

The constituent power in a transnational context

The paper attempts to make sense of Abbé Sieyès' classical conception of the nation as the constituent power underlying a constitutional system. It then goes on to explore whether it is possible to conceive of such a power under trans- or postnational conditions. What, if anything, might be the power constituting transnational sites of authority, which are by definition not linked to a particular people? The answer to this question requires a modified understanding of collective self-determination. It will be seen, however, that it remains an open question whether there is anything that "constitutes" in a transnational context.

Dark is good

The concept of the constituent power is a peculiar heirloom of our constitutional language. In a post-historical age, at any rate, it appears to be strangely out of place. If anything, the notion signifies the capacity to make a new beginning. This is inconsistent with what we have come to expect. We believe that whatever will happen will merely bring more of the same—*i.e.*, either liberalism or some form of irrational rebellion against it. Moreover, the sheer idea that government requires constituting by anything other than practical reason or rationality simply eludes us. What might this further force be if not something entirely mystical that we have good reason to meet with suspicion?

As if our scepticism required proof, we might pull out, in the next round, prominent contributions to the topic in order to see our misgivings reconfirmed. We may present writings by Carl Schmitt, for example, in which one encounters the use of Spinoza's metaphysics for the sake of explaining the relation between the constitution and the constituting nation in terms of the relation between *natura naturata* and *natura naturans*.¹ While the former stands for the bounded operation of the laws of nature, the latter signifies the infinite substance that accounts for their existence. The awe and gripping anxiety that befalls lawyers when they imagine pure jurigenerative spontaneity may have motivated Böckenförde to

¹ See Carl Schmitt, *Verfassungslehre* (7th ed., Berlin: Duncker & Humblot, 1989) at 79-80; *Die Diktatur: Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf* (4th ed., Berlin: Duncker & Humblot, 1978) at 142.

classify the constituent power as a *Grenzbegriff* of constitutional law.² It posits the existence of something that cannot be reasonably determined. It is the equivalent in public law of the “thing in itself” in metaphysics.

Worse, still, those attempting to steer clear of all mystification arrive at more empirical interpretations of the constituent power and are thereby selling the idea somewhat short. It loses its spell.³ One does not see, then, why one should take it seriously at all.

Apparently, the idea is attractive only as long as it remains dark.

Schmitt, of course, purported merely to elaborate what Abbé Sieyès, the creator of the concept, may have had in mind when he presented the nation as invested with an amazing *causal* power.⁴ Indeed, Sieyès’ brief sketch confronts us with perplexing claims. As the constituent power, the nation exists outside of that for which it is the cause. It makes a new beginning. In contrast to the constituted powers, the constituent power is not constrained by any positive laws. It is legally amorphous. Perplexingly, it is nonetheless “formed solely by *natural* law”.⁵ But not only is it the *causa prima* of the constitution, it also supervenes all constituted authority. This is important for the resolution of constitutional conflict, which requires, according to Sieyès, the nation’s intervention.⁶ When it comes to this, power is not exercised by an ordinary representative body, but active through a “surrogate” of the nation, that is, a body of extraordinary representatives.⁷

² See Ernst-Wolfgang Böckenförde, *Staat, Verfassung, Demokratie: Studien zur Verfassungstheorie und zum Verfassungsrecht* (Frankfurt aM: Suhrkamp 1991) at 91.

³ See Ulrich K. Preuss, ‘Constitutional powermaking of the new polity: Some deliberations in the relations between constituent power and the constitution’ In M. Rosenfeld (ed.), *Constitutionalism, Identity, Difference and Legitimacy* (Durham, Duke University Press, 1994) 143-164; Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (London: Routledge, 2010) at 130-131.

⁴ Abbé Sieyès, ‘What Is the Third Estate?’ In *Political Writings* (ed. and trans. E. Sonenscher, Indianapolis: Hackett Publishing, 2003) 92-162 at 133-140.

⁵ See *ibid.* at 136-137.

⁶ See *ibid.* at 138.

⁷ See *ibid.* at 139.

These are strong claims. Apparently, they locate sovereign power in an unorganized collective body. They assume a power of action where, absent a coordinating scheme, it must remain inexplicable how there can be any.

I take it, then, that if we encountered the idea of a constituent power on facebook we would certainly be unlikely to respond to it by clicking “*Like*”.

What it is not

The idea becomes somewhat clearer if one examines what this power is not. This is not to say that it will therefore also be more digestible from a post-historical perspective.

First, the constituent power is not a mere extension of natural into positive law even though the exercise of the constituent power presupposes the creation of some form of association among individuals.⁸ While it presupposes natural law, it does not amount to its application unless one would be satisfied with calling a contract and application of private law. By virtue of what it is not, the *pouvoir constituant* signals the historicity of the constitution. It is a human artifact.

Second, the constituent power is *not* exercised by a dictator, a monarch or any other autocrat. The constituent power, rather, originates from a collective. But this is exactly where the mystery begins. How can what is essentially formless act?

The nation qua self-effacing agent

A remarkable attempt at demystification has been recently presented by Lindahl.⁹ He suggests that it is possible to formulate an “ontology without reification” by elaborating how the first person plural of the people, who supposedly adopt a constitution, “reveals a fundamental *passivity* at the heart of political unity”.¹⁰ Evidently, the exercise of the constituent power constitutes the collective self whose

⁸ See *ibid.* at 134.

⁹ See Hans Lindahl, ‘Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood’ In *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (ed. M. Loughlin & N. Walker, Oxford: Oxford University Press, 2007) 9-25 at 18.

¹⁰ *Ibid.* (emphasis in the original).

agency it claims to exhibit (“We, the People”). Consequently, those acting and speaking in its name have to act and speak with an attitude of self-effacement, for they are not identical with the collective self that can only act by virtue of being constituted by them.

While this is clearly paradoxical, the paradox is thrown into even sharper relief when one considers that this is supposed to be an act of self-constitution. The people themselves constitute their union. Hence, whosoever *de facto* constitutes the collective self by acting on their behalf needs to submit, implicitly, to *be* this self, however, merely in *pre-constitutional* form. In this form, however, a political society can neither act nor constitute. How can it act, and thereby constitute, without being a point of imputation?

Any answer to this question needs to address the puzzling fact that this appears to be thinkable only if the people constitute themselves while being self-effacing as agents.

Even though this elaboration of the paradox is not consistent with Sieyès rather casual reference to extraordinary representatives qua agents of the constituent power,¹¹ it demonstrates, as Lindahl observes, that a successful act of constitution is actually possible only over time and involves more than merely one actor. This is possible only if those finding themselves confronted with the expectation to act as members of a collective body “retroactively” come to accept this attribution “by exercising the powers granted to them by a constitution”. For example, whenever they invoke their constitutional rights, individuals take up, retrospectively, the first-person plural perspective of the constitution.¹² Activity and passivity are thereby changing their place:¹³

[I]f the activity of the constituent power discloses an irreducible passivity in the political unity, a no less irreducible passivity is embedded in the constituent power’s activity. This insofar as this activity only constitutes a polity if taken up again and carried

¹¹ See Sieyès, note 4 at 139. Schmitt had a great time of celebrating the absence of representation as the self-presence of the political unit. See *Diktatur*, note 1 at 146.

¹² See Lindahl, note 9 at 19-20.

¹³ Lindahl, note 9 at 19.

forward by further acts. Thus, an act of constitution-making can only be viewed retroactively—and provisionally—as an act by the collective.

Remarkably, it escapes Lindahl’s attention that the meaning of “collective” is not unequivocal here. On its face, the reference seems to go to the collective *qua* constituted collective subject; but this subject can only constitute itself as long as it remains in a non-constituted state, *i.e.*, precisely the “state of nature” which Sieyès believed the nation to be in.¹⁴ This is the case because the self-identification of the constituting unit needs to be mediated by those who identify with the collective and are, therefore, different from it. They do it as members of the collective in *pre-constituted* form, which is the nation as an association of individuals. Identification is possible only by bridging a difference.

Lindahl’s point is nonetheless well taken. The constituting action not only has a social dimension in that it encompasses a number of people inhabiting a certain place of the earth, it also stretches forward in time. The self-effacing constituent agent acts through a plurality and is present through its absence in everyday constitutional routine and evolving practice. The constituent power is manifest not in one spectacular act but in the *evolution* of the fundamental laws of a particular society.

According to Lindahl, this observation provides the key to arriving at the desired “ontology without reification”. In his view,¹⁵

no collective self exists independently of the individual acts that compose it because, as noted earlier, acts of self-attribution are in each case individual acts.

Individuals take the position of the constitutional order and thereby lend it a voice. Lindahl concludes that, contrary to Schmitt, political unity is a consequence of implementing a constitution and not something that precedes it.¹⁶

But this is a too easy victory. As had been relentlessly and even unfairly argued by Schmitt against Kelsen,¹⁷ legal systems are not entities where, without

¹⁴ See Sieyès, note 4 at 137.

¹⁵ Lindahl, note 9 at 20.

¹⁶ See *ibid.* at 22.

¹⁷ See, for example, Carl Schmitt, *Der Hüter der Verfassung* (3d ed., Berlin: Duncker & Humblot, 1985) at 40-41.

anything further, one norm triggers the other from within. Something over and above the order of norms needs to intervene in order to tie norms together. The sheer self-identification of legal acts (“Hello, I am a contract”) is incapable of producing a legal system. The effective synthesis necessary to establish systematically mediated normativity lies outside the law—as not least enigmatically symbolized by Kelsen’s basic norm.¹⁸ The synthesizing force resides in the elusive and anarchical context that Sieyès called the “nation”.

Lindahl also shies away from explaining why a nation raises above itself through its self-constitution and what it is that is lost thereby. He is quite right in recognizing that any constitutional order is haunted by the problem of having to address the inclusion and exclusion that allows it to exist in the first place.¹⁹ But he leaves us in the dark with regard to what it is that is at stake. Is it the organization of humanity at large? Or perhaps it is the nation that embraces with its constitution its own negation?

Epochs in the existence of a nation

When taking up these questions, it pays to reconsider Sieyès’ classical text.

Sieyès sketches three “epochs” in the life of a political society.²⁰ During the first people exist as a nation purely and simply. The second involves the adoption of the constitution. The third is witness to political society thus constituted. It is during this epoch that the constitution turns out to be incomplete. Consequently, once society is confronted with the exigencies of constitutional conflict, what happens during the third epoch is haunted by echoes of the first.²¹

This is, basically, all that Sieyès gives us here.

In what follows, an attempt will be made to make sense of this sketch from the perspective of individual autonomy. It will be submitted that the collective act of constitution-making is best explained as “action in an Arendtian sense”. Action of this type does not presuppose a collective subject, but is for this very rea-

¹⁸ For the most profound elaboration of this question, see Fritz Sander.

¹⁹ See Lindahl, note 9 at 22.

²⁰ See Sieyès, note 4 at 134.

²¹ See *ibid.* at 139.

son subject to rapid decay. Action in the Arendtian sense is the most plausible candidate for the self-effacing “constituent” agent. This explanation is consistent with Sieyès reference to the constituting action of a “real”, rather than a “representative”, common will.

Identification with the situation of life

The key to understanding the constituent power is Sieyès characterization of the nation.

One finds a longer discussion of what the nation is at the outset of *What is the Third Estate*. Sieyès claims that the third estate is indeed a full “nation”. In order to prove this point he explains that its members participate in the totality of trades, professions and functions necessary to create a vibrant society.²² In a sense, this claim is misleading, for the participation of the bourgeoisie in all trades and professions is only the consequence, but not the essence, of what it takes to be a nation. When it comes to the latter, Sieyès gives us very little, but the little that he gives us provides us with excellent clues. A nation, he says, is a body of associates living under the same common law.²³ They have equal status and are represented by the same legislature. Pragmatically understood (“anything is what it does”), a nation is what lends unity to the associates as a consequence of which they believe it to be right to be subject to the same authority. Against this background, even Sieyès’ seemingly most enigmatic statement appears to make sense, according to which a nation is any more or less substantial number of individuals “seeking to unite”.²⁴

“Seeking to unite” is an individual, and not a collective, intention.²⁵ The unanswered question is, of course, why someone should seek to unite. Garden variety liberal political philosophy offers one prime reason, namely, long-term self-interest. Interestingly, however, the pursuit of what liberalism calls the long-term

²² See *ibid.* at 94-95.

²³ See *ibid.* at 97. The reader is immediately reminded of Kant’s characterization of a Volk qua Vereinigung von Menschen unter Rechtsgesetzen.

²⁴ See Sieyès, note 4 at 134.

²⁵ Apologies for mimicking the jargon of John Searle.

self-interest does not “unite” someone with others; paradoxically, it would do so only through the eyes of an executive to whom all submit.²⁶ The pursuit of the self-interest is reflexively directed at the person considered as a carrier of desires. There is nothing that any carrier of this type shares with other such carriers except, of course, the fact of being a carrier. If the attitude of “seeking to unite” is to make any sense then self-interest cannot be the uniting factor.

Of course, “seeking to unite” could also plausibly mean the desire to overcome the pains of individuation²⁷ through some exalted state of religious or quasi-religious effervescence.²⁸ But it is not plausible to assume that Sieyès may have had that in mind. Arguably, he may have envisaged that living a life within a nation invariably involves standing in relationships with others, aside from being absorbed by the things that one cares about. When individuals perceive such a larger context, they seem to understand their personal life correctly. Being who one is presupposes, necessarily, “seeking to unite”, for it requires affirming the social conditions—the relationships, the places—that make it possible to be who one is. People with adequate self-understanding come to accept the situation of their life—provided that it meets certain conditions—as their own. They then concurrently “seek to unite”. They perceive themselves at different positions within a larger situation that they share. This situation in which one sees one’s life going on is the nation.

Admittedly, such a “communitarian” rendering is not directly warranted by Sieyès’ text. It is submitted, nonetheless, that it usefully casts light on what characterizes his “first epoch”. Conceiving of oneself as element of a larger situation of life involves recognizing that who we are and what we do is always also determined by others with whom we share a place and with whom we continue that which has come down upon us from prior generations. We can only be the authors of our own lives by sharing this authorship with others. This realization

²⁶ See Thomas Hobbes, *De Cive*.

²⁷ See Friedrich Nietzsche, *Die Geburt der Tragödie aus dem Geist der Musik* (Frankfurt aM: Insel: 1987)

²⁸ See Émile Durkheim, *The Elementary Forms of Religious Life* (trans. C. Cosman, Oxford: Oxford University Press, 2001)

gives rise to moral demands only inasmuch as it is a condition of self-constitution.²⁹ The identification with a place is a condition of individual freedom, for one can be who one is only by situating oneself somewhere.³⁰

Identification requires making oneself actively passive. By identifying with a role model (*e.g.*, Ethan Hunt or John McLean) one allows oneself to be determined by the actions, attitudes, virtues or even gestures of another character. Analogously, in the case of a place one allows determination by the situation of which one believes to be a component. If one emphasizes the persons who are elements of this situation one speaks of “a people” to whom one belongs. In referring to the situation itself, one speaks of a “nation”.

Self-constitution and self-negation

A situation within which we perceive life at a particular place and among particular other people is, however, just that. It is not a determinate entity. It is neither something nor nothing, for in order to be something it would have to have bounds. It is not possible to say where one situation ends and the next begins. Aren't people outside my own state part of my situation, if only because they have built the engine driving my car? Are really all of my compatriots part of my situation even if our lives never intersect? The situation is boundless not in the sense of naturally flowing out into infinity but for the reason that it can be given a different outlook depending on where the focus rests. It is in and of itself multifarious. Any determination of it is, indeed, for that very reason already self-effacing.

This is part of the explanation why nations are necessarily elusive. What does it mean to be an American? Who knows. All that we know is what it takes to ar-

²⁹ Self-constitution is the activity of pulling one-self together. See Christine M. Korsgaard, *Self-Constitution: Agency, Identity and Integrity* (Oxford: Oxford University Press, 2009). It is submitted, therefore, that one can succeed at that only by seeing oneself as who one is, that is, as part of a situation.

³⁰ For an elaboration of this point, see Jürgen Habermas, *Nachmetaphysisches Denken: Philosophische Aufsätze* (Frankfurt aM.: Suhrkamp, 1988) at 187-241.

rive at some clarification. One has to look around from a position that is typically referred to as the “inside”.

Both public and private liberty presuppose boundaries. Only on the basis of boundaries is it possible to permit oneself to be determined by what has been resolved by the people inhabiting one’s place of identification. Surely, one can go with the crowd wherever one goes, but this also presupposes that there is a crowd to go with. When matters become messy and contentious we are confronted with the question whether we value our situation more than having our way within it. If we permit others to determine ourselves—indeed, if we see ourselves as one other from the perspective of these others—we are collectively self-determining. Self-determination presupposes bounds. Unbounded entities cannot decide. Situations need to be “pulled together” in order to constitute public autonomy. They have to grow beyond themselves in order to give rise to a collective will.

Evidently, such “pulling together” and “growing beyond” involves the negation of the most essential characteristic of a situation, namely its boundlessness. We are spontaneously who we are when we regard ourselves as surrounded by an internally multifarious social space that we expand and construct from one activity to the next. This is, indeed, a matter of engaging one’s imagination. But simple imagining also involves a negation, namely the neglect of the conditions that allow us to create a presence in this world. These conditions are normative in that they command respect for whoever we make ourselves to be. One can affirm living in a situation only at the price of a negation of the negative of autonomy that it entails. Creating a presence for oneself in this world presupposes line-drawing if only for the reason that it has to be possible to count votes. Since it would be impossible to create this presence if it were not for others who also care about where and how their life goes on with others, the common concern for the bounded place is a transcendental condition for being in this world, at any rate, if life is understood to be going on somewhere.

The view from within

With this we enter Sieyès second epoch, which designates the work of the constituent power. What we encounter, in a few sentences only, is an analysis of a spontaneous common effort:³¹

[...] [E]veryone involved in the association seeks to give their union consistency. They all want to accomplish this purpose. Thus, they confer with one another and agree upon public needs and to meet them. Here it can be seen that power belongs to the public. Individual wills still lie at its origin and still make up its essential underlying elements. But taken separately, their power would be null. Power resides solely in the whole. A community has to have a common will. Without this unity of will it would not be able to make itself a willing and acting whole.

What Sieyès seems to want to capture here is the moment at which a loose association of citizens attains unity of purpose and action. In order to bring such a moment about, however, power needs to be generated “from below” with the intent to secure its future reproduction. Once power attains the state of reproducibility it necessarily alters its shape. At the moment of constitution, power abrogates its spontaneous and boundless nature. In other words, in the form of competence (“legal powers”) any activity that originates from a situation that is perceived to be “common” reaches beyond itself by “pulling itself together”.

Action in the Arendtian sense

Arguably, therefore, a constitution in the Sieyèsian sense is the product of power in the Arendtian sense, which is in turn an offspring of action.

The concept of action that made Arendt’s work famous is explained by her as *agere* (action) in contradistinction to mere *gerere* (doing). Whoever exercises agency in the sense of *agere* sets something into motion, which others may undertake to finish in the sense of getting things done (*res gestae*).³² Action in the Arendtian sense is always “a new beginning” if only for the sole reason that the agents

³¹ Sieyès, note 4 at 134.

³² See Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958) at 189.

moving things represent a new beginning in this world by virtue of their birth.³³ It is through the medium of action and interaction that people experience what it is that is original and distinct about themselves and others. The stories told about someone's deeds are media of experiencing people as "who" they are, that is, more than the "what" that is predicated in general social attributes.³⁴

Arendt seems to believe that the new beginning that we are by virtue of birth is transitive and feeds into any action. Such a belief would appear to be misguided. We can do many things in our very own way, for example, holding a knife in a certain manner when eating *Wienerschnitzel*, but this would not make our ingestion of *Wienerschnitzel* into an action that moves things. What is more, the connection between "natality"³⁵ and the "miraculous"³⁶ quality of action to bring about something new is very tenuous, to say the least, in the case of common action.

The idea that action makes "a new beginning" may be easily mistaken, at least in our age, for the claim that an act is innovative as if for some secret reason action were in and of itself creative.³⁷ But this does not appear to be the point. In fact, the relation between natality and action in the Arendtian sense does not appear to be transitive, as Arendt herself must have believed, but rather a relation *per analogiam*. Just like a child presents a new beginning for everyone involved—not only for the child herself but also for the parents—any action in the Arendtian sense presents one with the puzzle that one needs to start over. The "natality" of action is inadequately captured by the idea that with a baby an unprecedented *noumenal* cause has been inserted into the ordinary flow of events, but rather that its presence means discontinuity, the breaking of routine, possibly with aim of changing direction. This is consistent with the examples that Arendt chose for action in the full-blown sense, namely popular uprisings, revolutions and syn-

³³ See *Ibid.* at 9, 178, 246.

³⁴ See *ibid.* at 176, 179-181, 183, 185.

³⁵ See *ibid.* at 9.

³⁶ See *ibid.* at 178.

³⁷ For a very serious and impressive exploration of this question, see Hans Joas, *The Creativity of Action* (trans. J. Gaines & P. Keast, Chicago: University of Chicago Press, 1996).

dicalist rebellions that attempted to replace old authority with something new.³⁸ As she summarized most beautifully the significance of revolutions:³⁹

The modern concept of the revolution [is] inextricably bound up with the notion that the course of history begins anew, that an entirely new story, a story never told before, is about to unfold [...].

Arendt seems to perceive action as growing into its most perfect form when people act together. She thereby seems to present the exception as the rule. But this is not the case. All action that moves things depends on individuals acting together. There would be no greatness if individuals had to fend for themselves. In a quasi-anarchical state of association anyone who wishes to lead depends on the voluntary support of others.⁴⁰ Action qua *agere* is originally the product of a common effort made in the face of the obstacle posed by human plurality.⁴¹ Therefore, anyone who desires to be a mover has to be heeded of counteractions and irritations originating from others. In particular, it is not possible to predict who is going to join in an effort and who is likely to obstruct. Action is boundless because anyone who feels potentially affected can interject his acts into its course.⁴² Action does not recognize any artificial demarcations, such as the boundaries of the state. Action offers the capacity to establish relationships across boundaries. Any nation always and invariably exceeds its limits. One consequence of this boundlessness is the unpredictability of an action's effect on a circle of human being. "One deed", Arendt insists, "suffices to change every constellation".⁴³

Finally, Arendt's perhaps most famous point is that action in its most original form—acting together—is a source of power that is *not* legally constituted:⁴⁴

³⁸ See Hannah Arendt, *On Revolution* (London, Penguin, 1990) at 271.

³⁹ See *ibid.* at 28.

⁴⁰ See Arendt, note 32 at 189.

⁴¹ See *ibid.* at 176.

⁴² See *ibid.* 190-191.

⁴³ *Ibid.* at 190.

⁴⁴ *Ibid.* at 200.

While strength is the natural quality of an individual seen in isolation, power springs up between men when they act together and vanishes the moment they disperse.

Power is generated when men and women act in concert, that is, when they express their dissatisfaction with what has been taken for granted and begin moving towards an alternative. One reason for the power of action is its boundlessness. Action has “a tremendous capacity for establishing relationships”.⁴⁵ At the same time, action can connect people and become generative of power only if people live together,⁴⁶ that is, when they experience their life against a background that they share. Power cannot emerge where people live in isolation and do not trust in one another’s words and intentions.⁴⁷ Tyranny isolates and thereby occasions fear and suspicion.⁴⁸

How power in the Arendtian sense becomes the “other” of constituted powers

The fleeting nature of power is evident in the fact that it arises from a situation for a special case merely in order to collapse after it has done its work. The protesters have succeeded. They disperse. The power that they have generated disappears from among their midst.

The polis and the state are attempts to conserve power and the public sphere.⁴⁹ However, understood strictly in Arendtian terms, the establishment of legally bounded authority and the delimitation of various jurisdictions alters the quality of power. Indeed, it entails the rejection of its unruly boundlessness.⁵⁰

⁴⁵ Ibid. at 191.

⁴⁶ Ibid. 201.

⁴⁷ See *ibid.* at 200: “Power is actualized only where word and deed have not parted company, where words are not empty and deeds not brutal, where words are not used to veil intentions but to disclose realities, and deeds are not used to violate and destroy but to establish relations and create new realities.”

⁴⁸ See *ibid.* 200-202.

⁴⁹ See Arendt, note 32 at 174, 197-199.

⁵⁰ It is a different matter why Arendt herself did not perceive her type of action at the heart of Sieyès’ understanding of the *pouvoir constituant*. The explanation may well be that she per-

Such a change of quality is essential in order to create what acting in a situation does not require, namely a common will.⁵¹ Acting in a situation can rely on a variety of ad hoc arrangements and understandings whose future significance is subject to subsequent debate and negotiation. By formulating a common will, by contrast, action in an Arendtian sense grows *beyond* itself. It effaces itself. Such a growing beyond itself is necessary in order to render permanent that which is fleeting and to anchor human life, which is set into time, into a context of political self-determination. The boundless action within a boundless situation thereby transcends itself into legality. Collective self-determination is given an anchor. As has been pointed out above, individuals are collectively self-determining if they yield to determinations by others because they accord to their relationship with those others greater weight than to their political preference. Whoever yields to *formal* choices remains at a distance from their substance. The constitution of a common will involves an attitude of both identification and indifference, for the identification with the body exercising authority is paired with detachment from what this body actually wants. This is very much like suspending wants while wanting or suspending beliefs while believing. A suspension of this kind can be the result of either taking oneself or one's desires not terribly seriously. Attitudes of this type are instances of irony. The irony of legality (of complying "outwardly"⁵²) does not only affect the substance of legal norms, it also extends to the identification with the constituted community. It signals that the political unity is merely a proxy for the situation within which one perceives one's life.

ceived the concept of the nation as a successor to the "absolute". See Arendt, note 38 at 195. One wonders whether Carl Schmitt may have been responsible for this misreading.

⁵¹ It was a point of contention of those who criticized Habermas's appropriation of Arendt's concept of action for this theory of "communicative action" that he did not pay attention to the fact that action in the Arendtian sense takes place in spite of the absence of unity and without a common will. There is no common will in the sense that people share convictions. See Margaret Canovan, 'A Case of Distorted Communication: A Note on Habermas and Arendt' (1983) 11 *Political Theory* 105-116 at 111-112. See Habermas, 'Hannah Arendts Begriff der Macht' in his *Philosophisch-politische Profile* (3d ed., Frankfurt aM: Suhrkamp, 1981) 228-247.

⁵² See Immanuel Kant, *The Metaphysics of Morals* (trans. M. Gregor, Cambridge: Cambridge University Press, 1991) at 46.

Power becomes sovereign if the people, on the basis of covenants,⁵³ dispose of the future.⁵⁴ Constituted authority is capable of exercising that well-defined and bounded agency which constituting power lacks. But once power attains this level of organization, it ceases to be equally *serious* as action in the Arendtian sense. The seriousness of the latter is manifest in the resolution that is required to rise up against authority, to suspend routine and to say that we need a fresh start. It takes guts to do so. Constituted power is also minted of a different material. It is authority that does not originate from amidst a group of people but rather is derived from other power by virtue of pedigree. Not only is the expectation that power only be exercised within legal form the antithesis to the spontaneity, unpredictability and anonymity of common action, the existence of state boundaries is even inconsistent with its unruly capacity to cut across borders.⁵⁵

The situation of human life is more encompassing than the organisation necessary to realise human freedom. Whereas, in original form, power can become *constituant* by virtue of its composition from human interaction, a constitution introduces power in a channelled form against which the “merely” constitutive power of action appears to be an illegal intruder.⁵⁶ In the mirror of the self-negation that is supposed to sustain freedom, power becomes the negative of its negative: unruly, situational, flexible, dismantling—in a word: Carl Schmitt’s delight.

The constitution in pre-constitutional form

It is time to take stock and to confront the findings with the questions left open after our brief discussion of Lindahl’s perceptive intervention.

We observed, first, that the constituent power would have to be identical with the constituted agent, however, in pre-constitutional form. Hence, identity appeared to be possible only subject to the condition of non-identity. Now we are in a position to perceive—forgive the Hegelianism—the identity of the iden-

⁵³ See Arendt, note 38 at 167-168, 171.

⁵⁴ See Arendt, note 32 at 245.

⁵⁵ See Arendt, note 32 at 191.

⁵⁶ See *ibid.* at 191.

tity and non-identity. Identity obtains in a state where it is simultaneously necessary and impossible. It is impossible because boundless action cannot be tantamount to action by a constituted subject. It is necessary, however, for boundless action can only realize itself by growing beyond itself. The relation of identity and non-identity is symbolized by the difference that remains between the situation of life and the contingent body politic. It should not come as a surprise that one encounters apparitions of the constituting power in instances of how the constitution is given effect. The constitution remains embedded in the life of the nation. Again, there is no agent. Concededly, many believe that it is the courts that do most of the work. Upon closer inspection, however, it turns out that “custom” and “public opinion” may be more apt designators in order to refer to the self-effacing agency that is to be encountered here.⁵⁷

Second, we have seen that the actor constituting the whole, in order to be able to claim to be the self-constitution by the whole, has to be self-effacing. Action is self-effacing if it does not really have an agent. Action in the Arendtian sense meets this condition. The constituent power is action of this type growing beyond itself, thereby taming its unruly nature.

Third, we have stopped short of resolving the puzzle of what it is that synthesizes the constitution in acts of interpretation and thereby “retroactively” puts the pieces of the constitution together that enter the world at the moment of the founding. Lindahl referred to it as a passivity inherent in the constituent power which gives room to subsequent activity. We can now realize that this activity betrays the unbounded situation into which the constitution remains embedded. The situation will tell what the constitution means in this or that case; the situation will tell whether or not the constitution has gaps; the situation will tell whether or not extraordinary measures need to be taken in extraordinary circumstances. Any action in the situation has the potential to be action in the Arendtian sense or, conversely, to trigger its resistance. Remarkably, inaction and silence on the part of the public are most often intrinsic to the life of a nation. Who exer-

⁵⁷ See, for example, Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (New York: Farrar, Straus and Giroux, 2009).

cises influence here are real people, as Sieyès was well aware of.⁵⁸ The life of a constitution can be witness to the re-appropriation by original power, which, of course, has the power to appear in any form.

Finally, Lindahl confronted us with the claim that any act of constitutions is including and excluding. This is consistent with the negation of the nation qua unbounded situation of life. Awareness of this requires to introduce into any constitution a principle recognizing that the country whose supreme law it claims to be is always too small and too large. It includes those who had better be separate and excludes others who may have a stake. The key of dealing with this necessary founding defect consists in incorporating certain cosmopolitan elements, such as the prohibition of discrimination on the grounds of nationality or the protection of ethnic minorities.

A regulative principle

The key question has not yet been addressed. Are we, in a spirit echoing Sieyès, confronted with *causation* in the sense that action in the Arendtian sense is what causes the existence of constitutions that are worth their name, whereas other constitutions that originate from some diktat or *octroy* are only fake?

The question admits of two answers.

The first answer says that the constitutions that are blemished with heteronomous origins can overcome their birth-defect through appropriation by a people over time. Evidently, this can happen only retroactively. Germany after the Second World War would be a case in point. Even though the German constitution was prepared under the guardianship of the Allied Council the Germans subsequently came to adopt it as their own and have developed in many ways their own form of “constitutional patriotism”.

While the first answer implicitly reaffirms the causal imaginary, the second answer introduces a counterfactual and a normative perspective. It suggests that we had better perceive constitutions either as though they originated or as though they *should* have originated from the self-effacing agency of action in the Arend-

⁵⁸ See Sieyès, note 4 at 140.

tian sense. The first supposition is merely counterfactual, the latter formulates a regulative ideal. Both raise normative questions.

The purely counterfactual perspective may invest too much authority into constitutions assuming that constitutions deserve respect because they preserve an achievement of emancipation for subsequent generations. Not all constitutions emerge from processes of emancipation. The regulative perspective, however, introduces a valuable critical standard. Above all, it sharpens our awareness that constitutions are fragile and incomplete. Constitutions are not sacred documents but often the outcome of settlements and compromise. Their vitality is closely associated with the life of the nation. People should feel free to amend them or to introduce new ones when they see fit. Finally, the regulative understanding signals that a constitution is a charter of powers granted by liberty,⁵⁹ a charter which, most importantly, facilitates political self-determination.

The transnational context

Can there be a constituent power in a transnational context? One might be inclined to give a negative answer. In a transnational situation, there can be no *demos*. But this reply may mean two different things. First, it can mean that it would be misleading to speak of a constituent power in a context where ordinary people are mediated by their governments, for this would rob the concept of its radically democratic core. This is undoubtedly correct.⁶⁰ Second, it can mean also that only a people is capable of establishing constitutional authority. But such a statement, borrowing Lindahl's parlance, would be guilty of reification and thereby confuse cause and effect. A people is the effect of the attempt to exercise joint control over what men and women perceive to be the situation of their life. Seeing oneself as a member of a people is a normative consequence of the constituent power, not its condition.

⁵⁹ See the quotation from Madison in Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, Mass.: Harvard University Press, 1967) at 55.

⁶⁰ See Christoph Möllers, 'Verfassungsgebende Gewalt – Verfassung – Konstitutionalisierung' In A. von Bogdandy (ed.), *Europäisches Verfassungsrecht: Theoretische und dogmatische Grundlagen* (Berlin - New York: Springer, 2003) 1-58 at 31-32.

Before jumping to premature conclusions one has to attend to the differences between a national and a transnational situation. In the national case, men and women see their lives situated at a place that they share with others. Being with these others is understood to be an essential part of their life. This is not the case in the case of a life that transcends boundaries. Beings who see their personal life detached from a place see their lives going on anywhere.⁶¹ What does not matter, as a consequence, is the broader context of life; what matters, instead, is the pursuit of opportunities and belonging to the segment of society in which one pursues these as though it were an extension of one's private sphere. It is in this segment that one encounters always the same type of people with the same type of educational backgrounds and similar tastes. Even though they are strangers, they are more familiar than relatives.

When the situation of life revolves around grasping individual opportunities, the broader context of society loses its relational character. People exist not in the ontological format of other persons, but rather in the form of aggregate quantities. Society is encountered in the form of data informing us, for example, of incidences of crime, obesity, college drop outs or racist speech. The quantification of social life is consistent with seeing the relation to society at large mediated not by voluntary agreements, but rather by knowledge. This is particularly true of a transnational context where people relate to issues of public concern by paying attention to the type of information that is useful to administrative bodies and social planners. From their "eudemonistic" perspective, what matters is overall welfare. Membership to society is not a question of being among others but of relating to society as a whole by putting oneself in the shoes of someone whose task is to offer solutions to problems. Since in a much-belaboured interconnected world public ills are, arguably, best addressed from a position over and above the nation state, the type of knowledge relevant to understanding society is tailored to fit the needs of the operations of the Basel Committee, the Codex Alimentarius Commission or the World Health Organization.

⁶¹ This reflects the accidental cosmopolitanism that had long been discovered by Tocqueville. See Alexis de Tocqueville, *Democracy in America* (trans. H. Mansfield & D. Winthrop, Chicago: University of Chicago Press, 2000) at 482.

For people pursuing private opportunities it is important that institutions with adequate transnational problem-solving capacity exist in order to put their requisite knowledge to a use which is to the benefit of all. While markets create opportunities, their routine operation also gives rise to manifold risks and various crises. Hence, it is important to have expertise implemented at a level where it is capable of informing effective risk- and crisis-management.

This means also, however, that the knowledge with which individuals relate to society is necessarily always second-hand. In a knowledge-based society it is rational to assume that to every question there is someone who is certified to know things better than oneself. This is true even of intimate things, such as sexuality or personal anxiety. We may need guidance and advice from a psychiatrist in order to understand our desires and to raise them to the level of self-awareness necessary in order to have them satisfied.

Therefore, it is rational to defer to others who are certified to know. Of course, one should not engage in deference haphazardly and indiscriminately. But here is a dilemma. Who would help people to know whether they may trust in the knowledge and problem-solving capacity of others? They would have to trust someone who were to guide them in choosing their object of deference. But whom to trust in selecting the guide? The situation clearly gives rise to an infinite regress of deference, which could only be halted by a collective choice. Such a choice, however, is not available under transnational conditions, for this is a place where people do not exercise any collective agency and shoulder responsibility for what they do under conditions of imperfect knowledge. Political communities make choices. This means that they establish responsibility even for what they could not have known. They cannot walk away from the consequences of prior choices. They have to deal with them. However, political choices are not available in the boundless realm of transnational opportunities. All that people can do in order to absorb uncertainty is to take their cue from others. They can only do as all others do.

A transnational society, in which political authority is either local or weak, is a society in which conventions play a very prominent role. Its categorical imperative says "I do as all others do". It should not come as a surprise to find in such a

society a certain predilection for herdish behaviour. Conventions are necessary to guide the perplexed and to shield them from the onslaughts of resentment against those who dare to stand out. It also relieves people from all responsibility for their own life. If one always does as all others do, one lives the life of all others. If something goes wrong with one's life it is merely a matter of bad luck.

It would be rational to follow conventions if collective deference eventually pointed to the one Razian individual that actually identified the conditions under which it is rational to defer to the greater insight or problem-solving capacity of others.⁶² Interestingly, the predicament of the transnational situation is that nobody can confidently claim to be able to find such an individual. What remains, therefore, is a practice of deference that is based on what Pfaller has so beautifully reconstructed as “beliefs without an owner”.⁶³ Everyone does as others do simply because everyone ascribes to an unknown other the belief that they are right in deferring to some transnational authority. The relation between and among the individuals is based upon the interpassivity involved in believing in the views of this fictive other. It is the collective unconscious of a transnational *Privatrechtsgesellschaft*. It helps to resolve the conflict between individual private desire and public involvement by surrounding passivity with an aura of smartness.

What one arrives at, then, is a post-political world which does not rest on the consent of the governed or public opinion. Willing, after all, is not at all an issue. What matters instead is the nodding attention to “sites” of authority⁶⁴ whose claim to authority is based on knowing how to do things best. Interpassive deference is the transnational equivalent to action in the Arendtian sense.

⁶² Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (2d ed. Oxford: Oxford University Press, 1994) at 347.

⁶³ See Robert Pfaller, *Die Illusionen der anderen: Über das Lustprinzip in der Kultur* (Frankfurt aM: Suhrkamp, 2002) at 27-41.

⁶⁴ See James N. Rosenau, *Along the Domestic-Foreign Frontier: Exploring Governance in a Turbulent World* (Cambridge: Cambridge University Press, 1997).

Radical Pluralism

The shift from the consent of the governed to their interpassive deference is of great consequence. Action in the Arendtian sense pulls people together into one *focus imaginarius* once it merges into the constituting act. No such focus comes into play in the case of interpassivity.

Constituted powers are ideally part of one system of government. First-order powers to lay down the law, or to say what it is, are coordinated on the basis of second-order powers to define or to limit the scope of these powers. It is in this context that in the United States, for example, the “people” are invoked as the ultimate arbiters of constitutional authority.⁶⁵

The idea that all constituted first- and second-order powers fit neatly into one system is, of course, an idealization. There is always room for contestation, in particular, when it comes to the authority to apply the constitution. Notoriously, a president and a court are the contenders. At the end of the day, however, one of the branches prevails while the other remains powerless to change the determination reached by the other. In practice, conflict is often avoided through practices of yielding to the other branch.

Such “institutional” pluralism⁶⁶ is the daily bread of constitutional systems.⁶⁷ It is thereby presupposed, mutually, that the institutions are part of the same legal order. What is contested, however, is the power to say what the law is *within* this order.

⁶⁵ Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford: Oxford University Press, 2004).

⁶⁶ On the useful distinction between “institutional” and “systemic” pluralism, see Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2010) at 71-74. Institutional pluralism involves different organs of the constitutional order claiming to have the final say on legal questions concerning the same legal order. Systemic pluralism actually recognizes the existence of different legal orders.

⁶⁷ See Daniel Halberstam, ‘Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States’ In J. Dunoff & J. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge: Cambridge University Press, 2009) 326-355.

The situation is completely different when claims to authority are not coordinated on the basis of second-order powers simply because there are no shared second-order powers to begin with. In a transnational context, the respective “sites” of authority exist side-by-side, one-by-another, rather than within a hierarchical order. What is more, by definition there is no sovereignty, which has traditionally served as the “mop-up” second-order power within and among constitutional systems.

In a transnational situation, hence, there is a variety of international, national or local sites of authority. None has *prima facie* a stronger or even overriding claim to legitimacy.⁶⁸ Whether one ought to follow the determinations made by the private “Forest Stewardship Council” or national legislation is not at all dependent on “belonging” to a polity. Citizenship or residence in and of itself does not create a stronger *prima facie* case for obeying laws than the inclusiveness and deliberative qualities of a private international organization. Rather, a number of considerations are supposed to establish the *degree* to which one site rather than another has a slightly stronger claim to authority in certain cases.⁶⁹ By default, one may want to concede to each site its own way of regulating—in a conflict of law manner—its interaction with others. But the application of such a default principle presupposes identification of the relevant site in the first place. Moreover, one cannot grant sites full power over choosing their collision rules for this would be tantamount to recognizing their sovereignty. Hence, even conflict rules have to be seen in light of overarching principles.

According to Krisch, the guiding principle for selecting a site with legitimate authority is public autonomy *qua* “expression” of the right to “self-legislation”.⁷⁰ In the transnational situation, however, no site can claim to have full legitimacy, for none of them is capable of fully realizing the ideal. While international organisations are potentially highly inclusive because of the membership of many states, they do usually not offer many avenues for participation by ordinary people. At the same time, local governments may be fully participatory but “exclusive”,

⁶⁸ On the following, see Krisch, note 66 at 98.

⁶⁹ See *ibid.* at 102.

⁷⁰ See *ibid.* at 99.

thereby creating “external” effects for outsiders who are not represented in political processes. If organisations are not sufficiently particularistic, participation will suffer; if they are not sufficiently inclusive they will lack universal appeal. The principles of universality and particularism⁷¹ are likely to do battle across the whole spectrum of candidates. No site of authority will ever look perfect. As Krisch explains:⁷²

[...] [A]ny determination of the relevant polity through the social practices of some will always have to give an account of how it takes seriously, on the one hand, the claims of outsiders to be included and, on the other hand, the claims of group insiders to pursue their particular goals through their own structures.

Krisch concludes that one needs to make oneself at home with “multiple identities and loyalties” and with leaving “contests for ultimate authority open”.⁷³ The balance between the competing principles of particularity (participation) and universality (inclusion) is always going to be imperfect.

Why political autonomy is not the issue

Krisch’s ideas serve as a useful reference point for explaining why it is mistaken to approach the pluralism of the transnational setting from the perspective of public autonomy. Several observations are in order.

First, if one were to apply Krisch’s balancing test to the two candidates at the extreme end of the spectrum—the world state on the one hand and anarchism on the other—it is obvious that while the first would fail on participatory grounds the latter would scarcely be deemed to be sufficiently inclusive. It is difficult to see, nonetheless, how *any* institution considered in isolation and without being seen as part of a larger multi-level system could ever pass muster, for it can only appear to be sufficiently balanced by virtue of being part of a larger whole.

⁷¹ I add, in passing, that Krisch, even though claiming to go “beyond constitutionalism” thereby returns to identifying overarching principles that permit to put various sites at their place within a larger structure. He thereby endorses the institutional and constitutionalist approach (at pp. 100-101) that he had disavowed a few pages earlier (at p. 77).

⁷² Ibid. at 100.

⁷³ Ibid. at 100.

If the larger background is not taken into consideration, striking the balance between inclusiveness and participation would necessarily be a matter of mere intuition. There would be no context allowing one to conclude why a less inclusive institution may be tolerated in the larger scheme of things. The systemic pluralism embraced by Krisch is not workable in practice for it does not give rise to a plausible standard governing the exercise of political autonomy. If Krisch had such a standard he would indeed embrace some non-pluralistic solution.

Second, a similar observation can be made about the principle of inclusion, which says that well-functioning political self-determination needs to take the interests of all people concerned into account. It is usually presented as an argument against national boundaries, which are alleged to be incapable of responding fully to the “needs and interests of those outsiders that are affected by their decisions”.⁷⁴ The problem with this principle is that it leaves open under which conditions bounded polities may legitimately not take the interests of others into account.⁷⁵ Arguably, a secular liberal democracy may legitimately ignore the interest of a neighbouring theocracy to be surrounded by sibling theocracies. A country sustaining a high level of social protection may insulate itself against competitive pressures from societies embracing authoritarian capitalism. The transnational effects argument is substantially empty. It says nothing about the *legitimacy* of the demands of others. In fact, rights are vehicles for excluding the potential impositions by others. In order to have bite, the transnational effects argument we would have to encompass a theory of the rights of individuals and collectives. Without an anchor in rights, the demand for participation loses its point. Mere participation neither confers nor enhances legitimacy. Only rightful participation does. Everything else is troublesome meddling. Undoubtedly, the Pope has an interest in preventing abortions, but it would be more than odd to concede that the papal legate must participate in national political processes because the pope has a stake in protecting unborn life.

⁷⁴ Ibid. at 86.

⁷⁵ For an extensive discussion, see my ‘The argument from transnational effects’ (2010) 16 *European Law Journal* 315-344, 375-395.

Third, the emptiness of the transnational effects standard is a consequence of a liberal dilution of political autonomy. The underlying intuition must be that regardless of whether outsiders have legitimate interests or not, it is only fair to give them a voice. Only on the basis of their input can it be determined whether their concerns are relevant or not. In the liberal imaginary, political rights provide opportunities for expression, but they do not confer powers to decide. Political autonomy is manifest, therefore, in freedom of speech or of the press, in the right to associate or in the right to petition. Within the same imaginary, public autonomy is often even more diluted when its exercise is expected to exhibit certain deliberative qualities. Political autonomy is then not treated as a right but identified with the normative commitments intrinsic to its exercise.⁷⁶ It is political autonomy in *moralized* form, that is, a liberty that is already burdened with the normative expectation to behave well, to be reasonable and to do one's bit. This betrays the prevalence of a bureaucratic understanding of participation according to which all expression is to be directed at some form of constructive problem solving. Contributions by those affected by decisions are welcome, but they do not get to decide on the issues. None of this has anything to do with collective self-determination as sketched out above.

Finally, Krisch's normative idealization of a "heterarchical" pluralistic world from the perspective of what he takes to be political autonomy confronts us with a situation where individuals themselves determine the scope of the regulating authority for certain issues. This explains why, in his view, considerations concerning the scope of the polity need to be an integral part of the exercise of public autonomy.⁷⁷ At the same time, he recognizes the paradox inherent in democratically choosing the adequate size of a democratic polity.⁷⁸ A choice of this type already presupposes the existence of an adequately sized democracy. A choice of this type is inconceivable. It is possible, nonetheless, to imagine individuals

⁷⁶ On this important difference, see, not least, Jürgen Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Frankfurt aM: Suhrkamp, 1992) at 157.

⁷⁷ See Krisch, note 66 at 100.

⁷⁸ See *ibid.* at 93-94.

choosing for certain issues from among relevant sites of authority privately. But it is difficult to imagine in which respects acts of this type could count as acts of public autonomy. Moreover, they could not be constitutive, but rather only selective. They concern the picking and choosing from among different authorities after the fact. But as we have seen above, without a larger constitutional context these choices must appear to be more or less baseless. They are roughly on a plane with the whim of consumers.

It is in this context that Krisch misses the point of action in the Arendtian sense. The act of “choosing” the right size of democracy can only be an act of self-constitution in the manner described above. Self-constitution is the resolution of the paradox that one needs to presuppose democracy in order to create it. The resolution lies in the will of the indeterminate nation to exist as a determinate polity. That the constituted polity is always too large and too small with regard to the nation is a matter that needs to be addressed not through capricious picking and choosing but through incorporating cosmopolitan elements into the constitution, chief among them a prohibition on discrimination on the grounds of nationality. Polities are not the result of a deliberative process. Their exclusiveness must be worked on from within. Open societies with dynamic political processes temporalize the solution to this problem.

Substantive legal rationality

Krisch’s theory is vulnerable to these objections because it has chosen political autonomy as its lens. It needs to concede, therefore, that the autonomy in question is always awfully diluted and that the reasons governing its exercise can only be ad hoc. This reveals why Krisch has adopted a wrong perspective.

What matters, instead, is interpassivity. Pragmatically, this is what Krischian individuals need to resort to in any event. Ideally, they could be smart Razian individuals telling themselves that it would be wrong to live by the standards adopted by the Basel committee since the process yielding banking standards is insufficiently participatory; practically, they have no ability to change these standards but can play at being smart by taking their cue from others. Following a standard becomes either a matter of prudence or of lived interpassivity.

Krisch also does not perceive what happens to the normative force of legal norms if their creation and application are not subject to some overarching system of second-order powers. Assume that some agency is in a certain case confronted with a piece of national legislation and benchmarks recommended by an international body (*e.g.*, the Forest Stewardship Council). Will the agency engage in an extensive computation of how the national legislature scores on inclusiveness and participation vis-à-vis the international body and arrive at the respective product for each site of authority? This is not likely to happen simply, if only because the agency will not know how to carry out such a calculation. What is more likely is that the agency will use everything that it finds useful, which means, in this case, that it will read national legislation in light of benchmarks, fill in the gaps, construct narrowly what appears to be overbroad etc. In a world where the pedigree of norms no longer matters, the law will be given a more substantive and less formal outlook. Using a standard might be based on invoking the reputation of an institution. Decision-making will be seen eventually as a process of problem-solving that can draw on a variety of sources that all appear to have something going for themselves. Instead of Krisch's fictional choice between and among various sites of authority one arrives at an understanding of law as experimental problem-solving that does not follow commands but is aimed at arriving at the most optimal solution to problems.⁷⁹ Law is then understood to be an extension of administrative action.

This is consistent with viewing authority cognitively. National legislation may appear to be deficient because it might be distorted by the influence of special interest groups or by lack of input from outsiders. International authorities may be smarter but not sufficiently responsive. They may not communicate well. Willing does not matter. In a universe where authority is merely necessary in order to solve problems its demands become fluid and flexible. The respect that one owes them is not tantamount to the respect that is due to the volition of others. In

⁷⁹ For a respective sketch, see William H. Simon, 'Toyota Jurisprudence: Legal Theory and Rolling Rule Regimes' in G de Búrca and J Scott (eds), *Law and New Governance in the EU and the US* (Hart Publishing, Oxford 2006) 37-64.

contrast to resolutions, intelligent problem-solving actually requires permanent adaptation and recalibration.

This is also true of the cognitive service of having one's right protected by a well-educated and trained judiciary. The matter becomes increasingly embedded into a transnational learning process, which revolves around the application of the proportionality principle. One jurisdiction yields to the other on the condition that what the other does can be considered to be "equivalent". The rights no longer need a textual basis in a constitutional document. They are part of the legacy of all constitutional democracies.

Political autonomy is quite unnecessary in a world of this type.

Result: Self-alienation and cynicism

Is there a constituent power in the transnational context?

It may be suspected that the answer is still negative, even after an effort has been made to demonstrate that the absence of a people or a nation is not decisive. What civic interpassivity lacks, in contrast to action in the Arendtian sense, is the power to grow beyond itself. There is no transubstantiation of the power of action into the power of the constitutional state. Consequently, the substantive demands of various sites of authority invariably flow into one another in the course of their implementation. Even though action in the Arendtian sense and civic interpassivity share the quality of being self-effacing for the reason of not recognizing an agent, the former is able to crystallize structure whereas the latter is not.

But this is not to say that the constituent power is completely absent in the transnational context. It would be more accurate to say that its absence is present in the pluralist universe where legality is substantive and problem-solving is all that matters. People experience this absence, not least, through their loss of public autonomy. No public realm is constituted either by them or for them.

Not surprisingly, a transnational world realizes freedom at the price of self-alienation. This, at any rate, is how the absence of the constituent power presents itself.

According to Marx's classic observation, one enters a state of self-alienation if one is governed by circumstances that one experiences as a foreign force. All doing is in fact enduring, all active engagement is a way of giving oneself up to fate.⁸⁰ The state of self-alienation is different from heteronomy, for one is not subjected to the will and command of another person.⁸¹ Rather, one merely adapts to the run of events. This involves alienation from one's acting self and a reification of the social world if one falsely believes to have no choice. The situation of life is then no longer seen as a situation in which one acts. One identifies with a situation of inactivity and resigns to drifting through life.⁸²

The inaction concerns, evidently, political autonomy. One may want to conclude that private autonomy remains nonetheless intact.

Political autonomy concerns the common authorship of laws. It involves the exercise of communicative freedom, which is subject to the intrinsically normative constraints of communicative action and discourse. Availing oneself of communicative freedom entails, therefore, normative commitments, such as the readiness to give reasons for one's claims and to be responsive to the reasons given by others.⁸³

Such a common practice of communicative freedom does not exist in the accidentally cosmopolitan situation. Arguably, its absence also alienates people from their private autonomy. If the point of private autonomy is to optimize freedom of action and choice for all,⁸⁴ it is the core question of public autonomy to articulate what it means to guarantee this freedom *equally*. Thus, the epicentre of political debate and action is the struggle over equality. People can only establish a meaningful connection with their private autonomy if it is mediated by their

⁸⁰ See Karl Marx, *Ökonomisch-philosophische Manuskripte* (ed. M. Quante, Frankfurt aM: Suhrkamp, 2009) at 88-89.

⁸¹ See Rachel Jaeggi, *Entfremdung: Zur Aktualität eines sozialphilosophischen Problems* (Frankfurt aM.: Campus, 2005) at 79-80, 238.

⁸² See, for that matter, Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) at 371. Raz, however, would describe such a situation as a situation of heteronomy because he does not recognize the concept of alienation.

⁸³ See Habermas, note 76 at 152.

⁸⁴ See *ibid.* at 161.

participation in the political choices governing its constitution. If they are alienated from their public selves they cannot proudly identify with their private achievements because these are, where it matters, the result of circumstances that one could not have reasonably endorsed had one had political freedom.⁸⁵ Rather, their alienation from the political world will likely be accompanied by a cynical disconnect from life in general.⁸⁶

Conclusion

What would pre-modern constitutionalism have identified to be constituent power of a polis? There are a number of potential answers this question. Causally understood, it is the founder of the city or the turbulence of time that gives rise to a succession of governments.

Arguably, however, the ancients would not have raised this question in the first place. Unlike the moderns, they were not concerned with collective autonomy generating the conditions for further autonomy, be it collective or individual or public or private. Yet, viewing the modern project through the lens of its ancestors one perceives the polity in juxtaposition with a fitting composition of the soul or a certain principle of life. Admittedly, the link between city and soul can be understood in quite different ways. Plato reasoned strictly *per analogiam* when he explained the composition of the human soul with reference to the city and the composition of the city with the composition of the human soul. One should not infer from this analysis that a particular type of soul is destined to be the ruler of a certain city because of the homologous structure of city and soul.⁸⁷ Aristotle, by contrast, emphasized a connection between the type of person that thrives in a city and the city's constitution. What meditates this relationship is the principle

⁸⁵ See Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, Mass.: Harvard University Press, 2000) at 265, 279.

⁸⁶ See Peter Sloterdijk, *Kritik der zynischen Vernunft* (Frankfurt aM.: Suhrkamp, 1983).

⁸⁷ This, at any rate, is what I took from the fine study by G.R.F. Ferrari, *City and Soul in Plato's Republic* (Chicago: University of Chicago Press, 2005) at 70-71.

governing the constitution. While wealth is the principle of an oligarchy, democracy is based on the principle that one may live as one pleases.⁸⁸

What we can take from the ancients, in particular from Aristotle, is the idea that constitutions are made for someone. Nowhere could this be more manifest than in Sieyès tract. The third estate is the governing class because it does everything. The more highly ranked estates are drones. As long as the third estate thrives the whole society will prosper. Cast in slightly different terms, this means that the third estate deserves to be the ruling class. Serving its interest serves the interest of society at large. In constituting itself, the third estate invests itself with the institutional wherewithal to rule.

The question for whom a constitution is made is decisive for the study of constitutions. It invites us to search for those who would make them if they could. They are, it seems, the primordial constituent power.

The modern constitution was made by and for political beings.

The emerging transnational world is passively constituted by a humanity that appears to believe that their place in the world is their career.

⁸⁸ See Aristotle, *The Politics and the Constitution of Athens* (ed. S. Everson, Cambridge: Cambridge University Press, 1988) III.5.