Contemporary approaches to constituent power: a critical survey.

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Abstract. This article presents the theoretical foundations of the concept of constituent power in the works of Sieyès and Schmitt and analyses some contemporary approaches to this idea. These are organized in three different strands: one that deploys the concept in order to justify existing constitutional orders; a second one which sees it as relevant for articulating and proposing radical constitutional change; and a third that aims to suppress the concept from constitutional theory altogether, as it sees it as superfluous. The article argues that the first approach is inadequate because, although it employs the concept of constituent power, it lets other ideas (usually consent and acceptance, but sometimes democratic procedures) do the heavy normative work of justifying the constitution. Furthermore, it may obscure the real sources of legitimacy of a constitutional order. It further argues that the third approach has a democratic deficit and faces difficulties when it tries to grapple with the phenomenon of future constitutional change. It, however, contains an important idea, namely, that the legitimacy of a constitution may not depend entirely on the procedures used to adopt it. I argue that the second approach is the most adequate conceptualisation of constituent power as it is able to overcome the problems of the other two and incorporate some of their insights. It helps us to articulate and propose future constitutional change but recognises that the constitution-making process is not all that matters. It may help political actors to critically shape their demands and is also able to deal with the question of the legitimacy of existing constitutions, conceptualising this as parasitic on future-oriented constituent proposals.

Keywords. Constituent power, legitimacy, popular sovereignty, democracy, rule of law, legality.

1. Introduction

The concept of constituent power has been used at least since the French Revolution to analyse and justify the creation of new political orders. Though some authors argue that the ideas underlying this concept were already present in earlier contributions (1,2) – presented for instance in the context of political conflicts which took place in seventeenth century England – the first relevant use of the term 'constituent power' is usually attributed to Emmanuel Sieyès in a pamphlet published in 1789, *What is the third estate?* (3,4).

In modern societies, which are organized and integrated through positive law, the creation of a political order amounts to the institutionalisation of a new written constitution. This means that a 'constituent power' is a power to create such a constitution (5). As constitutions are the highest legal norms in a given legal order, constituent power conceptualised in this way amounts to the foundation of such an order and seems to have an important role in justifying it. This paper aims to present and critically analyse some contemporary theories of constituent power

2. Methodology

As a strictly theoretical work, this paper adopts an analytic method (6). In short, it proceeds through the analysis of relevant political concepts – most notably constituent power, the main object of this study – in order to clarify its scope of application, the implications of different ways of formulating the concept, the normative commitments that underpin

each of them, and the normative consequences of adopting one or another. In other words, the aim here is to identify the best conception of constituent power according to criteria of descriptive plausibility and normative appeal (7). This approach follows from an understanding about political concepts as essentially controversial and not purely descriptive (8,9).

For reasons of space and scope, this paper is limited to contemporary approaches to constituent power. Two important exceptions are the proposals of Emmanuel Sieyès and Carl Schmitt, mentioned due to the great influence they had over later theorists.

3. Approaches to Constituent Power

3.1. Theoretical Background: Sieyès and Schmitt

As mentioned above, the language of constituent power was first articulated by Emmanuel Sieyès (10) in a pamphlet published immediately before some of the most dramatic events of the French Revolution. He argued that up to that point the Third Estate – French who were members neither of the nobility nor of the clergy – had been oppressed by the other two groups and should free itself from this oppression. Up to then, the Third Estate had been 'nothing', but it should be 'everything', because it was the only truly productive extract from the French population: the other two lived at its expenses. In order to do so, the Third Estate – which according to his argument amounted to the 'Nation' – should establish a new political order. It had a right to do so, as it was the subject of a 'constituent power', which was superior and prior to all 'constituted' powers – the powers of government, which were commissioned by the Nation in its constituent function.

The specifics of Sieyès theory are not relevant for present purposes. It is only important to notice that, as the first author to present a conceptualisation of constituent power, Sieyès is usually the starting point of later theorists who wrote about the concept. Further, although he attributes constituent power to the nation, he links its exercise to a theory of political representation: the Nation exercises its constituent power *through* its representatives acting in an Assembly. This is relevant to the extent that it contrasts to some later approaches to the concept.

Another important contribution to the theory of constituent power was developed by the German lawyer Carl Schmitt (11). His theory is worth mentioning because almost all later theorists of constituent power engaged – approvingly or critically – with his thought.

Schmitt argued that constituent power amounts to the 'political will, whose power or authority is capable of making the comprehensive decision about the type and form of its own political existence' (11). As such, constituent power determines the basic elements of a political organization which may or may not be written down in a constitutional text. This comprehensive political decision amounts to the constitution in the 'positive' sense – an idea currently referred to by concepts such as 'constitutional identity' (12,13) or 'basic structure of the constitution' (13–16) – which is different from mere 'constitutional laws', decisions enshrined in a formal document referred to as 'the constitution' but lacking this fundamental political character. In his theory, these constitutional laws are the object of the (constitutional) amendment power, while the 'constitution' shall only be altered by the constituent power, that is, by means of a new comprehensive political decision about the 'type and form' of the political unity (11).

Relevant here is that Schmitt's approach amounts to a species of 'decisionism': what matters is the sheer decision, as decision, not any normative criteria (justice, equality, democracy etc.) which purposedly orients that decision (17,18). In this interpretation, the constitution and consequently the whole legal order depends on a decision and may be broken or substituted by means of another such decision taken by an entity that exists permanently in a 'state of nature' (11).

3.2. Retrospectively justifying the constitutional state

In contemporary literature one can identify some different strands of thought about the concept of constituent power. A preliminary issue which was already mentioned in the methodology section is that this concept has both a descriptive and a normative content. It refers to some empirical facts that are then conceptualised as 'exercises' of a 'constituent power'. The framing of these facts depends on the combination of two ideas that came together only in modernity, namely, the understanding that law amounts to *positive* law; and the demand that political power be organized and exercised democratically (19).

George Duke has argued that constituent power is not in itself a democratic concept (20), but his argument is premised on a clear-cut distinction between 'conceptual' elements of the idea of constituent power and normative theories attached to it. Although I am not convinced that such strict separation is possible, it is important to recognize – *pace* Andreas Kalyvas (1,21), who argues that this element flows from the etymological origins of the verb 'to constitute' – that the democratic aspect of constituent power derives from normative commitments. These, however, correspond to the standards of justification in a context in which all people are seen as equally autonomous. This idea implies that every government or rule must be justifiable to the people subject to it – and this seems to recommend a democratic principle.

In light of that modern combination of ideas

mentioned above, constituent power is usually understood in its descriptive dimension as a legal or quasi-legal competence to introduce or change constitutional norms. (Some exceptions will be discussed shortly). In this vein, when there is a constitution in place, one can identify the person or institution that posited it and say that she or it has exercised a constituent power.

The normative dimension of the concept – which, as mentioned earlier, I see as intertwined with its descriptive dimension (on this, see the references in the Methodology section) – is the object of more controversy. It relates to the justification of political ideas, practices, actions, and decisions. Here we must ask, what is the idea of constituent power supposed to justify?

In general, this concept is deployed to justify and legitimise an existing constitution. This is usually done in a retrospective fashion, as constitution-making processes are not always (fully) democratic. So, some authors argue that, when a constitution is deemed legitimate, the constituent decision is retrospectively imputed to the people understood as the bearer of constituent power.

This is proposed, for instance, by Hans Lindahl (22,23). According to him, constitution-making processes always involve a paradox because the supposed author of the constitution – the people – is actually only created *by the constitution itself*. It does not exist prior to it. Therefore, recognising a constitution-making episode as an exercise of constituent power by the people can only be done in retrospect. This happens when the people – constituted by the constitution – recognises the constituent decision as their own. This happens in spite of the fact that the actual constituent decision was taken not by the people by some group who claimed to act in the name of a not-yet existing people.

A similar approach is presented by Mattias Kumm (24,25). According to him, the actual historical processes that gave rise to a constitution are not relevant for imputing the constituent decision to a popular constituent power. If the people mostly abide by the constitution, one can consider that is justified by the constituent power of the people. According to him, it is plausible to argue that the constitution derives its authority from the people, even if it was not them who wrote it. Constituent power, on this take, is not "sociological and explicative", but exclusively "justificatory and normative".

Now, although it makes sense to propose that a constitution must derive its authority from the people, it is unclear why this specific approach should be formulated in terms of a 'constituent power'. This concept suggests action deriving from a capacity, a competence, or a potential to do something. But, according to Kumm – and in a way, to Lindahl – what really matters is simply acceptance by the people of an existing constitution. The justification attached to the people derives not from its agency but from a kind of passivity. If the relevant element for determining the legitimacy of a constitution is a 'bless by the People' given in hindsight, we can possibly do without the concept of constituent power – an idea that will be discussed in section 3.4 below.

When we try to apply this retrospective approach to future constitutional change it proves even more inadequate. If a community decides after processes of public deliberation that its constitution is inadequate, unjust or outdated and has to be substituted, how would one committed to positions such as Kumm's and Lindahl's articulate such a movement?

Kumm would be in a position to argue that whoever writes and enacts a constitution, if it succeeds in stabilizing itself, has to be recognised as legitimated by a 'constituent power of the people'. His approach offers no critical tools to argue for one or another model of constituent process. Only the acquiescence to the future constitution matters. The concept of constituent power, as formulated by him, is unhelpful for political actors aiming to frame proposals for a constitution-making process.

The same holds for Lindahl's argument. In his account, what has to be recognized is the picture of the people painted by some supposedly representative group which has established the constitution in the name of an image of the people projected by them.

Another relevant contemporary approach, which may be interpreted as a retrospective justification of a standing constitution is Joel Colón-Ríos's. His, however, is a more substantive notion of constituent power to the extent that it must be exercised through highly participatory procedures in order to be considered legitimate. According to him, a constitution is only legitimate if created through such procedures and if containing provisions to allow for future constitutional substitution through the same kind of participatory procedures. This second element is the most important and may compensate for the lack of a democratic pedigree. It is also closer to a different way of theorising about constituent power which is presented in the following section.

3.3. Proposing future constitutional change

More recently, some have argued that the concept of constituent power may be useful for conceptualizing and understanding the actions of protesters aimed at the reconstitution of political orders (26–28). The distinguishing features of this mode of political action are that (1) it is not aimed at restoring past rights or privileges which have been undermined by an oppressive government; (2) it does not simply cast doubt on the existing order, questioning its legitimacy, but is actually tied to the idea of *creating something new*, a different political order; (3) even if it involves illegal action, it does not accept the

sanctions imposed to suppress such illegalities; and (4) it is internal to the existing order – constituent proposals are presented by people who live under a constituted order and engage critically with it.

In short, items 1 and 2 distinguish constituent movements from mere resistance (26,29); 3 distinguishes it from civil disobedience (29); and 4 opposes it to traditional approaches to constitutional change based on the concept of constituent power (28). The idea articulated in 2 also expresses a perception by political actors that the ordinary procedures for constitutional or fundamental change are blocked, therefore demanding a more radical alternative (30).

The action of arguing for constitutional substitution may be conceptually articulated with recourse to the category of "constituent discourses". These are proposals presented in public aimed at spurring a constituent process. These may be presented by individuals or organized groups such as social movements or political parties, or even by the government. They may alternatively correspond to diffuse popular demands which are not quite organized.

The concept of constituent power may be deployed to articulate such discourses. In this context, it is helpful for two main reasons: first, it signals that the intended change is so fundamental and extensive that it is not possible to accomplish it through ordinary institutionalized procedures; second, as it implies the idea that the political order depends on human actions and decisions, it recommends a democratic procedure: if the political order is *created*, not given, it must be framed *by the people who are subject to it*.

According to this kind of approach, then, "constituent power" is a concept used primarily in situations in which constitution-making or constitutional substitution is at stake. It is used to orient and coordinate the actions of political actors in order to crystalise an understanding about the need for a new constitution.

Now, it may be legitimately asked whether this approach would not prove inadequate if subjected to a test similar to the one proposed in face of 'retrospective' approaches discussed above. That is, it may be asked whether this conception focused on future constitutional change is adequate for interpreting past constitution-making processes and arguing about the legitimacy of existing constitutions.

It seems clear that any theory about constitution-making and constituent power may be deployed to interpret both past and future events to the extent that they are recognized as the same kind of event ("constitution-making" or "an exercise of constituent power"). Therefore, even future-oriented approaches, that focus on how the category 'constituent power' may work in what I called 'constituent discourses' – must provide a plausible account of the past.

As I see it, an appraisal of the legitimacy of existing constitutional arrangements in terms of constituent power is in itself part of a (future-oriented) constituent discourse. If the current constitution is deemed legitimate – for whatever reason – this will probably not be thematized. On the other hand, if a citizen or group of citizens sees the existing constitution as illegitimate, the procedure that led to its adoption may come under scrutiny and be denounced as inadequate. This will possibly lead to a proposal of constitutional substitution, which may, as I have argued, be articulated in terms of constituent power.

Seen in this light, the discussion on the legitimacy of past constitution-making processes is only parasitic on present constituent discourses. This approach is also compatible with the idea that the procedure which led to the adoption of a constitution is not (fully) determinant of its legitimacy. It is possible that, if a constitution establishes a well-functioning democratic system, including open and democratic amendment procedures, or if it is seen as fair and just, its legitimacy will not be questioned on the basis of the procedures leading to its adoption. As Arato remarks (31), such a 'birth defect' may always remain as an inherent tension in constitutional discourse, but it is likely to emerge clearly only during crises, and especially when the possibility of constitutional substitution is on the table.

3.4. Abandoning Constituent Power?

A different position is that which suggests we should abandon the concept of constituent power altogether. According to one of its proponents, David Dyzenhaus, this is an unhelpful idea in our quest to understand the authority of constitutions and of law in general and may even have some dangerous implications for the ideal of the rule of law (32,33). Dyzenhaus points to difficulties faced by some conceptualisations of constituent power, such as the fact that is usually understood as an unlimited and fully arbitrary capacity, which may at any time suppress or substitute the existing order; and the conceptual problem related to the authorship of the constitution: constituent power presupposes a subject (the 'people' or the 'nation') which is only created by the constitution itself (see the analysis of Hans Lindahl's approach above). This creates a 'paradox of authorship' in which, on the one hand, the constitution presupposes an author, and, on the other hand, this author presupposes the constitution. According to him, we do not have to bother with these problems because we can simply bypass them by adopting a more adequate theory of law.

In this account, the authority of law (and of the constitution in particular) derives not from a decision – whose only important element is the decision itself, as in the Schmittian position presented above – but from moral principles inherent in the law itself. These principles constitute a 'constitutional morality' which is immanent to the

practice of governing through law, and help to structure an 'attractive and viable' picture of political community that amounts to an adequate response to the subject's question *why should I obey the law?*

Similar arguments have been presented by Pavlos Eleftheriadis, Yasuo Hasebe, and Lars Vinx (34–36). Their shared core idea is that unlimited and arbitrary powers have no space in an adequate account of the rule of law.

A slightly different position that relies on similar theoretical commitments is proposed by Carlos Bernal (37). He also identifies the concept of constituent power as a dangerous tool that may be used to justify abuses and arbitrariness. Despite that – and in a way contrary to the authors mentioned in the last paragraphs – he does not believe that we can simply abandon the idea of a "constitution-making power". Therefore, he sets for himself the task of elaborating this notion and demonstrating how it is subject to some inherent conceptual limitations, which restrict its potential for arbitrary decisions.

Further, Dyzenhaus's position has been explicitly endorsed and refined by George Duke (38) who argues that it can be detached from Dyzenhaus's liberal assumptions. According to Duke, the point is that a theory of constituent power premised on 'strong popular sovereignty', that is, a theory that tries to justify the constitution only with recourse to a decision by 'We the People' lacks adequate normative elements to actually justify anything. In other words, the bare fact of a decision has no normative implications. When formulated in democratic terms, the normative work in such positions is actually done by a theory about democratic government, not by the concept of constituent power. Colón-Ríos's theory mentioned above may be seen as an example of such an approach.

The alternative conceptualisation of constitution-making presupposed by Dyzenhaus's critique may, however, suffer from a democratic deficit to the extent that the 'constitutional morality' allegedly inherent in the law seems to be related only to the protection of private autonomy, not to the guarantee and exercise of public freedom: the addressees of the law are not understood as also being their authors. Relatedly, the approach may not be capable of offering an adequate account of proposals to substitute an existing constitution when it does not provide for its own substitution. Such proposals seem to be better framed in terms of constituent power.

4. Conclusion

This survey on some contemporary approaches to constituent power and their historical foundations in the thought of Emmanuel Sieyès and Carl Schmitt indicates that this is still a controversial topic. This discussion is, after all, an attempt to conceptualize the role of the people in constitutional government and, as such, is strongly tied to each author's normative commitments. For liberals such as Dyzenhaus, the idea of an active people giving itself a constitution may not be central to the justification of the law and the constitution. For democratic theorists, on the other hand, constituent power is still a relevant notion for understanding processes of large and radical transformation in the structure of a political order.

As seen above, though some accounts which rely on the concept of constituent power are inadequate to the extent that they use the concept but let other ideas make the heavy normative work – thereby making 'constituent power' superfluous –, this concept seems still to be useful for conceptualising and articulating radical proposals of constitutional change in contexts in which the standing constitution does not provide for its own substitution. On the other hand, the liberal critique indicates that there is more to the legitimacy of a constitution than the idea of a popular constituent power: government through law implies some principles which are also necessary to fully justify state action and coercion. Both themes – popular foundations and principles of the rule of law – have therefore to be considered in a full account of constitutional legitimacy.

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