

Introduction

Basic Concepts

The idea of post-sovereign constitution making¹ emerged out of the adventures of the revolutionary and populist idea of the sovereign constituent power. Theoretically, it is an important alternative to the conception of the constituent power of a unitary, embodied popular sovereignty. Nevertheless, in spite of premature obituaries, the idea of the *pouvoir constituant* of “the people” is still very much alive. Its presumed viability and vitality are underwritten by the return of populist and revolutionary forms of constitution making, first in the Andean republics of Latin America, and then in the Middle East. All the same, the conceptual foundations of this now-traditional notion have been shaken. In the midst of political competition between constitution-making forms, whose several venues will be explored in this book, there is also a struggle over concepts. In order to understand the main intellectual stakes involved, I begin by presenting my interpretation of the main concepts presupposed by both sides: constitution, legitimacy, and sovereignty. How these notions are interpreted, and especially how they are to be combined, represents a main stake of the debate. Through a preliminary presentation of the idea of sovereign constitution making, I will try to show the special way in which constitution, legitimacy, and sovereignty converged in the traditional idea of the constituent power. I will argue that it is exactly on this level that sovereign constitution making reveals its fundamental weakness, or even danger, namely an elective affinity to dictatorship. The political dangers have been well illustrated by the history of revolutions. It is this weakness and this history that represents the background motivation for immanent criticism, as well as for the construction of the alternative paradigm of the post sovereign constituent power, one more faithful to the values of both democracy and constitutionalism.

¹ See my *Post Sovereign Constitution Making: Learning and Legitimacy* (Oxford: Oxford University Press, 2016).

I CONSTITUTION

There are many possible definitions of “constitution.” At issue here, first, is whether we are to understand the category as referring to a simple reality like a document with the relevant name, or to a complex set of institutions. Related to that question is another, namely whether we think of the origin of the constitution in terms of a single localizable act, such as a decision by an identifiable agency, or rather as the result of several interrelated processes, and possibly stages of development. While there is no one-to-one relation between the stress on the documentary constitution and a foundational decision, there is an elective affinity between these options that together are at the foundations of the sovereign theory. The case is similar with the alternative, the many-leveled concept, multi stage process, and the post-sovereign paradigm.

Unlike others, I think it is a grave error to simply treat the documentary constitution of countries as the only object of a study on constitution making. That choice, motivated by what is easily operationizable for large-scale empirical study, would avoid the question of definition.² The constitution would be simply what a political order has defined as such, by putting a set of norms into a document called “constitution” or “basic law.” One could argue for this position by stating, partly incorrectly, that it is only this meaning of constitution that refers to something “made.”³ What is certainly true, however, is that there is a significant relationship between reducing the constitution to the documentary legal text, and the idea of a constituent power whose decision, localizable as an event,⁴ produces it. This affinity is both historical and logical. The concept of the constituent power was developed in the three great

² Z. Elkins, T. Ginsburg and J. Melton *The Endurance of National Constitutions* (Cambridge: Cambridge University Press, 2009). After distinguishing between formal and functional constitution (p. 38ff), the authors simply go on to deal with the former. The book is valuable nevertheless, though it would have been more so if the authors focused on constitutions where there is a significant overlap between the formal and the material (or: the functioning). That would leave the communist constitutions out, for example. Keeping them in leads to strange results. For example, treating the important question of the structure of the amendment rule, the authors forget that in the one party authoritarian systems 50 percent of the legislature and 99 percent amount to the same thing. As in the Central European cases, the structure of such an amendment rule begins to matter only in the context of regime change leading to pluralization.

³ The term unwritten (and: “not made”) is correct only with reference to the conventions of the constitution. As is well known, the supposedly unwritten British constitution contains many written statutes and legal precedents that were made, often with a clear constitutional object in mind. That these should largely work as a protected second order law is admittedly itself a convention, one that is at times violated.

⁴ See Robin Wagner Pacifici’s forthcoming *What is an Event?* (Chicago: The University of Chicago Press, 2017).

revolutions, each of which has experienced significant episodes of documentary constitution making.

Here I am interested only in those documentary constitutions that become to a significant extent *the* “real” or actual or material one, and will certainly pay attention also to the making of rules that are constitutional but are outside the documentary text. These can emerge at different time periods, involving a multiplicity of events and sometimes no important or even noticeable events at all. In the United Kingdom, for example, the constitution of the state is rightly said to consist of statutes, precedents and conventions.⁵ Of these, parliamentary statutes and judicial precedents are “written” and “made” during a plurality of localizable events. The conventions of the constitution are unwritten, however, and can be said to be the results of an evolutionary development. In principle, no event could produce a convention, only long-term, repeated practice. As many interpreters have noticed, all polities with documentary constitutions also rely on statutes, judgments and conventions of constitutional significance. These considerations require a definition of constitution that thus becomes a complex matter.

I begin my analysis with the conceptual distinctions of Hans Kelsen who, in my view, put the topic on entirely new foundations even as he systematized earlier notions. He starts with the distinction of constitution in the formal and material senses,⁶ and considers the latter as the more fundamental category.⁷ I find highly significant the contrast between Kelsen’s scheme and that of Carl Schmitt’s definition (also in two parts), one that makes an analogous but much less clear distinction between constitution identified in terms of a fundamental decision of the constituent power and constitutional laws.⁸ It is extremely

⁵ Dicey, *The Law of the Constitution*, 8th ed. [1915] (Indianapolis: Liberty Publishers, 1982).

⁶ J. E. Fossum and A. J. Menendez attempt something similar, also derived mainly from Kelsen, in their recent book *The Constitution’s Gift* (Lanham, MD: Rowman and Littlefield, 2011), pp. 19–26. While I am hardly an orthodox follower of “the pure theory of law,” in this context I do not think the philosophical supplementation in terms of a third concept of the constitution, the normative one, helpful as the authors themselves admit that there are as many such concepts as normative theories. I prefer to discuss what they have in mind in terms of constitutionalism and democracy. Nor do I think that adding a sociological dimension in the sense of Hart’s rules of recognition is needed. In the case of the formal meaning of the constitution, this addition either moves the concept into the material domain, or requires only a minimal practice that is always at hand like the ritual meetings of the required bodies, or the celebration of the document on a special day, as in Communist Hungary, always on August 20.

⁷ *General Theory of Law and the State* (Cambridge: Harvard University Press, 1945), p. 124ff. and 258–259. See recently Julian Arato, “Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations,” (August 5, 2012) *Yale Journal of International Law*, 38(2), 2013.

⁸ *Verfassungslehre* (Berlin: Duncker & Humblot, 1928), pp. 21–25. When criticizing Kelsen, Schmitt inexplicably leaves the material constitution out of consideration. The idea that Kelsen

difficult to identify the contents of this fundamental decision, and which constitutional laws form its parts or its essential legal scaffolding. As in the case of Weimar in Schmitt's own presentation, the same constitution could be interpreted differently by opposing political sides. The decisionist conception does, however, have the advantage of thematizing the relationship of empirical-existential *political* structures and *legal* norms within a constitution. This is unfortunately excluded by Kelsen's *pure* theory. What is significant here, however, is that while Schmitt's decisionist concept identifies *the* constitution as the product of an event, and of a unitary agency, Kelsen's two-part definition focuses on the emergence of structures that can have multiple sources, acting in multiple historical contexts. The decisionist concept of the constitution allows no development on the most fundamental level. The Kelsenian concept of the constitution is, on the contrary, developmental.

According to Kelsen's analytically clear, if not entirely convincing presentation, constitution is interpreted as an entirely legal institution. But it has two senses. In the *formal* sense, the constitution is the "solemn document" ordinarily called by that name. This definition is not complete, however, since Kelsen adds that the completion of its formalization requires entrenchment, a codified rule of change (amendment or revision) more difficult than the rule of legislation in the same document.⁹ Thus, the formal constitution establishes the dimension of higher law in the sense that it is only this dimension that has the procedural protections that formally elevate it above all other norms in the legal hierarchy.¹⁰ In Kelsen's spirit and following some of his texts,¹¹ I would add that the real completion of formality would require some kind of enforcement mechanism that would help maintain the differentiation between constitutional and ordinary legislation, classically judicial or constitutional review. Functional substitutes for both entrenching rules and judicial enforcement, like the checks and balances in the separation of powers, or established conventions, however, are, and have been historically, possible. Their stability ultimately requires political sanctions and political enforcement. It may be that the stability of amendment rules, and in the end even the enforcement of judicial or constitutional review, requires political sanctions

identified the constitution with what is protected by the amendment rule is fallacious. *Verfassungslehre*, chapter 2.

⁹ Again I disagree with Fossum and Menendez (*The Constitution's Gift*, p. 21), who claim versus Kelsen that entrenchment by an amendment rule does not belong to the formal concept of the constitution. Precisely the same goals are served by entrenchment as by producing a documentary constitution in the first place.

¹⁰ Indeed one would think that the Kelsenian hierarchy, with constitution at its pinnacle is only established if a formal constitution establishes a differentiated, higher order, and thus relatively difficult rule of constitutional change.

¹¹ *General Theory*, p. 157.

as well. A court that is not backed by public opinion would ultimately be incapable of policing entrenched provisions and the rules that entrench them, to see that they are not transgressed, derogated from or bypassed through other political mechanisms.¹² I think, however, it makes a great deal of difference, on the level of politics as well as law, whether ultimate political intervention is the only device guarding the formal constitution, or there are other mechanism doing so with legal authority.¹³

Constitution in the *material* sense, according to Kelsen, refers to the legal rules of legal rule making, of legislation, in his own words to the “the rules that regulate the creation of general legal norms” [124]. This is the most important dimension, but not the whole, of what H.L.A. Hart would later call secondary rules.¹⁴ Kelsen’s definition identifies constitution as reflexive or meta-law, but it is incomplete. He himself has added fundamental rights constraining legislatures that can still be understood as rules of legislation, and on the level of “political theory,” rules defining and regulating “the creation and competences” of other (the highest executive and judicial) organs of government, whose full differentiation from legislation he was unwilling to accept.¹⁵

¹² See D. Davis for an interesting South African illustration of this from the 1950. Davis, D. and M. le Roux. *Precedent and Possibility. The (Ab)use of Law in South Africa*. Capetown: Double Storey Books, 2009.

¹³ It could be maintained that a formal constitution can be relatively well protected by public opinion, as was supposedly the case of the Third Republic in France, and conversely, that not only is judicial review not a full proof defense against informal constitutional change in Jellinek’s sense of *Verfassungswandlung* -see *Verfassungsänderung und Verfassungswandlung* (Berlin: Häring, 1906) – but it can also be ultimately the instrument of just such change through reinterpretation. This has been considered from Jellinek to Ackerman and others recently. In particular, the second argument should be taken really seriously, and will be in this book. With this said, structurally judicial review nevertheless strengthens the power of entrenchment, and its own role in bypassing occurs on a constitutional channel higher than the legislative one. Thus, for important cases Ackerman speaks of an informal constitutional amending process. This has the same implication as having a second, more flexible amending power in a multi-track scheme.

¹⁴ Secondary rules “specify the ways in which primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined.” *The Concept of Law* (Oxford: Oxford University Press, 1961), p. 92.

¹⁵ See *General Theory*, pp. 258–259. Kelsen’s adjustments open the road to other, legal definitions: Dieter Grimm, in *Die Zukunft der Verfassung* (Frankfurt: Suhrkamp, 1999), to take a particularly sophisticated version, identifies constitution as that “complex of norms which fundamentally regulates the setting up and exercise of state power and the relationship of state and society” [11]. This definition has the advantage that it includes the domain of fundamental rights along with political institutions more directly than it is possible through Kelsen’s or Hart’s conception. But through a slight change of focus the secondary–primary division is upheld: Grimm speaks of “a group of basic norms for the making of political decisions, aiming at the possessors of power, and a group of politically generated norms aiming at its subjects” [14]. The constitution is thus differentiated from ordinary law by the fact that “it has the highest power itself as its object.”

While he paid little attention to conventions of the constitution, presumably because of their nonlegal nature and their diffuse and merely political form of enforcement, the reflexive conception must include them as well to the extent they regulate the process of lawmaking, application, interpretation, and enforcement. Hart's notion of secondary rules, rightly freed from the sanction model through his notion of an "internal relation" to legal obligation, would allow the conceptualization of the laws and conventions of the constitution on a continuum.¹⁶ Conventions are certainly norms that regulate lawmaking. Conversely, even codified, secondary rules are often enforceable only on the political level.¹⁷ Conventions should be included in the concept of the constitution, not only because they are normative with some kind of enforcement attached to them, but also because they can be easily legalized. This has indeed happened with many British norms of parliamentary government when they became parts of documentary constitutions elsewhere, with the 22nd amendment in the United States, as well as important conventions of the Canadian constitution.¹⁸

The relationship of the material and formal constitutions is very important. Kelsen's idea that the formal is created for the sake of the material, in order to strengthen and stabilize it, can be accepted only as a structural rather than a historical point, not applicable to non-*constitutionalist* or minimally *constitutionalist* constitutions. Many formal constitutions are made for ideological reasons and sometimes primarily for external consumption. But if there is a significant overlap between the formal and material constitution the latter is indeed strengthened and stabilized by becoming public, and is potentially enforceable. When the material structure that is formalized includes limitations on the holders of the most important powers of government, we can speak of *constitutionalism* in more than a minimal sense. Thus, the authors of the French Declaration of Rights were right in the normative sense in claiming that without separation of powers and fundamental rights (art. 16¹⁹) we cannot speak of constitutions, only the meaning here is that of a *constitutionalist* constitution. Kelsen neglected this dimension in his definitions, in his attempt to

¹⁶ *The Concept of Law* (Oxford: Oxford University Press, 1962).

¹⁷ I. Jennings, *The Law and the Constitution*, 5th ed. (London: University of London Press, 1959). This text has been canonical for the Canadian constitutional judges, who have developed the most significant legal doctrine dealing with the conventions of the constitution.

¹⁸ In one well-known group of cases, a constitutional court may try to adjudicate if not yet strictly enforce conventions. Canadian Supreme Court Patriation Reference (1982); Quebec Veto Reference (1982). See P. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* 3rd ed. (Toronto: University of Toronto Press, 2008), chapter 8.

¹⁹ http://avalon.law.yale.edu/18th_century/rightsof.asp.

keep law purified of ideological elements. But it follows from his scheme that the idea of adding a normative constitution as a third dimension to material and formal, as desirable as it may be politically, is either theoretically superfluous or too demanding.²⁰ A nonconstitutionalist constitution is possible, but we should be clear about the sense in which we would use this term, and whether or not we are referring to merely symbolic or ideological constitutions that do not involve an overlap between the formal and the material, or also look to include constitutions without fundamental rights and separation of powers.²¹ Each of these options is possible independently of the other: rights and separation of powers can be formally present in mere paper constitutions, and formalized material constitutions can exist without the features that liberal theory would insist on.²²

It is elements of material limitation and documentary protection that together create a two-track structure of constitutional government.²³ Even law that involves documentary entrenchment genuinely separates the two tracks: legislative and constitutional²⁴ only if the material constitution itself limits power holders by separation of powers, or fundamental rights or other disabilities of the legislature.²⁵ Such limits conversely require formal entrenchment,

²⁰ As by Fossum and Menedez, *The Constitution's Gift*.

²¹ See the taxonomy of types of constitution of Karl Loewenstein, "Reflections on the Value of Constitutions in our Revolutionary Age" in A. Zurcher, *Constitutions and Constitutional Trends Since World War II*, 2nd ed. (New York: NYU Press, 1955), pp. 204–206. His distinction, which still remains relevant, is between normative (i.e., constitutionalist), nominal (nonconstitutionalist, but to be applied) and semantic (or, ritual, namely paper constitutions, not to be seriously applied). Said Arjomand, however, is entirely justified in adding ideological constitutions to this list, meaning constitutions that incorporate a strong substantive project, even if this category can cut across Loewenstein's typology. See, e.g., his "Constitutions and the Struggle for Political Order" 1992 in *European Journal of Sociology* 33.

²² See Nathan Brown's interesting book *Constitutions in a Non-Constitutional World* (Albany, NY: SUNY Press, 2002) for examples of both in the Arab world.

²³ Stressed by Ackerman, *We the People I* (Cambridge, MA: Harvard University Press, 1991), following the *Federalist* and J. Marshall in *Marbury* as well as *McCulloch*.

²⁴ Kelsen (*General Theory*, p. 258) speaks of two stages of the legislative process: "the creation of general norms which is usually called legislation . . . and the creation of general norms regulating this process of legislation." For this latter, more fundamental stage of legislation producing the constitution, he has in mind the constitution-making and -revising process. As to the latter we can derive from Kelsen the idea that revision or amendment procedures embody the idea of constitution as reflexive law to the highest degree since they apply legal procedures not only to legal procedures, but also on the higher level still to the procedures themselves that regulate the procedures of lawmaking. We find in Kelsen (even less than in Schmitt) no rules for original constitution making, paradoxically in line with the continental European idea of the unlimited constituent power.

²⁵ While an amendment rule does place the constitution at the highest level of a normative hierarchy, if the constitution itself had no other limits on legislative power, entrenchment would only have the meaning that the legislature cannot abolish or reduce its own absolutism.

otherwise the legislative track can derogate from its material limitations.²⁶ A three- and multi-track structure is possible when there are formal limits to the amending power (absolute entrenchment), or, preferably, when the amendment rule itself contains several hierarchical rules of possible amendments dealing with different parts of the constitution.²⁷ It is possible, if not in my view desirable, to add absolute entrenchment to a differentiated set of amendment rules, as was done without the benefit of codification by the creators of the basic structure doctrine in India. But as the Indian judges probably assumed, and as the Turkish judges have explicitly stated, absolute entrenchment can mean only recourse to an original and constituent power to create a new constitution. In turn, that assumption is legalized²⁸ by being built into constitutions that propose special procedures for replacement, like the Spanish, Bulgarian, Colombian and, we once assumed, the German Federal Basic Law with its article 146 in its 1949 version.

An important reason why analysis should not focus solely on the formal, documentary constitution is because there are very important constitutional elements in almost all political regimes, or norms that significantly determine norm creation that can be, and often are, left out of documentary constitutions. Thus, they lack the benefit of entrenchment against purely legislative alteration or derogation. This is usually the case for electoral rules, and in the USA was and remains the case for both the key institution of judicial review and for determining the makeup and jurisdiction of the federal courts. Some of these material constitutional provisions, like judicial review, can be formally constitutionalized by interpretation. In other words, the protection of existing formal elements, like constitutional supremacy, can be extended to them so that they cannot be abolished by simple statute, at least not without the unlikely agreement of a supreme or constitutional court. Other provisions continue playing a materially constitutional role, even as they become objects of legislative challenge and alteration in various court packing and

All else would be open to the legislative track. A superlegislature would be needed only to introduce a genuine two-track or multi-track structure.

²⁶ Elster identified the connection between the two forms of precommitment, e.g., separation of powers and entrenchment. See *Ulysses Unbound* (Cambridge: Cambridge University Press, 2000).

²⁷ See Arato “Multi-track Constitutionalism Beyond Carl Schmitt,” *Constellations*, Vol. 18, No. 3, 2011, and especially Chapter 5 below.

²⁸ On the contrary, the Decision of the Turkish Constitutional Court on the so-called head-scarf amendments in 2008 appealed to an extralegal revolution as the only modality able to alter the eternity clauses of the constitution. See my “Democratic constitution-making and unfreezing the Turkish process.” *Philosophy & Social Criticism* 36.3–4 (2010): 473–487. There is no such reference in the Indian Basic Structure doctrine.

unpacking as well as jurisdiction removal schemes. These are vivid reminders that very important provisions like any given composition and jurisdiction are not entrenched and may not be formally part of a US constitution.

The converse is also true. The formal constitution, as Kelsen recognized, may contain many provisions that are not materially constitutional. These can be of very different types. Some may highlight different aspects of the identity of the polity, as preambles often do. In spite of Schmitt's views to the contrary, only when they affirm and point to materially constitutional provisions should they be regarded as fundamental parts of the constitution. Thus, for example, the importance of a statement that "X country is a republic or a democracy" must be confirmed by entrenched provisions having to do with rule of law and elections. When some of these provisions, such as republic, democracy, federalism, fundamental rights, and secularism, are absolutely entrenched as variously in France, Germany, and Turkey, the symbolism of preambles can gain great material importance, with respect not only to the legislative but also to the amending power. However, in the case of ordinary laws, "primary rules" in Hart's sense of regulating citizens directly rather than aiming at the lawmaking and interpreting processes, constitutional formalization can often represent the usurpation of power by a temporary dominant political power or a supermajority wishing to protect its own political decisions against easy alteration and to bind its successors.²⁹ This has happened in the Chilean Constitution enacted in 1980, and the new Hungarian Basic Law of 2011. It may not be always easy to distinguish between primary and secondary rules, or Dworkin's partly parallel policies and principles. But these lines do exist, even if at an abstract theoretical level, and can therefore be abused. Thus, just as in the case of the abuse of the legislative power, it may be an important task of courts to pay attention to the abuse of the amending power as well.³⁰

Finally, the idea of a material constitution raises the question of regime, and the empirical structure of political systems. Historically, earlier

²⁹ I do not consider such binding per se usurpation, as Elster tends to in a second version of his argument about pre-commitsments. See *Ulysses Unbound*. Throughout this book, however, I will argue that the manner of original constitution creation is what distinguishes the legitimate binding of future generations. In this sense I accept the originally British assumption that a parliament should not bind a future parliament exactly like itself, even if such binding could be considered legally binding, as in Hart's argument. Admittedly, omnipotence could be interpreted this way as well as by the traditional British position that would deny such binding of the future. But the legitimacy, if not the legality of binding the future remains a fundamental problem. Both sovereign and post sovereign paradigms address it, in my view the second much more successfully.

³⁰ Balanced budget amendments, which may make ordinary policy decisions by new governments much more difficult, is one such abuse. Prohibition may have been a successful case of the same.

meanings of constitution (Aristotle's *politeia*; Machiavelli's *modi e ordini*) referred to the empirical structure of regimes that could be distinguished by empirically observable characteristics.³¹ Schmitt, who thematized this history or pre-history, still understood constitution on the most fundamental level as referring to a regime rather than a law. Given the requirements of not only “pure theory,” but also the pattern of historical development, Kelsen was more right in focusing on normative, legally binding structures when defining the two meanings of constitution. But when he maintained that every political regime must have a material, though not a formal, constitution (125), he was conflating the new eighteenth-century normative concept of an “unwritten” constitution with empirical regime. As has been shown,³² this claim is misleading even where normative and empirical regularities are not yet differentiated from one another. Moreover, as important German interpreters like Dieter Grimm and E.W. Böckenförde strongly imply, the empirical structure of regimes represents a third dimension of the constitution even if in modern times it is in significant part structured by the normative-legal dimension of the overall political order.³³

One important example that shows why we cannot neglect the empirical dimension of the constitution is the two- or multi-party system of modern democracies. These can indeed be determined in part by a materially constitutional rule, the electoral law. But only in part. The same law mandating first-past-the-post elections or proportional representation can produce different party systems in different democracies, and also at different times in the same democracy.³⁴ Conversely, changing electoral laws may not actually transform party systems. The outcome in each case depends also on a number of different factors: demography; the intensity of political cleavages; the character of the actual parties that compete; and the experience of previous elections.³⁵ The concept of the regime is the proper level where the old empirical meaning

³¹ Schmitt, *Verfassungslehre*, chapter 1; Grimm, *Zukunft*, p. 12ff; 17ff.

³² Hart, *Concept of Law* (Oxford: Oxford University Press, 1961), p. 89ff.; and especially Roberto Unger, *Law and Modern Society* (New York: Free Press, 1976), pp. 48–58.

³³ Böckenförde, *Staat, Verfassung, Demokratie* (Frankfurt: Suhrkamp, 1992), chapter 2; Grimm, *Zukunft*.

³⁴ For a highly interesting example, see S. Ruparelia, *Divided We Govern* (Oxford: Oxford University Press, 2015), showing how even a first-past-the-post (FPTP) electoral rule can have the consequence of extreme fragmentation of parties, in a federal and pluralistically divided society.

³⁵ G. Sartori, *Parties and Party Systems* (Cambridge: Cambridge University Press, 1978); superseding Duverger, *Political Parties* (New York: Wiley, 1959). For the relevant distinction between electoral rule and system, see M. Shugart and R. Taagepera, *Seats and Votes* (New Haven: Yale University Press, 1989).