ESSAY

Constitutional Values as the Normalisation of Societal Power: From a Moral Transvaluation to a Systemic Self-Valuation

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Abstract

In this article, I argue that values are fluid societal expectations which cannot be used as normative foundations of modern society. Despite their transcendental validity claims, they operate as immanent tools of the normalisation of societal power and contribute to the transformation of *potentia* of societal forces to the constitutional *auctoritas*. I subsequently argue that a sociology of constitutional values must address the distinction between moral values in law and law as a moral value. Constitutional processes of the transvaluation of values are complex forms of societal expectations in which understanding, consensus and conformity must be taken into account as much as confusion, dissent and deviance. I conclude by claiming that constitutional valuations and transvaluations need to be explained as part of the legal and political self-referentiality unlimited by nation-states and stretching into contemporary supranational and transnational regimes of law and their internal value productions.

The first time that I met Martin Krygier was at a conference at the Central European University in Budapest in the 1990s. At that time, Central Europe was full of liberal and democratic hopes associated with the rule of law transformations in which Martin was one of the leading world scholars. The Visegrád group was the name given to young aspiring democracies joining forces to become members of the newly founded European Union and we, young academics from the region, wanted to be part of this process and its forces. And, indeed, the university in Budapest was still unthreatened by authoritarian government and was not forced to move its activities to Vienna. One is almost tempted to nostalgically think that those were the best times of post-communist societies in Central Europe then investing so much effort and energy in constitution-making and democracy-building and inviting the most

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distinguished minds to be part of this process without being labelled as agents of some dark powers threatening local traditions and identities.

For me, meeting Martin was certainly one of the best things that happened in my academic and personal life. I was immediately taken by his irony and intelligence which always shone in his eyes. One could immediately tell that this was not one of those 'experts' presenting superficial knowledge but a typical Central European intellectual whose thinking is his life. When, many years later, I was invited by Martin to a book launch in the Bondi Pavilion in Sydney, I could see how he managed to keep this Central European style of thinking and cultural tradition in his Australian homeland and how much he was loved and respected for that by everyone in the crowd gathering that evening.

Martin has a rare capacity of clear and original writing in different registers from cultivated and entertaining essays to the most advanced academic studies. Whenever he writes or speaks, I carefully read or attentively listen already knowing that my own ways of thinking and views will be profoundly affected by his thoughts and arguments. Whenever we meet and discuss matters of the rule of law, social values or constitutionalism and democracy, I admire his ability to express serious ideas in a light and enlightening spirit. The following text is inspired by these discussions and encounters for which I am grateful to my dear friend Martin Krygier.

1 Introductory Remarks

In modern society, lawyers in general and constitutionalists in particular often take on the role of theologians and prescribe the moral and societal unity of values and principles despite the fact that their operations are constrained by the functionally differentiated system of positive law. Legal theorists appropriate this role by turning theoretical knowledge into a legitimation tool of the positive law system. They want to believe that their theoretical transvaluation of legal and political values will lead to practical policy changes in the system of positive law.

Modern society is functionally differentiated, systemically pluralistic and polyvalent because each social system produces its own values. These values are internally constituted by different systems, yet they also claim an external application and objective validity and expand into other social systems.

In the context of positive law, it is then considered a specific task of legal theory and jurisprudence to facilitate arguments and reasoning for the specific legal enforcement of allegedly general moral values. A sociology of constitutionalism, therefore, has to theoretically explain and contextualise this legal transvaluation of moral values in contemporary constitutional law within and beyond the nation state.

2 From Societal Foundations to Systemic Fluidity

While the transvaluation of values and their change can be evaluated and referred to as good or bad in themselves, there is a more general problem with values as societal foundations and guardians of cultural integration which needs to be addressed

at the beginning of this brief analysis of constitutional values. It is closely related to the modernisation of society and was already described by Emile Durkheim as *anomie*—a loss of values and meaningful existence which can only be described as bad and considered to be a symptom of the crisis of modern society and humanity.

Anomie is the negative absolute because it is always bad and cannot be contextually evaluated as good or bad for society and individuals. Durkheim's warning against the damaging consequences of modern anomie are matched by the Marxist revolutionary promises to save humanity from its alienation in capitalist society or conservative lamentations of the cultural crisis echoing Oswald Spengler's 'decline of the West'. Durkheim's theory of modernity as the permanent crisis of values and meaning thus represents a sociological response to the evergreen theme of the crisis of European civilisation addressed by so many philosophers, political leaders, moralists and ideologues of all kinds and colours.

Learning from Durkheim's theory of anomie and other sociological and moralist critiques of the decline and absence of values, it is then possible to state that moral principles and values are expected to operate as society's *foundations* and reservoirs of meaningful social existence. However, the very process of their transvaluation turns them into *fluid* expectations of what is considered socially valuable and can be challenged by individuals and groups but only with great societal risks of being labelled as bad people or communities.

Values are expected to embed society in the order of good and thus guarantee and justify their meaningful existence. Nevertheless, every value, rather than operating as a solid fundament of societal institutions and their ultimate point of reference, is an outcome of societal evolution. Society thus permanently and immanently constitutes its values which, paradoxically, are expected to be its transcendental foundations.

Societal values, including those operating in the system of positive law, borrow the distinction between good and bad from the system of religion. In the same way, values also draw on the religious distinction between transcendence and immanence and thus respond to the specific call for the meaningful existence of the universe and human life. They paradoxically promise universal validity in specific social conditions and thus stabilise functionally differentiated society through its imaginary of moral unity.

Modern society cannot exist without values and their imaginaries, yet these cannot guarantee its existence and evolution. Values make sense, not foundations. Society cannot be organised in the Parsonsian theoretical imagination as a culturally integrated system of values because it is typical of both the abundance and absence of moral values and ethics which are invoked every time there is a problem of social steering in different systems, such as 'business ethics', 'corporate social responsibility', 'environmental ethics', 'bioethics', etc.

Furthermore, values are expected to deal with societal risks, yet they also bring new risks, conflicts, and moral panic. They therefore cannot function as invariant structures of system maintenance. Instead of culturally stabilising the social system, they are contingently constituted as part of the system's evolution.

3   Societal Power of Normalisation: On *Potentia* in Values and Their Legal Constitutionalisations

Values are rooted in a metaphysical search for the meaning of our existence and position in the world. Their justification, therefore, is not a matter of mere morality. Their genealogy is impossible to exclusively explain in terms of validity and restrictive normativity. They are productive and demonstrate the *potentia* of human activity and societal evolution.

Values are tools of the normalisation of societal power. While societal norms restrict the possibilities of social action, values increase it as experiences of 'certainty independent of cognitive arguments' (Jonas 2000).[1] Instead of defining constitutive moral duties, values establish different degrees of the desirability and meaning of human action between good and bad. The highest goal of modern individuation, therefore, is possible to harmonise with a social utopia of valuable social existence.

Values are pervasive in all social systems despite their lack of institutional formalisation, enforcement and self-reference through official authorisation. Judges and other legal officials claim to be their guardians as much as guardians of legality, yet the question of the origins and genealogy of values can hardly be answered by their legal authority. A belief that values should be justified and publicly discussed and legitimised in society does not mean that this society actually constitutes its values through justification and deliberation.

In the specific context of constitutional law and theory, foundational values are codified by legal constitutions and even receive full doctrinal support, yet which general values are going to be enforced as constitutive and legally binding depends on specific court judgements, executive decisions and legislative acts. The theoretical conflict between originalists and organicists (Ackermann 2007) is obviously not just a conflict of values or another example of the paradigmatic tension between formalist and realist jurisprudence (Tamanaha 2010).[2] It covers the most general issues of the legal method of the interpretation and application of norms (Kennedy 1998). Nevertheless, it also shows the paradoxical legal operationalisation of values as prescriptive constitutional foundations despite their factual societal fluidity and contingency.

Constitutional originalists insist that constituent values and meaning had been formulated at the moment of constitution-making and the law's principal job is to preserve them despite knowing that any such retrospective interpretations are just a matter of speculation about the original understanding of the text by its authors and members of the respective constitutional polity at the time of its making.

Against this view, advocates of constitutional activism adopt the sociological concept of 'the living constitution' (Ackermann 2007)[3] to argue that the constitution's text has to be interpreted in the context of the present times, values, meanings and intentions. The living present establishes what is constitutionally viable and valuable while the past is declared the dead-letter law. Activists thus enforce absolute

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[1] See, for instance, Jonas 2000.

[2] See Tamanaha (2010).

[3] Ackerman, supra n. 2.

constitutional values and normative frameworks despite accepting the relativist view that future generations of lawyers, judges and citizens can invalidate them if different values and principles start evolving and prevailing in the living constitution.

The genealogy of values escapes the constraints of legal and political communication and cannot be left to either judges or politicians pretending to act as a moral compass of society as a whole. The valuing subject has to recognise the social fact that the genealogy of values is a matter of historical and societal contingency. Furthermore, there is no escape from the self-referential question of the value of the valuation of societal facts, and the distinction between their good and bad nature, and the transvaluation of values itself.

4 The Negative Value of the Rule of Law and Constitutional Authority

Understanding the process of the transvaluation of constitutional values as the normalisation of societal power requires a basic distinction to be made between external values legitimising legality and a specific societal value of legality and the rule of law itself. While general values, such as human dignity, equality, decency and public safety, operate as substantive tools of the legitimation of law, legality itself represents a specific version of both the valuable public and private life which, apart from procedural and technical values of impartiality, generality, predictability and clarity, involves the force of neutralising moral conflicts and their explosive potential. Any sociological dealing with constitutional values must therefore address the distinction between moral values in law and law as a moral value.

While criticising metaphysical notions of the rule of law as a societal immanent vehicle of the transcendental ideal of justice, legal positivists typically argue that the rule of law's value is primarily negative because it consists of the capacity to avoid the risk of arbitrary power. For instance, Joseph Raz states that the rule of law is not a carrier of good and can only avoid evil including in the form of law's societal expansion which involves the paradoxical risk of arbitrariness in legal norms themselves (Raz 2009).[4]

This negative value of the rule of law as a technique of the self-containment and self-restraint of law in society has its specific operationalization in the subsystem of constitutional law. Legal constitutions typically maximise the social efficiency of positive law and politics by separating them from each other as well as from their societal environment, such as the economy, science, religion and morality. Achieving this goal requires separating the legal constitution from appeals to higher transcendental principles and their replacement by the procedures self-validation and self-foundation.

This paradox of the self-validation of 'law as law through law'[5] constitutes authority (*auctoritas*) referring to the legal and political systems, yet it is impossible to

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[4] Joseph Raz speaks of both the value and virtue of the rule of law. See Raz (2009).

[5] Rudolf Wiethölter's expression, quoted in Frankenberg, G (2003) Autorität und Integration: Zur Grammatik von Recht und Verfassung. Frankfurt. Suhrkamp, p. 7.

extend beyond the limitations of these systems. Constitutional authority can hardly prescribe the conditions of the scientific truth or aesthetic beauty unless the legal constitution refers to utopian or dystopian societies.

Constitutional authority, therefore, is not the ultimate social self which could be constituted by society itself and guarantee its political sovereignty. In constitutional democratic societies, the sovereign people constituted by the sovereign legal document is always already de-substantialised and diluted into legislated competences and the limitations of power and decision-making procedures of different constitutional bodies.

The collective self is a matter of legal and political systemic self-description and self-reference and cannot be identified as the supreme leader and subject of the totality of social life. Law provides politics with legitimacy and receives enforcement in this constitutional exchange of communication. Law's authority thus depends on its dual capacity as politics' rational *modus significandi* and *modus operandi*. In return, it achieves the necessary support from the political system in the form of enforcement.

This capacity of self-programming positive law and constitutions through both legal rationality and political force is not limited by the nation state's institutions and the referential framework of sovereignty as it affects political and legal institutions in the post-sovereign societal condition, such as the EU. However, this capacity does not justify hasty conclusions regarding the legal and political possibility to integrate the multiplicity and plurality of globalised societies and cultures. Cultural pluralities and differences as well as heterogeneity can hardly be overcome by some kind of total societal 'self'—polity ultimately constituting our global society in terms of universal morality and cosmopolitan values.

5 Towards a Sociology of Constitutional Values

If values are tools of the normalisation of power in society, a sociology of constitutionalism must move beyond legal theoretical and jurisprudential questions of how political power becomes controlled by law and how law becomes legitimised by external values. It rather needs to ask how societal power constitutes the systems of positive law and politics. The problem of constitutional power ceases to be associated with political control and legal limitation. It is reformulated as a problem of the societal constitution and transformation of the *potentia* of multiple societal forces into generally recognised and operating authority—*auctoritas*.

This process of transforming the *potentia* of societal forces and imaginaries into the *potestas* of politics and the *auctoritas* of law requires a sociological and social theoretical response to the juridical question of ultimate legal force and the political question of sovereign power. A sociology of constitutionalism must subsequently analyse more general non-political and non-legal processes of self-constitutions of modern society including constituent powers behind self-validating legitimation procedures of the systems of positive law and politics.

A number of legal and constitutional theories can be considered as prescriptive specialist attempts at resolving the current crisis of reason, civilisation, politics and

human values including those legislated for by political constitutions. They typically invoke moral principles and foundational values and thus illuminate the function of values in law as much as the value of legality itself. They draw on a general philosophical critique of positivism that the background knowledge and values of the researcher cannot be eliminated and actually constitute the object of research. This legal theoretical and jurisprudential recourse to the external validation of law by philosophical speculation and the anthropological interpretation of values and political ethics calls for a sociological inquiry itself.

First, the theoretical dynamics between the self-validation and external validation of law requires introducing the sociological distinction between 'front-line' and 'second-line' legal knowledge. While front-line knowledge is an operative condition of the system of positive law and its different segments define different legal professions within the system, the second-line knowledge of legal theory offers a self-description of the system of positive law 'as it should be'. This internal legal distinction between front-line and second-line knowledge can subsequently be analysed from the external sociological perspective which also allows for a theoretical observation of legal theories and theorists as leaders of legal reforms and social policy-makers, if not ideologues of moral transformations of their polities.

Second, a sociological inquiry into constitutional values and positive law subsequently requires one to externally observe not only legal normativity but also all non-positive political, moral, economic, scientific, technological and all other societal normative interventions in the system of positive law and legal doctrines or jurisprudence (Luhmann 2004). A sociological theory of constitutional norms and values must involve a study of distinctions and conceptualisations of law as a system distinguishing between the right and wrong human conduct and constituted by individuals as 'norm-users' (MacCormick 2007) in their interaction and intersubjective recognition of normative patterns.

This sociological theory needs to move beyond explanations of the distinction between the spontaneity of societal normative orders and the formality of officially authorised legal institutions which describe individuals as interacting morally autonomous subjects constituting such orders in their ordinary practical life. Instead, this theory has to address these forms of intersubjective experiences and understanding as more complex forms of societal expectations of conduct in which understanding, consensus and conformity must be taken into account as much as confusion, dissent and deviance.

Third, this theoretical shift requires abandoning the concept of the constitution as a consensually grounded and gradually evolving document empowered and enforced by the collective will of the people as its constituent subject. Although it is true that constitutions become more stable if they last for a longer period of time, their legitimacy does not necessarily increase with the passage of historical time turning them from fresh political documents into shared societal traditions. Constitutional traditions can be considered illegitimate as much as utopian projects of future constitution-making.

Instead of turning societal consensus and dissent into absolute values and exclusive procedures of legitimation, it is the opposition and difference between consensus and dissent that drives societal evolution and, apart from other societal

semantics, defines the operative possibilities and legitimation potential of the systems of positive law and politics (Niklas Luhmann 1995).[6] There is no privilege for either consensus or dissent politics and no political or constitutional subject can be expected to evolve out of them. There is no chance to return to anthropological, ethnocentric and logocentric politics of overlapping or any other consensus as much as it is useless to romanticise the heroic struggle of dissidents in any political regimes with or without the rule of law. Issues of legitimation rather have to be addressed against the background of the consensus/dissent distinction.

6 Concluding Remarks: On the Societal Paradoxes of Constitutional Values

Constitutions are not the Hartian ultimate rules of recognition setting the criteria for the validity of positive law on the basis of the societal (and therefore the factual) acknowledgement of the expectations of the legal system's officials. Their mutual understanding, acceptance of conduct and even dialogue cannot resolve the basic question of the authority, power and enforcement of legal norms. As Neil MacCormick observed, the ultimate constitutional rule of recognition is closer to Kelsen's basic norm than Hart's rule of recognition.[7]

In light of these jurisprudential reflections of constitutional rules and values and with indispensable help from social and sociological theories of law, the political constitution can be paradoxically described as the customary basic norm validated by both spontaneous evolution and deliberative collective will-formation. Other paradoxes of constitutionalism drawing on the distinction between constituent and constituted power are also well covered by theories of constitutionalism and assisted by the sociological, anthropological and ethnographic perspectives of constitutional law. For instance, citizens constitute the people as constituent power, but citizenship needs to be codified by the constitution. The state's constituent power of the sovereign people must be represented by state bodies to achieve its sovereignty. Nations are considered to be real existing social and political units, yet they do not exist as sovereign entities until the socially constructed legal constitution brings them into their existence, and so on.

All these paradoxes are conceptualised by constitutional theories and philosophies, yet they also need to be sociologically explained as part of the legal and political self-referentiality that is unlimited by nation states and stretching into contemporary supranational and transnational regimes of law and their internal value productions.

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[6] For general comments on the opposition between consensus and dissent, see Niklas Luhmann (1995).

[7] MacCormick, supra n. 9, p. 57.

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