

Constituent Power: A response to critics

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Let me start by expressing my gratitude to the editors of the *Verfassung* blog and to the contributors to this debate. When I was writing the book, the very idea of it being read sent me into a panic. It still does today, but I am lucky to have found generous and insightful readers in Peter Niesen, Carlos Pérez Crespo, Markus Patberg and Esther Neuhann. Their comments raise both general methodological points and specific historical questions about the chapters. I will try to answer them in turn: I will first engage with the methodological critiques and I will then move to interpretative questions about the story I tell in the book, its protagonists and their historical contexts.

The main aim of the book is, as I see it, to explain how the idea of constituent power has been used to make sense of the democratic principle according to which power belongs to the people. This goal, as Patberg rightly points out, is meta-theoretical in kind and comes with two implications. The first is that I do not develop a theory of constituent power of my own, nor do I offer a normative defence of my preferred interpretation of the idea. On the contrary, I am interested in exploring the variety of ways in which the concept of constituent power has been interpreted in the past two hundred-odd years. I am thus not interested in finding the best or the correct theorisation of constituent power, but in bringing back to life the competing interpretations that have existed in history and that still influence how we think about democracy today. The second implication, which follows from the first, is that I position myself in a somewhat odd relation to contemporary theorists of constituent power. They are both my main interlocutors, in that I criticise their interpretations of the history of the idea, and my object of analysis, in so far as they too are part of the history of constituent power I am interested in reconstructing.

In his comments, Patberg expresses concerns about the implications of precisely this way of engaging with contemporary theories of constituent power. He argues that my approach leads to a sort of relativism because I take all existing interpretations of the idea of constituent power to be equally valid. I think Patberg picks up on a very important argument, one which I am willing to defend but which lends itself to some ambiguity, so I am grateful to have the chance to clarify it. When I discuss contemporary accounts of constituent power, I take issue with those theories that defend the superiority of a version of the idea on the ground of it being a better description of the 'reality' of constituent power, and look for this 'reality' in the history of political thought. I find this empiricist approach problematic because constituent power is a concept that has no immediate correspondence to a 'reality' out there in the world. There is no independently existing object 'constituent power', which the concept describes. It thus follows that there cannot be a straightforwardly true or false description of constituent power, but there only are competing accounts of what constituent power is. And, at a conceptual level, all these accounts are

equally valid, because there is no external reference point, no 'reality' of constituent power, that could prove any of them false. It is not because a given interpretation of constituent power does not fit with the definition I have in mind, that it is disqualified from being valid qua theory of constituent power. Hence, my claim is that, at a conceptual level, all self-described theories of constituent power should be engaged as such and should be taken seriously for what they purport to be. In other words, they are all equally valid because constituent power is, like many other political ideas, an 'essentially contested concept', as Walter Bryce Gallie would have it. And it is only by seeing all theories as equally valid that I can bring back to life the processes through which the meaning and implications of the idea of constituent power have taken the shape they have today.

Yet, at this point, I would like to introduce a distinction. Although I maintain that all theories of constituent power should be considered equally valid from a conceptual point of view, I do not believe that they ought to be seen as equally valid from a political perspective. Political theories offer visions of how politics should be organised and we are drawn to endorse a theory instead of another on the basis of the normative purchase they have on our political reality. These different normative preferences correspond to different judgements about the political validity of any given theory. Hence, these theories cannot all be equally valid politically. Saying the contrary would amount to denying the very possibility of normative theorising, which is far from what I intend to do. I am happy to recognise that different theories have differently valid purchases on our political reality, but I am not interested in theorising this difference in the book. Yet, arguing that all theories are valid conceptually but not politically is not enough to answer Patberg's critique. He is not satisfied with the possibility of distinguishing between theories on the basis of their political validity, but believes that a theory can be proved normatively superior to others by reference to an absolute standard, as he exemplifies in his discussion of Vedel's theory of constituent power. This is a position I do not wish to criticise. However, I do not share it. Differently from Patberg, I do not believe that there is an absolute standard, that remains constant across time and social contexts, which we can use to assign superior political validity to a theory of constituent power over another. By contrast, I believe that any normative argument is, at its core, a political judgment and that, as such, it is contingent on the context in which we find ourselves. This, it should be noted, does not amount to pure power struggle, but refers instead to a series of complex interactions between political, social and economic circumstances that shape our way of seeing politics and the political world around us. And it is precisely because I believe in the contextual validity of theories of constituent power that I have chosen not to think about its history normatively, but contextually.

In his comments, Patberg points out how this approach might result in a form of relativism. I value Patberg's concern, but I believe that there is a difference between claiming that all political values are equally good and that they are contextually situated. The first is, effectively, a form of relativism, which amounts to saying that all theories of constituent power are equally valid from a political perspective. This, as outlined above, is not what I believe. The second option is, instead, more consistent with my approach in that it recognises different values to different theories, but sees this judgment as historically situated and hence admits that its validity is limited to

the context in which it operates. It is thus not relativism, but a form of scepticism that lies behind my work. This, like all philosophical outlooks, carries some risks, one of which is its proximity with relativism, but it also has merits. While not denying the relevance of normative theorising, it offers a different lens through which to look at the question of constituent power. One that makes of its capacity to describe and explain the political possibilities opened up by the idea of constituent power its primary objective. It is an approach that assigns great importance to assessing how constituent power has been used in history, what political projects it has served and how these historical uses of the idea inform our thinking today. In prizing these interpretative questions over normative evaluations, it takes for its object all theories of constituent power in so far as they had an impact on our world qua theories of constituent power; and it allows to situate contemporary theorists within this long history, one in which their theorisations are made sense of as part and parcel of how constituent power has been conceived of in the past two centuries. Some might see in this approach a dangerous lack of judgment, but it is precisely thanks to this absence that it becomes possible to bring back to life the complexity, the diversity and the messiness of our political world, and I believe that there is an intrinsic intellectual value in being able and willing to do that.

A history of constituent power, as any history of an idea, requires developing criteria to identify which bits of discourse qualify as part of the idea. In this book, I have made a specific and, perhaps, unusual choice: I have decided to take into account only theories that explicitly use the language of constituent power. This, as Neuhann points out, means looking at the expressions 'constituent power' and their equivalent in other languages, notably 'pouvoir constituant', 'potere costituente' and 'verfassungsgebende Gewalt', which I take to be synonyms. Focussing on the use of these expressions helped me to avoid the risk of writing a genealogy, in that I did not start by assigning, *ex ante*, a meaning for constituent power and retracing its presence in history. This would have resulted in a linear story of just one meaning of the idea, which is not what I wanted to do. On the contrary, I wanted to explore the diversity and variety of meanings that have been assigned to constituent power. At this point, however, it is important to emphasise that my attention to the language of constituent power is just the methodological premise of the book, and not its argument. In other words, I do not argue that constituent power is nothing but a language, whose uses have nothing in common with each other, as Neuhann seems to suggest. Instead, the argument of the book is that the theories of constituent power I have studied, as different as they are, have all at least three things in common. First, they are ways of making sense of the principle according to which power belongs to the people, which means that they are all attempts to define who the people are, in any given context, and what their power amounts to. Of course, each of the theories I discuss in the book offers a different answer to these questions, and hence a different interpretation of the principle of popular power. However, and this is the second common element, they all theorised constituent power as different from contemporary ideas of sovereignty, a point on which Niesen has raised an interesting question to which I will return shortly. The last element these theories have in common is that, starting from after the French

revolution, they all refer back to Sieyès' initial theorisation of constituent power. This means that, although very different from each other, they share references to Sieyès and to the history of the revolution. So, although I do not start assuming any element of consistency between these theories, a part from their use of the language of constituent power, I arrive at the conclusion that, beyond their differences, there are some substantive elements of convergence. This, however, is a conclusion that I have arrived at inductively from the study of how the language of constituent power has been used.

I would now like to go back to Niesen's concern about my treatment of constituent power as distinct from sovereignty. As mentioned above, one of the arguments of the book is that all the theorists I look at imagined constituent power as conceptually distinct from sovereignty, whether it was national, parliamentary or popular. Niesen's worry is that, by doing so, I end up collapsing the idea of popular sovereignty, which according to Niesen indicates the law-making power of the citizens, into the Jacobin version of the idea or into the broader category of sovereignty, which he finds normatively problematic. To this concern, I can offer three answers. The first is that, whenever I discuss understandings of national or popular sovereignty in the book, I do not do so using my authorial voice, but I reconstruct what any given theorist of constituent power understood by sovereignty. So, for example, when I claim that Sieyès introduced constituent power as an alternative to the idea of popular sovereignty as direct rule by the people, I do not argue that this is the correct meaning of the concept 'popular sovereignty'. Instead, I engage with it only insofar as it is precisely that, however normatively undesirable, understanding of sovereignty that motivated Sieyès' thinking about constituent power. This is because I do not believe I should engage in distinguishing between normatively desirable and undesirable understandings of sovereignty in this context. Sovereignty, in all its various iterations, plays a secondary role in the book, which is limited to explaining what motivated given thinkers to theorise constituent power in the way they did. If I started to argue with their renditions of sovereignty, for example with the fact that Arendt confused popular sovereignty with national sovereignty, I would stop doing historical work and thus fail to achieve the aim I had set for myself: explaining how given theories of constituent power had come about, and how they related to coeval accounts of sovereignty. Second, in the same way as I do not believe that there is a historically correct definition of constituent power, I am not willing to project my preferred account of popular sovereignty onto history. As much as I like Niesen's idea of coupling up constituent power and popular sovereignty as legitimate expressions of popular power and distinguishing them from national sovereignty, I do not think this can be done historically. History is messier than our normative desiderata. My last thought on Niesen's question is that theories of sovereignty are indeed very diverse, especially when they refer to popular or national sovereignty. However, I think that they all have something in common, which is precisely what distinguishes them from constituent power. The latter implies, in its very words, the idea of constituting something. It is thus in a direct conceptual relation with the idea of a constituted power. By contrast, sovereignty, in all its various iterations, has no necessary conceptual connection to the institutionalisation of power, regardless of whether it is attributed to the people, the nation or parliament. Although it can of course be used to legitimise the creation of legal and political institutions, the

concept itself indicates a power that is self-standing and does not bind it to a type of politics that is constituted. This is precisely what Sieyès and Arendt, to name just two thinkers, found troubling about sovereignty. And it is this type of reasoning I am interested in reconstructing in the book, so as to explain what motivated my protagonists to think about constituent power in the way they did.

Moving on to the story I tell in the book, I would like to start by addressing Niesen's questions about Sieyès. He points out an inconsistency between what Sieyès argues in *Qu'est-ce que le Tiers-État?* and my claim that Sieyès believed that the constituent power of the people could only be exercised during moments of constitution-making. This is an interesting issue. On the one hand, Niesen has put his finger on a true tension that exists in my account of Sieyès as much as in his own writings. Part of the problem here has to do with the type of sources available. Sieyès' most known text is *Qu'est-ce que le Tiers-État?*, a revolutionary pamphlet published just a few months before the Estates General were summoned which contains the inflammatory statements mentioned by Niesen in his comments. Yet this is of course not the only and perhaps not even the most important of Sieyès' texts. There is a myriad of other works, mostly constitutional drafts, speeches, comments on constitutional matters and Sieyès' own notebooks. These, I contend, are much more representative of his own thinking, as they cover a large part of Sieyès' life. They also return a rather different image of the author from the one we get by reading *Qu'est-ce que le Tiers-État?*, one in which Sieyès is not concerned with revolutionary politics and the people's radical power to change the constitution. Instead, he is deeply interested in finding ways to stabilise the new constitutional system once and for all. And it is to this Sieyès that I have given space in my book. On the other hand, however, the idea according to which the people never alienate their constituent power and can always change the constitution is not necessarily inconsistent with his preference for constitutional stability and limiting popular involvement in politics. This is because Sieyès did prize stability within the constitutional order. Hence, he tried to limit the people's involvement in ordinary political as much as possible, but also believed that the people could always overthrow the existing constitution and create a new one. This, however, would only legitimately happen in extraordinary times, during revolutionary events. Rather than a change of mind, we are dealing with a change of tone and accent, which is posited not on the people's involvement in extra-ordinary politics, but on the stability of the constitutional system.

A thinker who did not dwell on interpretative questions about Sieyès' thought is Carl Schmitt. As I argue in the book, he willingly misinterpreted *Qu'est-ce que le Tiers-État?* to advance his own theory of constituent power as the sovereign's power to take the fundamental decision in the name of the people. In tracing the intellectual trajectory that connected Schmitt to the idea of constituent power and to Sieyès, I emphasise the importance of German thinkers such as Theodor Mommsen and Egon Zweig, as well as of some French jurists who, in the nineteenth and early twentieth century, systematised Sieyès' thinking on constituent power. Pérez Crespo commented precisely on this trajectory, which he finds lacking in engagement with the French public law tradition and, more specifically, with the work of constitutional theorists of the likes of Léon Duguit, Maurice Hauriou and Carré de Malberg. Indeed,

Pérez Crespo believes that Schmitt's theory of constituent power derives from his being situated at the intersection between this French tradition and German Staatslehre, more so than his engagement with Mommsen and Zweig. I think it is always difficult to pinpoint with any degree of precision how much a given thinker was influenced by a range of earlier, or even contemporary, authors. Bearing that in mind, I would respond to Pérez Crespo's point in two ways. The first would be to say that probably we do not have to choose between either of those options, in so far as they all, to some degree, influenced Carl Schmitt. Nonetheless, it is true that I do not explore the influence that the French constitutional theorists mentioned above had on Schmitt as much as it is needed, and more research should be done to reconstruct this intellectual encounter. Yet, and this is my second point, I decided to put the accent on Mommsen and Zweig more than anybody else because I think that they are key to explain Schmitt's engagement with Sieyès and his theory of constituent power. As Pérez Crespo writes in his comments, the French public law tradition saw in constituent power an organ of the state, an institutional feature of modern politics that finds its primary expression in the work of constituent assemblies. This approach to constituent power is quite different from the Sieyès of *Qu'est-ce que le Tiers-État?*. Equally, it is radically different from Schmitt's theory of constituent power, which refutes the reduction of constituent power to a state organ and prizes instead its pre-statist character, in that it is a power that acts beyond the legal structure of the state. It thus seems to me that, although the idea of constituent power was very much part of both German Staatslehre and French public law in the first two decades of the twentieth century, it is from Sieyès that Schmitt got the elements required to conceive of it as the power to take fundamental political decisions in exceptional times. As I explain in the book, much of what Schmitt takes from Sieyès is the result of his systematic misinterpretation of the political thought of the French revolution and his limited engagement with Sieyès' writings beyond the 1789 pamphlet. Yet it is Sieyès' theory of constituent power that gave Schmitt the conceptual tools to develop his own account of the idea. And this engagement with Sieyès' revolutionary ideas could only come from Zweig's study of the history of constituent power, which discusses Sieyès at length and in a way that is not consistent with French public law's limited interest in Sieyès. Similarly, Mommsen made evident to Schmitt the historical and conceptual connection between dictatorship and constituent power, which then became a centrepiece of his theorising about modern democratic politics. This too could not be gauged by reference to the French public law tradition, but comes from the study of Roman law. In other words, Pérez Crespo is right to say that the connection between German Staatslehre and French public law is very important, and that its influence on Schmitt's constitutional theory should be explored in much more detail. However, I think that this connection was more influential for Schmitt in relation to his broader thinking about constitutional law than to his theory of constituent power. The latter, it seems to me, primarily comes from Schmitt's engagement with Sieyès, as filtered through the works of Zweig and as made urgent by Mommsen's study of constituent power in Roman law.

Schmitt's interpretation of Sieyès is key to understanding subsequent moments in the history of constituent power. Not only, as Patberg points out, legal scholars Costantino Mortati, Georges Vedel and Ernst-Wolfgang Böckenförde took

inspiration from Schmitt's account of constituent power to make sense of post-war constitutionalism in Italy, France and Germany. Hannah Arendt too was deeply influenced by Schmitt's (mis)interpretation of the French revolution and of the role that Sieyès had played in it. One effect of such influence is that she misunderstands Sieyès as a theorist of sovereignty and not of constituent power. Therefore, she lists him as yet another philosopher, which in Arendt's view amounts to saying that Sieyès is only interested in thinking about politics in the abstract, relying on vague and dangerous ideas such as sovereignty. This is problematic for Arendt because it jeopardises the very possibility of politics, which she understands as a deeply practical activity. And it is precisely because of this distinction between politics and philosophy that, in the book, I give space to Arendt's argument according to which constituent power is not a philosophical concept but a political practice. Neuhann raises questions about this move which, she argues, seems to contradict my initial statement according to which the first half of the book deals with political history, while the second with political philosophy. I do not see any contradiction but, to explain why, I need to clarify the terms of my engagement with Arendt's work. Following Neuhann's reasoning, I will say the following: what I am interested in discussing in the book, with my own authorial voice, is how Arendt interpreted the history of constituent power, the elements of novelty she introduced, the misleading interpretations of Sieyès she subscribed to and the contextual relevance of all the above. This means treating her in exactly the same way as I treated Sieyès, Vedel or Schmitt: by taking her ideas and her motives seriously for what she believed them to be. This means exploring the fact that she refused to see herself as a philosopher and that she believed her account of constituent power not to be a political philosophy. However, the fact that I give space to her own beliefs about what she was doing does not mean that I am blind to the fact that her critique of political philosophy ("ii" in Neuhann's classification) is itself a political philosophy ("i"), which relies on particular historical moments, such as Roman history ("iv"), to make sense of the political circumstances in which she was living ("iii") via the language of constituent power. And my authorial voice is no different in my treatment of Arendt from that of Sieyès: in both chapters, I am interested in reconstructing why they thought about constituent power in the way they did. In the case of Sieyès, that requires paying attention to the dynamics of revolutionary politics and using archival sources such as debate transcripts and speeches. In the case of Arendt, the focus is more straightforwardly on her own writings which, notwithstanding her disapproval, could be classified as political philosophy. I thus see no contradiction in either my treatment of Sieyès and Arendt, or in my statement according to which the second half of the book deals with sources that are not primarily political, as constituent debates are, but philosophical.

I wish to thank Carlos Pérez Crespo, Esther Neuhann, Markus Patberg and Peter Niesen one more time. Their comments and questions have certainly made my engagement with my own book more thoughtful and have given me an opportunity to better clarify its methods and arguments.

