

Carl Schmitt, the Arbitrary Character of Constituent Power, and the Tradition of European Public Law

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In this comment, I engage with Chapter 3 of Lucia Rubinelli's book, which is an essential contribution to the study of constituent power in the Weimar Republic and the reception of this idea in the work of the controversial jurist Carl Schmitt (1888-1985). My thoughts are organized into two sections. In the first, I summarize Rubinelli's reading of Schmitt's understanding of constituent power in Weimar. My main criticism concerns Rubinelli's reading of the arbitrary character of constituent power in Schmitt, which in my view insufficiently reflects Schmitt's distinction between dictatorship and despotism. In the second part, I turn to the historical transition of constituent power that Rubinelli detects between the 19th-century French lawyers and the Weimar Republic. I point out that there is a missing link in Rubinelli's history of Schmitt's constituent power: the dialogue between the languages of German state theory (*Staatslehre*) and French public law (*Droit Public*) in the early 20th century.

Carl Schmitt and the Arbitrary Character of Constituent Power

Rubinelli begins Chapter 3 by stating that to understand Schmitt's use of constituent power, one must be aware of his conception of sovereignty as well as of the challenges the Weimar Republic placed on the idea. Rubinelli argues that Schmitt develops constituent power to apply his theory of sovereignty to justify the Reich president's dictatorship, according to Art. 48 of the Weimar constitution in democratic terms. According to Rubinelli, for Schmitt, "the sovereign, standing beyond and above the legal structure, is [...] the political entity that can decide over the creation or the suspension of the constitution" (p. 109). Rubinelli reconstructs Schmitt's conception of sovereignty, as it is developed in key works, such as *Politische Theologie* (1922), *Die Diktatur* (1921), *Legalität und Legitimität* (1932). She explains how Schmitt's work emerges as a critique of legal positivism, where his comments focused on the works of Thoma and Kelsen, who, according to Schmitt, have sacrificed the essentiality of the constitution (pp. 113–114). For Rubinelli, Schmitt's interest in Sieyès derives from the fact that "this allowed him to wage a powerful critique of the politics of Weimar as well as to sketch a solution for its multiple crises" (p. 115).

Rubinelli differentiates three characteristics of Schmitt's reading of constituent power in Sieyès. First, Rubinelli highlights the arbitrary character that Schmitt ascribes to the concept of constituent power. She points out that while for Egon Zweig, whose

seminal *Die Lehre vom Pouvoir Constituant* was published in 1909, constituent power was a “testimony of the Enlightenment,” for Carl Schmitt it exemplifies the arbitrary nature of political decisions. For Schmitt, “there was no underlying rationality to be found in the nation’s constituent power, as this could not be deduced from any a priori cause” (p. 116). The second characteristic of the constituent power in Schmitt, according to Rubinelli, is its exceptional character in its omnipotence: “Being fundamentally discretionary, it does not depend on any norm or value and, similarly, cannot be bound by any” (p. 116). Schmitt paraphrases Sieyès and points out that constituent power is unlimited and can do anything because it is not subordinate to the constitution. Furthermore, Schmitt sees in Sieyès a political theory in which the nation remains as the bearer of constituent power in an unorganized and unorganizable way. The third characteristic of constituent power, for Rubinelli, is its inalienable character. That means that after the sovereign decision, the constituent power does not disappear; instead, it remains an irreducible force within the constitutional order. For Schmitt, the idea of constituent power in Sieyès perfectly expresses the impossibility of constraining sovereignty through legal language. The distinction between *pouvoir constituant* and *pouvoir constitué* is to ensure that the exercise of delegated powers is limited and constrained by the existing constitution.

Rubinelli concludes that the concept of *pouvoir constituant* played an essential role in Schmitt’s writings in Weimar because “it offered him the language through which he could redefine the democratic principle of popular power to make it consistent with his understanding of sovereignty” (p. 135). Rubinelli argues that between Schmitt and Sieyès, there is a parallelism in understanding the nation such that it supports their political agendas: “what for Sieyès was the Revolution, for Schmitt was the Weimar Republic” (p. 137). However, Rubinelli believes that Schmitt misinterprets Sieyès’ theory of sovereignty, which instead of a legitimation of dictatorship in democratic terms sought to avoid the danger of despotism. For Rubinelli, this difference between the conception of the *pouvoir constituant* in Schmitt and Sieyès went unnoticed in Weimar. Moreover, Rubinelli accepts that Schmitt’s theoretical proposal has been influential in the work of legal scholars such as Costantino Mortati in Italy and Ernst-Wolfgang Böckenförde in Germany. Rubinelli points out, though, that in contrast to these later receptions, the appeal of Schmitt’s definition of constituent power lies in “his critique of liberalism in general and of liberal parliamentarianism in particular” (p. 139).

My impression here is that Rubinelli exaggerates the arbitrary character of constituent power in Schmitt’s theory, considering that he makes a distinction, in the introduction to *Die Diktatur*, between dictatorship and despotism. The dictatorship of the sovereign constituent power (*souveräne Diktatur*) is not just any despotism because it proposes that it is legitimized according to its goal, that is to say, in search of the establishment of a new constitutional order, with a new subject (*Träger*) of constituent power, through the suspension and elimination of the existing norms. In Schmitt’s theological-political approach, this higher instance is not organized. Moreover, it cannot be reduced to an organization (an organ of the state), so its commission becomes at the same time its competence. To my mind, this is the main idea behind a passage that Rubinelli later quotes from *Die Diktatur*: “From the infinite, incomprehensible abyss of the force of the *pouvoir constituant*, new forms

emerge incessantly, which it can destroy at any time and in which its power is never limited for good. It can will arbitrarily” (p. 116). Schmitt here does not propose a fully voluntaristic – in the sense of despotic – character of the constituent power. Rather, Schmitt offers an “anti-positivist argument” in which constituent power appeals to an unorganized authority.

A Missing Link in Rubinelli’s History of Constituent Power: Carl Schmitt and the European Public Law

My other comment concerns the continuity between Chapters 2 and 3, in which Rubinelli establishes a dialogue between French and German constitutionalism. In Chapter 2, she explains that the language of constituent power, after Sieyès, disappears from French constitutional politics. The French constitutions of the 18th-century integrated the conception of the nation’s sovereignty, which is attenuated in the constitution of 1795. What Rubinelli does not mention, however, is that the French constitution of 1848 includes a constituent assembly to reform the constitution in whole or in part. Here, constituent power reappears, although without the language of sovereignty. In other words, in the 19th-century, constituent power changed into a constitutional organ of the French Republic. Rubinelli’s book, however, does not consider if constituent power could also be exercised through a non-sovereign constituent assembly. If we accept this possibility, we can define two historical manifestations of constituent power in France: a sovereign constituent assembly (1789) and a non-sovereign constituent assembly (1848). When it comes to the intellectual history transition from the 19th to 20th centuries, Rubinelli seems to invite us to think that there is a history of a misinterpretation of constituent power between the 19th-century French lawyers (such as Laboulaye and Berriat-Saint-Prix) and Schmitt’s reading in Weimar. As I see it, this is not the most plausible interpretation of the history of constituent power.

In particular, I think Rubinelli’s book overlooks how Schmitt’s language of constituent power is influenced by a dialogue between German state theory (*Staatslehre*) and French public law (*Droit Public*). Rubinelli recounts how before the Weimar Republic, jurists such as Robert Redslob and Egon Zweig (who are almost forgotten in the current literature) analyzed the history of constituent power in their significant works. The author names this section “France in Germany” (p. 104) and explains that the work of Theodor Mommsen on the history of the Roman Republic played a key role in the study of the idea of constituent power at the time. Moreover, Rubinelli argues that the method of Jellinek’s *Allgemeine Staatslehre* was fundamental because Zweig’s book draws on this approach to explain the history of constituent power. In turn, “*Die Lehre vom Pouvoir Constituant* became the reference point for thinkers interested in using the idea of constituent power to make sense of popular power in the Weimar state, including Carl Schmitt” (p. 106). I am not convinced by this history of constituent power as a connection “Zweig-Schmitt.” In my reading, Schmitt develops his notion of constituent power in *Die Diktatur* and *Verfassungslehre* based on a language derived from the theory of state organs and their functions. This perspective comes not from Mommsen and Zweig but the 19th-century German state theory (Gerber, Laband, and Jellinek) and the public law of the Third French

Republic (Esmein, Duguit, and Hauriou). In other words, Rubinelli's history of constituent power does not reflect that the European public law established a language of constituent power through the theory of state organs in France and Germany in the early 20th-century.

Early 20th-century European public law understood constituent power as the constitution-making function of a state organ in the French constitutions of 1848 and the constitutional laws of 1875. That at least was the theoretical approach preferred by French followers of Jellinek like Carré de Malberg. The cases of Redslob and Zweig that Rubinelli describes are not different from this perspective. In contrast, Rubinelli takes the discussion about Schmitt in Weimar to the realm of the fusion of the concepts of sovereignty and constituent power, so Schmitt ends up disconnected from his European context of constitutional law. In the transition from the 19th to 20th centuries, constituent power in European public law was not considered sovereign but a particular function of constitution-making for the organization of state powers. Thus, we should not assume that Schmitt recovers the language of the sovereignty of constituent power through the language of popular sovereignty of 18th-century France. Rather, in Schmitt, there is a *sui generis* confluence of two movements that are merged in his understanding of constituent power: French public law (*Droit Public*) and German state theory (*Staatslehre*). Specifically, the *Staatslehre* idea of the sovereign state was adopted by Schmitt into the theory of the constituent power of the Third French Republic. Against this background, I disagree with Rubinelli's reading that Schmitt's idea of a "sovereign constituent power" comes from the language of 18th-century political theory. The history of constituent power from European public law perspective becomes complex because it involves developing a language in Schmitt that goes beyond Sieyès and the French lawyers of the 19th-century.

