

CONSTITUTIONAL DEMOCRACY, OR HOW TO PREVENT THE RULE OF THE PEOPLE

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I INTRODUCTION

We speak about "democratic constitutionalism." Upon using this expression, we are ready to entertain our minds with the difficult problems that the concept has to face today. Dealing with those problems is an enterprise that is both perfectly justified in academic terms and badly needed in "real-life" terms. But one preliminary consideration might not be necessarily out of line here: namely, it might be useful to try and see once more what the term "democratic constitutionalism" denotes. Before exploring possible ways and techniques of improving constitutionalism, we need to ask what is to be improved.

The main purpose of this sketchy contribution is to argue that the alleged tension between the liberal concept of limited (constitutional) government, on the one hand, and liberal democracy, on the other hand, should not necessarily present a problem for the conceptualization of a well-ordered liberal polity. What we need in order to overcome this tension is primarily a proper understanding of the term constitutional government. I will try to show that constitutional government is a comprehensive concept, in the sense that since the introduction of the general right to vote it embraces democracy as its constituent feature. I will use the argument that democracy ought to be considered a necessary addendum to the original liberal principle of the primacy of individual freedom. We cannot abandon the powerful appeal of democratic equality. Still, we can argue that democratic equality was brought into the liberal picture not as an independent value, but rather as an additional instrument of constitutionalism, aimed at further stabilization of the liberal concept of individual rights. Since this view may conflict with a somewhat different understanding of democracy, the bulk of the argument of this paper will be negative, aimed

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at saying what democracy is not. In the first section I will offer an abbreviated exposition of the essence of constitutionalism. The second section will be devoted to the critique of the notion of democracy that prevails in modern and contemporary constitutions, as well as in part of constitutional theory. I will argue that this concept of democracy contradicts the idea of constitutionalism. The third section will outline a desirable instrumental relation of democracy to constitutionalism. This will be supplemented by a short defense of the claim that some of the most difficult contemporary threats to constitutionalism are based on an unreflective acceptance of the idea that democracy has something to do with the rule of the people.

Before turning to these questions, I would like to make a short clarification. This text could easily be written off as a conservative exercise that merely sketches an old, probably outdated, and probably culture-specific (Western, or even only Anglo-Saxon) picture of liberal constitutionalism. But I believe that all of the obvious concepts sketched below are an exercise in recalling the *universal core* of constitutionalism, the core that transcends the local moralities of particular contexts of particular countries. This is not to say that constitutionalism is not culture-specific.¹ Still, what is specific for the meaning of constitutionalism in a plural (heterogeneous) polity, or in a post-communist polity, or in South Africa of today, I would like to consider probably necessary, but nevertheless auxiliary features of the universally-valid core concept.² What does this mean with regard to the main pillars of constitutionalism, the concept of limited government, and the primacy of individual rights?

First, one can argue that in some post-totalitarian contexts a certain amount of concentration of governmental authority is a necessary prerequisite for overcoming grave economic, societal, and political crises. This claim seems to obtain additional strength from the insight that, in contrast to the Western path of gradual development of constitutionalism and democracy over a period of centuries, the "newcomers" have to simultaneously start and articulate often

1 On the complex relationship between universal principles of constitutionalism and situated givens of particular communities, see: M. Rosenfeld, "Modern Constitutionalism as Interplay Between Identity and Diversity," in M. Rosenfeld (ed.), *Constitutionalism, Identity, Difference, and Legitimacy*, Durham, NC and London: Duke University Press, (1994); R. Goodin, "Designing Constitutions: The Political Constitution of a Mixed Commonwealth," *Political Studies, Special Issue XLIV* (1996) 635-646.

2 This of course does not mean that all countries in the world should – as a matter of normative difference between right and wrong – resort to constitutionalist universalism. In other words, this is not to deny that in some polities a specific concept of the *good* can override the demand for the universal *right*. I simply argue that in such cases the use of the category of constitutionalism would not make much sense.

contradictory processes of state building, the development of a market economy, the establishment of constitutional democracy, and the promotion of social justice. Since the actors in these processes are not easily identifiable, it follows that an "open society" ought to be implemented as a model, and that the main agent of bringing it to life should be the state.³ The further claim is that this paradoxical condition demands a certain concentration of authority in order for the state to be able to perform the context-specific multitude of tasks. This demand for a concentration of authority is to be understood as the demand for a "temporary" relativization of the procedural arrangement of the separation of powers, which is otherwise crucially important for bringing to life the concept of limited government. Therefore, it should be borne in mind that these context-specific demands amount to an "architecturally unprecedented and highly risky operation."⁴ In other words, a "certain concentration" of authority must not challenge the core of the universal principle of limited government. Below, I will argue in more detail that the efficiency demand cannot be recognized as an independent criterion of the governmental process – only the demand for the legitimacy of limited government can be recognized as legitimate.

Secondly, one can argue that the context of post-totalitarian constitutionalism demands a broader approach to rights, in which the distinction between legally guaranteed subjective fundamental rights, on the one hand, and institutionally guaranteed entitlements, on the other hand, will not always be perfectly clear.⁵ The proliferation of rights – not only in the form of social rights benefits, but also in the form of state aspirations and promises disguised as rights – is typical for post-totalitarian constitutions. Such "institutional guarantees"⁶ seem to arise

3 This paradoxical insight was – in academic terms at least – at the heart of controversies surrounding post-communist constitutionalism in the early nineties. See e.g., C. Offe, "Capitalism by Democratic Design. Democratic Theory Facing the Triple Transition in East Central Europe," *Social Research* 4 (1991) 865-892; S. Holmes, "Back to the Drawing Board," *East European Constitutional Review* 4 (1993) 21-25; J. Elster, "The Necessity and Impossibility of Simultaneous Economic and Political Reform," and L. Kolarska-Bobinska, "The Role of the State: Contradiction in the Transition to Democracy," both texts in *Constitutionalism and Democracy. Transitions in the Contemporary World*, D. Greenberg et al. (eds.), Oxford: Oxford University Press (1993).

4 Holmes, 25.

5 For a detailed analysis of this problem, see U. Preuß, *Constitutional Aspects of the Making of Democracy in the Post-Communist Societies of East Europe*, Bremen: Zentrum für Europäische Rechtspolitik (1993) 18.

6 The concept of institutional guarantees was in constitutional theory developed by C. Schmitt, in his analysis of the Weimar Constitution. Schmitt holds that in contrast to "real" individual rights, which are all derived from the fundamental human right to liberty, institutional

in contexts that are marked not only by fear of totalitarian power, but also by fear of economic and social collapse. This fear is sometimes elevated to a very high degree by real or imagined problems in defining the political identity of newly formed states.⁷ In such a context, constitution-makers often follow the criterion of instrumental rationality, where the highest act is used as a technical means aimed at taming sources and appearances of fear. The first consequence of such a poorly controlled constitutional dynamism is the suspension of the distinction between constitutional and normal politics. The second consequence is the normative overload of the constitution. The third consequence is uncritical expansion of the notion and content of basic rights, which in turn is likely to result in devaluation of this fundamental category of democratic constitutionalism.⁸ Ideally, one could simply argue that in such a context it would be highly preferable to reduce the catalogue of rights to legally identifiable and judicially enforceable "classical" rights. But, since the picture described here departs from "ideal rationality," the first step could consist in recognizing that "the concentration of all political, economic, social, and cultural aspirations in a document that claims unconditional and unqualified legal force may well entail a normative devaluation, just as any inflation is only a particular expression of depreciation."⁹ The universal threshold of constitutionalism should hold good in such contexts as well: institutional guarantees of different kinds must not challenge the primacy of legally identifiable and directly enforceable individual rights.

Preservation of the concept of limited government against the challenge posed by "efficiency demands," and preservation of the legal nature of individual subjective rights against the inflation of state-centered benefits and

guarantees are essentially products of the state, introduced to "fulfil particular tasks and meet particular goals." C. Schmitt, *Verfassungslehre*, Munich: Duncker & Humblot (1928) 170-71.

7 For the conceptual meaning of fear in the constitution-making process, see A. Sajó, *Limiting Government. An Introduction to Constitutionalism*, Budapest: Central European University Press (1999) 3: "The image of a constitution as the means for creating a rational order, and as an achievement of state engineering, is built on the Enlightenment tradition, which promises to override irrational inclinations like fear. The modernity of Enlightenment is built on the rational suppression of fears, but true rationalism is not oppression but the recognition and comprehension of those fears."

8 Liberal constitutionalism cannot be indifferent to the manner and reach of the suppression of fears. What is at issue is not merely to curb the appearance of fear, but rather to recognize and comprehend its nature and its sources in society, in order to be able to control it. Too much indiscriminate suppression of fear exercised in the form of over-ambitious constitutional engineering is itself irrational, for it aims at controlling what escapes control. Leaning toward a new form of totalitarianism would not be the least likely consequence.

9 Preuß, 13.

promises amount to the difference between a constitution that meets the requirements of constitutionalism and a constitution that fails to meet these requirements. We who were fortunate enough to have to study the fine nuances of communist "constitutionalism," recall the famous dictum of Ferdinand Lassalle: "All countries, in all times, had a real constitution. The true distinguishing feature of modernity is not – and this is something that should always be kept in mind – the existence of real constitutions, but simply the existence of written constitutions, or pieces of paper."¹⁰ What counts is not the piece of paper, since "constitutional questions are always questions of power."¹¹ Still, as Stephen Holmes is ready to remind us, pieces of paper sometimes do matter.¹² Those constitutions that define and help to bring to life fundamental demands of constitutionalism are much more than pieces of paper. Or, they are pieces of paper which turn Lassalle's phrase upside-down: "Questions of power are primarily constitutional questions."¹³

2 CONSTITUTIONALISM

In liberal constitutional thought, the question of the rightness of the fundamental-legal regime is primary. This is because the regime is a program for coercion. When we abide by a constitutional regime in place we collaborate in coercion of the ideally and presumptively free and equal individuals who live or come within its jurisdiction. For that collaboration, we liberally feel, some justification is owing. Justification means showing that the legal order's constitutive or fundamental laws are substantively right. Or at least there is something about them giving reason for obedience in their tendency toward rightness.¹⁴

Liberal constitutionalism is based on a simple, experience-mediated intuition. As the possessor of the monopoly of coercion in society, governmental authority is something *prima facie* bad. And it is not simply that we who are not rulers are confronted with a frightening apparatus of compulsion. The capacity to coerce comes from a more fundamental capacity of the state authority, which

10 F. Lassalle, *O suštini ustava*, Beograd (1907) 40. [F. Lassalle, *Rede über Verfassungswesen*, (1862); Europäische Verlagsanstalt (1993).]

11 Macht, in Lassalle.

12 S. Holmes, "Foreword" in A. Sajó, x.

13 U. Preuß, *Revolution, Fortschritt und Verfassung*, Berlin: K. Wagenbach, (1990) 8.

14 F. Michelman, "Constitutional Authorship," *Constitutionalism. Philosophical Foundations*, in L. Alexander (ed.), Cambridge: Cambridge University Press (1998) 82.

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can be summarized as the legal and political supremacy of the state: all its general rules are binding, any of its particular commands is authoritative.¹⁵ How can we then explain the fact that a minority of the people rule over the majority by passing binding norms and issuing commands the enforceability of which is made realistic due to the minority's monopoly of coercion? This unpleasant relationship between rulers and the ruled needs justification.

At this most general level, liberalism does not necessarily differ from pre-modern social and political formations. Still, in pre-modern times the practice of political authority was essentially a one-dimensional process, both in terms of its formation and exercise, and in terms of its justification. Authority used to be created, maintained, and confirmed as the "earthly representative" of final truths. Being presented as the embodiment of ultimate reasons, authority was consequently seen as unquestionably justified and valid. On the other hand, since authority itself was perceived as a part of a pre-defined order, its freedom from legitimacy demands that could be posed by subjects did not signify an absolute lack of constraints. Authority was supposed to act within the frames of law, though the subjects were expected to "fit into the cosmos."¹⁶ In other words, the nature of the authoritative relationship did not leave room for the subjects to address questions of the rightness of the normative basis, of the legal framework, or of the very practice of authority, as long as this practice was presented as being in accordance with higher values and the valid law.¹⁷

15 J. Kis, *Political Neutrality: A Defense*, manuscript on file with author, Budapest (1996) 22-23.

16 See e.g., the classical interpretation offered in the thirteenth century by the English lawyer H. Bracton in his *De Legibus et consuetudinibus Angliae*: "Ipse autem rex non debet esse sub homine sed deo et sub lege, quia lex facit legem." Quoted after Edward Corwin, *The "Higher Law" Background of the American Constitutional Law*, Ithaca, NY: Cornell University Press (1957) 27. This formula offers an accurate summary of the complex position of the pre-modern authority in its relation to the law and to subjects. The fact that the monarch is not responsible to his subjects does not provide for the reduction of his responsibility to the metaphysical source only. Responsible to God, the king is responsible to the law as well. The king, though the bearer of the supreme authority, is not the author of the law. To the contrary, it is the law that makes him the king. Or, in Hobbessian words, the monarch is only the actor: his right to act as the "representative" of the metaphysical order is derived from his faithfulness to the law, because only the law is the direct embodiment of the "higher order."

17 The relevance of this complex one-sided arrangement for later generations would become discernible with one particular predicament that King John had to face in 1215. His subjects claimed that they ceased to owe him the duty of obedience, due to the fact that he had abused the royal authority by violating their *folkrights*. The rebellion was justified as the restoration of the higher order. But the process of shaping of *Magna Carta Libertatum*, apart from enumerating subjects' privileges, brought to the fore what has probably remained as one of the basic constitutional questions: how can the authority be kept to the letter of the law?

Following the long, painful, and sometimes contradictory processes of the dissolution of the old regimes, the validity of the given order ceased to be self-comprehensible. Revolutionary Enlightenment took individual liberty as the starting point in reconsidering the problem of the legitimate relationship between the individual and the state: it proposed the idea that society is not based on anything preemptively binding, but is built exclusively around the value of personal autonomy. Then the normative picture of the liberal polity had to meet the following obvious question: what is the "rational-natural order of things," in the light of the superior principle of freedom? This seems to be a difficult problem, because from the primacy of freedom it follows that the plurality of values, convictions, and interests ought to be respected. It also follows that conflicts among those who are equally autonomous, but are – as human beings – different, are not only likely, but are legitimate as well. It might further follow that free individuals can legitimately exercise their autonomy to challenge the very fundamentals of community. On the other hand, it is equally clear that such an unlimited reflection should somehow be prevented, for no community can exist if it is not guaranteed a minimum necessary degree of stability. Or rather, there is no community that would normally be ready to open for discussion the question of its existence. To have this question on the political agenda is the sign of a deep crisis that not only challenges the legitimacy of authority, but also questions the legitimacy of community as such.

Liberal constitutionalism has to live with this tension between individual liberty and unquestionable commonality. The necessary peaceful reconciliation should be guaranteed, observed, and carried out (in part) by government. The "in part" qualifier is to remind us that liberty, scrutinized in the catalogue of rights, should not be seen as the product of state authority; equal freedom for all members of the community presents a normative standard that binds the state authority as the ultimate criterion of its legitimacy. In order to make this criterion the operational basis of the individual-community relationship, the constitution should contain rules which: 1) define individual liberty and equality through the formalized system of fundamental rights, and 2) limit the government. Limited government and the protection of rights are core features of constitutionalism.

But, of course, for constitutionalism it does not suffice to have these two features on the piece of paper. The destiny of rights is decisively dependent on a system of limits on governmental authority that effectively prevents those to whom a citizen's private judgment is surrendered from doing whatever they

please.¹⁸ From this follows the original humble ambition of liberalism: political authority is an evil that is necessary because citizens, in their partial instrumental rationality, are likely to be tempted to do harm to each other or to the community. Therefore, they should be guaranteed freedom, while at the same time prevented from acting in an unconstrained manner. But the other aspect of the harm is even more important when discussing the need for rights and limited government. Citizens are under threat both from fellow citizens and from the state. If government is equipped with the task of protecting freedom, it is of primary importance that those who exercise power be prevented from ruling in an unconstrained manner. The only way to achieve this latter goal is to prevent individuals who happen to occupy ruling positions from any independent capacity to rule. What does this mean? The state authority has to be depersonalized, neutral, and responsible. How can this be achieved? The preliminary answer is unambiguous: everybody has to be subject to abstract, generally valid rules.¹⁹ "Everybody" should be taken literally, as a characterization that embraces citizens and state officials alike. Since authoritative positions are occupied by human beings, the "government of laws and not of men" is a metaphor. But it is intended to be a powerful one: a governing process that is not carried out in accordance with general, abstract, known rules is not a governing process at all. It is merely an illegal and illegitimate abuse of power, through which the state becomes personalized, partial, and irresponsible. And individual freedom will be the first victim.

In dealing with rights and limited government, constitutionalism is supposed to do more than merely build a Berlin Wall between citizens and authority, for "open society" cannot be reduced to a society in which the private sphere is closed to rulers. Constitutionalism deals "more comprehensively with the organization of state-society relations,"²⁰ meaning that the legal identification of individuals and the legal identification of authority are supposed to create a common framework for an open communicative relationship, a framework that will guard and direct both the "horizontal" and "vertical" relations within society and community. This points to the one-sidedness of the view according to which constitutional rules that define rights and limit government are exclusively negative, existing only to protect individual privacy from the

18 "Constitutions are about power; a constitution impregnated with ideas of constitutionalism is about limited power." Sajó, 2.

19 "Constitutions restrict the discretion of power-wielders because rulers, too, need to be ruled." S. Holmes, *Passions and Constraints. On the Theory of Liberal Democracy*, Chicago: University of Chicago Press (1995) 6.

20 Holmes, "Foreword," in Sajó, xi.

Leviathan's intrusion. Rules empower as well, both citizens and the state authorities. In order to prevent government from acting in a voluntaristic manner, the constitution has to state clearly what government *can* do. Though the idea of the exclusively negative ("disabling") character of constitutionalism cannot stand logical scrutiny, it always has to be re-emphasized that "enabling constitutionalism" is the constituent feature of the concept of limited government.²¹ What is at stake is to create government that is able to "guard society against the oppression of its rulers," "to guard one part of society against the injustice of the other part," and to protect "the rights of individuals, or of the minority...from interested combinations of the majority."²² Using more empirical terms, we could say that constitutional limited government, since its early modern *Nightwatcher* appearance, has always been a strong government.²³ Therefore, to paraphrase Hannah Arendt, the question for constitution-makers is not simply how to limit power, but how to establish power that 1) is enabled to perform a multitude of difficult tasks that are all crucially relevant for individual liberty, and 2) still remains accountable, i.e., limited.²⁴

The openness of this arrangement, in which societal and political processes take place within the limits of the law, should provide room for the legitimate exercise of power, i.e., for a relation between the rulers and ruled that is capable of standing the test of justification. But, in order to make sense of the legitimacy problem in a liberal polity, we need to recall that constitutionalism empowers not only rulers, but subjects as well. This brings us to the question of the meaning and reach of democracy in the constitutional setting.

2 DEMOCRACY – WHAT IT IS NOT

It is almost a truism to say that democracy is a highly contestable term. The statement that the "rule of the people" is hardly conceivable in a "pure form" does not necessarily need further elaboration. Still, many people who devote their time to thinking about the meaning of this term feel that somehow justice needs to be done to its etymological signification. If the people cannot really rule, we still need to look for an arrangement that would at least approximate

21 Holmes, *Passions*, 7.

22 A. Hamilton, J. Madison, J. Jay, *The Federalist Papers*, No. 51, in Gary Wills (ed.), New York: Bantam Books (1982) 263-264.

23 F. Neumann, *The Democratic and the Authoritarian State*, New York: Free Press (1957) 259-260.

24 H. Arendt, *On Revolution*, Harmondsworth: Penguin (1973) 148.

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that rule; on ideological, symbolic, legal, and institutional levels, the original ideal ought to be given fair credit.²⁵ I believe this is a wrong starting point, for one simple reason: the rule of the people is an essentially illiberal concept. The task of constitutional government is not to solve the predicaments of the surrender of private judgment and the state's monopoly of coercion by dismantling the distinction between rulers and ruled. To repeat, the ambition is much more modest: to prevent uncontrolled use of power, which can be done only by preventing the rule of human beings. A "government of laws and not of men" holds good for rulers and ruled alike.

Since its introduction, democracy has or has not worked depending on its faithfulness to this self-constraint. We could even be tempted to state that democracy, understood as a political arrangement, is just another word for the system of limited government. But this would not be correct, for the simple reason that democracy, even if reduced to a political arrangement, is, to an important extent, about citizens and the role they play in politics. How should we understand that role?

Historically speaking, democracy had to be introduced in order to prevent a crisis in the controlling function of the liberal government. This crisis of governability was itself the consequence of the more fundamental legitimacy problem. The struggles of those who were deprived of the right to vote made it clear that constitutional government could not survive if a huge proportion of the adult population was excluded from political life. The inclusion of the strata that used to be denied the right to vote was not guided by any doctrinaire consideration of the inherent value of democracy. The point of inclusion was rather to prevent those excluded from trying to overcome the state of exclusion by radically challenging the legitimacy basis of the given arrangement along the lines of demands for a "more genuine," or "more autonomous" political organization.

Still, a historical sketch, even if it were much more serious, would not necessarily have the strength of a good argument. We need to recall that liberalism was born under the spell of the natural equality of all human beings, and that in consequence the idea of equality has been a powerful pillar of liberalism since its beginnings. Moreover, both the American and French revolutions were fought in the name of the people, a clarion cry that, framed as the concept of popular sovereignty, has remained one of the most powerful

25 See e.g., N. Bobbio, *Which Socialism?* Oxford: Cambridge University Press (1988) 90: "A political system is democratic where collective decisions, i.e. decisions which affect the whole of a community (no matter how small or large) are taken by all its members. Once this definition is accepted, the procedural rules...follow automatically as logical consequences."

and universally accepted principles of modern and contemporary constitutions. Here I will leave aside the profound differences – and their consequences – between the American and the French revolutionary understanding of popular sovereignty.²⁶ I would simply like to claim that most contemporary constitutions stick to a poorly reflected concept of popular sovereignty that presents the people as the possessors of both the ultimate legitimizing capacity and the supreme authority.²⁷ Such an image of the *locus* of authority is then supposed to be made operational through procedural mechanisms of political representation and the correspondent majority rule. The message, poorly protected against abuses, is clear: there is a body of persons constituting the *populus*. With the standard constitutional identification of popular sovereignty in place, this body is – contrary to the constitutional recourse to the rule of law, and most often contrary to what constitution-makers believe to have written down – symbolically presented as the ultimate judge, not only of what is *right* (legally allowed) and what is *wrong* (legally forbidden), but also of what is *good* and *bad*. This follows directly from defining the people as the ultimate, pre-legal source of all authority. Even at a very abstract, symbolic level, we can attribute to the people exclusive capacity to create, justify, and exercise authority only if we agree that the people precede the law.²⁸ Understood in such a standard un-

26 See e.g., Arendt, especially chapters "Constitutio Libertatis" and "Novus Ordo Saeculorum."

27 Example gratia:

"All state power derives from the people; they exercise this power by means of their legislative, executive and judicial bodies." (Art. 1 of the Czech Constitution).

"The powers of the state in Finland are vested in the people, who are represented by the Parliament." (Sec. 2 of the Finnish Constitution).

"National sovereignty belongs to the people, which shall exercise it through its representatives and by way of referendums." (Art. 3 of the French Constitution).

"All state authority emanates from the people. It is being exercised by the people through elections and voting, and by specific organs of the legislature, the executive power, and the judiciary." (Art. 20/2 of the German Basic Law).

28 In both ideological and academic terms, it is here much easier to be Abbe Sieyès or Carl Schmitt than a liberal constitutionalist. See e.g., Schmitt, 61: "The constitution comes to life through an act of the people who are politically capable of action. The people as a political unity must be pre-given, if it is to be understood as the holder of the constituent power." In an effort to avoid the objection of factuality in constitution-making, Schmitt argues that the constitution – "the nation's political decision about the manner and the form of its political existence" – can be passed only by a people as a nation (*ein Volk als Nation*), that is, by a politically already existing and unified body. The constituent power, although strictly legally unbound, can accomplish its task only if it identifies itself with the people/nation as the ultimate source of all legal validity, i.e., as the *real* constituent power: "The constituent power can never be legally-constitutionally limited. The people, the nation, remains the original basis of all political processes, the source of all strength which expresses itself in always new ways, which brings to life always new organizational forms, but the political existence

on the dubious idea that the rule of the people should be approximated in the form of the rule by the people: parliament is the highest political body because it is closest to the people, i.e., because it is – having been created by citizens – the most legitimate of all political bodies.³⁵ It could be argued that this kind of arrangement comes dangerously close to decisionism, where parliament, upon the popular mandate, usurps the capacity to determine what the law is. This is in direct opposition to the concept of the rule of law, which rejects the idea that any majoritarian preference whatsoever can legitimately obtain the form of law. In an obvious effort to constrain rulers, the rule of law tells us “what the law ought to be.”³⁶ Of course, it could be countered that procedural restraints keep both the meaning of parliamentary sovereignty and the procedures for the creation of parliament within the frame of the rule of law. But the point is that the rule of law and the rule of the people are mutually exclusive principles. While the former points to the depersonalized, neutral, and accountable governing process in the name of the protection of liberty, the latter points to the relevance of the political “will of the people” in the name of democracy. Once parliament is singled out as the highest, most legitimate political body on the account of its being the embodiment of popular sovereignty, the idea of the rule of the people ceases to be a mere ideological foundation of politics. The rule of the people becomes institutionalized, while the rule of law is under threat of being reduced to a poorly defensible ideological statement.³⁷ It is a euphemism to say that this creates a tension in which individual liberty becomes threatened by democracy.

This problem is further accentuated by the uneasy status of majority rule. If the playground is delimited by popular sovereignty, it follows that majority rule is a “realistic” way of approximating the rule of the people at the decision-making stage. In a political condition marked by a legitimate pluralism of opinions and preferences, we agree that in cases of disagreement and whenever the need for authoritative coordination arises, our private judgement will be surrendered to our representatives, i.e., to procedurally elected officials who will make decisions in a procedurally pre-defined manner. Majority rule is

supposed to make the democratically identified majority voice heard, by answering the questions: “Under what conditions will the numerical majority of citizens in a modern state maintain some modest influence over the processes of political decision-making? How can the people act, as a people, to enforce their will, at least occasionally, upon their rulers?”³⁸ And, we could say that majority rule is the core of democracy: “Democracy I shall understand as simple majority rule, based on the principle ‘One person, one vote.’”³⁹ This is a cliché, of course, but it is not wide of the mark, for it points to the essence of what can be found in almost all democratic constitutions: “In general, modern constitutions expressly recognize equal and universal voting rights as the basis of the political system and of the legitimate exercise of political power.”⁴⁰

With this, the continuity strategy (popular sovereignty – political representation – majority rule) is completed, and rulers have an extremely powerful tool in their hands. What ideologically started its life as the approximation of genuine popular rule, tends to end up as the rule of the genuine rulers. We can try to manage the despotic threat by pointing to the essence of constitutionalism, mechanisms of which are expected to prevent or delegitimize power holders who violate freedom and the principle of limited government. We can call to our aid Madison, de Tocqueville, and other writers who powerfully argued that majority rule has to recognize constraints imposed by more important values, mechanisms, and procedures, also defined by constitutional norms.⁴¹ Or, we can reiterate that majority rule cannot be defended as an approximation of the popular rule, for reasons that are both empirical and conceptual: a majority can be regarded only as a majority, and not possibly as an embodiment of the “whole;” further, the rule is on behalf of the constitutionally defined citizens as individual legal persons, and not of empirically observable human beings.⁴² Or, we can even try to soften the link between

35 For a detailed critical analysis of the relation between constitutionalism and parliamentarism, see e.g., Sajó, 106 *et passim*.

36 F. A. Hayek, *The Constitution of Liberty*, Chicago: University of Chicago Press (1960) 103.

37 The case of the parliamentary constitution-making might be exemplary in this regard. See e.g., A. Arato, “The Constitution-Making Endgame in Hungary,” *East European Constitutional Review* 4 (1996) 31–39; and “Between the Executive and the Constitutional Court: Parliamentary Constitution-Making in Hungary,” in *Civil Society, Revolution and Constitution*, Budapest: Új Mandátum Könyvkiadó (1999).

38 Holmes, *Passions*, 8–9.

39 J. Elster, “Introduction,” in J. Elster and R. Slagstad (eds.), *Constitutionalism and Democracy*, Cambridge: Cambridge University Press (1988) 1.

40 Sajó, 53.

41 “When the people are translated into a majority criterion, what is being provided is only an ‘operative definition.’ That is to say that the people are divided into a majority and a minority by the decision-making process and in order to have decisions made. The fact nonetheless remains that the people consist, overall, of the majority *plus* the minority...Conversely, democracy conceived as a majority rule limited by minority rights corresponds to the people in full, that is, to the sum total of majority plus minority. It is precisely because the rule of the majority is restrained that *all* the people (all those who are entitled to vote) are *always* included in the demos.” G. Sartori, *The Theory of Democracy Revisited, Part One*, Chatham, NJ: Chatham House (1987) 32–33.

42 Bragyo, 2.

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popular sovereignty and majority rule, claiming that majority rule is not about substantive rulership at all, but is rather rule of the game, i.e., a procedural decision-making mechanism in democratically constituted political bodies.⁴³

Still, this is not of decisive help, unless we try to re-conceptualize the meaning of the relationship between individuals and government in a democratic constitutional regime.

3 CONSTITUTIONAL DEMOCRACY, AND ONE PARTICULAR THREAT TO IT

Intuitively, we are prone to see democratic constitutionalism as an arrangement which protects the equal rights of all citizens, and which creates and guards room for the democratic participation of citizens in *res publica*. If democracy is a political arrangement, we need to make sense of it in the public space – shall we say then that it means participation (as genuinely as possible) of equal citizens in public affairs of the community? And, even if we agree on this participatory reading of democracy, what is the meaning of participation? Should we understand it as the virtue that holds the exclusive capacity of making sense of our personal freedom (as proponents of republicanism and deliberative democracy would suggest)? Or should we interpret democracy as a safeguarding device, devoted essentially to the protection of citizens' negative liberties from those who are stronger and who, as rulers, are capable of doing us harm?

Democracy can be safely and harmoniously associated with constitutionalism only if the latter option is taken seriously. To repeat: constitutionalism is essentially about the protection of individual freedom specified in the legal form of basic rights. In order for this fundamental task to be met, constitutionalism has to set and unambiguously limit the proper scope of the functions of government. Limited government cannot be achieved unless mechanisms of control of political authority are in place. There are two basic types of control mechanisms. Internal mechanisms are procedural and institutional arrangements of "checking power by power:" separation of powers, division of powers, checks and balances, and judicial review. Secondly, there should be external checks, consisting in control of government by citizens. And this is where – in this external control – the essence of constitutional democracy is to be sought. The meaning of democracy cannot consist in creating a sustainable arrangement that would approximate or in any feasible way do justice to

the ideal of the rule of the people. Democracy can properly be understood only as a limiting device: *democracy should be instituted and promoted as the constitutional limit of governmental authority.*⁴⁴

Democracy is an arrangement that legitimizes that which needs legitimization, namely the relationship in which there are rulers and ruled. As it has already been argued, some kind of relationship between rulers and ruled has always existed, but the democratic relationship is supposed to be different, in that both the creation of government and the governmental process are put under the scrutiny of the ruled – this we can call the legitimization process. This justificatory relationship can take different forms, and it can be theoretically expressed in different ways: democratic self-rule, democratic participation, and democratic control refer to different perceptions of the meaning of democracy. In the previous section I was arguing that the idea of self-rule opens the door not only and not primarily to the despotic power of the majority, but most importantly, to the uncontrollable power of those who govern "in the name of the people." What remain then are choices of participation and control.

The fact that participation fits the idea of "autonomous and authentic" self-rule does not necessarily lead to its disqualification. We only need to comprehend participation differently, so that it fits the control-based understanding of democracy. It can be maintained that "political participation has obviously proved to be an indispensable tool for protecting individuals against capricious, corrupt, and tyrannical government."⁴⁵ To repeat, the purpose of the democratic arrangement is instrumental, i.e., democracy, in contrast to liberty, is not an absolute or fundamental value; plainly, *democracy is an instrument of constitutionally-constrained liberty*. Participating citizens should not be understood as politically active for the sake of their sovereign rule, but rather for the sake of the defense of values upon which constitutionalism is built. What does this mean? Here it might be helpful to re-visit the meaning of rights.

"The political order treats citizens as equals in the political sphere, but this equality does not necessarily extend to other spheres of life. Here we find the limit to the implementation of the majority principle."⁴⁶ Classical personal rights as negative rights draw the line between legitimate action of the state and the autonomous sphere of individual privacy. Individuals are equal here in two formal senses. They all possess an identical basket of rights; consequently, they are all equally protected against the abuse of state power.

⁴⁴ Sajó, 54.

⁴⁵ Holmes, *Passions*, 28.

⁴⁶ U. Scheuner, *Das Mehrheit Prinzip in der Demokratie*, Opladen: Westdeutscher Verlag (1973)

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What they do behind the fence made by rights is their private matter. Liberal equality does not prevent us who are different from being unequal, i.e., from being who we are. This is all well known, of course: liberal constitutionalism does the most it can for individuals recognized as autonomous beings. Human beings who are different from one another can be made equal without violating their uniqueness, provided their relation to the principal threat of their liberty is formulated in a legally universal manner. Liberal constitutionalism allows individuals to be real human beings in the private sphere, provided they accept formal constraints (formulated as rights) of this authenticity, constraints that shape the realm of authenticity in a manner that is supposed to protect them from being harmed by those who are stronger (government), and from those who are equal (other individuals) alike. This latter feature indicates that through personal rights I am not only protected from those who might do me harm, but I am also prevented from doing harm to those who are – as rights bearers – equal to me.

But things are different with political rights. These rights need to be understood as broader than personal rights in order to achieve the most important feature of the political process: to keep government within prescribed limits and to curb possible excesses of democracy. To state it in another fashion: citizens' political rights have to be considered broader than personal rights in order for citizens to be more efficiently protected *and* to have less capacity to rule. Before explaining what "broader political rights" means, I would like to emphasize that this characterization does not amount to the known distinction between negative and positive rights. Political rights, as rights of participation guided by the goal of effective control of government, are also *negative rights*. The purpose of these rights is not to realize the virtue of participation. Their purpose is rather to make room for participation, so that citizens are effectively enabled to communicate with the state in the public space, all with the principal goal of *protecting personal rights*. In other words, political rights and democracy, when properly understood, are instruments that defend individual liberty against the state.

What, then, should this "broader" understanding of political rights signify? Let me turn very briefly to the issue of social rights. We know that social rights have been introduced to catalogues of rights following the claim that formal equality in the private sphere does not suffice if the substantive condition of human beings is such that it renders formal equality empty. And we know that this arrangement, aimed at promoting substantive equality as the necessary

condition for making sense of formal equality, is not free of ambiguities, which in the end might threaten the very fundamentals of liberal constitutionalism.⁴⁷

But the interplay between formal and substantive has a different meaning in the realm of political rights. Political rights do not work without special care, care that prevents the substantive inequality of citizens from violating their formal equality. The existing distribution of resources, which results in the possible economic and social inequality of citizens, must not shape their position and capacity to act in the public sphere. If we simply pretend that the substantive inequality of actors in the political realm does not exist, the consequence will be that those who are socially more powerful will become politically more influential, in terms of their capacity to politically articulate and aggregate their interests, in terms of their capacity to present their interests as more relevant than the interests of those who are weaker and, finally, in terms of their capacity to enter into direct communication with the government. Therefore, in order to enable political rights to function as guarantees of the equality of citizens in the public space, at least two additional constraining substantive demands should be constitutionally formulated:

Government shall not favor the interests of any individual or group or organization on the ground of their strength or alleged special relevance in a particular case, for a particular area of societal life, or for the political community in general.

Government shall not be allowed to claim the efficiency imperative as an independent criterion of justification for its actions.

Such a statement might, from the constitutional perspective, look like a mere pleonasm or a superfluous addition to formal equality in political rights. But this is only seemingly so. In order to demonstrate that the problem is serious and that the proposed constraining devices deserve attention, I will briefly point to one specific threat to individual freedom that stems from the wrong perception of political rights and their role in contemporary societies.

The power of political authority to make binding decisions is not simply the power to cut off deliberation on the contested issue by making a binding proclamation on what is the right and allowed behaviour in a particular case. It is equally important to observe that government in its decision-making capacity has the capacity to choose which issues, i.e., issues belonging to which realms and pertaining to which actors in the political arena, will be brought

⁴⁷ See e.g., Sajó, 32-38. Of course, opposing views, those that speak in favour of social rights, prevail. Most interesting are probably those that firmly stay within liberal tradition, claiming that welfare rights are in accordance with liberally conceived freedom. See e.g., Holmes, *Passions*, 236 *et passim*.

to the agenda. In negative terms, the decision-making capacity of government denotes the capacity to exclude as irrelevant both issues and actors. If the choice of what and who is relevant, i.e., what and who deserves governmental scrutiny and decision, is left to the government, subject only to the condition of formal equality of political actors and to procedures relying exclusively on such formal equality, government will, in the end, have the freedom (only poorly restrained) to choose the problems and actors it deems relevant. Citizens, on their part, will be divided into those who have effective access to the decision-making stage and those who do not. As a consequence, in the name of democracy and the rule of the people, we would get something that really would approximate the old cherished ideal of self-rule. Still, it would be a limping approximation: some people, groups, and organizations chosen by government would – upon invitation – really enter the governmental apparatus, thus breaking the dividing line between rulers and ruled. But those “some people” are likely to be of a special kind: politically-economically organized employers and employees, the arms industry, the tobacco industry, or mafia in some of the post-communist countries.⁴⁸ This kind of “rule by the people” leads directly to the establishment of the “dual state.” The “corporate state,” made up of agents of economically powerful interests, on the one hand, and the state apparatus, on the other hand, would pass many important decisions, standing in the shadow of the “official” constitutional government. And formally equal citizens, equipped with political control mechanisms to observe the “official state,” are left at the mercy of the invisible one.

So, it could be argued that the so-called complexity of contemporary societies is one of the most threatening enemies of liberty and of the system of constitutional government as a whole. Here we need to see that the complexity story is probably more complex than its subject, i.e., we need to carefully distinguish empirical insights from normative preferences disguised as description. We know the line of argument: the ideal picture of liberal society presupposes the primacy of the individual perspective and the emancipation of civil society from the political realm. But liberal societies long ago became pluralistic,⁴⁹ blurring, in consequence, the distinction between society and the state. The society of competing groups is becoming increasingly complex,

interest lines are cross-cutting each other and government can neither pretend to be a mere *Nightwatcher*, nor can it manage interest pluralism if the old society-state distinction is preserved. The state becomes overloaded with too many, too distinct, and too complex demands standing in need of authoritative coordination. This is the set of issues that has long been known in theory as the governability problem. At this point the argument switches from description to a false description: government has to make a choice in order to preserve the necessary minimum of its working capacity. The efficiency requirement is presented here as a matter of survival. The state, confronted with urgent coordination and decision-making needs, cannot wait for interest pluralism aggregated in civil society to be translated into political choices. Efficiency demands that the state “enter” civil society, choose relevant societal actors, and bring them *as* societal actors to the political stage. In this way, actors, their interests, and preferences would be presented to the political stage in their “original form,” thus making democracy allegedly more genuine. “We” do not simply sporadically vote, “we” are not simply in the position of critical observers – nor do we have to hide our true identity and true interests behind the legal masks of abstract citizens. Rather, “we” as genuine selves participate in deciding public matters in cooperation with government.

Still, Niklas Luhmann has made a much better case here than the defenders of “economic democracy,” and his inferences deserve to be mentioned as the most accurate insights into the complexity problem and its consequences for liberty and democracy. Luhmann does not pretend that in the pluralistic perspective constitutional government is in search of a new formula: he simply proclaims the death of the modern, Enlightenment-based paradigm, bringing generously to light the internal limits and logical consequences of the pluralism-complexity-(non)governability line of thought. For Luhmann, contemporary complex society is a mosaic of self-referential sub-systems, which are all being reproduced following their own exclusive “circular constellations of power.” Only the state, as the embodiment of the general societal system, has the capacity to see what is going on within its sub-systems. Politics cannot be conceptualized in terms of the distinction between power-holders and subjects anymore, but rather as the administration of the ever-growing societal complexity.⁵⁰ Luhmann claims that what is at stake is not the meaning of our life

48 Of course, the “likely to” or “would” minimizers are not entirely appropriate here, for the above is the story of “economic democracy” or “corporatism.” The post-communist picture is surely different, at least in being much more grim – see “Crime and Corruption after Communism,” *East European Constitutional Review* Vol. 6. No. 4 (Fall 1997).

49 For a classical interpretative account, see R. Dahl, *A Preface to Democratic Theory*, Chicago: University of Chicago Press (1956).

50 “Differentiation and delimitation exist, to the extent they are controllable at all, at the same time as acts of creation and as techniques of reduction of high levels of complexity. This is most probably the remaining option for evolutionary developed societies, societies which are structurally oriented toward high selectivity, i.e., toward producing more ‘noes’ than ‘yeses.’” N. Luhmann, “Politische Verfassungen im Kontext des Gesellschafts-systems,” part

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together, but rather the making of that life bearable in the face of its over-complexity. Applied to the relationship between citizens and the state, the axiom reads: "Legitimation is always self-legitimation."⁵¹ When it comes to the meaning of the law, it should be known that we ascribe its validity to the principle of variation only. The fact that a norm can be changed in a procedurally correct way without any further limitation is the basis of all legal validity and stability. Positivation of the law means that any content whatsoever can obtain legal validity, provided it is made part of the legal system in accordance with existing procedures. The paradigmatic conclusion follows: "The positive law is valid on the basis of decision."⁵²

The above described "empirical" analysis of the complexity of modern societies leads to the normative preference for the strong, legally unbound state at the direct expense of individual freedom. If political rights are opened up to become more than control instruments, if they are introduced to promote a "more genuine" democracy, a likely consequence is the one described by James Madison: the dictatorship of factions, or the uncontrollable particularism of the most powerful interests allied with government. The basic preconditions of the constitutional political process – transparency, accountability, the public character of government and of the decision-making process – are under direct threat, and the individual is again on the verge of facing the pre-modern condition of "fitting into the cosmos." But the character of "the cosmos" would be much more difficult to discern today.

2, *Der Staat* 2 (1973) 168.

51 N. Luhmann, "Selbstlegitimation des Staates," in N. Achterberg and W. Krawietz (eds.), *Legitimation des modernen Staates*, Wiesbaden: Steiner (1981) 65.

52 N. Luhmann, "Positives Recht und Ideologie," *Archiv für Rechts- und Sozial Philosophie* 4 (1967) 535.