Three arenas of struggle: A contextual approach to the constituent power of 'the people'

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Abstract: Against recent contributions to the debate about the constituent power of the people, the article proposes to reorient the debate by analytically distinguishing three dominant arenas of political struggle – democratic, social and national – in which the vocabulary of 'the people' and its constituent power is invoked. The invocation of the 'will of the people' and its constituent power in these arenas is associated with different assumptions, risks and implicit ideational trade-offs that must be laid bare. A contextual approach to constituent power counsels caution in dignifying pro-democratic constitutional transformations with the name of 'the people'. It invites those who theorize constituent power with social struggles in mind to rebalance their attention to constituent power – and devote more attention to imaginaries and strategies that minimize moral hazards implicit in the vocabulary of peoplehood and to maximize the likelihood of the new order's survival. Finally, a contextual approach rejects the role for constituent power in national struggles, arguing that constitutional theory is incapable of arbitrating between competing assertions of popular sovereignty. In the final part of the paper, I defend the contextual approach against the theoretical interventions currently on offer, and gesture towards its potential in crafting a *provincialized* constitutional theory.

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'Догодио се народ.' (Serbia, 1988)[1]
'Wir sind das Volk.'[2]; 'Wir sind ein Volk.' (Germany, 1989)[3]

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[1] 'It's "the people" that happened', a statement by the Serbian poet Milovan Vitezović at a mass meeting organized by supporters of Slobodan Milošević's 'anti-bureaucratic revolution'. Vitezović implicitly responded to allegations that the popular happenings that toppled the regional leaderships of Vojvodina and Montenegro in the fall of 1988, were orchestrated by Milošević.

[2] 'We are the people', the slogan chanted at anti-regime demonstrations in Leipzig, German Democratic Republic, on 2 October 1989.

[3] 'We are one people', the transfiguration of the slogan 'we are the people', widely popularized in Western Germany as the putative East German plea for national unification, but which initially began as a plea on the part of the civil society groups in Leipzig on 9 October 1989, with the aim of inviting the members of the security forces to *see themselves as members of same people* as the protesters, and thus renounce violence. Vanessa Fischer, '"Wir sind ein Volk": Die Geschichte eines deutschen Rufes' <http://www.deutschlandradiokultur.de/wir-sind-ein-volk.1001.de.html?dram:article_id=155887>.

'النظام إسـقاط يريــد الشــعب' (Tunisia, Egypt, 2011)[4]
'Коли народ є нескореним владі, влада перестає бути владою.'
(Ukraine, 2014)[5]

I. Introduction

Once a quickly gleaned-over section in Continental European constitutional law textbooks, the concept of constituent power of the people is nowadays one of its most debated foundational concepts. The spikes in attention it has received over the last 20 years have coincided with momentous political developments that have either torn the fabric of existing constitutional orders, or ushered in the creation of new ones. The anti-communist revolutions of the 1990s in Eastern Europe, the democratic deficit in an increasingly constitutionalized EU legal order, Bolivarian revolutions and populist constitution-making in Latin America, and, finally, anti-authoritarian revolutions in the Middle East have all raised questions about the underpinning assumptions, meaning and function of this enigmatic concept.

Theoretical interventions that have tackled constituent power of the people over the last 20 years have rarely been contextualized in a self-conscious manner, however. Constituent power has either been debated in the abstract, where historical examples or philosophical resources are used to shed light on the general features of the concept[6] or, the geographical context of constituent power (the formula, 'constituent power in …') was used as a foil to make a theoretical point whose geographical, temporal and political reach is hinted at, but has remained

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[4] 'The people wants to topple the regime', the slogan used during the Arab Spring in 2011, which, for some analysts like Uriel Abulof, signified the question, 'What is the Arab Third Estate?', *The Huffington Post* <http://www.huffingtonpost.com/uriel-abulof/what-is-the-arab-third-es_b_832628.html>. For Abulof, 'the people (شــعب, sha'ab) was born – a collective, rather than a collection, of individuals, a whole greater than the sum of its parts'.

[5] 'When the people are an unconquered power, the government is no longer a power.': statement by the Ukrainian pop star Ruslana, in her blog post, 'Very concerned about what is happening, and even more so as it happens!' <http://blogs.pravda.com.ua/authors/ruslana/52d0acdc26f07/>.

[6] L Barshack, 'Constituent Power as Body: An Outline of Constitutional Theology' (2006) 56 *University of Toronto Law Journal* 185 ; R Cristi, 'Schmitt on Constituent Power and Monarchical Principle' (2011) 18(3) *Constellations* 352 ; M-S Kuo, 'Reconciling Constitutionalism with Power: Towards a Constitutional Nomos of Political Ordering' (2010) 23(3) *Ratio Juris* 390.

under-articulated.[7] But speaking of the people and its constituent power in Serbia (1988), Romania (1989), East Germany (1990), the EU, Bolivia (2006), Kosovo (2008), Tunisia and Egypt (2011), Greece (2012), Scotland or Ukraine (2014) surely assumes, implies and gestures towards different things.

Of course, the vocabulary of constituent power of the people owes part of its potency to its very generality, which has enabled it to become intelligible across different contexts, though it has meant different things to different people. In doing so, constituent power is no different from other important concepts in political and constitutional theory. Equally, a certain neglect of context may even be necessary for the unity of the academic field of 'constitutional theory'. Yet, while constituent power remains a 'source of critique, regeneration and change',[8] we must still inquire, at a certain level of generality: for what purpose? for whom? when? and where?

The aim of this paper is to engage in the contextualization of constituent power, but not in a casuistic way by framing the debate in terms of specific geographic localities but rather by distinguishing its operation in three political contexts, three arenas of political struggle in which it appears: democratic, social and national.

Using Sieyès's celebrated *What is the Third Estate?* as a starting point, in the first part of the article I will argue that these three arenas are already present, though not analytically distinguished, in his classical account of constituent power. The animating concern of this article, developed in the next three parts of the essay, is simple. The invocation of the 'will of the people' and its constituent power in democratic, social and national struggles, is associated with risks and implicit ideational trade-offs that must be laid bare.

My specific points are a bit more complex. In the context of a democratic struggle against a corrupt, unresponsive or oppressive regime, invoking the will of the people makes sense in *ideal* circumstances where, following

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[7] L Jaume, 'Constituent Power in France: The Revolution and Its Consequences' in M Loughlin and N Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, Oxford, 2007) 67 ; C Möllers, '"We are (afraid of) the People": Constituent Power in German Constitutionalism' in Loughlin and Walker 87; D Azellini, 'Constituent Power in Motion: Ten Years of Transformation in Venezuela' (2010) 24:2 *Socialism and Democracy* 8 ; U Mattei and S Balley, 'Social Movements as Constituent Power: The Italian Struggle for the Commons' (2013) 20 *Indiana Journal of Global Legal Studies* 965 ; R Stacey, 'Constituent Power and Carl Schmitt's Theory of Constitution in Kenya's Constitution-Making Process' (2011) 9 *International Journal of Constitutional Law* 587.

[8] D Chalmers, 'Constituent Power and the Pluralist Ethic' 291–315 in Loughlin and Walker, *The Paradox of Constitutionalism* (n 7) 291, 300.

exhaustion from political oppression, there is *widespread* insurrection – *not* accompanied by *spatially-concentrated* counter-displays of loyalty towards the regime – followed by an *inclusive* political process of constitution-making leading to a document approved by the vast majority of the population. This is rarely the case. Those who insist on styling constitutional transformations as the exercise of the constituent power of the people in non-ideal, most often fluid and multifaceted conditions must be willing to gamble. Their wager is that the functional benefits of 'peoplehood' after the conflict are more important than the risks associated with its invocation during the constitutional conflict itself. There is no reason why constitutional theory should accept this risk singlemindedly and unreflectively.

In the context of social struggles – struggles for socio-economic equality – the reliance on the will of the people against established constitutional channels of political change may usher in progressive social change, but runs the risk of violating the rights of vulnerable national, religious, sexual or other minorities. Their identities do not always align with an understanding of the people as the downtrodden 'plebs'. As I will demonstrate later in the text, some theorists of constitutional power most aligned with the project of sociopolitical change simply accept this risk. Others rework the idea of constituent power to explicitly include various marginalized groups, but in doing so sever the link between the exercise of constituent power and the authorization of the new constitutional order. For them, the exercise of constituent power during the process of constitutional change is an example of how things should be run after the new order is in place. From the perspective of a theorist not committed to the success of social emancipation, both approaches are vulnerable to the same set of objections I have raised in the context of democratic struggle. But even if we accept that thinking about constituent power should be framed predominantly with social struggles in mind, it would be useful for their proponents to consider rebalancing their theoretical energies: from putting faith in constituent power as the repository of emancipatory potential, towards developing more specific blueprints for a constitutional order for *the day after* together with institutional mechanisms and programmes for the maintenance of popular enthusiasm, critical for the long-term survival of such a socially emancipatory project. In both democratic and social arenas of struggle constitutional theorists should expose the assumptions, risks and hoped-for beneficial effects of the vocabulary of peoplehood, instead of theoretically dignifying its invocation or success as the manifestation of constituent power.

In both arenas, the identity of the people – who is in and who is out – is occasionally put in question. But in the arena of national struggles, this question is endemic and highly inflammatory. There, the attitude of

constitutional theory towards the invocation of the people should be straightforward. Constitutional theory should refuse to theorize nationalist invocations of 'the people' or even the 'democratic' or 'social' invocation of 'the people' in a multinational setting, in a register of constituent power. The reason for this is not, however, an alleged conceptual distance between constituent power and nationalism and the somehow inherent affinity of constituent power with the projects of democratic and social emancipation that, vis-à-vis nationalism, feature a 'universalist tendency'.[9] Rather, the reason for it, apart from its highly inflammatory role in nationalist conflicts, lies in constitutional theory's incapacity to arbitrate between competing, *differently concretized,* universalistic aspirations (for that is what nationalist projects are) to govern in the name of the people.

In the next section of the paper I further complicate this picture by adding an orthogonal dimension to the understanding of constituent power's three arenas of struggle. This dimension is the location of its invocation in the global distribution of political power. It matters both for the credibility of the concept as well as for its capacity to catalyse meaningful change whether 'the people' is invoked in the core or in the periphery of the international political order.

Inspired by James Tully's account of public philosophy, in the final part of the paper I further defend the call for a contextual approach to constituent power by situating it among existing theoretical approaches to the subject. The first approach has been to abandon constituent power in favour of another, purportedly more attractive ideal, such as the rule of law. The second has been to recast constituent power by either replacing the subject of constituent power, 'the people', with a differently conjured collective political subject, or, by de-subjectivizing the idea of the constituent power of the people, treating it not as a description of a collective subject (people) and its most important attribute (constituent power), but rather as a vocabulary performing a certain function in the formation of constitutional orders.

My proposal rejects an attempt to simply abandon constituent power *tout court*, but in so doing likewise does not accept indiscriminate re-conceptualizations of its bearer, or the explanation of its function without further caveats. Part of a theorist's job, of course, is to conceptually innovate or offer meta-doctrinal functional explanations of perplexing concepts. But as it travels from one context to another as constitutional medicine for different societies' most serious ailments, the 'constituent

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[9] UK Preuss, 'The Exercise of Constituent Power in Central and Eastern Europe' in Loughlin and Walker, *The Paradox of Constitutionalism* (n 7) 211, 227.

power of the people' should do so with an affixed declaration of potential side effects and contraindications.

II. Contextualizing *pouvoir constituant*: Sieyès and three arenas of political struggle

Contemporary debates about constituent power of the people have assumed, but have so far failed to (clearly) analytically distinguish, three arenas of political struggle – democratic, social and national – in which this concept enjoys eminence. While some theorists, such as Carl Schmitt, managed to marry the idea of constituent power of the people with the justification for a sovereign dictatorship,[10] most contemporary constitutional theorists have focused on democratic insurrections as the true home for the exercise of constituent power. Thus understood, the concept of *pouvoir constituant* justifies uprisings and the overthrow of unresponsive, corrupt, despotic political regimes. In its 'ultra-democratic' and 'near ritualistic' incarnation, it also requests the convocation of constituent assemblies, and ratification of a new constitution by means of a referendum.[11]

None of this necessarily implies a particular type of socio-economic transformation. Some authors argue that the radical democratic understanding of constituent power is implicated in creating a constitution that 'tends to incorporate many of the revolution's *social* promises'.[12] In this view, the people are the downtrodden, the poor and the miserable. For others, the *telos* of constituent power in the French Revolution cannot be associated with any particular social programme. Rather, its main purpose was to shatter politically unresponsive and unrepresentative legal structures of the *Ancien Régime,* which entrenched special privileges at the expense of the vast majority of the population. While nominally open-ended, the exercise of constituent power has been justified, according to its purpose in establishing a politically egalitarian, rights-based, in effect, *liberal-*democratic constitutional regime.[13]

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[10] C Schmitt, *Constitutional Theory*, trans. by J Seitzer, (Duke University Press, Durham, NC, 2007) 267, '[a] dictatorship in particular is possible only on a democratic foundation'.

[11] K Lowenstein, 'Constitutions and Constitutional Law in the East and in the West' (1969) 30 *The Indian Journal of Political Science* 203, 214.

[12] UK Preuss, 'Constitutional Powermaking for the New Polity: Some Deliberations on the Relations between Constituent Power and the Constitution' (1992) 14 *Cardozo Law Review* 639, 641.

[13] C Thornhill, 'Contemporary Constitutionalism and the Dialectic of Constituent Power' (2012) 1 *Global Constitutionalism* 369. Thornhill's account of constituent power is not, admittedly, explicitly liberal-democratic, but his re-articulation of the *telos* of constituent power does not leave much room to interpret it otherwise.

But in the vocabulary of constituent power, the democratic and the social arenas of political struggle have from the outset been joined at the hip. Sieyès's '*What is the Third Estate?* was not only a call for the abolition of privileges and the establishment of the democratic order, but also part of the 'rhetoric of social revolution'.[14] For William Sewell, this rhetoric 'harnessed private social grievances and resentments to public political issues; and … called into question the basic architecture of the Old Regime's social order'.[15] In his pamphlet, Sieyès 'linked a very specific and practical political program to the identification and denunciation of a class enemy'.[16] The *Ancien Regime* was a system where one-twentieth of the population leeched off the productive efforts of the rest of the population. The 'arduous work' in 'public services' and 'private activities' comes almost exclusively from the *Third Estate*. Excluding them – the productive ones – from political power would be a '*social* crime'.[17] In other words, the problem was not only that nobles and clergy were political oppressors, but also that they were social parasites and economic exploiters.

While Sieyès's constituent power clearly speaks to the democratic and the social arenas of political struggle, the salience of constituent power to the nationalist arena is not immediately discernible. In fact, when contemporary constitutional theorists invoke Sieyès, they do so mainly to celebrate his purportedly civic understanding of nationhood, where the nation exists as the 'body of associates living under a common law and represented by the same legislature'.[18] What logically follows from this definition is the circumscription of constituent power's sphere of applicability. As Martin Loughlin has recently suggested in his analysis of Sieyès, 'it is the government, not the nation, that is constituted'.[19] According to this line of thought, we can only speak about constituent power once we have settled the issue of the identity of the constitutional subject. If this is correct, national struggles, and nationalist struggles about territory in particular, should be divorced from the vocabulary of constituent power. By implication, to attribute constituent power to a civic nation defined by existing 'common law' is to dignify the spatio-political *status quo*, and exclude struggles over territory and power sharing between different

[14] WH Sewell, *A Rhetoric of Bourgeois Revolution: The Abbé Sieyès and* What is the Third Estate? (Duke University Press, Durham, NC, 1994) 54.

[15] Ibid.

[16] Ibid.

[17] EJ Sieyès, 'What is the Third Estate?' trans. by M Sonenscher in *Political Writings: Including the Debate between Sieyès and Tom Paine in 1791* (Hackett Publishing, Indianapolis, IN, 2003) 92, 95(emphasis mine).

[18] Ibid 97.

[19] M Loughlin, 'The Concept of Constituent Power' (2014) 13 *European Journal of Political Theory* 218, 220.

nations within a single polity – the bread and butter of nationalist conflict – from the purview of constitutional theory.

But Sieyès's pamphlet features another, radically different understanding of a nation, which complicates the picture above.[20] The nation here is not a *territorially and institutionally prefigured citizenry* but an assemblage of 'isolated individuals seeking to unite'.[21] 'This fact alone', Sieyès is clear, 'makes them a nation'.[22] The nation, to put it differently, is an amorphous and desirous assemblage of individuals who share nothing but the political impulse of wanting to live together. When these individuals begin to 'confer with one another and agree upon public needs' their union obtains power.[23]

The focus on the alternative account of nationhood by implication reveals an alternative account of constituent power: constituent power emerges among and for those who share the same political aspiration to live together and are able to discursively solidify a new national identity. Pre-existing institutions, obviously, go a long way towards helping generate constituent power, but are not necessary. The people (*nation*) endowed with constituent power is not (only) a 'body of associates', a civic body, but also, a group held together by affective bonds: an entity we today usually describe as an ethnic nation. This interpretation shows at a minimum that there is a tension between two understandings of the nation in Sieyès's overall argument about constituent power that enables it to be read both ways. While this still does not mean that constituent power ought to be invoked as the appropriate template for the context of a national struggle in constitutional theory, it does mean that such struggles cannot be divorced

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[20] Constitutional theory has by and large insisted on this 'body of associates' definition of the people. See for example, H Brunkhorst, *From Civic Friendship to a Global Legal Community* (The MIT Press, Cambridge, MA and London, 2005) 57. See also UK Preuss, *Constitutional Revolution: The Link between Constitutionalism and Progress* (Humanities Press, Atlantic Highlands, NJ, 1995) 6. More recently, these simplistic accounts of the nation have begun to be complicated. For a more nuanced account distinguishing 'substance' and 'form' of nationhood, see IR Wall, *Human Rights and Constituent Power: Without Model or Warranty* (Routledge, New York, 2012) 47. The difficulty with this account is that it does not acknowledge that accounts of 'substance' and 'form' can clash against each other, and can be in effect understood as juxtaposed, coequal, complete understandings of a nation. For another attempt to reconcile the pre-political and political account of Sieyèsian nationhood, see I Hont, 'The Permanent Crisis of a Divided Mankind: Contemporary Crisis of the Nation State in Historical Perspective' (1994) 42 *Political Studies* 166, 193.

[21] See (n 17) 134.

[22] Ibid. This 'seeking to unite', I hasten to add, should not be interpreted as evidence of the contractual nature of the Nation. Rather, arguing with Paul W Kahn, we should see it as an expression of political *eros*, 'that links us to the polity and to each other'. PW Kahn, *Putting Liberalism in Its Place* (Princeton University Press, Princeton, NJ, 2005) 287.

[23] See (n 17) 134.

from debates about constituent power by a simple definitional fiat that somehow claims to have discovered the *true* meaning of constituent power.

If this were true, then behind the unitary concept of constituent power there would be three arenas of political struggle – democratic, social and national – in which this concept is involved, both at the level of practice, as well as at that of theory. By isolating them analytically and then engaging them side by side in the sections that follow, my aim is not to deny the possibility of their factual overlap in actual political struggle, nor the attractiveness of the possibility that the projects of democratic, social and national emancipation may be productively theoretically conjoined. Rather, my next aim is to show how different arenas of struggle carry with them specific assumptions and risks, and as a result, rely on certain underexplored trade-offs that produce particular sets of winners and losers.

III. Constituent power in the arena of democratic struggles

Though Sieyèsian constituent power cannot be understood outside the social struggles on the part of the young French bourgeoisie for political primacy, the dominant understanding of popular constituent power, *today*, links it with extra-legal popular movements that seek to overthrow authoritarian, unresponsive political regimes. When citizens gather in the streets, when they paralyse the political and social life of a country, when parts of the state's coercive apparatus switch sides yet when civil war ultimately does not ensue, this is the ideal-type of the exercise of popular constituent power. The deposing of Ceausescu and Honecker in 1989, Milošević in 2000, Ben Ali and Mubarak in 2011: these are constituent power's proudest recent achievements.

But not just any overthrow of an unresponsive regime counts as the exercise of the people's constituent power. Built into the idea of constituent power is a threefold normative promise. First, the exercise of constituent power ought to be triggered by as many of those who will end up under a new constitutional order. What undermines the credibility of the invocation of the people in a process of constitution-making is if the process is triggered by a dictator's lieutenant, a military junta, or an external intervention. Second, once the process of constitution making has begun, it ought to be as inclusive and participatory as possible.[24] As Carl Friedrich famously said, '[t]o make the constitutional decision genuine it is also necessary that it be participated in by some of those who are being governed, as contrasted with those who do the governing. This differentiates such a constituent

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[24] A Kalyvas, 'The Basic Norm and Democracy in Hans Kelsen's Legal and Political Theory' (2005) 32 *Philosophy and Social Criticism* 573, 589.

act from a coup d'état.'[25] Finally, the imperative of inclusiveness does not exhaust itself in the triggering and the process alone. To be attributed the name of constituent power of the people, the *telos* of its exercise must be the creation of an inclusive regime of politically equal individuals.

But when these three normative promises selectively materialize in practice we have a problem with the vocabulary of people's constituent power. For instance, is it 'the people' that is exercising its constituent power when democratic political transformation is triggered by a small section of the population, with the helping hand of the army? Or, by the army claiming to be the 'armed people', itself? Justifying the army's role in the deposition of the Peruvian left-leaning regime of General Velasco in 1975, General Vargas Prieto exclaimed that 'the true forerunners of the Peruvian revolution are its armed forces, *the root and institutional essence of the people because they are born from them*'.[26]

Today, as well, we do not need to go beyond current events to see the significance of this question. Who were the people in Egypt in 2013? Those in Tahrir Square on 1 July 2013 demanding the ousting of democratically-elected president Morsi? Or those, at Rabaa al-Adawiya Mosque, on 14 August, 44 days later, demanding his reinstatement? When the three normative promises do not align, we have something that has not been theorized in constitutional theory, something escaping Friedrich's neat distinction between a constituent act and a coup d'état: a *rev-o-coup* or a *coup-o-lution*.[27] There is no way from within the vocabulary of constitutional power to answer the question what has been more legitimate, Sisi's 'coup-o-lution', which emerged through the army coup d'état, yet promised a new, inclusive round of constitution-making, or Morsi's electorally legitimate 'demokratura', that was apparently bent on curtailing the freedoms of citizens.

In response, one could say that the practical contestability of the identity of the people is actually not a problem for the theory of constituent power, but rather a condition for its correct understanding. For some theorists, such as Hans Lindahl, the mantle of peoplehood is always up for grabs, and constituent power can only be attributed ex post, to the *successful* political project, achieved in the name of the people.[28] A smaller problem

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[25] CJ Friedrich, *Constitutional Government and Democracy: Theory and Practice in Europe and America* (Ginn, Boston, MA, 1950) 128 quoted from Kalyvas (n 24) 590.

[26] P Virilio, *Speed and Politics: An Essay on Dromology* (Semiotexte, Los Angeles, CA, 2006) 120 (italics by Virilio).

[27] *Mada Masr*: Independent, Progressive Journalism, 'Excuse me sir, is it a coup?' at <http://madamasr.com/content/excuse-me-sir-it-coup>, 5 July 2013.

[28] H Lindahl, 'Acquiring a Community: The *Acquis* and the Institution of European Legal Order' (2003) 9 *European Law Journal* 441–2.

with this understanding of constituent power is that it might become the victim of its own success. If Lindahl's claim is taken seriously, we can imagine a situation in which political antagonists invoke the will of the people, only to be met with the confident knowledge on the part of the other side that such invocation is just another attempt to 'pull off' a radical political change. To work its magic, ironically, constituent power is best left 'in the dark'.[29]

But Lindahl's intervention, illuminating as it is, neglects that 'the people' is invoked not only *after*, but also during the democratic revolution, and during the period of protracted political upheaval. During this period, the invocation of 'the people', such as in Leipzig on 9 October, 1989, may be intended to have and indeed may end up having a palliative, *violence-minimizing* impact.[30] To assert the existence of the people, one people, is not only to broadcast with confidence to the security apparatus that *vox populi* is *vox dei*, and that resistance to its will is futile. It is also, as Leipzig civil society groups intended it, a call for the security apparatus to switch alliances, to side with the people, and bring a speedy, non-violent end to the uprising.

Equally, however, these putative palliative effects of the invocation of the people are often undermined in cases of the temporal or spatial proximity of the people's antagonistic invocation. To be plausible, the assertion of peoplehood relies not only on the 'activity' of those who present themselves in Tahrir Square in Egypt, or Maidan Square in Ukraine, but also on the 'passivity' of everybody else, which enables the attribution of the claim of peoplehood to all.[31] This passivity may be temporal in the sense that a significant period of time passes between two successful invocations of peoplehood. Or, it may be spatial in the sense that the claims of peoplehood will not be matched by the simultaneous 'presentation' of a *counter*-people devoted to the maintenance of the political status quo. Authoritarians, semi-authoritarians and dictators such as Milošević, Yanukovych and Assad know this well. As a result, part of their strategy for staying in power has always been to show that a credible claim to peoplehood cannot be made since there is another 'people' assembled, two squares away, supporting not the revolution, but their own regimes.

[29] A Somek, 'The Constituent Power in a Transnational Context', Wissenschaftszentrum Berlin für Sozialforschung, <www.wzb.eu/sites/default/files/u32/somek_constituent_power_in_a_transnational_context.pdf> 3.

[30] See (n 3 and n 4).

[31] H Lindahl, 'Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood' in Loughlin and Walker, *The Paradox of Constitutionalism* (n 7) 9, 18.

Constitutional theory deals with the problem of what I call spatio-temporal proximity of the people's antagonistic invocation in two ways. The first is well known. Carl Schmitt has posited the homogeneity of the population as a condition for the existence of constituent power in a democracy. Some have attributed Schmitt's embrace of homogeneity to his ethno-nationalist commitments. But if the preceding argument were correct, homogeneity should be better understood as a wager that the likelihood of the proximate antagonistic invocation of peoplehood is low. In other words, homogeneity is a stand-in for the requisite modicum of 'passivity', necessary for the invocation of peoplehood to make sense *during* the period of political upheaval.

Constitutional theory's second way of dealing with the problem of antagonistic proximate invocation of peoplehood is not so well illuminated, though it is present in the classical literature on the subject. As John Locke argued, there is 'slowness and aversion in the People to quit their old Constitutions'.[32] If the people are naturally docile, what justifies democratic revolutions is *not only* the objective quality of the regime's behaviour, and not only the normative quality of the constituent process, but also the fact of the population's justified exhaustion, the assumed depletion of people's capacity for political suffering. The concealed tropes of docility and exhaustion serve as constitutionalism's meta-guarantee that popular uprisings won't happen too often, that there won't be temporal proximity between opposing invocations of a finicky 'people'. Without this tacit wager, the proponents of constitutional power would not only have to accept that there is nothing problematic with spurious re-foundations of constitutional orders, but would also have a hard time associating frequent upheavals with the constituent power of the people.

In many cases of democratic upheaval we cannot rely on Schmitt's and Locke's postulates of homogeneity and docility to help us identify who legitimately speaks for the people during the period of political upheaval. Even nominally homogenous states can be radically polarized, their 'streets' and Schmittian 'horse tracks' populated with antagonistic groups claiming the mantle of peoplehood. Equally, only rarely can one credibly distinguish

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[32] J Locke, *Second Treatise of Government*, (Hackett Publishing, Indianapolis, IN, 1980) section 223, 113. The same assumption reverberates, for example, in the American *Declaration of Independence* (1776). Echoing Locke, the signatories maintained that 'mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed'. It is only after 'long train of abuses and usurpations' and only after 'patient sufferance' that they have undertook the revolution. For a similar rhetorical juxtaposition of 'patient sufferance' and justified exhaustion in contemporary Egypt see Khaled Fahmy, 'We did not risk our lives simply to change the players', CNN, 3 July 2013, <http://www.cnn.com/2013/07/03/opinion/egypt-morsy-khaled-fahmy/>.

between the *pose* of exhaustion and the true exhaustion of reasonable political alternatives to revolution. To attribute the honorific of 'the people' as shorthand for legitimacy judgment in such situations is futile at best, and inflammatory at worst.

If this were true, to keep insisting on the vocabulary of peoplehood – its sovereignty and constituent power – in the context of democratic revolutions is to rely on a tacit consequentialist calculus, and not on the logical necessity of understanding the constituent power of the people as a politically successful regime change that can only be deigned 'popular' in hindsight. To the contrary, what appears as an ontological explanation of the vocabulary of peoplehood aimed at fellow theorists is in effect a hidden judgment that the putative benefits of the people's invocation trump its potential hazards. To continue indiscriminately invoking the concept of the constituent power of the people in the context of democratic struggles implies the upholding of a globally valid trade-off: that the benefits from catalysing participation, political inclusion and the quick stabilization of the nascent political order[33] with its rhetorical potential to persuade the security apparatus to switch sides, on the one hand, are more significant than the perils of the increased solipsistic violent vehemence on the part of those who claim to fight in the people's name.

When asked about the nature of the popularly-backed military intervention against democratically elected president Morsi, one Egyptian journalist urged: '[d]escribe, don't label', '[r]efrain from the use of coup or revolution … because they're loaded terms and will explode in your face'.[34] Probably animated by similar concerns, Andrew Arato has recently warned that 'from the beginning the populist revolutionary imaginary of [the Egyptian political] transformation pointed toward the outcome whose unfolding we now witness, although it could have been avoided through constitutional learning'.[35] If Arato has a point, does this mean that constitutional theorists should abandon providing theoretical rationalizations for the grassroots' invocation of the will of the people? While Arato is probably right to counsel 'the central post-sovereign principles of consensus, public participation and self-limitation'[36] as stand-ins for the paradigm of constituent power in the process of post-conflict constitution-making, invoking 'the people' – its will, constituent power, and sovereignty – may in certain contexts have salutary political effects. The task of constitutional theory should not then be to counsel the wholesale rejection of the vocabulary of constituent

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[33] See (n 5) 379ff.

[34] See (n 27).

[35] A Arato and E Tombus, 'Learning from Success, Learning from Failure: South Africa, Hungary, Turkey and Egypt' (2013) 39 *Philosophy and Social Criticism* 427, 437.

[36] Ibid 438.

power in the contexts of democratic struggles, but rather to articulate those putative benefits and risks, highlight the possibility that their ratio – and, by implication, the advisability of invoking 'the people' – will in a given situation always be contingent.

IV. Constituent power in the arena of social struggles

Reconstituting constitutional orders in the name of the people is often associated with the redistribution of wealth and social egalitarianism. The *populus*, the putative bearer of constituent power, is traditionally seen not only as the body of citizens, but also the *plebs*, the lower stratum, those oppressed and dispossessed.

In Sieyès's classical account of constituent power the two registers of political struggle overlapped: the Nation, the Third Estate, demanded democracy and political equality, as well as the overthrow of a parasitical and inefficient socio-economic system. In contemporary political practice, however, the relationship between the democratic overthrow and the direction of radical social change is contingent. The '99%' (echoing Sieyès's 19/20ths) in the Occupy Wall Street movement have not mobilized – not en masse, and not loudly at least – around a radical political programme to overthrow the extant political system of the United States on the grounds that it is undemocratic. Conversely, some have claimed that popular insurrections in Tunisia and Egypt, while aiming to change the political regime, had no ambition to change the foundations of the existing capitalist economic model. If anything, according to Hernando de Soto, what animated the protesters in these two contexts was a desire for legal certainty, and the protection of their nominally guaranteed, but in reality disrespected property rights.[37] Departing from capitalism, or ushering in a more equitable distribution of wealth in the name of the people, has not been on the aspirational horizon of these revolutions. Likewise, the early 1990s *return* to capitalism, the cheerful re-embrace of social inequality where the state- or socially-owned property ended up restituted to the descendants of the Austro-Hungarian nobility, has actually been inextricably linked with popular revolutions in the former communist countries in Eastern Europe. Democratic social transformation in the name of 'the people' can cut both ways.

Irrespective of the factual contingency of the relationship between democratic change and the content of social change, recent work in

[37] H de Soto, 'The Free Market Secret of the Arab Revolutions', *Financial Times*, 8 November 2012.

constitutional theory has not abandoned the project of linking democratic emancipation with social egalitarianism. Linking them, however, has been achieved either at the price of 'weakening' constitutionalism, or that of abandoning the very collective agency of 'the people'. In the first case, democratic and social emancipation are linked implicitly; in the second, explicitly.

In the first case, where the link between democratic and social emancipation is implicit, the hoped for social change results from an expansive understanding of constituent power, unconstrained by prior substantive or procedural constitutional guarantees. Joel Colón-Riós' 'weak' constitutionalism, for instance, downplays the importance of constitutional form, and demands that the citizens be allowed to propose, deliberate, and decide on a new constitution unconstrained by the strictures of the existing constitution.[38] This means that constituent power can, if it so decides, abolish private property, expropriate the rich and institute a far-reaching system of economic redistribution.

Colón-Riós' explicit argument does not go that far. While he mentions in passing that liberal-democratic constitutional rights carry the baggage of 'mainstream acquisitive capitalism',[39] he does not associate 'the people' with the socially deprived 'populus' (the 99%, for example) nor is his constituent power explicitly deployed in the service of a radical, left-wing project. The examples he uses to substantiate the desirable operation of constituent power, however, come from Venezuela, Colombia and Ecuador – all countries where constitutional change in the name of people's constituent power has led not only to an increase in popular political participation, but also to an increase in social equality.

The implicit bet that inclusion and participation will yield greater social equality has paid off in Latin America. But the result of the openness of the constitutional process without prefiguring the idea of the people to include the promise of social equality can, in theory and in practice, yield constitutional settlements that undermine the ideal of sociopolitical equality. Colón-Riós' recent contribution to the debate should be credited for being willing to bite that bullet. Instead of explicitly defending a *left-wing constitutional project*, he follows Sheldon Wolin and Cornelius Castoriadis in their understanding of democracy, which embraces the inherent riskiness and the radical political openness it requires. For Wolin, democracy is not a mode of government, but a risky, episodic moment of popular participation that cannot be contained, ever destined to challenge established constitutional

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[38] JI Colón-Riós, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power* (Routledge, London, 2012).

[39] Ibid 27.

forms.[40] Equally, for Castoriadis, democracy means that the people can do anything, which establishes it as a regime of 'historical risk', and potentially 'a tragic regime'.[41] And indeed, while constituent power seems to have served the cause of social justice in Latin America, in Europe, in Croatia, the constitutional referendum based on popular initiative resulted in a triumph of a right wing political movement that has managed to constitutionally ban gay marriage,[42] and would have most likely succeeded in reducing the right of the minority Serb population to use its language in public had pressure from the European Union not succeeded in persuading the leading centre-right party, the Croatian Democratic Union, to abandon support for this project.

The simplest way to escape implicating constituent power with 'risk' and the potential constitutional 'tragedy' of political oppression is to associate it explicitly with a specific project of social change. In his recent work on constituent power in the context of the Greek mass demonstrations in 2011 in Syntagma Square, Costas Douzinas does exactly that. In doing so, however, he severs the link between 'the people' and constituent power.[43] 'Constituent power' is not the master attribute of the unitary, sovereign people, but rather the cause of a 'sovereign people's' rightful downfall.[44] Disobedience in the city squares, controversies over immigration and ethnicity, all demolish the fiction of the people's corporate existence, and its role in legitimizing an extant constitutional order.

Instead of the debunked fiction of 'the people', Douzinas proposes a conceptual innovation, a differently imagined 'we' that steers clear of both the unitary people, as well as from the formless multitude, à la Hardt and Negri. The new collective agent, 'demos in the square', as Douzinas calls it, captures the new-old phenomenon 'where multiple singularities lived in

[40] Ibid 50.

[41] Ibid 59.

[42] An interesting twist in the Croatian case was the '*Upozorenje*' [Warning] issued by the Croatian Constitutional Court who rejected the interpretation of the Croatian Sabor's [Parliament] standing Committee on Constitution, Parliamentary Procedure and Political System which interpreted a potential 'yes' vote in the referendum as *triggering the process* of constitutional amendment, with the final decision allegedly resting in the Sabor. In contrast, the Court stated that the 'Constitution is changed on the day the referendum was held, with an immediate legal effect.' (6.1.) But, the support for the outcome preferred by the radical-democratic constitutionalists was in fact justified by a structural reading of the constitution where 'every particular constitutional provision must be interpreted in accordance with the highest values of the constitutional order which are the foundation for the interpretation of the Constitution itself'. (5.1.) Thus, robust radical democracy in Croatia was justified by a robust understanding of constitutionalism (on file with the author).

[43] C Douzinas, *Philosophy and Resistance in the Crisis: Greece and the Future of Europe* (Polity, London, 2013) 105.

[44] Ibid.

common, discussed, decided and acted together'. While Douzinas' theoretical intervention gives it a name, 'demos in the square', those assembled in the square have themselves refused to disclose their political identity as a unified agent, opting throughout the demonstrations to remain a simple, all-inclusive 'we'.

In underscoring inclusion, Douzinas' 'demos in the square' is no different from Kalyvas' or Colón-Riós' highly inclusive, highly participatory 'people'. However, the Syntagma Square's 'we' is better suited for the imaginative inclusion of the marginal – the poor, minorities and immigrants.[45] Whether this is true is an empirical question, but the crucial difference between the two concepts is absence of the claim to ultimate political authority, on behalf of the 'demos'. The resolutions of those in the square bind no one: while present in the square, the 'we' is representative of Greece's population, but they are not its representatives.

If that were the case, it is fair then to ask what is the utility of Douzinas' conceptual innovation in the context of social struggles? Douzinas' demos does not only fight theoretical battles, but as a conceptual innovation has a twofold strategic use. It serves as a *blueprint*, as well as a *catalyst* of actual constitutional change. In its first guise, 'demos in the square' encapsulates the principle of equality, which is both political as well as social. While with Kalyvas' or Colón-Riós' people we cannot know whether the constituent process will yield a socially equal society, with Douzinas' demos, as inspiration for the content of constitutional transformation, we know it must. 'Starting from direct democracy', Douzinas maintains, 'equality is transferred to social and economic rights creating a duty to set aside inegalitarian structures'.[46] Mirroring the example of how demos in the square operated during the insurrection, the new constitution should entrench 'co-operation and solidarity, sharing of knowledge and skills, discussing in public and deciding in common [as] the guiding principles'.[47] From an institutional point of view, a new constitution will entrench 'the principle of occupations' where 'the commons become the central concept of the organization of society and the constitution'.[48]

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[45] Another reason to abandon it in favour of a speaking, debating multitude is to undercut liberal qualms about mass politics. In constitutional theory, masses feature prominently in Schmitt's vision as inarticulate constituent power capable only of sounding binary signs – yes or no – in the 'race track', 'streets' or 'theatre'. For Douzinas, in contrast, in demos in the square, 'the crowd became a speaking multitude' ibid 163. As such, Douzinas simultaneously rejects the charge of demos being a mob – *mobile vulgus* – fickle commoners, but also wrests away the epistemic authority of the rulers, because, as he maintains, 'for the first time, the ruled have the same knowledge and skills as their rulers'. Ibid 168.

[46] Ibid 171.

[47] Ibid 194.

[48] Ibid 178.

But in his sketch of radical changes, Douzinas is less interested in the mechanics of the constituent process, and more in the strategic role of the demos in the square. Demos is not only a blueprint, an exemplar of the values that ought to be entrenched in the new constitution, but also the catalyst, the generator, and echo chamber of the political process leading to social transformation, that does not abandon the parliamentary route. That change comes as the result of a 'dual track strategy' where 'social mobilization [in the square] and parliamentary presence' of parties such as Syriza[49] 'act in parallel and coordinated ways'. As a result, it is not at all inconceivable that radical constitutional change may come about through an ordinary amendment process, should a progressive political party capture enough votes in the parliament. The 'dual track strategy', in turn, must be read against the backdrop of a wider strategic assessment that '[d]espite the hopes of Left internationalism and liberal cosmopolitanism, effective politics still takes place at home' and that '[t]he resistances reminded us that radical politics, faced with a hostile international environment, can win victories only in its own polis'.[50]

Embedding the discourse of constituent power in a conversation about strategy to achieve radical social and constitutional change raises the broader question of the role of political strategy in the field of constitutional theory. At this point, it would probably be hasty to claim that Douzinas' work suggests that there must be a logical link between the abandonment of constitutional foundationalism (i.e. *pouvoir constituée* having constitutional authority because of what the *constituant* did before) and increasing attention to matters of political strategy in the sense that the former must be traded against the latter, as we craft alternatives to the 'sovereign people'. But once unpacked, his intervention must remind constitutional theorists that conceptual innovation, or lack thereof, is less about distilling the true meaning of constituent power than about responding to the perception of the wider opportunity structure for radical change, in light of the overarching, tacit or explicit, political ideal. Constitutional theorists who privilege social struggles should be invited to explicate more fully their understanding of this opportunity structure, but cannot be criticized for their particular understanding of it. Equally, they cannot be criticized for their self-aware acceptance of potential 'tragedies' and 'historic risks' when they celebrate a radical democratic understanding of the constituent power of the people. However, they should be prodded to contemplate and to construct an alternative constitutional imaginary that minimizes these risks and increases the chances for enduring social emancipation.

[49] Ibid 192.
[50] Ibid 157.

Doing so, however, requires keen attention not only to the difficulties associated with invoking the idea of the constituent power of the people, but also to something thus far shunned by those who theorize constituent power with social struggles in mind. It would require the reorientation of constitutional theory away from celebrating constituent power (popular or not) as a repository of emancipatory potential, and instead toward developing more specific blueprints for a constitutional order for *the day after* – together with institutional mechanisms and programmes for the maintenance of popular enthusiasm, critical for the long-term survival of such a socially emancipatory project.

V. Constituent power in the arena of national struggles

It is the ideal of inclusion – expanding the circle of those who share political power or economic wealth – that unites struggles for democratic and social emancipation, despite their differences. Struggles for national emancipation, by contrast, redraw and most often contract that circle. When the people is invoked as part of a nationalist ideal the point is not inclusion, but rather self-exclusion from the larger polity and often, other-exclusion from nationalists' own, exclusionary project. The point of invoking constituent power of, say, 'the people of Scotland', was to deny the inclusion of the rest of the British people in how Scotland is governed.

Some may argue that this tension between the registers is false, that exclusionary nationalism is in opposition to a true understanding of constituent power. Using state-building in Eastern Europe as a foil, Preuss has argued that ethnic groups cannot be carriers of constituent power, because as a pre-political subject, they do not reflect a 'universalist tendency'.[51] This alleged universalist inclusionary tendency is what helps to explain the reluctance of constitutional theory to problematize the inherited territorial container of an independent state. Constituent power, according to (one reading of) Sieyès, Schmitt, and most recently Loughlin, presupposes the existing territorial state[52] that prefigures a united collective agent, the people. The givenness of that frame, we might further induce, is what prevents the claim of *inclusion* (social and democratic) from being countered by claims of national, spatial, *reconfiguration*.

As a result, we may reject the idea of constituent power in the context of a nationalist struggle that seeks to upset the existing territorial frame.

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[51] See (n 9) 227.
[52] Loughlin for example writes about constituent power in the context of a right 'to make and re-make the *institutional arrangements* through which they are governed' (emphasis mine). See (n 19) 219.

In doing so, we would find traditional theoretical support for that move in the work of a number of modern and contemporary constitutional theorists. But the tensions identified in Sieyès's contradictory account of the nation, mentioned in section I, show that the desire to be united in a nation cannot be expunged from the thinking about constituent power. As a logically preceding question, it will continue to haunt the invocation of the constituent power of 'the people of' a particular territorial polity.

Before abandoning constituent power in the context of national struggles, there are two, partially successful ways to theoretically reconcile nationalist aspirations and the idea of constituent power. The first is advocated by Stephen Tierney in the context the potential independence of Scotland from the United Kingdom. Tierney transforms the idea of a unitary people as the bearer of a constituent power. He argues that the constitutional experiences of Scotland (but also of Quebec and Catalonia) which feature territorially concentrated, potentially self-governing societies, invite us to pluralize the concept of constituent power of the people. Tierney argues that these polities perceive themselves not as minorities composing the united people of the whole state, but rather as distinct polities, 'forward-looking territorial demoi', each possessing constituent power. But conjuring 'the people' of Scotland as the bearer of constituent power, for example, only makes sense because the territory of Scotland is not only 'a recognized political and territorial entity' within the UK, but also because 'its territorial extent is not disputed'.[53]

On the other hand, while the legitimacy of the Catalan territory is not questioned, the spatial reach of 'the people' which should determine its destiny is questioned: should it be the Catalans only, or the entire people of Spain, the bearer of constituent power as stipulated in Article 2 of the Spanish constitution. Finally, in Canada, the talk of 'the people' is potentially even more inflaming. The James Bay Crees have visibly rejected the claims of the existence of 'the people' of Quebec, with its putative right to unilaterally change the political status of Quebec, and keep its territory intact.[54]

The Canadian case is demonstrative of a wider phenomenon, politically salient in the former Yugoslavia in the 1990s, and in Syria and Ukraine, today, where the contours of territorial fragmentation are not neat, but where ever smaller 'peoples' iterate their demands for the redrawing of boundaries in the name of ethno-nationalism, or differently conjured affective

[53] Scottish Executive, *Choosing Scotland's Future: A National Conversation*, para 3.5 at 20 <http://www.scotland.gov.uk/Resource/Doc/194791/0052321.pdf> accessed 23 February 2014.
[54] Grand Council of the Crees, 'Sovereign Injustice: Summary of Double Standards, Inconsistencies and Discrimination by Separatists' <http://www.gcc.ca/archive/article.php?id=137> accessed 11 February 2014.

solidarity. Those who screen out this phenomenon from the canvas of 'constituent power' may do so as a matter of definitional fiat, but will, in the process, neglect the fact that the principle that emerges from demands for such territorial reconfiguration ironically leads us back to Sieyès, and his first desire-based account of the nation. 'Isolated individuals seeking to unite', of course, is not an endorsement for ethno-nationalism, but it may legitimately be read as an endorsement of a principle that a political desire to live together in a polity, unconstrained by political context, should be accommodated to the highest degree possible. To put it differently: the hidden principle in the successful iterations of constituent powers on the part of ever-smaller 'peoples' is a tacit principle of boundary-drawing. The ideal that the more people live in political communities with consocates with whom, and in a polity with which, they may identify the better. While this process does not lead to everyone living in a political community of their first choice, such a process would lead asymptotically to the ideal of unanimous creation of a nation, implicit in Sieyès argument.

Another practical way in which constitutional law may attempt to overcome the threat of fragmentation is not to multiply the number of unitary demoi within a multinational state such as in the UK, Canada or Spain but rather to change the character of the single unitary demos in such polities. The vocabulary of the Bolivian and Ecuadorian constitutions, for example, speaks of the 'plurinational people' of Bolivia and Ecuador.[55] In this way, national plurality is recognized and accommodated while the territorial container of the state is not put in question. As a conceptual innovation, this gestures towards accommodating desires towards autonomy, but it does not (and cannot) provide a 'correct' conceptual and normative answer as to why this 'people', plurinational or not, would exist in the first place.

In Bolivia, the Lindahlian 'pulling off' of the 'plurinational people' ultimately 'worked', but at the price of bringing the country dangerously close to the brink of civil war.[56] The push for a nationwide popular constitutional referendum in 2008 by Evo Morales and his *Movement for Socialism-Political Instrument for the Sovereignty of the Peoples* was countered by demands for a popular counter-referendum at a smaller scale, in the hydrocarbon rich region of Santa Cruz, the stronghold of the conservative autonomist movement. The counter-referendum yielded a majority in favour of a de facto secession of that region from Bolivia, and has brought the nationwide constitutional process to a standstill.

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[55] L Lixinski, 'Constitutionalism and the Other: Multiculturalism and Indigeneity in Selected Latin American Countries' (2010) *Anuario Iberoamericano de Justicia Constitucional* 235.

[56] D Landau, 'Constitution Making Gone Wrong' (2013) 64 *Alabama Law Review* 923, 957.

Only the subsequent negotiations between Morales and the autonomist provincial governors alleviated the threat of civil war, and have enabled the constitution-making process to proceed, culminating in a national constitution approved in a referendum in the autumn of 2008.[57] The constituent power of the plurinational people of Bolivia ushered in a socially progressive constitution, but at a high risk of protracted political violence.

In 2014, in Bosnia and Herzegovina, socially-inspired uprisings in the Bosniak-dominated cities of Tuzla, Sarajevo and Bihać failed to take hold in the Bosnian-Serb dominated Republika Srpska, and the Croatian-majority cantons of Bosnia and Herzegovina. The protesters' 'Manifesto for a New Bosnia and Herzegovina' conjoined demands for expropriating corrupt politicians and greater social justice, with the constitutional demand to abolish the constitutional power-sharing arrangements blamed for Bosnia's rampant public spending. While some commentators hoped they were the beginnings of a pan-'Bosnian spring',[58] the people's invocation in the protesters' agenda failed to capture the imagination of Bosnian Serbs and Croats who were deeply suspicious of the protesters' organizations' desire to speak in the name of 'our people' – Sieyèsian constitutionally pre-defined 'citizens of Bosnia and Herzegovina'.[59]

Both the Bolivian and Bosnian examples show the difficulties of invoking the will of the people at the intersection of social and national struggles. In Bolivia, the invocation of the inclusive, socially emancipatory people of Bolivia failed to prevent the invocation of a smaller-scale, conservative, 'counter-people' of Santa Cruz and nearly led to a civil war. Bosnia had its civil war, and its subsequent constitutional order entrenched an awkward power-sharing arrangement between its three, (for the most part) territorially-concentrated 'constituent peoples'. An attempt to upset this bargain from within the register of social struggle failed to take hold because it failed to speak to the ongoing national commitments on the part of large segments of the Bosnian population. Finally, the upheaval in Ukraine reveals similar dangers involved in the invocation of 'the people' at the intersection of the 'democratic' and 'national' arenas of political struggle. Responding to popular pressure on the streets of Kiev, the *Verkhovna Rada* deposed president Yanukovych, and reinstated the 2004 Ukrainian constitution. It was not long before the shape of a

[57] K Eaton, 'Conservative Autonomy Movements: Territorial Dimensions of Ideological Conflict in Bolivia and Ecuador' (2011) 43 *Comparative Politics* 291, 297.

[58] M Sadović, 'Could Sarajevo Protests Herald "Bosnian Spring"?', *IWPR* <http://iwpr.net/report-news/could-sarajevo-protests-herald-bosnian-spring> accessed 23 February 2014.

[59] 'Manifest "Nova Bosna i Hercegovina": Pročitajte zahtjeve grupe Udar I Revolt', *Index* <http://www.index.hr/vijesti/clanak/manifest-nova-bosna-i-hercegovina-procitajte-zahtjeve-grupe-udar-i-revolt/726493.aspx> accessed 28 May 2014.

counter-constituent power began to emerge. Responding to the developments in Kyiv, pro-Russian forces in the Eastern Ukraine, supported by Moscow, swiftly declared the independence of Crimea (in the name of its 'people'), and have continued to struggle for *their* 'popular' self-determination in the territorial *provisorium* of Donetsk People's Republic.[60]

These quick sketches should not be interpreted as my rejection of attempts that try either to achieve social emancipation in a multinational setting, or try to conjoin social and national registers of political struggle. They do show, however, that pursuing such a project under the aegis of 'the people' leads either to a highly-elevated risk of protracted political bloodshed, or simple failure of the social agenda to take hold. Constitutional theory in such contexts should distance itself from the vocabulary of peoplehood and constituent power and instead highlight the hard work of political negotiations and strategizing that is necessary to achieve a common platform between the goals of democratic, social and national emancipation.

VI. Location, location, location: Invoking the people in the core, and in the periphery

So far I have argued that constituent power of the people is deployed in three analytically separate arenas of political struggle: democratic, social and national. However, the picture has to be complicated further. These struggles 'look' different, depending or whether they are conducted at the 'core' or 'periphery' of the international political order. Portraying the people of Scotland unlike the 'people of Crimea' as an agent vested with constituent power, for example, makes sense not only because the identity of this 'people' is not questioned neither from within Scotland, nor the wider United Kingdom, but also because other, external actors will not intervene to shape the constitutional choices of this particular people. In other cases of state-formation at the periphery of international legal order, such as Iraq or Yugoslavia, external actors have been more decisively involved, first in nominating both the territorial scope of the polity, as well as in shaping the nascent order's institutional options. Such external interference is most discernible in situations of escalated ethnic conflict where it is conducted in plain sight, often under the banner of 'humanitarian interventions', 'international territorial administrations' or 'jus post-bellum'.

The blatant constituent involvement of external actors is occasionally registered by commentators from within other disciplines. International

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60 '"Donetsk People's Republic" leadership declares independence, seeks accession to Russia', *Kyiv Post*, available at <http://www.kyivpost.com/content/ukraine/donetsk-peoples-republic-leadership-declares-independence-seeks-accession-to-russia-2-347490.html> accessed 28 May 2014.

legal scholar Nehal Bhuta has, for example, claimed that '[t]he real constituent power behind the creation of the new Iraqi political system – and the sole arbiter of exceptions to it – was the United States'.[61] Even outside of contexts which feature violent external constitutional imposition, external powers present themselves as constituent. The imposition of harsh financial conditions by the 'troika', led Douzinas, for example, to call it 'the ultimate lawmaker'[62] and 'the bearer of (economic) sovereignty' in Greece.[63]

In the next section I discuss whether such realistic re-articulations of constituent power are apposite, but these lateral remarks show, whether or not they were intended seriously, that the rhetorical persuasiveness of the concept changes depending on *where* in the global power grid it is invoked. For instance, one could more easily imagine a *successful* outcome of a social revolution in the name of 'the people' within the command centre of global capitalism, the United States, than at its periphery – Greece, Italy, or Portugal. Equally, one can more easily imagine a successful democratic revolution if there were external political support readily available to stabilize the nascent political regime, or if external actors were less prone to interfere and to support an authoritarian incumbent.

I hasten to add that the presence of an external constituent power, though inescapable in certain coordinates, ought not to be understood as an ontological condition of people-formation. We *can* imagine an act of self-constitution à la Sieyès, where symmetrical desires culminate in a new polity, *without* external constituent powers. Such an isolated, small political community can constitute itself without external involvement. Equally, we can imagine a political community, because it is short-lived, for example, as escaping external constitutive involvement. Finally, a voluntary a-territorial political community can, in principle, escape the problems of over-inclusion that often lead the external actors to step in and arbitrate its internal setup.

But if constitutional theory concerns itself with present-day, territorial political communities, if it is concerned with the phenomena that bring about their profound reconstitution such as external military interventions, economic impositions, prolonged constitutional presence in the form of 'international territorial administrations', then the possibility of external powers acting as (co-)constituent powers cannot, at least *prima facie*, be disregarded. This likewise applies to situations where external actors decide not to intervene in the formation of a nascent constitutional order. Given the power differentials between great powers and the often-weaker

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[61] N Bhuta, 'Antinomies of Transformative Occupation' (2005) 16 *European Journal of International Law* 721, 737.

[62] See (n 41) 46.

[63] Ibid 48.

polities in the process of reconstitution, the omission of intervention on behalf of such powers should be seen as a form of constituent commission.

The geographical context of constituent power's invocation in the context of international power disparities raises a question that has lurked behind this article's analysis of constituent power's invocation in other contexts. If constituent power serves different functions at different latitudes, if its rhetoric makes more sense in one place and less in another, and if its invocation creates a different set of benefits and risks depending on the context, how should constitutional theory respond to this challenge?

VII. Pragmatics of conceptual adaptation: reject, reframe, contextualize

Constitutional theory's approach to the question of constituent power will, in part, depend on how constitutional theorists understand their field's role. For example, Stephen Tierney has argued that constitutional theory should not stray too much from the inherited social imaginary of ordinary people.[64] In other words, if the people of a certain locality invoke the 'will of the people' as the horizon for their political self-understanding, a theorist should embrace that, and seek to articulate a vision of constituent power that fits that context. According to this view, conceptual adaptations in constitutional theory should continue to closely orbit around the gravity centre of the modern social imaginary, which gives pride of place to the idea of people's sovereignty.[65] On the other hand, constitutional theorists may be more relaxed about the relationship between theory and grassroots' political self-understanding. In that case, the margin for innovation is wider: constituent power may be abandoned altogether, or be divorced from the people. As part of this approach the people may be given a different name ('demos in the square'), or assigned a different role from the one habitually expected among the general population ('the people' as the result of a clash of constituent powers). Finally, theorists may implicitly or explicitly refuse to confront how the concept of constituent power of the people operates in concrete arenas of political struggle, not because they believe that constitutional theory ought to have a larger margin for conceptual innovation, but because they see the nature of their intervention as primarily theoretical. The vocabulary of the constituent power of the people, on this account, is primarily a theoretical 'puzzle' to be solved, not a political tool to be recalibrated.

[64] S Tierney, 'Beyond the Ontological Question: Liberal Nationalism and the Task of Constitution-Building' (2008) 14 *European Law Journal* 128, 136.

[65] C Taylor, *Modern Social Imaginaries* (Duke University Press, Durham, NC, 2003).

In contrast to these theoretical attitudes, constitutional theorists may elect to view their task not only as that of a theoretical innovation, or the systematization of the extant political vocabulary but also as a critical practice of clarifying the moral ideals, strategic assumptions and prudential anxieties that inform both the existing grassroots uses of peoplehood, as well as the second-order theoretical articulations of those uses. Informed, and in part inspired, by James Tully's vision public philosophy as civic engagement, I propose such an approach to constitutional theory in this article.[66] In addition to conceptual clarification, this approach also seeks to intervene in grassroots struggles as a theoretically informed practice of political encouragement, discouragement and avenue opening. Its hope is to elucidate the anatomy of worries and hopes that animate the grassroots' invocation of peoplehood, and which inform existing theoretical positions, without itself making definitive judgments on the wholesale justifiability of the vocabulary of constituent power of the people.

While remaining respectful of the existing grassroots vocabulary, however, this approach does not shirk from announcing its own ethical commitments, prudential anxieties, or the risks it is willing to take in advancing this theoretical stance. While their contours have already emerged from the preceding discussion of the three arenas of struggle, they will ultimately be sharpened against the background of alternative approaches to the constituent power of the people, which either propose its wholesale rejection, or its wholesale reframing.

Rejecting constituent power

Advancing a twin attack on constituent power, David Dyzenhaus has so far established himself as its most vocal opponent. On the one hand, he has associated constituent power with 'mild anti-liberalism',[67] and has argued that the question of constituent power is irrelevant, from the perspective of liberal legal and political theory.[68] Framed in this way, a debate between the socialist, radical or nationalist proponents of constituent power and its liberal opponents would simply fail to materialize *ex hypothesi*. The concerns of the former may modestly overlap with that of the latter (all would welcome a responsive and accountable political order), but their projects are so radically opposed that differing accounts of constituent

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[66] J Tully, *Public Philosophy in a New Key: Democracy and Civic Freedom* (vol I) (Cambridge University Press, Cambridge, 2008).

[67] D Dyzenhaus, 'The Politics of the Question of Constituent Power' in M Loughlin and N Walker (eds), *Paradox of Constitutionalism* (Oxford University Press, Oxford, 2007) 129, 134.

[68] Ibid.

power are more of a symptom of the profundity of their disagreement than a point of contention that can be resolved, or at least productively engaged.

Fortunately, Dyzenhaus also advances a positive argument against constituent power: it is the ideal of the rule of law, and not constituent power, that lends a more capacious and attractive view of the authority of the constitutional order. For Dyzenhaus, 'what comes into view are principles of legality that condition the exercise of power, indeed, constitute power in such a way that it becomes authoritative'.[69] More specifically, the promise of the rule of law is that it 'signals to those subject to the law that they are promised the first condition of "stake" – the requirement that political decisions must be consistent with equal respect for all – and so invites challenges in public forums to official decisions that seem to undermine equal respect'.[70]

It seems that Dyzenhaus' critique of constituent power somewhat misses the mark, or rather that the target has itself moved, in light of current developments in radical democratic constitutional theory. Ironically, radical democratic constitutionalists would agree with Dyzenhaus that constituent power is not a source of constitutional authority. For Colón-Ríos, the order is legitimate if it remains fundamentally open to radical change. For Douzinas, it is legitimate if it entrenches the political practices that were manifest during the time in which constituent power displayed itself in 'the square'. For both, constituent power (with or without 'the people') is more of a placeholder for worthy practices than a source of legitimacy of the constitutional order.

A more important challenge for the liberal opponents of the constituent power of the people are the moral hazards that would arise if we were to abandon constituent power, together with its normative promises. Without constituent power of the people, the vocabulary of the rule of law may become a ruse that cloaks the exercise of hegemony externally, or internally. External powers can impose constitutional settlements, disregard the wishes of the concerned populations, suspend democratic decision-making, all in the name of the ideal of the rule of law, where those presently aggrieved would be invited to redeem their 'stake' in some unspecified future, and 'challenge in public forums [the] official decisions that seem to undermine equal respect'.[71] Internally, the government may justify the creepingly slow pace of social and political empowerment by pointing to the legitimacy of

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[69] D Dyzenhaus, 'Constitutionalism in an Old Key: Legality and Constituent Power' (2012) 1 *Global Constitutionalism*, 229, 260.

[70] Ibid 255.

[71] Ibid.

procedural and substantive hurdles that stand in the way of a more energetic pursuit of valuable social and political goals.

The concept of constituent power in its most radical iterations would seem to dignify the refusal to endure not only blatant injustice, as implicitly argued by Locke, but also the sum of provisional, perhaps medium-sized injustices that purportedly must be endured on the road towards a fully inclusive and fair liberal polity. If this is true, there is a deeper question involved in rejecting constituent power which does not revolve around the axis of liberalism/'mild anti-liberalism' as suggested by Dyzenhaus, but rather around the judgment of how much is too much to endure not in a dictatorial, or anti-democratic regime, but in the grey zone in the middle. Charles McIlwain's account of Thomas Paine, the famous American radical, captures this difference nicely. For McIlwain, Paine's rejection of judicial review is ultimately explicable not by his radicalism as such, but by the fact that 'like many idealists *in a hurry*, [Paine] was probably *impatient* of the *slowness* of legal remedies for existing abuses'.[72] It is the *quantum of patience*, not only political ideology that fundamentally differentiates between adherents of the rule of law and those of constituent power.

Had 'the people' always reconstituted its constitutional order according to the ideals of the rule of law, and only when *truly* exhausted from oppression, Dyzenhaus probably would not mind the vocabulary of constituent power of the people neither on prudential, nor theoretical grounds. Such insurgent 'people' could be seamlessly theoretically articulated (and dignified) as a politically oppressed community mobilized predominantly by the ideals of the rule of law. Dyzenhaus' charge that there is a 'politics' in the question of constituent power is, of course, right. But his demasking of the political project behind it is not only political itself (which he seems to acknowledge), but also relies on prudential anxieties, which are under-articulated and contextually undifferentiated.

Reframing constituent power: between re-subjectivizing and de-subjectivizing

Another approach to the tensions built into the idea of constituent power is to reframe it in one of two ways. On the one hand, theorists can decide that the name 'constituent power' applies to a different subject, and not 'the people'. Already in his *Constitutional Theory*, Schmitt noted that the bearers of constituent power change according to historical epoch. Though constituent power can be attributed to a

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[72] C McIlwain, *Constitutionalism: Ancient and Modern* (Cornell University Press, Ithaca, NY, 1947) (emphases mine).

king, or a 'minority organization' (Schmitt's code for Bolsheviks and Fascists), only in a democracy, says Schmitt, can constituent power belong to 'the people'.[73] Though radically opposed to Schmitt in his political commitments, Douzinas affirms, as we have seen, the contingent link between constituent power and 'the people'. For him, the commitment to radical democracy impels him to divorce constituent power from 'the people', and attribute it to a differently conjured political subject, 'demos in the square'.

Implicitly appreciating the contextual nature of 'the people's' invocation, other authors have engaged in the re-subjectivizing strategy as well. In the context of international politics and state-formation, Achilles Skordas has attributed constituent power to the groups vying for recognition within a nascent state, relegating 'the people' to the status of the final 'product' of such a process, not its trigger.[74] In a previous article thematizing state formation in the Balkans, I have suggested attributing constituent power to all relevant actors who participate in the formation of a political community, both from within and without.[75] Finally, perhaps the most celebrated example of the re-subjectivizing move comes from the work of Hardt and Negri who abandoned 'the people' as the bearer of constituent power, and instead attributed it to the multitude.

While different both in their political preoccupations and in the degree in which they make them visible, all re-subjectivizing interventions, explicitly or implicitly, privilege some and abandon other arenas of struggle where the voice and the image of 'the people' continues to be seen and heard. There are three possible reasons for that. First, the selective embrace of different political struggles may be the result of a foundational ethical commitment, which, for example, sees struggles for democratic and social inclusion as intrinsically good, and the struggle for national self-, and other-exclusion as intrinsically bad. Second, a re-subjectivizing strategy may be driven by a *retrospective* political and moral judgment. For example, Hart and Negri abandoned 'the people' not (only) because of Spinoza's somehow more theoretically attractive idea of the multitude, but because the vocabulary of 'the people' and its sovereignty has been endemically implicated in vicious nationalist excesses in the twentieth century, failing, at the same time, to serve as a reliable defensive barricade

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[73] See (n 10).

[74] A Skordas, 'Self-Determination of Peoples and Transnational Regimes: A Foundational Principle of Global Governance' in N Tsagourias (ed), *Transnational Constitutionalism: International and European Models* (Cambridge University Press, Cambridge, 2007) 207, 215.

[75] Z Oklopcic, 'Constitutional (Re)Vision: Sovereign Peoples, New Constituent Powers, and the Formation of Constitutional Orders in the Balkans' (2012) 19 *Constellations* 81.

against the steady global advance of capitalist economy.[76] Third, the re-subjectivizing theoretical move also relies on a *prospective* strategic judgment. We have already seen this with Douzinas: conjuring the 'demos in the square' relies on a strategic assessment of the ongoing salience of territorially circumscribed socio-economic struggles. For Hardt and Negri, in contrast, it is precisely the assessment of the ongoing futility of territorialized local resistance that leads them to propose the multitude as the bearer of constituent power.[77] Instead of tragically and ineffectually *holding their ground* either as 'the people' or 'demos in the square' the multitude should use the virtual and real *underground railways* constructed by global capitalism to undermine and corrode the logic of its operation through the strategy of 'desertion'.

Highlighting the politics of re-subjectivizing perforce has both political and theoretical implications for the alternative I propose in this article. I will return to this issue in the next section, but before I do I wish to address *de-subjectivizing*, the remaining theoretical move through which the debate about constituent power of the people has been reframed. Unlike re-subjectivizing, the de-subjectivizing move rejects theoretical innovations that construct a different collective political subject. Instead of innovations, the theoretical task of de-subjectivizing is to clarify the concept's true meaning. For Loughlin, for instance, '[p]ower … resides neither in "the people" nor in the constituted authorities; it exists in the relation established between constitutional imagination and governmental action'.[78] Equally, Lindahl has pointed that only retroactively are we able to say who has exercised constituent power: the Court, 'the people' or perhaps the army.[79] Finally, Thornhill has highlighted the concept's role in transforming the 'loosely correlated, half-privatistic, political system' into 'the concentrated, and increasingly monopolistic, edifice of the modern state',[80] critically contributing to a 'uniform and inclusive use of political power across all society'.[81]

Though their wider theoretical projects do not share a common denominator, all three do not do away with the concept of 'the people' or constituent power as such, but focus instead on describing its operation and role in the structure of public law. By implication, the intended

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[76] M Hardt and A Negri, *Empire* (Harvard University Press, Cambridge, MA, 2000) 134. M Hardt and A Negri, 'Globalization and Democracy' in A Negri *et al.*, *Reflections on Empire* (Polity Press, Cambridge, 2008) 91.

[77] Ibid 89.

[78] See (n 19) 231.

[79] See (n 28) 378.

[80] Ibid 383.

[81] Ibid.

audience for de-subjectivizing theoretical interventions are not those who directly participate in political struggles, but rather fellow academics who have been seduced by *words* and have taken the concept too literally, thus misunderstanding its true meaning and significance.

In contrast to Dyzenhaus' rejection or the re-subjectivizing moves of Douzinas and Hardt and Negri, the political implications of de-subjectivizing are less immediately visible. Excluding the possibility that the absence of explicit thematizing of the political implications of their theoretical moves is simply an unreflective omission, the first reason may be the putative foundational theoretical commitment of these theorists to bracket the consideration of how theory impacts the larger political world it thematizes. But in this case one could still wonder what signals does the de-subjectivizing strategy send to the grassroots who vie for emancipation in the name of 'the people'. Moreover, these signals seem to be mixed: keep acting as if 'the people' exists, but remain keenly aware of the ironies of the people's invocation, or the fact that your appropriation of the name of 'the people' is fulfilling functions that you may not much care about!

In contrast, the second reason for bracketing the question of the political impact of de-subjectivizing may be a tacit wager that the political impact of the reframing project is destined to be negligible anyhow. Implicated in a dense web of academic conversations within an increasingly specialized discipline, such a putative assumption behind the de-subjectivizing move is not groundless. While Rousseau's smiling face presided over the then contemporary illustration of the political imaginary of the French Revolution,[82] probably no contemporary constitutional theorist can reasonably expect such recognition of the political impact of her theoretical work in her lifetime.

Finally, a third reason for bracketing the political character of the de-subjectivizing move is itself political. Constitutional theorists who de-subjectivize constituent power may think that the implicit political purposes of de-subjectivizing are better served by insisting on the purely theoretical character of their theoretical interventions. *Publicized* self-awareness of the political implications of theoretical positions may corrode the intended political impact of the theoretical intervention. Sometimes, however, the political purpose will resurface as an aside, if only at the very end of the theoretical articulation of the true meaning of constituent power. For Loughlin, for example, aside from its correct understanding as a relational concept, constituent power of the people ultimately '*must not*

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[82] *An Allegory of the Revolution with a Portrait Medallion of Jean-Jacques Rousseau* by Nicolas Henri Jeaurat de Bertry, painted at the end of the Reign of Terror in 1794, also features on the front page of the Penguin Classics' edition of Rousseau's Social Contract (trans., by M Cranston) (Penguin, Harmondsworth, 1968).

disappear' because of its productive role in confronting what he identifies as 'the most pressing issue today': 'the struggle between two opposing classes: the nobility who rule and the people who desire not to be oppressed'.[83]

Contextualizing constituent power

By keeping an eye on the different struggles in which the vocabulary of peoplehood enjoys pride of place, the project of contextualizing constituent power hazarded in this article differs both from abandoning as well as from reframing constituent power in that it openly embraces the political implications of its own theoretical intervention. Instead of downplaying or bracketing the context-dependent political salience of the debates about constituent power, this approach hopes for an 'ongoing mutual relation with the concrete struggles, negotiations and implementations of citizens who experiment with modifying the practices of governance on the ground'.[84] Irrespectively of whether it ultimately reaches them, the contextual approach is 'addressed to the wider audience of citizens'.[85]

As I said earlier, the purpose of the contextual approach is not to offer a generally correct or true understanding of constituent power or 'the people', but rather to engage in the elucidation of the anatomy of this foundational concept. By clarifying the language of constituent power in the context of three arenas of struggle, this approach deliberately seeks to provoke those who struggle on the ground to meditate on whether 'inherited languages of description and reflection are adequate to the task'[86] of achieving desired political emancipation.

However, while this approach intervenes with a keen eye on the struggles on the ground, it is not committed to a 'certain primacy of practice' in the sense that it would feel compelled to firmly anchor its constructive proposals within the confines of the epoch's dominant social imaginary. Equally, by highlighting political *struggle* this approach to constituent power accepts agonism as ultimately inescapable, but not necessarily a desirable feature of constitutional politics. This approach, for example, does not preclude proposing a constitutional theory that speaks to a particular arena of struggle in such a way that would stylize

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[83] See (n 19) 234 (emphasis mine). For a similar, if a bit more elegiac de-subjectivizing account of *pouvoir constituant* as a placeholder for our increasingly unrealistic hopes of collective self-government see N Krisch, 'Pouvoir Constituant and Pouvoir Irritant in the Postnational Order' (28 April 2014) <http://ssrn.com/abstract=2430128>.

[84] See (n 66) 17.

[85] Ibid 37.

[86] Ibid 19.

our moral intuitions, doing so, in part, in relation to existing debates in normative theory.[87]

Equally, defending the road taken in this paper compels me to accept an implication that has not, in my mind, been sufficiently underscored in Tully's project: that a politically and rhetorically self-aware theoretical position which offers new 'conditional perspectives' and which openly questions the inherited language of constitutional power cannot but undermine the worth of that vocabulary for somebody, somewhere. Not only the lack of self-awareness, or a concealed self-awareness, but also a *publicized* self-awareness about the political implications and underpinnings of a theoretical project come at a price. The approach to constituent power inspired by Tully's public philosophy must be willing to pay that price in advance, and to gamble that it will not be too high.

In this article, the willingness to pay such an unidentified price has been informed by an assessment of the political, moral and prudential risks involved in the invocation of the people's will, sovereignty, or constituent power in three different arenas of struggle. There are contexts in which it occasionally makes sense to *continue* using the vocabulary of constituent power, such as in democratic struggles against corrupt or tyrannical regimes mostly in relatively homogenous states where the likelihood of civil war is relatively low. So, a qualified '*Yes*' to constituent power of the people in Venezuela, Greece and England. While the rhetorical impact of peoplehood in democratic struggles may vary from country to country, invoking it is still probably the best way to package a set of normative benefits and implicit rhetorical 'invitations' which have a comparatively better chance of contributing to the overthrow of an undemocratic regime, in contrast to the less emotively potent invocations of 'the rule of law' or, say, 'peace, order and good government'. On the other hand, constitutional theorists should decisively intervene against the invocation of 'the people' – any people – in the context of diverse but territorially concentrated polarized societies, most of which are multiethnic states. So, *'No'* to constituent power of 'the people' in Ukraine, Bosnia and Herzegovina or Syria.

While my intervention denied the mantle of peoplehood to national struggles, it did so without an *a priori* moral or conceptual privileging of the other two. The struggles for national emancipation in multinational settings could still be justified using a different constitutional vocabulary. The ethical implication of this refusal to privilege a particular arena of struggle *through a conceptual fiat* is that those whose projects were previously delegitimized can now be seen as *losers*, not as somehow

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[87] Z Oklopcic, 'Provincializing Constitutional Pluralism' (2014) 5(2) *Transnational Legal Theory* (forthcoming).

logically derived outcomes of 'correct' theoretical interpretation of constituent power of the people. And this might have salutary political effects. The ignored and denigrated may view attempts to define them away not as sneaky attempts to deny them voice through definitional fiat, but rather as conceptual responses to specific projects and specific anxieties. In turn, such clarification may enable them to speak back in a more compelling, self-aware way, and to incorporate the anxieties of their political and theoretical antagonists in the vocabulary of their own political struggle.

Finally, by mapping the use of constituent power along the three domains of political struggle we are invited to craft constitutional vocabularies that seek to minimize inescapable frictions between them. Could we, for example, try to construct a vocabulary or institutions that deflate the vehemence of nationalist mobilization, yet still dignify minoritarian nationalist projects, while at the same time maximize their power for social emancipation? Can we rethink the tense relationship between the social and national *without* the lens of peoplehood, so that we begin to imagine a constitutional theory contributing to a more enduring affective endorsement of a constitutional project of social emancipation, more resilient to the corrosive impact of economic cycles? Or could we imagine the process of post-conflict constitution making where social and national equality are addressed *in tandem*, and where external constituent powers are held under much closer democratic scrutiny than is the case today? By mapping three arenas of political struggle side by side, the contextual approach proposed here should also be seen as a theoretically-grounded political invitation to begin looking for (historical) inspiration where the productive union between the three struggles worked and took hold, and where it failed, and why.

VIII. Closing remarks: contextualizing constituent power, *provincializing constitutional theory?*

The final implication of the contextual approach to constituent power concerns its potential spatial reach and deeper political significance. It is legitimate to ask who are, and where, the constituencies that have not only a theoretical interest, but actually may *care* about the role of 'the people' in national, social and democratic emancipation given the current global distribution of political power. By rejecting both the generality and the abstractness, on the one hand, and the ultra-concrete specificity of theorizing constituent power, on the other ('constituent power in country x'), the contextualizing move does not simply distance itself from the quasi-universal, essentially Western preoccupation with the idea of the constituent power of the people. It likewise invites all those who have been betrayed by this concept, either because of their position within the global power

matrix, or their experiences with constituent power's unsavoury 'side effects,' to think about a new constitutional theory which will exhibit these experiences with an aim to construct a modified, or new set of theoretical lenses primarily aimed for the movements and groups in the global peripheries and semi-peripheries, where the three registers of political struggle sometimes overlap, but most often stand in a tension-riven, ambiguous relationship with one another.

Such a larger project of a *provincialized* constitutional theory would intrinsically be fragile. The provisional *spatial* identification of global centres and peripheries is in many situations possible. (For example, the Balkans or Ukraine objectively *are* peripheries of the European Union.) In many cases, however, peripheries equally nest within centres, which themselves sprawl across different territories. Much will, as always, depend on the granularity and framing of one's political vision. 'To claim that *this* is peripheral to *that*', as David Kennedy has rightly argued, 'requires a suspension of awareness of life's complexity, irrationality, and unpredictability'.[88]

Without doubt, contemporary constitutional theory cannot be accused of a lack of sensitivity to the complexity of global juridical phenomena. But its focus on regional constitutional integrations, interactions among de-territorialized, yet increasingly constitutionalized legal regimes, and on the allegedly emerging global constitutionalism, have, by and large,[89] distracted it from *asserting* the existence of the Global South, or the Third World, as the legitimate focus for a new constitutional imaginary. No wonder then that despite the increasing scholarly production of different adjectival constitutionalisms,[90] there has not been a move towards constitutional theory's complementary equivalent to the TWAIL movement

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[88] D Kennedy, 'Law and the Political Economy of the World' (2013) *Leiden Journal of International Law* 1, 29.

[89] Some notable exceptions include D Bonilla Maldonaldo (ed), *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (Cambridge University Press, Cambridge, 2013); J Tully, 'Modern Constitutional Democracy and Imperialism' (2008) 46 Osgoode Hall Law Journal 461; U Baxi, 'Constitutionalism as a Site of State Formative Practices' (1999) 21 Cardozo Law Review 1183; L Catá Backer, 'From Constitution to Constitutionalism: A Global Framework for Legitimate Power Systems' (2008) 113 *University of Pennsylvania Law Review* 671.

[90] See, for example, S Arjomand, 'Islamic Constitutionalism'(2007) 3 *Annual Review of Law and Social Science* 115 ; A A An-Na'im, *African Constitutionalism and the Role of Islam* (University of Pennsylvania Press, Philadelphia, PA, 2006); T Ginsburg, 'Constitutionalism: East Asian Antecedents' (2012) 88 *Chicago-Kent Law Review* 11; M Tushnet, 'Authoritarian Constitutionalism: Some Conceptual Issues' in T Ginsburg and A Simpser (eds), *Constitutions in Authoritarian Regimes* (Cambridge University Press, Cambridge, 2014).

in international law.[91] In addition to other implications articulated above, contextualizing constituent power by identifying three dominant arenas of struggle and asserting that their interaction is a particular problem at the internal and external edges of Western liberal democratic constitutionalism, leaves the door ajar for such theoretical and political gesture.

Acknowledgements

[91] This in no way implies denying the plurality, tensions and contradictions within the TWAIL movement itself. For a recent account, see J Haskell, (2014) 'Trailing the TWAIL: Arguments and Blind Spots in Third World Approaches to International Law' *Canadian Journal of Law and Jurisprudence* (forthcoming).