

# ARETE

POSITION PAPER

## **Building a New Horizon: Transnational Constituent Power**

April 8, 2018

*Xavier Fàbrega*

ANALYSIS

### **I. CP in the modern age**

Talking about Constituent Power (CP) in our times is facing one of the great conundrums of constitutional theory. Since the modern era enthroned CP as the originating momentum of any state configuration of authority, CP has been an uneasy term indistinctively used to enhance revolutions and to maintain order.

CP is a legal concept that captures the pre-eminence of the political, previous to any legal configuration, in the constitution of a society. Thus, CP also points out to express and set the goods that the sovereign power, the “We” previously set, establishes as pillars in which to develop a normative legal order. The ‘democratic impetus’<sup>1</sup> of CP makes it to be the expression of democracy, continuously and problematically related to a set expression of it, this is: a

---

<sup>1</sup> LOUGHLIN, Martin; *The idea of public law*, Oxford University Press, Oxford, 2004.

constitution. CP is ‘the generative principle of modern constitutions’<sup>2</sup> and the tension set into any constitution resides, in a more radical and pre-legal way, into it.

For constitutions, the basis of liberal democracy and constitutionalism, set identities, develop laws, protect the common good, establish a *raison d'état* and set the ultimate morality of the society. They constitute and establish the ‘ethos’ of the society as well as the procedures to enforce and develop this ethos, trying to answer the ‘practical question’: the question about how to properly live in society.<sup>3</sup>

CP not only constitutes a step towards the establishing of this society, becoming a hallowed vessel when done its job. As Lindahl has wonderfully explained, constituent power legally embodies the tension within the Aristotelian concepts of *dynamis* and *energeia*, possibility (potentiality) and reality (actuality).<sup>4</sup> CP is something that relies in within the society, from its very first moment from its very end. It is the dynamical and core element continuously transforms any society.

In the task of conforming and constituting identities, that is setting a ‘We’, CP faces, from my point of view, an irresolvable paradox that is closely linked to the representational dimension of democracy. The paradox is that ‘the foundation of a novel legal order can only come about as its re-foundation, as the continuation, albeit in a legal guise, of an extant collective’<sup>5</sup>. The A, the constituent power, can only be identified when the B, the outcome realized by A, is set and determined. Another problem that CP faces is the consolidation of an identity that is, *per se*, exclusive. The inclusion of people into an identity directly entails an exclusion of those who are not into this identity, creating a collective identity by way of a self-inclusion and other-exclusion<sup>6</sup>, thus perpetuating the schmittian *friend-enemy* distinction and consequently, prevailing the political character of CP<sup>7</sup>. However, notwithstanding the ontological prevalence of the

---

<sup>2</sup> Ibid.

<sup>3</sup> LINDAHL, Hans; ‘Constituent power and the constitution’ in *Philosophical foundations of Constitutional Law* by DYZENHAUS, David and THORBURN, Malcolm; Oxford University Press, Oxford, 2016.

<sup>4</sup> LINDAHL, Hans; ‘Possibility, Actuality, Rupture: Constituent Power and the Ontology of Change’, *Constellations*, Vol. 22 (2), 2015.

<sup>5</sup> LINDAHL, Hans; ‘Constituent power and the constitution’.

<sup>6</sup> Ibid.

<sup>7</sup> SCHMITT, Carl; *The concept of the political*, University of Chicago Press, Chicago, 2007.

political, the legal dimension cannot be dismissed without infringing the whole construction: the constitution.

Ultimately, what is CP definitive account is to structure a coherent set of authorities in the concrete legal order itself constitutes. Since God is out of the picture of public law, liberal democracies have to constitute a new set of authorities to give reason of themselves and enforce the effectiveness of law in their jurisdictions, which are set by the constituent 'We' according to the established framework of rational reasoning. The definitive task of public law, since Hobbes *Leviathan*, is to fill the God-shaped hole in society. And, since public law cannot presuppose anything because it is the presupposition of the private dimension of law, the filling of God's space is up to it.

Schmitt's analysis of the secularization of theological concepts as the state basis for authority<sup>8</sup> shows the transformation of divine authority into secular rule; Raz's service conception of authority as the improvement of one's conformity with reason when conforming to the state authority is a great account of how authority works in the state.<sup>9</sup> However, when confronting with the transnational and globalized world in which we are, the transnational dimension of CP, and the authority it constitutes, has to be set into a more broad theory of authority.<sup>10</sup>

Sovereignty structures and relates to the state towards the relations of authority that are set in the state through the people. In sovereignty converge all the aspects of CP: the 'We', which is the one that exercises the sovereignty; the theory of authority, which establishes how the relations between the 'We' and the constituted framework of power are done; the goods that are set by the same constituent power; and the continuous reflexivity and change of the basic legal framework set by it. Sovereignty has moved from a static perspective to a relational one, which inheres in the relation between the constituted power and the set authority<sup>11</sup>. Regarding the national state perspective, this is a tremendous task to be developed that continuously poses unsolvable problems. But, if we want to be truly honest and committed to the challenges of the

---

<sup>8</sup> SCHMITT, Carl; *Verfassungslehre*, Dunker und Humboldt, Berlin, 1965.

<sup>9</sup> RAZ, Joseph; 'The problem of authority: revisiting the service conception'; *Minnesota Law Review*, Vol. 90(4), 2006.

<sup>10</sup> ROUGHAN, Nicole; *Authorities conflicts, cooperation and transnational legal theory*, Oxford University Press, Oxford, 2014.

<sup>11</sup> LOUGHLIN, Martin; *The idea of public law*.

globalized era it seems that another value has to be added into the equation: the possibility of a transnational legal order which does not disregard both dimensions of any legal order: the legal and the political.

## II. The turning point of CP

On the transnational level is questioned how this relation is being done. The best example of a transnational institution and, therefore, the case study for any transnational perspective of constituent power is the EU. Some have argued that sovereignty is not being destroyed or divided, but eroded in this relation.<sup>12</sup> However, the fact is that, while the monist and pluralist accounts on sovereignty being on the stake, other forms of non-state power are arising challenging the monist conception of it. The world is not going to evolve into a post-sovereign era (sovereignty is alive more than ever), neither into an erosion of it. What the world is going for is towards a new relational dynamics of sovereignty. This means that the state-frame politico-legal dimension of sovereignty must be surpassed.

The problem that legal theorist face is the way in which this is to be achieved. In the representativeness inherent to the current constitutional framework, and bringing into a transnational framework, some have argued that CP has to change its perspective and bring a more universalistic approach that includes the international community crafting it as “a community of free and equal persons governing itself through law as part of an international community of equally sovereign states.”<sup>13</sup> The inclusion of the international community into the foundations of every legal order, thus breaking the national constraints into CP is a good intuition but, nevertheless, a failed intuition.

Kumm gets to the point when saying that CP “is not monopolized by ‘We the People’ operating within the context of a state.”<sup>14</sup> Though controversial, the constitution of the EU is a good example of the de-monopolization of CP, or delegation of competences to create a multinational structure. The problem with this structure is that the political dimension of CP, the

---

<sup>12</sup> LOUGHLIN, Martin; ‘The erosion of sovereignty’, *Netherlands Journal of Legal Philosophy*, Vol. 45 (2), 2016.

<sup>13</sup> KUMM, Mattias; ‘Constituent power, cosmopolitan constitutionalism, and post-positivist law’, *International Journal of Constitutional Law*, Vol. 14(3), 2016, p.698.

<sup>14</sup> *Ibid.* p.702.

pre-legal one, is drowned in an enormous sea of legalism that fails to keep the legitimacy to the whole structure.

On the one hand, as Walker points out, this leads to the failure of constituting any possible authority because of the “absent reference to a particular authorizing political community” which leads to the impossibility of justification of any “stream of constitutional authority” that connects the legal and the political.<sup>15</sup> On the other hand, Kumm’s account of CP lacks the “constitutive unity to provide an anchoring identity”<sup>16</sup> to the subsequent political community. And, in failing to do so, this breaks down the whole basis of how constitutionalism is, not being able to provide two of the constitutive elements of CP.

In response to Kumm’s propositions Walker provides a normative reconstitution of CP in a transnational sense that tries to make converge the political, the legal and the identitarian into the same framework. But, as he acknowledges, the frustration in trying to resolve this problem awaits to those who try to find the “constitutional way to global justice”<sup>17</sup>

### **III. Conclusion**

The difficult resolution of the nature of CP in an ever more globalized era is not an easy one, but the necessary starting point is to construct a normative account of CP that sets the basics for a future transnational development of it. The main challenge that arises is the one of putting together, and differentiating at the same time, the political and legal dimension of CP and the state-frame of it into an open structure that enables an evolution of the traditional account of CP into a transnational CP.

Not maintaining the division between both aspects can lead to a frustration and to a misunderstanding of what CP really is. Because, even in a global framework CP is to be the same, otherwise it would not be CP. The fact of not differentiating the different parts of CP would break the bedrock in which we are all set. “We do better to reconnect politics and law with global

---

<sup>15</sup> WALKER, Neil; ‘The return of constituent power: A reply to Mattias Kumm’, *International Journal of Constitutional Law*, Vol. 14(4), 2016, p. 907.

<sup>16</sup> Ibid. p. 908.

<sup>17</sup>Ibid. p. 912.

justice (...) by maintaining a firmer sense of their different starting points”<sup>18</sup> and, from then, constructing a new horizon.

#### IV. References

- KUMM, Mattias; ‘Constituent power, cosmopolitan constitutionalism, and post-positivist law’, *International Journal of Constitutional Law*, Vol. 14(3), 2016.
- KUMM, Mattias; ‘Constituent power, boundaries and identity: On the justificatory depth of constitutionalism – A rejoinder to Neil Walker’, *International Journal of Constitutional Law*, Vol. 14(4), 2016.
- LINDAHL, Hans; ‘Constituent power and the constitution’ in *Philosophical foundations of Constitutional Law* by DYZENHAUS, David and THORBURN, Malcolm; Oxford University Press, Oxford, 2016.
- LINDAHL, Hans; ‘Possibility, Actuality, Rupture: Constituent Power and the Ontology of Change’, *Constellations*, Vol. 22 (2), 2015.
- LOUGHLIN, Martin; *The idea of public law*, Oxford University Press, Oxford, 2004.
- LOUGHLIN, Martin; ‘The erosion of sovereignty’, *Netherlands Journal of Legal Philosophy*, Vol. 45 (2), 2016.
- RAZ, Joseph; ‘The problem of authority: revisiting the service conception’; *Minnesota Law Review*, Vol. 90(4), 2006.
- ROUGHAN, Nicole; *Authorities conflicts, cooperation and transnational legal theory*, Oxford University Press, Oxford, 2014.
- SCHMITT, Carl; *The concept of the political*, University of Chicago Press, Chicago, 2007.
- SCHMITT, Carl; *Verfassungslehre*, Dunker und Humboldt, Berlin, 1965.
- WALKER, Neil; ‘The return of constituent power: A reply to Mattias Kumm’, *International Journal of Constitutional Law*, Vol. 14(4), 2016.

---

<sup>18</sup> Ibid. p. 913.