Int J Polit Cult Soc (2009) 22:427–443
DOI 10.1007/s10767-009-9070-z

Redeeming the Still Redeemable: Post Sovereign Constitution Making

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Published online: 28 August 2009

Abstract My concern here is for the dramatic new method of democratic constitution making, one that I call post-sovereign in the sense that the constituent power is not embodied in a single organ or instance with the plenitude of power, and all organs participating in constitutional politics are brought under legal rules. This method is the democratic alternative to revolutionary constitution making that all too easily steps over the threshold to dictatorship. And, this was the method that was reluctantly adopted in Iraq. Yet, because of what happened in Iraq, future international efforts during military occupations are likely to avoid the instruments used in that country. In this sense, this essay is part a rescue operation, an attempt to redeem the still redeemable. In what follows, I would first like to present the developed new paradigm of constitution making, as it has been first developed in Poland and Hungary and fully realized in South Africa, making the relevant comparisons with the two classical models of democratic constituent power originating in America and France. I would like to show that all components of the model are significant and mutually reinforcing, including the role of the constitutional court that is the most important clue to the newness of what is involved. Next, I would like to argue that, while the application of constitutionalism to the process as well as the result of constitution making seems to be a conscious part of these new efforts, this move in my view does not represent a sufficient solution of the problem of legitimacy. The second part of the essay will therefore focus on that question, trying to formulate a hypothesis that could serve as a beginning point for a normative theory of democratic post-sovereign constitution making. The third part will reconsider the very old problem whether beginnings can be mad legitimate.

Keywords Revolutionary constitution · Post-sovereign constitution · Constitutional court · Constitutionalism · Legitimacy

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Introduction

This essay is part of a rescue operation, an attempt to redeem the still redeemable. The treasure it seeks to save lies not in the eighteenth century or even 1956 but in the recent democratic transformations. It is about to be buried, who knows for how long, due to the perverse but revolutionary attempt of the Bush government, supported by a veritable treason of supposedly post-revolutionary Central European intellectuals,[1] to impose political democracy through military force or to use democratization as the ideological arm of a neo-imperial project to establish a new type of control over the Islamic Middle East. Either way, the project is collapsing, but it is threatening to bury worldwide projects for democracy and democratization under its rubble.[2]

My concern here for the dramatic new method of democratic constitution making, one that I call post-sovereign in the sense that the constituent power is not embodied in a single organ or instance with the plenitude of power, and all organs participating in constitutional politics are brought under legal rules.[3] This method whose roots go back to the American revolution and some experiments in more recent French history (1945–1946), as well as the making of the Grundgesetz, was revived in Spain in the 1970s, was practiced in Central Europe in the years of regime change 1989–1990, and was perfected in the Republic of South Africa in the 1990s. It is still practiced in Nepal in the present decade but without anyone outside noticing.[4] Its key characteristics are a two-stage process of constitution making, with free elections in between, and an interim constitution. The underlying idea, unfortunately all too poorly understood, is to apply constitutionalism not only to result but also to the democratic process of constitution making. This method is the democratic alternative to revolutionary constitution making that all too easily steps over the threshold to dictatorship. And, this was the method that was reluctantly adopted in Iraq by the country's American rulers and could very well be entirely compromised by that even if in a very pathological and unsuccessful form. Already, in Latin America, in the Andean republics, in Venezuela, Bolivia, and Ecuador, the alternative of revolutionary-populist sovereign constitution making has re-appeared, and after Iraq it will offer itself, in spite of the already authoritarian processes and predictably authoritarian outcomes as the better, more radical and indeed the more democratic alternative. People may very well forget South Africa and may remember Iraq

[1] With some honorable exceptions. The late Jacek Kuron and my friend Janos Kis were the most famous of these exceptional political and intellectual leaders in Central Europe who condemned the illegal and irrational American war even before it started and not only *after* it began to produce a disaster.

[2] It has not quite collapsed yet. Today, the day the new realist Barack Obama will take the Potomac primaries (what a term!), I read in *The Guardian* that David Milliband, the UK Foreign Secretary, son of the Marxist scholar and Left critic of the state Ralph, has just argued in a speech that in spite of some mistakes that were made "we" must continue to promote democracy by the means of not only soft but also hard, namely, military power. See Wintour 2008. While the report of the speech in fact goes easy on the use of military means, we do get the false antinomy of both soft and hard power on behalf of democracy or "the argument of the left and the right to retreat into a world of realpolitik." As to *R*ealpolitik, it is still preferable to idealism a la Bush and Blair acolytes!

[3] And not in the matter of post state sovereignty in the sense of international law!

[4] See, however, my op. eds and interviews in Nepalnews.com, Arato 2006, 2007a, 2007b. I went to Nepal to consult and lecture in September of 2006.

when interim constitutions and binding constitutional assemblies will be raised as political and legal options.[5]

There have been other recent "democratic" interventions and occupations along with an external role in constitution making before: Iraq in Bosnia, Cambodia, East Timor, and Afghanistan. None of the results are very good, and the populist theories of participation that guided the international community that advised constitution makers in these cases were also not very helpful. They opened the door almost without exception to executive dominance of the process, yet any of them will likely be remembered as preferable to what will be seen as the American approach typified by Iraq.

In my view however (Arato 2009), strangely enough, the method adopted in Iraq, born not of an American plan but of the conflict between the occupiers and the movement led by Grand Ayatollah Sistani, if we forget the pathological aspects due to the persistence of imposition and exclusion throughout, was quite superior to what was done elsewhere during other occupations, including that of Japan (if not Germany). Yet, because of what happened in Iraq, future international efforts during military occupations are likely to avoid the instruments used in that country. It is not that Iraqi constitution making will be forgotten; rather it will be relegated to a dark chapter in the collective memory. At a time when there is a dramatic need to rethink the whole legal problem of when and how international interventions are permissible and what to do during occupations after such interventions, forgetting or excluding some of the most important options that should be extensively discussed and generalized instead is bound to have very negative consequences.

In what follows, I would first like to present the developed new paradigm of constitution making, as it has been first developed in Poland and Hungary and fully realized in South Africa, making the relevant comparisons with the two classical models of democratic constituent power originating in America and France. I would like to show that all components of the model are significant and mutually reinforcing, including the role of the constitutional court that is the most important clue to the newness of what is involved. Next, I would like to argue that, while the application of constitutionalism to the process as well as the result of constitution making seems to be a conscious part of these new efforts, this move in my view does not represent a sufficient solution of the problem of legitimacy. The second part of the essay will therefore focus on that question, trying to formulate a hypothesis that could serve as a beginning point for a normative theory of democratic post-sovereign constitution making. The third part will reconsider the very old problem whether beginnings can be made legitimate.

[5] There is of course the possibility that constitution making will be entirely disregarded in the case of Iraq, since matters like state destruction, insurrection, and civil war rightly occupy everyone's attention. If Iraq were an isolated case that will never again recur, perhaps this could happen. There is indeed little attention paid to Iraq in a country like Nepal where the democratic transformation is indigenous, although some lessons could have been learned even here, for example the desirability of avoiding co-opted transitional legislatures and being extremely cautious with identity politics based on ethnicity. But the role of the USA in Iraq and the disasters that it has caused make it unlikely that any aspect of this said history will be forgotten. If remembered, it will likely be only as a series of cautionary tales. The constitutional aspect will be one of these.

Elements of the New Method

The existence and the meaning of a new, contemporary *democratic* method of constitution making is best illustrated by focusing on its elements. These are best understood in comparison with the great historical paradigms of the American and French Revolutions, with the proviso that the additional simplification that the former is treated under the eventually triumphant version first used in Massachusetts in 1780 and more influentially in Philadelphia in 1787 ("American Model") while the latter is considered under two variants that remained historically relevant ("French Model I": 1791/1848 vs. French Model II: 1793–1795/1945–1946) involving two (unitary vs. dualistic) interpretations of the role of the people in the constituent process.

Two-Stage Process and Interim Constitution

In a sense, of course, all constitution making involves many events, thus arguably several stages. What gradually emerges from Spain in 1975–1977 and South Africa between 1991 and 1996 is the new reliance on two drafting stages that foresee from the outset the interlinked production of two constitutions, an interim and a final one, where the rules of the first constrain the making of the second. The existence of a fully developed, explicitly interim constitution is the most important documentary evidence of the new paradigm of constitution making. It successfully combines the need of a provisional government, with the requirement of subjecting this form too to constitutional limitations, and the needs of constitutional learning in the early stages of constitution making with the requirement that the new constitution be insulated against easy alteration.

It is true of course that many successful constitutions like the US Federal Constitution, the Grundgesetz, and the Constitution of the Vth Republic were parts of learning processes involving two constitutions with long or short crisis periods in between. None of the initial constitutions though, not the Articles of Confederation, the Weimar Constitution, nor the Constitution of the 4th Republic were said or meant to be interim or provisional, and the successor constitutions were not made according to their rules of amendment. It is also possible to regard the making of a single constitution like that of the USA in 1787 as involving a plurality of instances: the Convention, Congress, and the ratifying Conventions. But as the anti-federalists specifically charged (and Jefferson supported in some letters when he called for ratification by nine only, with the last four calling for amendments, the Bill of Rights, before ratifying),[6] only one of these instances could play a role in the actual drafting, and the state Conventions were denied the power to do anything but to ratify or reject the document as a whole. In the new, emerging paradigm, there are at least two instances that play a fundamental role in the drafting process: the instance that drafts the interim constitution, typically a round table of major political forces, and an instance that drafts the final document, always a freely elected body that should not be called a

[6] See: "To A. Donald" February 7, 1788 and "To Francis Hopkinson" March 13, 1789 in Koch and Peden 1944. The original ratification rule, article VII, was only that of a new treaty, and not as it were the amendment rule of an already existing federal state. Thus, the first nine would not bind the next four. That would only happen by Article V. of the Constitution itself, first with the Bill of Rights that were passed according a set of promises rather than the compulsion suggested by Jefferson. This point is often misunderstood, but see Madison in Federalist Papers No. 39. Ackerman (1998) has corrected himself on his earlier error regarding the illegality involved (actually only treaty renunciation by the nine forming a new treaty, not violating an old constitutional amendment rule) in *We the People, Volume 2. Transformations*, Chap. 2.

constituent assembly (*une constituante*) in the French terminology at least. In addition, parliaments inherited from a previous system, ministries of justice, and constitutional courts too may play a role.

In my view, it is this two-stage character above all that is the key to the idea of *post* sovereign constitution making. With respect to the French Model 1, there is no instance here that can represent in the absolute sense the sovereign will of the people. But also with respect to French Model II and the American Model, there is no incorporation of the people in a "two-body" version where the natural body of the people in a referendum or the organized body of the people in a convention checks, through its yes or no, the compliance of the will of the assembly with the people's will. If the people can be said to be present in the new type of constituent process, this is, would be in a plural, complex and always a limited way that has neither the possibility of the absolute no of the referendum, nor the unlimited constituent power incorporated in an assembly.[7]

Round-Table Agreements, Free Elections, and Non-Sovereign Constitutional Assemblies

The interim constitution helps with subjecting the process of constitution making to constitutionalism but not with the vexing problem of how to begin democratically or at least legitimately where there is no democracy before. Note that this last problem can never be solved rigorously: the French constitution makers of 1945 (mainly René Capitant, it seems), who tried desperately and creatively by putting elections and a referendum at the very beginning of the process, were nevertheless open to charge that they determined the electoral rule undemocratically.

The famous round tables from Poland and Hungary to Bulgaria and South Africa (under whatever name) partially solve the problem by substituting principles like pluralistic inclusion of the main political forces, publicity and adherence to the rule of law for the missing principle of democratic legitimacy. This act of replacement is accompanied by consciousness, in varying degrees, of the lack of representative status that only electoral legitimacy could provide, effecting the degree to which the round tables would fashion constitution-making rules for a subsequent freely elected constitutional assembly. Nevertheless, what would be a common element in this model is that, while the final constitution would have to be the work of a freely elected parliamentary assembly and not some commission chosen by the executive, such an assembly would not, minimally, dispose over its own constitution-making rules and more maximally may be forced to adhere to substantive principles agreed upon by the round tables.

Evidently, the round tables are new institutions with respect to the drafting assemblies of the two French Models and even the American one; they are not the makers of the final constitution. But they have been compared to the drafting convention of the American model nevertheless, an argument made plausible by their co-existence with the ordinary

[7] It is true that there was one important anticipation of the interim constitution within a classical democratic model, namely, of the French type II utilized in 1945–1946 when a referendum was asked to approve a very short set of regulations (La loi constitutionnelle du 2 Novembre 1945) a "préconstitution" (or: "la petite constitution") that would minimally bind the constituent assembly to be elected during the same voting procedures as well as the provisional government. But neither the limited contents nor the extent of the limits on the constituent assembly make this important forerunner an actual example of the new model. The importance of a referendum authorizing the preconstitution, which in turn established another referendum to control the work of the assembly, suggests treating this case as a deviant or transitional one of sovereign constitution making. In contrast, the new model does not involve referenda, except in its own deviant or pathological case of Iraq.

legislative body that they do not supersede in its normal operations and whose formal consent they must secure even with respect to constitutional drafting. In fact, they are juridically weaker, though politically stronger than the American convention in its last and final form of appearance, as pioneered in Massachusetts and Philadelphia. Legally, the round tables are only private gatherings with no public law status. But given the role of the old ruling party in their negotiations, round-table agreements generally amount to much more than mere recommendations that can be turned down by ratifying bodies. The official parliaments that must approve the interim constitutions for the sake of formal legality have little ability to do more than to initiate marginal changes and sometimes not even that.

At the same time, the constitutional assemblies of the model are new as well, with respect to all three great democratic models because of the limitations to which they are subjected, even if they are given special names like the Grand National Assembly in Bulgaria or where the distinction between constitutional and constituent assembly is fudged. The limitations can admittedly be as little as having to work under the amendment rule of the interim constitution or under ratification rules provided by that constitution for the final process, but in fact, much more can be regulated like the voting rules, the composition of constitution making committee, their voting rules, the role of outside inputs, the length of time allowed for the process, mechanisms for new elections in case of failure, and so on. Some of these restrictions (especially time frameworks) could be applied to traditional constituent assemblies like the two 1946 assemblies in France, but the number of possible procedural limitations and especially the restrictions on majority rule here are very new. Of course, we should not mistake these external and prior restrictions with ones that a sovereign assembly establishes entirely for itself after it first meets.[8]

Legal Continuity and the Use of Amendment Rules

We now come to somewhat more contingent but nevertheless very characteristic elements of the new model. The first is legal continuity. The new model generally avoids the legal and institutional state of nature in which one line of thought from Sieyès to Schmitt put the *pouvoir constituant* but even the illegalities involved in the Philadelphia Convention's break with the amendment rules of the Articles of Confederation. All the characteristic cases from Spain to South Africa involve no legal break between old regime and new, and generally, they rely on using the old regime's amendment rule to accomplish revolutionary change through legal means.

Two reservations however need to be made regarding this important issue. First, it is the amendment rule of the formal constitution that is used, which may not have been ever seriously treated as the old regime's actual rule of change. Indeed, the legality that is being preserved in many of the cases is fictional or is rather created for the occasion, since the old regime's were dictatorships with paper constitutions that may have routinely disregarded and not only violated their own ritualized legality. Second, when an amendment rule was used *for real* for the first time, there was also a risk that it will be unusable in practice. That certainly could be the case for previous rule of law regimes as well as dictatorships, as the cases of the Articles of Confederation and The Constitution of 1791 in the age of

[8] Nor should some other historical parallels mislead us. It is true that the South African interim constitution's provision for electing a two-chambered legislature that would meet under one roof as the constitutional assembly was anticipated by the French 3rd Republic. But under that system, it was the amendment rule that involved this provision, while the national assembly that made the original constitutional laws of 1875 was unicameral, entirely unbound, and could have made no senate if it so desired. The South African constitutional assembly thus represented the new model with respect to all our older historical predecessors.

democratic revolutions, or the Czechoslovak Constitution inherited by the opposition in 1989–1990, and the European treaties of the present tend to show. In such situations, the example of the American framers seems to be a better one than that of the other relevant constitutional politicians who blindly stick to legality.

At the same time, one should be very careful with illegality. As the admittedly somewhat farcical adoption of the new model Iraq indicates, initial legal continuity with the old regime though important is not an absolutely essential prerequisite of its applicability. Once the model is launched, however, legal continuity between its procedures and stages, i.e., the strict legality of the actions of all who participate in the process, is absolutely important. Again, the Iraqi case demonstrates the great harm the violation of the procedural rules implies for a paradigm of constitution making that depends on the coordination and the compliance of many instances and of course the mutual trust that only the possibility of enforcement makes possible.

The Role of Constitutional Courts and Constitutional Principles

Enforcement is in fact central for the model. Once an interim constitution is drafted, it must be enforced to be the type of constitution that can regulate the constitution-making process itself. After opposing the premature setting up of a Constitutional Court, the Hungarian Democratic opposition consented once it had a constitution "worthy of defense." Nothing like the role of a Constitutional Court in original constitution making exists in classical democratic models. Of course in the new model too, such courts play no role in the making of interim constitutions. It is the role of the former to set up the latter, even if some primitive forerunner tribunal already existed. What happens then is truly extraordinary though we have only seen the full-fledged results only in the South African case. The constitutional assembly now falls under the control of the Constitutional Court, in the sense that its constitutional product has to be certified by the Court as constitutional. Something remarkable (though not entirely unprecedented, given the existence of unamendable parts of constitutions like the Grundgesetz) becomes now possible: an unconstitutional constitution. Interested parties can sue to have the Court declare parts of the constitutional draft unconstitutional, and the Court can issue guidelines to the Assembly concerning the forms of redrafting. Nowhere has anything like this been possible during the original constitution-making process.[9]

In South Africa, as is well known, the powerful role of the Court was made possible by 34 constitutional principles, enacted in the interim constitution, themselves un-amendable, many of them substantive that allowed the Court to play a very active role in constitution making through the certification process. But in principle, the new model implies such a possibility at the very least on procedural grounds, if the freely elected constitutional assembly violated the rules set out for it by the interim constitution. Note the re-appearance here of the counter-majoritarian difficulty, but without the ability of a Hamilton or a Marshall or a Hayek or an Ackerman to argue that the court is denying the majority of an assembly in the name of the majority of the people, since the makers of the interim constitution had no link to the will of the electorate. The limitation of the freely elected assembly thus cannot gain its legitimacy from the will of a higher, sovereign authority.

[9] In Germany, too, only amendments can be declared unconstitutional, although who knows what might have happened if the promise of a constitution upon unification had been taken up.

Can the New Method Be Justified (Made Legitimate)?

The elements of the new model imply one another. The two-stage structure logically means an interim constitution and vice versa. The problems of legitimacy of the interim constitution require both round-table type agreements and freely elected constitutional assemblies. The agreements would not be worth much to their makers (or some of them), however, if the freely elected assembly would then be entirely unbound nor if they could not be enforced. Hence, setting up a Constitutional Court by the interim constitution is an intrinsic part of the model, though neither full legal continuity, as I argued, nor substantive and enforceable constitutional principles (unique to South Africa) may be. There may not be enough legality in the old regime to allow the former and enough legitimacy inherited by or generated by the round tables to allow the latter. But assuming even enough legality and legitimacy in the process, can the idea of binding what is often a country's very first democratically elected assembly by instances that include representatives of the old regime be justified or at least made legitimate? Can lesser legitimacy bind the greater one as I asked with Sistani when the Iraqi interim constitution was produced with very limited political inclusion? But theoretically, the same question arises even when the political inclusion is initially relatively broad.

The answer depends of course on the standards of justification. From the point of view of strategic prudence, the answer is certainly yes, while from the point of view of a comprehensive, moral theory of justice, the answer is most likely no. As to the former, in all the relevant cases, the model came about for initially strategic reasons. The old regime controlled the means of violence, and the most important strategic objective of oppositions was to avoid a top down imposition of mere reform and to accomplish the task of complete political regime change. The new method of transition and constitution making was admirably successful in accomplishing these two goals. Giving old regime actors an important voice in the modalities of the new regime was the cost. But could a merely prudential justification bind the new democratic forces to adhere to their "solemn promise," as the South African Constitutional Court called it, as soon as they came to be a majority in the freely elected constitutional assembly, and in possession of the means of violence as the result of the political regime change achieved by the interim constitution? As to the latter, the very participation of the forces of the old regime in the bargaining process, and especially their ability to negotiate guarantees for their organizations, members and the beneficiaries of their rule, would certainly appear unacceptable from the point of view of justice. The deals made at the round tables almost always inhibit punishing the wrongdoers of the past to greater or lesser extent and redressing the balance of economic distribution in favor of the victims and to the expense of the beneficiaries, to use a justice based terminology introduced by Mahmood Mamdami. It may not be evident to all, but it is to me, that the justice-based arguments revive the old claims of social revolutions which need to be confronted with their own elaborate historical record of injustice. From the strategic point of view, moreover, a justice-based model could have worked in the relevant contexts only at the cost of deception (possibly intentional), that is first making and then violating the "solemn promises" that the South African Constitutional Court refused to countenance even in relation to relatively partial matters in a context where the major actors in general conspicuously adhered to their promises and obligations.

Prudence is thus asking too little, and justice is asking too much, as almost always in politics. So I come to the properly political criterion, legitimacy, that following Jürgen Habermas I see as always having *both* an empirical and a normative dimension. The empirical side has to do with the fact that legitimacy or legitimation comes about when

actual political actors, taking into account their identities and interests, come to regard a state of affairs or a projected one as valid. They can do so in my view when they can come to an agreement that they regard as second best. The normative side is more complex. The figure of the agreement as long as the equal dignity of the participants is respected implies fundamental norms that Habermas has repeatedly analyzed, and these are present even in empirical agreements. Moreover, the standards used by the actors to evaluate what is best, second best, and so on are always connected to some norms, values, visions of the good life, and so on.[10] Legitimacy and legitimation can have many sources, beyond the Weberian triad even if we add, as we should, democratic legitimacy achieved in elections. Legitimation in the constitution-making processes discussed here is generated when actors, in light of their interests and identities, agree to (polyarchic) options that would be at best *second best* from their point of view and solemnly agree to adhere to them in the eye of the public for the sake of peace and unity.

Needless to say, such a legitimacy works only if the major relevant actors are present and manage to make inputs into what becomes a second (or third) best political option, and they have enough trust in their partners or in a machinery of enforcement or both to make the deal work. I am not concerned here with a situation of dramatic exclusion, as in Iraq. There is also a problem when a freely elected assembly contains very different constellation of powers than the round table that may have produced important constraints on latter constitution making. In South Africa, e.g., the African National Congress had almost two thirds of the seats in the constitutional Assembly, and yet it was limited by the 34 constitutional principles and the power of the Constitutional Court, a mere *constitué.* Without analyzing that old distinction in detail, should not democratic legitimacy trump all other forms in the process of building a democracy? Should restrictions insisted on by small groups tied to the oppression of the past, and still having the forces of violence at their disposal, bind the will of the people as the *pouvoir constituant*? The question ultimately has to do with the identity of the people. An argument from popular sovereignty would seem to imply that a solemn promise made through the agreement of others who were not legitimate representatives could not bind the people. In terms of the metaphor, the people could be bound only if it was a promise they made to themselves.

Of course, one could contest the identification of the people and the assembly, as it was done in the French revolution repeatedly, as well as in England and America before, and also in South Africa after the constitution making process was over. But it would be absurd to deny the popular character of the Constituent Assembly elected in the country's dramatic first elections, after wide public education and wide particiaption, often at tremendous cost. At the same time, it is important to see, as my friend Janos Kis has recently argued in an important paper (but as Condorcet already showed against the early Sieyès), that the people are never a primordial entity but are always legally constituted and therefore with specific powers as well as limitations. With this idea in mind, Raymond Carré de Malberg has argued that the proper understanding of even the *pouvoir constituant* involves and must

[10] The latter, of course, can be justice-based—the best option in view of each actor—but in my view, it is hopeless to try to integrate them or even criticize them on the basis of a preferred theory of justice because the "bests" are usually incompatible in the context of political division. The least we must expect is a reconciliation in terms of a modus vivendi—inevitably on the ground of some kind of constitutional, polyarchic politics—that gains its legitimacy procedurally from the agreement itself and substantively from the minimum shared standards of peace and possibly the desire for unity, but rarely justice, while the most we can hope for is the developing of an overlapping consensus that may eventually include some shared concepts of justice. It is because we can expect only the least that enforcement is so important.

involve limitation, at least procedural, but possible substantive limits like the famous republican government clause of the French 3rd Republic that could not be amended. To be sure, he saw the proper exercise of the *pouvoir constituant* in terms of amendment rules, since according to him there could be no juridical science of coups d'état and revolutions, matters of mere power. With this view, he anticipated the reliance on amendment rules in our new paradigm, and yet, we cannot stop with his positivistic perspective which does not really ask who can authorize limits on the original pouvoir constituant.

Here, the work of another French author, Maurice Hauriou, can help us. As disturbed by the memories of convention government and omnipotent "constituants" in French history as Carré de Malberg, Hauriou too (as Olivier Beaud recently showed) believed in the limitation of the constituent power. But he tried to conceptualize this limit on more active foundations than his colleague's rather passive and ultimately negative concept of "national sovereignty." According to Hauriou, sovereignty itself from the beginning should be seen as double, originating in force and consent, imposition and agreement, leading to state and popular sovereignty. While the two principles reinforce the unity of the state toward the outside, internally they represent limitations for one another. Thus, the constituent power of the people is to be limited by state sovereignty, just as the sovereign state is limited by popular consent. The former limit is a condition of "stateness;" the latter of "legitimacy."

With respect to our two-stage model, it is not difficult to see the importance of state building in the first stage and regime creation dominating in the second stage even if the two domains are never strictly separable. The governmental participant of the Round Table earns its place there through the possession of the means of violence. It is essential that all those who may dispose over rival forces of armed men be included to whatever extent possible. Here, exclusion, as we have seen in Iraq, leads to insurrection and civil war. Even when participants are not (yet) armed, their potential role in armed or peaceful revolutionary insurrections plays a significant role in their participation and especially in the weight of their participation. Finally, control over armed forces including militia, and the organization or re-organization of the state structure in terms of federal, confederal, or consociational arrangements, with or without sunset clauses, is a central issue many of the Round Tables must decide, and it is above all agreements on these issues that minorities seek to enshrine or protect with respect to the later stage of the constituent process. We can say with certainty that the most important limitations on the freely elected constitutional assembly are functions of a state bargain achieved during the first stage of the constituent process, which may at times be buried in the drafting process as a whole especially where state issues are not particularly controversial. The only problem is, and this is what we have seen in Iraq, that this state bargain itself can be exclusionary and therefore illegitimate. Is this because we want a state that would limit the people to legitimately speak in the name of the people? That would make the argument circular, leading to no legitimate limitation on the ultimate authority of the people.

But in order to see who can limit the people, we should probably see the limits of identifying the people entirely with the legal body of the electorate. I think the argument of Kis, seeking the meaning of popular sovereignty, correctly identifies the people in the one capacity of being able to authorize a constitution (or the laws for that matter) for a political community. No other meaning of the people than an electorate based on universal suffrage can have the combination of requisite universality, equality, and decisional power. But we know that the bodies so elected have only limited linkage to the electorate in terms of any bridging concept like accountability. Thus, ever since the democratic revolutions in the democratic tradition, we rightly insist that the people must have many bodies, limiting one

another. One such bifurcation is that between the constituent and constituted power, that could be understood only as denying constitution-making powers to ordinary legislatures or, in the American way, also denying other than constitution-making powers to a "convention." Another still is the separation of powers, if involving separate election of the executive. Most relevant here are the understandings of public opinion and societal forms of self organization and mobilization as "bodies" of the people that bring formally constituted political bodies under their influence.

Thus, we must not regard the round-table agreements concerning the state as mere elite bargains that seek to limit democratic and popular constitutional assemblies. For the bargains to be legitimate, and for the agreements to have their solemn character, they must incorporate much wider social aspirations than those of the leaderships of a few parties. Whether these aspirations find their way into the agreements in terms of recognized inputs that reappear as specific paragraphs or the new leading positions of specifically trusted persons does not matter very much. When neither happens, interim agreements cannot do their job. But when both happen, as in South Africa, it is very striking how few people actually question the rightness of adhering to the limits agreed upon under very difficult circumstances. Having convincing leaders is a matter of luck. Representing all relevant groups is almost always possible, until one group or another uses its presence only to bring down negotiations. When there is convincing evidence of such sabotage, exclusion becomes more legitimate. Finding solutions that incorporate some preferences of almost all parties is again almost always possible, even if here power relations in the country will dictate the weight of each bargaining position. The general rule must be: the more inclusion, the better leadership, the more incorporation of public aspirations openly expressed and discussed, the more a freely elected assembly can be constrained. But wherever those constraints lie, the limits of where one can speak of sovereign dictatorship or convention government must not be crossed. The new method of constitution making available today finally allows us to see beyond this particular danger by applying constitutionalism to the method of constitution making on foundations that according to my hypothesis here can be made legitimate.

Legitimacy and New Beginning

For some time, I have stressed that where there is no democracy one cannot, strictly speaking, begin democratically.[11] At the same time, I have also tended to add that there are nevertheless legitimate and illegitimate beginnings, and I have at various times treated legal continuity, revolutionary legitimacy, pluralistic inclusion, and other principles like consensus and publicity from the point of view of an initial nondemocratic legitimacy.

The point that now needs deeper elaboration is relevant to populist democratic constitution making. Its overwhelming superiority is supposed to be due to the facts that in this model the sovereign people, and no one but the sovereign people, gives itself a constitution. This position is based however on unacceptable political mythology, based on incoherent originalism and what has been recently called the metaphysics of presence (Lindahl 2003). Both historical analysis and logical considerations reveal that the *legal* identity of the sovereign people, one capable of action only *within* representation, is determined by *prior* electoral and other procedural rules that must be given to the "people"

[11] See Arato 2000, pp. 230–231 and the rest of this Chap. 7; also see Arato 2005.

by elites who thereby constitute them as a people capable of action.[12] Hans Kelsen already argued that "the people—from whom the constitution claims its origin—comes to legal existence first through the constitution" (Kelsen 1945: 261)[13] This idea, as I see it, contains two: some kind of nonpopular beginning of popular constitutions and the legal, representative character of the people within constitutions. Regarding both, one needs to distinguish the "we" that speaks words like "We, the people…", and the "we" in whose name these words are spoken (Van Roermund 2003:47 et sqq).[14] The first "we" that speaks (the "actor") is not the people (one cannot begin democracy under nondemocracy democratically) and the second "we" (the "author") never acts. The first we claims that it is a "representative" of the people and therefore has a right to act in its name.[15] How can this act of representation, or equally substitution, and arguably usurpation with its element of arbitrariness by a self-designated agent be made legitimate? Advocates of the classical democratic method of constitution making (who have often criticized liberal constitutionalists in terms of their result rather than process orientation) in the end answer in terms of the result: to the extent the constitution actually contributes, performatively, to the creation of its supposed author, the unified people.[16] Leaving aside the irrelevance of that ideal to a divided society like Iraq or even the peaceful European Union, the formula resembles that of Joseph Weiler's biblical "We will do, and hearken…" (i.e., impose a covenant first, and understand the divine dispensation later) that was applied to a more appropriate model of

[12] It is important to admit that, in a political community, any legal identity cannot exhaust the symbolic meaning of the people. A given legal identity can be challenged in the name of other competing legal identities in the name of the same "people." But that "people" is a symbolic one whose place, following Claude Lefort, is legally and politically an empty place. Claims to embody it are always usurpations as Carré de Malberg already argued in his defense of *national* and critique of *organ* sovereignty. I would distinguish political meanings of the people from legal ones, only to leave open the possibility of alternative institutional options, some of which are not yet realized. The legal meaning of the people need not be understood very narrowly in terms of the legislature and the electorate and can encompass any number of pluralistic forms in civil as well as political society as long as they receive some formalized or institutionalized roles. The political meaning is available to take up the rest of the forms. As Kelsen realized, the political people are likely to be more minoritarian than the legal people. But only the symbolic meaning that may encompass future generations too is fully universal. Note that, outside the symbolic meaning of the people, the various other meanings may be redundant and contradictory.

[13] This problem has been since thematized by a variety of diverse thinkers from J. Derrida to J. Weiler. See the very detailed and serious treatment of my friend Janos Kis 2006/2 and the critique of the metaphysics of presence by Lindahl op.cit. Kelsen himself admittedly added that, in a political if not a juristic sense, a people can be seen as the source of the constitution, but then they would certainly be only a minute part of the whole people.

[14] Roermund uses the Hobbesian actor/author distinction in this context that works less well for the specifically cited American case where the Convention *technically* treated itself as a recommender of mere language (as Rousseau's legislator) and the ratifying conventions as both (en)actors/authors of the famous phrase. In light, however, of the fact that the Federal Convention constituted the rules under which the rest of the process was to proceed and the relatively narrow freedom of the state conventions to approve/disapprove but not to amend, something like the same distinction can be upheld also in this case. The new post sovereign method however breaks with the model, as I will show, by making it reflexive. Only it establishes the actorship of the authors, in both stages.

[15] This is done in the classical European version by freely elected constituent assemblies, occluding their inevitably arbitrary beginnings. The American convention of the 1787 type does not claim representative status, but in effect, the ratifying conventions do. The drafting convention thus plays the role of the instance that makes the electoral rule (in effect it did that, by choosing state conventions), and the arbitrariness here had to do with its extra-legal actions.

[16] This is so even in the cited reflections of Kis, Roermund, and Lindahl, all of which are brilliant but none of them offering a challenge to the first claims of being authorized which evidently can be arbitrary or legitimate to very different degrees even if arbitrariness can never be eliminated and legitimacy, at that stage cannot be complete. I rely on all of them, but based on the positive experience of the successful cases and the negative experience of Iraq, I am hopefully able to take one or two additional steps.

European pluralistic culture of constitutional tolerance. Here too the initial process is redeemed by the result, and asking for its initially democratic credentials would ask for an unfree people to participate in the creation of freedom, forever privileging that unfree subject as the constitution's author (Weiler 1999: chapter 1). Thus, Weiler goes so far as to make heteronomy not only inevitable but a virtue as well.

Nothing like a biblical dispensation from on high occurred in Europe, but no great disaster either. For the moment, constitutional change carried out or rubber-stamped by the European Court of Justice has helped to produce only a huge democracy deficit that is not yet well understood as a clash between factual constituent power and legitimate constituent authority. The new Reform Treaty, that has its own democracy deficit, should make the situation worse. Iraq on the other hand shows the possible consequences of thinking along lines like Weiler's when the constitutional imposition is both more drastic and more visible.

And yet, even in Iraq, the pathological version of the two-stage model that was adopted indicates why the genuine version points beyond all imposition. This can be shown by pointing to the possibility of a more sophisticated version of the actor–author schema in the new model. Here, that schema becomes reflexive, differentiating its components and indicating that a legitimate version has organizational requirements. What in the single-stage model is a single set of utterances, made by one speaker(s) in the name of another subject that never speaks, becomes two, with two acting subjects, in two distinct stages, with ascending but never complete legitimacy. Unlike the speaker of the classical populist model, the speaker of neither stage here is able to fully identify itself with the popular sovereign. And yet, their legitimacy can be higher. This is so fundamentally because of the changed character of the very beginning. While the arbitrariness is still there in the first stage, it does not lead to an arbitrary and potentially self-serving imposition of initial rules. What can only be to an extent arbitrary is the choice of negotiating partners and decision rules but for these sociological, historical, and moral criteria of inclusion and fairness exist even if an old legal order has been disrupted. Inclusion may never be perfect, but as we have seen in Iraq, one can do much better or much worse, at the very least. If the first stage is accomplished fairly, what was simply an actor in the classical populist model is now bifurcated into a subject of action (with its now receding arbitrary element) and authorized agent (authorized by all or most of the political organizations of the country). The speaker (s) who write an interim constitution speak at the same time directly in the name of political organizations and establish a process by which a democratically authorized set of speaker(s) can be elected. Still, it is the decision makers of the first stage that constitute the people as a legal entity capable of action. Broadly understood, they are representatives not only of political groups but of the population understood in terms of politically articulated segments. Evidently, they also constitute, performatively, the population in terms of these segments by their action if not always the rules they generate. They thus refer to the people in two possible senses, and this can lead to problems (e.g., the freezing of consociationalism or power-sharing) later on. Much depends on the extent they are genuinely superseded by the second set of speakers not only as authors who can legitimate an unchanged interim constitution but as actors as well creating a new one.

The speakers in the second stage are also representatives, this time of the citizens understood in terms of universal suffrage (who in turn are themselves only representatives, since not all citizens can or do vote, and the electorate represents therefore the nonvoters as well as children, e.g.) Their legitimacy can be higher than that of a classical constituent assembly because the manner they were chosen was less arbitrary and more inclusive. Yet, in the two-stage process, the rule makers of the first stage who structure the process as a whole have no interest in mythologizing the second set of speakers as *identical* to the

people and especially as direct embodiments of a constituent power outside of law. Nevertheless, in the second stage, the representatives have the democratic authority to speak in the name of the people or the citizens (Kis 2006/2). Because they are neither identical to the people nor seen as such, their power can, should be, and always is to an extent limited. But one must be very careful with these limitations. This is so because the constitutional actors in the second stage are authorized, unlike those in the first, from a democratic point of view, or: if that begs the question from a universalist and egalitarian one. What has however become crystal clear in Iraq is that, since the first stage is to limit the *more* democratic one, the legitimacy of both stages is extremely important. Thus, it is by no means irrelevant how one begins in the very beginning. The element of heteronomy, if it is logically inevitable, must be as reduced and confined a possible. And the missing democratic legitimation, while it cannot be fully replaced, must be compensated for. Understanding the non-identity of the actors even of the democratic stage with the people allows the first stage to partially define and limit them. But understanding the greater deficiency of the first stage requires that the second stage not be neutralized through either impossible learning mechanisms or executive usurpation. These are the lessons from the pathological case of Iraq that could not be clearly seen where the processes worked more or less well.

Finally, state destruction and failure of state (not nation!) rebuilding play extremely important roles in the new model. There is no need to again rehearse the no state, no constitution thesis here. But I would like to again stress the priority of state building and rebuilding to constitution making and even make this argument entirely general. What I have in mind is the empirical regularity (though not entirely universal) that even in revolutions surviving institutions, organs, associations, and so on from the inherited state play important role in constitution making even where the strict legal continuity of the state has been disrupted (in domestic, if not international law; “”Esmein 2003: 583–586; de Malberg 2004: I. 49, 65–66, II. 500–501). This phenomenon has to do with the necessity of political integration for political agency that goes far beyond what H. Arendt recognized in the case of America, namely the role of small, inherited republics in the making of the big republic. Some *pouvoir constitué* is always part of the constituant[17] except, perhaps, very tenuously, in the ideal limiting case of what Carré de Malberg and Kelsen called the “first” constitution.[18] All previous constitutions contribute to the making of the following ones. Thus, we can have a juridical theory also of revolutions, something that Carré de Malberg and Kelsen thought unlikely (though the latter came up with it in this respect rather implausible theory of international law).[19] In terms of the model of actor and author, as several contemporary analysts now recognize, in some respects, both must be seen not only as two parts of the *constituant* but also as *constitué*, the actor by the old state and the author (who is both an actor and an author) by the new regime. But that constitution by the old

[17] A.Arato “Dilemmas Arising from the Power to Create Constitutions in Eastern Europe” in M.Rosenfeld, 1994. Revised as Chap. 4 of Arato 2000. This problem of the relativization of the *constituant* and *constitué* distinctions now greatly occupies authors like Lindahl op.cit.,105ff. who start out with Foucault's description of the supposed contradiction of sovereignty, both under law and legibus solutus. See Walker 2003 and Van Roermund 2003. It remains unclear how any of their solutions solve Foucault's paradox.

[18] Even there, Maurice Hauriou probably rightly insisted on the constitutive rule of custom that precedes all state formation that should not therefore be identified with the origins of law. See *Precis de droit constitututionnel* 2nd ed. (Paris: Sirey, 1929) Chap. III “L'état.”

[19] That reduces revolution (contrary to the point of view of the domestic system of course) to a kind of constitutional amendment under international law. See Kelsen 1945, pp. 219-220; 368 et sqq.

order means survival of some organ or agency as part of the state structure, organizational, political. or symbolic.[20]

And this is not only because of the impossibility of beginning ex nihilo in revolutions and the need to rely on some inherited structures, institutions, organizational patterns, or groups to integrate society. The role of continuity is obviously even greater under reform, regime change, and transformations from above, the types that were introduced in Chap. 1 along with revolution. In any significant large-scale transformation, the specter of revolution plays a major a role, and whatever their historical reality, revolutions can, in principle and in our imagination, challenge the state structure as well as the regime. Great structural reforms are undertaken to pre-empt revolutions and so are negotiations of political power with important oppositional forces concerning regime change. In the case of the latter, not only the structure of the regime but political power over the state is likely to change. All the participants need guarantees: the opposition, that the existing power will not use state resources against them during the process, and the governmental forces, that new incumbents will not use the state later in a repressive way. Agreement concerning constitutional rules will not be enough; it is even more important that state structures be so organized that forces of violence, material resources, and population groups be so distributed and governed as to protect all negotiating partners from even worst-case scenarios. Where the repressive role of the state (its administrative and military organs) with respect to some population groups plays a major role in the demise of an old regime, renegotiating the state structure so that it all cannot happen again under new management is of prime importance. But to some extent, relevant questions like the militia of political organizations come up everywhere and must be dealt with in all negotiations. It also follows that all those capable of materially effecting the relevant questions through actual or potential use of violence of their own become the most important members of these negotiations, and their exclusion tends to make state bargaining at least difficult and generally futile.

Once again, we should be able to see a central advantage of the two-stage process of constitution making. From the point of view of the state-regime distinction, the great lesson of Iraq is that the first stage is necessarily the locus of the state bargain, while the second stage can shift more in the direction of regime construction. Of course, the distinction is analytical only, and both types of issues are generally dealt with in both stages, with the added proviso that the first stage must contain both state and regime rules for the transitional period. But logically, at least, the part of the first stage that should be negotiated among the main political actors controlling or capable of controlling means of violence is the one that has some claims of being enshrined against the democratic will of the electorate as represented in a constituent assembly. In political life, the ethics of responsibility requires that we do not try to treat those as equal who cannot be in fact reduced to equality. Making the distinction between state structure and regime should however help in reducing the number of areas where this undemocratic element is given some of its due. Since this was not done in Iraq, in addition to the confederal state structures conceded to the Kurds, they were granted consociational regime structures as well, leading to an entirely unjust

[20] I must admit that as a general proposition, state continuity seems to be a symbolic matter above all. Organizationally, territory, people, or administrative apparatus could all play the relevant role, but with respect to each, it is possible that there is significant discontinuity, and yet the "state" survives, and not only as a center of international law obligations that serve the interests of other states. This survival is symbolic and discursive, and tentatively, I think it would require the continuity of either territory or at least population as well. Possibly an intact military–administrative structure could play this role with some of the people and territory only.

arrangement from the point of view of Arab Iraqis, who can rightly say: they have separated off their quasi state where we have no say but are in a position to deadlock our political and constitutional development.

Again, it will never happen anywhere that the first stage, even if dedicated to peace making, can be entirely kept away from constitutional or regime building areas. But from the point of view of the new model, as understood through the lens of Iraq, we can understand the centrality of state making in other first stages. In South Africa, e.g., the interim constitution involved making important deals about the military forces of both sides, about the inherited administration, about police powers, and about federal arrangements. Not all issues regarding the state structure were enshrined in the 34 principles, but when they were, as in the case of federalism, the Constitutional Court wound up using its extraordinary powers even against the new dispensation of the freely elected constitutional assembly. In unitary states, with more homogenous societies, I would grant that state rebuilding is very implicit, at best during the first stage of negotiations. But even in Hungary, e.g., there was a contentious issue of the communist party's militia that had to be resolved. More importantly, consensus about all state-related issues guarantees the continuity of the transition which can then concentrate on regime change exclusively.

I realize now that (especially after a friendly suggestion by Nehal Bhuta) I have been concerned with state continuity even before Iraq, under the heading of legal continuity.[21] Not being a follower of Kelsen, who has influenced me in a number of ways, I do not consider the two to be the same. But I always argued that legal continuity from authoritarian to rule of law states has a fictional aspect. Amendment rules for example that were never the real rules of change of systems are suddenly used for real, masking actual ruptures. If there is state continuity, legal discontinuity, especially some acts of illegality as in America in 1787 (where the individual states supplied what was continuous) may be of relatively little consequence for constitutional stability. But without state continuity, legal continuity is impossible. It may be therefore true that the deeper continuity that really mattered in a Japan or a Hungary or a South Africa was state continuity, and it is a negative lesson of Iraq as well that without it the stabilization of a democratic revolution or transition becomes extremely difficult. In the end, we may only have the German case to indicate that such a thing is possible, but that was under extraordinary and perhaps unrepeatable circumstances. The theoretical problem of Iraq was whether the two-stage, post sovereign method of constitution making could initiate a second major exemplar of a democratic transformation in the context of state collapse. The challenge should never have been there to take up: first, because Iraq should not have been invaded, and second, because its state should not have been destroyed. Given that it was taken up, we will never know whether the answer could have been positive because of the remarkable misjudgments and policy failures that took place in Iraq.

[21] In Chap. 5 of *Civil Society, Constitution and Legitimacy*, "Constitution and Continuity in the East European Transitions," I argued that Arendt's thesis of continuity in the midst of change, that she discerned even in the American revolution, can be differentiated along her two axes of power and law. While she rightly maintained that in America it was the power axes (intact small republics) that were relied on, I argued that in central Europe it was the law axis that was the locus of continuity. Either (constituted bodies or constitutive rules) avoid the constituent power being in the state of nature. I now think both aspects express a more fundamental state continuity.

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