

Central European University
Doctoral School of Political
Science, Public Policy and
International Relations
Political Theory Track
Academic year 2016/2017
Fall Semester

Course Description

Constituent Power: Between Facticity, Validity and Legitimacy

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Meeting time: Mondays 11-12:40; Thursdays 9-10:40

Office hours: two hours after each class

Number of credits: 4

Teaching format: a lecture and seminar cover each topic

Course Overview

This is a course at the intersection of constitutional and political theory. Its central question concerns the conditions of legitimacy of constitutional democracy. We will ask the legitimacy question from a particular perspective – that of the (ir)relevance of the source and the original authorship of the legal and political order. Who makes the first rule, on the basis of what authorization, when and how? Does it matter at all, say for us who care about democratic legitimacy?

Early modern political theory assumed the relevance of these questions for legitimacy of law and politics. One set of classical guidelines came in the form of the social contract theories. But contractarianism did not address the specific sub-questions of the *institutional* origin, composition and authorship of the first author and first rule; neither did it ask about the relevance of the original authorship and choice for the established legal and political regime. An important attempt to address these sub-questions assumes the shape of the theory of the constituent power. In its classical 18th century expositions (Abbe Sieyes, Federalists, deep differences between them notwithstanding), the constituent power is presented as the source of the constitution (the constitution-making power). The constitution is the first and highest juridical norm, and the rule of recognition for the whole legal and political regime. It follows that the constituent power

is not ‘merely’ about writing and enacting a constitution. Rather, it is a power that establishes political community, by creating and institutionalizing its membership (citizenship), the relationships among members (basic rights), and political authority bound by the requirements of constitutionalism (the ‘constituted power’ under the rule of law).

Theories of the constituent power rest on a difficult to comprehend dualism between the original power and the constituted powers; they often assume that the constituent power remains beyond the limits of the established constitutional democracy. While they typically hold that the holder of this original and uncontainable power is the people (nation) as a pre-legal category, constitutionalism sees the people as the legally established and constrained entity. This leads to the problem of the circular reasoning (‘the paradox of the constituent power’): the ultimate author of the constitution is itself the constitutional creation. Such and related ambiguities of the concept – combined with the insight that the concept has been mainly a province of the radical revolutionary thinkers (Sieyes, Schmitt, Negri) - pushed the constituent power to the sidelines of the interest of liberal democratic theory. However, the question remains of the practical-political importance, especially after the regime change. As the democratic transitions in the second part of the 20th century have shown, the fall of the old regime leads directly to the puzzle of the founding act and the rule of recognition of the new regime. The theoretical and practical relevance of the question has been recently reiterated by democratic social movements that have proposed to revive the concept of constituent power as a core feature of an alternative social and political constitution of democracy.

We will explore some of the best-known theoretical attempts to conceptualize the constituent power, or – alternatively – to deny its relevance. We will first discuss the questions of identification, authorization, timing, and the ways of acting of the constituent power. Second, by focusing on the ‘paradox of the constituent power’ we will analyze radical democratic responses to the question of agency of the constituent power; these approaches (Sieyes, Schmitt) reject the constitutionalist idea that an established democratic regime can legitimately constrain the original sovereign. Third, we will read theories (Arendt, Ackerman, Habermas, Rawls) that acknowledge dualism between ‘constitutional’ and ‘normal’ politics, while trying in different ways to show that this dualism does not lead to the legitimacy trap of the constituent power. Fourth, we will discuss arguments that the constituent power and legitimacy of constitution-making process are not (at least not primarily) relevant for the proper understanding and legitimacy of constitutional democracy (Kelsen, Michelman, Dworkin).

Expected outcomes

Students will master differing theoretical approaches to the question of the constituent power, understood here as the question of the foundational legitimacy of political and legal order. It is expected that by the end of the course students will be capable of forming their own - critical and well-informed – opinions on the importance of this particular subject for the fields of political and constitutional theory. In addition, it is expected that the course will achieve the following:

1. Elucidating the key concepts used in the field;
2. Identifying and explaining common features and basic differences among the theories analyzed;
3. Clarifying the relationship between founding of a community, constitutionalism and democracy.

Course requirements and evaluation

This is a four-credit course. Each topic will be covered by a lecture and a seminar. One of you will be asked to prepare a short presentation for each seminar class, as the basis for a more concentrated discussion. Your presentation will take approx. 20 minutes, and it will be based on a short position paper (4-5 pages), that you will distribute electronically to all class participants and to me before 4 pm, on the day preceding the seminar class. Your presentation should contain a short critical evaluation of the topic and of the way it is presented in the assigned readings, as well as questions that you think need to be raised in the seminar discussion. Each class participant will contribute to the seminar preparation by sending 2-3 questions/comments. The same deadline applies. I will provide written comments on your background paper and on your questions.

Classes are mandatory. In case of absence, you will need to provide written documentation of legitimate circumstances that prevented you from attending class. Legitimate circumstances include illness, serious family emergencies, and participation in activities sponsored by CEU. The same documentation is required in case you fail to submit your written assignment on time. Should you fail to provide required documentation, you will not receive credits for the course.

You are expected to be familiar with the CEU policies on scholarly dishonesty.

Questions and comments during lectures are welcome. Active participation in seminars is required. You are expected to come prepared for in-depth discussion of the topics and the required readings. The readings classified as 'optional' are for your further consideration and reference – you may find them particularly useful when preparing your presentation or final paper.

The use of electronic devices (laptops, tablets, e-readers, phones, etc.) is not allowed.

You should write an approx. 15-20 pages long (Times New Roman 12, double-spaced) final essay. The topic should be chosen - upon my approval - by December 1, 2016. The final paper should be submitted by December 21, 2016.

Grading will depend on the above presented features, in the following way:

- class participation: 25%
- presentation: 25%
- final essay: 50%

Topics

Zero week. Introducing the course (Summarizing the core questions, structure and main topics of the course. Discussing requirements)

Week One. Introduction: creating and maintaining a legitimate constitutional order (A conceptual reading of the historical process of the modern 'disenchantment of the world'. Popular sovereignty, legitimate constitutional authorship and legitimacy of constitutional democracy. Constitution as the highest legal act and higher law. On the tension between constitutionalism and democracy).

Mandatory readings

- Martin Loughlin, *Swords and Scales. An Examination of the Relationship between Law and Politics* (Oxford: Hart Publishing, 2000), pp. 161-197.

- Ulrich Preuss, *Constitutional Revolution. The Link between Constitutionalism and Progress* (New Jersey: Humanities Press, 1995), pp. 1-40.

Additional readings

- Hans Agne, “Democratic Founding: We the People and the Others”, *ICON*, Vol. 10, No. 3, 2012.
- Dieter Grimm, “The Achievement of Constitutionalism and its Prospects in a Changed World”, in P. Dobner and M. Loughlin (eds.), *The Twilight of Constitutionalism?* (Oxford: Oxford University Press, 2010).
- Jacob Levy, “Not so Novus an Ordo: Constitutions Without Social Contracts”, *Political Theory*, Vol. 37, No. 2, 2009.
- Melissa Schwartzberg, *Democracy and Legal Change* (Cambridge: Cambridge University Press, 2007).
- Simone Chambers, “Democracy, Popular Sovereignty, and Constitutional Legitimacy”, *Constellations*, Vol. 11, No. 2, 2004
- Janos Kis, *Constitutional Democracy* (Budapest: CEU Press, 2003)
- Carl J. Friedrich, *Constitutional Government and Democracy. Theory and Practice in Europe and America* (Waltham, Mass.: Blaisdell Publishing, 1968), esp. Chs. 7 & 8.
- Charles H. McIlwain, *Constitutionalism: Ancient and Modern* (Ithaca: Great Seal Books, 1958; other editions also available)

Week Two. Between facts and norms: the paradox of the constituent power. (Responding to crisis by creating a new order: ultimate authority, authorization to act and constitutional authorship: who makes the higher law, and where the authority comes from? The meaning of sovereignty. On whether factuality implies arbitrariness. Pre-constitutional and constitutional identity. Circularity problem. On whether the paradox is real).

Mandatory readings

- Martin Loughlin, “The Concept of Constituent Power”, *European Journal of Political Theory*, 2013, at: <http://ept.sagepub.com/content/early/2013/05/22/1474885113488766.full.pdf+html>
- Andreas Kalyvas, “Popular Sovereignty, Democracy, and the Constituent Power”, *Constellations*, Vol. 12, No 2, 2005.

Additional readings

- Mikael Spang, *Constituent Power and Constitutional Order: Above, Within, and Beside the Constitution* (New York: Palgrave, 2014)
- Mark Wenman, *Agonistic Democracy: Constituent Power in the Era of Globalisation* (New York: Cambridge University Press, 2013)
- Illan Rua Wall, “Notes on an Open Constituent Power”, *Social Science Research Network*, 2013, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2259008
- Juan Colon-Rios, *Weak Constitutionalism. Democratic Legitimacy and the Question of Constituent Power* (London: Routledge, 2012).
- Andreas Kalyvas, “Constituent Power”, *Political Concepts. A Critical Lexicon*, 2012, at <http://www.politicalconcepts.org/constituentpower/>
- Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood*,

Citizenship, Culture, and Community (New York: Routledge, 2010).

- Gary Jacobsohn, “The Disharmonic Constitution”, in J. Tullis and S. Macedo (eds.), *The Limits of Constitutional Democracy* (Princeton: Princeton University Press, 2010).
- David Dyzenhaus, “The Politics of the Question of Constituent Power”, in M. Loughlin & N Walker (eds.), *The Paradox of Constitutionalism. Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2008).
- Gerhard Hoogers, “The Paradox of Politics from a Constitutional Perspective: The Constituent Power of the People and the Representation of the General Will”, *Netherlands Journal of Legal Philosophy*, 2, 2008, at: http://www.elevenjournals.com/tijdschrift/rechtsfilosofieentheorie/2008/2/RenR_2008_038_002_005
- Antonio Negri, *Insurgencies. Constituent Power and the Modern State* (Minneapolis: University of Minnesota Press, 1999).
- Jacques Derrida, “The Force of Law: The Mystical Foundation of Authority,” in D. Cornell et al (eds.), *Deconstruction and the Possibility of Justice* (New York: Routledge, 1992).

Week Three. Conceptualizing the paradox I: Abbe Sieyes (Social and political context. On the distinction between the constituent power and the constituted powers. How to understand the nation. ‘Always above the law’ as a normative claim. How the constitution matters).

Mandatory readings

- Emanuel Sieyes, “What is the Third Estate”, in his *Political Writings: Including the Debate between Sieyes and Tom Paine in 1791* (Indianapolis: Hackett Publishing, 2003).

Additional readings

- Aleksander Somek, “The Constituent Power in a National and in a Transnational Context”, *Social Science Research Network*, 2012, at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2172054
- Lucien Jaume, “Constituent Power in France: Revolution and its Consequences”, in Martin Loughlin & Neil Walker (eds.), *The Paradox of Constitutionalism. Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2008).
- William Sewall, *A Rhetoric of Bourgeois Revolution: Abbe Sieyès and “What is the Third Estate”* (Durham: Duke University Press, 1994).
- Murray Forsyth, *Reason and Revolution. The Political Thought of the Abbe Sieyes* (Leicester: Leicester University Press, 1987)
- Edmund Burke, *Reflections on the Revolution in France* (New York: The Liberal Arts Press, 1955; other editions also available).

Week Four. Conceptualizing the paradox II: Carl Schmitt (Once more on the distinction between the constituent power and the constituted powers. How Schmitt moves beyond Sieyes. Political existence and the will of the people: real, permanent, unlimited. Decisionism. The state and the constitution: against liberal constitutional democracy).

Mandatory readings

- Carl Schmitt, *Constitutional Theory* (Durham and London: Duke University Press, 2008), pp. 125-147.
- Lars Vinx, “Carl Schmitt”, *Stanford Encyclopedia of Philosophy*, The Fall 2010 Edition, at: <http://plato.stanford.edu/archives/fall2010/entries/schmitt/>

Additional readings

- Lars Vinx, *The Guardian of the Constitution. Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge: Cambridge University Press, 2015).
- Andreas Kalyvas, *Democracy and the Politics of the Extraordinary. Max Weber, Carl Schmitt, and Hannah Arendt* (New York: Cambridge University Press, 2008)
- Cardozo Law Review, Vol. 21, No. 5-6, 2000: “A Special Issue on Carl Schmitt”. See especially Andreas Kalyvas, “Carl Schmitt and the Three Moments of Democracy”, pp. 1525-1565.
- Carl Schmitt, *Political Theology. Four Chapters on the Concept of Sovereignty* (Cambridge, Mass.: MIT Press, 1988).
- William Scheuerman, *Carl Schmitt. The End of Law* (Lanham: Rowman & Littlefield, 1999).
- Jeffrey Seitzer, “Carl Schmitt’s Internal Critique of Liberal Constitutionalism”, in David Dyzenhaus (ed.), *Law as Politics. Carl Schmitt’s Critique of Liberalism* (Durham: Duke University Press, 1998)
- David Dyzenhaus, *Legality and Legitimacy. Carl Schmitt, Hans Kelsen and Herman Heller in Weimar* (Oxford: Clarendon Press, 1997).
- Peter Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism* (Durham: Duke University Press, 1997).

Week Five. Basic norm instead of the constituent power: Hans Kelsen on the validity of legal order (Why identification of law does not require resort to non-judicial considerations. How normativity of law does not depend on morality. Law as a social fact. Constitution in legal hierarchy. Basic norm as the norm of norms instead of the constituent power as the power of powers).

Mandatory readings

- Hans Kelsen, *Pure Theory of Law* (Gloucester, Mass.: Peter Smith, 1989), pp. 193-236.

Additional readings

- Carlo Accetti, “The Temporality of Normativity. Hans Kelsen’s Overcoming of the Problem of the Foundation for Legal Validity”, *Philosophy and Social Criticism*, Vol. 42, No. 1, 2016.
- Lars Vinx, *The Guardian of the Constitution. Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge: Cambridge University Press, 2015).
- Hans Lindahl, “Authority and Representation”, *Law and Philosophy*, 19: 2000.
- Stanley Paulson *et al* (eds.), *Critical Perspectives on Kelsenian Themes* (Oxford: Clarendon Press, 1998) [note: this is an excellent collection of Kelsen’s texts, accompanied by critical commentaries by Herbert Hart, Joseph Raz, Toni Honore, Carlos Santiago Nino, Norberto Bobbio, among others].

- David Dyzenhaus, *Legality and Legitimacy. Carl Schmitt, Hans Kelsen and Herman Heller in Weimar* (Oxford: Clarendon Press, 1997).
- Hans Kelsen, *Introduction to the Problems of Legal Theory* (Oxford: Clarendon Press, 1992) [note: this is the English-language translation of the first German-language edition of the *Pure Theory...*].

Week Six. Overcoming the paradox by recourse to principles: Hannah Arendt (Arendt's comparative reconstruction of the theoretical meaning and practical- political status of the constituent power in the French and American revolutions. Liberation and freedom. The ambiguity of the 'social question'. Power and authority. "Beginning carrying its own principles", what it means).

Mandatory readings

- Hannah Arendt, *On Revolution* (Harmondsworth: Penguin Books, 1987; other editions also available), Chs. 4 & 5.

Additional Readings

- Lucy Cane, "Hannah Arendt on the Principles of Political Action", *European Journal of Political Theory*, Vol. 14, No. 1, 2015.
- Michael Wilkinson, "Between Freedom and Law: Hannah Arendt on the Promise of Modern Revolution and the Burden of 'the Tradition'", *LSE Law, Society and Economy Working Papers*, 5/2011, at <http://ssrn.com/abstract=1874741>
- Lisa Disch, "How Could Hannah Arendt Glorify the American Revolution and Revile the French?", *European Journal of Political Theory*, Vol. 10, No. 3, 2011.
- Andreas Kalyvas, *Democracy and the Politics of the Extraordinary. Max Weber, Carl Schmitt, and Hannah Arendt* (New York: Cambridge University Press, 2008)
- Hans Lindahl, "Give and Take. Arendt and the *Nomos* of Political Community", *Philosophy and Social Criticism*, Vol. 32, No. 7, 2006.
- Jeremy Waldron "Arendt's Constitutional Politics"
- Albrecht Wellmer, "Arendt on Revolution"
Waldron's and Wellmer's texts are in David Villa (ed.), *The Cambridge Companion to Hannah Arendt* (Cambridge: Cambridge University Press, 2001).
- William Scheuerman, "Revolutions and Constitutions: Hannah Arendt's Challenge to Carl Schmitt", in David Dyzenhaus (ed.), *Law as Politics. Carl Schmitt's Critique of Liberalism* (Durham: Duke University Press, 1998).

Week Seven. Conceptualizing dual politics: Bruce Ackerman (A democratic reading of the distinction between 'constitutional' and 'normal' politics. How Ackerman interprets the American founding act and the dynamics of the American constitutional order).

Mandatory readings

- Bruce Ackerman, *We the People. Foundations* (Cambridge, Mass.: Belknap Press, 1991), 1-58.

Additional readings

- Sujit Choudry, "Ackerman's Higher Lawmaking in Comparative Constitutional

Perspective: Constitutional Moments as Constitutional Failures?”, *International Journal of Constitutional Law*, Vol. 6, No. 2, 2008.

- Frank Michelman, “Constitutional Fidelity/ Democratic Agency”, *Fordham Law Review*, Vol. 65, No. 4, 1997.
- Mark Tushnet, “Constituting We the People”, *Fordham Law Review*, Vol. 65, No. 4, 1997.
- William Fisher, “The Defects of Dualism”, *The University of Chicago Law Review*, Vol. 59, No. 2, 1992.

Week Eight. Jürgen Habermas on the genesis and legitimacy of the constitutional state (How Habermas conceptualizes law in modernity. The tension between facts and norms. What is constitution, and how it comes to life; how to understand the authorship question. From moral substance to legal form: institutionalizing the ideal discourse principle without assigning a simple primacy to moral universals. Legitimate law-making and legitimacy of constitutional democracy: co-existence of 1. popular sovereignty and rights, 2. democracy and the rule of law. Co-originality and co-equality theses).

Mandatory readings

[Note: Habermas is painfully slow in developing his ideas – it takes a lot reading to get a whole picture of his theory; the assigned passages, though important, don’t do full justice to our subject; more than with other topics, you may wish to consult additional readings]

- Jürgen Habermas, *Between Facts and Norms* (Cambridge, Mass.: MIT Press, 1996), pp. 118-168.

Additional readings

- William Rehg, “Preface” to *Between Facts and Norms* (highly recommended as an accessible and reliable summary of Habermas’ argument)
- Chris Thornhill, “Political Legitimacy: A Theoretical Approach Between Facts and Norms”, *Constellations*, Vol. 18, No. 2, 2011.
- Todd Hedrick, “Coping With Constitutional Indeterminacy: John Rawls and Jürgen Habermas”, *Philosophy and Social Criticism*, Vol. 36, No. 2, 2010.
- Cioran Cronin, “On the Possibility of a Democratic Constitutional Founding: Habermas and Michelman in Dialogue”, *Ratio Juris*, Vol. 19, No. 3, 2006.
- Mathieu Dehlem (ed.), *Habermas, Modernity, and Law* (London: Sage, 1996).
- Michel Rosenfeld and Andrew Arato (eds.), *Habermas on Law and Democracy. Critical Exchanges* (Berkeley: University of California Press, 1998).
- Jürgen Habermas, *The Inclusion of the Other. Studies in Political Theory* (Cambridge, Mass.: MIT Press, 1998), esp. Chs 7-10.

Week Nine. Constituent power as the process of construction of a political conception of justice: John Rawls (Political conception of justice as a response to the challenge of modern pluralism. How it is achieved: political constructivism. Method: original position, reasonableness, public justification of a constitutional regime. The object of the political conception: basic structure of society. Core features of basic structure subject to an overlapping consensus: justice and constitutional essentials. Public reason).

Mandatory readings:

- John Rawls, *Political Liberalism*, Lectures III-IV (New York, Columbia University Press, 1993, 1996, and other editions)

Additional readings

- John Rawls, “Introduction”, and “Introduction to the Paperback Edition” [Both pieces are in the paperback edition of *PL* (1996); they are highly recommended readings that offer a snapshot of the whole of the theory]
- Silje Langvatn, “Legitimate, but Unjust; Just, but Illegitimate: Rawls on Political Legitimacy”, *Philosophy and Social Criticism*, Vol. 42, No. 2, 2016.
- Paul Wheatman, *Why Political Liberalism? On John Rawls's Political Turn* (New York: Oxford University Press, 2013)
- James Gordon Finlayson & Fabian Freyenhagen (eds), *Habermas and Rawls: Disputing the Political* (London: Routledge, 2013)
- Todd Hedrick, *Rawls and Habermas: Reason, Pluralism, and the Claims of Political Philosophy* (Redwood City: Stanford University Press, 2010)
- Samuel Freeman (ed), *The Cambridge Companion to Rawls* (New York: Cambridge University Press, 2002)
- Samuel Freeman, “Political Liberalism and the Possibility of a Just Democratic Constitution”, *Chicago-Kent Law Review*, Vol. 69, No. 3, 1994.

Week Ten. ‘Respect-worthiness’, or against dualism I: Frank Michelman (The first legitimacy question: how to morally justify legally allowed coercion. A paradox of democratic commitment. Competing accounts of the legitimacy of constitutional democracy and their critique. In particular: why focusing on constitutional authorship cannot meet the legitimacy challenge. More sharply: why constitutional legitimation does not suffice. Respect-worthiness, what it means. The problem of interpretative disagreement. ‘Full-merits legitimation’).

Mandatory readings

- Frank Michelman, “Constitutional Authorship”, in Lary Alexander (ed.), *Constitutionalism. Philosophical Foundations* (Cambridge: Cambridge University Press, 2001).
- Frank Michelman, “Ida’s Way: Constructing the Respect-Worthy Governmental System”, 72 *Fordham Law Review*, 2003.

Additional Readings

- Cioran Cronin, “On the Possibility of a Democratic Constitutional Founding: Habermas and Michelman in Dialogue”, *Ratio Juris*, Vol. 19, No. 3, 2006.
- Jack Balkin, “Respect-Worthy: Frank Michelman and the Legitimate Constitution”, *Tulsa Law Review*, Vol. 39, 2004.
- Frank Michelman, “Constitutional Legitimation for Political Acts”, *Modern Law Review*, Vol. 66, No. 1, 2003.
- Frank Michelman, *Brennan and Democracy* (Princeton: Princeton University Press, 1999).
- Frank Michelman, “Must Constitutional Democracy Be ‘Responsive’?”, *Ethics*, Vol. 107, No. 4, 1997.

Week Eleven. Political morality of the republic, or against dualism II: Ronald Dworkin. (‘Integrated one-system theory of law’ instead of dualism of law and morals. Law as a feature of political morality. Partnership conception of democracy and institutional legitimacy. Unity of value, ethical independence, and /legally/ right interpretation).

Mandatory readings

- Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, Mass.: Belknap Press, 2011), Chs. 18 & 19.

Additional Readings

- Ronald Dworkin, *Freedom's Law. The Moral Reading of the American Constitution* (Oxford: Oxford University Press, 1995), pp. 1-39.
- *Boston University Law Review*, Vol. 90, No. 2, 2010, Special Issue on *Justice for Hedgehogs*, at: <http://www.bu.edu/law/central/jd/organizations/journals/bulr/volume90n2/>

[note: this is a special issue of BLR that includes contributions of Francis Kamm, Frank Michelman, Thomas Scanlon, Jeremy Waldron, among others].

Week Twelve. Discussing final papers proposals (By December 1 you will agree with me on the topic of your final paper, and you will submit a 1-2 page outline of the structure and main arguments. In the closing meeting of the course we will organize a 'panel discussion' on your proposals).