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THE PARADOX OF GOVERNMENT: EXPLAINING THE LIFE AND DEATH OF A STATE

abstract

According to Searle (2010), the existence of a State brings a paradox with it. On one side, since a State is a social object, its existence seems to imply the existence of a collective acceptance towards it; on the other side, the existence of this collective acceptance seems to be granted only by the existence of a State that is capable to exercise violence – if needed – on its citizens by means of the military and the police. This implies a contradiction for, if the existence of a government should in principle rely on the free and voluntary acceptance of a certain social system, at the same time it seems that this acceptance derives only from the exercise of brute force, and thus it is all but voluntarily. I will argue that this paradox can be solved only if we distinguish two different notions of collective acceptance: one that can be individuated at the level of natural facts, the other at the level of social – and, more precisely, institutional – facts.

keywords

Government, collective intentionality, principle of efficacy, fictio iuris

1. The Paradox of Government

According to Searle (2010) social reality has only a derived kind of existence, since it depends on the collective acceptance of certain constitutive rules of the form: “We make it the case, by declaration, that a status function Y exists in context C” (Searle 2010, 101). For example, we can make it the case, by declaration, that a President exists in the context of the Italian Republic. This picture of the construction of social reality holds also for a complex social entity such as a State. More precisely, Searle specifies, a State can be conceived as a *system* of status functions, that is, a structured and coherent set of social entities that are put into existence by the collective acceptance of a series of constitutive rules (Searle 2010, 163). Among the status functions that constitute a State we can include its law system and all the institutions through which the State accomplishes its tasks (the ministers, the provinces, the schools, etc.).

However, the existence of a State also poses an important problem for Searle’s account, leading to the so-called *paradox of government* (Searle 2010, 160ff). In fact, Searle observes, if the existence of a government seems to depend on the existence of a collective acceptance, the existence of this collective acceptance seems to depend, in turn, on the existence of a government, that has the power to exercise violence – if needed – on its citizens, by means of the military and the police (Searle 2010, 163). More precisely, what Searle defines as the “paradox of government” should be better described as a double problem. On one hand, the paradox poses a problem of circularity on the ontological level, since the existence of a government seems to rely on the existence of a collective acceptance, but the existence of this collective acceptance seems to be grounded, *vice versa*, on the existence of a government endowed with coercive powers. On the other hand, the paradox also involves a contradiction, because, when we say that governmental power is based on collective acceptance, we mean a free and voluntarily act of acceptance, whereas, when we say that collective acceptance is granted by the existence of the military and the police, this acceptance seems to be obtained through coercion instead.

Searle focuses mainly on this latter problem and tries to solve this contradiction by denying the second horn of the dilemma. In other words, what Searle claims is that the threat of violence that is exercised by the military and the police is not *per se* a form of coercion: it does not force anyone to accept the government, rather, it motivates the citizens to accept

the government providing them with *desire-independent reasons* to act according to the government.

In order to explain the idea of a desire-independent reason Searle gives the following example: suppose, he says, that I have promised to someone that I will meet her the following day at 9 a.m. When the day comes, I would rather desire to stay in bed, but the obligation that I have with this person “gives me a reason to want to do it” (2010, 167). In other words, the existence of this obligation, created by my promise, gives me a desire-independent reason to stand up and go to the meeting. The same holds for other kinds of social realities. For example, although I have no desire at all to pay taxes, I do it because of the threat of being sent to jail and, much the same way, although I can dislike the government I have and desire to have another, I can nevertheless accept it for the same reason. Of course, this is not necessarily the only reason to accept a certain social reality: for example, I can be motivated to pay taxes also because I simply recognize that paying them is the right thing to do in order to maintain the healthiness of the collectivity in which I live, or I can decide to accept the government, even if I dislike it, because I know that the elections were valid and thus I want to respect the majority’s will. Still, even if I accept a certain government only because of the threat of violence that it could exercise, this acceptance, Searle claims, is free and voluntary: I am not forced, but the threat of violence is simply effective in providing me with a good reason to act in a certain way (Searle 2010, 167ff).

2. **Problems for Searle** As said above, however, the problem of contradiction is not the only problem created by the paradox of government. More importantly, the paradox poses an ontological problem, that becomes clearer if we take into consideration a political situation such as the Libyan revolution. As known, starting from February 2011 Libya has experienced a long period of civil war, that perhaps cannot be considered concluded yet. During the war the Libyan citizens have been basically divided into two opposite alliances: one faithful to the old government, the Libyan Arab Jamahiriya, and its leader, Gaddafi; the other that was trying, instead, to overthrow Gaddafi’s regime and constitute an antagonist government, the National Transitional Council. Given this situation, in which a collective acceptance is clearly lacking, one could then ask which of the two competing governments was really existing: was it the Libyan Arab Jamahiriya or the National Transitional Council, or perhaps both? And what is the criterion, then, to decide which social entities exist and which do not? The problem is that, the Libyan case set aside, collective acceptance

can never be total: every political system, be it a democratic state or a totalitarian regime, always houses some dissidents, people who try to change their regime, by legal or illegal means. Just think of anarchists: they are typically recognized by the State as citizens, but they do not recognize, in turn, the existence of the State nor, when imprisoned, they recognize the legitimacy of the police and that of the judicial system under which they are posed; rather, what they claim is that some people are violating their freedom by using on them brute force. They “call them out of the play”, so to say, not recognizing what the collectivity accepts, instead, as existent, and their ontology seems to include much less entities than other people’s.

To be true, Searle partly recognizes this problem and admits that: “for the political system *to function* there has to be recognition or acceptance of a set of status function by a *sufficient* number of members of the group sharing collective intentionality” (Searle 2010, 171, emphasis added). So, he seems to recognize, at least, that collective acceptance is never total. The problem, however, is that in Searle’s theory collective acceptance grants something more than the *actual functioning* of a government: it grants the *reality itself* of the government. But, if we say that the existence of a government is based on a sufficient degree of collective acceptance, the problem is then to establish which is the minimal degree of acceptance that can grant the existence of a social entity. For example, which degree of acceptance could have granted the existence of the Libyan Arab Jamahiriya? 70%? 90%? 50% plus one? The risk, of course, is that of falling in the sorites paradox, ending up with social entities with vague boundaries.

3. A Look to the Theory of Law

As I suggested above, the problems raised by the paradox of government can be solved, in my view, only if we distinguish two different notions of collective acceptance, one that refers to a social – or, more precisely, institutional – fact, the other to a natural one. In order to clarify the distinction between these two notions we can gain some important insights if we look at the theory of law.

In the first edition of his *Reine Rechtslehre* (1934), while discussing the foundation of the law system – and thus of the State itself¹ – Hans Kelsen describes a case that seems very similar to the Libyan situation. More precisely, he takes into consideration the case of a revolution that tries to overthrow a monarchy and to establish a republican regime:

A band of revolutionaries stages a violent coup d’Etat in a monarchy,

1 For Kelsen the State *coincides* with its law system.

attempting to oust the legitimate rulers and to replace the monarchy with a republican form of government. If the revolutionaries succeed, the old system ceases to be effective, and the new system becomes effective, because the actual behaviour of the human beings for whom the system claims to be valid corresponds no longer to the old system but, by and large, to the new system (Kelsen 1992, 59).

A revolution, then, can be defined as succeeded and a new system is established, according to Kelsen, only if the *actual behavior* of the human beings involved changes, so that they stop conforming to the old law system and start behaving according to new rules. In saying this, Kelsen is giving an implicit formulation of a principle that has been central in his entire philosophical reflection, meaning, the *principle of efficacy*:

The validity of a legal system governing the behaviour of particular human beings depends on the fact that their real behaviour corresponds to the legal system - depends in a certain way, as one also puts it, on the efficacy of the system (Kelsen 1992, 60, emphasis added).

It is worth noting that by the term “validity” Kelsen means the specific kind of existence of juridical entities. Kelsen thus endorses a position which is very close to the one proposed by Searle insofar as they both distinguish the level of social and institutional facts from the level of natural facts and both maintain that what founds the existence of a social entity such as a State is nothing but its efficacy, that is, a *natural fact*: a behavior of acceptance shown by a certain group of people who live in a certain territory.

This notion of collective acceptance, however, does not seem to be the only one at disposal. If we look at other theorists of law, in particular the theorists of the early modern State, a different notion seems to emerge. One of the main ideas characterizing modern States, in fact, is that of *popular sovereignty*: a government is a form of organization that a certain people has decided to give to itself, and thus it is, *by definition*, the expression of a collective will.

A clear formulation of this idea can be found, for example, in one of the former theorists of the modern State, Marsilius of Padua. In his *Defensor pacis* (1324) Marsilius affirms in fact that law emerges as the product of a *persona ficta*, that is as the product of a *juridical person* that represents the collectivity or, at least, the best part of it (*pars valentior*). The existence of a law system, in other words, presupposes, in Marsilius' view, the existence of a collectivity that detains the sovereignty and that has decided to put into existence the law system itself.

However, according to Marsilius, this collectivity is an entity with a different ontological status with respect to physical entities: it is a fictional entity for, of course, we need to conceive the collectivity as a single person, with a single will. Nearly five centuries later, in his *Metaphysics of Morals*, Kant expresses an idea which is very close to Marsilius' one, when he observes that "legislative power can be due only to the collective will of the people [*vereinigte Volkswille*]" (1797, § 46, transl. mine).

Although typical of democracies, then, the idea that the law system is the product of the entire collectivity and thus of a collective will is not restricted to democracies, but it applies to every regime which is based on the notions of *people's sovereignty*, and thus on some sort of *representative power*.

Another good example is represented by the Italian referendum of 1946, by means of which the Italian people was called to choose between republic and monarchy. On June the 2nd more than 22 million Italians voted: Republic won with 12 million votes against the 10 million votes for monarchy. This, of course, does not mean that all Italians immediately accepted the new republican regime: on the contrary, in the following weeks there were many protests and riots by the monarchists. Finally, however, on June the 18th the Supreme Court ratified the results of the referendum and the Republic was formally set up. This means that *the majority's will* (expressed through the referendum) became *the will of the entire nation*, and thus of all Italian citizens. In other words, despite the fact that a lot of people were not willing to accept the newborn government, its instauration was, in virtue of the law, the expression of the will of all citizens, no one excluded.

In this sense, then, besides the notion of collective acceptance understood as a *natural fact* – a *collective behavior* of acceptance towards a certain government – we can identify another notion of collective acceptance which seems to found all regimes in which the people is sovereign: in those regimes the majority's will becomes, by default, the will of the entire collectivity. To put it in another way, democratic regimes *presuppose*, by definition, *the idea of a collectivity which has accepted them*. But, if this notion of collective acceptance is presupposed by the law system itself, it cannot consist in a natural fact – it is not the actual behavior of a collectivity – but it will rather consist in a *social, and more precisely institutional, fact* – a fact whose existence is stated by the law system itself.

4. **A Way to Solve the Paradox** Given the two notions of collective acceptance that we distinguished in the previous paragraph we can now come back to the paradox and ask ourselves which of the two is involved in it. Let us recall, first of all, the exact formulation of the paradox:

Governmental power is a system of status functions and thus rests on collective recognition or acceptance, but the collective recognition or acceptance, thought typically not itself based on violence, can continue to function only if there is a permanent threat of violence in the form of the military and the police (Searle 2010, 163).

The paradox can be thus broken down into two different claims:

- (1) governmental power is a system of status functions and thus rests on collective acceptance;
- (2) but collective acceptance, in turn, functions only if there is a government which is capable to exercise a permanent threat of violence on its citizens in the form of the military and the police.

Now, if we consider claim (2), it is clear that the notion of collective acceptance to which it makes reference is the *natural* one, meaning: the behavior of acceptance shown by the citizens of a State. The threat of violence exercised by the military and the police, in fact, can have an efficacy only on the minds, and thus on the behavior of people, providing them, as seen, with desire-independent reasons to act in a certain way rather than others. Claim (1), however, does not seem to refer to the same notion. What this statement claims, in fact, is that the existence of a government is founded on the collective acceptance of a series of rules but, as seen, the collective acceptance posed at the basis of a State – at least in democratic regimes – is typically a *fictio iuris*, an entity whose existence is presupposed by the existence of the State.

The paradox of government can be thus solved without denying any of the two horns of the problem, but simply by recognizing the ambiguity of the notion of collective acceptance involved in it, which indeed stands for two different entities: a social and a natural one. If these two notions are distinguished, the circularity problem immediately disappears. When we say that the military and the police grant the existence of collective acceptance, we make reference, in fact, to a behavior of acceptance – the fact that people choose to conform their actions to a certain regime rather than another. Instead, when we say that the existence of collective acceptance founds the existence of a State, we are rather making reference to the fact that a State – at least a State founded on popular sovereignty – is by definition the product of a collective will, the will of the entire people. Most importantly, recognizing the difference between these two notions

allows to solve the problem of vagueness that seems to afflict, instead, Searle's social ontology. If one founds the existence of a State on collective acceptance conceived as an institutional entity, then the question of which is the minimal degree of acceptance which assures the existence of a State can easily be avoided (See § 2), since this kind of collective acceptance is always – by definition – *total* (it is the expression of the entire people). Speaking of a “sufficient number of members of the group sharing collective intentionality” (Searle 2010, 171), in other words, makes sense only if collective acceptance is conceived as a natural fact – the behavior of a certain group – but not if we conceive collective acceptance as a *fictio iuris*.

Before concluding, I want to take into consideration also a possible objection that could be raised against my solution. If collective acceptance is to be conceived as a *fictio iuris*, an entity whose existence is presupposed by the existence of a certain kind of regime, one could object in fact that it is impossible to found the existence of a State on this collective acceptance. In other words, if the existence of (social) collective acceptance is stated – implicitly or explicitly – by a certain law system, then (social) collective acceptance cannot found, in turn, the existence of the law system, and thus of the State that is based upon it. In this sense, analogously to Searle, also my solution would incur a circularity problem: either social collective acceptance founds the existence of a State or it is the State (and, more precisely, its law system) that founds the existence of social collective acceptance.

This objection, however, fails to distinguish two different kinds of priority: a temporal priority and a logical one. If it is true that collective acceptance comes into existence, from the temporal point of view, only when a certain law system starts to exist, the existence of collective acceptance is logically presupposed by the existence of a certain law system (if there is a system based on popular sovereignty, then we must suppose that there was a collective will that put this system into existence). So, from the logical and ontological point of view, collective acceptance is necessarily prior to the existence of a State, and thus it is collective acceptance which founds the existence of a State, whereas the reversal is necessarily false.

Finally, in saying that the only notion that can found the existence of a government is social collective acceptance, I do not intend to deny the importance that natural collective acceptance – the actual behavior of citizens towards the government – has in order to maintain a government. Certainly, natural collective acceptance is the presupposition for the birth of a certain government and, symmetrically, the vanishing of this collective acceptance can be the presupposition for the death of that regime in the sense that, even if a regime is imposed with the use of brute force

and coercion, normally it cannot resist for a long time if the majority of citizens rebels against it. So, it is certainly true that the lacking of collective acceptance understood as a brute fact (a collective behavior) can provoke, for example, the fact that those who are in power abandon their places and that a new regime can be constituted, but what founds the existence of a (representative) regime, I claim, cannot be only a collective behavior of acceptance, but it is rather the collective acceptance of the entire people, which is presupposed – explicitly or implicitly – by that regime.

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