

THE ADVENTURES OF THE CONSTITUENT POWER

Constitutions are made in almost all transformations of regimes. What are the dangers and the hopes associated with such a process? What can make constitution making legitimate? *The Adventures of the Constituent Power* explores the democratic methods by which political communities make their basic law, arguing that the most advanced method developed from Spain and South Africa. The first part of this book focuses on history of the idea of constitution making, before and during the democratic revolutions of the eighteenth century. The second part traces the notion of the constituent power in recent regime transitions that were consciously post-revolutionary, from Spain to South Africa. With the return of revolutions or revolutionary patterns of constitution making, the book examines the use and potential failure of the new ideas available. The third part then proceeds to consider the type of constitution that is likely to emerge from the post-sovereign process.

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The Adventures of the Constituent Power

BEYOND REVOLUTIONS?

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Preface

Andrew Arato

For the last four decades, constitutional politics has been a major terrain of contemporary struggles. Contestations around designing, replacing, revising, and dramatically reinterpreting constitutions have proliferated worldwide. Starting with Southern Europe in post-Franco Spain, then in the ex-Communist countries in Central Europe along with Latin America, moving on to post-apartheid South Africa, followed by Nepal and the Arab world, constitution making has become a project not only of radical political movements, but of liberals and conservatives as well. Even populist politics, both on the left and right, once opposed to constitutionalism, has now integrated constitution making into its political projects as well as claims of legitimacy. Wherever new states or new regimes will emerge in the future, whether through negotiation, revolutionary process, federation, secession, or partition, the making of new constitutions will likely be a key item on the political agenda.

Intellectual developments have, in part, kept pace with the rebirth of constitutional politics. We now have an increasing series of excellent comparative and single-country studies concerning constitution making, as well as a few large N monographs seeking to discover the common elements of the constituent process, constitutional contents and arrangements that foster stability. While theoretical deepening has lagged behind somewhat, we do have important new works on the constituent power, both from various radical (Negri, Colon-Rios, Kalyvas) and constitutionalist (Ackerman, Dyzenhaus, Loughlin and Walker) perspectives. What is missing are serious synthetic works linking theory and comparative analysis that are capable of prudentially orienting actors engaged in constitution-making processes all over the world. This volume, combining historical reflection, constitutional theory and comparative analysis, purports to make a contribution to that end.

My book is different than Bruce Ackerman's influential work, *We the People* (vols. 1 and 2) not only theoretically, but also because of its strongly

comparative orientation. Moreover, I deal with several country cases, rather than just one, in contrast to many important works on recent constitutional politics, such as Peter Russell's book on Canada (*Constitutional Odyssey*) or T. Moustafa's on Egypt (*The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt*). As against most of the comparative and large N literature, e.g., the work of Tom Ginsburg and his collaborators (*The Endurance of Constitutions*), I stress normative theory. Yet my work differs from the works of Negri (*Insurgencies: Constituent Power and the Modern State*) and Kalyvas ("Popular Sovereignty, Democracy, and the Constituent Power," *Constellations*, 2005), by combining theory with case studies, and through a more consistent critique of the framework of Carl Schmitt than is to be found either in their work or in Colon-Rios' *Weak Constitutionalism*. While closer to the approach adopted by the authors in the edited volume by Loughlin and Walker, *The Paradox of Constitutionalism*,¹ I introduce a new paradigm that is not found in the work of any of their contributors. Compared to David Dyzenhaus and Hans Lindahl in that volume, I think the concept of the legitimate constituent power freed of populist fictions remains important, and that it should not be imputed to a process merely on the bases of its outcome. As against the many authors who have written on the important South African process, I draw out its universal implications that they rarely recognized. In comparison to other criticisms of recent constitution making in Hungary, I have a much more critical perspective with respect to the previous, more liberal period of development. Finally, next to the literature on the new constitutionalism (Said Arjomand, *Constitutionalism and Political Reconstruction*) and "juristocracy" (Ran Hirschl, *Towards Juristocracy*) my work is not court-centered, though I do recognize the important and often-positive role of constitutional courts in the development of the new paradigm. I take law and politics in the life of constitutions equally seriously, and I reduce constitutions to neither, taken alone. Thus, hopefully, this book, informed by recent scholarship, has entirely new contributions to make.

Based on a long period of interdisciplinary work in law, political science, intellectual history, and political sociology, as well as following my previous book,² it remains my overall thesis that a new paradigm of "post-sovereign" "post-revolutionary" "multi-stage" constitution making has emerged and is increasingly important today. Although path-determined, the new paradigm

¹ For my critique of these authors, see the Introduction to *Post Sovereign Constitution Making. Learning and Legitimacy* (Oxford: Oxford University Press, 2016).

² *Ibid.*

promises nonetheless to have great significance wherever constitution making has become salient. Born in processes of relatively recent democratic transitions from authoritarian rule, the normative achievements of this paradigm have now made their appearance during reform attempts, as well as under revolutionary ruptures. There is no question that a veritably international discussion, stressed by Heinz Klug,³ has played a role in the dissemination of the new ideas. At the same time, those who advocate them in various settings have run into strong competition from older ideas of constitution making. The results have been mixed, as the competing cases of Tunisia and Egypt show. We still do not know enough concerning the conditions under which the new ideas can be successfully transplanted. I aim to present not only the new paradigm, but also some of the necessary conditions for its implementation.

I have three aims in this volume. First, I seek to reinterpret the historical background of the new “post-sovereign” paradigm of constitution making, contrasting it with the main democratic alternatives: the French sovereign model and the American one that I see as antinomic or dualistic (i.e., internalizing the tension between the sovereign and the post-sovereign notions of agency). Second, I wish to reconstruct the new paradigm that has emerged first in Spain, then in Central Europe, and, finally, in the most developed form, in South Africa. I shall do so in terms of theoretical considerations and the analysis of cases. In particular, I am interested in reconstructing what appears to a developmental logic, at least from the Spanish forerunner, to the South African version that I regard as the most complete and coherent. Third, I explore the relevance of the new principles of legitimacy in contexts significantly different than the original Central European and South African settings that established their possibility. Finally, I end with an extended chapter considering the type of democratic constitutionalism that is likely to emerge from the post-sovereign paradigm, as well as from more revolutionary forms that have incorporated some of its lessons.

I use three or four related terms to describe the new paradigm of constitution making. I call it “post-sovereign,” to focus on the key theoretical issue of the exclusion of any single agency, institution or individual that claims to embody the sovereign power and authority of “the constituent people.” But I also refer to it as “post-revolutionary,” in that radical changes are accomplished beyond the old antinomy of reform or revolution. Focusing on the central institution of the paradigm, I speak of roundtable-led constitution making.

³ Heinz Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (Cambridge: Cambridge University Press, 2000).

Finally, concentrating on the process and the key role of interim constitutions, I also use the adjective “multi-stage.” Each of these terms highlights a different feature of the paradigm.

My previous book focuses on the great gains of the post-sovereign paradigm in the domains of legitimacy and learning. Yet, in spite of its great advantages, in my still earlier book I had already come to recognize the path-determined aspects of post-sovereign constitution making.⁴ Upon further reflection, first on the case of Turkey, and later when comparing Egypt and Tunisia, I have nevertheless come to the conclusion that aspects of the post-revolutionary, post-reformist model are also applicable in revolutions, as well as under comprehensive reform attempts. After previously considering reform scenarios, this book, focusing on the return of revolutionary forms of change, explains how this is possible. I argue that, given the international dissemination of many of the new principles, they are inevitably present in both reform processes, such as Turkey, from the 1990s, and in genuine revolutionary conditions, as in Tunisia and Egypt after 2011. Under all these settings, there seems to be a veritable horse race between paradigms, one in which the older models of sovereign constitution making would have the advantage, and where the presence of elements of the new may play a destabilizing rather than a constructive role. Focusing on issues of time and sequence, and relying on comparisons between Colombia and Venezuela, as well as Tunisia and Egypt, allows me to analyze some of the preconditions under which what has been learned from the new method could be productively utilized even in revolutions.

The purpose of my analysis is not only descriptive. It is rather to intervene in intellectual, ideological, and political problem complexes. As those involved in the relevant processes well know, constitution making and remaking pertains to the highest level of lawmaking, political design of, and allocation of power within a polity. How one understands the process, its structure, participants, and purpose matters a great deal and the stakes are high indeed.

STRUCTURE OF THE BOOK

The book is divided into three main sections. These are preceded by an Introduction developing my understanding of three concepts that are crucial to the intellectual effort here: legitimacy, sovereignty, and constitution. This will be followed by a preliminary introduction of the conception of sovereign constitution making, and the project of transcending it by an alternative democratic paradigm.

⁴ *Constitution Making Under Occupation* (New York: Columbia University Press, 2009).

Part I focuses first on historical, then on theoretical issues that will help me locate the new paradigm, and explicate the need for it given the problems of its forerunners. Its two chapters reconstruct the origins of the concept of sovereign constitution making in the history of political thought and practice. I stress throughout the almost simultaneous emergence of post-sovereign conceptions, both in theory and practice, which remain, however, a minor chord in the history of constitutionalism till our own time. Chapter 1 focuses on the history of ideas, discussing the intellectual foundations of the sovereign theory (along with anticipations of the post-sovereign one) in early modern political philosophy. Chapter 2 analyzes the complex and contradictory carrier of the idea of the sovereign constituent power during the first democratic revolutions. Particular attention is paid to the earliest attempts in both France and America to move beyond the sovereign conception. In France this happened mostly on the level of theory, while in America it was the practice of “conventions” in their post-1780 version pioneered in Massachusetts that anticipated elements of the post-sovereign idea.

Part II of the volume turns to cases. After presenting an ideal typical reconstruction of the post-sovereign paradigm, Chapter 3 will present its development as a nonlinear learning process from Spain to Central Europe, and from there to South Africa. Moving from case to case, the focus will be the depiction of a process whereby greater institutional elaboration and political democratization were achieved. I call the learning process involved non-linear because there were also losses both on the normative and institutional levels, and indeed successes as well as failures, as we move from country to country. In particular in its existing form, the post-sovereign paradigm never solved the problems of state formation or re-organization where the inherited structure of the state came to be untenable, whether because of voluntary partition as in Czechoslovakia, or through mutually agreed upon incorporation, as in the case of the German Democratic Republic. As in the case of Hungary, however, the process could fail even in an intact unitary state where its inherent logic toward completion in a second stage was not properly followed.

Chapter 4 focuses on cases with three types of scenarios more revolutionary than associated with the post-sovereign paradigm. It examines the cases of Iraq and Nepal where there were clear breaks with existing legality, and where nevertheless something close to the post-sovereign paradigm was adopted. I consider the deformations caused by these breaks, as well as the negative role of external occupation in the case of Iraq. Next, through a brief discussion of India, followed by a comparison of Colombia and Venezuela, I examine the possibility that even where the classical option of revolutionary constituent assemblies is utilized, elements of the post-sovereign conception can play a

very positive role. Finally, in the case of two nearly classical revolutions in the Arab world, Tunisia and Egypt, I consider not only such a positive role in the first, but also the destabilizing role of post sovereign norms in the second, where the institutional translation of normative principles of inclusion and consensus was very deficient.

In Part III, Chapter 5 turns to the type of constitutional structure that has the greatest affinity with the post-sovereign process, what I call multi-track constitutionalism involving a differentiated structure for options of change and replacement. In my view the strong constitutional jurisprudence that is required for the working of such a model is a likely consequence not only of the international dissemination of ideas, but the structure of the post-sovereign paradigm. While I derive the constitutionalist component from an insurance model that is highly applicable to the post-sovereign cases, I propose that the democratic dimension follows normatively from the paradigm's main assumptions. I thus revive a project insisted on by Hannah Arendt, but as old as some famous texts of Jefferson and Condorcet, to preserve the spirit of democratic constitution within the new constitutions themselves. I believe that the post sovereign paradigm is a more favorable context for the actualization of such democratic affinity than previous revolutionary models.

Finally, I end with an epilogue on a generally neglected case of the dissolution of the All Russian Constituent Assembly in 1918. In my view this case remains important not only to indicate the moment when the Russian Revolution began to disappoint all the democratic hopes associated with it, but also as a decisive moment in the adventures of the constituent power that took a new turn with the disassociation of constitution and revolution, that were previously united in European history, and even beyond, as in China, Iran, Turkey. In my view the assumptions of the sovereign constituent power played almost as great role in this misadventure as the dictatorial propensities of the Bolsheviks.

A word on the title. It represents conscious borrowing from Merleau-Ponty's great work, *Adventures of the Dialectic*. Ever since my early studies of Lukács, I have felt genuine affinity for Merleau-Ponty's perspective, but more as a political thinker than for his philosophical works. The present work borrows part of Merleau-Ponty's title for reasons that go beyond my longstanding political sympathy for his work of 1955. First, I fight against the conceptual mythology of the popular sovereign of the constituent process, much as he fought against the myth of the subject of history.⁵ I focus on the resulting but inevitable

⁵ On this, and the continuity of my work, see the very generous introductory essay by Enrique Peruzzotti and Martin Plot in *Critical Theory and Democracy* (New York: Routledge, 2013).

antinomies of such an assumption, as did Merleau-Ponty. The two mythologies are internally related, and while the first is a more modest version of the second, the attraction to populist “reason” that brings them together often reveals disappointment in historically generated or self-generated proletarian class consciousness as once articulated by Lukács. Nowhere is this clearer than in the theory of populism of the recently departed Ernesto Laclau, whose whole train of argument closely resembles what Merleau-Ponty depicted as Sartre’s ultra-bolshevism.⁶ And, second, I am persuaded, and I hope to persuade the reader, that the historical experience in the case of constitutional politics and theory “with all its false starts, its omissions, its disparities, and with the possibility of revisions at a later date”⁷ can be just as much an exciting if dangerous “adventure” as the political history of dialectical thought treated by the French philosopher sixty years ago. Of course, with so many years more hindsight concerning Merleau-Ponty’s own topic, we are in a better position to give contents to his call for a new left that would also be a new liberalism. Both his own student Claude Lefort, as well as Jürgen Habermas, have contributed a great deal to the realization of this regulative idea. With respect to my topic, the combination of “new left, new liberalism” entails the insistence on constitution-making procedures beyond both radical democratic mythologies of the actor, and equally mythical liberal imputation from result to process. The post-sovereign model of constitution making presented here is liberal as well as radical, but its highest virtue is critical self-reflection on what has been the historical position of liberals and radical democrats in light of their negative experiences. That critical self-reflection must also be directed at the paradigm itself, and aim at “the possibility of revisions at a later date.” We can hope for many such revisions because the adventures of the constituent power are exciting enough to continue, and I believe will continue, as long as modern society and politics survive.

⁶ See Chapter 6 of *Post Sovereign Constitution Making*.

⁷ Merleau Ponty, *Adventures of the Dialectic* (Evanston: Northwestern University Press, 1973) p. 3.