We the Limited People

Yaniv Roznai*

“I want to plead here against any weakening of our constitutional limitations of power, even the power of the people themselves; in the interest of individuals or minorities among the people. For the people have now succeeded to the power of the benevolent despots of the eighteenth century, and in the exercise of it they are often swayed by special interests or crafty demagogues as their predecessors were by favourites. I frankly want to rely on the earlier, the sounder, yes the medieval principle, that there are some individual rights that even a people's government can never touch”

C. H. Mcllwain, CONSTITUTIONALISM AND THE CHANGING WORLD 263 (1939)

INTRODUCTION

Constituent Power, as a branch of constitutional law, involves legal theory at its highest level. Claude Klein proposes that this is why “jurists throughout history have always been fascinated by the constituent power and its theory”.1 However, whereas constituent power remained a subject frequently dealt with within European continental and Latin American scholarship, in Anglo-American legal debates it somehow sank into slumber; in the UK obviously due to the absence of a written constitution and in the U.S. debates probably owing to the stability of the 1787 Constitution and the prevailing approach of American constitutionalism, which assumes that after the establishment of the Constitution, Art. V, through which “the people” may amend the Constitution, contains the constituent power, and therefore the latter “plays no direct role in American constitutionalism.”2

Nevertheless, constituent power has (and should have) an immense prominence to modern constitutionalism.3 We live in an age of constitution-making. The Arab spring with its significant social and political changes across North-Africa and the Middle East, is just one example. One recent study estimated that in any given year, about 4 or 5 constitutions are replaced.4 Consequently, there is a renewed interest in the issue of constitution-making,5 and a revival of attention to the concept of constituent power.6

Constitution-making is a process driven by a constitution-making power – a constituent power.7 In the modern era, a nation’s constitution is regarded as receiving its normative status from the political will of “the people” to act as a constitutional authority.8 The locus of ultimate source of legitimacy is thus bottom-up, originating in “the people”.9 Nonetheless, such vague phrase conceals many complexities, such as who...
are the people? How do we recognise them? Through which mechanisms can the people speak in one voice? There are of course different modalities for the exercise of constituent power, and experience in different countries indicates a wide variety of options as to the arenas for constitution-making, such as expert commissions, parliamentary enactment, executive diplomacy, constituent assemblies, popular initiatives and referenda. This article does not focus on constitution-making process, important as this issue may be; rather it focuses on a theoretical question with practical implications: are “the people”, in their constituent capacity, substantively limited in any way? This question has concrete consequences since if constituent power is conceived as limited then certain actions may be considered as ultra vires and hence, a constitution might (at least as a matter of theory) be deemed as “unconstitutional”.

The article’s theoretical approach would be a methodological dualism. It would be both explanatory, aimed at describing the legal behavior of the constitution-making power and normative, aiming to propose a prospective theory. This research attempts to construct a general theory of the scope of constituent power which would bond together different concepts such as sovereignty, constitutionalism, rights, and democracy in a coherent form. True, one may be inclined to share Joseph Raz’s skepticism about the potential of grand constitutional theories. Perhaps, as he says, there really is “no room for a truly universal theory of the subject”. However, this article confronts the research question from a more general perspective. Due to the foremost theoretical nature of this article, its enquiries transcend any specific boundaries insofar as it presents phenomena common to all contemporary constitutional transformations.

A. CONSTITUTION-MAKING MOMENTS – A “WILD-WEST”?

In order to properly address the scope of constitution-making power one ought to return to the theoretical roots of constituent power. The concept of constituent power is relatively modern; emerging in the French and North-America’s revolutionary thinking. In his famous political pamphlet Qu’est-ce que le Tiers état?, Abbé Emmanuel Joseph Sieyès writes that “in each of its parts a constitution is not the work of a constituted power but a constituent power”. Sieyès thus distinguished between constituted power and constituent power. The latter is the extraordinary power to form a constitution, the immediate expression of the nation. It is independent of any constitutional forms and restrictions. In contrast, the former is the power created by the constitution, an ordinary, limited
power, that functions according to the forms and mode the nation grants it in positive law.\textsuperscript{19} Thus, according to this traditional approach, \textit{constituent power} and \textit{constituted powers} exist on different planes: \textit{constituent power} is external to the existing constitutional order while \textit{constituted power} is inseparable from a pre-established constitutional order.\textsuperscript{20} Hence, contrary to \textit{constituted powers}, \textit{constituent power} is free and independent from any formal bonds of positive law: “The nation”, Sieyès wrote, “exists prior to everything; it is the origin of everything. Its will is always legal. It is the law itself”.\textsuperscript{21} The constitution, as a positive law, emanates “solely from the nation’s will”.\textsuperscript{22} For Sieyès, the \textit{constituent power} was unlimited for “it would be ridiculous to suppose that the nation itself could be constricted by the procedures or the constitution to which it had subjected its mandatories”.\textsuperscript{23} The nation is free from constitutional limits. “Not only is the nation not subject to a constitution”, Sieyès insists, “it cannot be and should not be…”.\textsuperscript{24} The sovereign people, according to his idea of \textit{constituent power}, are exterior to their institutions.\textsuperscript{25} Thus, the nation remains above its constitution, and the constitution does not limit the nation, rather only \textit{constituted powers}, created by the constitution.\textsuperscript{26}

What is “the nation”? For Sieyès, it is “a body of associates living under a common law, represented by the same legislature, etc.”\textsuperscript{27} This could mean that the \textit{political will} of the people to be linked to each other (politically and legally) is what creates a national bond.\textsuperscript{28} It is “the people”, rather than a divine Monarch, who is the subject and the holder of the \textit{constituent power}.\textsuperscript{29} How may the nation exercise its \textit{constituent power}? According to Joseph de Maistre, “the people are the sovereign which cannot exercise their sovereignty…”.\textsuperscript{30} However, if the people are said to “exercise their sovereignty by means of their representatives”, this, de Maistre believed, “begins to make sense”.\textsuperscript{31} Indeed, according to Sieyès, since “members of the association will have become too numerous and occupy too widely dispersed to be easily able to exercise their common will themselves” there is a need for representation.\textsuperscript{32} Sieyès’ conception of \textit{constituent power} is thus attached to representation.\textsuperscript{33} This representation is \textit{extraordinary} since it is free from any prior constitutional restrictions or procedures, and should not be confused with the “ordinary representatives of a people”, who possess only limited powers, confined to those granted to them by the positive constitution. These representatives serve as “a surrogate for the Nation in its independence from all constitutional forms”.\textsuperscript{34} As Egon Zwein attempted to demonstrate, by his theory of \textit{constituent power}, which could be filtered through complex representation, Sieyès applied Montesquieu’s concept of separation of powers to Rousseau’s notion of sovereignty.\textsuperscript{35}
Carl Schmitt developed the doctrine of *constituent power* in his 1928 book *Verfassungslehre*. Like Sieyès, Schmitt declared that “the constitution does not establish itself”. It “is valid because it derives from a constitution-making capacity... and is established by the will of this constitution-making power”. This constitution-making power (*verfassungsgebende Gewalt*) “is the political will, whose power or authority is capable of making the concrete, comprehensive decision over the type and form of its own political existence”. For Schmitt, the constitution is created through the act of political will and is composed of fundamental political decisions regarding the form of government, the state’s structure, and society’s highest principles and symbolic values.

Schmitt accepted Sieyès’ distinction between *constituent* and *constituted* power, and conceived *constituent power* to be unlimited and unrestricted by positive constitutional forms or rules. By conceiving *constituent power* as external to (and above) the constitution, and as never exhausted within the positive juridical constitution, Schmitt’s rejects “juridical normativism”. *Constituent power* was understood by Schmitt as an “unmediated will”, which cannot be regulated or restricted by legal procedures or process. Any attempt to formalize it would be “akin to transforming fire into water”.

Antonio Negri explained that any legal approach to *constituent power* fails since *constituent power* “comes from a void and constitutes everything”, thus capable of disrupting constituted boundaries. For Negri, this disregard for pre-existing legality is not necessarily problematic; it instead can be regarded as establishing the “political bottom” for a new democratic constitution.

The conception of *constituent power* as unlimited by nature, was acknowledged by legal and political theorists from different jurisdictions and diverse intellectual traditions. Substantivists like Olivier Beaud regard *constituent power* as sovereign. And for the French positivists, such as Raymond Carré de Malberg, Georges Burdeau, Roger Bonnard Guy Héraud, and Georges Vedel, *constituent power*, which exists outside of any constitutional authority, is exercised in revolutionary circumstances, outside the laws (forms, procedures, and limits) established by the constitution. It is not a legal power, but a pure fact. For Paolo Carrozza, *constituent power* is exercised in a legal vacuum, whether in the establishment of the first constitution of a new state or in the repeal of the existing constitutional order, for instance in circumstances of regime change. Likewise, for the political scientist Carl Friedrich, *constituent power* is not a *de jure* power but a *de facto* power. It is not based on a prior legal norm; hence, it is unlimited, independent, and unconditional. Hans Kelsen does not even tackle the question of the *constituent power*, but
rather claims that the question of the basic norm or obedience to the historically first constitution is assumed or presupposed as a hypothesis in juristic thinking.\textsuperscript{51}

As Markku Suksi summarizes, the \textit{constituent power} is “extra-constitutional, pre-constitutional, latent and inalienable authority of the people to adopt a constitution for itself in a situation where the people’s power of enacting constitutional provisions or revising the current constitution completely or drafting a constitution in a constitutional vacuum is not subjected to any restrictions of a previous or a current constitution.”\textsuperscript{52} To conclude this prevailing approach, \textit{constituent power} is the absolute power to establish a new legal order (\textit{ordre juridique nouveau}).\textsuperscript{53}

Some thinkers regard the conception of a formless and limitless power of “the people” to break any constitutional bounds at any time as a dangerous idea, open to abuse.\textsuperscript{54} Hannah Arendt wrote about:

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\text{[T]he extraordinary ease with which the national will could be manipulated and imposed upon whenever someone was willing to take the burden or the glory of dictatorship upon himself. Napoleon Bonaparte was only the first in a long series of national statesmen who, to the applause of a whole nation, could declare: “I am the pouvoir constituant”}.\textsuperscript{55}
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Indeed, history teaches us that dictators seized governmental power, through revolutionary acts or coups, claiming to be the bearers of the \textit{constituent power}.\textsuperscript{56} William Parlett recently demonstrated how charismatic leaders have relied upon appeals to the \textit{constituent power} in order to exploit popular sentiment and to reshape the state’s institutional framework to constitutional dictatorship.\textsuperscript{57} Parlett contends that such an abuse of the \textit{constituent power} should remind us of the necessary fundamental requirement for constitution-making: ensuring the deep democratic deliberation and compromise needed for a successful constitutional order.\textsuperscript{58}

The classical view as expressed thus far, is that \textit{constituent power} cannot, conceptually and logically, be constrained by existing rules, institutions and procedures. It cannot be brought “within the four corners of the constitution.”\textsuperscript{59} We therefore face with a dilemma. One the one hand, in a democracy, a new constitution is seen as the product of the people’s \textit{constituent power}, a force which has always been closely linked to Locke’s “right to revolution,”\textsuperscript{60} and which does not find limits in the existing constitution.\textsuperscript{61} On the other hand, not only is \textit{constituent power} open to abuse but also that it allegedly gives a \textit{carte blanche} for the establishment of non-democratic and authoritarian regimes. As Claude Klein explains, while the transition from fascist regimes to democracy is always welcome, by accepting said transition we must acknowledge the power of a transition in
the other direction. The recognition of the ability of constituent power to overthrow regimes must work in both directions. As Ben Nwabueze puts it, “it would be expected that a democratic constitution would establish a constitutional government, indeed a constitutional democracy, and ideally, that should be the case, but this cannot be insisted upon as a condition of a democratic constitution. A people should be at liberty to choose...any form of government ... it considers suitable for itself. ... there is no inherent limitation on their power of choice.” So, until recently, constitution-making moments were considered in constitutional theory as a kind of “wild-west”, in the words of David Landau, free from any substantive limitations. In the next section I argue that this understanding of constituent power is a misconception of the traditional constitution-making power as understood even by early writers.

B. REVISITING CONSTITUENT POWER

Constituent power as the power of the people to establish their constitutional order is considered as some kind of a natural right. As The 1776 American Declaration of Independence states “Whenever any Form of Government becomes destructive of [its] ends, it is the right of the People to alter or abolish it, and to institute new Government.” As was elaborated in Marbury v. Madison, the people have an “original right” to establish their government and fundamental principles according to which they wish to be governed. It is the people’s “original and supreme will” that organises the government. Nevertheless, isn’t people’s constituent power simply the total of natural sovereignty inherent in each individual with respect to himself? This begs the question why to prioritize this natural right over other natural rights supposedly belonging to individuals? In this section, I claim that the traditional conception according to which constituent power is unlimited is simply a misunderstanding of its nature, and that even the early revolutionary approach to constituent power regarded it as a limited power.

We return again to Abbe Sieyès, and to his often-cited phrase which is used to describe the unlimited nature of the constituent power: “The nation exists prior to everything; it is the origin of everything. It’s will is always legal. It is the law itself.” However, more important are the final words of this sentence which are often omitted: “Prior to the nation and above the nation, there is only natural law.” This implies that Sieyès viewed constituent power as limited by certain principles derived from his natural law conceptions. If one takes Sieyès’ understanding of the nation as “the mass of associated
men…all equal in rights”, it may well be that constituent power is bound to respect certain rights that belong to all peoples. In other words, constituent power was preceded by and subordinated to natural rights of man – which the political association serves to protect.

It is not difficult to understand this conception which finds its roots in the medieval understanding of natural law as a certain “divine will of god” with immutable characteristics. Natural law is based on the premise that there is a perpetual higher law which is superior even to the sovereign. This is compatible with how early political writers conceived natural law. Indeed, many great eighteenth and nineteenth century European thinkers such as Pufendorf, Vattel, Burlamaqui, and Rutherford believed that governmental power was limited by natural law. Even in Jean Bodin’s theory of sovereignty, the power of the “sovereign prince” was not unlimited, but was restricted by natural law: “for if we say that to have absolute power is not to be subject to any law at all, no prince of this world will be sovereign, since every earthly prince is subject to the laws of God and of nature and to various human laws that are common to all peoples.” If natural law is supreme, then it cannot be violated, not even by the constitution.

Then again, even within modern ideas of natural law, which rests upon the relationship between law and morals, law is a means to achieve certain absolute moral values, which can be discovered by reason. From natural law derives the theory of natural rights. Invoking “natural law” or “natural rights”, some scholars hold the view that certain rights have a supra-constitutional status in that they cannot be altered even by constitutional means, such as constitution-making. The constitution must be subject to the higher standard of natural law. As Roscoe Pound explained, “there are rights in every free government beyond the reach of the state, apparently beyond the reach even of a constitution.” In France, the question of the existence of any supra-constitutional limits on the constituent power has received rather wide attention. Authors such as Maurice Hauriou and Léon Duguit defend the view that the Declaration of the Rights of Man and the Citizen of 1789 has a supra-constitutional status, as it simply recognizes and proclaims pre-existing rights. They argue that the Declaration of Rights imposes limits on the state that rank higher than constitutional legislation and a fortiori ordinary legislation.

Drawing on the writings of Hauriou, even Schmitt had argued, during the Weimar period, that certain basic freedoms “have, as an outstanding French theorist of public law, Maurice Hauriou has explained, a ‘superlegalite constitutionelle’, which is raised not only above the usual simple laws, but also over the written constitutional laws…” Paradoxically, this notion was revived after the Second World War as German
jurisprudence in the post-Nazi regime era was characterised by the rejection of pure positivism and the endorsement of natural law ideas and supra-constitutional principles which are superior to positive law. This notion was accepted in German Courts at that time. In 1950, the Bavarian Constitutional Court famously declared: “There are fundamental constitutional principles, which are of so elementary a nature and so much the expression of a law that precedes the constitution, that the maker of the constitution himself is bound by them. Other constitutional norms … can be void because they conflict with them.” The Federal Constitutional Court later cited and re-affirmed this paragraph in the 1951 Southwest case. In his book Unconstitutional Constitutional Norms?, published in 1951, Otto Bachof summerized the idea of supra-constitutional limits on the constituent power. According to Bachof, the constitution-maker has leeway to establish an autonomous system of values but only within the borderline of a higher natural law which exists “above” positive law. Therefore, a constitution is valid only with regard to those sections within the positivist legal order that do not exceed the predetermined borders of higher law.

Since by definition, natural law is considered as external and superior to all positive law, a theory that recognizes natural law as a form of a superior higher law must lead to the conclusion that the constituent power is limited. I merely want to claim here that the reading of the traditional conception of constituent power as extra-legal, does not have to draw the conclusion that it was conceived as an unlimited power. Nevertheless, natural law theories seem inappropriate to serve as limitations on constitution-making powers. Even if one accepts the presupposition that binding, objective moral principles exist in every society, the yardstick for determining the legal validity of constitutional norms appears problematic as the definition of “moral” is extremely vague. Subjecting the legal validity of constitutional norms to moral thresholds would not only undermine certainty in law but would necessitate an a priori resolution of contentious moral questions. Indeed, even in Germany, where the superiority of “natural law” over constitutional norms was seriously debated in courts, it was, to use the words of Ivo Duchacek, the “supraconstitutional invocations” – i.e. the constitutional referral to certain “eternal” principles in the Basic Law as basis for recognizing such higher norms. I have elaborated on the circularity of such arguments elsewhere. Moreover, in later years the Federal Constitutional Court declined to refer to supra-positive principles, concentrating on the constitution’s eternity clause as stipulated in
Article 79(3). This raises the question of whether constitutional principles such as eternity clauses pose limitations on constitution-making powers.

C. CONSTITUTIONAL PRINCIPLES AND CONSTITUENT POWER

1. Eternity Clauses

Written against the background of the Weimar Constitution’s experience, Art. 79(3) of the German Basic Law (1949) prohibits constitutional amendments affecting the division of the Federation into Länder, human dignity, the constitutional order, or basic institutional principles describing Germany as a democratic and social federal state. This provision is often described as eternal (ewigkeitsgarantie) meaning that its values should be perpetual and everlasting. The German Basic Law has also attempted to constitutionalize the constituent power. The final article of the Basic Law reads: “This Basic Law will lose its validity on the effective date of a constitution that has been chosen by the German people in a free decision” (Art.146). This provision not only anticipated the Basic Law’s own destruction, but also reflects the legal positivization of the constituent power. Although it is possible to claim that the lack of stipulation as for the conditions or procedures for the exercise of constituent power seems as a confirmation of its extra-legal character. Now, is the emergence of a new primary constituent power, as acknowledged by Art. 146, restricted by the principles enshrined by Art. 79(3)?

Some authors have opined that the unamendable principles also apply in such circumstances and thus would guide any future constitution-making. Others remark in contrast that Art. 146 is a legal manner with which to overcome the eternity clause, while another group claims that this question ought to be resolved by the Constitutional Court. Indeed, in the Lisbon Case, the Constitutional Court expressly left open the question of whether the German people’s constituent power might be restricted by the Art. 79(3). I agree with Jo Murkens that Art. 79(3) addresses only the amendment power and dealing with Parliament’s changes to the Basic Law, whereas Art. 146 foresees a new constitution adopted by the constituent power, which by its nature cannot be bound by the rules of the prior constitution. The new constitution-drafters may take Art. 79(3) into account, but that would depend on their own “goodwill”, rather than on the nature of the eternity clause as a legal obligation. Consequently, even though the constituent power is constitutionalized within the German Basic Law, Art. 79(3) is unable to bind later generations when exercising their constituent power. That is because, as I have argued
elsewhere, unamendability is not an absolute entrenchment. Unamendability limits the amendment power, but it cannot block the constituent power from its ability to change even the basic principles of the constitutional order.\textsuperscript{106} This approach was advanced, for instance, by the Brazilian Federal Supreme Court, which held that in order to preserve the identity and continuity of the constitutional text as a whole, the framers created “immutable provisions” that impose limits on the derived constituent power, but these provisions do not subordinate the original constituent power itself.\textsuperscript{107}

Constitutions, as Richard Parker writes, are embedded within the idea of populism – the liberty of people to shape and reshape their society.\textsuperscript{108} Constituent power is not exhausted after the constitution’s establishment and the people always possess the power to establish and change their constitutional order. As Carl Friedrich notes, “no matter how elaborate the provisions for an amending power may be, they must never … be assumed to have superseded the constituent power”.\textsuperscript{109} Take the extreme example of a constitution that does not prescribe an amendment process or even explicitly states that it is completely unamendable. Would that mean that future generations are bound to live by an unamendable constitution? Surely the people possess the power (a right, as noted earlier) to constitute a new constitution?\textsuperscript{110} As James Wilson declares, “as our constitutions are superior to our legislatures; so the people are superior to our constitutions. … the people may change the constitutions, whenever, and however they please. This right, of which no positive institution can ever deprive them…”\textsuperscript{111} In other words, the constitution establishes democracy and not necrocracy.\textsuperscript{112}

To conclude, the constituent power is neither exhausted nor bound by the existing constitutional limitations – including eternity clauses. Constituent power remains in the constitutional background and can re-emerge to take its role. It is the “sovereignty at the back of the Constitution”, which can change even the constitution’s basic structure and eternity clauses.\textsuperscript{113} Recall, the U.S. Constitution itself was adopted in violation of the Articles of the Confederation, which were virtually unamendable since they required agreement in Congress and confirmation by the legislatures of every state in the Union.\textsuperscript{114} Thus, the constitution cannot restrict the constituent power, which resides outside of it and can “exercise its authority de novo.”\textsuperscript{115}
2. Pre-agreed upon Constitutional Principles

At times, constitution-making process is guided by a pre-determined, pre-agreed upon, or pre-imposed principles. An example of the latter might be the terse instructions of the military governors in Germany to the *Parlamentarischer Rat* in 1948, which provided parameters that facilitated the prompt creation of a clear Basic Law.116

The use of prescribing binding principles to constitution-makers took place in the international involvement in Namibia. In 1977, the “Western Contact Group” (U.S., Canada, France, UK and Germany) initiated diplomatic effort to solve the problem of South West Africa. In 1982, in consultation with all interested parties, they have produced a set of “principles for a constitution for an independent Namibia” to guide the constitution-making process. The principles included: supremacy of a rigid and justiciable constitution; separation of powers; regular multi-party democratic elections; bill of rights; prohibition on retroactive legislation; balanced public and security services, fair personnel policies and elected councils for regional or local administrations. The principles obtained international legitimacy through their acceptance by the UN Security Council. The established constituent assembly abided by these principles in its work.117

The idea of fundamental principles as limiting constitution-making received an interesting treatment during the establishment of the new post-apartheid South-African constitution. The interim Constitution of 1994 stipulated that the constitution-making process would take place within a framework of thirty-four agreed-upon principles.118 These principles ensured that political parties publicly pledge themselves to a definite vision, clarifying the direction of the constitution-making process.119 The Constitutional Court of South Africa was empowered to review the compliance of the draft Constitution with those principles. In its review (the famous Certification case), the Court declared that the Constitution, although establishing democratic institutions and protecting human rights, failed to comply with certain agreed-upon principles, and was therefore unconstitutional.120 Only after a revision the draft Constitution did the Constitutional Court declare that it complied with the principles.121

Therefore, it appears that there is a possibility of imposing limitations on constitution-making powers through pre-determined principles. Yet, it is fair to say that *constituent power* voluntarily accepted upon itself these limitations rather than being obliged by them. In the next section, I argue the modern developments in international law,
modern understanding of constitutionalism and the nature of constituent power itself, impose limitations on the scope of exercise of constitution-making powers.

D. THE LIMITED SCOPE OF CONSTITUENT POWER

In this section I would like to argue that constituent power must be regarded as limited by evolving norms of international law, constitutionalism, and the nature of constituent power itself.

1. International and other Supra-national Law

Serge Arne defines supra-constitutionality as the superiority of certain rules or principles to the content of the constitution. In this sub-section, I argue that contemporary international and supra-national norms, what Louis Favoreu terms “external supra-constitutionality” influence our understanding of constituent power as a limited power.

It has been argued of late that constitutional powers are substantially limited by international law. Scholars as Jorge Tapia Valdés, Vincent Samar and Matthias Herdegen, suggest that international human rights law and jus cogens norms may set new limits to constitutional powers. Stephen J. Schnably points out that certain emerging international and supranational legal rules address matters such as constitutional transformations. And Didier Maus mentioned the international development of principles of “good constitutional governance.” Larry Backer summarizes this idea: “Supra-national constitutionalism posited limits on national constitution making grounded in an evolving set of foundational universal norms derived from the understandings of basic right and wrong developed by consensus among the community of nations … it was clear that no state could unilaterally opt out of the system, whatever its own views of the relationship between its internal constitutional system and that of the global legal order.”

In an earlier work, I have examined possible supra-constitutional limitations on the constitutional amendment power. I have argued that from the perspective of international law, it is clear that a state has to comply with its international obligations regardless of any conflicting domestic laws - be it ordinary legislation or a constitutional norm. Take, for example, international treaty law. At the heart of international law lies the Vienna Convention on the Law of Treaties 1969, which regulates inter-states treaties.
According to Article 27 of the VCLT: “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” Taking into account the principle of *pacta sunt servanda*, the reference to “internal law” must include the constitution. This interpretation is supported by the VCLT’s travaux préparatoires. Moreover, international judicial practice may support this claim. In 1875, in the case of the Montijo, an international arbitrator stated that “a treaty is superior to the Constitution, which latter must give way.”

In its 1932 Advisory Opinion regarding *Treatment of Polish Nationals in the Danzig Territory*, the Permanent Court of International Justice stated that according to generally accepted principles: “... a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.”

Similarly, in the supranational level, the European Court of Human Rights (EChTR) established in several cases its authority to review even constitutional provisions — not merely ordinary legislation — and to assess their compatibility with the European Convention on Human Rights (ECHR). In a recent case, the EChTR criticized Article 70(5) of the Hungarian Constitution for indiscriminately depriving the right to vote from persons placed under total or partial guardianship. In *Sejdie and Finci v. Bosnia and Herzegovina*, the EChTR held that a constitutional provision limiting the right to be elected in parliamentary and presidential elections to people belonging to Bosniaks, Croats, and Serbs (the “constituent peoples” of Bosnia and Herzegovina) is discriminatory, and the disqualification of Jewish and Roma origin candidates constitutes a breach of the ECHR. Therefore, as Dieter Grimm notes, the EU law may even “include an obligation to change the national constitution of member states.”

Another example is Security Council (SC) Resolution 554 of 1984, regarding the Constitution of South Africa of 1983 that entrenched apartheid. In that resolution, the SC declared that it “strongly rejects and declares as null and void the so-called ‘new constitution,’” due to its contradiction of the principles of the UN Charter, mainly racial equality. Ulrich Preuss considers this resolution an example of the changing roles of national constitutions: “No longer can we regard them as purely domestic instruments of government of a nation-bound population which exercises its right to national self-determination without concern of its regional or global surroundings.” Therefore, it is plausible to derive certain limitations on *constituent power* from international and supranational norms. And these limitations might increase the more constitution-making processes become an international process involving international and supranational
actors. Indeed, today, supranational law seems to serve as an autonomous limitation to constitutional powers. Nevertheless, as I remarked elsewhere, the main problem with such limitations is their enforceability. Recall, although the South African Constitution of 1983 was declared “null and void,” it remained in force for ten years, until it was replaced by the Interim Constitution in 1994.\(^{139}\)

2. Basic principles of constitutionalism

In the Eighteenth century, a significant political objective behind constitution-making was freedom. Constitutionalism as a movement was directed against monarchical absolutism, and its consequent oppressive restrictions upon individual freedoms.\(^{140}\) Likewise, as lessons of totalitarian dictatorships, post-WWII constitution-making put, once again freedom as its prime objective.\(^{141}\) Clearly, nowadays it is a common understanding that “principles of freedom should guide the liberated nations and republics in framing their constitutions”\(^{142}\).

In the past, the idea of constitutionalism seemed to introduce a *supra positivist* element of evaluation to constitutional theory by insisting that a law must not conflicts with historically received, imperative constitutional norms – a “spirit of the laws” to use Montesquieu, or *Volksgeist*, as juridically formulated by von Savigny as the accumulated weight of the national legal tradition.\(^{143}\) Nowadays, constitutionalism is anchored on certain principles such as the recognition of the people as the source of all governmental authority; the supremacy of the constitution; the constitution regulates and limits the power of government; adherence for the rule of law and respect for fundamental rights.\(^{144}\) And it appears, as François Venter claimed, that the growing universality of standards of constitutionalism represents a significant form of integration whereby a common language of constitutionalism is being developed. These principles of the modern constitutional states which are becoming globally standardized may have a powerful influence on the legitimacy of the constitution.\(^{145}\)

Vicki C. Jackson asserts that the goal of constitution-making is not to produce a written constitution, but to promote constitutionalism.\(^{146}\) Constitutions are a means, not goals themselves. Therefore, an emerging approach may well be that constitutionalism and constitutions are inseparably linked so that an exercise of *constituent power* which would undermine principles of constitutionalism would not automatically bind society.\(^{147}\) Remember Article 16 of the French Declaration of the Rights of Man of 1789 which
puts it bluntly: “A society in which the guarantee of rights is not assured nor the separation of powers provided for, has no constitution.” In other words, in order to be legitimately exercised, constituent power must ensure certain basic principles. This might seem as a limitation which is imposed upon constituent power from its very purpose.

Nevertheless, since under the banner of constitutionalism there are innumerable nuances of ideas – and each carries a myriad of different formal and substantive aspects and varied meaning, it is very difficult to develop a comprehensive treatise on precise meaning of constitutionalism: “the greatest crisis of constitutionalism is the absence of universal consensus on its nature and purpose.” This is a great challenge for any theory of limitations upon constitution-making powers.

3. Limitations inherent to the concept of Constituent Power

Finally, I argue that the very concept of constituent power may carry certain inherent limitations, by the fact that at the basis of the theory of constituent power is the collective voice of the people. Constituent power is the power of the people to create and recreate their constitutional world. The conception of a democratic constituent power means that it must be committed to popular sovereignty. It may exercise itself in forms such as special constitutional assemblies and constitutional referenda. In order for the constituent power to be direct, these forms must have a special character, i.e. separate from other public functions, thereby replacing revolution with peaceful means incorporating actual, deliberate, free choice by society’s members. Constituent power should be grasped as a means for realising a well-deliberated and thoughtful change. While it is true that “in the end, there can be no precise algorithm specifying the conditions for defining a people capable of exercising constituent authority”, an exercise of constituent power should be inclusive, participatory, and deliberative. After all, the word constituer, Andreas Kalyvas reminds us, marks the act of founding together, jointly.

An important aspect is the maintenance of freedoms such as freedom of speech, free and fair election, freedom from arbitrary arrest, and freedom of assembly and association, the absence of which “spell[s] the death for the legal concept that is constituent power”. As Kostas Chryssogonos explains:

A Constitution may be characterized as democratic, from the point of view of the holder of constituent power, when it has been elaborated and voted by a collective representative body (constituent assembly, national assembly, etc.), elected through universal, equal and secret suffrage by the people, occasionally with some form of direct participation of the latter…It should be emphasized
that a Constitution, which has been elaborated by the organs of an authoritarian regime and submitted directly to a referendum, is not a “democratic” one, in that sense, since in this way the people are deprived of the possibility to have an influential impact on its content.\textsuperscript{156}

This understanding refuses to reduce \textit{constituent power} to a mere acclamation – a “soccer-stadium democracy”, in the words of Holmes.\textsuperscript{157} It is “We the People”, not merely “Oui, the People”! Process matters. But what if through a deliberative, inclusive and direct exercise of \textit{constituent power} the people want to destroy the democratic order or its basic principles? Aren’t they free to do so?

Walter Murphy contends that there are certain limitations even “on the constitutive power of the people as whole”.\textsuperscript{158} Basing his argument on John Stuart Mill’s rejection of a person’s right to sell him to slavery, Murphy claims that even if the whole population agreed to destroy the democratic order and replace it with a new order that would deny them democracy’s basic values, this might be prohibited in order to protect themselves and future generations.\textsuperscript{159} Likewise, Sharon Weintal claims that democracy reflects a universal “definite virtue”, which deserves to be a truly eternal principle.\textsuperscript{160}

I argue that in order to be legitimately exercised, those rights which form the basis of \textit{constituent power} must be protected.\textsuperscript{161} The exercise of \textit{constituent power} cannot result in the abolition of rights such as freedom of expression and assembly, and political rights, which are necessary in order for \textit{constituent power} to reappear in the future.\textsuperscript{162} The exercise of \textit{constituent power} must maintain its “capacity to rethink and constitutional order as a whole”.\textsuperscript{163} A constitution-making process which results with the alienation of certain sections of the population cannot be a legitimate exercise of constituent power since it undermines the entire \textit{raison d’être}. The exercise of \textit{constituent power} must be consistent with the idea of “the people giving itself a constitution”.\textsuperscript{164}

E. CONCLUSION

The conception underlying sovereign power is that it is unlimited and subject to no law.\textsuperscript{165} As Mellwain writes, “speaking generally, the power of the people can have no limits. It is idle to speak of it as either de facto or de jure if this implies a difference.”\textsuperscript{166} Indeed, according to the traditional conception of \textit{constituent power}, it is “original, inherent and unlimited” power.\textsuperscript{167}

Long ago Benjamin Constant, who feared the danger posed to liberty by revolutionaries like Robespierre and his fellow Jacobins, cautioned us against the danger
of unlimited popular sovereignty. While embracing the principle of popular sovereignty, Constant claimed that neither the people as a whole nor their representatives possess total authority over the lives of individuals: “sovereignty of the people is not unlimited.”

Recently, David Dyzenhaus has argued that the question of constituent power exists outside of normative constitutional theory. He urges constitutional theorists to avoid the idea of constituent power, which has its basis outside of the legal order, and instead to focus on the question of the constitution’s authority as completely internal to the legal order, as founded on the intrinsic morality of law. However, as Martin Loughlin argues, “constitutional legality is not self-generating: the practice of legality rests on political conditions it cannot itself guarantee. … Consideration of the origins of constitutional ordering invariably brings the concept of constituent power into play”. Therefore, constituent power remains a central theme in constitutional theory. János Kis’s approach to this matter seems lucid. On the one hand, Kis acknowledges the risks carried with the concept of constituent power. However, at the same time, Kis rejects calls to abandon the doctrine of constituent power as based on “the people”, since there is no other satisfactory answer but “the power of the people” as the ultimate source of state power. Instead of being abandoned, constituent power should be reconceived: “it should be given an interpretation that, on the one hand, arrests the regress, and on the other, may not be mobilizes for the purpose of totalitarian politics.”

It is my aim in this research to maintain within the theoretical framework of constituent power but to re-work its nature and scope. I’ve made three main claims: first, traditionally, constituent power was conceived as unlimited; second, this conception is erroneous and although constituent power is above the constitution it was never considered absolute; third, nowadays, constituent power is inherently and substantively limited by norms of international law, principles of constitutionalism, and our understanding of the very nature of constituent power. Of course a related but different question to any internal or external constrains on constitution-making power is their enforcement. Even if such limitations exist, it is questionable how likely they are to work in practice.

~ End of Body of the Text ~


3 See Marco Goldoni and Christopher McCorkindale, Why we (still) need a revolution, 14 GERMAN L. J. (November, 2013). See also: JOEL COLÓN-RIOS, WEAK CONSTITUTIONALISM: DEMOCRATIC LEGITIMACY AND THE QUESTION OF CONSTITUENT POWER 111, 188 (2012) (“constituent power has been ignored by constitutional theory for too long and at a very high price”).


7 MARTIN LOUGHLIN, THE IDEA OF PUBLIC LAW 100 (2004).


10 See Tushnet, … at 1988-1989,See, for example, Hans Agné, Democratic Founding: We the People and the Others, 10(3) INT’L J. CONST. L. 836 (2012).


13 See e.g. CARL A. PALEVEDA, IS THE U.S. CONSTITUTION UNCONSTITUTIONAL? (1990).
Draft for discussion at NYU Global Fellows Forum, March 10, 2015. Please do not cite or circulate.
40 Carl Schmitt, Constitutional Theory (Duke University Press, 2008), 125.
44 Id., at 14, 16.
58 Id., at 45-46. See also David Landau, Abusive Constitutionalism, UC DAVIS LAW REVIEW 49-56 (2013).
61 Gabriel Negretto, Replacing and Amending Constitutions: The Logic of Constitutional Change in Latin America, 46 LAW & SOC’Y REV. 749, 751 (2012)
Draft for discussion at NYU Global Fellows Forum, March 10, 2015. Please do not cite or circulate.
96 On the German unamendable clause, see HELMUT GOERLICH, Concept of Special Protection For Certain Elements and Principles of the Constitution Against Amendments and Article 79(3), Basic Law of Germany, 1 NUJS L. Rev. 397 (2008).
97 Christoph Möllers, ‘"We are (afraid of) the people": Constituent Power in German Constitutionalism’, in The Paradox of Constitutionalism - Constituent Power and Constitutional Form (Martin Loughlin and Neil Walker eds., Oxford University Press, 2007), 87, 97-98.


JT Valdés, ‘Poder constituyente irregular: los límites metajurídicos del poder constituyente originario’ (2008) 6(2) Estudios Constitucionales 121; Herdegen …at 605; Samar …at 691-3.


163 William F. Harris II, The Interpretable Constitution (Johns Hopkins University Press 1993), 203


165 C. H. Mcllwain, Constitutionalism and the Changing World 29 (1939)

166 C. H. Mcllwain, Constitutionalism and the Changing World 37 (1939)


168 Benjamin Constant, ‘On The Sovereignty of the People’ (1815) Solonian Reprints, No. 2 (Charles Randolph Bowman trs., 1996), 1, 6.


172 Tushnet, … at 1999.

173 János Kis, Constitutional Democracy (Central European University Press, 2003), 136-7.

174 János Kis, Constitutional Democracy (Central European University Press, 2003), 137.