

Schmooze Ticket - March 3, 2008

Reflections on the Constitutional Duties of
Citizens (and Persons)

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I. Introduction: Fundamental Duties of
Citizens in the Philosophical Tradition. There is a persistent strand of thought in Western political philosophy that holds that citizens owe fundamental duties to each other and to the state. Certainly such a view is implicit in the social contract theory of John Locke which holds that a person who consents to be part of the social community not only receives the benefits of belonging to such a community but also incurs the obligation of following the will of the majority of the community -- unless that will requires unjustifiable incursions into the life, liberty or property of the individual. No doubt this view reflects principles of the common law of contract which insists on a duty or obligation for each reciprocal right.

Some political philosophers, in a tradition that can be traced back to Aristotle, argue that the duties of citizens extend beyond simple obedience; in this "republican" tradition, citizens may also have an obligation to pursue political virtue, preferring the common good over personal gain and seeking to achieve the common good through active participation in political affairs.

Among modern writers, the political philosophy of John Rawls posits strong duties or obligations of citizen. Not only is the citizen bound by political obligations that have been expressly undertaken -- the citizen may also be bound by obligations to which he or she has not expressly consented. If the citizen finds himself or herself in a society that is generally guided by principles of justice that would be arrived at by representative persons in the "original position" behind the veil of ignorance (and if he or she participates in the benefits of that society), the citizen has an obligation to follow the constitutional and statutory rules so derived. Indeed, Rawls asserts that such a strong

fundamental duty would itself be adopted by persons in the "original position". Only when the political institutions vary from the principles of justice in some fundamental way is civil disobedience justified -- a general principle that would also presumably be adopted by the representative individuals in the original position.

According to Rawls, the principles that would be adopted by persons in the "original position" should then form the basis of an actual constitutional system. Accordingly -- although I do not believe Rawls says this explicitly -- the constitutional duties of citizens derived from principles adopted in the original position might well ultimately find their way into the relevant constitutional documents. Indeed, since constitutional documents are generally somewhat more detailed and explicit than the general philosophical principles that they are designed to implement, it seems possible that Rawls might not only countenance the inclusion of citizens' constitutional duties of obedience in the constitution of a republic, but he might also

consider the inclusion of certain other constitutional duties of citizens that might generally strengthen the social solidarity necessary for the success of the constitutional enterprise. Even though these fundamental duties might limit the citizens' liberty to some degree, those fundamental duties might permissibly be taken into account in determining the "greatest possible" liberty required by Rawls' first principle of justice.

II. Express fundamental duties of citizens in twentieth century constitutions. These reflections lead us to the question of whether it might make sense to embody fundamental duties of citizens in constitutional documents; and we could begin this inquiry by asking whether duties of citizens have ever been included in constitutions in the past or today.

Of course the eighteenth century Constitution of the United States -- which was principally intended not to rule the conduct of citizens, but rather to establish the federal government and to impose limitations on the government in favor of citizens -- does not

expressly contain constitutional duties of citizens. But the drafters of certain twentieth century constitutions were perhaps not so confident that their societies possessed the requisite degree of political and social solidarity. Moreover -- for various reasons -- these drafters may have held a broader view of the authority of constitutions over citizens. Accordingly, some twentieth century constitutions have indeed included fundamental duties of citizens (and/or persons) in express provisions in the constitutional text.

A. Weimar Constitution (1919). Among the democratic constitutions of the twentieth century, perhaps the leader in this respect was the German Constitution of 1919 -- the famous and ill-fated Weimar Constitution.

The Weimar Constitution was an eminent example of a constitution drafted for a riven and demoralized society and a large proportion of the citizens retained an internal allegiance not to the new German republic, but to the old monarchy or to more ominous political ideas of the powerful right wing. The Social Democrats who bravely

devised and supported this charter not only included prolific provisions requiring social welfare for German citizens, but also set forth a significant number of duties or obligations of citizenship. Indeed, the second major portion of the Weimar Constitution -- in effect its Bill of Rights -- is entitled "Basic Rights and Basic Duties of the Germans".

The express duties of citizens in the Weimar Constitution break down into three basic forms: general duties of citizens to the state; duties with respect to education and upbringing of children; and duties relating to property. In addition, a few constitutional provisions impose burdens directly on citizens and therefore might be considered to impose a form of constitutional "duty", although the word itself is not employed in these provisions.

Let us first examine the general duties of citizens. Article 163 declares that "every German has, irrespective of his personal freedom, the moral duty to employ his intellectual and physical powers in a manner called for by the common good

(das Wohl der Gesamtheit)".¹ Here the Weimar Constitution goes beyond the duty of loyalty and requires duties apparently drawn from the Aristotelian tradition; yet the universal claims of this provision are perhaps mitigated by the fact that this is a "moral" obligation only. Other sections, however, seem to repeat aspects of this provision without that qualification: thus all citizens are "obligated, in accordance with the laws, to perform personal services for the state and for the municipalities" (Art. 133), and every German has a similar duty to undertake certain forms of volunteer activity ("ehrenamtliche Tätigkeiten) (Art. 132).² On the questions of education and upbringing, Article 120 says that the upbringing of children is the "highest duty and natural right of parents...", and there appears to be a constitutional duty of children to attend school up until the age of 18 (Art. 145).

¹ Translations by the author.

² The duties of citizens, moreover, cannot be limited by claims of religious freedom (Art. 136 (1)).

Perhaps the most influential of the constitutional duties in the Weimar Constitution relate to property. The general statement of this duty declares -- in a concise formulation -- that "property imposes duties (Eigentum verpflichtet). Its use should also serve the common good (Gemeine Beste)". Art. 153 (3). Even more specifically, and rather startlingly, Article 155 (3) states: "the working and exploitation of the land is a duty of the landowner with respect to the community. The increase in the value of property, arising without the investment of labor or capital in the property, is to be made available for use by the community."

The Weimar Constitution also imposed certain obligations directly on individuals. Although the term "duty" is not explicitly employed in these provisions, any constitutional provision that directly imposes a legal burden on individuals can be seen as creating a constitutional "duty". Presumably for the purpose of protecting loyalty as well as furthering social and political solidarity, Article 109 (5) prohibits citizens from accepting "titles or orders" from other

countries³, and individuals are prohibited from imposing a disadvantage on another person for exercising the freedom of speech (Art. 118 (1)). Certain obligations of the "ordinary" law are also imposed upon individuals by the Constitution: usury is constitutionally prohibited and any "jural act" which violates "good morals" is void as a constitutional matter (Art. 152 (2)).

B. Constitution of India (1976 amendments).

Another important twentieth century constitution that contains a prolific list of fundamental duties -- as well as other provisions that impose obligations directly on citizens -- is the Constitution of India adopted in 1950 and amended numerous times thereafter. In 1976, the Constitution was amended to insert Part IV-A (Section 51-A) entitled "Fundamental Duties." Adopted as part of the wide-ranging forty-second amendment, this provision was enacted under Prime Minister Indira Gandhi's emergency government, and therefore it may well be considered to have been

³ Interestingly, a similar provision in Article 1 Section 9 of the U.S. Constitution applies only against federal office holders, rather than against citizens at large, and therefore seems directed against a form of political bribery.

of very dubious origin. Nonetheless, the “fundamental duties” of Article 51-A seem to have become well accepted -- even after the end of the “emergency” -- and an additional “fundamental duty” was even adopted in 2002. Art. 51-A(k) (duty of parent or guardian to provide opportunities for children’s education).

A significant number of these “fundamental duties” seem directed toward reinforcing some of the basic principles of the original Indian Constitution, such as the duties “to abide by the Constitution and respect its ideals and institutions;” “to cherish and follow the noble ideals which inspired our national struggle for freedom”; “to uphold and protect the sovereignty, unity and integrity of India”; “to promote harmony and the spirit of common brotherhood amongst all the people of India...”; and “to value and preserve the rich heritage of our composite culture.” Art. 51-A (a)-(c), (e)-(f). In sum, it shall also be the duty of every citizen “to strive towards excellence in all spheres of individual and collective activity so that the nation

constantly rises to higher levels of endeavour and achievement." Art. 51-A (j).

Not all of the Fundamental Duties achieve such rhetorical extremes. Rather more specifically, it shall also be the duty of every citizen of India "to defend the country and render national service..." (Art. 51-A (d)). Other obligations include the duty "to protect and improve the natural environment..." (Art. 51-A (g)) and to "renounce practices derogatory to the dignity of women" (Art. 51-A (e)).

In addition to these largely hortatory provisions, a number of other provisions impose obligations on individuals which are considerably more concrete. Article 15 (2)(a), for example, seems to grant access to places of public accommodation without discrimination, thereby apparently imposing a constitutional obligation that is rather analogous to the statutory obligation of restaurant and hotel keepers, etc., set forth in Title II of the American Civil Rights Act of 1964. Similarly Section 17 abolishes "untouchability" -- a provision which also is apparently intended to impose direct obligations

of nondiscrimination on individuals and which requires enforcement by statute.

Unlike the Weimar Constitution of 1919, the Indian Constitution does confer on the Indian Supreme Court broad powers of judicial review, and these powers have been exercised -- in sometimes breath-taking ways -- by the Supreme Court over the intervening decades. The fundamental duties of Article 51-A -- like the directive principles of state policy which immediately precede them -- probably do not constitute directly enforceable law. On the other hand it does seem to be acknowledged that the Fundamental Duties may ease a finding of constitutionality for legislative attempts to enforce these duties.

III. Constitutional duties of citizens (or persons) in the German Basic Law. The Basic Law of the Federal Republic of Germany is in many ways (although of course not all) the successor of the Weimar Constitution, but it excludes almost all of the Fundamental Duties of the earlier document. Nonetheless, not all of the duties have been removed and it also seems that duties of citizens can be teased out of certain other constitutional

provisions. First, and most obviously, the Basic Law of the Federal Republic of Germany repeats the striking declaration in the Weimar Constitution that “property imposes duties” (Eigentum verpflichtet) (Art. 14 (2) GG)⁴. Indeed the word “Pflicht”, buried in the verb “verpflichtet” is directly translated as “duty”. This provision proclaims an obligation of social solidarity through which the most “propertied” individuals within German society owe an obligation to the less fortunate, a proposition that is obviously related to the “social state” (social welfare) provisions of the German Basic Law. (Arts. 20, 28 GG). This idea is further developed in section 14(3) of the Basic Law which makes clear that compensation for the expropriation of property need not be calculated according to market value - - but may be determined through a “just” balancing of the interests of the property owner and the general interests of society. As a constitutional

⁴ The same section also requires, in a rephrasing of the parallel provision in the Weimar Constitution, that the use of property serve the common good. The Basic Law also contains a lightly revised version of the parental duty set forth in the Weimar Constitution (Art. 6 (2) GG).

matter, this conception seems to contrast sharply with the view of the isolated individual possessing the right of property against the world, which seems to prevail in American constitutional law.

A very striking example of this general principle is presented in certain cases involving property expropriations that arose after German unification. The Constitutional Court found that the government must compensate certain former property holders in Eastern Germany whose land had been expropriated by the Soviet occupation regime in 1945, but the Court went on to approve compensation at an amount considerably below market value. An important justification for this lower level of compensation was that, as the Soviet Regime imposed extraordinary burdens on all, it would be unfair for the property rights of landowners to be compensated at full market value, while many other victims of the Soviet Regime could never be adequately compensated for physical impairment, imprisonment, etc. Accordingly, the remaining rights of the landowners must be diminished by a general social obligation to all.

Perhaps even more important, the Basic Law of the Federal Republic of Germany is a constitution that requires the state to provide a measure of social welfare to its citizens (Arts. 20, 28 GG). One could say that whenever a constitution imposes an obligation of this kind on the government, it is also imposing an obligation of social solidarity on its citizens -- an obligation that is made concrete through the taxing system. Thus, an obligation on the state to pay social welfare benefits to its citizens is also an obligation on its citizens -- according to their means, as funneled through the rules of taxation -- to pay taxes to support those social welfare obligations. Thus, in constitutional systems where social welfare is optional, the citizens have no constitutional duty to pay taxes to support it -- this obligation (if it exists) is imposed by the parliament and not by the constitution itself. In a constitution like the Basic Law of the Federal Republic of Germany, however, this duty of the taxpayers is imposed by the constitution itself.

Finally, in German constitutional law, the doctrine of the "third-party effect" (Drittwirkung) can also be viewed as resulting in the creation of certain constitutional duties of individuals. Under this doctrine (which bears some relationship to the state action doctrine in the United States) the Basic Rights, which have an "objective" nature, apply not only against the state but also "influence" the law applicable to transactions or relationships among individuals. Under this doctrine, the "influence" of the constitution might prohibit an employer from discharging an employee on the basis of the employee's political views. Accordingly, a form of a constitutional right is conferred on the employee, but a constitutional obligation or duty -- to retain the employee -- is also imposed on the employer.

IV. Constitutional duties of citizens or persons in the Constitution of the United States.

And finally we come to the question of whether -- notwithstanding their absence in the text itself -- one also might find constitutional

obligations of citizens or persons in the Constitution of the United States.

It might be tempting to consider that the treason clause of Article III, Section 3 imposes a constitutional duty of loyalty on American citizens, rather like the obligation of loyalty resulting from the social contract in Locke, and its variations elaborated by John Rawls. Certainly the law of treason posits the citizen's obligation of loyalty to the government -- and the cases make clear, for example, that a person who is not a United States citizen (and therefore has no duty of loyalty to the United States) ordinarily cannot be convicted of treason.

Thus, the law of treason certainly imposes an obligation of loyalty on the citizen -- but the question is whether it is a constitutional obligation. Does the treason clause require Congress to create a law of treason -- in which case the clause can be seen as imposing a constitutional duty of loyalty on citizens? Or, is this section merely a limitation on the discretionary power that Congress would otherwise have under the necessary and proper clause to

enact a statute creating and defining the crime of treason -- in which case the duty of loyalty is created by Congress and not by the Constitution?

This question probably cannot be answered from the text itself, which seems more than ordinarily ambiguous on this point. Suffice it to say, in any case, that the law of treason seems to be a relic of the past, as there has not been a conviction for treason in the United States for well over 50 years. I believe that the most recent prosecutions for treason in the United States arose out of the events of World War II. Since then, the role that the criminal offense of treason has played in the American political structure has been assumed by other offenses -- such as espionage -- which are certainly within Congress's discretion to create or abolish.

But even though the existence of a constitutional duty of loyalty in the treason clause may be problematic, there is indeed one relatively narrow area in which the Supreme Court of the United States has found constitutional duties in the interstices of American constitutional doctrine -- although not clearly

found in the constitutional text. These constitutional duties of individuals are created by the Supreme Court in its cases on the state action doctrine. According to the basic view, the Fourteenth Amendment binds the government only and does not ordinarily impose limitations on citizens or groups of citizens. Yet, for interesting historical reasons, the Supreme Court has found -- albeit in a relatively small number of instances -- that private individuals or groups are so closely intertwined with the state, or are so clearly engaging in state-like functions, that they are likewise subject to the strictures and limitations of the Fourteenth Amendment. So, for this purpose, these individuals or groups are seen to be exercising the power of the state and are subject to the limitations of the Fourteenth Amendment.

Yet, the reality is that these individuals or groups remain individuals or groups -- they are in reality not converted into the state. Yet, when the state action doctrine imposes the limitations of the Fourteenth Amendment on these individuals or groups, it is imposing

constitutional duties upon them. Thus, the Gulf Shipbuilding Company has the constitutional duty to permit Mrs. Marsh to come onto its property for the purpose of distributing religious pamphlets⁵, and the Logan Valley Plaza had the constitutional duty -- until the case was later overruled -- to allow the picketers of the AFGU to come upon its land.⁶ The Jaybird Democratic Association of Fort Bend County, Texas had the constitutional duty (through the Fifteenth Amendment) to refrain from discriminating on the basis of race in its "straw poll,"⁷ and the Eagle Coffee Shop (located in a building owned by the Wilmington Parking Authority) had a similar constitutional obligation to refrain from excluding people from its premises

⁵ March v. Alabama, 326 U.S. 501 (1946).

⁶ AFEU v. Logan Valley Plaza, 391 U.S. 308 (1968). Even after Logan Valley was overruled, the PruneYard Shopping Center had the constitutional obligation -- under the California Constitution -- to allow protestors to spread their message at certain sites within the mall. PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980).

⁷ Terry v. Adams 345 U.S. 461 (1953).

on the bases of race.⁸ Moreover, of course, the Thirteenth Amendment which is generally acknowledged to apply against private individuals and groups as well as against the state and federal governments, has also created a federal constitutional duty of individuals not to enslave others. With perhaps only a little exaggeration one could say that the constitutional duty of the Thirteenth Amendment is a duty of citizens to treat all other citizens as citizens.

5. Conclusion. Unlike the laconic eighteenth century Constitution of the United States, certain twentieth century constitutions contain express constitutional duties of citizens or other individuals. Indeed, implied constitutional duties may even be found in the United States Constitution, which seems to focus almost exclusively on the state -- rather than on providing rules for society. But, in any case, whenever a constitution turns its focus away from exclusive concern with the structure of the state and turns its attention to providing rules for

⁸ Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

various aspects of society -- or when it requires the state to take certain actions on behalf of members of society -- the constitution is most likely not only creating rights for certain groups and individuals in society; it is almost certainly also creating reciprocal constitutional duties or obligations which are to be imposed on citizens and certain other individuals.