Constitutionalism and Democracy[1]

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1. Introduction

Professor Habermas was kind enough to send me an advance copy of his paper.[2] I thought it might be best, in the interests of a concentrated discussion, to address some of the same themes as he does, though, as you will see, my perspective is a different one. So I shall discuss connections between law and jurisprudence, on the one hand, and moral and political theory on the other.

By 'constitutionalism' I mean a system that establishes individual legal rights that the dominant legislature does not have the power to override or compromise. Constitutionalism, so understood, is an increasingly popular political phenomenon. It has become increasingly common to suppose that a respectable legal system must include constitutional protection of individual rights. That is the assumption not only of the European Convention of Human Rights, but of almost all the Member States of that convention, in their domestic law. (Even in Britain, which is an exception, the pressure for an embedded constitution is growing.) Perhaps the most remarkable example, however, is South Africa. Even when the ANC legal committee was in exile, drafting a constitution against the day in which a black majority would be permitted to govern, it was never doubted that a South African Constitution should protect minorities against majority power.

But nevertheless a strong objection has been pressed against constitutionalism: that it subverts or compromises democracy, because if a constitution forbids the legislation to pass a law limiting freedom of speech, for example, that diminishes the democratic right of the majority to have the law it wants. If we respect constitutionalism, but also democracy, what should we do? What is the proper accommodation between the two ideals?

I believe that the conflict just described is illusory, because it is based on an inaccurate understanding of what democracy is. We should begin by noticing a distinction between democracy and majority rule. Democracy means *legitimate* majority rule, which means that mere majoritarianism does not constitute democracy unless further conditions are met. It is controversial just what these conditions are. But *some* kind of constitutional structure that a majority cannot change is certainly a prerequisite to democracy. There must be embedded constitutional rules stipulating that a majority cannot abolish future elections, for example, or disenfranchise a minority.

Let us distinguish, then, between *enabling* constitutional rules, which construct majority government by stipulating who may vote, when elections are

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to be held, how representative officials are assigned to electoral districts, what powers each group of representative officials has, and so forth, and *disabling* constitutional rules, which restrict the powers of the representative officals that the enabling rules have defined. We cannot say that only enabling rules are prerequisites of democracy, because some constitutional rules that might seem, on the surface, to be disabling rules are plainly essential to democracy. A majority would destroy democracy just as effectively by forbidding a minority the right to free expression as it would by denying that minority the vote, for example.

It is nevertheless controversial which disabling rules are essential to constructing democracy and so cannot be regarded as compromising or subverting it. Is it essential to democracy that minorities are guaranteed freedom from private discrimination in schools and employment, for example? Is it essential that women are guaranteed the right to an abortion if they wish, or that homosexuals are guaranteed sexual freedom? Is it essential that people are guaranteed a decent level of health care or housing or nutrition or education? These various rights are not so evidently connected to fair political procedures as is the right to free speech, and it may therefore seem plausible that embedding any of these rights in a constitution that cannot be amended by the majority is a compromise of democracy, a constraint on a majority's legitimate right to govern. That issue is, however, more complex than it might first appear, and we must look again.

2. Two Concepts of Collective Action

Democracy, like almost any other form of government, involves collective action. We say that in a democracy government is by the *people*: we mean that the people collectively do things – elect leaders, for example – that no individual does or can do alone. There are two kinds of collective action, however – statistical and communal – and our conception of the essential pre-conditions of democracy will turn on which kind of collective action we take democratic government to require. Collective action is statistical when what the group does is only a matter of some function, rough or specific, of what the individual members of the group do on their own, that is, with no sense of doing something *as* a group. We might say: the German people want a more aggressive foreign policy. We describe a kind of collective action: no one German can act in such a way that he has made it true that the German people think anything in particular. But the reference to the German *people* is nevertheless only and simply a figure of speech. Our remark only makes a rough statistical judgment of some sort about what (say) most Germans who think about the subject think, or something of that sort. Or we might say that yesterday the foreign exchange market drove up the price of the Mark. Once again, we are describing collective action: only a large group of bankers and dealers can affect the foreign currency

market in any substantial way. But once again our reference to a collective entity, the currency market, does not point to any actual entity. We could, without changing our meaning, make an overtly statistical claim instead: that the combined effects of individual currency transactions were responsible for the higher price of the Mark at the latest trade.

Collective action is communal, on the other hand, when it cannot be reduced just to some statistical function of individual action, because it is collective in the deeper sense that requires individuals to assume the existence of the group as a separate entity or phenomenon. The familiar but very powerful example of collective guilt provides a good example. Many Germans (including those born after 1945) feel responsible for what *Germany* did, not just for what other Germans did; their sense of responsibility assumes that they are themselves connected to the Nazi terror in some way, that they belong to the *nation* that committed those crimes. Here is a less unpleasant example. An orchestra can play a symphony, though no single musician can, but this is not a case of statistical collective action because it is essential to an orchestral performance not just that a specified function of musicians each plays some appropriate score, but that the musicians play *as* an orchestra, each intending to make a contribution to the performance of the group, and not just as isolated individual recitations.

The distinction between statistical and communal action allows us two conceptions of democracy as collective action. The first is a statistical conception: that in a democracy political decisions are made in accordance with some function – a majority or plurality – of the votes or decisions or wishes of individual citizens. The second is a communal conception: that in a democracy political decisions are taken by a distinct entity – the *people* as such – rather than any set of individuals one by one. Rousseau's idea of government by general will is an example of a communal rather than a statistical conception of democracy.

Our sense of which constitutional rights are essential preconditions of democracy will depend on which of these conceptions of democracy – these two conceptions of collective action – we accept. I suspect that most of you are drawn to a statistical conception, which is certainly more familiar in our political theory, if not our political rhetoric, than a communal conception. You may think the communal conception metaphysical and mysterious. You may also think it dangerously totalitarian, and my reference to Rousseau would not have allayed that suspicion. So I will proceed, first, on that assumption, though we shall later find reason to consider how the matter would look if we adopted a communal conception (which I myself prefer).

If we adopt a statistical conception of democracy, then we must think about the pre-conditions of democracy in the following way. The bare fact that a majority or plurality of people favour one decision rather than another does not, just in itself, provide more legitimacy – it does not provide an appealing moral case justifying the coercion of the minority, who may have been seriously disadvantaged by the decision. We must consider what further facts would confer moral legitimacy on such a decision. We have already noticed some of

these: a constitutional structure must be in place protecting the right of every adult to vote and to participate in political decisions. What other rights or conditions must be guaranteed? This is a question of political morality that different people would answer differently. But two further conditions might seem necessary. A majority vote does not achieve the needed legitimacy unless, first, all citizens have the moral independence necessary to participate in the political decision as free moral agents, and unless, second, the political process is such as to treat all citizens with equal concern. If that is right, then the preconditions of democracy include some rights – which ones is a matter for debate – tending to secure these conditions. It must include freedom of conscience and religion as well as freedom of political speech, and it must guarantee that political decisions do not reflect prejudice against any group, or disdain for or indifference towards its needs.

3. Does Constitutionalism Undermine Equality?

So the case seems compelling, on the statistical conception of collective action, that constitutional rights do not subvert democracy but, on the contrary, are an essential precondition of it. But now we must take account of arguments to the contrary. I assumed, just now, that the bare fact of a statistical majority or plurality does not provide moral legitimacy. But some of you might object to that quick conclusion. You might think that, even if a majoritarian vote does not provide full legitimacy, it has some moral consequence, just in itself, so that curtailing majoritarianism by accepting constitutionalism, even if overall justified, does involve a moral cost. If that were true, then it would give sense to the popular idea that constitutionalism involves *some* compromise in democracy. So I must now consider arguments to that effect.

It might be said that constitutionalism compromises political equality because it gives enormous power to a group of judges who are not elected or politically responsible. That might sound right, at first blush, but it is actually hard to defend in any troubling form. In the first place, as I have tried to explain at length elsewhere, we cannot define political equality as a function of political *power*. If we define power as impact, the goal of equal power is unattainable in a representative democracy; if we define it as influence, the goal is undesirable as well as unattainable. Political equality must be defined as a matter of *status* not power, and many constitutional rights, like the right of free speech, therefore contribute to rather than derogate from political equality. Second, many other officials who are appointed rather than elected – cabinet officers, for example – wield even greater power than judges. An American secretary of state may bring the country into war. In any case, however, we should distinguish between two forms of power: legislative power and adjudicative or interpretive power. The argument that constitutionalism subverts political equality generally assumes that constitutional interpretation is actually legislation. That is an important fact

for us to notice, because it shows the impact of both legal theory and moral philosophy on this political issue.

The important constitutional disabling provisions are usually drafted in very abstract language. The American constitution, for example, requires 'due process of law' and 'equal protection of the laws', and forbids punishments that are 'cruel'. Judges must decide how to apply these to concrete cases and, of course, judges disagree. They disagree, moreover, in ways that suggest the impact of any judge's convictions about political morality – about the relative moral importance of particular freedoms, for example – on that judge's opinion about what the constitution really means. There are two connected doctrines that argue, from these facts, that judges are not interpreting the law, but inventing new law. According to these doctrines, judges' interpretations are actually pieces of fundamental legislation that, once enacted by a judicial decision at the highest level, cannot be changed by a majoritarian parliament.

The two connected doctrines are a legal theory – legal positivism – and a philosophical thesis – Archimedean moral scepticism. Legal positivism (in its strictest form) holds that law consists in the decisions of officials or other people who have been given law-creating powers by the social conventions of the community in question. If positivism is sound, as a general theory of law, then constitutional adjudication must be constitutional legislation in disguise, because no official or anyone else with conventional law-creating powers has ever decided whether, for example, the equal protection clause forbids paying women lower wages for the same work or the due process clause forbids making abortion a crime. But legal positivism is an inadequate interpretation of legal practice, not just in constitutional cases, but generally. It ignores the fact that we treat as law, not only what the proper officials have declared, but the principles underlying what they have declared, whether they recognized those principles or intended to enact them or not. Law is a matter of integrity not just fiat. So legal positivism cannot support the claim that constitutionalism is undemocratic, because legal positivism is a bad theory of law.

4. Moral Scepticism

Archimedean scepticism, which argues, on philosophical grounds, that there cannot be a single right answer to a controversial moral question, poses a greater challenge, if only because of the great popularity of such scepticism in our cultures now. The question whether outlawing abortion offends the due process clause plainly involves issues of political morality: it requires judges to decide, as one justice put it, which freedoms are basic to the very idea of 'ordered liberty'. If moral convictions are only expressions or projections of emotions or sentiments, as Archimedean sceptics insist, then it cannot be accurate to say that judges interpret the constitution hoping to discover its right or true meaning. We must say that they project their own emotions onto the constitution, which means that they are legislating a new one.

I called this form of scepticism 'Archimedean' to distinguish it from ordinary, or internal, scepticism, of the kind that you and I ourselves share, I assume, about some parts of conventional morality. Internal scepticism rejects morality on internal, moral grounds. If we are sceptical about conventional sexual morality, it is because we think that morality is a matter of people's interests, and we don't think that voluntary sexual choices, however unusual, are harmful. If we think that moral duty can be generated only by the command of a supernatural being, and we think there is no God, we will be sceptical for that reason. This form of scepticism, however global, is rooted in a moral sense, in a set of deep beliefs that, when made explicit, count as a positive moral assertion, a claim about what the only true ground of morality could be. That is why, as J. Stern put it, the three most important moral sceptics of the 19th century, Freud, Marx and Nietzsche, were all profound moralists.

Archimedean (or external) scepticism, on the contrary, is supposedly independent of and neutral among all value claims: it is a philosophical position, based on epistemological or ontological or semantic considerations, not a moral one. The difference is very important in the present context. Since internal scepticism is itself grounded in a moral sense, it can be global but not universal: it cannot be scepticism all the way down. It cannot claim that there is not truth in the *neighbourhood* of the moral. External scepticism, on the contrary, is Archimedean because it is supposedly rooted not in some deep moral sense but in a realm outside morality altogether: a special philosophical platform from which a philosopher might look down on morality and pass judgment about it on the whole. An internal sceptic about sexual morality answers the charge that homosexuality is wrong with an opposite moral claim: that it is not wrong. An Archimedean critic answers that it is neither true nor false that homosexuality is wrong, or that its wrongness or rightness is not out there in reality but in here, in our breasts.

Archimedean sceptics are sceptical (we might say) not about the content but about the status of moral claims. They oppose not particular opinions about how we should behave, what we should value, and so on, but what we might call the 'face value' view of these opinions. That is the view you and I have about many of our moral opinions. We think that genocide in Bosnia is wrong, immoral, wicked, odious. We think that these opinions are true – we might be sufficiently confident, in this case at least, to say that we know that genocide is wrong – and the people who do not agree with us in these opinions are making a bad mistake. That is the view of morality, indeed of value in general, that the Archimedean sceptics wish to oppose or defeat. According to them, the face-value view is not itself a moral view. It is a second-order view about moral views, and, in their opinion, a mistaken one.

But this distinction between the first-order moral convictions which Archimedean scepticism accepts and the second-order face-value view which it rejects is itself a mistake. For the face-value view of morality is itself a piece of morality: it cannot be understood any other way. To say that it is true that abortion is wicked is, for our purposes, just to say that abortion is wicked. To say

it is objectively wicked is just to say that it is wicked everywhere and at all times. To say that the wickedness of morality is 'out there' or 'part of the furniture of the universe', if this means anything at all, is just to say that abortion would still be wicked even if no-one thought it was, which is a further moral claim. We cannot assign any sense to these various redundant or metaphorical or odd beliefs that the Archimedeans think the rest of us have, about the 'status' of our moral convictions, that does not make these into redundant or further moral convictions. (If we try, we turn them into preposterous convictions that no-one actually holds, like the view that the wrongness of abortion is a weird physical fact or that the wrongness of abortion enters into the causal explanation of why people think it is wrong.) But if so, then Archimedean or external scepticism is based on a plainly mistaken idea: that an ordinary, internal moral conviction can somehow be undermined by a morally neutral, external claim. In fact, the only thing that can undermine a moral position either is or presupposes a moral or evaluative commitment of some kind.

You will be amazed that I propose so quickly to dispose of a philosophical tradition that has exercised such great influence since Hume. But I do think that that is all there is to it. Any genuine form of scepticism about morality (or art or law or ethics) must be internal to those domains. We can (and I hope we will) pursue the point in discussion. But if it is correct, then we must understand what might be regarded as meta-ethical theories of different sorts as substantive ethical theories instead. Consider the dialogic theory that Professor Habermas has defended so powerfully: the only form of truth in morals, he suggests, is a kind of convergence under ideal conditions. This is unpersuasive, for the reasons I suggested, when viewed as an external, philosophical analysis of truth. But it is more attractive as a substantive account of morality – as a substantive moral claim that hypothetical convergence is a substantively appropriate test of a moral or a political view. One way (there are others) to put the claim would then be this: we must reject any moral position, at least as a basis for government, unless it is likely (or plausible, or possible) that it would be the object of convergence under circumstances we would think suitable. (Compare Thomas Scanlon's 'contractarian' view that no principle is morally sound if it could be reasonably rejected by anyone, under appropriate circumstances.) I should say that I am, so far, not fully persuaded by Habermas' view even in this substantive form. I have more confidence that racial prejudice is wrong than I do that people would converge on that view under *any* circumstances. In fact, I doubt that we will find a satisfying overall, general substantive account of moral truth.

In any case, I reject the idea that any form of Archimedean scepticism shows us, in advance, that constitutional interpretation must be constitutional legislation. Even though judges disagree about the best interpretation of abstract constitutional clauses, like the due process clause, it does not follow that they are legislating new constitutional law rather than doing their best to discover what the existing constitutional law really is. It remains possible to argue, on *internal* grounds, that there is no right answer to some legal question, like the

question, for example, whether the due process clause forbids states to make abortion a crime. But of course the possibility that some such argument might succeed as to some issues gives us no reason to claim, as a general matter, that there is never a right answer to a controversial constitutional issue.

5. Does Constitutionalism Deny Freedom?

It is sometimes said that though constitutionalism may protect negative liberty, or the liberty of the moderns, it does so at the cost of positive liberty, or the liberty of the ancients, or the Kantian power of people to legislate their own laws. The distinction I made earlier, between a statistical and a communal concept of collective action, is important in trying to understand this charge. If we conceive of democracy as statistical, then the charge seems simply a flat mistake. Democracy does not protect any *individual's* power to control his own destiny: in a large state, of many million people, no-one's positive freedom is greater, in any but the thinnest, most academic sense, if he has a vote than if he does not. In order to reveal the force of the claim about positive liberty, we must take up the *communal* conception of democracy. Then it might seem a powerful point that constitutionalism limits the power of 'the people', now conceived as an entity rather than only statistically, to govern its own affairs.

But if we adopt a communal conception of democracy, then we must answer a qustion parallel to the question I asked with respect to the statistical conception earlier. What are the pre-conditions for a collection of people counting as a genuine community, such that it is then morally significant what the community does? I will suggest that three conditions are necessary in order that a political community count as a moral community. The structure of the political community must be such that individual citizens have a *part* in the collective, a *stake* in it, and *independence* from it.

First, in a democracy understood as communal government by equals, each person must be offered the chance to play a role that could make a difference to the character of political decisions, and the force of her role – the magnitude of the difference she can make – must not be structurally fixed or limited by assumptions about her worth or talent or ability, or the soundness of her convictions or tastes. Second, collective decisions must reflect equal concern for the interests of all members. Membership in a collective unit of responsibility involves reciprocity: a person is not a member of a collective unit sharing success and failure unless he is treated as a member by others, and treating him as a member means accepting that the impact of collective action on his life and interests is as important to the overall success of the action as the impact on the life and interests of any other member. Though even Germans who actively opposed Hitler feel a measure of collective responsibility for his crimes, it would be absurd, even perverse, for German Jews to feel any such sense. So the communal conception of democracy explains an intuition many of us share: that

a society in which the majority deliberately distributes resources unfairly is undemocratic as well as unjust. Third, if a community is to have moral significance, so that its decisions give legitimacy to coercion of dissenters, then it must be a community of moral agents. Citizens must be encouraged to see moral and ethical judgment as their own responsibility rather than the responsibility of the collective unit; otherwise they will form not a democracy but a monolithic tyranny. A communal democratic government must not dictate what its citizens think about matters of political or moral or ethical judgment, but must, on the contrary, provide circumstances that encourage citizens to arrive at beliefs on these matters through their own reflective and finally individual conviction.

6. Democracy and Mistakes

So constitutionalism does not threaten positive liberty, because constitutionalism is essential to creating a democratic community – to constituting 'the people' – and there can *be* no communal, collective freedom without it. I mean, of course, that constitutionalism does not compromise positive liberty *in principle*. It may do so if the constitution contains the *wrong* principles, or if judges make the wrong decisions interpreting it. But that is hardly surprising. Democracy can go wrong in many ways, and this is only one of them. But the point does remind us of an important further question. Suppose we accept that constitutionalism, as I defined it, is a necessary precondition of democracy. How should a society decide what its constitution should be, and – what may come to the same thing in practice – how should it apply its constitution to particular controversial issues?

There seems only one way in which a society that aspires to be a democracy should decide what abstract principles or rights to declare in its constitution. It should do so by popular referendum. But how should the constitution be interpreted? I favour (perhaps unsurprisingly) the American method: we assign adjudicative responsibility to judges, whose decision is final, barring a constitutional amendment, until it is changed by a later judicial decision. Of course that does give great power to a few men and women. Even if we agree that interpretation is not invention, and that judges can sensibly take themselves to be attempting to find the best interpretation of the constitution they have rather than to write a new one, the fact that their views will be final gives them exceptional power. That power is limited in various ways – there are typically several judges in a constitutional court, and new appointments, reflecting popular judgments, are fairly frequent. And judges can be impeached if they behave outrageously. But it is still exceptional power, and the arrangement needs a justification.

I would offer a negative and a positive argument on its behalf. First, democracy requires that the power of elected officials be checked by individual rights, as we have seen, and the responsibility to decide when those rights have

been infringed is not one that can sensibly be assigned to the officials whose power is supposed to be limited. Second, asking judges to interpret and enforce those rights provides the best available forum for viewing the question of their interpretation as a moral rather than a political one. The public participates in the discussion – as it has in the United States, for example, about abortion, school prayer and many other issues – but it does so not in the ordinary way, by pressuring officials who need their votes or their campaign contributions, but by expressing convictions about matters of principle. In that sense, even the terrible debate in the United States about the Supreme Court's abortion decision, *Roe v. Wade,* has been beneficial.

There is, of course, a good deal of idealization in my description. Judges are not trained as political philosophers, and are not necessarily impressive at it – though the decisions of the Supreme Court do contain some marvellously lucid and effective arguments of principle. The constitutional debate in the newspapers, on television, and in political campaigns rarely reaches the sophistication of a seminar. But I believe that adding to a political system a process that is institutionally structured as a debate over principle rather than a contest over power is nevertheless desirable, and that counts as a strong reason for allowing judicial interpretation of a fundamental constitution.

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NOTES

[1] I prepared this paper not to read at the symposium held at the Zentrum für interdisziplinäre Forschung, Bielefeld, but to give Professor Habermas an advance idea of what I would discuss there. I agreed to its publication here, but did not have an opportunity to revise it for that purpose.

[2] J. Habermas, 'On the Internal Relation between the Role of Law and Democracy', this volume, pp. 12–20.