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## Popular sovereignty facing the deep state. The rule of recognition and the powers of the people

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### ABSTRACT

This paper investigates the relationship between the idea of popular sovereignty and the conditions for legal validity and argue that the latter imposes definitive limits to the former. Popular sovereignty has been defined as the condition when the will of the people is the "supreme authority in the state". Following this conception, there is no authority above the people and this is traditionally understood to mean that the authority of the people is above the constitution. Legal validity, though admittedly still debated, is here understood along Hart's "rule of recognition" According to which the validity of norms ultimately depends on the social practices of public officials. Though presumably uncontroversial that democratic peoples are entitled to remake the constitution, the powers of the people with respect to the substance of the law are nevertheless limited with respect to decisions of legal validity. The most basic rules in a legal system are not found in the constitution as they are the rules deciding what is to count as a legal norm within that system. They are more fundamental than the constitution because they also define what norms is the constitution legally speaking.

**KEYWORDS** Popular sovereignty; legality; populism; rule of recognition

'The deep state' is a theme in a recent conspiracy theory according to which opaque segments of the public administration prevent the will of the people from being fully reflected in public policy and law. The theory is unsurprisingly popular among supporters of President Donald Trump who himself chastened the deep state as 'criminal', in a characteristic tweet (quoted in Weiner, 2018). But the sense that 'the people' and the state are at odds is not unique to the rhetoric of Trump. In many countries, the ruling government mounts systematic attacks on elements of its own administrative apparatus. The justification is often 'populist' in style and grounded in scepticism towards 'formal, bounded institutions and procedures' as they 'impede majorities from working their will' (Galston, 2018). The policies and reforms launched by populist parties and leaders accordingly seek to reduce

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the independence of the judiciary, the integrity of the civil administration and ultimately to remove legal and institutional obstacles to the realization of the will of the people. The result is, as observed by Neil Walker (2018) and Samuel Issacharoff (2018, p. 454) that populist governments are in effect 'ruling against the state'.

While these tendencies are often regarded as contrary to democratic ideals, there is also a sense in which they are fuelled by them. The democratic ideal is closely related to the principle of popular sovereignty according to which 'the people's unified will is the supreme authority in the state' (Espejo, 2015). For the people to be the supreme authority, participation in the making of collective decisions is not enough. The sovereign people must also be the body that authorizes the institutions and procedures through which collective decisions are made. The people is the 'constituent power', the body that authorizes and creates the 'institutional arrangements through which they are governed' (Kalyvas, 2005). In other words, the powers of the people are superior to those established by the legal and political system and that are exercised by the officials that populate it. The affirmation of the sovereign people entails the 'subordination of the state to the popular will' (Post, 1998, p. 437). The people are imagined as 'the master' of the state (Yack, 2001, p. 527).

The implication of the doctrine of popular sovereignty is that the people are above the law. Thus, the very idea of popular sovereignty offers a welcome source of inspiration for populist attacks on 'the deep state' and on the 'unelected and unaccountable' powers of legal institutions. In the effort to undermine or even dismantle legal institutions, populists are able to picture themselves as the saviours of democracy since they aim to 'give back' the power to the people and thereby 'restore popular sovereignty' (Abts & Rummens, 2007, p. 408; Laycock, 2005, p. 127; Corrias, 2016, p. 9; Huq, 2018, p. 1128). On this reading, the tension between the people and their representatives, on the one hand, and the law, the judges and public officials, on the other, is a tension between conflicting understandings of the democratic ideal.

One way to resist this conclusion is by challenging the above reading of popular sovereignty on the basis of normative theories of democratic legitimacy. The claim would be that a defensible interpretation of popular sovereignty does not require that the will of the people is the 'supreme authority' of the state. It does require, however, that the constitutional and political framework conforms to principles that could be justified to the people subjected to it.<sup>1</sup>

Though I believe such an argument is important and is likely to be correct, this paper takes a different route. The aim is not to subject the doctrine of popular sovereignty to criticism on the basis of a normative account of democratic legitimacy but to show that this doctrine is

inconsistent with facts about the law. The view defended here is that the suspicion that legal institutions ('the deep state') frustrate the full realization of popular sovereignty is in a specific sense basically true. The contemporary state is premised on the rule by rules and not on the rule by persons, as was the case in the past (Hampton, 1994). The point is that the quality that makes rules valid precepts of law cannot be decided by the people. In a democracy, the people are able to rule only by rules and that implies important constraints on the powers of the people. Democracy could never be rule by the people, but the only rule by rules made by people. In that respect, democratic government depends on practices that are inconsistent with the notion that the supreme authority of the state is vested in the collective body of the people. This might seem comforting to anyone who presently fears that some government are using their powers to usurp legal institutions. On the other hand, it deprives the ideal of popular sovereignty of one of its defining characteristics. If the people could not be the supreme authority of the state, what then could it be?

In what follows, I will examine the conflict between standards of legality and the powers of the people in three steps. In the first, the problems facing the received view of popular sovereignty are illustrated by analogy to Austin's theory of the relationship between the sovereign and the legal system and the widely recognized problems that are associated with this view. In the second, I introduce Hart's theory of legality – the rule of recognition – and explain the crucial role accorded to public officials that follows from it. The third section confronts this understanding with a series of claims about the powers of the people that emerge in the literature. The conclusion is that the conception of popular sovereignty as 'the supreme authority of the people' is inconsistent with the notion of a legal system. Thus, we need to revise the meaning attributed to the sovereign people in order to make room for the fact that decisions on legal validity are always beyond the powers of the people.

## **The people and the problem of legality**

Rule by the people is premised on the popular authorization of power over the substance of the rules that apply to them. More precisely, the standard understanding of the democratic ideal posits that the people subject to the state should enjoy equal and adequate opportunities for participation in the process whereby laws are created, revised or abolished (Dahl, 1989). On this picture, law is the product of decisions made by the people or their representatives. Yet, law also conditions the powers exercised by the people. Collective decisions are made by procedures that are legally defined and that play a constitutive role in democratic decision-making. The ideal of popular sovereignty applies to these procedural preconditions just as much.

Following Andreas Kalyvas, the sovereignty of the people demands that the people 'determines the constitutional form, the juridical and political identity, and the governmental structure of a community in its entirety' (Kalyvas, 2005, p. 226). Thus, the people should be able to determine not just the rules that impose legal rights and duties but also the rules that confer legal powers and immunities and that define the procedures for collective decision-making. Rule by the people, following the idea of the sovereign people, should permeate the legal system as a whole.

However, modern states are governed by means of legal norms. This requires some way of identifying valid norms within the legal system from those that are not. The process whereby this is accomplished is distinct from the decision to enact law or legislate.

Decisions about legal validity are the every-day business of public officials tasked with determining and enforcing the law.<sup>2</sup> It is perhaps true that in most cases, judgments about legal validity follow largely predictable routes and are to that extent uncontroversial. In other situations, decisions about legal validity are intricate and materially significant as they determine legal effects that may not have been foreseen by the law-maker. Uncertainty regarding valid legal norms arise when the substance of the law is unclear, vague, or incomplete, as when they are applied to new cases that challenge hitherto established understandings. Uncertainty regarding the validity of legal norms also appear in conflicts between legal sources, when their priority is not clear from the sources themselves.

Deciding the validity of legal norms can be politically explosive, as has often been the case in the United States. US legal history is ripe with ruptures in the prevalent understanding of the basic rights and duties of citizens. Whether we speak of the right to schooling, rights against discrimination, or rights to abort, Courts and other law-applying institutions at one point introduced a new interpretation of precedent and the constitution that had a significant impact on US citizens (cf. Ackerman, 2014).

Another well known example is the European Court of Human Rights that have gradually recognized rights that were not included in – even denied by – the European Convention (Letsas, 2007, p. 65). Though the treaties that form the constitutional backbone of the European human rights regime does not mention the right to vote, for example, the ECtHR has issued several rulings to the effect that this right is strongly protected. What is at one point not considered a valid legal norm, it at a later point recognized as such, despite the fact that no new norm has been enacted or legislated by the people or its equivalents.<sup>3</sup>

The fact that every norm that is applied by a legal system is subject to judgments about its validity implies that practices that determine which norms are valid and which are not penetrated all corners of law – it does not merely apply in cases where new legal norms are found. The context of legal

validity is thus distinct from the tendency of courts to limit and regulate powers of elected bodies, democratic procedures and to make substantive decisions about public policy (Ferejohn, 2002). The problem of legal validity is distinct as it applies irrespective of the extent to which courts are empowered to limit or regulate decisions enacted by elected bodies. Procedures that determine the validity of legal norms exist in every legal system and are ubiquitous in the sense that they are activated whenever public officials determine the effects of the law in cases before them.

The point is that a myriad of decisions about legal validity is made beyond the reach of the people whose supreme authority is at the same time perceived as the basis for the normative legitimacy of the political and legal system. The principle of the sovereign people is thus impotent, in this particular regard, when confronted with the legal system. The people may be able to create a new constitution and to enact legislation and policy in accordance with it. Yet, they are unable to control decisions by public officials that determine the meaning of legal norms. The law enforced is to a great extent defined by the officials of the legal system, not by the people or its representatives.

The theory that the validity of legal norms depends on them being traceable to the sovereign finds its most systematic defender in John Austin.<sup>4</sup> As noted by Joseph Raz (1970, p. 18) Austin's theory of legal validity operates on the basis of a "principle of origin". The validity of a rule is fully determined by its origin or the 'set of facts which brings it into existence'. Ascertaining whether the pedigree is right is both a necessary and sufficient condition for the validity of a norm. In cases where the law is vague or incomplete, the task of the judge is to decipher what Austin called the sovereign's 'tacit commands' (Bix, 2018; Raz, 1970, p. 39). Officials tasked with the determination of law are essentially clarifying the will of the sovereign.

Austin's picture aligns with the common precept that decisions by public officials are derivative of the legislative intentions of the law-maker. The application of the law by judges and officials does not take place in a vacuum; the aim is to enforce the law in accordance with the aspirations of the sovereign that in a democracy is constituted by the people. Decisions about legal validity are consequently traceable to legal norms that are ultimately enacted by people (or its representatives).

To Austin, the sovereign is that body within a state to 'whom others are in the habit of obeying but who is not in the habit of obeying anyone else'. This is not necessarily equal to the people. But it can be, depending on the nature of the political system. Austin recognized that the sovereign is the same as the 'the electors' in a representative political system (Hart, 1962, p. 74; Eleftheriadis, 2011). In a very real sense, then, Austin offers the theoretical basis for the claim that sovereign peoples are 'master of states'.

In conjunction with the claim that any decision made by judges and public officials is just implementing the will of the people, it appears that the supreme authority of the people is able to prevail.

However, Austin's account of the sovereign and the legal system are untenable, for reasons conveyed by a host of legal theorists. The reasons for rejecting his theory are also reasons to appreciate the tensions between the ideal of popular sovereignty and the practices that determine the validity of legal norms.

A common objection against Austin is that he fails to account for the continuity of legal systems. If legal norms are valid only because they can be traced to an act by the sovereign, it follows that no legal norm enacted by sovereign A should be regarded as valid under the reign of sovereign B. This implication runs counter to facts about legal systems as we know them (Bayles, 1992; Raz, 1970, p. 93; Hart, 1962, p. 61). Despite Austin's view that legal validity is fully determined by the origins of the law, legal systems usually remain the same even when governments and constitutions are replaced.

To take just one example; a significant part of the present Swedish legal system is constituted by laws introduced in 1734 that created separate sections ('balkar') for criminal law, marriage law, property law and so on. The laws of 1734 remain valid, albeit with many adjustments, despite the fact that the Swedish constitution has since been replaced three times (1772, 1809 and 1974). The sovereign in the Swedish political system has changed accordingly, initially vested in the King alone, subsequently shared by the King and the estates, and eventually located in the people through its elected members of the parliament. Consequently, not just the body to which 'the sovereign' refers has been replaced, also the very meaning of the sovereign in Swedish law has shifted radically. The theory according to which the law reflects the intentions of the sovereign and her capacity to elicit obedience is arguably difficult to square with these facts.

The laws of 1734 represent a particularly telling example as they remain valid today also in Finland. When the laws were enacted, Finland formed an integrated part of the Swedish kingdom. The fact that Finland later became a province of the Russian Empire (in 1809), and later gained independence (in 1918), had little effect on the validity of the statutes of 1734.<sup>5</sup> The view that the validity of legal norms depends on them being traceable to the sovereign's decision is consequently empirically incorrect.

Another classic objection against Austin is that his theory cannot explain the capacity of the sovereign to make *law*. In fact, the sovereign as defined by Austin is not authorized to make law since the absence of a higher authority with the capacity to authorize law-making is precisely what defines the sovereign. But no-one has the power to create legal norms without being authorized to that effect. This particular criticism is found in

the work of Hans Kelsen. Following Kelsen, the fact that some person or group of persons is habitually obeyed 'simply does not entail that that person or group of persons is authorized to enact legal norms' (Vinx, 2011, p. 482). Because the entity that Austin identifies as sovereign is not vested with authority to make law, Austin's sovereign is plainly unable to create anything that is *law*. Austin, therefore, fails to account for the *legal* authority of the sovereign's decisions (Eleftheriadis, 2010).

The failure to explain how a body for the making of collective decisions can achieve legal authority is effectively a failure to explain what separates the rule of law from the rule of men. The subjects of a sovereign who is able to impose sanctions may certainly have interests to comply. But the ability to punish disobedience is barely unique to the state. Terrorists that have captured a hostage may also possess the means to inflict punishments. The reason to conform with the decisions made by a sovereign is therefore essentially the same as the reason to conform with the decision made by a terrorist. If we were to believe in Austin, this is just what authority means. The reasons we have for compliance with the law are ultimately explained by reference to our interests in following the orders expressed by the sovereign. But the view according to which the will of the sovereign is the source of legal norms is more akin to an absolutist state than to a state governed by law. Indeed, the attempt to reduce law to the commands of the sovereign undermines the distinction between ruling based on the arbitrary orders of gangsters (or terrorists) and the rule of law (Bix, 2011, p. 432). 'Law surely is not the gunman situation writ large', as Hart (1958, p. 603) famously summarized this insight. The conclusion is that Austin's theory 'is not a theory of the Rule of Law: of government subject to law. It is a theory of the "rule of men": of government using law as an instrument of power' (Cotterrell, 2003, p. 70). For a law to be vested with authority and for the rule of law to be distinct from the rule of men, it is necessary to explain the validity of law by reference to something that is not just the coercive power of the sovereign.

The defects of Austin's theory are telling also for the problems associated with the view that law emanates from people. To herald the people as the 'supreme authority of the state' is to suggest that the people are able to fully determine what law is. This reading of the powers of the sovereign people is explicit in the Abbé Sieyès' work dating back to the French revolution that is still cited approvingly by advocates of popular sovereignty in many quarters. According to Sieyès, the will of the people 'never needs anything but its own existence to be legal. It is the source of all legality' (quoted in Colón-Ríos, 2010, p. 206). Thus, whatever is willed by the people is transformed into law simply by virtue of being the will of the people. In so far as the people are able to participate in the process of law-making, the laws enacted by the legislature determine the validity of legal norms – by



a process analogous to the one described by Austin. However, just as Austin's sovereign commands are indistinguishable from the orders of terrorists, the decisions made by the people would be no more akin to 'law' than the coercive threats imposed by the hostage-taker. Whatever is law depends on the 'raw powers' of the people. To model the sovereignty of the people on the basis of Austin's conception of law, therefore, results in denial of the distinction between the rule of law and the rule of men. In order to maintain the rule of law as a distinct form of governance, we are thus well advised to rely on a different theory of law.

### The rules of recognition

Though the conditions for legal validity remain debated in legal theory, there is little doubt that the most influential and most widely accepted account is that of H.L.A. Hart according to which validity depends on recognition by officials in the application of the law.<sup>6</sup> What Hart termed the 'rules of recognition' represent the benchmark for determining valid legal norms and is constituted by practices that define behaviour, perceptions and methods employed by legal officials.

The view that legal validity is settled by the rule of recognition is a more sophisticated version of the traditional theory according to which the legal validity of a rule ultimately depends on it being enacted and signed by a relevant authority. On Hobbes' account, rules are valid to the extent they have been registered as such by the means of 'publique Registers, publique Counsels, publique Ministers, and publique Seals' (Hobbes quoted in Waldron, 1999a, p. 40). The rules established by the King are valid law simply because they bear the royal seal, the official emblem or the King's signature. But as Hart would have pointed out, the question could always be asked why these symbols are sufficient to establish validity. Instead of the seals or signatures doing the work alone, it is the fact that legal officials consider them as proof of validity that is decisive. What makes a rule valid is the fact that officials agree that registration or seals confer legal validity on the decision. A norm is valid by virtue of being accepted as such by those officials that according to Raz (2009) are tasked with 'law-enforcement' or that following Alexander and Schauer (2009, p. 177) have the 'power to interpret and enforce the law'.

The practices that make up the rules of recognition basically serve as criteria for the validity of norms. When asked about the validity of a rule, the judge or official typically refers to a different rule by virtue of which it is valid. If the validity of that rule is questioned, there is presumably another rule of higher standing that confers validity to it. In both cases, the higher legal rule function as a rule of recognition as it explains why the rule in question should be treated as valid. But at some point, the chain of legal

justification reaches an end station. A decision by a public official may be valid because it was enacted in accordance with an ordinance enacted by a public authority that was empowered to enact it by a law that was in turn enacted by the parliament. Since the constitution authorizes the parliament to make law, the conclusion seems to be that the constitution is the ultimate source of legal authorization. But what authorizes the constitution to empower the parliament? In the end, the constitution and all the powers that follow from it are valid only because they conform to the standards of validity adopted by officials. These standards equal the *ultimate* rule of recognition. The ultimate rule of recognition is thus not itself a legal rule. Indeed, it cannot be a legal rule in order for it to serve the purpose of deciding the validity of the highest norms in a legal system (Hart, 1962, p. 255; Postema, 2011, p. 311; Gardner, 2012, p. 107).<sup>7</sup>

This theory of legal validity may occasion the objection that rule by rules is in the end not that different from rule by men. Decisions about validity must be made by persons, 'at some point some person or persons possess the competence to decide questions regarding it' (Bellamy, 2007, p. 56). It might be true that the people enacting law are not the same people that determine the validity of law. But in the end, law is still made by persons.

While basically correct, this objection obfuscates the significance of the fact that the validity of law depends on legal practices that are not themselves the object of legal regulation. Explaining legality in terms of the rule of recognition implies that legal systems are treated as essentially self-sustaining. They have the resources to determine legal validity without reference to any entity external to themselves. Hence, there is no need to assume the existence of a sovereign beyond law, which means that concepts such as the 'the sovereign' and 'the constituent power' are rendered superfluous (Dyzenhaus, 2012, p. 222).

While this may appear an attractive feature of the legal system from the juridical point of view, it does seem to corroborate the populist suspicion that legal institutions are resistant to popular will and therefore contrary to the ideal of popular sovereignty. Whatever legislative powers the people or its representatives hold, it cannot use them to define the conditions for legality; they cannot legislate the standards of legal validity because such standards are not legal norms. Whereas legislative power entails the capacity to enact laws, it does not entail the capacity to decide the legal validity of the norms that ensue. The implication is that the powers of the people are limited; the people does not, indeed cannot, hold the 'supreme authority of the state'.

## **The constitution as the rule of recognition**

One objection against the previous conclusion is the observation that the constitution usually represents the highest legal standard in a legal

community. The constitution authorizes political institutions both to make a law to enforce them. This chain of authorizations makes it possible to distinguish between subjection to the state and subjection to other forms of coercion. In contrast to other coercive decisions, the laws enacted by the members of a legislative body represent an exercise of powers that are conferred to them by the constitution. For this reason, it may seem as if ‘the constitution [...] provides the rule of recognition for law-making processes’ (Ginsburg, Zachary, & Blount, 2009, p. 206). In a similar vein, Thomas Franck (1995, p. 42) argues that legal rules are valid because they are ‘made in accordance with the process established by the constitution, which is the ultimate rule of recognition’ (also Reid, 2014).

If the ultimate rule of recognition is embedded in the constitution, the tensions between legal validity and the status of the people as the ‘supreme authority in the state’ does not seem to obtain. Legal validity may ultimately depend on the rule of recognition. But if the factual conditions that constitute the rule of recognition are codified by a constitution that can be revised or replaced by the people, the ultimate conditions for legal validity effectively remain with the people. It is exactly because the rule of recognition is part of the constitution that Tom Ginsburg and colleagues contend that constitutional law ‘requires the greatest possible level of legitimation in democratic theory’ (Ginsburg et al., 2009, p. 206).

However, this objection is premised on misunderstanding the nature of validity in a legal system. The rule of recognition supplies the ultimate test of legal validity by virtue of certain *social* practices among judges and other officials. A constitution is not a social practice and consequently does not provide such a test, except to the extent that it is recognized to perform that function by established interpretative practices among officials enforcing it. The constitution might include a provision to the effect that it is the ‘supreme law of the land’ (Article VI, US Const.). But the extent to which it is recognized as such is contingent upon beliefs, perceptions and interpretations among the officials charged with legal enforcement.

The significance of constitutional law amounts to acting on the understanding that the constitution and the precedent derived from it should be employed for these purposes. The legal status of the constitution is not established by the constitution itself. In fact, the norms defined by the constitution are subject to the criteria of legal validity, defined by the social practices that constitute the rule of recognition. The legal status of the norms that are part of the constitution depends on the officials whose practices embody the ultimate rule of recognition (Gardner, 2012, p. 107; Green, 2018).

This points towards a more general lesson regarding the relationship between the rule of recognition and the constitution. As the perceptions and interpretative practices that are constitutive of the rule of recognition

change, so does the meaning of the codified constitution. Mutations in the practices that ultimately decide the validity of the constitution entail that law-enforcing officials will at different times be 'looking at different constitutions' (Alexander & Schauer, 2009, p. 183).

The above point is distinct from the common observation that the substance of the formal constitution – the distribution of public power according to the written constitution – can differ from the substance of the informal constitution – the distribution of public power according to constitutional custom (Gardbaum, 2016, p. 171). The informal constitution may change without the formal constitution changing, as was the case in Sweden in 1917 when the King surrendered his right to appoint the prime minister and the cabinet. The change in constitutional practice occurred without formal amendment of the relevant articles in the written constitution that afforded the king the power to appoint the prime minister. The formal Swedish constitution remained virtually intact until 1974. Transformations in the constitution may accordingly take place without legal institutions being involved. The events that precipitated a fundamental redistribution of powers exercised under the constitution in 1917 were not triggered by a reorientation in legal practice but by politics. Evidently, the people and its representatives have the power to revise the (formal and informal = constitution and the 'rules of the game' defined by it.

A source of confusion is that the functions performed by the rule of recognition is sometimes described in similar terms. Jean Hampton has characterized the rule of recognition as constitutive of the 'objects of the political game'. The difference between the constitutional rules that define the distribution of public power and the rule of recognition is just that the latter are rules of a higher order as they define procedures for constitutional change. A characteristic of democracy, following Hampton's analysis, is that the people are empowered to change the rules that determine the distribution of public power and the rules whereby these rules are changed (Hampton, 1994, pp. 35–37).

Yet, the functions of the rule of recognition are distinct from that performed by rules that distribute public power and that constitute the 'rules of the game'. To equal the rules of the game with the rule of recognition is to obfuscate the fact that the latter determine the validity of the rules of the game but are not themselves rules that apply to it. Whereas the rules of the game regulate behaviour and relationships in political life, the rule of recognition is just that standard that allows participants to separate valid from invalid rules in that context. The point is that the legal status of constitutional rules that regulate political life is not settled by the constitution itself. Since the rule of recognition determines the validity of the constitution, rather than the other way around, it follows that the constitution lacks the power to determine the rule of recognition.

To illustrate, consider the claim that approval in a popular referendum is necessary for the ratification of amendments to the constitution. The amendment clause in the constitution of Ireland is just one of many examples of that effect (Anckar, 2014). Following Article 47, any amendment to the constitution proposed by the *Oireachtas* (the legislature) must be 'submitted by Referendum to the decision of the people'. It is, of course, tempting to conclude that this provision is also the ultimate rule of recognition in so far as the validity of amendments to the constitution is concerned. But that is not the case. The constitutional provision according to which an amendment of the constitution is valid only if ratified by the people does not establish the validity of this very provision. Constitutional rules are not self-validating in the sense of having the capacity to identify the sources of their own legal validity. The claim that a law is valid because it has been enacted by a body authorized by the constitution is incomplete even though the constitution may serve as a rule of recognition in that legal system (Hart, 1983, p. 178, n 16). That is, the validity of the constitutional rule that any amendment of the constitution must be accepted in the referendum is not settled either by being part of the codified constitution or by being accepted in a popular referendum. Rather, the provision that makes a constitutional referendum mandatory is valid only on the condition that it is accepted as valid by law-enforcing officials (Alexander & Schauer, 2009, p. 180). Hence, the powers of the people in Ireland to reject a proposed constitutional amendment is a valid piece of Irish constitutional law only to the extent that it is ultimately endorsed by the legal practices that are constitutive of the rule of recognition.

The radical implications of this conclusion are often overlooked.<sup>8</sup> There is substantial literature today that endorses the tenet that popular sovereignty is realized only if constitutional law is subject to democratic participation. Melissa Schwartzberg seemingly subscribes to this view when affirming that 'the ability to engage in constitutional change is a fundamental act of popular sovereignty' (Schwartzberg, 2007, p. 6). Similarly, Colón-Ríos and Hutchinson (2011, p. 50) insist that 'ordinary laws and especially fundamental laws' must result from 'exercise of popular participation' in order for law to enjoy democratic legitimacy. The implicit premise is that the democratization of constitutional politics is sufficient for the people to enjoy supreme authority in the state. As we know now, this presumption is false. If legal validity depends on the practices of law-applying institutions, not on the decisions made by the people, it follows that the legal validity of the constitution and other norms are ultimately impervious to the powers of the people. The standards of legal validity are determined by the social practices of law-enforcing officials, not by the law-makers.<sup>9</sup> Advocates of popular sovereignty have yet to realize that the realm of law is never fully

determined by the people. Law as method of governance necessarily implies that the ruler is unable to exercise absolute control (Harvey, 2000, p. 668).

## **The people as the source of law according to the rule of recognition**

Is it possible to reconcile the supreme authority of the people with recognition of the social practices of judges and officials as the ultimate standard of legal validity? One suggestion is to install the ‘principle of popular sovereignty as the rule of recognition’ (de Witte, 1995, p. 148). Constitutions all over the world do in fact include an occasional reference to ‘the people’ in conjunction with the claim that it enjoys ‘sovereign power’ and that the public powers of the state derive from the people (Galligan, 2013). The Swedish Instruments of Government are not unique in proclaiming that ‘all public power derives from the people’ (RF 1974; 1:1). The earliest example is of course found in the preamble to the Constitution of the United States according to which the constitution has been ordained and established by ‘We the people’. In the US case, these were not just words, as indicated by the extent of popular involvement in the process of constitution-making. The constitution was created by a national convention whose members were elected by the states and who subsequently ratified the final draft in an act of ‘quasi-direct democracy’ (Ackerman & Katyal, 1995).

The point is that the constitutional identification of the people as supreme authority might be understood to define a substantive element in the rule of recognition. Following the rule of recognition, it is not the constitution as such, but the established reading of the constitution, and the methods used in interpreting it that constitute the criteria of legal validity. But if judges and officials share the perception that public power derives from the people, and if their perceptions are integral to the practices that constitute the rule of recognition, it does seem that the rule of recognition includes reference to the people. Should we not conclude, then, that the standards of legality depend on the people?

However, the argument is faulty as it depends on two mutually inconsistent propositions; that the people constitute the ultimate source of legal validity and that legal validity is ultimately determined by the rule of recognition. The substance of the rule of recognition may certainly include a reference to either ‘the people’ or ‘popular sovereignty’ and judges and other officials may consequently refer to the people in decisions that confirm the validity of legal norms.

Yet, the substance of the rule of recognition is immaterial to the fact that legal validity is determined by the social practices of law-enforcing institutions. When officials refer to ‘the people’, it is not ‘the people’ that ultimately justifies the authority of these decisions, but the social practices that prevail

among law-applying institutions. Given the view that legal validity is decided by rule of recognition, there is no escape from the conclusion that ‘the people’ have little or no influence on the final meaning of the laws enacted by it or its representatives. As observed by Kent Greenawalt (1987), whatever is meant by ‘the people’ or ‘the people’s will’, it is ‘not part of the ultimate rule of recognition for the legal order’.

## **The people as the source of the rule of recognition**

Since the ultimate rule of recognition is not itself a legal norm, it cannot be regulated. Perhaps, though the people do have the power to pass legislation that determine the way that the rule of recognition operates. Following Andreas Kalyvas, the people hold constituent power in the sense that it ‘posits a rule of recognition, in H.L.A. Hart’s famous formulation’. By virtue of this capacity, the people are able to supply authoritative criteria for the identification of valid rules of democratic constitutional making (Kalyvas, 2005, p. 238).

It is not clear how to understand the claim that the people ‘posits’ a rule of recognition, however. If Kalyvas’ point is that the people can participate in the making of the constitution, we would refer back to the positions already discussed (and discarded). Yet, I believe there are two other interpretations available that may at first glance permit the people to influence the rule of recognition, despite the fact that legislative powers are by definition unable to control the standards of legality. The first is by regulating aspects of the practices that constitute the rule of recognition; the second is by an extra-legal transformation of the legal order.

## ***Regulating the rule of recognition***

The first response from the advocate of popular sovereignty is to regulate the factual conditions that determine the rule of recognition. The point is that the impossibility of regulating the rule of recognition does not entail the impossibility of regulating the factual conditions that determine the practices that constitute the rule of recognition. The distinction here is between the people legislating the criteria of legal validity and the people legislating the conditions that define the criteria of legal validity. Though the status of the rule of recognition is inconsistent with the former claim, it may be consistent with the latter.

An example of attempts to regulate the conditions that determine the rule of recognition are legal provisions that proscribe specific interpretative practices for the enforcement of the constitution. The ambition to regulate interpretative practices by the law-makers is easy to understand, given the significance of interpretation in deciding the substance of legal norms. As is

commonly acknowledged, the application of laws requires interpretation and the subjects of the law are therefore largely submitted to the interpreters rather than the law-makers (Troper, 2009, p. 98).

The attempt to regulate the interpretative practices that are constitutive of the rule of recognition is distinct from legislation that seeks to define the legal terms employed by public officials. The latter is exemplified by 'Interpretation Acts', known in the UK, Canada, and other commonwealth countries. By contrast, legislation that regulates the interpretative practices that are constitutive of the rule of recognition seeks to control the basis for the determination of legal validity. Article 83 of the Swedish 1809 Instrument of Government is a case in point.<sup>10</sup> According to this provision, the constitution 'should be applied in accordance with their literal meaning'.<sup>11</sup> A similar example is found in the provisional legal framework adopted by the allied forces of occupation in post-war Germany. The framework prohibited German officials from invoking Nazi ideology in the interpretation of the law and required them to adhere strictly to the 'the clear meaning of the text' (Stolleis, 1998, p. 170).

But of course, a rule that stipulates a certain method of interpretation must itself be interpreted in order to obtain determinate meaning. The claim that constitutional law should be interpreted 'literally' requires interpretation. The obvious questions are by what method of interpretation? The answer that it should be interpreted literally is to assume that the rule applies to itself. This is not necessarily true, in the first instance. But even if accepted that the rule does apply to itself, it lends no help to the aim of clarifying the legal meaning of the claim that constitutional law should be interpreted literally. The proposition 'the rule that "law should be interpreted literally" is given meaning by the method of interpretation defined by that rule' is just putting the cart before the horse. The only alternative is to resort to usual interpretative methods. The meaning of the law according to which law should be interpreted literally is premised on interpretative standards not defined by that rule (Westerståhl, 1949–1982). The legal meaning of the rule that seeks to regulate the rule of recognition is in other words dependent on the very practices that it attempts to regulate. Hence, the result is that efforts to control the social practices that guide officials depend on how these legal rules are interpreted, which in turn is determined by the social practices of officials. The attempt to regulate the rule of recognition is therefore ineffective.

### ***Transforming the rule of recognition***

The other way to redefine the substance of the rule of recognition is by an extra-legal transformation of the legal context in which it operates. The American, French and Russian revolutions were not just replacing one



government with another; they were also legal ‘ruptures’ in the sense that they violated the existing legal framework and succeeded in establishing a new legal beginning. A revolution is an event that succeeds in producing new legal facts, despite the creation of these facts not being authorized by existing legal institutions.<sup>12</sup> Revolutions are illegal and yet they produce facts that are recognized as legal. One explanation for the success of such transformations is the tendency among officials to acquiesce to authority rather than to the law (Sampford, 1989, p. 264).

According to Frederic Schauer (2015), the fact that legal revolutions are sometimes successful is evidence of the claim that ultimate decisions about legal validity are not always constrained by the rule of recognition. Occasionally, it is by the use of force that the legal system is identified. Recent examples, according to Schauer, are the events that unfolded in Egypt in 2011 and 2013. On both occasions, the legal system of Egypt was determined by the army and therefore by the use of ‘raw force’ (Schauer, 2015, p. 84).

Schauer is certainly right to point out that revolutions occasionally produce new governments that enjoy legal recognition and that ‘raw force’ is then instrumental in securing legal authority to political regimes. But it remains a distinct matter whether revolutions are able to determine the legal validity of regimes by recourse to ‘raw force’. The fact that events that are illegal by the existing framework eventually produce results that are recognized as legal does not entail that legal recognition is conferred by those events. A government that is established by illegal means does not possess the means to determine the conditions for the validity of legal norms. The point can be illuminated by the distinction between legality and validity (Honoré, 1967, p. 269).<sup>13</sup> An illegal government may, in the end, be able to make legal decisions, but the extent to which these decisions are valid does not depend on the fact it decided thus but on recognition by the social practices among judges and other officials tasked with enforcing the law. The point is that legal validity depends on the ultimate rule of recognition even in cases where force is used to change the regime.

On this analysis, Schauer is mistaken in saying that the use of force produced a new legal system in Egypt. The more correct interpretation of the events that unfolded in 2011 and 2013 is that the Egyptian army introduced a new government by the use of force and that the decisions enacted by it were subsequently accepted as valid by legal practices. The validity of the decisions that ensued were not established by forceful means but by those practices that define the ultimate rule of recognition. The Egyptian army were, in other words, able to establish certain facts by the use of force that subsequently produced changes in the legal system. Force

may be part of the causal explanation of legal change but is not what makes changes legal.

An illustrative example is a relation between the courts and the Junta that seized power in Chile in 1973. In the early days of dictatorial repression, the Supreme Court declared as unconstitutional one of the decrees enacted by the four-headed Junta (that comprised the commanders of the army, the navy, the air force and the national police force). Though the Junta responded by retroactively constitutionalizing its previous decree, the case shows that the conditions of legal validity were not subject to the use of force even though the regime had recourse to 'raw force' with few limitations (Barros, 2003, p. 202).

The perception that legal validity is established by the use of force might depend on misreading the social facts produced by revolutions with the social facts that constitute the ultimate rule of recognition. A revolution produces new social facts that are subsequently accepted as legal. And the rule of recognition is a set of social facts that ultimately determine the basis of validity in a legal system. They are both facts that authoritatively terminate chains of legal justification.

Yet, the social facts created by revolutions and the social facts that constitute the rule of recognition differ fundamentally in how they relate to law. The crucial difference is that the facts that constitute the rule of recognition emanate from the 'internal point of view' of the legal system. The internal point of view is that 'attitude' adopted by a 'legal insider' who accepts the duties associated with the legal system and the rule of recognition (Perry, 2006, p. 1173). Revolutionaries or coup-makers clearly do not adopt the internal point of view, as they pay no attention to the duties of existing legal norms. Their attitude towards the legal system is more accurately described as 'external'. Perhaps they know the law and are able to identify lawful and unlawful acts according to prevailing norms. Yet, they scarcely adopt the internal point of view as this requires the 'critical attitude' associated with acting on the basis of accepted rules (Hart, 1962, p. 54). The point is that only those social facts characterized by participants adopting the internal point of view pertain to the legal validity of norms. The internal point of view plays a crucial role in explaining how decisions made by public officials are considered as legally binding. The social practices that constitute the rule of recognition generate decisions that are binding because participants in these practices think of themselves as adhering to legal practices. Compare this with the activities of revolutionaries and coup leaders. These are evidently instances of breaking or ignoring the law. Their participants consequently do not act as 'rule followers' adopting the 'internal point of view' and therefore do not have the capacity to redefine the practices that decide the validity of law. In the end, in a seemingly paradoxical twist, only officials who *do* adopt 'the internal point of view' are capable of transforming the orders of coup-makers into valid legal norms.

## Conclusions

Dissatisfaction with legal institutions is a hallmark of populist politics. Where the people rule, the people should be able to fully determine the exercises of public power. As showed at the outset of this paper, this understanding of the relationship between law and the powers of the people is not accidental but is underpinned by influential understandings of the ideal of popular sovereignty. Following the doctrine of popular sovereignty, the collective body of the people enjoys 'supreme authority' in the state. By appeal to this view, populist movements are able to pit seemingly democratic principles against the existing institutional framework of law (Huq, 2018).

The argument defended here is that popular sovereignty so conceived is inconsistent with the basic conditions of a legal system. In order for the rule of law to exist, some mechanism that confirms the validity of collective decisions as the law must be in place. In so far as these mechanisms are constituted by certain social practices among public officials and judges, it appears that the legal validity of norms is determined by procedures that are ultimately beyond reach of the legal powers exercised by the people and its representatives. The ultimate rule of recognition is not subject to control by legal means and indeed cannot be. The rule of law necessarily imposes limits to the rule of men.

If legal validity ultimately depends on social practices among public officials and judges, populist politics is premised on an erroneous understanding of the mode of governance that is the hallmark of modern states. In order for there to be rule of law, as distinct from the rule of men, there must be procedures in place whereby legal authority is conferred to decisions made by governments and elected representatives. Laws enacted are not self-validating. In order for a decision to become a valid legal precept, it must be authorized by the legal system.

The same mistake that infects populist politics is applicable also to advocates of popular sovereignty. The notion that supreme authority in the state is vested in the people leaves no room for the fact that legal practices are in the end decisive vis-à-vis the validity of legal norms. The point is not just that some facts about the law are not amenable to democratic decision-making. It is also that democratic legislation is premised on certain facts about the law in order for the people to be able to make law at all (Eleftheriadis, 2010, p. 568). The wider implications are that certain aspects of legal institutions do represent ineliminable constraints on populist politics. While decisions taken in the name of the people can undoubtedly reshape and potentially do much harm to legal institutions, the practices that decide the validity of legal norms remain beyond the reach of the 'sovereign' people.

## Notes

1. This is basically Rawls (2001) view. See also Stacey (2016) for the view that popular sovereignty should be understood as a normative theory of democratic legitimacy and Morris (2000) and Vinx (2013) for good overviews.
2. Though in the following I will often speak about public officials enforcing the law I follow Raz (2009, pp. 109f.) in assuming that the validity of legal norms depends on decisions made by the 'primary norm-applying institutions' that both determine and create the law in specific situations. Examples mentioned by Raz are judges and police officers. For a critical discussion on the meaning of 'legal validity' see Bulygin (2015).
3. The argument in this paper applies to legal norms that are *made*; i.e. norms enacted by the law-maker. There is of course law that is neither enacted nor made, such as rules that arise from conduct or custom or what Postema (1994) calls 'implicit law'. This paper does not specifically address law in that sense and it seems that it may nevertheless be even more difficult to square with the pretensions of popular sovereignty understood as people's 'supreme authority of the state'.
4. Austin's theory is used here as a proxy for a more general doctrine that has been widely influential and that echoes back to Roman law, Hobbes, Pufendorf and whose lasting impact on the social sciences is probably largely due to Max Weber. See Kalyvas (2005, p. 224).
5. Another example is the question regarding the validity of Nazi-law after the Allied forces assumed supreme authority over Germany in 1945. Though the old regime (and its 'sovereign') were shattered, the new regime carefully repealed Nazi-laws one by one, clearly acting on the premise that the laws introduced by the former regime otherwise remained valid (Stolleis, 1998). Similar questions concerned with the legal status of inherited legal systems were present in many other places after both world wars. For an overview, see Grzybowski (1957).
6. I follow Eleftheriadis (2010, p. 546) who argues that "all modern legal theorists accept the majority of Hart's points and reject Austin's account of sovereignty and law. They all rely on the idea of the rule or rules of recognition or a suitably organized institutional framework". Hart's view is also portrayed as either 'the most influential view' or as 'widely accepted' in Green (2018), Moore (2017) and Boardman (1987). Hart's position is similar to that of Raz but differs from Kelsen's Grundnorm, according to which legal validity ultimately derives from a presupposed norm, rather than from social practices. For the view that the rules of recognition have limited purchase in the case of international law, see Culver and Giudice (2010).
7. Henceforth, when speaking about the rule of recognition, I refer to the ultimate rule of recognition unless otherwise specified.
8. Cf. Rawls (2001, p. 145 n. 15) who acknowledges that there must be a rule of recognition in order for the decisions made by the people to be *law* and not something else.
9. Following Raz (2009, p. 105), the existence of a law-maker in the form of a legislature is not even necessary for there to be a system of law. The sole necessary condition for the existence of legal norms is social practices among law-applying officials that allows for the legal validity of norms to be determined. But see Waldron (1999b, p. 16) for a critique of Raz's view.

10. From 1866 the text in Article 83 was shifted to Article 84.
11. The Swedish wording is "Grundlagarna skola efter deras ordalydelse i varje särskilt fall tillämpas" A similar provision existed in the Instrument of Government of 1772: 'Tå något otydligt skulle finnas i thenna Lag, så må man tå sig rätta efter thess bokstafveliga innehåll' (RF 1772, § 57).
12. Green (2005, p. 335) distinguishes between political revolutions, dramatic changes in social, political or economic relations, and legal revolutions, where "chains of legal justification are broken".
13. Indeed, the rule of recognition necessitates this distinction, since this rule itself is valid (because accepted by officials) but not law (because it does not conform to the legal order). See on this point Suber (1990, sec. 7).

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