in turn, requires the recognition that “we the people” can rule ourselves only by means of a constitution.

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