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Constitutional Sociology and Politics : Theories and Memories

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CONSTITUTIONAL SOCIOLOGY AND POLITICS: THEORIES AND MEMORIES

1. APPEARANCE AND ESSENCE, BEING AND MEANING IN CONSTITUTIONAL LAW

A Constitution [Cunha, 2006: p. 653 *sq*.] can be seen as a mere technical instrument for the simple distribution of power among several political actors (and pretenders to power) and Constitutional Law as the body of law (this syntagm is already used with a positivist connotation) that is instituted for the protection of this distribution. A Constitution like this, which only distributes powers and provides organisational guidelines, would still have a purpose. A society without rights and statal purposes that are clearly declared would, obviously, have several hidden purposes – and these may be not the best ones. However, without the specification of rights (perhaps having no rights at all if that distopia would be concievable), one could not say that it would be a real Constitution in accordance with the requirements of the 16th article of the first French Declaration of the Rights of Man and of the Citizen.

The Constitution of Indonesia, especially before 1998, for example, had so many references to the ordinary law that we doubt that it has in itself the heart of constituent power. It appears that it endorses it to the legislator… Which means a proper conception of power and of its holders; however, it does not serve very well as a proper constitutional text. There may be far more examples.

What we mean is that there is always a unique political direction in each Constitution, although it can be the way of pluralism, of course (we do not mean a Constitution that imposes neither a "unique thought" to all citizens, nor a state ideology or dogma). There is always a constitutional genetic code.

In Portugal, Gomes Canotilho and Vital Moreira, in their *Constituição Anotada* [Canotilho, Moreira, 1978: p. 28], have identified this genetic code, which grasps the deepest sense of our Constitution (despite the constitutional revisions), in the *Preamble*. This is the Constitution's "Identity Card", they said [Canotilho, Moreira, 1984: p. 63]. This would be even more characteristic than the material or substantial limits of constitutional revision, the "stone norms".

After all, this is the fundamental and enlightening, mythical and utopic part of the Constitution, which links together yesterday, today and tomorrow, and which, in spite of the presence of nonconsensual elements (such as "socialism" – although socialism is not consensual, neither were or are the hermeneutical theories of the Constitution: neither the ones which support it, nor the ones which tackle it [Miranda, 1987], has survived successive constitutional revisions. Perhaps it also persisted because of the non-

chalance of some, who still follow old ideas of the Preamble's "non-constitutionality" and "non-juridicity". However, it remains and continues to reveal the meaning of our Constitution through all the successive seven revisions [Cunha, 1988: p. 25 *sq*.; Cunha, 199: p. 341 *sq*.; Tajadura Tejada, 1997; LaRue, 1995].

More or less legitimating narratives (and thus mythical) such as the Preambles (as well as the laws' "statements of reasons" – as emphasized by José Calvo González) are great settings in which to find the Constitution's explicit legitimations, which may, in a dialogue with the constitutional reality and other texts, lead us to the path of the implied, tacit and non-expressed legitimations.

In Law in general and also in Constitutional Law, legitimating discourses are one thing; the most basic, the most essential guidelines are another. Sometimes they match; sometimes they do not. A few authoritarian states have formally handed out constitutions, some more democratic than others. We live in some sort of pan-constitutionalism; the "Constitutional State" is the apparently normal form of the State, as was stressed by the former president of the UN Assembly, the Portuguese, Freitas do Amaral [Amaral, 1994: 1984, cols. 1126]. At is well known, only the United Kingdom, Canada, New Zealand and Israel stand out as the most complex cases in the global context of written and codified constitutions. However, one issue is the form and another is the being, the meaning.

Constitutionalists are not naive readers of constitutions and their wonders. They have to know the legal system and the political system in which the constitutions arise. They have to know them in History and in the neighborhood (through constitutional comparatism, which Peter Haeberle considers a new element of hermeneutics, which should be added to the classic ones of Savigny) and also has to do the archaeology of senses, which will enable him not only to comprehend the standard's meaning, but also to understand the system's spirit. Furthermore, this "spirit" is claimed to be the ordinary "judge" in the case of the integration of loopholes, according to the 10th article of the Portuguese Civil Code. This is an example of a constitutional norm within a non-constitutional law, that is to say, a materially constitutional matter in a non-formally constitutional juridical context.

2. FOUNDATION AND LEGITIMATION

The issues of foundation and legitimation arise a lot, especially in Constitutional Law, primarily because they belong to Constitutional Law and play an essential role in the legal system itself and in each countries' law in particular, which is precisely a foundational and legitimating role, among other functions that seem to depend on primordial tales or myths.

However, if it is easy for a positivist jurist to invoke the Constitution as the ground for his work and as the remaining support for his normative chain inferences (such as in Kelsen's Pyramid) in order to overcome a merely formal legitimation of a logical or legalistic point of view, a bigger demand is required.

Nevertheless, this is not about finding simple solutions. The issue of legitimation is one of the most complex, and we could say the most mysterious in Law and in Politics, which faces more problems, of course, in the most political of Laws, Constitutional Law. Nonetheless, it is one which must be raised when discussing any legal system or Constitution due to its complexity [Comparato, 2006: p. 49 *sq*.].

This issue leads us to question the very legitimation of power and the reason why some rule and others obey, either in a political society in general, or in any micro-society. That is, of course, a very complex and polemic question.

Altough they have resemblences (we are entering a domain in which everything is related), the issues of legitimation and legality by no means coincide. What is legal may not be legitimate and what is legitimate may not be legal, altough it is desirable for them to draw near enough to each other to become one. Sometimes *sortir de la légalité pour entrer dans le droit* proves to be correct not in its Napoleonic version, but as if to say: *par le code, mais au-delà le code* (by the code, but beyond the code).

Some of the most classic theorisations lead us to a mythical society without power in different ways, to a State of nature in which, according to the authors, either man would be man's wolf – *homo homini lupus* (Hobbes) or man would be the good savage (Rousseau – who never spoke about a "noble" savage) or humankind would only have the inconvenience of exaggerating in it real and personal defence regarding offences and abuses due to being both the judge and the judged (Locke). Therefore, we have – in a sense mythically – three types of ideological responses to describe a golden age without a centralised power and deprived of the legal monopoly of coercion, which is what Law primarily does in political societies, in the "post" – State of nature or civil society or "state" *hoc sensu*. In any case, we must underline that Rousseau's thought was much more complex than the idea of him conceived by many of his vulgarisers. He also exalts, for example, the importance of mankind *differentia specifica*, culture, and he is an advocate of both equality and liberty, not an abstract, plain and totalitarian will, which many people see in his "general will".

A mythical "social contract" was also conjured up in contractualist theories (in the naturalistic ones of Aristotle, Thomas Aquinas and others, in which man has always lived in a political society), the passage from a state of nature to a political society – which many immediately named inaccurately as "the State" [Miranda, 2002: p. 31 *sq*.] for the sake of convenience. One way or another (there are several possible combinations and it is even possible to identify successive and complementary agreements), the people would hand over the power to someone, primarily to monarchs, thereby legitimizing them to wield the power through that pact.

However, this handing over was done under certain conditions, according to less royalist, less authoritarian authors, which gave the people the right to "withdraw" and eventually to have some control over the rulers.

We have several examples of mythical conditional arrangements, such as the classic aphorism *rex eris si recte facias, si non facias non eris* or the Teixeira de Pascoaes' contractual description of the Portuguese monarchy in *Arte de ser português*, a book he desired to be adopted in elementary education in order to teach youngsters [Pascoaes, 1991]. We are impressed with the words of this poet who left his career as a lawyer in order to enter a quiet retirement among his books in the countryside. In his words, we can hear the clearest echoes of the old and traditional Portuguese Constitution:

"We also have the charters and principles of law established in ancient political parliaments, revealing the spirit of freedom and independence that always animated the popular soul. The People intervened in the government of the country, in succession to the throne, in all acts of general interest that King practiced: war and peace, raising taxes, etc.. And yet exercised a smart surveillance on the procedure of statesmen, some of whom were accused and convicted!

In the Middle Ages, while other people groaned under the weight of absolute power, to our Monarchy we imposed the conditional form: the King will rule if worthy to govern, and (he our she must) govern according to our will, expressed in general parliaments assembled annually" [Pascoaes, 1991: p. 78–79]. Let us return now to more theorectical matters.

First of all, we must search the most profound foundation of power. Some seek it in the social contract. Others in a particular aspect (charisma, wisdom, a choice made by vote, for example), etc. Others in a certain divine unction (with or without the people's intervention), because if some say *omnia potestas a Deo*, others add: *per populum*. By the way, Bertold Brecht, the iconoclastic playwright, would ask something like: "If all the power comes from the People, where does it go?".

The legitimation's types of power holders were well depicted by the sociologist Max Weber [Weber, 1978: p. 215 *sq*.].

The charismatic leader could be Napoleon Bonaparte: hence the word "Bonapartism".

As a patriarchal leader we will always remember Coronel Ramiro Bastos, who was played by Paulo Gracindo in the first Brazilean television series *Gabriela* that was broadcast in Portugal and was based on the Jorge Amado's novel. In that series, Coronel Ramiro Bastos is painted with all of a patriarchal power's characteristics. Only in the final scene, in which the exporter Raimundo (Mundinho) Falcão is enthroned (Ramiro leaves the scene without stepping down, because he dies in his sleep: a beautiful metaphor of standstill power), do we see that the new power can become an old power.

The novel also contains references to the Bonapartist takeover by Bastos, which at the time was considered to be a sign of progress, as well as Mundinho's authoritarian mannerisms in the opposition, with explicit comparison with Coronel Bastos [Amado, 2006, p. 58 *sq*., 67, 208 *sq*.; Ferin, 1977, Cunha, 2009: p. 657 *sq*.].

Finnaly, the rational-legal leader could be any ruler without the other two dimensions who is chosen in a bureaucratic way, or even by vote [Cunha, 2005: p. 79 *sq*.].

But in addition to this dimension, which always summons mythical or psychological elements, the issue of legitimation also arises at several moments of a State's activity, thus directly or indirectly reminding us of Constitutional Law (even when related to Administrative Law, Tax Law, Urban Planning Law, Environmental Law… the legitimising shadow and Constitutional Law's *ultima ratio* is always there).

Administrative acts must be reasoned. Sentences must be considered…and something is wrong when a political act is not well explained. The spirit of a Constitutional State is largely a spirit of an appeal to legitimation. It is a part of the culture of dialogue and legitimation by procedure and by consensus (or the attempt of reaching it) which permeates our societies not only the democratic ones (on a political level), but also the pluralistic ones (in the political, cultural and social dimensions).

To search the foundations of power and Constitutional sense is a complex task, which creates the need to appeal to scholarship and multi-disciplinary skills. It is the real entry into the most profound and elusive *arcana* of our domains and is partly moving into Political Philosophy and may even go futher in some cases. The magic of power is deeply grounded in its mythical and spiritual roots. In some cases, we should study political theology and political mythology in order to really understand what the real and deep sources of some political ideas, institutions, etc. are.

Even if the question about the *foundation* as well as about the *being* can no longer be ignored by us, it does not rely on our theoretical strengths. Nevertheless, the issue

of day-to-day legitimation, as we have already mentioned, is not only a constitucional imperative as a vetoer that passes through the entire modern legal system, but also as the necessary enforcement of our constitutional culture, which is a culture of rights, of hearing and of participation.

When the project of the EU's written constitution was under discussion, the issues of legitimacy and the legitimation were constantly raised. It was impossible not to take into account the opinions of several political and legal agents during that important historic moment in the light of the two main variants that interacted with each other: on one hand, their most profound political conceptions (in particular about nationalism *vs.* europeanism and social concerns *vs.* economic liberalism), and on the other hand, their accession to legal theories (state *vs.* absence of state; internationalists / communitarianists / constitutionalists, etc.). This proves that concepts are changing once again and that realities no longer belong to them. Futhermore, this *novum* called the "European Union" presents us with enormous constitutional and legal challenges [Melo, 2001: p. 103 *sq.*; Cunha, 2005].

This is where the Law comes in to play a creative and integrating role; it can not be influenced by the simple normative force of the facts, especially by the established facts, and it cannot be enclosed in the sleeping castle of the Princess's Tale [Soares, 1965: p. 5].

3. LEGITIMACY AND LEGITIMATION

There is a classic distinction between legitimacy through entitlement and legitimacy through the wielding of power. Entitlement is a fundamental issue when it comes to the Law. A legal entitlement is the *ratio* that enables us to establish the essential vicissitudes of a legal status [Cunha, s.d.: p. 493–591]; thus, legal statuses are created, modified and extinguished due to the intervention of legal titles.

Thus, legal titles such as an original acquisition, a contract, a will, a rule, etc., and to some (which involve a complex, philosophical and social issue) human nature or human condition are the basis of the right of A's or the right of B's. What the Law gives to each one (*suum cuique*) depends on whether he or she is the holder of a legal title. This also happens in Constitutional Law, which hands out powers and honours according to the entitlements.

Portugal's political-constitutional history (which shares some common grounds with Brasil) is the perfect exemple to highlight a few classic aspects that are related to the legitimation and legitimacy of power.

We will begin at a time during which there was a political union between these two countries.

After Portugal's union with Spain from 1580 to 1640, the Restoration of Portuguese independence raised legitimacy issues regarding the Philipine dynasty [Torgal, 1982]. According to the myth, Philipe II of Spain, I of Portugal, based his legitimacy of his entitlement to the Portuguese crown on the following sentence: "I have inherited, bought and conquered Portugal". These are, in fact, all classic forms of attaining power: succession, acquirement and conquest. The question is whether all of them are ethical or not in every circumstance.

In any case, even if the Philipine dynasty had the *legitimacy of entitlement*, which is not entirely clear (some argue that D. António, Prior of Crato, was the one who had it),

under the reckless rule of Portugal by the Philipes, namely involving Portugal in Spanish disputes – see, for instance, the disastrous case of the "Spanish Armada", by a ironical paradox named "Invincible Fleet" by the defeated Spanish, and neglecting our interesses, mainly abandoning part of Portuguese overseas positions to foreign attacks, and even to occupation, such as the Dutch invasion of Angola and Pernambuco, in Brazil – , they would lose it completely in 1640 due to their continuously condemnable and iniquitious wielding of power from 1580 or or shortly thereafter. On 1st december 1640, when only 40 conjurates decided to take the palace and proclaim independence once again, it was quite clear they were no longer covered by the shroud of the just wielding of power.

Legitimacy through entitlement is important; however, legitimacy through the just wielding of power is even more important. Tyrants (etymologically speaking, according to the first meaning of this word in Greek), who take over power in a non-constitutional way, thanks to their charisma or often through revolutionary or rebel means, can become legitimate statesman due to the benefits of their rule. Legitimacy through the wielding of power validates legitimacy through entitlement. Usually, the ones who attain power through questionable means will continue behaving in that manner. But power institutionalises revolutionaries because we realise that power tends to soften the more radical ones, for example, Michael Collins in the Irish Independence Revolution [Jordan, 1996] to more recent cases. This happens not only with politicians, but also with political groups. The evolution of Hamas is an example.

In a curious paradox that preserves the distances, someone once said "the government of the Mafia would not be a mafious government". This is the idea of the two faces Janus in politics [Duverger, 1977, 1962], which was recalled by the French constitutionalist and political scientist, Maurice Duverger, who said that all governments must also be administrative governments, must look after the needs of their citizens, no matter how authoritarian or how autocratic they are. They always have to look after pratical issues such as medical assistence or rubbish disposal.

If the perfect access to power through entitlement assures *legitimacy* at least formally speaking, once in power only proper behaviour endows *legitimation.* Therefore, a legitimate power is mainly the one that has legitimation due to the proper behaviour of its holder. Nowadays, this happens with governments that are chosen according to constitutional standards. Despite being legitimate formally speaking, these governments need to prove their legitimacy through their practises, for example, sticking to their election programme from the beginning.

However, the legitimation issue is far more complex and is neverending. In a formal political democracy, the electoral ritual is a huge cultural breakthrough when compared to other forms of appointing power holders, but the matter of its legitimacy still remains unsolved, so we cannot rest.

In fact, public opinion and the shaping of an election will face numerous refractions and deflections, which derive from the factive powers that strongly influence them, for example, the *media*, which can be monitored by several public or private entities and the economic (or political) power that provides them with guidance. Very often, one or many of these powers can severely affect the people's perception of reality and, consequently, their vote. People are almost never "free to chose", in either economics or in politics. The free market and free political market are abstract and often merely ideological constructions (to use the ideological argument in order to better understand the reality of those who use it to criticise "ideology").

Despite the pressure on the electorate and its preparation and level of information, a more legitimate way to delegate power than the popular vote (the method used to achieve a fair representation) has not yet been found, and this must be strongly emphasised against any anti-democratic arguments that arise from time to time (especially in times of crisis when they are taken advantage of).

Of course, the issue of representation is in itself full of shadows and prejudices. The voters' confidence in their representative (which is not a commisioner, a simple messenger or nuncio, and therefore has much more freedom to act) has been shattered by the disappointments regarding many elected representatives in many countries in many elections for a very long time. However, the popular vote is the only known way to avoid the autocracy of the few and also the populism of a few (or from one single candidate to run a dictatorship) for the many, which is a terrible situation that denies real opinions and is a result of "direct democracy", namely of referendum democracy, with the exception of old and stable cases, in small and quiet societies, like that of Switzerland.

A referendum would apparently seem to be a way to fully give voice to the people, but the truth is that the simplicy of "yes" or "no" decisions ends up being a breeding ground for the emergence of demagogues, who by exploiting simplism and discontent and relying on misinformation and the lack of education of the masses, often fare better in referendums. This was the case with the Brazilian referendum regarding firearms in which an armed man was glorified along with the alleged "natural right" to possess weapons in an inappropriate return to the *far-west* mythology.

Not drawing a distinction between intermediate positions is another problem of a referendum democracy that often leads to artificial results that are not mediated by dialogue and commitement and end up favouring negative coalitions or hollow positive majorities. Look at, for example, the French and Dutch referendums regarding the European Constitution, in which conservative nationalists, who feared a loss of sovereignty, and the most revolutionary socialists, who feared the Treaty's liberalism, merged into a "no" vote.

If representatives betray voters' aspirations, referendums often provide a radicalised environment in which overstatements rather than commitment and moderation thrive [Cunha, 2005: p. 198 *sq*.; Sousa, 1971]. However, understanding the risk of a contradiction, it seems there are still some rare and serious time when the call for a referendum appears to be the only way out, for example, when we are in a situation of deep political impasse, and when the referendum result, whatever it might be, would not significantly jeopardise the current constitutional order. For example, if Greece wanted to decide whether to leave the euro or stay in it, how could Greeks legitimately decide without a referendum? This would be the only solution in spite of what the Greek Constitution may say. In that case, the risk of demagogy equilibrates the risk of a unilateral, bureaucratic and unpopular decision.

Thus, a referendum is a very delicate and strong weapon that should be used with all of the necessary precautions, and never as a legitimation process for unvoted constitutions and important bills or unelected and dictatorial powers.

4. CONSTITUENT POWER AND MATERIAL CONSTITUTION

4.1. ORIGINS OF CONSTITUENT POWER

Constituent Power [Jellinek, 1991; Mueller, 1995, 2004; Ferreira Filho, 2005; Pinto, 1994; Brito, 2000; Amaral, 1984; Martins, 1990; Sanches Viamonte, 1957; Mortati, 1972; Vega, 1985; Tarantino (ed.) 1980; Negri, 1994; Troper, / Jaume (dir.) 1994; Héraud, 1946; Mcwhinney, 1981; Barnet, *et al.* (eds.) 1993; Klein, 1996; Blaustein, 1986: p. 699 *sq*.; Duhamel, 1992: p. 777–778; Berlia, p. 353–365; Coni, 2006] is one of those concepts that have historical significance and even a date of birth, although it always seems incredible that it has not been around forever. In view of the historical-universal concept of a Constitution, of the certainty that there was always a Constitution at all times and in all places, it would seem that constituent power must always have existed. A power coming from the People that would provide the impulse to the Constitution's creation; either it grew silently through the centuries in times of natural constitutionalism or it was a symbolic and solemn act, a "grito do Ipiranga" (the proclamation of Brazil's independence on the banks of the Ipiranga River) with immediate effects in times of voluntary constitutionalism. This is the effect of chronocentrism (a kind of temporal "ethnocentrism" that often affects us [Cunha, 2006: p. 255 *sq*.]. If we pay a bit more attention, we will realize it did not have to be like this, nor was it like this. The natural, traditional and historical constitutionalism, which naturally comprises the creative forces of constitutional vectors due to its "corporate" character and to its promoters not taking the leading role, tends to mythicize the primordial legislator (when he exists or when resorting to him) as a god, a half-god or a hero, but does not provide us with a constituent assembly. Furthermore, everything is too ancient and too nebulous. The "once upon a time" narrative does not fall into the category "constituent power".

It was not until the 18th century that the concept was carved out for the first time. This concept was the contemporary emergence of Modern Constitutionalism. In fact, Modern Constitutionalism with its voluntarism contains the requirements to create the category of "constituent power".

Alexander Hamilton [Hamilton, 1788] managed to draw near to the notion of constituent power, although not yet to its expression: "There is no position that depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid."

D'Holbach, in the article *Représentants* in Diderot and D'Alembert's *Enciclopédia*, also draws near to the concept when referring to constituents as simply the voters and their representatives: "les représentants supposent des constituants de qui leur pouvoir est émané ».

The idea of representation already existed in these two authors, but only Sieyès confirmed it as a dynamic principle and the basis of modern constitutionalism [Bastid, 1970; Bredin, 1988]. We are not sure whether when the Abbot of Sieyès mentions the idea of constituent power (which some German purists still write in French – *pouvoir*

constituant) in his classic *Qu'est-ce que le tiers état* (written in 1788 and published the following year), he was fully aware that he was creating the basic notion of modern constitutionalism, or whether these words emerged from his quill as just an argument during a political struggle.

This happens all the time; one must not think that the greatest theories emerge from theorists' amusement or that they do not get their hands dirty in the mud (and sometimes in the blood) of political reality and of political struggle during their lifetime.

Sieyès' words became and still are the "sacred text" in this matter: « La nation existe avant tout, elle est l'origine de tout. Sa volonté est toujours légale, elle est la loi elle-même. Avant elle et au-dessus d'elle il n'y a que le droit *naturel*. Si nous voulons nous former une idée juste de la suite des lois *positives* qui ne peuvent émaner que de sa volonté, nous voyons en première ligne les lois *constitutionnelles*, qui se divisent en deux parties: les unes règlent l'organisation et les fonctions du corps *législatif*; les autres déterminent l'organisation et les fonctions des différents corps *actifs*. Ces lois sont dites *fondamentales*, non pas en ce sens qu'elles puissent devenir indépendantes de la volonté nationale, mais parce que les corps qui existent et agissent par elles ne peuvent point y toucher. Dans chaque partie, la constitution n'est pas l'ouvrage du pouvoir constitué, mais du pouvoir constituant. Aucune sorte de pouvoir délégué ne peut rien changer aux conditions de sa délégation. C'est en ce sens que les lois constitutionnelles sont *fondamentales*» [Sieyès, 1789: p. 68].

Some purists think that constituent power can be a harmless, non-revolutionary method of creating constitutions. Nowadays, it can be that way whenever a Constituent Assembly is smoothly summoned in established democracies. We may, for instance, remember again the Constitutional History of Portugal and Brazil, in which constituent power ended up playing a revolutionary role. There is always something violent and sacred [Girard, 1972, 1978, 1982] in these landmark changes. There are always blemishes and "democratic" imperfections in the birth of a new Constitution. This also happened in the earliest periods of the written European Constitution, now called "Treaty of Lisbon".

The constituent power of the French Constituent Assembly is tainted and flawed, and therefore it needs ulterior legitimation. Sieyès wrote: "Les représentants de la nation française, réunis en Assemblée nationale, reconnaissent qu'ils ont par leurs mandats la charge spéciale de régénérer la Constitution de l'État.

En conséquence ils vont, à ce titre, exercer le pouvoir constituant, et pourtant, comme la représentation actuelle n'est pas rigoureusement conforme à ce qu'exige une telle nature de pouvoir, ils déclarent que la Constitution qu'ils vont donner à la nation, quoique provisoirement obligatoire pour tous, ne sera définitive, qu'après qu'un nouveau pouvoir constituant, extraordinairement convoqué pour cet unique objet, lui aura donné un consentement que réclame la rigueur des principes » [Sieyès *apud* Furet, 1989, p. 1005].

This is the same Sieyès who, in *Qu'est-ce que le Tiers Etat?,* probably acknowledging that at least some of the original constituent power had representability imperfections and refractions, gives to the Nation (ultimately to the political, constituent body) a wide margin to intervene later, or in other words, a huge amount of power to review the constitution: "il serait ridicule de supposer la nation liée elle-même par la Constitution à laquelle elle a assujetti ses mandataires. Non seulement la nation n'est pas soumise à une Constitution, mais elle ne peut pas l'être, mais elle ne doit pas l'être, ce qui équivaut encore à dire qu'elle ne l'est pas" [Sieyès, 1789: p. 69].

Therefore: "[…] la Constitution d'un peuple n'est et ne peut être que la Constitution de son gouvernement, et du pouvoir chargé de donner des lois, tant au peuple qu'au governement. Une Constitution suppose avant tout un pouvoir constituant » [Sieyés *apud* Furet, 1989: p. 1013].

Constitutional history eventually follows this doctrine. In accordance with these assertions, the 28th article of 24th June 1793 Constitution states: "un peuple a toujours le droit de revoir, de réformer et de changer sa Constitution. Une génération ne peut assujettir à ses lois les générations futures".

4.2. CONSTITUENT POWER. MATERIAL CONSTITUTION

4.2.1. FORMS OF CONSTITUENT POWER

4.2.1.1. ORIGINAL CONSTITUENT POWER AND DERIVATIVE CONSTITUENT POWER

Before further development, it is important to distinguish the two types of constituent power – the original constituent power, which rests on the people during the historic turning point of the creation of a constitution and the derivative constituent power, which takes place when some people (delegates in any sense) assume the symbolic and the real representation, even if there is no mandate or when they go beyond the mandate. However, this is normally the power of the parliaments, their given powers to review an already existing constitution. This constitution is supposed to continue to exist, of course, eventually being adapted to new important (not superficial) challenges (with constitutional dignity) or just new times, or even with a new political majority (although in this last situation the political agenda may not be so rigorous in terms of what is constitutionally important).

However, it is necessary to specify one small detail. The *derivative constituent power* already exists and is active in the act of creating the first version of a Constitution because all of the representatives (members of the Parliament) act in the creation of the constitution by using it. As we know, the power of reviewing the Constitution, when assumed by an assembly with constituent competences in accordance with the Constitution, is also called constituent power. Therefore, the issue of the rigidity or flexibility of a Constitution is a problem of derivative constituent power. From this, we can say that the original constituent power, because it is not a mere abstraction, is very difficult to capture. Perhaps we are more able to see it in the early morning times of new political periods, such as in revolutions.

Let us consider Portugal again. In recent times, the non-democratic, non-republican and non-social political forces repeatedly put forward a claim for constitutional revision. When the last ones assumed power, the tactics were different – they ignored the constitution in its aspects of social, cultural and economic rights. Although the world-renowned architect Siza Vieira seems to the smell the perfume of a dictatorship, we still think it can be avoided – there are many constitutional remedies, including a large political spectrum new government if the Parliament or the President wants it. It is not necessary to revise the Constitution. It is simply a case of respecting the decisions of the constitutional courts, which include the need for the government and the Parliament to be equanimous in the distribution of austerity measures – not only on the workers and civil servants. Curiously, after the Constitutional Court declared the unconstitu-

tionality of some measures of the 2012's State Budget, the government tried to enforce new ones, but it had to climb down because they were unanimously refused by all of the unions and the associations of the capital. And the result was, at the beginning of 2013, a general and severe increase of taxes (IRS) and the Constitutional Court was once again called to judge the constitutionality of the 2013 State Budget.

Some claim we have a constitutional problem in Portugal. This is not true. There are not only financial, economic and social crises, but also a lasting political one. However, the constitution clearly shows many ways out.

4.2.1.2. CONSTITUENT CULTURES: REVEAL, DECLARE OR CREATE

What different constituent cultures perceive as Constituent Power, and in general as the representation for the procedure of creating a Constitution, is naturally quite diverse. Gomes Canotilho neatly summed up what the British, Americans and French respectively meant with their constitutional revolutions: *Reveal*, *Declare or Create* [Canotilho, 2003: p. 68 *sq*.]. We may add that all constituent processes fall within at least one of these projects: *reveal* the traditional, typically British, "uchronic" Constitution, which was somehow transmuted into the North-American *declare* ("We, the people…"; this is an obvious proclamation) until the breaking process of the French Revolution, which is all about *creating* a new Constitution or *the* Constitution, in accordance with modern constitutional requirements. In this last case, they clearly have great expectations about the universality of the constitutional proclamations or the Declarations of Rights. And their names show that hope.

4.2.2. FROM THE MATERIAL CONSTITUTION TO CONSTITUENT POWER AND VICE VERSA

Due to the necessity to be concise, we can only select a few from among the countless senses and theories about what is or what has been a material Constitution [Mortati, 1998; Bartole, 1982: p. 605 *sq*.], and which have been consolidated through history. They may not be the most common, although we find them to be the most relevant in order to clarify the ideas regarding this matter.

Although mythically coined by Lassale, the proclamation of a Constitution's historical-universal concept seems to be a Columbus' egg. There is the implicit conscience of the existence, which is natural to all political groups, of a juspolitical core. In other words, it seems that the first Indo-European political function always returns. *Nomos*, *Constitutio*, a *kingdom's fundamental laws* are some of the historical formulas that this juridical "intuition" [Ferreira Filho, 2005: p. 4 *sq*.; Martin, 1990, 1988] assumed. This assumption, which differs completely from *Taxis*, a voluntary organization created by man, is the real material Constitution in its deepest meaning.

This order of societies can be seen as intrinsic and inherent to them or as something from outside (for example, something from above, something supernatural) that is communicated to them. Nevertheless, no matter what the point of view is, the material Constitution in an initial sense imposes itself in an absolute and natural way. Therefore, it resembles the idea of a Natural Law, at least on its political side – a political or "constitutional" Common Law. This to a great extent explains the classic comparison of *Nomos* with the Polis' walls… and the nonexistence of written constitutions until the Princes' voluntarism first began to build their "masterpiece", the State. After that important historical achievment, and always concentrating more and more power, the "Prince" ended

up choosing the power of a positive, written and universally observed law. The positive written law is also better for complex administrative building like a State. However, on the other hand, it obliged the sovereign to submit to his / her own laws.

According to the first constituents (in different Western European countries), the oblivion (they "forgot" them, said the contitutional texts) of the fundamental laws (or material Constitution) by the Princes' positive law (and by the political practice in general) was the source of all of the evils of their times. A very similar formula to this is present in the Preambles of the French constitution of 1791, the Spanish "La Pepa" of 1812 and the Portuguese first written constitution of 1822.

However, the same constituents realised that once the harm of that lack of memory of the laws by the almighty power was done, it could only be reshaped by new laws . Thus, by being converted to legalism, the constituents were no longer going to restore the unwritten or sparsely written material Constitution, but would provide formal Constitutions to the countries (which in the meantime became statal). These constitutions are extremely reinforced laws, above all else.

The connection with constituent power comes precisely from there. Rogério Ehrhardt Soares, the dean of the Portuguese Public Law Professors, states: "The emergence of a formal Constitution poses a new problem – finding the source of constitutional legitimation in order for the Constitution to be the greatest factually existing force at the moment of its publication. Unfortunately, the issue of constituent power still calls for the principle of a material Constitution – the principle of national sovereignity (democratic Constitutions) or the monarchical principle (monarch-given Constitutions) are the normative ingredients prior to a formal Constitution" [Soares, 1983: col. 1166].

Likewise, a "Material Constitution" would have the sense and play a similar role (but more effective and better known) to that of the *Social Contract* in which the people alienate the power to the prince, but hold onto the the possibility of withdrawing it. Through Constituent Power, the people preserve their natural and essential freedom; therefore, the power of rulers (and also of the ruling laws, (even of the highest ones, the Constitutions) are delegated "powers". People in those high positions may be removed from their places and be deprived of their prerrogatives (and laws may be changed).

Obviously, the prevalent legalist juspositivist mentality (and many powers that in general converted to legalism because it almost always suits those in power: for example, the jusnaturalistic proclamations regarding the 1933 Constitution and the 1967 Civil Code would become mere *flatu vocis,* as expected, due to the nature of the regime) wiped these matters away to a great extent. It always seeks to forget, and even to label as "metaphysical" and without "pratical value", everything that is not a mere mechanical exegesis of the orders. At this point (which even seems paradoxal) – "[…] the progressive rule of positivist prejudices ensures that constitutional problems are conceived only as post-constitutional issues, referred to a specific text. The Constitution becomes a promise of the material power holder" [Soares, 1983: col. 1167].

Nevertheless, just like Goethe's swan, the material Constitution always returns. Revolutionary and constituent processes are good moments in which to make itself heard again because it is not a simple theoretical construction, but the theoric expression of the people's pulse. Constituent power will always have to appeal (whether considering it explicitly or implicitly) to the boundaries and the material constitution's silent recommendations.

Constituent power is not without limits [Silva, 1999] (although the opposite has been proclamed so many times) nor is it without sense; this sense is given to it through the material Constitution.

Visionaries will always tend to include pipe dreams that do not coincide with either the nature of things or of men, nor with the current feelings of these; reactionaries will always try to reverse the times, attemping to reshape them into old formulas, which they find to be the perfect truth; selfish people will always attempt to pass them off one way or another as their personal convictions or interests. Therefore, from our point of view, the wise researcher can do no more than utter an *ignoramus*.

However, something will happen here like it happened with Saint Augustine and Time; if we are not asked for it, maybe we will know what it is – diffusely, without requirements nor the constituent elements of a legal act (*Tatbestand*). Futhermore, we realise whatever a material Constitution is through the rebuttal evidence of its crude infringement. In some cases, one can feel the collapse of the City's walls. This is also evident from a broad consensus. When the Portuguese held hands and dressed in white for East Timor, which was brutally occupied by a foreign country, it was the walls of the global city that were in danger, not the walls of our own polis, or even only Timor's. Why? Because Timor's material Constitution was crying out for the purest of its purposes – its existence as a sovereign State. And that is a matter of the global constitution. Although it is still not a written one, but a material constitution. Exactly as it happened in older times with national constitutions.

However, establishing a catalogue of pure and mainly immutable Common Law is very sensitive as is defining our material Constitution even here and now due to its polysemy (especially with two dimensions). To sum up, as Gomes Canotilho states, one could say that it is "the body of the aims and constituent values of the effective principle of unity and permanency in a legal system (objective dimension) and the body of political and social forces (subjective dimension), which express these aims and values, that ensures their pursuance and attainment, sometimes beyond the written constitution. […] the material constitution does not boil down to a simple 'factual power' ("pure political fact") because the material constitution also has an ordering logic" [Canotilho, 2003: p. 1139].

The author also establishes another important relation between two core concepts – a material Constitution and that Constitution's normative force. "The so-called *constitution's normative force* (K. Hesse) includes most of the times the will to constitute […], or in order words, the explanation in the written or formal constitution of the complex of aims and values churned by the political and social sets alongside the material constitution" [Canotilho, 2003: p. 1139].

This way of reasoning explains the contrasts between all of the forms of constitutional reality and the letter of the law (the written text of the Constitution). When stuying a Constitution, we must not forget the costumary laws and constitutional praxis as well as the ineffective written constitutional norms, constitutional successions, constitutional developments, etc.

A constitution may be effective and normative or not. Karl Loewenstein considers two forms of non-normativity – nominal and semantic constitutions are the names for those juridico-political codes that really are not effective, which are not law in action, but merely law in the book, law as a book.

4.2.3. THE MATERIAL CONSTITUTION IN THE FORMAL CONSTITUTION

Contrary to what is normally said, this matter is of huge practical interest. On closer observation, constituent legislators often attempt to determine what is the material Constitution by looking for it when they are thinking about and writing successive versions of the articles of the Constitution. Sometimes, the counstituent members of a constituent assembly are searching the material constitution without even realizing what they are doing, and without any knowledge of the technical constitutional vocabulary. They also try to capture the material constitution by establishing fundamental clauses, general principles, and even material limits to constitutional reviews [Miranda, 1990; Rigaux, 1985; Mortati, 1952]. Bearing in mind that these limits match only the minimum, the redoubt of the material Constitution, which may change (in reality and through interpretation) in meaning, but always retains the basic message, the consitutional programme. Each constitution has its own.

Generally speaking, nowadays, given the existence of a formal Constitution, the material Constitution becomes what is essential; what has constitutional dignity. In fact, there are formally constitutional matters that are somehow materially "administrative", or something else, in the formal Constitution. What is left out of it and should have been included is also a part of the material Constitution. For example, the sources of law, which are in some Civil Codes [Cunha, 1998: p. 87 *sq*.] due to a historic tradition (perhaps it is a caution against rapid constitutional changes). These are no doubt constitutional.

On the other hand, a school example that we are no longer sure of its being excellent and eloquent is about the presence in the Portuguese Constitution of a norm giving parties, unions and associations some airtime on television and radio. Perhaps this is was not so important in revolutionary times when freedom had just been reconquered and everybody seemed to be allowed to speak and was heard. But times changed and when media became concentrated, or some fear to their governamentalisation, this is only a small guarentee that is meant to ensure pluralism. So, the qualification of formal or material constitutional matters may also change according to the political, social or historical reality.

Nowadays, the meaning of the expression (and the very operative concept, paradigm) *material Constitution* is different from the classic one because the context is different. There is no doubt that the positivation of constitutionally relevant matters is at the heart of this.

The same thing happened in relation to the 1900 German Civil Code (BGB – *Bürgerliche Gesetzbuch*) and still happens today with Constitutions and Universal Rights Declarations. Many become excited about the positivation (legal positivism is the spontaneous philosophy of the works of jurists, even of the most pluralistic ones) and believe that their most cherished myths (they act like myths in this context) "Roman Law", "Natural Law" or "material Constitution" are embodied in the respective normative texts. The truth is Justice (including the "material constitutional righteous") is never fully reincarnated and its ideal must go on being pursued, even if the texts are excellent. Ulpian wrote that Justice was a *constans et perpetua voluntas*, a constant and perpetual will.

With the legal affirmation of great values, principles, of fine legal concepts, etc., the work of the jurist moved to another level. Henceforth, he or she began to use the texts to get justice.

Before the modern, positivist mentality (even without knowing), no matter how clear, beautiful, profound, true or righteous are the principles that are recalled or the unwritten reasons, little or no success is achieved. Therefore, their affirmation is essential. Although one should not stop trying to explain, or preaching to the choir, that not all of the standard texts are Law, nor is Law always the most important thing in the world (or even in the courts of justice). However, everything (for example, all of the sources of law, sometimes as if they were "topics" – but with the Constitution always prevailing) must be considered with maximum care, so that this idea will not be confused with a "free right" perspective and so that the immaterial Law's nobility is not tainted with interests under a more or less poetic or theoretic cape. Rejecting legal positivism is not ignoring law and the other sources, and it does not mean giving the judge a purely subjective power. That would certainly be worse than bureaucratic obedience to an abstract and sometimes not very adaptable text.

4.2.4. IN SEARCH OF THE MATERIAL CONSTITUTION

Nowadays it is not easy to find a material Constitution. To achieve this, one must rely on the Constitution's most lasting topics – they may be the "basis" or fundamental principles, material limits, preambules, etc.. For exemple, in pratice, in the Portuguese Constitution, the Preamble is the most lasting one, despite its not being consensual these days. The material limits of the primitive 290th article (currently the 288th article) were altered during the 1989 constitutional review, which involved a double-review, and which has always shocked us because it undermines the standard meaning and thus causes the Constitution to lose all of its enforceability, according to a similar principle to the one which states that a *bad currency drives out the good*.

One can always argue that a material constitution changes and material limits can exceptionally be changed in one and the same Constitution, especially in order to prevent a revolution.

The truth is that the intrinsic pluralism [Cunha, 2006: p. 321 *sq*.; 303 *sq*.] of our current Constitutional States makes any atitude somehow "transcendent" (this may be said "above" or "outside" the constitution) to the constitutional text (and therefore it becomes more political than juridical) into the *crux* of troubles, due to the impossibility of reaching a consensus. This is difficult to overcome. The alternative of seeking a consensus (of reaching at least a rhetorically – and sometimes elusive – based consensus) would be an unpleasent and unacceptable change in the main political paradigm of our times – an authoritarian or totalitarian way, in either a secular or theocratic approach. Although those dangers are real and ever more frightning, the mainstream is far from them.

No one can claim to communicate directly with the material Constitution. Although, of course, some prudent and wise Statespeople may have a special smell for it. But how can they be recognized by the opposing parties? It is better not to count on that.

Values become consolidated through elements that are widely attained. We have reached a moment of aporia in the material Constitution. If, on the one hand, the formal Constitution would inspire the constituent power, it would limit it in its utopia and would lead it to the "Common Good" *hoc sensu*, thus, this same formal Constitution would assure its normative force and would have the people's acclaim. However, appealing to the material Constitution may be a new trump card for those who see themselves as the holders of truth. This is how a deadlock is reached.

In human, social matters, the nucleous of things that Aristotle chose as unquestionable is shrinking. The Stagirite stated that there can be no question of whether one should honour his parents or if the snow is white. Today, we know that Eskimos refer to "snow" under various names and perhaps we could also fallaciously argue that dirty snow (although still no less than snow in its essence) is not white. In fact, it appears not to be white. Nonetheless, is it still snow, although it is dirty and obscured by that fact?

It is true that there are unquestionable things. But even so we question these and then we discuss them.

Finally, due to a legitimate and wise fear that the theory of a material Constitution may jeopardise the democracy of consensus and the pluralism in which we live, many turn their eyes away from those so-called "transcendent" (or even " unconstitutional" in a positivistic legalistic way) doctrines; however, we feel as though constitutional legalism, despite being intelligent, has in itself a harshness and an oppression that is similar in practice to the dangers that it is intented to avoid. Nonetheless, this last situation seems more controllable – firstly, because the opression in the order of plural and democratic textual detail is a dysfunction of the system and is the object of micro-powers or of the negative effects of the general machine, which free information will expose and thus will be corrected; secondly, because since the great theorical ideals – such as Human Rights – the current language of Natural Law, which can also be seen as a topic and argument [Puy, 1984, 1985; 2004] – were massively incorporated into the normative texts, they have acquired greater force, which is even greater when the current mentality is based on a documented and written logic [Goody, 1987] and not on a culture of oral communication.

This does not mean one should renounce the concept of a material Constitution in its two current dimensions and return to a remembrance of its original meaning. It must be handled with particular care. Let us remember the adjuvant criteria to handle a complex and even dangerous *quid* with gloves and surgical tongs:

Firstly, the negative criteria that awaken us to the material Constitution, due to the shock of a constitution or a formal constitutional provision apparently in obvious contravention of the imminent constitutional spirit, of the Idea of Justice on constitutional grounds.

Secondly, the criteria of consensus that is associated with topic, dialectic and rethoric as peaceful forms of creating social agreements. It is clearly admitted that the *vox populi* can often be mistaken. We know sometimes that the grave-diggers for Constitutions and for Freedom attain power by constitutional means and even by the vote. However, consensus together with the sense of constitutional Justice will allow another safeguard to be added when evaluating a Constitution, especially from a certain constitutional point of view.

Finally, one must always take into account the lesser evil criteria – does invoking the material Constitution against a constitutional point really brings water to the mill of peace, order, safety and Justice (one has to be careful regarding *fiat iustitia, pereat mundus*)? And is it the presence of that shocking norm, for example, really intolerable?

The issue is then immediately taken into another theorical area, which is the possibility of the existing unconstitutional constitutional norms [Bachof, 1977]. Similar to many other cases, this links to the question of knowing one way or the other if there are superior constitutional principles, an eventual *Grundnorm* (the norm of norms, Kelsen's fundamental norm) or even supraconstitutional principles [Rials, 1986; Arné, 1993: p. 459–512; Vedel, 1993: p. 79–97].

In this matter, which is better handled in written Constitutional Law, there are several cases that can be noted.

First of all, there are "non-existing" issues, which would be better discussed elsewhere. For example, cases of infra-constitutional antinomies, which are the result of parcel readings (non-holistic) of the Constitution and, thus, of non-contextual, non-systematic and flawed hermeneutics.

It is admited that some extreme cases may make sense and cause alarm, and that a simple hermeneutical articulation does not provide a reassuring solution. In that case, the theory of *pratical accordance* seems to be relevant because it assures the minimal nuclear sense of each provision – it is another way of reaching a consensus.

Finally, the most serious cases of overwhelming opposition can be placed in the category of *unconstitutional constitutional norms*. But we must not forget that this opposition can be thought through by using the established written norms, which are present in the same constitutional text, as well as those which are especially relevant to the matter in question – between an established norm of the Constitution and the general background of the material Constitution. This is the most complex question.

In the end, the issue of unconstitutionality summons the material Constitution matter, if we provide room for it, because the norms' incompatibility with the Constitution would be far more serious if they related to the true and most profound spirit of the constitutional norms rather than their simple and concrete letter. After all, the material Constitution would be the real "spirit of (constitutional) laws".

Now, one can better understand why placing these problems (material constitution, unconstitutional constitutional norms, even constituent power) between brackets can be considered by some as the best way to handle their magnitude and transcendence. Invoking the material Constitution can resemble the act of Prometheus or worse, an enchantment of a sorcerer's apprentice that conjures up forces that he cannot control. Once again, one can draw a parallel with Natural Law, which Michel Villey advised normal jurists to avoid in order to prevent greater evils. In an article written for a legal sociology encyclopedia [Villey, 1986], the French philosopher of Law fiercely criticises jusnaturalism (or its misuse) through satire, by presenting it as a mental disease, hypertrophy of the natural law's organs– so, a medical metaphor. In his posthumous work he goes further: «Le droit naturel n'est pas la philosophie des juristes – seulement les meilleurs d'entre eux – (le droit naturel inclut du reste le positivisme – et il explique le succès du positivisme – car de notre point de vue mieux vaut élever le juge médiocre dans cet excès plus que dans l'autre qui serait contraire: l'arbitraire, la fantaisie, le rationalisme). Je ne recommande pas à tous le droit naturel, mais à ceux-là seulement qui peuvent comprendre. Le droit naturel est ésotérique» [Villey, 1995: p. 45 *sq*.].

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