

Lectio Magistralis: University of Trieste, Italy

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Revolutionary Constitutions: Charismatic Leadership and the Rule of  
Law

Law legitimates power. Constitutionalism has played an increasingly dominant role in this process of legitimation over the past century. Its rise has profoundly reshaped modern notions of lawful authority.

But how?

Lots of historical studies provide insights into one-or-another polity or region. Yet it has been difficult to organize the bewildering complexity of global experience in a compelling comparative framework. We can make life easy for ourselves by supposing that “constitutionalism” is a “one-size-fits-all” ideal that animates a common project throughout the world. But this seems unlikely (to put it mildly).

Once we recognize the reality of deep differences across the globe, a fundamental problem emerges: how to distinguish the accidental from the truly fundamental?

Max Weber asked himself a similar question when confronting an earlier political universe. He too rejected the idea that political power appealed to a single legitimating logic – famously distinguishing between the very different appeals of tradition, charisma, and bureaucratic rationality. This trichotomy remains relevant, but it fails to recognize the distinctive legitimation-dynamics of constitutionalism.

I aim to fill this gap. In future work, I will be exploring the very different pathways through which constitutions have won legitimacy over the past century. Each pathway generates a distinctive ideal-type – with its own set of attractions and problems.

The present Lecture, however, introduces an ideal type particularly relevant for the present moment. With crises erupting throughout the world, it is tempting to believe that all of them are symptoms of the same evil force – “populism” – which threatens to destroy the liberal constitutional project built up, with such great effort, in the aftermath of World War II. This Lecture, and my book on *Revolutionary Constitutions* forthcoming from Harvard Press, rejects this simplistic diagnosis.

It shows that the current constitutional systems in places as different as India and South Africa, France and Italy, were propelled forward by populism and could never have gained legitimacy without the mobilized consent of ordinary citizens. Despite their obvious differences from one another, the constitutions of all these nations are rooted in a common experience – in which revolutionary insurgents manage to sustain a struggle against the old order for years or decades before finally gaining political ascendancy.

Call this Time one. During this period, insurgents do not merely engage in complex campaigns of underground resistance and open rebellion. They issue revolutionary declarations denouncing the existing regime as *illegitimate*. These declarations of principle play a central role in sustaining the movement, especially during periods of adversity. During dark moments, leading activists face the prospect of detention or death at the hands of the old regime. Nevertheless, they refuse to give up their struggle – and it is only natural for them to tell the world why they are right to persist against great odds. Moreover, these declarations cannot be dismissed as idle talk. They were affirmed by activists with the courage to risk imprisonment or detention even though they could have actively collaborated with, or passively acquiesced in, the existing system. It is this

willingness to sacrifice personal self-interest for principled conviction which *earns* these revolutionaries a distinctive claim to legitimacy.

This history of self-sacrifice during Time one sets the stage for a common legitimation problem once the insurgents rise to power at Time Two. How can they assure themselves, as well as the more skeptical portions of the population, that they will not engage in the very same abuses of power that had led them to revolt in the first place?

Call this the problem of betrayal – and a revolutionary Constitution tries to provide an answer to this fundamental question. To be sure, the Founding constitution will also contain many provisions that do not address this problem. Instead of looking backward to Time one, the new Constitution will also look forward to the future and try to commit the nation to one-or-another-version of progress.

I will call these “visions of progress” and consider their significance shortly. But let’s focus first on the “never again” provisions which aim to resolve the betrayal problem.

Their content will depend on the character of the evils that motivated the revolutionaries’ struggle in the first place. Italy provides an instructive example. Despite their radically different visions of progress, Communists, Socialists, and Christian Democrats joined together in a common diagnosis

of the failures that permitted Mussolini to seize power in the first place. In their view, it was the “flexibility” of the Statuto Albertino which enabled the King to hand over power to Mussolini despite the availability of more liberal democratic options. It was therefore imperative to create a “rigid Constitution,” creating a system of checks and balances, including the judicial protection of fundamental rights, to prevent this tragedy from repeating itself. For all the twists and turns of later Italian history, these basic constitutional principles still govern the Republic seventy years later.

In contrast, Charles De Gaulle advanced a very different diagnosis of the failures of the old regime – both during his time as leader of the Free French in the 1940s and during his successful effort to sweep away the Fourth Republic in the 1950s. So far as he was concerned, the parliamentary system of the Third and Fourth Republics was responsible for France’s fall from greatness – encouraging party leaders in the Assembly to engage in endless power-plays without taking a large view of the national interest. To insure against this happening again, the Constitution of the Fifth Republic created a super-strong presidency enabling its incumbent to transcend petty party bickering and enable France to regain its central position in Europe and the world. Given De Gaulle’s diagnosis, the super-president was granted the unilateral power to

declare an emergency and arbitrarily imprison citizens without any judicial supervision. While a formidable set of rights can also be found in the Gaullist text, these should not be numbered amongst the “never agains” of the Fifth Republic’s constitution.

The Congress Parties of India and South Africa constitutionalized a very different set of revolutionary commitments. In these cases, the central target was the political subordinations imposed by the previous regime’s support of the caste system in India and apartheid in South Africa. As a consequence, the revolutionary Constitutions in both countries emphatically guaranteed equal voting rights to all citizens of the new Republics. While these provisions do not differ dramatically from those in many other modern constitutions, they are foundational “never agains,” given the character of both insurgencies during Time one.

In all these cases, the revolutionary movements also sought to repudiate many other features of the old regime – with more or less unanimity. Moreover, as they looked to the future, different factions promoted very different projects of national renewal. These basic facts of political life suffice to generate the next move in my argument – which seeks to establish that insurgent movements, regardless of their

substantive aims, confront a “race against time” if they hope to hammer out a successful revolutionary constitution.

To put the point abstractly: While a revolutionary movement’s particular “never agains” provide the ideological glue which unite its diverse factions in the struggle against the old regime during Time one, these bonds begin to dissolve during Time two as newly ascendant leaders start disagreeing amongst themselves over the country’s future course. These forward-looking disagreements threaten to split the revolutionaries into rival factions in a way that prevents them from working together to enact a constitution codifying the “never agains” that had unified the movement during their earlier struggle. If this happens, the revolutionaries will lose their race against time – since, once factional divisions come to dominate the political stage, it will be very hard to recover the broad support required to anchor the legitimacy of a never-again Constitution.

When viewed in comparative terms, India and South Africa had a large advantage over Italy and France in winning the race against time. In the first two cases, the mass insurgencies were organized by a single dominant organization. While there were many competing factions within the Congress Parties of both India and South Africa, leaders like Nehru and Mandela nevertheless could temper these disputes by focusing on areas

that commanded broad agreement. In contrast, the Resistance in France and Italy was fragmented into three parties – Communists, Socialists, and Christian Democrats -- each with radically different agendas for the future. From this vantage point, Togliatti's turn at Salerno was a critical element in enabling the Communists to join a broad-based revolutionary coalition, extending to De Gasperi's Christian Democrats, that made it possible to hammer out a never-again Constitution before the escalating Cold War made its enactment impossible.

The French case was similar to Italy's – but coordination by the Communists, Socialists, and Popular Republicans (Christian Democrats) was made even more difficult by Charles De Gaulle's independent assertion of authority to speak for the Free French. To put it mildly, Marshal Badoglio could not credibly make a similar claim. Nevertheless, the three-party coalition in France managed to defeat De Gaulle's appeal to the People to reject the Constitution of the Fourth Republic. Indeed, their victory at the critical referendum on their Constitution was more decisive than that achieved by their Italian counterparts. Nevertheless, De Gaulle continued to remain a compelling symbol of France's war-time insurgency against Vichy and he successfully exploited this fact to legitimate the overthrow of the Fourth Republic at a moment of weakness.

Yet despite his contempt for the established regime, the General followed in the footsteps of the founders of the Fourth Republic in one fundamental respect. He too moved rapidly to channel the high-energy engagement of his followers into the project of constitutional construction. Within the space of a year, he had gained an overwhelming victory at a referendum in support of a Constitution that repudiated the parliamentary tradition which had served as the framework for French government for almost a century. He followed up this victory by installing himself in the Presidency and his party in the Chamber of Deputies by sweeping margins.

These victories not only served as the basis for the further development of an exceptionally strong form of presidential government in France during the next two generations. It has also served as a model for many later revolutionary efforts to mark out constitutional “new beginnings” – often, with tragic consequences. My new book argues that the Gaullist model bears a great deal of responsibility for the failure of Solidarity in Poland to win its race against time and gain broad support for a revolutionary Constitution.

The powerful influence of the Gaullist model in Poland and elsewhere is a very surprising phenomenon. After all, it was the United States, not France, which functioned as the world hegemon throughout the second half

of the twentieth century – only militarily but culturally. Think of Hollywood and McDonald's, Elvis Presley and Madonna. Yet when it comes to constitutional design, it is the French – not American – model of presidential government which has been profoundly influential.

Comparative lawyers are in the habit of calling the French model “semi-presidential” to distinguish it from the American archetype. But this label is very misleading. In fact, the French president's powers can only provoke Donald Trump's envy if he fully understood them. Not only does the Gaullist president exercise plenary power over military and foreign affairs without the need to gain parliament consent. He is explicitly granted unilateral authority to declare a state of emergency and throw people into jail without any pretense to due process of law. What is more, if the National Assembly refuses to cooperate, he can simply dissolve it and force members to run for reelection at a time of his own choosing (so long as he has not exercised this power during the preceding twelve months). Comparatists should call this model “superpresidentialist,” rather than suggest that is a semi-presidential compromise between the British and the American models.

In my forthcoming book, I argue that it is the Polish adoption of the super-presidentialist model which led Polish revolutionaries to lose their

“race against time” after 1989. After all, Solidarity represented the most successful popular mobilization in European history. Not only did the overwhelming majorities of factory and agricultural workers join Solidarity. They voluntarily contributed five percent of their income to pay the salaries of 40,000 organizers to channel their revolutionary energies into a formidable organization. This steady stream of contributions was exceptionally remarkable, given the low wages prevailing in Poland at the time, and the practical impossibility of punishing members who failed to contribute. Nevertheless, the continuing flow of funds permitted Solidarity to emerge from the underground in 1988 as a well organized movement, fully capable of mobilizing massive support a “never again” Constitution redeeming their Time one commitments to constitutional democracy.

Nevertheless, Walesa and his fellow revolutionary leaders failed to follow the examples of India and South Africa and Italy and France. A great deal of the blame, I argue, should be attributed to the ill-considered rejection of the parliamentary model of government and the adoption of a Gaullist design for Poland’s “new beginning.” Once Walesa ascended to the Presidency, he waged a bitter struggle for political ascendancy against his closest revolutionary allies in control of parliament. This so-called “war at the top” only managed to alienate the millions of former Solidarity

supporters, who despaired at the inability of their leaders to work together on their behalf. As the months and years passed, the on-going effort to hammer out a “never again” framework for constitutional democracy degenerated into endless factional power-plays which deprived the final Constitution of 1997 of deep and broad support.

Worse yet, this tragic outcome has cast a shadow over the country’s subsequent political development. Solidarity’s failure to win its race against time lies at the root of Poland’s current lurch toward dictatorship at the present time. I don’t have the time to go into the details right now, but my book does provide a detailed analysis of the dynamics involved.

For the present, I have invoked the Polish case so that it may serve as a cautionary tale for Italians, who are confronting an accelerating crisis of their own. To put it gently, this is a tough time for Italy’s parliamentary system. Indeed, the governability crisis may become so severe that it may become tempting to suppose that super-presidentialism provides Italy’s best hope for stable and statesmanlike government. Yet if we are to learn anything from Poland, and other failed efforts to copy the Gaullist design, this is a false hope. The challenge instead is to redesign the parliamentary tradition in ways that make sense of the political, social, and economic realities of twenty-first century Italian life.

Easier said than done. Indeed, it is all too easy to despair and cynically await the resurgence of another strong-man in the tradition of Mussolini. But I urge you to find your role model in a very different Italian statesman: Alcide de Gasperi. Nowadays, we remember him as the founder of the Christian Democratic Party which governed Italy until the Cold War came to an end. But De Gasperi's career began much earlier, when he became a leading figure in the first Catholic party that, despite the Pope's opposition, began to participate in Italian politics after the First World War. Indeed, he served as the last representative of the parliamentary opposition to Mussolini's seizure of power.

Once his resistance was declared illegal, De Gasperi recognized that his life was in danger, and tried to flee the country. But he was seized by the Fascists at the railroad station and locked up in jail for the next eighteen months. With his health rapidly deteriorating, he was only saved from death by the intervention of a sympathetic Cardinal who arranged his release at the last moment. Once he re-entered the civilian world in 1928, however, he found that he had become a social pariah. Nobody wanted to associate with him, for fear that they too would be stigmatized in Mussolini's totalitarian order. As a consequence, the desperately ill De Gasperi found that he could survive economically – until another sympathetic Catholic got

him a menial position in the Vatican Library. Needless to say, he was profoundly grateful to the Church for its acts of mercy.

Nevertheless, when Mussolini and the Pope reach the Vatican Accords in 1929, De Gasperi did not hesitate. He immediately made his opposition clear – even though the Church could well have responded by discharging from the Library. Nevertheless, the risk of impoverishment and death did not prevent him from repeatedly denouncing the Vatican Accords during the 1930s. Like others in the underground, he used a pseudonym, Demophilo. But he was well aware that the Fascists were skilled in penetrating such disguises in their on-going efforts to crush opposition. Once again, however, the risk of death did not deter him from taking an even more active role in opposing Mussolini during the early years of the Second World War – leading De Gasperi to call for a convention of a revolutionary Christian Democrats at a time when such an act was utterly illegal under the existing regime.

Once the founding Convention of the Demo-Christians convened, it did not content itself with denouncing the Fascist order. Under De Gasperi's leadership, it affirmed a more positive vision for Italy – elaborating a well-developed program for a strong constitutional democracy once Italy emerged from the war's devastation. It was this Christian

Democratic commitment, together with Togliatti's "Turn at Salerno," that made it possible to gain a majority vote at the referendum ratifying the Constitution of 1948. In emphasizing the role of popular mobilization, I do not wish to deny the importance of Calamandrei, and other leading jurists, in designing a new governing framework to replace the Statuto. Most notably, it was only their intellectual leadership which led to the creation of a powerful Constitutional Court -- despite the fact that this new institution had no roots in Italian legal or political traditions. But as my book argues, the Court would never have gained an important role in the emerging system of checks-and-balances in the 1950s without the continuing support of a broad political coalition rooted in the revolutionary politics of the 1940s.

I recall this history because it has become of great contemporary importance for the future of Italy – and especially for the graduates of the University of Trieste. As I speak to you in 2018, the very foundations of the Constitution of 1948 are under assault – forcing you to face the same choices that confronted previous generations of Italians. On the one hand, you may remain passive while the manipulations of clever politicians prepare the way for a strong-man to insist that only he can restore stability and statecraft to Italian government. Or you may follow De Gasperi and sacrifice greatly for the principles of constitutional democracy. In urging the

graduates of the University to take this second path, I do not wish to underestimate its dangers. Especially for lawyers, the price for opposing would-be dictators may be very high indeed.

Nevertheless, the future of the West may well depend on the willingness of Italians, and committed constitutionalists in America and elsewhere, to pay this price.

How, then, will you decide?

Thank you very much.