

**DEMOCRATIC LEGITIMACY AND ITS DISCONTENTS**

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**Table of Contents**

1. Law's promise: freedom through coercion .....	128
2. The background assumption: legitimacy through consensus .....	129
3. The trouble with "We the People": from consensus to majority and back .....	132
4. A comforting illusion? .....	137
5. References .....	139

**Résumé**

Dans une démocratie constitutionnelle, le droit dérive du peuple souverain. Le droit est donc autant légitime qu'il s'appuie sur l'accord général de ses destinataires („consent of the governed“). Cet article met en évidence les insuffisances de la fondation consensuelle du droit et démontre que la souveraineté du peuple n'offre aucun cadre conceptuel à l'intérieur duquel s'accorde la liberté de l'individu avec la contrainte provenant du droit.

**Zusammenfassung**

In einem demokratischen Verfassungsstaat wird das Recht aus dem souveränen Willen des Volkes abgeleitet. Das Recht ist demnach insofern legitim, als es sich auf einen allgemeinen Konsens der Rechtsunterworfenen („consent of the governed“) stützen lässt. Der vorliegende Beitrag thematisiert die Unzulänglichkeiten der konsensualen Begründung des Rechts und zeigt auf, dass die Volkssouveränität keinen konzeptuellen Rahmen bietet, innerhalb dessen sich die Freiheit des Einzelnen mit dem vom Recht ausgehenden Zwang vereinbaren liesse.

## **Abstract**

In a constitutional democracy the law derives its legitimacy from the sovereign will of the people. By basing the obligation to obey the law on the consent of the governed the principle of popular sovereignty makes coercion exercised by the law appear as authorized by the very individuals at whom it is directed. The present paper examines deficits inherent in the notion of the consent of the governed and argues that the principle of popular sovereignty fails to reconcile the ideal of individual autonomy and self-determination with the reality of the individual being subjected to the terms of social life defined by the law.

## **1. Law's promise: freedom through coercion**

Conventional wisdom has it that those who are in power tend to abuse it if no constraints are placed upon them. Hence, the need to render the exercise of power calculable and restrained is a constant factor in the organization of social life. Law has ever been viewed as the most effective mechanism to contain power. The ideal of “the rule of law, not of men” which can be traced far back to the ancient times<sup>1</sup> stands essentially for the promise that the freedom of the individual is best served when the ruler(s) operate(s) within the limits of legal system. Law thus is conceived as a bulwark that shields the governed from the potentially arbitrary will of the powerful. Especially since the age of the Enlightenment, the idea that political authority is subordinate to law and that government is to be performed subject to legal rules has gradually gained ground and become a central pillar upon which modern states are (or at least purport to be) built.

The following frequently quoted passage from F. A. HAYEK's *The Constitution of Liberty*, an iconic work of liberal thought,<sup>2</sup> may serve as one of the clearest expressions of the dominant paradigm of contemporary legal culture:

“When we obey laws, in the sense of general abstract rules laid down irrespective of their application to us, we are not subject to another man's will and are therefore free.”<sup>3</sup>

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<sup>1</sup> Cf. ARISTOTLE 1985 [c. 330 BC], Book III, 1287a, at 2042-2043: „And the rule of law, it is argued, is preferable to that of any individual. [...] Therefore he who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men. The law is reason unaffected by desire.“

<sup>2</sup> Telling in this regard is the following anecdote provided by RANELAGH 1991, IX. At a Conservative Party meeting, MARGARET THATCHER, the then newly elected leader of the party, interrupted a speaker by holding Hayek's *The Constitution of Liberty* up for all to see, saying, “This is what we believe”, and banging the book down on the table.

The statement captures the essential promise of law: to restrain the exercise of power and enable individuals to live together nonviolently on the basis of each person's equal freedom. The freedom-guaranteeing function of law, however, gives rise to the fundamental paradox of securing freedom by means of legal system that is by its very nature designed to impose restraints upon the freedom of its subjects in the form of duties, obligations, responsibilities and outright coercion. This in turn puts the law in need of justification and differentiation from the exercise of naked power. As H. L. A. HART puts it plainly, the challenge for law is to demonstrate how its commands are any different from the commands of a gunman who threatens his victim to shoot him if he refuses to hand over his purse.<sup>4</sup> The only way to succeed in this enterprise is to show that the obligation to obey the law is based on something else than the mere brute force, something being capable of making coercion inherent in law compatible with individual freedom, autonomy and self-determination. What is at stake in other words is the issue of legitimacy.<sup>5</sup>

## 2. The background assumption: legitimacy through consensus

In a constitutional democracy, a form of government most states nowadays are committed to, the central criterion of legitimacy of legal and political order is the popular sovereignty, also referred to as the consent of the governed.<sup>6</sup> The principle of popular sovereignty is closely linked with the notions of human equality, autonomy and self-determination, pursuant to which the will of each individual is equally authoritative in establishing the normative order it is subjected to. All obligations, whether moral or legal, incurred by the individual are assumed to have their origin in the autonomous will of that very individual.<sup>7</sup>

The idea that only the consent of the governed can legitimate the power that government exercises over its subjects and obligate the people to obey the law has its roots in the Enlightenment rationalism. The decline of the medieval worldview with its focus on the divine authority as the ultimate source of legitimacy of the existing order<sup>8</sup> gave rise to the problem of finding an alternative basis for the organization of social life in a new secular

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<sup>3</sup> HAYEK 1960, 153.

<sup>4</sup> See HART 1994, 7: „A penal statute declaring certain conduct to be an offence and specifying the punishment to which the offender is liable, may appear to be the gunman situation writ large; and the only difference to be the relatively minor one, that in the case of statutes, the orders are addressed generally to a group which customarily obeys such orders.”

<sup>5</sup> The term “legitimacy” can of course be associated with the broadest range of questions, philosophical, ethical, legal, and else. For the purposes of this article, we use it to refer to the problem set forth above, namely, how being obliged to obey the commands of law differs in substance from being subjected to naked power and violence.

<sup>6</sup> Cf., e.g., MORGAN 1988, 13; GARDNER 1990, 192; ROSENFELD 2001, 1311.

<sup>7</sup> Cf., e.g., MÜLLER 1993, 20-22; BÖCKENFÖRDE 2004, 452-453.

<sup>8</sup> For an account of the medieval concept of legitimate political authority and law, see generally ULLMANN 1975.

world. In addressing this problem, political theorists of the Enlightenment came up with the concept of social contract, the most influential versions of which were developed by HOBBS, LOCKE and ROUSSEAU.<sup>9</sup> Whatever their differences, the social contract theorists produced a common conceptual framework for the justification of political authority and legal order that has proven itself remarkably successful.

At the core of this legitimation enterprise is the notion of social contract. The assumption that all human beings are equal and autonomous individuals, a linchpin of the whole Enlightenment project, means that no individual can claim natural authority over another. Given, however, that the exercise of authority is a characteristic feature of all forms of social organization, the question is how the authority as such can be legitimate. For the exponents of the social contract school, the key to establishing the legitimacy of political order and finding the source of obligation to obey the law is to be found in the consent of the affected persons. Only by voluntarily consenting to give up his natural freedom and submit to some kind of authority does the autonomous individual incur political and legal obligations. The reason behind the decision attributed to each member of society to relinquish his natural freedom is seen in the need to escape the dangers of the “state of nature” described by HOBBS in terms of “*bellum omnium contra omnes*”.<sup>10</sup> Precisely the fact that human beings are equal and have similar interests that can only be satisfied at the expense of others holds the potential for conflict. The voluntary submission to a common authority, referred to by the social contract theorists as “sovereign”<sup>11</sup>, is the price that must be paid by each individual for the possibility of nonviolent coexistence with others. By basing political and legal obligations on the agreement between the affected persons, the social contract approach appears to live up to the ideal of human equality.

At the same time, the idea of social contract purports to solve the tension between freedom and coercion by distinguishing between the total freedom in the state of lawlessness, which is ultimately self-destructing since it puts individuals at the mercy of the most powerful, and the

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<sup>9</sup> See HOBBS 1996 [1651]; LOCKE 1999 [1689]; ROUSSEAU 2001 [1762].

<sup>10</sup> See HOBBS 1996 [1651], Chapter XIII, at 112-113: „ Hereby it is manifest, that during the time men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war, as is of every man against every man.“ Although such a pessimistic view on human nature is not necessarily shared by other social contract theorists, the need for limitation of natural freedom for the sake of maintenance of peaceful relations in society is manifest in all versions of the social contract theory.

<sup>11</sup> The notion of the sovereign has been subject to much controversy within the social contract school. In particular, the Hobbesian and Rousseauian versions of social contract offer fundamentally different perspectives on the nature of supreme power. Hobbes identifies sovereignty with government: sovereign is an individual (or a group of individuals) who has absolute power conferred to him by the social contract. Rousseau, by contrast, vests sovereignty in the people: sovereignty is not simply the will of those in power but rather the general will (*volonté générale*) of the people as a whole. It is the Rousseauian version of sovereignty that has had a greater impact upon the development of modern constitutional democracies.

restrained freedom in the civil society, in which each individual is entitled to equal freedom. While limiting the freedom for all in a non-arbitrary way, law simultaneously protects it by compelling each individual not to infringe upon the equal freedom of other individuals. This dialectic is famously captured by ROUSSEAU's holding that compelling people to abide by the general will as manifested in law amounts to compelling them to be free.<sup>12</sup> In similar vein, KANT defines the law as "the aggregate of those conditions under which the will of one person can be conjoined with the will of another in accordance with a universal law of freedom."<sup>13</sup> Importantly, such an understanding of the interrelationship of law and freedom has far-reaching implications for the design of political decision-making procedures. The recognition of the human being as "an end in himself and not merely as a means to be arbitrarily used by this or that will",<sup>14</sup> provides a powerful underpinning for the principle of popular sovereignty.<sup>15</sup> Being an end in himself implies that no one can be subjected to obligations determined by some external will. Taking individual autonomy and self-determination seriously means that each individual must be able to design and pursue his life plan on his own. Consequently, the only source of justification of political and legal order is the unanimous consensus of its subjects. Without such a consensus, the obligation to obey the law amounts to the infringement upon the freedom and self-determination of non-consenting individuals. KANT himself offers the most eloquent argument on this account:

"[A] public law which defines for everyone that which is permitted and prohibited by right, is the act of a public will, from which all right proceeds and which must not therefore itself be able to do an injustice to any one. And this requires no less than the will of the entire people (since all men decide for all men and each decides for himself). For only towards oneself can one never act unjustly. But on the other hand, the will of another person cannot decide anything for someone without injustice, so that the law made by this other person would require a further law to limit his legislation. Thus an individual will cannot legislate for a commonwealth. For this requires freedom, equality and *unity* of the will of *all* the members. And the prerequisite for unity, since it necessitates a general vote (if freedom and equality are both present), is independence. The basic law, which can

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<sup>12</sup> See ROUSSEAU 2007 [1762], Book I, Chapter 7, at 26: "Thus, in order for the social compact to avoid being an empty formula, it tacitly entails the commitment – which alone can give force to the others – that whoever refuses to obey the general will will be forced to do so by the entire body."

<sup>13</sup> KANT 1980 [1797], 34.

<sup>14</sup> KANT 1981 [1785], 35.

<sup>15</sup> For an insightful discussion of the implications of Kantian ethics for the theory of democracy, see MAUS 1992.

come only from the general, united will of the people, is called the *original contract*.”<sup>16</sup>

Far from being abandoned as a utopian vision rooted in the Enlightenment thought with its belief in universal truths and values discernible by reason alone, the notion of general consensus features prominently in the self-understanding of modern constitutional democracies.<sup>17</sup> Today, we take it for granted that the people as a whole – not simply the majority thereof – are the source of all governmental power and law.<sup>18</sup> State actions and legal norms are considered legitimate only to the extent they fall within the powers granted by the people through a constitution. The constitution, the supreme law of the state, is held to be the expression of a legitimating consensus, the sovereign will of people.<sup>19</sup> Characteristically, hardly any constitution fails to employ some variation of the traditional formula “We the People”.<sup>20</sup> The very idea that it is “We the People” who establish constitutional order engenders the corresponding obligation of each and every individual to obey the duly constituted government and laws. The constitution thus appears as a set of basic principles on the organization of social life on which all those who wish to live together are in agreement. By putting legal subject in the role of the maker of his legal system, the principle of popular sovereignty purports to reconcile the ideal of individual autonomy and self-determination with the reality of the individual being subjected to the terms of social life determined to a great extent by the law. And this in turn offers a solution to the problem of securing freedom through coercive force of law. The notion of the individual as both maker and subject of law allows us to view coercion as authorized by the very individual at whom it is directed.

### 3. The trouble with “We the People”: from consensus to majority and back

However appealing the assumption of “We the People” establishing law and government might be, it must face the objection that the actual unanimous consent to constitutional order

<sup>16</sup> KANT 1970 [1793], 77.

<sup>17</sup> JOHN RAWLS theory of justice and JÜRGEN HABERMAS discourse theory of law and democracy, widely credited with a major influence on current debate on power, law and legitimacy, are representative in this respect. The former explains the ability of the constitutional democracy to maintain widespread allegiance in terms of an “overlapping consensus” on certain core commitments common to divergent comprehensive moral views maintained in the community (see RAWLS 1971, 387-388 and 1985). The latter grounds law’s normative validity in a democratic principle, according to which only those laws may claim legitimacy that can meet with the assent of all legal consociates in a discursive process of law-making that is itself legally constituted (see HABERMAS 1996 [1992], 110).

<sup>18</sup> Cf., e.g., Article 20 Section 2 of the Basic Law for the Federal Republic of Germany: „*Alle Staatsgewalt geht vom Volke aus*.“ („All state authority is derived from the people.“).

<sup>19</sup> Cf., e.g., MÜLLER 1993, 26-28; KU 1995, 557.

<sup>20</sup> Cf., e.g., the Preamble of the Federal Constitution of the Swiss Confederation: „*Das Schweizervolk und die Kantone, [...] geben sich folgende Verfassung*“ („We, the Swiss People and Cantons, [...] adopt the following Constitution“).

is virtually unattainable. Hardly any constitution has ever been adopted by 100 percent of the votes.<sup>21</sup> This leaves us with the question of how a decision by some subset of society – usually the majority of those who vote – can bind dissenters and nonvoters. Legitimacy thus turns on the problem of justification of majority rule.

Once again, the notions of human equality, autonomy and self-determination serve as a starting point for the justification argument. In a democratic society, the people are assumed to be masters of their collective destiny. This necessarily presupposes the existence of mechanisms of collective will-formation inclusive of the perspectives of all individuals. By guaranteeing the right to equal participation in decision-making processes, the principle of popular sovereignty stands for the promise of such all-inclusiveness. As, for example, HABERMAS stresses, it is the equal participation in processes of opinion- and will-formation in which citizens exercise their political autonomy that allows them to acquire the role of authors of their legal order.<sup>22</sup> In line with this understanding, democratic rights of participation transform individual freedom and self-determination into collective will-formation.<sup>23</sup> They enable all citizens to participate in the decision-making process with a reasonable expectation to influence its outcome. Without an effective opportunity to give voice to their perspectives, those who happen to be in the minority would perceive themselves as being subjected to the oppressive will of the majority.<sup>24</sup> The majority rule, so the argument goes, offers the dissenting minority a good reason to accept the majority's decision since it leaves the door open for further deliberation and possible future revision. Knowing that their decision is open for revision, those in the majority now would be aware of the possibility of finding themselves in a minority and feel compelled to take the minority position into account.<sup>25</sup> Further, the constitutional guarantees of fundamental rights and freedoms are designed to ensure that democracy, though majoritarian in nature, is not just a matter of "two wolves and a sheep voting on what to have for dinner".<sup>26</sup> Indeed, the Constitution with its provisions limiting the majority's ability to exercise power is commonly invoked as the answer to the question of why decisions voted by the majority are binding on the dissenting minority.<sup>27</sup>

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<sup>21</sup> For example, the Federal Constitution of the Swiss Confederation of April 18, 1999 was adopted by 59.2 percent of the valid votes cast in a referendum with a turnout of just 35.89 percent (see <http://www.admin.ch/ch/d/pore/va/19990418/det453.html>).

<sup>22</sup> HABERMAS 1996 [1992], 156.

<sup>23</sup> Cf. BÖCKENFÖRDE 2004, 454.

<sup>24</sup> Cf. BOHMAN 1994, 921.

<sup>25</sup> Cf. MANIN 1987, 360.

<sup>26</sup> BOVARD 1994, 333.

<sup>27</sup> Cf. REIMAN 1988, 134.

Democratic legitimacy thus does not require that everyone agree to each particular decision, law or even constitutional provision. It does, however, presuppose the general acceptance of a decision-making process, which is equally open to all participants and provides safeguards for dissenting minorities in the form of fundamental rights and freedoms. In the end, having identified the actual unanimous consent of the governed as an inadequate source of justification of legal and political order, we are left with the assumption that democratic legitimacy is based on tacit consent.

The tacit consent approach has the advantage of not requiring any direct evidence of the consent of the governed in the form of a “yes” vote in a constitutional referendum, an oath of allegiance to the constitution, and the like. Instead, the consent to obey the law is inferred from participation (or rather the equal opportunity to participation) in democratic processes of decision-making or from residence in a democratic state.

Let us first consider the argument that participation in democratic decision-making establishes consent to be bound by its outcome.<sup>28</sup> The claim here is that the right to vote entails the power to alter laws and constitution and change government. Like a player who by participating in a game consents to its rules and outcome regardless of whether he wins or loses, we are obliged to obey democratically enacted laws and elected government even if we end up on a “losing” side in the decision-making “game”. This line of reasoning is misleading though. For even if we concede that by participating in a decision-making process we influence, however marginally, its outcome and are therefore under obligation to accept it, there still remains the problem of establishing tacit consent of those who do not vote at all. Nonvoters cannot be said to have tacitly assented to the outcome of a decision-making procedure in the manner of a player whose participation in the game entails the acceptance of its rules and result. Nonvoting may in no way be construed as participation. Nonetheless, the argument for inferring tacit consent to obey the law from having a right to participate in its making dies hard. As long as everybody is equally free to participate in decision-making, it is maintained, the failure to do so cannot be invoked as a reason for refusing to comply with its outcome since those who have abstained from voting have had an opportunity to influence it but freely chosen not to do so. The argument, however, is flawed since it leaves no freedom of choice, which is inherent to the notion of consent. For if consent means that the individual freely choose to do something (say obey the law) then there must also be a possibility to chose otherwise. Consent, in other words, implies that there is a room for dissent. Consequently,

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<sup>28</sup> For this view, cf., e.g., DOWNIE 1964, 70-71; SINGER 1973, 45-53; HABERMAS 1996 [1992], 156; BÖCKENFÖRDE 2004, 457-458.

inferring consent to the outcome of a decision-making procedure from a mere opportunity to participate in it amounts to denying any opportunity of dissent. This is of course not a kind of consent that can legitimate law and political authority.

The same holds true for “consent” derived from an active participation in democratic decision-making. It may be the case that playing a game implies accepting its rules and result, but it is generally up to the player to stay away and remain unaffected by the game. The subject of the legal and political order does not enjoy this comfortable position. Whether he participates in decision-making or not, the outcome will affect him. The average voter normally votes not because he is ready to commit himself to whatever the outcome might be, but because he hopes to help bring about a desired decision or avert an undesired one. Voting with such an attitude cannot be plausibly held as giving consent to any decision.<sup>29</sup> Accordingly, the mere participation in democratic decision-making processes does not constitute by itself consent to existing legal and political order.

Residence in a democratic state is another frequently cited candidate for tacit consent to obey the law. The thrust of the argument goes as follows: By residing in a state one is free to leave and accepting the benefits entailed by residence, one tacitly assents to the legal and political order of that state.<sup>30</sup> On this view, the residence in a state is comparable to the membership in an association. Being a member of a given association (say a sports club) means that one accepts the authority of the association to issue rules binding on him. Any member who refuses to comply with the body of association rules can simply terminate his membership (be it instantly or at the end of a notice period) and thus revoke the authority of the association to bind him. By the same token, anyone residing in a democratic state, whether citizen or resident alien, who comes to reject the authority of democratically enacted laws and elected government, can defy this authority by leaving the state. Based on this logic, the continued residence in a democratic state signifies consent to abide by terms set forth by the democratic majority.

Establishing the consent of the governed via residence is open to objections on several counts. First, not only democratic states allow their subjects to leave the country. Emigration, more or less unhindered, is also possible in states that fall far short of democratic standards. On the

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<sup>29</sup> Cf., e.g., SIMMONS 1984, 800-801 (arguing that voting is a way of expressing preference rather than undertaking obligations); BARNETT 2003, 118-119 (arguing that people vote simply to minimize the threat to their interests posed by the lawmaking process).

<sup>30</sup> Cf., e.g., WALZER 1970, 28; BERAN 1987, 125-155. The first known articulation of the idea that one implicitly agrees to obey the laws of a state by choosing to stay there can be found in PLATO’S account of the debate preceding SOCRATES’ death. See PLATO 1984 [c. 390 BC], 36-37. For a critical assessment of SOCRATES’ arguments, see D’AMATO 1976.

argument presented above, every political system, however oppressive, must be considered legitimated by the consent of the governed as long as it grants its citizens the right to emigrate. To take the most extreme example, consider the situation of Jews in Nazi Germany. In the first years of the Third Reich, Jews were generally allowed and even encouraged to emigrate. Yet little more than half of the approximately 500,000 Jews residing in Germany by 1933 left the country. The assumption that residence establishes consent would lead us to the obviously absurd conclusion that those Jews who forwent the opportunity to emigrate gave their consent to the very regime that set out to subject them to worst forms of discrimination, terror and eventually annihilation.

Admittedly, Jews willing to emigrate from Nazi Germany had to cope with extremely difficult problems and make great sacrifices. A visa for a country of refuge had to be obtained, considerable part of the property had to be left behind, and so forth. However, and this is the next point to be made against deriving consent from residence, emigration is rarely an easy undertaking. Considering all the ties (personal, cultural, linguistic, economic, *etc.*) that bind one to the country one lives in, emigration cannot be held to be a reasonable alternative to submitting to the will of those who effectively have a greater say in the running the country. Besides, states nowadays are generally hardly any more welcoming to would-be immigrants than they were to Jews seeking to escape the Nazi regime.

Finally, the argument that residence implies consent to obey the law is patently circular. For it already presupposes that the constitutional legislator (“We the People”, *i.e.*, the democratic majority) has the authority to hold everybody within the given territory to constitutional order.<sup>31</sup> Yet it is the legitimacy of this very authority that is at issue. The residence is accordingly no more appropriate a candidate for the legitimating consent than the participation in democratic decision-making.<sup>32</sup>

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<sup>31</sup> For an exhaustive discussion of this circularity, see generally BRILMAYER 1989.

<sup>32</sup> One further argument linking consent to residence focuses on the acceptance of benefits entailed by residence. On this view (advanced, *inter alia*, by HART 1955, 185, and RAWLS 1964, 9-10), which has come to be known as the principle of fair play, the enjoyment of benefits provided by the state gives rise to the obligation to obey its laws. Given that every individual is to some extent dependent on such benefits (security, infrastructure, schooling, *etc.*), the state may legitimately claim that everybody within its territory comply with its laws. The obvious trouble with this argument is that it makes virtually every political system appear legitimate. If accepting benefits provided by the state establishes consent to its constitutional order, then it must be conceded that not only political systems we call constitutional democracies are democratically legitimated, but also those such as fascist regimes, communist dictatorships, Islamic theocracies, *etc.* Legitimacy defined in these terms is of no conceptual or practical value whatsoever.

#### 4. A comforting illusion?

The deficits inherent in the concept of the consent of the governed, which we pointed out in the preceding section, suggest that the consent, whether express or tacit, cannot provide sufficient ground for the justification of the imposition of legal obligations. Accepting this proposition but seeking to avoid the skeptical conclusion that there is no general obligation to obey the law,<sup>33</sup> one strain of contemporary legal scholarship derives the legitimacy of law from the necessity of protection of fundamental rights of the individual. This rights-oriented approach stresses the significance of the rule of law as a *conditio sine qua non* for the actual enjoyment of fundamental rights. Given that only the government under law – as opposed to the arbitrary and despotic rule – effectively secures such rights, each individual owes it obedience.<sup>34</sup> On this account, the legitimacy of legal and political order is not *prima facie* a matter of consent of the governed. Rather, it rests on the indispensability of positive law for the protection of fundamental rights of the individual.

As it is easy to see, the argument draws heavily on the body of thought associated with the natural law tradition. It operates on the assumption that there are certain fundamental rights, which, though non-positive, rely on coercive force of positive law for protection. Positive law thus is legitimate to the extent the restrictions it imposes on the freedom of the individual are necessary to secure these rights.<sup>35</sup> What is striking about this attempt to reconstruct legitimacy is the nonchalance with which it presupposes the existence of some one-size-fits-all set of rights. After all, it is precisely the lack of general agreement on standards of justice that gives rise to the problem of legitimacy. Were we all in agreement on the nature and scope of rights each individual is entitled to enjoy, there would be little trouble to justify restrictions imposed by law to prevent infringements upon these rights.

Certainly, it can hardly be disputed that general notions of human dignity, equality before the law, right to life and so forth command universal assent. Yet what exactly these rights mean is far from being subject to universally shared understanding. Does human dignity entail a right to physician-assisted suicide in cases involving intense pain or imminent death? Are the various schemes of affirmative action benefiting *de facto* disadvantaged groups consistent with equality before the law? Does the right to life extend to the fetus? Such are the questions

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<sup>33</sup> Among those who share this view are, for example, WOLFF 1970; SMITH 1973; RAZ 1979.

<sup>34</sup> Cf., e.g., MACCORMICK 1979, 406-410 (arguing that if people do have any rights, each of us has an obligation to respect the system which guarantees them); BARNETT 2003, 137-148 (asserting that, in the absence of unanimous consent, constitutional legitimacy is based solely on procedural assurances that the fundamental rights of non-consenting individuals are protected).

<sup>35</sup> Cf. BARNETT 2003, 142.

that divide not only people from different legal cultures and backgrounds, but also, as anyone with even the slightest familiarity with the law knows, judges sitting on the same bench.

In the end, what particular rights are secured by the legal system is determined by the standards of justice prevailing (or held by the lawmaker<sup>36</sup> to be prevailing) in a given society.<sup>37</sup> Confronting diversity in the understanding of what this or that right means and unable or unwilling to go along with it, the lawmaker makes a choice for one particular vision conferring on it the full authority of positive law and suppressing at the same time the rest. The very act of lawmaking thus is the manifestation of the thoroughly totalitarian and violent nature of law.<sup>38</sup> For subjecting the individual who happens to adhere to certain concept of rights to a legal system that enforces some substantially different vision (typically held by the majority of the community) cannot be described as anything else but violence.

To be sure, we do not dispute that the violence inherent in law is generally preferable to the only conceivable alternative of each individual being able to pursue his own cause, however abhorrent to the rest of society. Yet viewing law from this perspective is quite different from cultivating the illusion that when we obey the law “we are not subject to another man’s will and are therefore free”<sup>39</sup>. Comforting as this belief might be, it does not stand up to the reality of law being all too often (mis)used in a manner most detrimental to the cause of individual freedom.

Perhaps nothing illustrates law’s ambiguous relationship to freedom better than the following episode that is not without irony. A quarter of a century before HAYEK’s *magnum opus* of liberal thought *The Constitution of Liberty* was published, another eminent scholar had presented a remarkable piece of paper with the same title (in German: *Die Verfassung der Freiheit*). It was CARL SCHMITT, the notorious apologist of the Nazi rule, praising the merits

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<sup>36</sup> By “lawmaker” we refer not only to legislators in the narrow sense, but also and foremost to judges who play crucial role in the creation of legal meaning.

<sup>37</sup> Speaking in Wittgensteinian terms, it is the dominant “form of life” (cf. WITTGENSTEIN 2001 [1953], §§ 19, 23, 241) that is instrumental in establishing the meaning of the respective right (cf., e.g., NIGGL/AMSTUTZ 2004, 171-177).

<sup>38</sup> COVER 1983 provides an extraordinarily powerful exposition of violence as a necessary adjunct to the creation of legal meaning. The violence, he is preoccupied with, is what he calls the “jurispathic” power exercised by the court each time it pronounces the meaning of law “killing” thereby alternative legal meanings. (See *id.* at 40: “[T]he jurisgenerative principle by which legal meaning proliferates in all communities never exists in isolation from violence. Interpretation always takes place in the shadow of coercion.”) The violence that COVER identifies in the realm of judicial interpretation is certainly not limited to lawmaking from the bench. Legislation (in the common sense of the term) is no less a violent enterprise. True, an enacted statute does not by itself convey the definitive legal meaning. But as a necessary step in the establishment of the authoritative legal meaning, the legislative decision indicates certain choices and discards others.

<sup>39</sup> HAYEK 1960, 153.

of the Nuremberg laws<sup>40</sup>, which created legal basis for one of the most comprehensive assaults on human dignity, life and freedom world has ever experienced.<sup>41</sup>

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<sup>40</sup> Reichsbürgergesetz vom 15. September 1935 (Reichsgesetzblatt 1935 I, 1146); Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre vom 15. September 1935 (Reichsgesetzblatt 1935 I, 1146-1147)

<sup>41</sup> Cf. SCHMITT 1935.

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