

CONCRETE-ORDER-FORMATION OR RATIONAL WILL-FORMATION?  
CONSTITUENT POWER AS THE *RATIO OF VOLUNTAS*

I

One of Martin Loughlin's basic assumptions is that modern law in general, and public law in particular is *immanent* in the sense that it can no longer be justified transcendentally (e.g. by reference to God, natural law, or transcendental subject). Therefore, all references to the ancient understanding: the « dignified aspect<sup>1</sup> », and the « dignified façade<sup>2</sup> », of public law are a « masking of reality<sup>3</sup> » – or as one might say with the German sociologist Rudolf Stichweh, they are just a transitional semantics (*Übergangssemantik*)<sup>4</sup>. In their way, Loughlin and Stichweh corroborate an old Marxist argument. After the basic structure has accomplished the « transference of the other into immanence<sup>5</sup> », « sooner or later the whole immense superstructure is transformed<sup>6</sup> ».

After the crumbling of the transcendental façade, however, there is still some need for justification or grounding of the positive law of the legally institutionalized political « community [*Gemeinschaft*]<sup>7</sup> ». The constitution is not just a contract<sup>8</sup>. Public law has a *foundational* and *legitimizing character* that is not identical with its own legality. This foundation takes us back to the idea of constituent power.

Once institutionalized as political organization (*i.e.* a state) the foundational character of political right protects the community (*universitas*) from the pressure of society (*societas*), especially from the blackmailing power of the economy, at least as far as the political

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<sup>1</sup> M. LOUGHLIN, *Foundations of Public Law*, Oxford, Oxford University Press, 2010 [hereinafter *FPL*], p. 100.

<sup>2</sup> *FPL*, p. 157.

<sup>3</sup> *FPL*, p. 158

<sup>4</sup> R. STICHWEH, « Professionen in einer funktional differenzierten Gesellschaft », in A. COMBE & W. HELSPER, *Pädagogische Professionalität*, Frankfurt, Suhrkamp, 1996, p. 49-69.

<sup>5</sup> *FPL*, p. 49.

<sup>6</sup> K. MARX, *A Contribution to the Critique of Political Economy*, available at <https://www.marxists.org/archive/marx/works/1859/critique-pol-economy/preface.htm>. « Immense » in the German is « *ungeheure* » and hesitates in Marx text a bit between « immense » and « uncanny ».

<sup>7</sup> *FPL*, p. 199 *sq.* Loughlin refers with « community » to Tönnies famous distinction between « *Gemeinschaft* » (community) and « *Gesellschaft* » (society).

<sup>8</sup> *FPL*, p. 275 *sq.*

organization can enforce its own autonomy (be it as politonomy, public autonomy or functional autonomy)<sup>9</sup>. The constitutional *constraints* against the social systems *enable* the *potestas* of the state to augment its own technical and disciplinary *potentia* that (in a first meaning of *potential*) is mere *technical* power, and itself *societal* and not political<sup>10</sup>. The power of technical *potentia* has a strong tendency to destroy its master, the *potestas* of the state, that which is truly and originally *political*. One of the branches of the state that paradigmatically represents the « managerial mindset » of *potentia* is the legal profession<sup>11</sup>. The system of courts is not, thus, what Alexander Bickel famously labelled the « least dangerous branch<sup>12</sup> ». On the contrary, for Loughlin, the original sin of the modern constitutional state is *Marbury v. Madison*, leading to the progressive positivization of political right and the decay of the political and politonomy<sup>13</sup>. The *Rechtsstaat* comes to colonize the *Staatsrecht*, and its ideological assumption of neutrality opens the door for all kinds of particular social interests to dominate<sup>14</sup>. The technical and disciplinary power of *potentia* (now organized by private-public partnerships,) ultimately subsumes the authority of *potestas*<sup>15</sup>. With this negative dialectic, developed in the last chapter, the book ends<sup>16</sup>.

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<sup>9</sup> On the problem see B. JESSOP, « The State: Comments on Martin Loughlin, *Foundations of Public Law* (2010) » (paper presented on the Singapore-Symposium 2015; M. WILKINSON, « The transformation of public law in the project of European integration From nomos to cosmos? » (paper presented on the Singapore-Symposium 2015).

<sup>10</sup> With the distinction between « society » and the political that is the « state » Loughlin goes back to Hegel and German statutory positivism (*Staatswillenspositivismus*, see below), and their shared basic distinction between « Staat » and « Gesellschaft », hesitating a bit between Hegel and Tönnies. However, the hesitation makes sense because Hegel's state is a form of « *Gemeinschaft* » but (different to Tönnies) a modern one (that should have drawn over the best of the classical meaning of *polis* and *res publica* to modernity). In Tönnies more robust Hobbesianism the modern state clearly is at the peak of *societal* advances, but this is exactly what Hegel calls a *Not- und Verstandesstaat* (« external state » or « a state subservient to necessity »).

<sup>11</sup> See M. KOSKENNIEMI.

<sup>12</sup> A. BICKEL, *The Least Dangerous Branch. The Supreme Court at the Bar of Politics*, New Haven, Yale Univ. Press, 1986 [1962]; see *FPL*, p. 362 sq.

<sup>13</sup> *FPL*, p. 289 sq.

<sup>14</sup> *FPL*, p. 312 sq.

<sup>15</sup> *FPL*, p. 407 sq. On the colonization of the state and the political lifeworld by the global economy, and in particular through private-public partnerships see T. JUDT, *Ill Fares the Land*, New York, Penguin, 2010; C. CROUCH, *The Strange Non-Death of Neoliberalism*, Oxford, Polity, 2011.

<sup>16</sup> The diagnosis resembles not only that of Judt and Crouch who see the cause of colonization of the political sphere by the economy in the politically enforced globalization of financial capitalism, reinforced by the neoliberal episteme, and social well-fare state the main weapon of defense of a political sphere that is democratic. Loughlin's diagnosis at the same time strongly overlaps with that of Arendt, Forsthoef and Schmitt, who consider the socialization of the state by social welfare, pluralist representation of interests and social democracy. As it seems as, Loughlin hesitates between both, the progressive and the neoconservative diagnosis without resolving the ambivalence.

## II

One could already ask here why Loughlin refers only to the reflexive and systemic versions of technical power as domination (that he finds in the works of Léon Duguit, Michael Mann, Michel Foucault and Philipp Gorski), instead of returning to the *alternative version* of *potentia* that he had distinguished in Chapter 6 on *Political Jurisprudence*<sup>17</sup>. This alternative version of *potentia* characterised by Loughlin as « power to » (with Arendt and Habermas), as distinct from « power over » (Mann, Foucault) and which is « rooted in the intersubjective generation of solidarity » is gradually lost<sup>18</sup>. But constituent power, in particular, is a « power to ». Moreover, the guarantee of egalitarian solidarity (as « power to ») is an essential characteristic and indeed Loughlin's *main justification* of the state. He assumes, as Hannah Arendt did in the immediate aftermath of World War II, that the « sovereignty of the nation-state which once was supposed to express the sovereignty of the people », is « the greatest bulwark against the unlimited domination of bourgeois society, and [...] the introduction of imperialistic politics in the structure of Western states<sup>19</sup> ».

But my criticism is more fundamental. It is that Loughlin's own conception of « power to » as *intersubjective generation of solidarity* must in any case include much more than political power alone. The point here is that « power to » also *stems from the social*, belonging to the sphere of society, and emerging from it. « Power to » dates back to the beginning of *social evolution*, long before the first pre-adaptive advances towards the differentiation of a specialized sphere of politics that is co-original with the ancient origins of the state about 3000 BCE, or even the invention of the agrarian use of the words *nomos* and *nemein* (« appropriation », « division » of land of « pasture ») about 10,000 years ago. « Power to » dates back to a time and society long before the origin of the ancient state that, following Schmitt's genealogy, is traced back to the (agrarian) use of *nomos* and *nemein* as land grabbing and concrete ordering of the soil in ancient Greece. For Schmitt, *nomos* is the determining origin of *all* formations of state and state sovereignty, ancient and modern. And, despite his distance to the elitist thinking of Schmitt, Loughlin remains dependent on Schmitt's genealogy (and similar genealogies).

Schmitt's argument can be briefly reconstructed. Schmitt traces the origin of the ancient and modern state back to the Greek terms *nomos* and *nemein*. The meaning of *nomos* and *nemein* in the Schmittian genealogy is originally land grabbing (*Landnahme*) for reasons of agrarian settlement<sup>20</sup>. Once land grabbing becomes a normatively (tacitly) accepted division of the

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<sup>17</sup> *FPL*, p. 164-171.

<sup>18</sup> *FPL*, p. 169 *sq.*

<sup>19</sup> Arendt's diagnosis of 1948 was already the same as that of Loughlin today, that the sovereignty of the nation state, «now (is) threatened from all sides » (H. ARENDT, *Die verborgene Tradition*, Frankfurt, Fischer, 1976, p. 29).

<sup>20</sup> C. SCHMITT, *Der Nomos der Erde*, Berlin, Duncker&Humblot, 1988 [1950], p. 36-51.

soil, the (« illegal ») appropriation and occupation of land (*Landnahme*) shades into (« legal ») land ownership (*Landbesitz*): the three original meanings of the Greek *nemein*, « appropriation », « division » and « pasture » coincide. One can call this coincidence in the terminology of Schmitt (and Hauriou) the « concrete ordering » of the space of the earth that is the origin of « the political » and the state.

However, from a functional sociological perspective, the so-called *origin* is at most a *pre-adaptive advance* (in Luhmann's terminology) that can only become relevant for the much later functional differentiation of the political system when it occurs in a plurality of different cases and at many different places across the globe. Moreover, pre-adaptive advances might vanish without any effect, or evolution could completely change their original meaning in light of functional differentiation. From a functional perspective, pre-adaptive advances (« origins ») have at most a minor significance for later developments, and they are far beyond any power to determine history.

Schmitt's genealogy then is nothing other than an instance of conceptual idealism (*Begriffsidealismus*). Schmitt's (and Hauriou's) « concrete ordering » is *concrete* and (literally) « down to earth », in exactly the way Rousseau's famous « first man » concretely orders the space of the soil. The « first who, having enclosed a piece of ground, bethought himself of saying *This is mine* [« appropriation » of « pasture »/ agricultural land], and found people [...] to believe him [« division »], constituted the first concrete order, and with it the paradigm (or model) for the formation of law and state<sup>21</sup>. Enclosing a piece of ground, and finding people to accept it as *mine*, are the concrete operations which constitute a first kind of customary law. From here, only a few logical steps of generalization, abstraction and differentiation are required to arrive at the meaning of *nomos* as *abstract law*, a concept that covers the whole variety of legal forms: customary, natural, common, positive law, and so on. Eventually, people living in cities on the Peloponnese began to draw a distinction between the (proto-private) *eco-nomy* that is the *law of the oikos* (household), and the public *polito-nomy* that is the *law of the polis* (the political organization of the city). It is to that extent that *nomos* as land grabbing and concrete ordering is the origin of the political sphere and the state<sup>22</sup>.

But which state? – Sociologically speaking, the evolutionary origin of the ancient (Eurasian and Middle-/South-American) formation of states (city-states, empires etc.) is the Agrarian Revolution about 10,000 years ago. If state formation actually began with a kind of land grabbing and

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<sup>21</sup> J.-J. ROUSSEAU, *Second Discourse on Inequality*, Part II, first sentence, quoted from: [http://www.constitution.org/jjr/ineq\\_04.htm](http://www.constitution.org/jjr/ineq_04.htm).

<sup>22</sup> See M. LOUGHLIN, *Politonomy*, Oxford Handbook Online, p. 1, 8-9, <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199916931.001.0001/oxfordhb-9780199916931-e-004?rskey=sY3ZHz&result=1> (09.05.2015). Rousseau and Kant are using the word *usurpation* (illegal appropriation) to characterize the origin of the existing legal state of the 18<sup>th</sup> century (that is the pre-revolutionary state, where they lived: France, Prussia).

concrete ordering of the earth, land ownership and tenure, it rapidly proceeded (simultaneously in several areas of the globe) to *social class differentiation*, together with the formation of centralization, bureaucracy and political domination. No *nomos* (in the original Greek sense) without class-rule<sup>23</sup>. So far, Schmitt's genealogy is more or less compatible with the sociology of social and political evolution. However, what emerged in the aftermath of the agrarian revolution, was a *very specific kind of state*, which Schmitt takes for the origin not only of the imperial Greek city-state and the *ancient* states and empires in general (which all were based on social stratification, political domination, and a huge variety of slave labor) but *of any political and state-formation*, and this original usurpation and concrete ordering *determines the state throughout its social evolution*. Once the first act of land grabbing and the speech-act *This is mine* was performed successfully, there is no longer any alternative path of political state formation and public law. This is because the successful performance of *This is mine* has actualized the latent structure of the political « power to », consisting in land grabbing and concrete ordering, *and there is no other*. This latent structure is the historical essence of political power. Philosophically speaking, it is merely the historicization of metaphysical essence, and to that extent has exactly the same structure as Heidegger's *Seinsgeschick* (destiny of Being) that is inescapable and beyond human praxis, will-formation and choice. For Schmitt therefore the pre-legal but already proto-legal (in *Political Theology* he calls it enigmatically « juristic beyond legality ») *nomos* is the original power that discloses once and forever the world of the political, and the first land grabbers speech-act is a *seinsgeschichtliches Ereignis*: an « occurrence in the history of Being ».

*Nomos* in the political theory of the late Schmitt thus becomes the constitution behind all written constitutions, the resolved « riddle of all constitutions<sup>24</sup> ». If we follow Schmitt this far, then it becomes plausible that « the core of all human order (is) the mutual relation of protection and obedience [*ewiger Zusammenhang von Schutz und Gehorsam*]<sup>25</sup> ». The *power to* establish a concrete ordering that emerged with the first land grabbing therefore (if we follow Schmitt's basic premise) is already the first emergence of *constituent power*. But this is only plausible on the basis of Schmitt's highly *implausible* metaphysical assumptions.

It is *methodologically* interesting to compare this with Marx's resolution of the riddle of all constitutions. For Marx, combining Hegelian dialectics with modern evolutionary social theory, the resolution is the respectively latest (and arguably highest) *result* of a long constitutional evolution that

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<sup>23</sup> In this point (and many other ones) Schmitt is completely in accordance with his conservative fellow-travelers Oakshot and Strauß, see the brilliant analysis by Perry Anderson, « The Intransigent Right at the End of the Century », *London Review of Books*, 18, 1992, p. 7-11.

<sup>24</sup> K. MARX, *Kritik des Hegelschen Staatsrechts*, §§ 261-313, *MEW* 1, Berlin, Dietz, 1988, p. 231; see S. MARKS, *The Riddle of all Constitutions*, Oxford, Oxford Univ. Press, 2000.

<sup>25</sup> C. SCHMITT, *The Nomos of the Earth*, New York, Telos Press, 2006, p. 318, see p. 48; see C. SCHMITT, *Nomos der Erde*, p. 295.



(besides natural and social conditions) is due to cooperative labor and interactive praxis (class struggle). For Marx, *democracy* is the resolved riddle of all constitutions. This democratic resolution to the riddle of all constitutions *did not exist* before the French Revolution and *could only be recognized after the French Revolution*.

Schmitt, on the other hand, thinks precisely the reverse, in an old-European and metaphysical way. The beginning of politics and public law, once disclosed by the first land grabbers, determines the resolution of the riddle, and whatever is written and defined as public law (legality) is a constitution if and only if it is grounded in a concrete ordering of mutual relations of protection and obedience.

Schmitt restricts himself to an extremely impoverished notion of « power to » and political solidarity as based on an eternal relation of protection and obedience and one whose genealogy is profoundly mistaken, relying on an untenable overgeneralization and hypostatization of a historically specific path of social evolution.

Schmitt makes just the same mistake that Rousseau had already criticized in Hobbes. According to Rousseau, Hobbes projected an advanced social state onto the state of nature, hence *naturalizing historically established societal relations*, an argument that anticipates later Marxist critique of ideology<sup>26</sup>. Schmitt too conceals the historical and social conditions of *nomos* and *nemein*, which Rousseau had highlighted in his *Second Discourse* in June 1754, anticipating Marx: The Nomos-Man is « the first man who, having enclosed a piece of ground, bethought himself of saying *This is mine* ». However, Rousseau's point is that the land grabbing Nomos-Man not only « found people [...] to believe him » (as quoted above and in accordance with Schmitt) – but found « people *simple enough* to believe him », and only thus, could he become « the real founder of civil society », as Rousseau adds ironically<sup>27</sup>. However, as Rousseau argues, the *Nomos-Man and his submissive believers* must be identified neither with the *natural man*, nor with the *political animal*.

Identifying (with Hobbes and Schmitt) the origin of *all* possible formations of political « power to » with land grabbing, agrarian production and social stratification beginning about 10,000 BCE, abstracts from the social fact that this was preceded by 100,000 years of *segmentary differentiated, egalitarian hunter- and gatherer societies* (allowing only flat hierarchies). Moreover, it abstracts from the social fact that *egalitarian societies were already socially integrated by « power to »*, « rooted in the intersubjective generation of solidarity<sup>28</sup> ». Therefore, the evolutionary path of *nomos* and *nemein*, land grabbing and concrete ordering is only *one of*

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<sup>26</sup> For an advanced version of this criticism, see C.B. MACPHERSON, *The Political Theory of Possessive Individualism. Hobbes to Locke*, Oxford, Oxford University Press, 2011 [1962]. Loughlin rightly makes the same point with Rousseau against Hobbes (*FPL*, p. 134-35, 137-38) and Montesquieu (*Politonomy*, *op. cit.*, p. 12) but not against Schmitt.

<sup>27</sup> J.-J. ROUSSEAU, *Second Discourse on Inequality*, Part II, first sentence.

<sup>28</sup> *FPL*, p. 169 sq.

*many possible paths*, and to take it was a *political* choice for hierarchy over egalitarianism. Instead of believing the Nomos-Man, some could have decided to object, « pulling up the stakes, or filling up the ditch, and crying to his fellows, "Beware of listening to this impostor; you are undone if you once forget that the fruits of the earth belong to us all, and the earth itself to nobody"<sup>29</sup> ».

To conclude, the evolutionary path of land grabbing and class rule was neither a causal effect of natural laws nor an unavoidable and unchangeable « destiny of Being », but a process of social selection through a combination of *accidents* (due to the unavoidable complexity of interaction, specifically « double contingency »), already established *structures of « power over »*, and *choice*. Even if we (with Rousseau) take into account accident, and the fact that the Nomos-Man might have had better weapons and well-armed allies, the people even then had the choice to believe the Nomos-Man *or not*, also because (as Rousseau insists) they were not born *so simple* that they had to believe the land grabbers<sup>30</sup>. Anyway, vis-à-vis the Nomos-Man the people already had the *political power to accept or reject* his speech-act *This is mine*. Even if they used their power in the wrong way, they had the choice, and (which is more important) *they still have it*., They can, therefore, change their mind and revise their decision, in particular after they have learned from negative experience and increasing injustice, « how many crimes, wars and murders, [...] how many horrors and misfortunes » were effected by their tacit consent to the speech act of the Nomos-Man<sup>31</sup>. At least Rousseau's path-breaking insight had liberated them (and us) in principle to try and try again, and to search for, construct and establish *alternative paths of political power formation that are beyond political and social class rule*.

Rousseau's world- disclosing argument of 1754 was that there are origins of the social evolution of « power to » and the intersubjective generation of solidarity other than land grabbing and simple minds who believed without reflection in the validity of the speech act *This is mine*. Political action is not predetermined to take the evolutionary path of reifying mutual relations of protection and obedience.

### III

To overcome the conceptual regime of the Nomos-Man, Hannah Arendt provides an interesting alternative. In a *first step*, she traces political « power to » back to the Greek polis and the Roman republic, and further

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<sup>29</sup> J.-J. ROUSSEAU, *Second Discourse on Inequality*, Part II, second sentence.

<sup>30</sup> As Rousseau writes realistically, « there is great probability that things had then already come to such a pitch, that they could no longer continue as they were », but it is only a probability, not necessity that makes them believe (J.-J. ROUSSEAU, *Second Discourse on Inequality*, Part II, third sentence).

<sup>31</sup> J.-J. ROUSSEAU, *Second Discourse on Inequality*, Part II, first sentence.

back to *nomos*. However, Arendt's *nomos* is not the *nomos* of land grabbing and concrete ordering of domination (mutual relations of protection and obedience) but of reciprocal solidarity among citizens. Like Schmitt, she derives political solidarity from the Greek *nomia* but this time from *isonomia*. *Iso-nomia* marks an important break from *eco-nomia* and (Schmittian) *polito-nomia* but still is as Eurocentric, elitist and exclusive as the Schmittian genealogy, based on the same implicit social conditions of stratification, agrarian production, exclusion of the non-citizen, and slave labor.

However, it is interesting to observe that in a *second step*, which she made in *The Human Condition*, Arendt (without making it explicit) reconstructed an *alternative genealogy* of the political that immediately avoids the pitfalls of Eurocentrism, elitism and exclusion. This alternative is announced with her famous idea that the *ultimate evolutionary origin of political* « power to » is not *polis*, *res publica* or *isonomia* but *natality*. *Polis*, *res publica* and *isonomia* thus only point to one possible path of constitutional evolution whereas *natality* keeps evolution open for alternative paths because of its connotations of creativity and universality.

In Arendt's anthropological reconstruction, *natality* is our « second birth » that is co-original with the use of language. Therefore, political « power to » is *co-original with every performance of a new speech act*, or any *unexpected symbolic act* that is *deviant* or *different*, compared with acting as always. Deviant use of language (symbols) includes forms of *negation*, and can be made explicit as negation (« this is different because it is *not* the same as usual »). Deviant and negating use of symbols is performed by everyone all the time in every society. Arendt's political anthropology therefore not only *fits modern evolutionary theory* (contradicting her own anti-evolutionist Heideggerian self-understanding), it also clearly *opposes her own Eurocentric, elitist and exclusive genealogy* of political « power to » in the slaveholder society of the urban polis.

When Arendt briefly turns to the Greek understanding of action in *The Human Condition*, she too quickly closes the path of political alternatives to the Nomos- or Iso-Nomos-Man. Such an alternative is, however, suggested by Arendt's own reconstruction of political « power to » from a Christian understanding of *natality* as Augustinian *initium* (initiative, new beginning) and the egalitarian Christian hope that is related to the new beginning when a child is born<sup>32</sup>. In her political anthropology, not *land grabbing* but every unexpected *negation* or any other, more implicit expression of a normative expectation of a speech-act is political, the origin of (innovative) political power to, and of communicative power and public law<sup>33</sup>.

In Arendt's anthropological genealogy, the political is rooted in the *potentia* to begin something new, just by interrupting habitually settled

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<sup>32</sup> H. ARENDT, *The Human Condition*, p. 247; see already the last sentence of her *Origins of Totalitarianism*.

<sup>33</sup> H. ARENDT, *The Human Condition*, *op. cit.*, p. 176-191, 246-47. In this point she is in accordance with Habermas and neither Schmitt or Heidegger.



interaction with an arbitrary act of negation, deviation or expectation. We are already political animals with these first acts, and not only after the polemical differentiation between citizens and idiots introduced by Aristotle at the beginning of his *Politics*<sup>34</sup>. Arbitrary action does not depend on the differentiation between urban centre and rural periphery, or between nobles, peoples and slaves. It is *co-original with social evolution* and the use of language. The *origin of political « power to » therefore is social « power to »*. It is only much later, after the emergence of a public sphere in urban societies of political class rule, that social power *can* (but need not) be transformed into the specifically political power of « foundation<sup>35</sup> ». However, even then, communicative « power to » (Arendt, Habermas) must be *reproduced through private and non-political social spheres of intimate communication* and *life-long processes of socialization*, and the different spheres of *civil society where private and public spheres merge*<sup>36</sup>.

#### IV

Once social power becomes political in the sense of being exercised within a differentiated political sphere of action, the power of action (or negation) is transformed into the *constituent* (therefore potentially revolutionary) *power* that, in modern democratic constitutional regimes, is *permanent*, as Arendt, Böckenförde, and Habermas have argued<sup>37</sup>. As we can see from the ambivalent use of « solidarity » in Durkheim, solidarity has a *functional* as well as a *normative* side. In modern societies, it binds together an ever-increasing number of conflicting differences, functionally through *social division of professionalized labour* (this is the source of infrastructural discursive power [Mann, Foucault]), and normatively through the *collective consciousness* (that is the source of political « power to », the power of the people). But both sides are integral to the modern concept of law.

To be sure, the *potentia* that originates in the social power to say « no » and that can become the political power of foundation and permanent *pouvoir constituant*, need not develop in this way, as we have seen. It also can become an instrumental, technical and administrative power of control. « power to » *can* be instrumentalised from the *top-down* as « power over », which is the technical and administrative power of control, discipline and surveillance (Deguit/ Mann/ Foucault/ Gorski). Yet the possibility remains

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<sup>34</sup> Aristotle defines the *zoon politikon* the essence of the human being which is realised only by perfect formations of human beings living in city-states as Athena, excluding metics (as Aristotle himself), women, passive homosexuals, slaves, peasants, and the colonized city-states of the Athenian empire (ARISTOTLE, *Politics*, 1252a-1255b, in particular 1253a-b).

<sup>35</sup> *FPL*, p. 169.

<sup>36</sup> See J. HABERMAS, *Structural Transformation of the Public Sphere*.

<sup>37</sup> See H. ARENDT, *On Revolution*; E.-W. BÖCKENFÖRDE, *Verfassungsgebende Gewalt*; J. HABERMAS, *Faktizität und Geltung*.

that it can still emerge from the *bottom-up* as public (Arendt) or communicative « power to » (Habermas)<sup>38</sup>. « Power over » can always be turned into « power to » and vice versa.

Even though Loughlin is highly critical of administrative *potentia* (at least as far as it threatens the foundations of public law), in his defence of *Staatsrecht* against the normativism of *Rechtsstaat* he demonstrates a clearly state-supportive attitude that prioritises the top-down perspective.

My contention is that Loughlin's polemical position in the discursive wars over the state is determined by a specific meta-narrative that supports it<sup>39</sup>. That is the meta-narrative of *state-sovereignty*. The sovereign state is the result of the emancipation, first, of the mortal God that is a living person (the King) from the domination of the personalized, immortal God, and his religious foundation in the *absolute truth* of belief and the spiritual, and especially legal power of the clerics. The last stage of this top-down process of emancipation of secular state-power consists in the « absorption » of the personalized sovereign « into the idea of the state » that is the abstract, de-personalized « institutionalization » of sovereign *potestas*, or public right, a position culminating with Hegel and German statutory positivism (*Staatswillenpositivismus*, in particular in the work of Georg Jellinek)<sup>40</sup>.

There are two problematic features internal to this specific and one-sided genealogy which can be highlighted by comparing it with the story Max Weber tells us about the process of religious disenchantment.

First, what the sovereign state *maintains* from its religious origins is the claim of *omnipotence* and *sovereign authority* performed through a separation of state-power that « enables » an unprecedented augmentation of administrative power through « constraints<sup>41</sup> ». The process of the growth of power through its legally institutionalized differentiation was already prepared though by the constitutional advances of the Papal Revolution of the 11<sup>th</sup>, 12<sup>th</sup> and 13<sup>th</sup> centuries.<sup>42</sup> Loughlin (like Hobbes, Protestantism, the Enlightenment, Hegel and many others) casually dismisses this as the « dark ages », a cliché that seems to be constitutive for the meta-narrative of state-sovereignty. But this dismissal has been called into question considerably by medieval historians in the last decades of the 20<sup>th</sup> century<sup>43</sup>. And as we will

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<sup>38</sup> For a similar objection see Wilkinson, *The transformation of public law in the project of European integration*.

<sup>39</sup> See Thornhills review of Loughlin.

<sup>40</sup> *FPL*, p. 102.

<sup>41</sup> *FPL*, p. 106, 167, 171, 177 *sq.*, 231. That constraining, specializing and differentiating power augments and reinforces existing power instead of restricting and taming it is an old observation, going back at least to Machiavelli, Hegel, Spencer and Durkheim.

<sup>42</sup> See H. BRUNKHORST, *Critical Theory of Legal Revolutions. Evolutionary Perspectives*, New York/London, Bloomsbury, 2014, p. 90-146.

<sup>43</sup> See only J. FRIED (ed.), *Die abendländische Freiheit vom 10. zum 14. Jahrhundert*, Siegmaringen, Thorbecke, 1991; H. BRUNKHORST, *Critical Theory of Legal Revolutions*, *op. cit.*, p. 90-146 (with further literature).

explore below, it elides an alternative, democratic narrative that can be traced back to the Marsilius of Padua in the 13<sup>th</sup> century.

What the secularized state *loses* in the turn from the (wrongly) so called theocratic age to the age of confessionalization (note: not secularization) and territorial and national state formation in the times of the Protestant Revolution (16<sup>th</sup>/17<sup>th</sup> century) is the claim to universal *truth* (*auctoritas non veritas facit legem*). The political result clearly is top-down: concrete-ordering-formation precedes public will-formation (*der Staat als Verfassungsvoraussetzung*). This provokes the emergence of a new and fundamental opposition of social groups (« classes ») between wielders of state « power over » and the rest, now describing themselves as a people or nation, and *bringing truth-claims back to politics* (culminating in the course of the Atlantic Revolution of the 18<sup>th</sup> century).

Second, and closely related to the « emancipation » of state-sovereignty from universal truth claims, is that the sovereign state retains the idea of founding positive law on the *will* of the sovereign from the « dark ages » of clerical rule. However, distinct from the legislation through papal and imperial sovereignty, the new sovereign will of the secular ruler loses its foundation in *rationality* (or natural law). Therefore, the confessionalized (later secularized) sovereign state (or the prince) keeps *voluntas* and drops *ratio* (in this reading, the missing philosophical link between the « dark ages » and the modern world is William of Ockham). The theory of the sovereign will that emerges from the time of the Reformation is then developed juristically by German statutory positivism and German *Staatsrecht* from Laband to Schmitt, (albeit strongly opposed by Kelsen from his *Habilitationsschrift* in 1911, and his Viennese school of legal theory).

The *emancipation* of absolute sovereignty and the sovereign will of the functionally differentiated modern national state (with the abstract state as the author/ subject of *voluntas*) from universal claims to truth and rationality rightly has been described as the liberation of political organization from the authoritarian truth-regime of a despotic cast of clerics. This liberation enabled the emergence of the modern public sphere that Loughlin identifies with the state. However, this is not the *only story about religious truth and rationality*. Another can be told.

## V

Throughout the history of monotheism<sup>44</sup>, the absolute truth-claim was also an important means of prophetic criticism of authoritarian rule, and especially of the new and unprecedented social injustice of the *socially stratified societies of political class-rule*. The lower and under-classes of ancient societies were not just idiots (isolated, pre-political animals) as

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<sup>44</sup> One probably can generalize this to all religious world views that emerged during the axe-age all over the Eurasian continent.

Aristotle and most philosophers who followed him have suggested over and over again. The oppressed understood their social situation and the injustice of their oppressors, and therefore they had *good reasons* to follow the prophets (and not the philosophers). The anti-authoritarian Jesus gives one of these reasons, preaching to the poor: « I am the truth, not the custom », hence you have to change custom if you want to constitute a better society<sup>45</sup>.

If we now try to develop this other genealogy, we can tell the story of the evolutionary emergence of public law as a transformation and rationalization of religious truth-claims. If we do so, the emergence of public law can be reconstructed as a *bottom-up political learning process* that is mediated through legal revolutions motivated by egalitarian and emancipatory goals which established a law to cope with the paradox that *modern law is freedom*, or in Hegel's famous phrase: *Dasein des freien Willens* (existence of the free will). This (internally contradictory) law first emerged in the hundred years that followed the Papal Revolution<sup>46</sup>. At its core was the highly unlikely combination of Roman Civil Law and Canon Law. Roman Law was an important advance of managerial *potentia* that stabilized the Roman Empire<sup>47</sup>. As all civil law, it worked primarily as a law of coordination of the ruling classes. But different, and in dialectical opposition to Roman Law, Canon Law was not *only* an instrument of *oppression* that stabilized and augmented the administrative power of the church-state and the clerics. Canon Law was also an instrument of *emancipation*, as far as it was understood and designed as the embodiment of the egalitarian idea of universal salvation and equality of all men before God and his last judgment<sup>48</sup>.

The concurrent activity of academic professionalization led to the beginning of the functional differentiation of law and the transformation of the old Roman *legal order* into an autonomous *legal system*. The latter then was of great use for clerics and civil rulers to establish and improve their power over their subjects, and to increase the agrarian exploitation rates through the disciplinary advances of the first European Revolution<sup>49</sup>. However, the same law also could be used, and was used over and over again for the formation of *bottom-up communicative power by the people*. It could, in other words, « strike back » (Friedrich Müller). It enabled, for example, the Common Man (*Gemeiner Man*) in 1525, advised by Zwinglian jurists, to justify their revolutionary claims with a fresh universalizable interpretation of the same medieval law books that had been used by the managerially minded state-supportive lawyers to perpetuate their oppression<sup>50</sup>.

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<sup>45</sup> G. TELLENBACH, *Liberias*, Stuttgart, Kohleimport, p. 195.

<sup>46</sup> H. BERMAN, *Law and Revolution*, Cambridge, Harvard Univ. Press, 1982.

<sup>47</sup> T. PARSONS, *Societies*, Englewood Cliffs, Prentice Hall, 1966.

<sup>48</sup> H. BERMAN, *Law and Revolution*, *op. cit.*; H. BRUNKHORST, *Critical Theory of Legal Revolutions. Evolutionary Perspectives*, *op. cit.*

<sup>49</sup> R.I. MOORE, *The First European Revolution*, Melden Ma, Blackwell, 2000.

<sup>50</sup> P. BLICKLE, *Der Bauernkrieg*, München, Beck, 2006.

To reconstruct the emergence of the constituent power that was performed in the time of the Common Man's insurgencies of 1525, and later during the Protestant and the Atlantic Revolutions as a normative and political learning process, another concept with a different genealogy of modern constituent power and public law is required, that begins with Ockham's radical decoupling of the sovereign will of God from its metaphysical foundation in objective rationality and natural law *but does not drop truth and ratio*. This genealogical narrative begins only a little earlier with a discourse initiated by Duns Scotus (1266-1308). If the sovereign God is real, and absolutely free in his wants, he can start with an arbitrary decision. However, once he has first freely acted, he is then bound by the principle of consistency<sup>51</sup>. Such an alternative genealogy of the intellectual discourse (that is embedded in political and legal discourses and social class struggles) begins with the « normative innovation » of the discovery of *voluntas* as the kernel of practical *ratio*<sup>52</sup>. From here, and the transplantation of the idea that *ratio* is *voluntas* into the idea of the political formation of the *general will* by the Marsilius of Padua<sup>53</sup>, the discourse of rational will formation leads over many (socially mediated) loops back to Rousseau, Madison, Sieyes, Kant and Fichte, and finally to Hegel's contradictory idea that law is the existence of the free will. This power of beginning is internal to modern law, at least as long as it remains a strange mix of oppressive facticity and emancipatory normativity.

In our alternative genealogy of modern public law, rational will-formation thus precedes concrete order-formation and the written constitution founds the state. In this genealogy, the origin of modern public law is not the sovereign state/ prince of the 16<sup>th</sup> and 17<sup>th</sup> century that dissociates power from truth-claims and legislative *voluntas* from *ratio* but the Papal Revolution with its combination of law and religion and the idea of a *voluntas* that *is ratio*; hence, not *auctoritas*, but *veritas facit legem*. Even if *voluntas* becomes utterly contingent in the evolution of public law, and all law becomes positive law, this does not imply a new form of « a-rational » and « post-truth » public law. The resolution of the riddle of a contingent but rational legislative power is still democracy<sup>54</sup>.

## VI

Reading Loughlin's *Foundations*, I have the impression that he alternates between a *dualistic* construction of a Schmittian (substantial/ existential/ historical/ higher) *constitution of nomos behind the written constitution* – and a *dialectical* construction of positive, *changeable constitutional law* that is internally related to *popular will formation* within

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<sup>51</sup> L. HONNEFELDER, *Duns Scotus*, München, Beck, 2005, p. 118 sq.

<sup>52</sup> *FPL*, p. 227.

<sup>53</sup> J. HABERMAS, *Unpublished Manuskript*, Starnberg 2015, on file with author.

<sup>54</sup> This is the point of J. HABERMAS, *Between Facts and Norms*.



one and the same legal order. In a similar vein as Hermann Heller, Loughlin uses Hobbes, Hegel and the whole branch of conservative state-theory (Schmitt, Oakshot etc.) for his (probably empty) polemic against empty normativism. However, his allegiance in particular with Schmitt is limited, and the limits are interesting, as we already have seen in part II. Loughlin parts with Schmitt, once Schmitt falls back to the *dualism of political theology* and explains the foundational relation between constitution (*nomos*) and constitutional law through an *ontological difference* between the *constituting* « presence » of the substantial equality of the people and their « representation » through different voices and interests, articulated in *constituted* bodies such as parliaments and courts. Loughlin rejects Schmitt's « mysterious prior substantial equality » of the « people » in « presence » that implies a fundamentalist « opposition between representation and presence<sup>55</sup> ». Schmitt's « concept of constitution in its substantive sense that is dealing with the *total situation* of the political unit », Loughlin writes, is of little value because it « includes all natural and cultural conditions of the state unity without any worthwhile differentiation<sup>56</sup> ».

However, if Schmitt's dualistic solution does not work, how can we « move beyond this opposition between representation and presence<sup>57</sup>? » We first have to accept that there exists only a continuum of differences but no ontological difference between « legality and legitimacy<sup>58</sup> ». Therefore we have to cope with the inbuilt « tensions' « between fact and norm<sup>59</sup> », between « reason » and « history », « the rational and the empirical, the normative and the factual<sup>60</sup> », « instrumental and communicative rationality<sup>61</sup> », « an idea and the instantiation of that idea<sup>62</sup> ».

If foundation is not based on a dualistic and transcendental relation between constituent and constituted power, then the relation must be – as Loughlin argues with Lindahl – « reflexive » and « not causal »<sup>63</sup>, and – as he argues with Heller – « dialectical<sup>64</sup> », hence circular or spiral and not linear.

Therefore, Loughlin argues, Schmitt was right that the constituent power, emerging in constitutional revolutions such as the French Revolution

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<sup>55</sup> *FPL*, p. 226. For the same reason he rejects Rancière's dualism of the *political* and the *police*, and rightly so.

<sup>56</sup> *FPL*, p. 236, quoting Hermann Heller.

<sup>57</sup> *FPL*, p. 226.

<sup>58</sup> *FPL*, p. 40.

<sup>59</sup> *FPL*, p. 220, and see p. 171, 190, 204, 211, 235

<sup>60</sup> *FPL*, p. 85.

<sup>61</sup> *FPL*, p. 170.

<sup>62</sup> *FPL*, p. 208.

<sup>63</sup> *FPL*, p. 228.

<sup>64</sup> *FPL*, p. 226 *sq.*, 234 *sq.*

« interrupts representational practices<sup>65</sup> », but was wrong because this « rupture » through « normative innovation », « is never a pure decision that “emanates from nothingness”<sup>66</sup> ». Because it does not *emanate* from *nothing* but *emerges* from *something*, the use of « constituent power not only involves the exercise of power by a people; it simultaneously constitutes a people ». Therefore, the « constituent power cannot be understood without reference to constituted power<sup>67</sup> ». Emmanuel Josef Sieyès, for example, needed the constituted power of the assembly of Estates to constitute a completely new National Assembly, and to get rid of the old constitution of the French Monarchy. The « existential and normative aspects of constituent power remain mutually dependent<sup>68</sup> ». Moreover, because the people are nothing static, status-like and statist but something dynamic and developing, driven not only by relatively stable « customs », but also by (sometimes rapidly) changing « beliefs, and opinions », « *i.e.*, practices » – the « political unity » they constitute « comes not from a single constituent act but depends on continuous renewal of terms<sup>69</sup> ». The people's common will formation matters exactly because constituent power is not just « an idea founded *on* the people » but must be « actively formed *by* the people<sup>70</sup> ». Therefore the « content and validity of a norm are never determined merely by its text, and never solely by the standpoints and characteristics of its legislators, but above all by the characteristics of the norm addressees who observe them<sup>71</sup> ». This means that the constitution must enable the people to act as *authors* of those legal norms that address them. The rule of law is not worth the paper it is (not) written on, unless it is author-ized *by* the people. To put in in Habermasian terms, there is no *Rechtsstaat* without democracy, and the norms that constrain state power must enable the *formation of the general will* of the people through augmentation of their public or communicative power.

If this is accepted, the contradiction between Madison's republican idea of representation and the democratic idea of representation that only emerged in conjunction with socialism in the course of the 20<sup>th</sup> century becomes evident. Whereas Madison, in Loughlin's quote, argues that checks and balances of power are designed to discipline the people (« enable the government to control the governed »)<sup>72</sup>, and then to realize a strong

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<sup>65</sup> *FPL*, p. 227 (quoted from Lindahl).

<sup>66</sup> *FPL*, p. 227, quoted from Lindahl (quoting Schmitt).

<sup>67</sup> *FPL*, p. 227.

<sup>68</sup> *FPL*, p. 236.

<sup>69</sup> *FPL*, p. 233. Habermas (like Arendt) locates it in the « anarchic » and « untamable » character of public opinion and public will formation that comes not from a single constituent act but from continuous renewal of terms. Public will formation *is* the performance of communicative power that Habermas defines as a permanent revolution that is legal.

<sup>70</sup> *FPL*, p. 224.

<sup>71</sup> *FPL*, p. 233, quoted from Herman Heller.

<sup>72</sup> *FPL*, p. 284.

executive power, Hermann Heller replaces this with an egalitarian and radical democratic interpretation of *the same* constitutional checks and balances:

The whole system of the constitutional law of checks and balances, of reciprocal commitments and determinations as election, countersignature, parliamentary legislation, referenda, initiative, and of all the other provisions that determine the competences of presidents, governments, legislative bodies and so on – this whole constitutional apparatus has the one and only legal meaning to enable and guarantee that the power of the government factually originates in, stems from, and is performed by the people<sup>73</sup>.

Here again, we are back to the dialectical idea that popular sovereignty precedes state sovereignty, and rational will-formation precedes concrete order-formation. Constituent power can reunite *ratio* and *voluntas* if recast as a democratic constitutional learning process based on the human potential for action, and emancipation. At the very least, that path must neither be ignored in its concrete historical achievements, nor foreclosed for the future.

*Hauke Brunkhorst is Professor of Sociology and Head of the Institute of Sociology, Flensburg University, Europa-Institute.*

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<sup>73</sup> H. HELLER, « Souveränität » [1928], in *Gesammelte Schriften*, 2, Leiden, Sijthoff, 1971, p. 39-40 (quote translated by Poul Kjaer).