

Introduction

The modern state is built upon the principle that political power belongs to the people. Yet this principle has no uniform meaning. The very institutional structure of the modern state testifies to the plurality of understandings about the meaning, extent and implications of popular power. A quick look at modern European states reveals how each of their institutions is based upon a specific way of understanding and framing the power of the people. More strikingly, even within a single institution different conceptions of the people's power play out simultaneously. As an example, it may suffice to think about how different the principle of popular power looks when invoked to justify the role of legislative assemblies and that of constitutional courts. The first institution is considered the forum where popular concerns and interests are elaborated, compromised upon and transformed into law by representatives. The second, by contrast, is thought of as the ultimate guarantee of the respect of the people's founding will as expressed in the constitution against the legislative assembly. Both refer directly to the people as the ultimate source of authority, but they frame their power in very different ways. One is the power to make laws through representatives; the other is the power to trump laws made by representatives in the name of a higher expression of the people's will.

Another example is the coexistence of multiple conceptions of popular power within a single institution, such as an electoral law. Electoral laws often are a mix of proportional and majoritarian systems. Although this combination normally responds to the need to guarantee stability and governability, the two elements enshrine different understandings of what the power of the people is and how it is to be identified. On the one hand, it is considered to be mirrored in the exact collection of individual preferences. This corresponds to strictly proportional electoral systems.¹

¹ On the logic and history of proportional representation, see G. Conti, *Parliament the Mirror of the Nation* (Cambridge: Cambridge University Press, 2019).

On the other hand, majoritarian systems conceive of popular power as an aggregate which is equivalent to the opinion of the majority. When the two systems are combined, as in most European electoral laws, two understandings of popular power coexist. As for the previous example, these are not necessarily mutually exclusive. Often, they have a common rationale and are organised in such a way as to form a coherent institutional structure. But when taken singularly, they point toward the multiplicity of understandings of popular power underpinning the state and its institutions.

Yet there are cases in which these multiple conceptualisations of popular power clash at both practical and theoretical levels. This happens when different institutions put forward competing claims to embody the will of the people, as in the case of constitutional courts judging the legitimacy of a referendum's result. Or when a system in which the parliament is the privileged forum for the elaboration of the popular will calls for a referendum. What is to be considered the faithful expression of the power of the people in these cases – the decision expressed in the constitution, that taken by the parliament or the people's answer to a yes or no question? The first two options suggest that popular power is never immediately present but is formed through the mediation of either a constitutional text or a representative assembly. By contrast, the second option is based on the idea that popular will coincides with the people's direct expression of their individual preferences. This tension not only plays out at an institutional level but also is reflected in theoretical and intellectual debates.

Very often we find ourselves invoking the principle of popular power through different concepts at the same time, such as, the different variations of sovereignty – national, popular and parliamentary, to name just a few. As in the previous examples, the use of these ideas to account for the content and implications of the principle of popular power is not always consistent. It happens that the idea of popular sovereignty is mobilised to defend the result of a parliamentary decision as well as that of a referendum. At the same time, we often have recourse to the idea of national sovereignty to defend the supremacy of the parliament as well as to uphold the independence of the people's will in the international arena. Alongside these expressions of popular authority, the idea of constituent power is invoked to justify constitutional courts as well as to point at the power of the people to overthrow the entire constitutional structure in revolutionary moments. How are we to make sense of this multiplicity of conceptualisations of the principle of popular power? How do they structure, explain and justify the institutional systems in which we live? Does

their coexistence tell us something about the way in which we negotiate the form, role and extent of popular power in the modern state?

This book is an attempt to contribute an answer to some of these questions. It aims to shed light on the role that constituent power plays in articulating the meaning and implications of the principle of popular power. To do so, the book analyses some key moments in the history of the idea. These moments demonstrate that no single meaning can be attached to the notion of constituent power, rather its sense has changed over time in relation to given historical circumstances. The latter in turn, suggest that any time the language of constituent power has been theorised it was to offer a conceptualisation of popular power alternative to contemporary understandings of sovereignty. The result is a story that portrays constituent power as one amongst other ways of framing the principle of popular power over time. As such, it was – and still is – used to make sense of the people’s relationship to their political power and to the institutions meant to embody it.

Constituent Power

In mid-2000s, Martin Loughlin and Neil Walker, invited scholars from different disciplines, national cultures and ideological orientations to contribute to the debate about the origins and relevance of the idea of constituent power for modern constitutional politics.² Together they influentially asserted that the main interest in studying constituent power lies in its capacity to solve the paradox of constitutionalism. The paradox touches upon the very possibility of the exercise of popular power. The idea that the modern state is based upon a paradox derives from the fact that ‘the power [the people] possess, it would appear, can only be exercised through constitutional forms already established or in the process of being established’.³ This paradox captures a widespread concern for the actual sense of the principle of popular power, raising the question of how, if at all, it can factually be realised. The tension between what might look like an aspirational principle and its realisation is indeed the motivation behind most of the thinking about constituent power, both historical

² M. Loughlin and N. Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2008).

³ *Ibid.*, p. 1.

and contemporary. Thinkers as distant as the Abbé Sieyès during the French Revolution and Antonio Negri today rely on the notion of constituent power to think about who the people are, what their power entails and how it can be institutionally exercised. Constituent power is thus mobilised to question the role played by the people in the foundation of the modern state, the working of the legal-political system and the criteria to assess its legitimacy over time, as well as the eventuality of its overthrowing in revolutionary events. What changes is the answer that constituent power is meant to offer to this series of questions and hence the type of solution to the paradox that it supposedly provides.

Currently, three main types of answer appear to have gained traction. They bring with themselves not only different approaches to the paradox but also different ways of engaging with the idea and its history. One answer completely rejects the paradox, arguing that it arises from a series of mistaken assumptions about the theory and practice of constitution-making. Another tends to see in constituent power an instrument to reinvigorate the democratic meaning of the principle of popular sovereignty within the constitutional state. The last set of answers sees in constituent power a way to frame sovereignty in terms of the power the people have to act beyond and against the state. Yet all answers tend to present the idea of constituent power as the correct interpretation of the phenomenon ‘popular power’. To ground this claim, they rely on the history of the idea, as this is supposed to offer evidence of both the meaning and the practice of constituent power. In addition, they often strengthen their point by discussing their understanding of constituent power in relation to given interpretations of sovereignty. As the following paragraphs will demonstrate, these similarities among otherwise different accounts of constituent power mark what distinguishes my book from current scholarship on the subject. While contemporary debates focus on the possibility of finding the correct meaning and use of the idea, I ask what is the distinct contribution that the notion of constituent power brings to the negotiation and systematisation of the principle of popular power.

The first answer to the paradox has mostly been developed by Andrew Arato, who has devoted much of his career to distinguishing the idea of constituent power from ‘a unitary, embodied popular sovereignty’.⁴ According to his view, the paradox of constitutionalism derives from the systematic misinterpretation of a constellation of concepts connected to the idea of constituent power. These are the

⁴ A. Arato, *The Adventures of the Constituent Power* (Cambridge: Cambridge University Press, 2017), p. 1.

concepts of constitution, when understood as a merely formal legal text; legitimacy, when considered to be independent from the procedures of constitution-making; and sovereignty, any time this is taken to be embodied in a single unified decision maker. The result of this series of misinterpretations is what Arato calls the model of 'sovereign constitution-making'.⁵ In this model, constituent power is 'a constitutionally unbound, sovereign constituent power, institutionalised in an organ of government, that at the time of this making unites in itself all of the formal powers of the state, a process that is legitimated by reference to supposedly unified, pre-existing popular sovereignty'.⁶ This vision of constituent power is, in Arato's view, problematic on many different levels. To start with, it is dangerous. Constituent power is indeed presented as unlimited, in that it is able to 'create any logically and empirically possible form of government and system of laws'.⁷ In addition, it is always exercised by an organ that claims to embody the totality of the people. The combination of the unlimited nature of the sovereign constituent power and its association to the people as a whole is likely to result, in Arato's view, in dictatorship. This is because it makes the self-perpetuation of the organ representing the totality of the people possible both theoretically and empirically.⁸ Second, the sovereign theory of constitution-making is logically impossible and, as such, leads to the paradox mentioned by Loughlin. This is because it posits the people as the antecedent source of sovereign power and authority, thus falling into the trap of postulating the existence of an already formed and organised people before a constitution comes into place to organise it. Sovereign constitution-making is thus a theory aimed at disguising the unlimited power exercised by the constitution-making organ through the appeal to 'the people', which, for Arato, is but an instrumental fiction. To buy into the idea of a paradox is thus to fall prey to this ideological construct, which portrays constituent power as the normless, unlimited and unified source of all constitutions.

By contrast, Arato suggests an alternative: this is called post-sovereign constitution-making and requires adopting a different account of constituent power, one that is separate from the sovereign paradigm. According to Arato, post-sovereign constituent power has a long and distinguished history. Its traces can be found in the political practices of the English, French and American Revolutions, as well as in the political thought of Sieyès, some nineteenth-century French theorists of the state

⁵ Cf. *ibid.*, chapter 1. ⁶ *Ibid.*, p. 31. ⁷ *Ibid.*, p. 34. ⁸ *Ibid.*, p. 35.

and Arendt.⁹ Its fundamental pillars are the rejection of unitary understandings of sovereignty in favour of a multi-level concept of constituent power and a multi-stage practice of constitution-making. This only takes place when the plurality of groups comprising ‘the people’ is invited to write the constitution by participating in a variety of settings, including round tables and other formats of collective constitution-making. The necessary consequence of this approach is that no single organ of the state can be said to embody the totality of the constituent power and that the exercise of the latter is necessarily limited by a set of procedures ‘justified by reference to their own discursively justifiable principles’.¹⁰ In this way, Arato reintroduces norms and procedures into the process of constitution-making which, in turn, offer what he believes to be a vision of constituent power that is both empirically closer to reality and normatively more desirable than the sovereign paradigm. It is closer to the reality of popular power because all empirical evidence of its practice demonstrates it to be bound by some sorts of procedures. In addition, this is also a normatively preferable account of constituent power in that it avoids attributing it to a unified organ and endowing it with an unlimited power. In Arato’s terms, post-sovereign constituent power escapes the paradox of constitutionalism while offering a truly democratic theory of legitimate constitution-making.¹¹

⁹ Arato repeatedly discusses the history of the idea; see for instance chapters 1 and 2 of A. Arato, *The Adventures of Constituent Power*, and A. Arato, ‘Forms of constitution-making and theories of democracy’, *Cardozo Law Review* (17) (1995), pp. 191–230. Also see part I of A. Arato, *Post-sovereign Constitution Making* (Oxford: Oxford University Press, 2016).

¹⁰ *Ibid.*, p. 36.

¹¹ Building on the work of Arato, Melissa Williams also argues that constituent power has been associated with sovereignty for too long. The latter, she claims, is inextricably bound to a territorial conception of the state which is, in itself, problematic. It is thus the task of the democratic theorist to retrieve ‘the normative core of the idea of popular sovereignty’ (p. 8). And this is constituent power. To do so, it is necessary to reconstruct the history of the idea which, she claims, dates further back than the French Revolution. Like Arato, Williams suggests that constituent power needs to be considered as different from current ideas of sovereignty. And like him, she grounds her claim by reconstructing the history of the idea. The resulting definition of the concept is also similar to Arato’s. Yet, differently from him, she is not entirely clear as to whether constituent power is conceptually different from sovereignty tout court or simply different from the statist paradigm of sovereignty. If the second is the case, then she is closer to theorists like Loughlin and Kalyvas, who are both discussed in the next paragraphs. See M. S. Williams, ‘Deterritorializing Democratic Legitimacy’, in Archon Fung, Sean W. D. Gray and Tomer Perry (eds.), *Democratic Inclusion in a Globalized World: The Principle of Affected Interests* (Cambridge: Cambridge University Press, forthcoming). No less, Pettit distinguishes between constituent power and sovereignty in his reconstruction of popular power in the republican tradition, cf. P. Pettit, *On the People’s Terms: A Republican Theory and Model of Democracy* (Cambridge: Cambridge University Press, 2012), pp. 285–8.

Among the exponents of the second view of constituent power – let’s call it the constitutional view – are thinkers who believe that the idea, if correctly interpreted, will solve the paradox of constitutionalism. This is because it reveals the democratic essence of popular sovereignty and points at how it should be institutionalised in day-to-day political practices of popular participation inside the constitutional state. Within this framework, different interpretations of constituent power’s democratic meaning are offered. Loughlin suggests that the core of the idea is its relational character.¹² This is because constituent power describes popular power as the process through which the people’s will is transformed into institutional structures without being either absorbed or neutralised in their ordinary working. Constituent power construes the people’s power as consubstantial with the institutions it constitutes. Differently from other understandings of popular power, that treat it ‘as an existential unity preceding the formation of the constitution’, the idea of constituent power thus ‘expresses a dialectical relation between the nation posited for the purpose of self-constitution and the constitutional form through which it can speak authoritatively’.¹³ This, in Loughlin’s view, reveals that constituent power amounts, de facto, to the essence and true meaning of sovereignty.

Yet no definition is offered as to what the essence and true meaning of sovereignty is, if not through a circular reference to the idea of constituent power. In his words, ‘real or political sovereignty . . . is synonymous with what Sieyès called the “constituent power”’,¹⁴ which is ‘the repository of sovereignty’.¹⁵ The result is that constituent power is defined in terms of sovereignty, and sovereignty in terms of constituent power; the two ideas are seemingly equivalent. To justify why constituent power enshrines the real meaning of sovereignty, Loughlin mobilises the history of the idea. Overlooking whether the term ‘constituent power’ was used or not, he identifies its origins in Bodin’s concept of real sovereignty.¹⁶ In other passages, he suggests that the first theorisation of constituent power is in fact Machiavelli’s theory of the balance between social forces, power and freedom, and *virtù* and

¹² This idea was first introduced by Hans Lindhal. See H. Lindhal, ‘Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood’, in M. Loughlin and N. Walker, *The Paradox of Constitutionalism*, pp. 9–24.

¹³ M. Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press, 2010), p. 227.

¹⁴ *Ibid.*, p. 85.

¹⁵ M. Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press, 2004), p. 90.

¹⁶ M. Loughlin, ‘The Concept of Constituent Power’, *European Journal of Political Theory* 13(2) (2014), pp. 218–37, p. 220.

fortuna.¹⁷ Successively, constituent power appears also in Hobbes' and Rousseau's theories of sovereignty. They both recognise the people's constituent power – what they call sovereignty – but then constrain it in favour of the constituted order in Hobbes' case or of the abstract notion of general will in Rousseau's.¹⁸ The idea found a completely satisfactory theorisation only in the reflections of the American founding fathers, the revolutionary thought of Sieyès and, to a lesser extent, Condorcet in France. These are the theorisations of constituent power able to solve the paradox mentioned earlier. Yet their meaning is defined once more in terms of sovereignty. Constituent power and sovereignty both are 'the essence of the modern state ... the name given to express the quality of the political relationship that is formed between the state and the people'.¹⁹

It is not just Loughlin who presents the two ideas, constituent power and sovereignty, as synonyms. Andreas Kalyvas too deploys them in pair but uses constituent power to distinguish the 'good' understanding of sovereignty from other biased interpretations of the same idea. These coincide with the theory of sovereignty as command.²⁰ The latter comes from Bodin's doctrine of sovereignty as 'the highest power of command'²¹ and is structured around a vertical relation between the ruler and the ruled, where the power to command is absolute, personified and unitary.²² As influential as this theory has been, it can and should be contrasted by relying on alternative accounts of sovereignty, such as those channelled through the idea of constituent power. This idea illustrates a completely different way of thinking about popular sovereignty, one that puts the emphasis on the people's collective authority. In his words:

[T]he conceptual history of constituent power speaks directly against this grand narrative of command and subjection. It illuminates important but

¹⁷ Loughlin, *The Idea of Public Law*, ch. 6. Miguel Vatter also argues that the most important theorisation of constituent power is to be found in Machiavelli and especially in his ideas of originary repetition and of democracy as resistance to sovereign rule. Cf. Miguel Vatter, 'Legality and resistance: Arendt and Negri on constituent power', *Kairos* (20) (2002), pp. 191–230. This resonates with arguments put forward by Antonio Negri, on which more will be said in the following paragraphs.

¹⁸ Loughlin offers different versions of constituent power's history, but they all follow the same general path. See M. Loughlin, *The Idea of Public Law*, ch. 6, and M. Loughlin and N. Walker, *The Paradox of Constitutionalism*, ch. 2.

¹⁹ M. Loughlin, *The Idea of Public Law*, p. 83.

²⁰ A. Kalyvas, 'Popular Sovereignty, Democracy and the Constituent Power', *Constellations* 12(2) (2005), pp. 223–44, p. 225.

²¹ A. Kalyvas, 'Constituent power', *Political Concepts* Issue 3 (2012), p. 2. ²² *Ibid.*, p. 1.

neglected dimensions of the democratic experience and discloses another understanding of sovereignty . . . not only historically prior but also analytically distinct from the regal paradigm, opposed and antagonistic to it: the power of the people to constitute.²³

The history of this alternative sovereignty-as-constituent power is found in the Roman republican tradition, in the thought of Marsilius of Padua and of the Monarchomachs, the American founding fathers and Sieyès, Lafayette and Condorcet, to eventually arrive at twentieth-century anti-colonial independence movements. Kalyvas' story of sovereignty-as-constituent power is tightly connected to theories of direct democracy, resistance and revolution. It is the modern version of ancient practices of direct sovereignty, 'a more sophisticated restatement of the old, fundamental democratic principle of self-government and self-determination'.²⁴ As such, constituent power allows Kalyvas to solve the paradox of constitutionalism by rejecting wrong understandings of sovereignty as command and substituting for them accounts of sovereignty as collective self-government. Once more, constituent power is presented as historically and conceptually paired with the idea of sovereignty, in its more democratic iterations. This is evident in that, for Kalyvas, the birth of 'the modern doctrine of popular sovereignty coincides with the conceptual advent of constituent power', and 'constituent power and modern democracy are associated from the beginning with the idiom of popular sovereignty'.²⁵

Loughlin and Kalyvas are but two examples of a much wider trend that spans well beyond academia to also embrace the world of radical public intellectuals and activists. It is indeed not uncommon to find thinkers associated with social movements claim that constituent power is the only truly revolutionary understanding of the sovereignty of the people. Yet the pay-off of this claim is substantially different from the one offered by Loughlin and Kalyvas, or even by Arato, and, as a consequence, is here presented as a distinct set of answers to the paradox of constitutionalism. Granted the relevant differences, Arato, Loughlin and Kalyvas conceive of constituent power as a force active within and alongside the state. By contrast, radical theorists and public intellectuals tend to see in constituent power a conceptualisation of popular power that should not and cannot be institutionalised within the strictures of the constitutional state. This position adds up to what I've called the third answer to the paradox of

²³ Ibid., p. 2. ²⁴ A. Kalyvas, 'Popular sovereignty, democracy and the constituent power', p. 238.

²⁵ Ibid.

constitutionalism. It is largely inspired by Antonio Negri's depiction of constituent power as pure politics irreducible to any constituted order.

In Negri's terms, before being a concept, constituent power is an immanent reality, a praxis. Its defining features are its being self-founding, unlimited in both time and space and expressing pure *strength*, as opposed to institutionalised *power*. These features of constituent power make it the 'true sense of democracy',²⁶ insofar as democracy is understood as a form of absolute government. Like constituent power, democracy cannot be created from the outside, it is self-founding, its temporality cannot be limited or constrained, and it expresses itself spontaneously, through *strength* as opposed to *power*. It thus is absolute and, as such, it is in a relation of necessary tension with the constitutional state. While the latter is founded on the principle of the limitation and institutionalisation of power, democracy is the pure, unlimited and immanent expression of the constituent power. It is a form of absolute government that, however, never becomes totalitarian.²⁷

It seems to follow, for Negri, that constituent power is the revolution itself, in that – like democracy – it resists not only the constitutional state but also all forms of constituted politics. It thus becomes clear why, for Negri, the concept of constituent power cannot be but 'the concept of a crisis'.²⁸ This is because, by conceiving of popular power through the language of constituent power, key concepts of the liberal constitutional states are necessarily challenged. These are constitutionalism, the organisation of the constituted order, political representation and sovereignty.²⁹ In opposition to all these concepts, constituent power opens 'the door through which the multitude's democratic will (and consequently the social question) has entered the political system – destroying constitutionalism or in any case significantly weakening it'.³⁰ This, Negri maintains, is evident in the history of both the theory and praxis of constituent power. The first runs through the works of Machiavelli, Spinoza and Marx; the second is best evident in the English, American, French and Russian Revolutions, passing through the fundamental experience of the Paris Commune. What both the theory and the praxis of constituent power reveal is thus the key to the realisation of democracy in modernity: the shattering of all attempts to constitutionalise the multitude's will through sovereignty and to annihilate *strength* by transforming it into *power*. Hence, Negri's response to the paradox of

²⁶ M. Vatter, 'Legality and resistance: Arendt and Negri on constituent power', p. 209.

²⁷ Cf. Negri, *Insurgencies: Constituent Power and the Modern State*, p. 2 and p. 21. ²⁸ *Ibid.*, p. 2.

²⁹ *Ibid.*, p. 22. ³⁰ *Ibid.*, p. 21.