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Constituent power and people-as-the-governed: About the 'invisible' people of political and legal theory

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Abstract: The core promise of the modern concept of constituent power is to make the people-as-the-governed active participants in the shaping and ruling of political regimes. Its development was related to the consolidation of the modern state. Current circumstances, though, raise the issue of the possibility of a non-state based concept of constituent power, and of appropriate constituencies. The article argues that dominant views have made the people-as-the-governed capacity to act dependent upon state sovereignty, whereas the latter actually was informed by theses antithetical to popular sovereignty. In order to show how a non-state based concept of constituent power may be articulated, the article builds on a critique of Martin Loughlin's attempt to capture the structure of beliefs that frames the idea of the state and the function of constituent power within that structure. The first part of the article focuses on the main elements of such a theory in order to situate its basic assumptions about constituent power. The second discusses the issues raised by such a conception, amongst other things as to the status granted to the structure of beliefs that frames the idea of the modern polity in Loughlin's perspective; this discussion opens the way to an alternative conception of constituent power, one that stresses that the core fact of the political is that people are always already embedded in relations of power that are not restricted to the state, relations in the course of which they strive to achieve their civic freedom. Political power is not necessarily made public until the people-as-the-governed, in challenging the boundaries of the polity, claim it.

Keywords: civic freedom; constituent power; Martin Loughlin; political theory

I. Introduction

The concept of constituent power has played a major part in the conceptual apparatus of Western political modernity. It embodies the collective political agency of the persons who belong to a polity, and the idea that they are

to be the source of the arrangements (constitutional and institutional) peculiar to a specific regime. As such an agent, the people are to be both the subject (the author) and the object (the governed) of the laws, including the most basic ones – those that frame a regime and regulate the function of government. The core matter is that the governed are to be agents (individually and collectively) in the political domain, not merely objects of policymaking. It is this democratic meaning and its inextricable relationship with the rule of law that explains the appeal of the concept of constituent power: the core promise of the latter is to make the governed active participants in ruling and in the shaping of regimes. To do so, the concept depicts the governed in a specific way, deemed to provide for a sense of being part to a collective political agent able to conjoin the search for a common good with the protection of individual rights and interests. In other words, constituent power is a symbolic reconstruction of a multitude as a collective political agent that is crystallized a posteriori in distinctive representations of 'the people' (in a kind of 'back-to-the-future' move) that build on the empirical and discursive significance of specific interests, yet whose function is to represent the *whole* body politics.

As it developed in modern Western legal and political theory, the concept of constituent power is related to the state as a territorialized, sovereign entity. But does it mean that constituent power is unformed and unbound unless framed by such an entity? Is the democratic impetus it embodies so intrinsically related to the state that it would loose its function in any other context? Is a non-state based conception of constituent power possible at all? These questions are relevant from a twofold point of view. First, within the modern state, the democratic impetus must be related not only with the relationships that are contained, and containable, within the constitutional form, but also to the people's capacity to renegotiate governing relationships and the boundaries of the polity. For example, a mere focus on representative institutions cannot capture the whole nature of struggles for civic freedom; democracy cannot be restricted to the institutionalized practices of representative government. Second, these questions also are significant to anyone concerned with the conditions of democracy in the current context of globalization. The latter can be described as embodying a reorganization of public power, based amongst other things on a redefinition of the public/private distinction, an increase in the activity of governing at the transnational/international level (a fragmentation and a relocalization of public power at various levels, including the global one), and a loosening of the linkage between law and democracy. If the concept of constituent power is context-specific/dependent, and makes sense only within the conceptual apparatus of the modern idea of the state, then we may have to forfeit the search for any

democratic legitimization of regimes of governance at a trans-/international level, namely, one based on a 'matching' of agents and subjects of law-making. At the end of the day, these two areas of concern are closely related, because they raise the issue of the possibility of a non-state based conception of constituent power and, more generally, the one of the capacity for collective action by a political subject in circumstances that are not captured by the prevailing statist framework.

This issue actually points to the fate of the people-as-the-governed in the conceptual apparatus of Western political modernity, and how they relate to conceptions of collective political agency. Such a fate often has been obscured, in discussions about constitutionalism as a political theory. Too often, it bears the legacy of a conception of the polity much influenced by Jean Bodin (1962), Thomas Hobbes (1996; 1998), or Georg Wilhelm Friedrich Hegel (1952), whose arguments ultimately make the capacity of the people to act as a collective political agent dependent upon the state. Hobbes's formulation of the concept of sovereignty extinguished the people's separate personality; Bodin's conception of the state as the locus of legislative sovereignty reinforced the thesis of absolute regal power; and Hegel argued that civil society could not offer an adequate expression of public reason, that only the state can. Dominant views have made the people-as-the-governed capacity to act dependent upon state sovereignty; yet the latter is informed by theses antithetical to popular sovereignty.

I am going to argue that another, non-state based reading of what is conveyed by the concept of constituent power is possible *and* necessary. My argument will build on a critique of Martin Loughlin's attempt to capture the structure of beliefs that frames the idea of the modern polity – the state – and the function of constituent power within such a structure (Loughlin 2003; 2008; 2010; 2014a; 2014b). The autonomous status of public power, according to Loughlin, depends upon the existence of the state, and is the sine qua non condition of the existence of the concept of constituent power (and, therefore, of equal citizenship). In the structure of beliefs that constitutes the idea of public law, constituent power is the generative aspect of the political power relationship that bounds rulers and ruled within a constitutional order; so, although constituent power is vested in the people, it does not mean that political authority is located in the people, according to Loughlin. Yet, an alternative, non-state based account of constituent power can support a coherent reconfiguration of political authority, one that would not make the people-as-the-governed 'invisible' in legal and political theory because devoid of collective political agency; one that, moreover, can be more appropriate in understanding and theorizing struggles for civic freedom characteristic of our era.

Focusing on Loughlin's work is appropriate and fruitful, from this point of view, because he makes a very explicit argument about the structure of beliefs on which the modern polity depends. In many works of legal and political theory, a widespread but implicit assumption in favour of a statist model prevails. In Loughlin's work, the structure sustaining such an assumption is explicitly and brilliantly explained. A careful analysis of it really is helpful in disclosing how, and why, in predominant statist views, the people-as-the-governed are subsumed under a structure of public law that makes them invisible (and disempowered). Therefore, it helps in understanding the possible fates of democracy in the current context.

I will first briefly recall the main elements of Loughlin's theory in order to situate his basic assumptions about constituent power. The presentation of a number of concepts and differentiations is required in order to fully understand his argument; the article keeps these as brief as possible. I will then show that the attempt to contain constituent power within such a framework faces significant problems, related to the way Loughlin conceives of public power and its relationships with authority, and to the status he grants to the structure of beliefs that frames the idea of the modern polity. I will hint at a few distinctive approaches, and will sketch the main lines of an alternative view of constituent power, one that would retain its democratic promise while freeing it from a framework much informed by theses actually antithetical to the capacity of the people to decide together upon the norms and rules that are to govern them. This alternative approach builds on the recognition that state sovereignty was developed within an ideological framework that was deeply antagonistic to the idea of popular sovereignty, and that the very idea of public law was not immune to processes crystallizing the dominance of specific interests. It stresses that the core fact of the political is that people are always already embedded in relations of power that are not necessarily circumscribed by the territorial state, and that power has to be made public in the course of the interactions between rulers and ruled, if the core ideal of the idea constituent power is to be achieved. In the current context, the most urgent issue is to empower constituencies that are denied to be so by dominant representations of the political, representations that tend to disempower the people-as-the-governed.

II. Public law as *droit politique* and the issue of constituent power

Loughlin's thesis is that the concept of 'the people' as a collective political actor takes life in the foundation of the sovereign state, as generative of the power relationship. It depends on the idea that public power – namely,

political power harnessed through the institutionalization of authority, i.e. a system of government – acquires autonomous status with the establishment of the modern idea of the state (Loughlin 2003: 78). Public power is a formal relationship constituted by a system of rule. Public law depends on sovereignty as a representation of the autonomy of the political, which ultimately is, according to Loughlin, an ontological claim. It is 'the normative (in a rule-based sense) structure concerned with the creation and ongoing dynamics of public authority' (Christodoulidis and Tierney 2008: 3). The argument is meant as a rational reconstruction of the structure of beliefs that constitutes the idea of public law; and it intends to explain how public law *does* work. The basic claim is the claim to autonomy, which depends upon state sovereignty. In order to do justice to the argument, it is necessary to briefly recall its main components before turning to the issue of constituent power per se.

The broad theoretical framework in which Loughlin's assumption about constituent power is to be understood concerns the issue of 'how, in juristic terms, we conceive of the constitution of the polity' (Loughlin 2008: 49). Loughlin's *The Idea of Public Law* is an inquiry into the regulatory function of law. It is not intended to be a normative account; it seeks to explain how public law actually works. The objective is to outline the structure of beliefs that constitutes the idea of public law, the basic concepts that are presupposed when we seek to speak (and act) in public law terms (Loughlin 2008: 64; see also Tierney 2008: 16, and Christodoulidis and Tierney 2008: 6). In this account, public power is political power harnessed through the institutionalization of authority, and it acquires autonomous status with the establishment of the modern idea of the state. It is generated and utilized through representation; the latter points to 'a distinction between the public and private aspects of a representative's personality' (Loughlin 2003: 57). Through representation, those exercising governmental powers are given certain responsibilities, and people are transformed into citizens. Hence, 'it is in the foundation of the sovereign state that the concept of "the people" as a collective political actor takes life; and it is in this foundation that people and sovereign are bound together by the concept of representation' (Tierney 2008: 17). Hence, public power does not reside in any specific locus: it is generated 'as a product of the political relationship between the people and the state' (Loughlin 2003: 70), through the apparatus of rule (Loughlin 2003: 81, 83).

Public law's object is the activity of governing the state as an entity distinct from both its members and its officers (Loughlin 2003: 153). Law as the activity of governing establishes a framework for enacting the rules that order social life; it also identifies and maintains the authority structure of the state (Loughlin 2003: 155). In other words, public law is the law

related to the activity of governing; it 'can be defined as the assemblage of rules, principles, canons, maxims, customs, usages, and manners that condition, sustain, and regulate the activity of governing' (Loughlin 2003: 15). Since sovereignty is the expression of such autonomous public power, it cannot be divided nor shared. Sovereignty is constitutive of public law, it is 'an authoritative expression of a particular way of being. We cannot move beyond sovereignty without destroying the idea of public law' (Loughlin 2008: 56). Sovereignty 'stands as a representation of the autonomy of the political and is the foundational concept of modern public law' (Loughlin 2003: 72–3). It 'emerges from the foundation of the modern state as both a claim to the supremacy of law and a symbol of the autonomy of the political' (Loughlin 2003: 158). It is 'a function of the institutional arrangements established as a consequence of the formation of the modern state' (Loughlin 2003: 80). It makes sense 'only once the public, official character of governmental power has been acknowledged' (Loughlin 2003: 82). It is the name given to the supreme will of the state (Loughlin 2014a: 14). The legal concept of sovereignty is concerned with the right of a government to be obeyed (Loughlin 2014a: 12).

Loughlin recognizes that oppression is inherent in the logic of rule, and so that public law *can* act oppressively. Institutionalization is needed for power-generation, and this implies domination. However, he stresses that in a *conceptual* sense, public law does not permit exploitation. As I understand it, this is because sovereignty would be rooted in the principle of equal citizenship (see e.g. Loughlin 2008: 59). Public law is the explanatory and justificatory language of a particular mode of ruling founded in basic ideas of sovereignty and citizenship, of democracy and rights, so that exploitation is conceptually eliminated from the world of public law (Loughlin 2008: 57). Such a position is in clear contradistinction with, for example, James Tully's one; Tully argues that the modern construct of politics is itself conceptually oppressive (Christodoulidis and Tierney 2008: 6).

The state is the necessary institutional vehicle for the modern conception of politics. The idea of the state 'provides the founding assumption on which an elaboration of the precepts of political right becomes conceivable. This structure of political right generates a series of truths about the political world. Consequently, the claim to autonomy is ultimately an ontological claim: it expresses a particular way of seeing, and being in, the world' (Loughlin 2008: 60). The political realm is a discrete sphere of human activity, not in the sense that it would constitute a subdomain of it, but rather in the sense that it 'represents the entire society viewed from a distinctive perspective' (Loughlin 2008: 59). As a comprehensive representation of society, the claim of the political sphere to autonomy

comes 'from its ability to offer an authoritative expression of the world' (Loughlin 2008: 59). As long as the political realm can be conceptualized as a discrete sphere of human activity, and provided that the state retains ultimate power and authority, issues of jurisdictional competence are not determinative of questions of sovereignty. Hence, contrary to what Stephen Tierney argues, the indivisibility thesis cannot be challenged; if it is, then there is no sovereignty anymore. The questions raised by Tierney 'might *in extremis* touch on the question of the sovereign, they generally do not affect sovereignty […] [P]luralistic accommodations – whether through the special claim of a group to form a "distinct political society" demanding asymmetric federal arrangements within the state or through the ambiguities and disputes about EU-member state relations – do not concern sovereignty' (Loughlin 2008: 56). According to Loughlin, 'we cannot move beyond sovereignty without destroying the idea of public law' (Loughlin 2008: 56).

Where does constituent power stands, in this picture of the modern conception of the political? Constituent power is a concept of representation that converts the multitude into a form of political agency: 'Modern constitutional texts aspire not only to establish the forms of governmental authority (legally constituted power) but also to reconstitute the people in a particular way' (Loughlin and Walker 2007: 3). It generates political power, because this is possible 'only when "the people" is differentiated from the existential reality of a mass of particular people (the multitude)' (Loughlin 2014b: 228). Political power is created through a symbolic act in which a multitude of people recognize themselves as forming a unity. More precisely, it is created through symbolic representation of foundation and constitution, and is then applied through the action of government; 'Power thus resides neither in "the people" nor in the constitutional authorities; it exists in the relation established between constitutional imagination and governmental action' (Loughlin 2014b: 231). Constituent power is at once the generative principle of public law (because it expresses the generative aspect of the political power relationship) (Loughlin 2014b: 218, 231), an expression of *droit politique* (because political unity is formed through the way in which *droit politique* operates to frame the constitution of the state), and the juristic expression of the democratic impetus. It connects the symbolic with the actual (Loughlin 2014b: 232). The foundation of the sovereign state hence is the very condition of a concept of the people as a collective political agent; the state is the collective representation of a people, and it is a unified will (Loughlin 2014a: 12ff).

So constituent power does not express the power of the people. It founds an association divided between rulers and ruled, who are bounded by a relation of domination (Loughlin 2014b: 229). In the founding moment, the people must be conceptualized both as a virtual entity and

as a non-institutionalized one established in opposition to the constituted authority (the 'people-as-the-governed'). Loughlin argues that constituent power is the generative principle of public law because it is the power to model a state (political sovereignty). It has to do with the question of how legal authority is generated within the political domain (Loughlin 2014b: 224). Its focus is the capacity of a people to overcome social division and conflict by establishing a sense of political unity (Loughlin 2003).

A constitution is valid because it derives from this unified will that is found not in norms, but in the political existence of the state (Loughlin 2014b: 224). Hence, constituent power mediates the tension between democracy and law. It embraces at once right (the symbolic representation of all), interests (the concerns of the many), and the relation between them (Loughlin 2014b: 233–4). The function of the concept of constituent power, therefore, is to specify in constitutional language the ultimate source of authority within the state (Loughlin 2014b: 219). The concept of constituent power 'comes into its own only when the constitution is understood as a juridical instrument deriving its authority from a principle of self-determination: specifically, that the constitution is an expression of the constituent power of the people to make and re-make the institutional arrangements through which they are governed' (Loughlin 2014b: 219). The concept of constituent power, moreover, keeps open the question of who represents the people itself; it 'resists institutionalized representation' (Loughlin 2014b: 234). The relation of the constitutional identity of a people to the constituent power possessed by the people is perplexing, since the authority of the constitutional form depends, in some measure, 'upon its continuing capacity faithfully to reflect that collective political identity. The formal constitution that establishes unconditioned authority, therefore, must always remain provisional. The legal norm remains subject to the political exception, which is an expression of the constituent power of the people to make, and therefore also to break, the constituted authority of the state' (Loughlin and Walker 2007: 2). Constituent power keeps constitutions responsive to social change. From such a perspective, 'constituent power always refers back to constituted power. In this sense, the foundation in its ideals (i.e. with respect to its normative form) can only be understood virtually. Yet this virtual event founds actual association' (Loughlin 2014b: 229).

So constituent power is not the actual material power of a multitude, because it exists 'only when that multitude can project itself not just as the expression of the many (a majority) but – in some sense at least – of the all (unity)' (Loughlin 2014b: 232). There is no constituent power without that dimension of symbolic representation. And the people must be conceptualized in a double sense, in the foundational moment:

as a virtual unity (the state/nation) (Loughlin equates them), and as a non-institutionalized entity established in relation to the constituted authority (the people-as-the-governed) (Loughlin 2014b: 33).

To summarize, then, constituent power is vested in the people, but this does not mean that political authority is located in the people (qua the multitude) as adherents of the principle of popular sovereignty maintain. It expresses a virtual equality of citizens. This 'is generated *inter homines* (establishing the principle of unity) but it founds an actual association divided into rulers and ruled in a relation of domination. […] It founds constitutional rationality (normativity), but the association evolves through action (decision)' (Loughlin 2014b: 229). Such a tension between sovereignty (general will) and the sovereign (the agent with authority to enforce a decision in the name of the general will) 'ensures that the constituent power is not to be understood merely as power (in the sense of force). It involves a dialectic of right – of political right (*droit politique*) – that seeks constantly to irritate the institutionalized form of constituted authority' (Loughlin 2014b: 229). So the constitution of a political unity relies upon the way 'in which *droit politique* operates to frame the constitution of the state' (Loughlin 2014b: 230). And constituent power is an expression of *droit politique*.

III. Collective political agency, the people-as-the-governed, and the state

There are of course different strands of legal thought, and different accounts of 'who the people are' within legal and political theory. Let me very briefly sketch some of the most significant differences that make Loughlin's standpoint a distinctive one within legal thought. Amongst other things, Loughlin criticizes 'normativism' for substituting an autonomous concept of constitution for the state (Loughlin 2008, 2014b; see e.g. Dyzenhaus 2007; 2012). He also departs from Carl Schmitt's 'decisionism' because the latter takes democracy to require some prior substantive equality of the people, a move that, according to Loughlin, leads to totalitarianism (see e.g. Schmitt 2008). However, he takes Schmitt to rightly argue that the concept of constitution *presupposes* the state, and that the state is the political unity of a people (Loughlin 2014b). Constitutionalism is a philosophy of state building (Loughlin 2008: 52). As to accounts of 'who the people are', Loughlin's perspective is peculiar in that he understands constituent power as the generative aspect of the political power relationship that bounds rulers and ruled within a constitutional order. He hence departs from approaches that either absorb constituent power into the constitutional form (such as David Dyzenhaus's) (Dyzenhaus 2007; 2012), make it stand behind the legally constituted authority of the polity (e.g., Antonio Negri for whom constituent power is a latent

revolutionary activity),[1] or view constituent power as occupying a domain independent of constitutional structure and form (e.g. Emilio Christodoulidis) (Christodoulidis 2007).[2]

Apart from these two broad distinctions (within legal thought, and between approaches of the issue of 'who the people are'), Loughlin also defends a peculiar point of view on the issue of the impact of the relational approach on the unity assumption conveyed by sovereignty, on the one hand, and the issue of public power in an era of globalization, on the other one. As to the former, Tierney has argued that the concept of relationality can be applied to explain the transformation in relations of power and authority between citizens and government 'across a range of increasingly diffuse sites of territorial governance today' (Tierney 2008: 15). From his point of view, 'by continuing to rely upon a modernist conception of the state as a unitary receptacle of sovereignty we underestimate the essential fluidity of relations of sovereignty' (Tierney 2008: 20). As I have already explained, Loughlin rather insists that since sovereignty represents the autonomy of the political domain, it cannot be divided (Loughlin 2008: 58; see also Loughlin 2014a: 22–3). In a similar vein, he criticizes pluralists such as for example, Neil McCormick (1999) for being concerned with contemporary limitations on power rather than with the issue of authority (Loughlin 2014a: 12), and argues that they do not succeed in offering a conceptual apparatus that could sustain an alternative to modern public law. Contra pluralists, he reasserts that the foundation of political authority lies in the state, not in the constitution (the latter establishes the office of government); that it is not clear whether the claim related to a multiplicity of sites of public authority is an empirical or a conceptual one; and that sovereignty cannot be divided nor pooled, so that arguing otherwise is conceptually incoherent (Loughlin 2014a). Constitutionalism does not have a pluralist structure, contrary to what for example Mattias Kumm (2010) argues. A divided sovereignty is no sovereignty at all, and cannot make for autonomous public power; and without such autonomous public power, there can be no constituent power that represents collective political agency from within such a standpoint. Loughlin's peculiar standpoint within the debates on constitutionalism also turns, then, upon the issue of whether, for now, the 'conceptual edifice of public law' is left unchanged. Whereas Dieter Grimm argues that in the current condition the identification of public power with state power is dissolving (Grimm 2010), Loughlin disagrees. And if it were to be the case, if, namely, the polity within which

[1] On Negri's view see Carrozza (2007).

[2] For a discussion of these various views, see e.g. Loughlin and Walker 2007. See also Oklopcic's discussion of how constitutional theorists understand their field's role (2014).

public law developed really was transformed, then we would need a new account of political authority, one that would build upon an alternative conceptual apparatus.

Loughlin claims to be describing a specific conception of the constitution of the polity. Recall that his inquiry is one into the regulatory function of law. He aims at identifying the conceptual structure of a mode of ruling that claims to be law-governed (Loughlin 2008: 58). From his point of view, a theory of public law is not a normative enterprise, one that would be looking for the normative justification of peculiar types of political arrangements. He means to present a descriptive (empirical) argument focusing on the function of the concept of public law in modern constitutional and political theory. However, it is not clear that he actually can avoid some significant normative issues. Of course, he may claim to be describing normative beliefs without making himself an argument of a normative type. Yet, there are reasons to doubt that he succeeds in doing so. This is what we are going to turn to now.

Loughlin argues that public law is the language of a mode of rule based on sovereignty, citizenship, democracy, and rights (Loughlin 2008: 57–8); 'It is a mode of rule that claims to be law (*droit*)-governed. It therefore yields a conceptual language through which our practices of governing can – and have – evolved' (Loughlin 2008: 58). According to him, the achievement of a system of public law 'does mean that exploitation is eliminated *conceptually* from the world of public law [...] [T]he establishment of a public discourse that operates on the *principle* of formal political and legal equality and the deliberative procedures of open institutions does at least open up the possibility of achieving a distinctive type of governing arrangement' (original emphases) (Loughlin 2008: 58). The whole point of the argument, then, turns upon public power and its relationship to sovereignty, and on the assumption of a necessary relation between the state, the concept of constituent power, and democratic self-rule. It is the latter assumption that sustains the claim that the idea of public law is free from exploitation. Sovereignty, he claims, is rooted in the principle of equal citizenship (Loughlin 2008: 58). Note that the argument is at once conceptual, ontological (the foundational claim that is at the heart of sovereignty is about a way of seeing and being in the world), and epistemological (this is how we have to understand the structure of beliefs that constitutes the idea of public law to have a coherent and rational knowledge of it – it generates *truths* about the political).

One may wonder, though, 1) whether the ontological claim really is free from any normative assumption; 2) how it can sustain the claim of a necessary relationship between sovereignty and democracy ('necessary' in the sense that sovereignty would logically include the point of view of

equal citizenship); 3) hence, if it really is the case that the structure of beliefs that sustains public law is conceptually free from oppression. From my point of view, answering these questions opens the way to developing a non-state based concept of constituent power.

Let us tackle them by focusing on democratic self-determination. The core matter is that it is far from clear that the way Loughlin relates sovereignty to democracy can be sustained. Remember that the basic foundational claim of his argument is the claim to autonomy (the ontological one). It is the claim that the political is an autonomous domain that expresses a distinctive way of being. This claim depends upon sovereignty. It is retained when authority is transferred from the prince to the people: Loughlin argues that such a transfer does not impact upon the space of sovereignty (Loughlin 2014b: 228). How, then, can democratic self-determination be related to sovereignty? If sovereignty is retained unchanged in the transfer, one may have to conclude that sovereignty is basically indifferent to forms of rule. If it is retained, yet presumed to necessarily relate with democratic self-determination and equal citizenship, then one may wonder about the presence of a teleological reading at work that would make democratic self-determination necessarily unfolding with the modern state. Democracy and sovereignty would be ontologically related in the claim to autonomy, namely, the idea of the political sphere as a representation of the entire society from a distinctive point of view. Note here the contradistinction with Ulrich Preuss's argument: Preuss (2010) rather argues that when sovereign power is claimed for the multitude, we have a different pattern of rule, a different type of polity, so that the creation of the modern constitution is not intrinsically bound with the concept of the territorially bounded state, but rather with the creation of the constituent power of the people.

From my perspective, Loughlin is right to stress that the transfer of authority from prince to people does not impact upon the space of sovereignty. But this is also why he is wrong to argue that sovereignty necessarily relates to democratic self-determination. He actually underestimates the extent to which the views on which the justification of state sovereignty ultimately depends actually were *antagonistic* to the participation of the people to the framing and ruling of regimes. He assumes that the form of the modern state necessarily makes it the home of democratic self-determination and equal citizenship. But by doing so, he dismisses the significance of the many tensions and conflicts that drove the paths of this history. These do not only concern debates on for instance how to achieve the common good, but also what it actually is – namely, what is being represented by the claim to autonomy. More precisely, there are two problems with his argument. First, it risks justifying rationalizations of the standpoint of the political as

representations of the common good (the interest of all). Second, it neglects how much democratization actually depends on processes of contention that are not wholly contained within the dialectic of right he depicts. Let us examine each of these issues in turn.

As to the first one, Loughlin's argument neglects the presence of interests specific to rulers and their agents that may make the claim to represent the interest of all a mere rationalization. He recognizes that the constitution is a political seizure. However, he argues that because the state is law-governed, because constituent power mediates between democracy and law, and because sovereignty represents the autonomy of the political, oppression is eliminated from the concept of public law. But I am afraid the matter is much more complicated. For example, the fact that the state as law-governed has allowed for the subordination of groups whose interests and structures of beliefs were estranged to dominant ones clearly contradicts it. Interests that do not fit in the structure of beliefs that sustains public law – for example, the legal and normative orders of First Nations – and contexts that embody forms of authority that do not correspond to it are a priori excluded. It is a peculiar view of the common good – or more precisely, of how it is to be framed – that is embodied in public law.[3] Amongst other things, it builds upon a distinctive conception of the relationship between the political and the economic sphere. Part of the matter, then, is that the structure of beliefs is somehow related to actual processes that made it part of the political. It is not only that the structure described is a distinctive way of world building that has purchase on how the polity works. This structure embodies distinctive ways to frame the modern polity, peculiar interests; and as such, it excludes competing normative and legal arrangements. It may be more inclusive than alternative ones. It may convey a powerful ideal of equal citizenship. The rule of law certainly is an impressive achievement of modern democratic regimes, and has contributed to the achievement of equal dignity for important categories of citizens. But it is not free of oppression. For example, without necessarily violating individual rights, one can impinge upon the rights of individuals belonging to a minority nation, undermining these individuals' self-respect and autonomy. The issue, then, is up to what point the idea can be taken to be independent of the processes by which it was basically shaped. Let me stress that Loughlin's position stands in clear contradistinction with Tully's one. Tully argues that the modern construct of politics itself is oppressive (Tully 2007, 2008a, 2008b), and that restrictive practices of government and democracy have come to maturity and predominance through the historical process

[3] I do not want to mean that it cannot be justified, though.

of progressive governmentalization (Tully 2008b: 48–9) – a process that includes a juridification of the subject that is core to the paradigm of sovereignty. According to Tully, the formalization and disembedding of modern constitutionalism and constituent powers have displaced the freedom to negotiate the norms to which we are subject to representative institutions. In the latter, the idea of one people acts as a symbolic pole of sovereignty stressing unity at the expense of diversity. In contradistinction with these restrictive practices – that are typical of representative democracy in nation states – extensive practices of government and democracy rather are 'the exercise of the abilities of the governed to negotiate the way their conduct is guided' (Tully 2008b: 57). Struggles to bring institutions and regimes under the participants' shared authority are meant to put an end to the 'imperialism' of modern constitutionalism, and to express the equally basic status of the rule of law and popular sovereignty. Actually, the project of democratic constitutionalism is 'to exploit and expand the existing yet severely limited field of possibilities of direct participatory freedom (the exercise of constituent powers) within and against the constitutional forms to which the governed are now subject, directly and indirectly, at the very sites where these unjustly constraint their ability to exercise shared authority over the conditions of their activities' (Tully 2008b: 217–18).[4]

The second issue, then, is the one of democratization per se, namely, of how much democracy actually depends upon processes of popular mobilization and contention. It is through such processes that people came to be recognized as a source of legitimate authority and a collective political agency. The concept of constituent power is related to the modern idea of the state insofar as it is within this specific historical context that the people-as-the-governed were transmuted into a peculiar form of collective political agency depicted as one nation of free and equal citizens. But to argue that this was so *because* the form of public power peculiar to the state depended on, or necessarily implied, such a role for the people is questionable. Actually, Loughlin's argument works only if the capacity to redescribe the multitude as a kind of corporate body is specific to the modern state – which it is not – and if one assumes that there is no other way polities could have been democratized as an expression of the recognition of the people-as-the-governed active participation in the

[4] A significant issue is whether (and if yes, how) the rule of law can be rescued from Tully's critique of the juridification of the subject. I won't tackle this issue here, since it requires an article of its own. The important point for the purposes of this article is that Tully proposes a peculiar view of the relationship between the rule of law and popular sovereignty, one that may ground a non-statist conception of constituent power.

framing and ruling of regimes. At a conceptual level, I do not see how one could demonstrate such an impossibility of alternative pathways to democracy.

This points to a more basic concern. In the structure of beliefs depicted by Loughlin, the people as a collective political agent has no existence independent from the state, so the people-as-the-governed, in their capacity to renegotiate the governing relationship, disappear; they become invisible. The argument, henceforth, allows only for an incomplete explanation of the dynamics of power and authority that is core to the political; it only accounts for the relations contained and subsumed within the constitutional form of the modern state. It focuses on specific institutionalized forms of political power and does not allow to take into account forms that either are not contained by institutional norms or that are institutionalized in different ways – in ways that are not congruent or do not fit with the state. But then, how are we to tackle the issue of political power that is *not* harnessed through the institutionalization of authority, and/or that does *not* build upon the formal representation of some unity? Is it accurate to assume that public power, even if we stick to Loughlin's definition, is contained within the constitutional form? Is not public power power that, because it impacts upon people's well-being and interest in self-rule, is *made* public by contention and negotiation over the boundaries of the polity? And are there not significant loci of power that interact with state public power in non-constitutionally contained ways, yet shape it? Such questions are not only relevant as to for instance international regimes; they also are relevant as to issues of domination and recognition within modern states, such as with the example of minority nations I gave above.[5]

Power, actually, is not really made public unless (and until) the people-as-the-governed claim it so that those who rule are constrained to do so from the perspective of a common good. The form in which this at once symbolic and actual capacity is reconstructed is in constant relation and tension with the governance relationships in which people are embedded. The whole point of the modern constitution and its affiliate concept of constituent power is to embody the claim that the governed are to determine the conditions under which political power is to be exercised, and so to regulate the establishment and exercise of public power (see e.g. Grimm 2010: 7). What bounds constituent power as the idea that the governed are to participate both in the framing and the ruling of regimes

[5] Kumm (2010) argues that the state is but *one* institutional context for constitutionalism, and that constitutionalism has a pluralist structure. According to him, the heart of modern constitutionalism is the idea that the exercise of legitimate public authority is not unlimited and requires a certain kind of justification (Kumm 2010: 213).

(practices of government) is that at any point, people are already constituted as political subjects by their embeddedness in relations of power and governance (Tully 2008a, 2008b). Constituent power takes shape in the processes in the course of which people challenge the scope and nature of these governance relationships. The state is one such place, but it is not the only one. This is how Western states democratized in the nineteenth and twentieth centuries, and this is how the current practices of government of our globalizing world are going to be democratized, by people claiming to be rightful constituencies striving to democratically determine their fate.

What we face in the current context is a multi-sited structure of governance that embodies a specific type of governing relationships, characterized amongst other things by the growth of private forms of authority, the marketizing of public functions, and differentiated regimes of rights (Sassen 2006). According to Sassen, private actors shape new forms of public authority, particularly in the international domain. Such private authority embodies a new normative order, of which key elements enter the public realm where they get represented as part of public policy. This new normativity derives from the operational logic of the capital market. As these new elements are made legitimate, other kinds of claims (such as expenditure relative to the well-being of people) are *de*-legitimized. People face different legal categories defining rights and obligations of different population segments, in this global structure of interdependence (Sassen 2006). At the same time, there are practices of freedom by which people challenge non-democratic practices of government. Some citizens, social movements, and NGOs are engaged in contentious politics opposing them to states and global regimes at once. Although one may suspect that in many cases (as in the EU) such actions are cases of domestication (namely, claims that target supranational regimes and institutions but are addressed to national agents), supranational institutions have become a significant target of contention. These processes may still be, for now, at the 'gates' of institutional politics (see e.g. Tarrow 2012), as Tarrow concludes from his analysis of transnational activism. But it is precisely through such challenges to the boundaries of institutional politics that public power is brought under the control of ordinary people. Let me stress that Tarrow's focus on what goes on at the borderland between contentious and routine politics – in other words, at the boundaries of constituted politics, culture, and institutions – also points to practices of civic freedom, and to the idea that these can challenge the institutional framework of the modern state and carry contention beyond borders, wherever people face power holders that subject them to power relations. In the course of such processes, political identities are (re)built, and the boundaries of the polity are redefined.

The absence of a system of enforcement is not an argument against the appropriateness of constituent power and constitutionalism in today's complex world, because it is precisely the set-up of some capacity to have the equal rights of citizens enforced that is the core issue. The most urgent task is to empower constituencies to hold power holders accountable for the many public 'bads' that pervade our world, and to cooperate to promote some basic common goods. We live in a world in which the elites and the powerful are able to escape the regulation that had been made possible by national constitutions, while ordinary people have no other forum than a state that does not always protect their basic interests. More basically, it may be suggested the nation state and its system of rule sustained the illusion that rulers and ruled could be identical, whereas such a coincidence was made possible only by the fierce struggles ordinary people led to have their rights and interests recognized, in a compromise that the actual circumstances of politics clearly show to have been brief and fragile. Ordinary people actually have achieved much, in contemporary Western states, but they did it by claiming, contending, and redefining the boundaries of politics.

IV. Conclusion

So where does that leave us, as alternatives, if we agree upon the tension between constituent power and state sovereignty that is inherent to the modern polity, and is never settled by the constitutional form? As I said, what is key to the issue of constituent power is the relationship of struggles for civic freedom within actual practices of governance that are reshaping the polity and public power. It is the activity of citizens struggling against what they consider to be unjust and oppressive practices of rule that is core to democracy (Tully 2008a, 2008b). Having a wider perspective on struggles for civic freedom is a first step in developing a non-state based conception of constituent power and its relationship with people-as-the-governed so as to support a coherent reconfiguration of political authority in a context in which states remain significant loci of public power, but also are part of a major reconfiguration of governing relationships.

But as I hope to have showed, it is not only that the structure of beliefs described by Loughlin would require to be re-conceptualized to account for the configuration of a new structure of authority. Basically, the problem is that in such a perspective the people-as-the-governed are subsumed into a statist conception of constituent power. But the state is not some kind of metaphysical entity instilling an ontological unity into a dispersed, fragmented multitude. The *discourse* of sovereignty presents it that way.

A significant consequence of for example Hobbes's formulation is not only to substitute the abstract notion of the state for the prince, but also to extinguish the people's separate personality. Loughlin shares the latter point of view, and ultimately justifies it by the presumption that public law is free of oppression. But the people-as-the-governed still exists and acts; it is they who claim, contend, protest, and sometimes die, to have their rights recognized and power made public. The fact that we may not contain this within a predetermined constitutionalizable form does not allow downplaying it when we analyse the very structure of the modern polity. The relationship between sovereignty, democracy, and equal citizenship that Loughlin postulates deprives the people-as-the-governed from a significant part of their civic freedom. In a sense, it may be seen as an attempt to save decisionism by trying to show that the content of norms is not wholly contingent. But Oklopcic (2014) has stressed the ambiguous message that a position such as Loughlin sends to the people. At the end of the day, it is a position that disempowers them.

The important thing is that relations of power ultimately are, as Tully has argued, relations of governance that act on free agents, opening up a field of possible ways of thinking and acting in response (Tully 2008a: 23, 125; 2008b: 56–7). Extensive practices of government and democracy (contrary to restrictive practices that were constructed through the historical process of historical governmentalization) are 'the exercise of the abilities of the governed to negotiate the way their conduct is guided' (Tully 2008b: 57). From this point of view, a political agency is public not because it *claims* to represent the whole of society so that it would embody a specific standpoint on it, but because 'its impact poses a systematic threat to the autonomy of some population of individuals' (Macdonald 2012: 49). It is this recognition of the legitimacy of people's claim to be rightful constituencies that is the condition of democracy.

Hence, Loughlin's brilliant picture of the function of public law is of limited relevance in understanding how the concept of constituent power relates to the people-as-the-governed. Moreover, it contributes to perpetuate the assumption that constituent power is unformed and unbounded unless framed by a modern conception of the state that owes much to the thesis of absolute regal power. Recall that it was the latter that was reinforced, in the sixteenth century, by the new conception of the state as the locus of legislative sovereignty and as distinct from both rulers and ruled; and that the thesis of absolute regal power was in tension with the early modern theory of popular sovereignty. It would be interesting to analyse how such a tension perpetuates in today's debates about the future of state and popular sovereignty. But most important for the purposes of this article, it also recalls that focus is to be less on the state per se than on power yielded

for political purposes – which is not restricted to the institutional field of the state. So do we need to retain the concept of constituent power? I don't know. It surely is a powerful normative referent of the modern idea of democracy. But what is most significant is the basic idea it embodies: that the governed are to be active participants in the framing and ruling of regimes. They are the heart and soul of what Tully calls 'struggles for civic freedom'.

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