

COLLECTIVE ACTION, CONSTITUENT POWER, AND DEMOCRACY: ON REPRESENTATION IN LINDAHL'S PHILOSOPHY OF LAW

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ABSTRACT

This contribution develops two objections to Hans Lindahl's legal philosophy, as exhibited in his *Authority and the Globalization of Inclusion and Exclusion*. First, his conception of constituent power overstates the necessity of violence in initiating collective action. Second, his rejection of the distinction between participatory and representative democracy on the grounds that participation is representation is misleading, and compromises our ability to differentiate qualitatively among various forms of (purportedly) democratic involvement. Both problems stem from the same root. They result from conflating two distinct senses of 'representation': acting-for-someone (or representative agency) and portraying-something-as-something (or representation-as).

KEYWORDS

Representation, democracy, constituent power, collective action, law

“Representation” is perhaps the master concept of Hans Lindahl's imposingly rigorous and massively erudite book, *Authority and the Globalization of Inclusion and Exclusion*.¹ Lindahl conceives of legal order as a specific form of collective action (IACA, or “institutionalized and authoritatively mediated collective action”). Because, Lindahl argues, collectivities only exist in being represented—to say ‘we’ is to represent a multitude as a unity—law also is essentially representational. Moreover, a legal system operates by representing space, time, subjects, and actions as ordered in some particular way. Last but not least, Lindahl regards his own task as a matter of representing law in a particular way, namely as essentially a

¹ Hans Lindahl, *Authority and the Globalisation of Inclusion and Exclusion* (Cambridge: Cambridge University Press, 2018). All in-text page numbers refer to this work.

specific form of collective action. At each of these levels of analysis, the book concerns the *politics* of representation because Lindahl argues that representation inevitably operates by including and excluding (in a complex, dynamic way: including also what is excluded and excluding what is included), and he seeks to come to terms with the fundamental contestability that follows from this.

I find much to learn and little to disagree with in Lindahl's conception of law, including the role of representation therein. My critical remarks focus on two arguments that Lindahl advances which are perhaps tangential to legal theory, but pertinent to political theory. The first claim is about the nature of collective action: it essentially involves violence. This has to do with Lindahl's view of constituent power. The second claim concerns democracy. Lindahl maintains that the distinction between participatory and representative democracy is specious because all democracy involves representation. Both claims, I will argue, are problematic. The first leads to an overly bellicose view of collective action, which obscures the possibility of constituent power in the mode of invitation. And the second compromises our ability to distinguish qualitatively among various forms of (purportedly) democratic involvement. Moreover, I'll try to show that the cause of both problems is the same: they result from conflating two distinct senses of 'representation': acting-for-someone (or representative agency) and portraying-something-as-something (or representation-as). Lindahl's analysis of representation in the sense of portrayal is more careful and sophisticated than much of the literature on representation in political theory that I am familiar with, particularly in attending to the dynamics of representing-something-as-something. But if the 'as' tends to get lost in contemporary political theory, it seems to me that Lindahl makes the opposite mistake of treating this particular sense of the word (portraying-something-as-something) as the only sense there is.

1. REMARKS ON 'REPRESENTATION'

Let me start with a reminder: many languages have various words that translate as 'representation' in English. This speaks to the polysemy of representation: the word has multiple meanings. Two senses are crucial in the present context: the sense of *acting-for-someone* in the capacity of a representative, as an MP might represent a constituency or a lawyer a client (*vertegenwoordigen* in Dutch and *vertreten* in German), and the sense in which a picture might represent something: *portraying-something-as-something* (*voorstellen* and *darstellen*). Call the former representative agency, and the latter portrayal or representation-as. Both are politically salient. At an abstract level, both senses involve rendering present in some sense what is also absent. But it is important not to conflate them.

These senses don't just come apart semantically, but also logically. When we speak of representative roles, such as when an MP is said to be the representative of her constituency, or the government of "the people", the posited relation of representation is dyadic: x represents y . But to speak of a picture as portraying something in one way or another is to posit a triadic relation: x represents y as z . This is true also for discursive representation-as, e.g. "the MP portrays the plan as being contrary to the public interest".²

Recognizing the triadic structure of representation-as is vital to understanding the dynamics (and politics) of portrayal. What is represented *as* thus-and-so can always be represented differently. This is also central to Lindahl's analysis: "Representation always discloses something as *this*, rather than as *that*, which entails that it is not possible to include without excluding" (6). This brings out the crucial "*difference* between the interpreted and the interpretation" "between something and its disclosure as something" (7). Likewise any particular representation-as can be taken to be about *this*, or instead about *that*. Any portrayal is subject to interpretation, and therefore contestable, both with respect to what it is a representation *of* (its referent) and what it is represented *as*—how it is *characterized*.

We fully agree about representation-as, I believe. But in my view, Lindahl is too hasty to claim that all representation is to be understood along these lines: "representation is indissolubly representation *of* (something) and representation *as* (this or that)" (109). This overextends his insightful analysis, and misses the dyadic structure of relations of representative agency: if I call someone a representative of some constituency, I posit a relation with two terms. It makes no sense to call someone the "representative" of her constituency *as* thus-and-so. Of course the representative may represent her constituency as having such-and-such interests, but so may a journalist. We have now switched back to the sense of portrayal. It may be true that the sense of representation-as is ontologically more fundamental than representative agency, in that the roles of representative and constituent depend on being portrayed. But that does not entail that, conceptually speaking, representing, in the sense of acting-for-someone, can be reduced to representing in the sense of portraying (representing-as).

2. CONSTITUENT POWER: IMPOSITION OR INVITATION?

With this in the back of our minds, let's turn to the first claim I wish to discuss, which is about the form of power that animates collective action. Lindahl argues

² I develop this point and some implications for theoretical disputes about representative democracy and constituent power in my "Constructivism and the Logic of Political Representation", *American Political Science Review* 113, no.3 (2019): 824-837.

that law is a specific form of collective action, and collective action draws on and is sustained by a certain form of power: constituent (or *constituting*) power—the power through which groups or collectives are brought into being, as opposed to the *constituted* power of an established collective. On Lindahl’s conception, constituent power operates essentially through a kind of dissimulated annexation. Annexation, because Lindahl holds that all collective action stems from a moment of illicit appropriation, a taking or seizure. Someone has to take the initiative to say “we” in order to institute—to *represent*—“us” as a collective. Insofar as the initiative succeeds, the addressees are swept up into a collective, and this ineluctably carries an element of violence. This moment of violence is then *veiled* because in order to succeed the initiatory act must present itself as legitimate. And in legitimating itself, Lindahl believes, it must appeal to the collective agent that it seeks to bring about. The initiator thus initiates while pretending that the initiative has already taken place.

Lindahl sees this bootstrapping conundrum as characteristic of all collective action (and consequently all law): a collective must, but cannot, authorize its own initiation. “Representation deploys a paradox: a foundational act of inclusion and exclusion can only *originate* a putative collective unity to the extent that it succeeds in representing an *original* unity” (292). The radical implication Lindahl draws is that violence is at the root of all collective action, hence all law: “To call attention to the moment of seizure inherent to representation is to insist that violence, even if a productive (but never only productive) violence, is necessarily ensconced in all legal orders” (181).

Is it true that all collective action, by definition, rests on dissimulated annexation? This is no doubt a common, perhaps pervasive, mode of constituent power. But is it true as a matter of conceptual necessity? We need to carefully examine the sense or senses of representation involved.

It seems to me there are two distinct ideas running through Lindahl’s argument: a thought about *collective ontology* and a normative claim about *authorization*. The first is a basic insight about the mode of existence of collectives: that they exist in being portrayed. The key idea, as Raf Geenens *et alia* have put the point, is that a group “needs to be *represented* as a collectivity in order for it to *be* a collectivity.”³ To speak of a people is to portray a multiplicity of individuals as a unity. The sense of representation involved here is representation-*as*. This, I take it, is the point Lindahl is making when he says, for example: “A collective, i.e. the unity implied in we* together, is always a *represented unity*, a unity that is only given indirectly (*as* this or *as* that), regardless of whether the collective has two, 2 billion or more participants” (109).

³ Raf Geenens, Thomas Decreus, Femmy Thewissen, Antoon Braeckman, and Marta Resmini, “The ‘Co-Originality’ of Constituent Power and Representation,” *Constellations* 22, no. 4 (2015): 515.

The second thought about representation in Lindahl's account of constituent power concerns the question: what entitles someone to be considered a representative? To genuinely speak or act on behalf of someone requires some kind of authorization. This is the sense he invokes in instances such as this: “[B]ecause a we* cannot say ‘we’, the collective on whose behalf someone first speaks and acts cannot have authorised the initiative in advance.” (181) (The asterisk marks the first-person plural standpoint of the collective in question.⁴) Clearly, the sense of representation at stake here is representative agency.

The crux of Lindahl's account of constituent power seems to be this: Lindahl believes that someone who seeks to initiate a collective—who makes a representational claim in the first sense, portraying a multitude as a unity—must necessarily claim the role of a representative of that collective in the second sense. This is what generates a legitimation gap, in cases where the collective appealed to does not yet exist. For it seems reasonable to insist that for authorization to occur, the authorizer must exist. Hence the apparent paradox at the heart of constituent power. This is clear in the following passage:

“Yet, whoever seizes the initiative to act on behalf of a we* presupposes that there is a bounded we* that needs representation. Who occupies the we* speaker position claims *to act on behalf of* [emphasis added] the broader group of participants—the we* at stake—that is *already deemed to exist* [emphasis added] and for whose sake its authorities rule by articulating, monitoring and upholding the point of joint action. So even the first closure that includes and excludes claims that a closure has taken place (literally) in the past, hence that the first closure is no more than a restoration of an earlier closure, the boundaries of which may be nebulous but not effaced. [...] [T]he taking that founds a collective must claim to operate a *retaking*, the legal re-foundation of a collective.” (288-289)

Is it true that an initiatory moment of portrayal is also, *ipso facto*, a moment of representative agency? I do not see why that would be so. A we* need not come into being because someone says “we” on *its* behalf. *I* can say “we” on *my* behalf, as the putative *member* of a we* to be. That is what an invitation is all about (“let us...”). When Peter says: “Shall we discuss Hans’ new book in Hamburg?”, he does not have to pretend that the collective he alludes to already exists, as a bounded whole. He has to imagine, and ask his addressees to imagine, a collective that *could* come into existence, and that *would* come into existence (and include himself and the addressees) as a result of appropriate uptake—a sufficient number of addressees accepting his invitation. This involves representation in the sense of portrayal.

The crux of the story is how we interpret the “re-” of representation. Notice Lindahl's *chronological* interpretation, in the passage just quoted, of the “re-” pre-

⁴ Here Lindahl draws on a seminal article by Bert van Roermund: “First-Person Plural Legislature: Political Reflexivity and Representation,” *Philosophical Explorations* 6, no. 3 (2003): 235–50.

fix: what is represented is “already deemed to exist”; its founding is supposed to have “taken place (literally) in the past”. This is what generates the paradox, for what is deemed to exist already before an act is supposed to be brought into existence through that very act. The chronological interpretation makes sense on the assumption that the sense of representation in question is representative agency. But here, the pertinent sense is that of portrayal. And in that case, the chronological reading of the “re-” prefix is too restrictive. Note again the triadic structure of representation-as: x (*subject*) represents y (*referent*) as z (*characterization*). A representational object *denotes* something and *characterizes* it in some specific way (e.g. a multitude as a unity). What it denotes, the referent, must be logically prior to being represented in the object. But the priority need not be chronological; it does not have to *exist* before it is invoked in representation. All that is required is that one can refer to it. And we can refer to all sorts of things that do not or do not yet exist—imaginary things, things that will or could come to exist, things that existed in the past. When Peter issues his invitation, he posits a collective that is as yet counterfactual, and that becomes determinate (i.e. comes to denote a specific set of individuals) only by invitees accepting his invitation and turning up. This suggests: the initiative cannot be seized but must be granted; there is no taking without *partaking*.

Does Peter not pretend to act on behalf of the ‘we’ that he seeks to constitute? I do not see why we cannot say that Peter acts of his own accord, as a putative member of the w^* to be. Of course, he must assume the standing to invite. But this standing does not derive from the w^* he seeks to constitute. It is also true that an invitation usually comes unasked, may sometimes be impertinent, and you cannot un-invite yourself. But you can ignore or refuse an invitation. And when you do, if it is genuinely an invitation, that’s the end of it. If there is a profound paradox here, I do not see it.

So it is true that “acts of representation [that initiate collectives] are always *premature* and depend on follow-up by those to whom they are addressed.” But that is not because they “have not and cannot have been authorised in advance by the collective that is represented” (110). Rather it is because uptake by addressees—accepting or rejecting the invitation—is constitutive of whether the portrayal finds a referent (and which referent, exactly).

In short, the idea that constituent power is essentially a moment of seizure turns on conflating two different senses of representation. A collective is brought into being through portrayal (and its uptake), not necessarily through representative agency. Lindahl’s account obscures the different compartments one might adopt in taking an initiative. When collectivities arise by means of force and violence, this is not because imposition is “inherent to representation” but because power is employed in the mode of imposition rather than invitation.

3. REPRESENTATIVE DEMOCRACY: NO TAUTOLOGY

The same conflation of representative agency and representation-as is behind Lindahl's remarks about democracy. Lindahl claims that all democracy is essentially representative democracy, joining a "representative turn" among democratic theorists who contest the distinction between "direct" and "indirect" democracy, or between "participation" and "representation".⁵ Lindahl formulates the point thus:

"In effect, the well-known distinction between direct and indirect democracy, between participative and representative democracy, is specious: *participation is a form of representation* in the twofold sense of representation of a collective and its representation as this or that unity. [...] Institutionally speaking, parliaments are one of the possible ways of staging representation, but by no means the only one." (109)

It is true that democracy cannot do without representation. But we have to be careful to specify in what sense, exactly. No democratic politics can do without portraying things in various ways: e.g. the people as a unity, the common interest as being such-and-such, the referendum-outcome as expressing (or failing to express) what "the people" want, and so on. I agree that the opposition between "direct" and "indirect" democracy is a simplification, one that is dangerous if it is taken to mean that the "will of the people" can ever be present in an unmediated way, without being represented, contestably, *as this or as that*.

It is *not* true, on the other hand, that democracy by conceptual necessity requires that some set of people make decisions on behalf of the rest, in the special role of *representatives*, as distinct from ordinary *members*, of the collective. And that sense of representation as acting-for-others, institutionalized by means of elections, is what "representative democracy" ordinarily means. Understood in this sense, the distinction between representation and participation is not specious. There is a qualitative difference between making a decision or expressing an opinion (representing one's own views as being thus-and-so, if you will), on the one hand, and relying on someone else to do so for you. This is precisely the contrast Hannah Arendt seeks to draw in *On Revolution*, when she compares revolutionary councils with political parties. The former aspired to manifest "the equality of those who had committed themselves to, and now were engaged in, a joint enterprise."⁶ The latter, in contrast, turned on a division of roles between ordinary citizens and their representatives: "Even if there is communication between representative and voter, between the nation and parliament [...] this communication is never between equals but between those who aspire to govern and those who con-

⁵ See, for example, Sofia Näsström, "Where Is the Representative Turn Going?," *European Journal of Political Theory* 10, no. 4 (2011): 501–10.

⁶ Hannah Arendt, *On Revolution* (London: Penguin Books, 1990): 278.

sent to be governed.”⁷ Lindahl obscures the difference between these modes of political involvement when he argues against Arendt that “it is a misconception to characterize the conflict between the two by asserting that ‘the issue at stake [is] representation versus action and participation.’” (110)⁸

In short: all democracy may be representational, in that it involves practices of portraying the will of the people as this or that, but not all democracy is by definition *representative* democracy, in that some persons are considered representative agents of others.

⁷ Ibid.: 276.

⁸ Quoting *ibid.*: 273.