

# Avoidance of Constitutional Imposition and Democratic Constituent Power in Divided, Conflict-Ridden Societies

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## Abstract

*The aim of this essay is to present and then to critically discuss some arguments that have cast serious doubt on whether the conception of democratic constituent power is appropriate for, and should be invoked in, divided, conflict-ridden societies to avoid or fend off, among others, the prospect of a constitutional imposition. The author's main argument is that the conception of democratic constituent power in such cases can be a matrix of normative (and potentially legalized) principles and standards, which do not preclude the intervention of external powers as such, but frame the demand for self-restraint as regards the forms, the aims, the intensity and the extent of such intervention. The invocation of the constituent power of 'We the People' in divided societies entails important risks, and one should take recourse to its rhetorical use only upon prudential, consequentialist considerations, which should include the possible exclusionary effects of the nationalist version of constituent power. Nevertheless, the prudential calculus can also indicate that such invocation may become useful as a reference point for a forward-looking learning (and potentially therapeutic) process, which will not aspire to simply obliterate the past and its original sins. Ultimately, everything depends on the context and on the virtues of the people and of their leaders.*

**Keywords:** democratic constituent power, internationalized *pouvoir constituant*, constitutional imposition, external intervention in constitution-making, forward-looking learning process, divided societies, conflict-ridden societies

## Introduction

The commonsensical dichotomy between imposed constitutions, on the one hand, and constitutions which are adopted through an autochthonous and democratically autonomous constitution-making process, on the other hand, could be challenged on various grounds, first empirical-historical ones. Constitutions which were allegedly imposed under conditions of military occupation, such as the postwar Japanese *Nihonkoku Kenpō*, were not in fact (totally) lacking in domestic input and in public

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support.<sup>2</sup> On the other hand, largely autochthonous constitution-making processes are abused in the hands of charismatic leaders claiming to embody the popular will so that the representativeness and/or the effectiveness of constitution-making assemblies is seriously distorted and democratic autonomy, as a matter of popular participation in consultation and drafting processes, is – sometimes fatally – compromised.<sup>3</sup> Furthermore, the various diffusion mechanisms of ‘transnational constitutionalism’<sup>4</sup> minimize the stakes of autochthony in constitution-making, and they create an intermediate category of ‘transnational constitutions’, blurring again the distinction between imposition and autonomous-autochthonous endorsement.<sup>5</sup> Another version of such blurring is brought up by Richard Albert under the generic title ‘heteronomous constitutions imposed with consent’, pointing to the case of the Canadian Constitution whose amendment, before its patriation in 1982, remained in the hands of the UK Parliament after the invitation of Canadian political actors in early 1930s.<sup>6</sup> Although at least some of these empirical challenges could find an answer,<sup>7</sup> they generally indicate

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- 2 For Kenpō see, inter alia, D. Law, ‘The Myth of the Imposed Constitution’), *Social and Political Foundations of Constitutions*, eds D. Galligan and M. Versteeg (Cambridge University Press, 2013) 239-268, drawing from a variety of sources. A clearer example is the (West) German Grundgesetz; see U. Preuss, ‘Perspectives on Post-Conflict Constitutionalism: Reflections on Regime Change Through External Constitutionalization’, *New York Law School Law Review* Vol. 51 (2006/07), 467. Also, the 2005 Constitution of Iraq could be taken as a combination of instances of imposition with some (seriously limited) instances of autonomous endorsement; see P. Dann and Z. Al-Ali, ‘The Internationalized Pouvoir Constituant—Constitution-Making Under External Influence in Iraq, Sudan and East Timor’, *Max Planck Yearbook of United Nations Law*, ed. A. von Bogdany and R. Wolfrum, Vol. 10 (2006), 423-463 (classifying constitution-making in Iraq under the category of partial external influence).
  - 3 See D. Landau, ‘Abusive Constitutionalism’, *University of California, Davis, Law Review* Vol. 47 (2013-2014), 189; idem, ‘Constitution-Making Gone Wrong’, *Alabama Law Review* Vol. 64, No. 5, (2012-2013) 923; W. Partlett, ‘The Dangers of Popular Constitution-Making’, *Brooklyn Journal of International Law* Vol. 38, No. 1 (2012), 193.
  - 4 See for them, among much else, B. Goderis and M. Versteeg, ‘Transnational Constitutionalism: A Conceptual Framework’, in *Galligan and Versteeg* (n.3), 103-133.
  - 5 See F. Schauer, ‘On the Migration of Constitutional Ideas’, *Connecticut Law Review* Vol. 37 (2005), 907.
  - 6 See R. Albert, ‘Imposed Constitutions with Consent?’, *Boston College Law School Legal Studies Research Paper* No. 434, 3 February 2017, available at: <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2911180](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2911180)>, 3-7.
  - 7 For instance, we could argue that the category of imposed constitutions remains empirically relevant in view of cases such as the Bosnia-Herzegovina (BiH) Constitution, which was drafted through proximity talks and which was enacted behind closed doors in Dayton without the participation of the ‘constituent peoples’ to which its preamble refers (but see J. O’Brien, ‘The Dayton Constitution of Bosnia and Herzegovina’, in *Framing the State in Times of Transition: Case Studies in Constitution Making*, ed. L. Miller (Washington, D.C.: United States Institute of Peace Press 2010), 332-349, at 345, noticing that the BiH was approved by the legislatures of the two constituent entities) or in view of dictatorial constitutions, which are internally imposed in a Bonapartist fashion leaving little, if any, space for their rejection by the peoples concerned (see e.g. A. Arato, *Post Sovereign Constitution Making: Learning and Legitimacy* (Oxford University Press, 2016), 224-225, referring to the 1982 Constitution

the presence of grey zones in between the poles of imposition and autochthonous / democratically autonomous constitution-making.

A second route to cast doubt on the aforementioned dichotomy would be to challenge its normative-theoretical grounds in a direct and generalized way. For instance, Hans Agné argued that ‘the *very sense* in which a political order can be democratically founded already presupposes an involvement of people beyond their own boundaries’.<sup>8</sup> This is so, first, because a democratically legitimate people is one ‘recognized as such by, or justified in the views of, even those who will not play the role of citizens in the state about to be constituted’.<sup>9</sup> Besides, ‘the founding of states is democratically legitimate if *it produces as much autonomy as possible to as many people as possible*’.<sup>10</sup> Therefore, ‘the concept of purely internal constituent powers is not valid even as ideal to be approximated’,<sup>11</sup> and foreign intervention in constitution-making is legitimate whenever a particular state ‘constrains the autonomy of people inside *or outside* its own boundaries’,<sup>12</sup> on condition that the actions of the intervening state serves ‘the purpose of furthering autonomy for as many as possible, rather than for some other purpose’.<sup>13</sup> Another version of a direct and generalized confrontation with the conception of purely internal constituent power is the one advocated by Chaihark Hahm and Sung Ho Kim.<sup>14</sup> These scholars stressed the constitutive role of interaction with external actors in the formation of peoplehood, and they argued that we should take the presence of such actors not only as ‘permissible but ... even [as] a logical necessity’.<sup>15</sup>

In this essay I shall not tackle this line of thought, but I shall address the more nuanced and context-sensitive approach of Zoran Oklopčič. In a series of articles published recently,<sup>16</sup> Oklopčič has highlighted the role of external constituent powers

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of Turkey and to the 1980 Pinochet Constitution). As regards the argument from ‘transnational constitutionalism’, we could refer to studies which elevate the role of domestic views and interests in the specification of constitution-making choices; see e.g. M. Tushnet, ‘Some Skepticism About Normative Constitutional Advice’, *William and Mary Law Review* Vol. 49 (2008) 1473; L. Epstein and J. Knight, ‘Constitutional borrowing and nonborrowing’, *International Journal of Constitutional Law* Vol. 1, No. 2 (2003), 196.

8 H. Agné, ‘Democratic founding: We the people and the others’ *International Journal of Constitutional Law* Vol. 10, No. 3 (2012), 836, 837 (my emphasis).

9 *Ibid.*, 843.

10 *Ibid.*, 844.

11 *Ibid.*, 854.

12 *Ibid.*, 845 (my emphasis).

13 *Ibid.* (omitting clarifying comments in the footnotes).

14 *Making We the People: Democratic Constitutional Founding in Postwar Japan and South Korea* (Cambridge University Press 2015), esp. ch. 1.

15 *Ibid.*, 65.

16 See mainly Z. Oklopčič, ‘Constitutional (Re)Vision: Sovereign Peoples, New Constituent Powers,

in the context of ethnically divided and conflict prone societies which are situated in the periphery of constitutional thought. In an earlier article, which focused on the re-constitution of post-Yugoslav political space, Oklopcic pointed out that the establishment of the constitutional orders in Bosnia and Herzegovina (BiH), Kosovo and Montenegro was not the work of the relevant peoples acting as bearers of a sovereign constituent will, but ‘external actors, through the use of political power and interpretation of legal norms created the possibility for populations captured within these orders to be recognized as “the peoples”’.<sup>17</sup> In BiH and Kosovo, this had to do with the territorial aspects of polity-formation, while in the case of Montenegro the influence of external powers was related with the determination of the composition of the people and with the specification of the majority threshold that was required for the declaration of independence through the relevant referendum. In view of these developments, Oklopcic called us ‘not only to pluralize the unitary concept of constituent power and divorce it from the idea of “the people”’, but also to ‘recognize the existence of constituent powers on both sides of an often tentative political divide between the “inside” and the “outside” of an emergent constitutional order’.<sup>18</sup>

In a later article, Oklopcic suggested again that the vocabulary of popular constituent power should be dismissed ‘in the context of diverse but territorially concentrated polarized societies, most of which are multiethnic states’, such as Ukraine, Syria and BiH,<sup>19</sup> because in this context it will have nationalist repercussions

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and the Formation of Constitutional Orders in the Balkans’, *Constellations* Vol. 19 No. 1 (2012), 81 (henceforth: ‘Constitutional (Re)Vision’); ‘Three arenas of struggle: A contextual approach to the constituent power of “the people”’, *Global Constitutionalism* Vol. 3, No. 2 (2014), 200 (henceforth: ‘Three arenas’); ‘Populus Interruptus: Self-Determination, The Independence of Kosovo, and the Vocabulary of Peoplehood’, *Leiden Journal of International Law* Vol. 22 (2009), 677. See also Z. Oklopcic, ‘The Territorial Challenge: From Constitutional Patriotism to Unencumbered Agonism in Bosnia and Herzegovina’, *German Law Journal* Vol. 13 (2012), 23 (henceforth: ‘The Territorial Challenge’); ‘The Idea of Early-Conflict Constitution-Making: The Conflict in Ukraine Beyond Territorial Rights and Constitutional Paradoxes’, *German Law Journal* Vol. 16, No. 3 (2015), 658 (henceforth: ‘The Conflict in Ukraine’); ‘Provincialising Constitutional Pluralism’, *Transnational Legal Theory* Vol. 5, No. (3) (2014), 331 (henceforth: ‘Provincialising’). To be noted that very recently Oklopcic has published a book (*Beyond the People: Social Imaginary and Constituent Imagination* (Oxford University Press, 2018)) in which he presented us with an impressive meta-theoretical account of ‘constituent imagination’, i.e. one which traces and criticizes the modes of our thinking and theorizing constituent power, the people, self-determination and other relevant concepts, both on the plane of academic discourses and in the terrains of political practice. It would be impossible to expound, much less to engage with, the contents of this book in the present article. In any case, the arguments of this essay are not affected by this book for the most part. For the remaining part (which has mostly to do with the question of whether we should abandon the concept of constituent power altogether for reasons that do not concern the interests of this study), I reserve my thoughts for another study.

17 ‘Constitutional (Re)Vision’, 82.

18 *Ibid.*, 90.

19 ‘Three arenas’, 232.

and exclusionary effects, leading either to ‘a highly-elevated risk of protracted political bloodshed, or simple failure of the social agenda to take hold’.<sup>20</sup> However, in the same article Oklopcic analyzed in depth and finally defended the significance of the vocabulary of popular constituent power, appropriately modified, in the context of democratic struggles taking place ‘in relatively homogenous states where the likelihood of civil war is relatively low’ (Venezuela, Greece and England were mentioned in this respect).<sup>21</sup> According to Oklopcic, in these latter contexts, the ‘normative benefits and implicit rhetorical “invitations”’ of the vocabulary of popular constituent power with regard to ‘the overthrow of an undemocratic regime’ cannot be substituted by invoking “the rule of law” or, say, ‘peace, order and good government’.<sup>22</sup> Even worse, [w]ithout constituent power of the people, the vocabulary of the rule of law may become a ruse that cloaks the exercise of hegemony externally, or internally’.<sup>23</sup>

In the first section I shall expound in an analytical way the main components of Oklopcic’s approach to the issue of internal and external co-constituent powers.<sup>24</sup> Then, I shall argue that, in the terrain of divided and conflict prone societies to which this approach points, the conception of democratic constituent power can still be pertinent insofar as it frames a set of normative standards which help us distinguish between legitimate and illegitimate forms of ‘internationalized *pouvoir constituant*’ and which ultimately fend off the prospect of an (externally and/or internally) imposed constitution. In the last section I shall provide a synthetic response to some challenges which concern the utility of the conception of democratic constituent power in ethnically divided societies that have undergone some form of internationalized *pouvoir constituant*.

The reader must have already understood that I do not intend to address directly the exceptional case of Cyprus from the perspective of the imposed constitutionalism debate. In my view, this would deserve a separate study, of which the present one would be only the introduction. The demanding reader then will wonder why this study takes part in a special issue dedicated to the case of Cyprus. A preliminary answer the following:

Cyprus has always been a divided, conflict-prone society in many different ways and forms throughout its.<sup>25</sup> And it is still a divided island, notwithstanding the

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20 Ibid., 222.

21 Ibid., 232.

22 Ibid., 232.

23 Ibid., 226.

24 My analysis will focus on the arguments presented in ‘Constitutional (Re)Vision’ and in ‘Three arenas’, but I shall also take into account some other aspects of Oklopcic’s wider project, as appearing in the other articles referred to in n.18.

25 See e.g., Y. Papadakis, N. Peristianis, and G. Welz, *Divided Cyprus: Modernity, History, and an Island in Conflict* (Bloomington, IN: Indiana University Press 2006).

considerable transformations<sup>26</sup> and the considerable but unfruitful so far efforts of the first- and of the third-interested parties, aided by the good offices of the UN Secretary-General as representative of the international community, to conclude a process of reunification. The Republic of Cyprus is also a polity with a constitution that has been considered imposed.<sup>27</sup> The imposition passed through a process of internationalized *pouvoir constituant*, albeit a very exceptional one, something which international law scholars have not failed to see, putting the case of Cyprus next to that of the BiH.<sup>28</sup> The important differences between the two cases, which cannot be analyzed here, do not affect the arguments in this essay. Thus, it is sufficient to suggest that, when the analysis or an argument refers to, or implies cases such as, the BiH, the reader should also think of Cyprus.

### Contextualizing Constituent Power (Zoran Oklopcic)

The starting point of Oklopcic's argument is related with the notorious 'paradox of constitutionalism'<sup>29</sup> which accompanies the conception of democratic constituent power; that is, the problem of the pre-constitutional identification and formation of 'the people' which is supposed to be the bearer of constituent power and which is thus postulated in advance as the agent of its own future constitutional and political-institutional potency.<sup>30</sup> As Oklopcic rightly observes, this pervasive *aporia* 'is not

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26 See e.g., N. Trimikliniotis and U. Bozkurt, *Beyond a Divided Cyprus: A State and Society in Transformation* (NY, NY: Palgrave MacMillan 2012).

27 C. Tornaritis, *Cyprus and its Constitutional and Other Legal Problems* (2<sup>nd</sup> ed. 1980), 43, 54-56; P. Polyviou, *Cyprus: Conflict and Negotiation 1960 – 1980* (London: Duckworth, 1980), 13-15. See also A. Emilianides, *Constitutional Law in Cyprus* (The Hague: Kluwer Law International, 2013), 17: 'the constitutional structure of Cyprus was essentially decided without the participation of the people of Cyprus. Consequently, the people of Cyprus considered that the constitution had been imposed on them' (my emphasis).

28 See N. Maziau, 'L'internationalisation du pouvoir constituant. Essai de typologie: Le point de vue heterodoxe du constitutionnaliste', *Revue Générale de Droit International Public* (2002-03), 549; G. Cahin (2014) 'Limitation du pouvoir constituant: le point de vue de l'internationaliste', *Civitas Europa*, Vol. 32, No. 1 (2014), 55.

29 See M. Loughlin and N. Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, 2007); and Oklopcic's review in *International Journal of Constitutional Law*, Vol. 6, No. 2 (2008), 358.

30 As Hans Lindahl ('Possibility, Actuality, Rupture: Constituent Power and the Ontology of Change', *Constellations* Vol. 22, No. 2 (2015), 163, 168) has put it: 'Whoever seizes the initiative to speak on behalf of a putative "we," projecting a collective image that allows a manifold of individuals to identify themselves as the members of a group oriented to realizing a certain normative point under law, is the constituent power of a legal order. But this initial act of identification and empowerment only works as a constituent act if its addressees retroactively identify themselves as the members of the collective by exercising the practical possibilities made available to them by ACA [i.e., authoritative collective action]. Hence, an act succeeds as the exercise of constituent power only if, retrospectively, it appears to be the act of a constituted power'.

constrained to the issue of constituting institutions, but stretches back to the very beginning of a polity in its totality, including the territorial aspect of a constitutional order'.<sup>31</sup> Constitutional theory often underestimates this aspect, which invites us to pay greater attention not only to the relevant norms and principles of international law, but also to the critical role of external constituent actors in the processes through which the apportionment of the space of constitutional politics takes place.<sup>32</sup> Acknowledging this role may help us see that the link between the idea of constituent power and its supposedly popular subject is not as strong as it appears to be, and that the bearer of constituent power can in fact be plural. Besides, a mere pluralization of internal constituent powers, appropriate as it might be for multiethnic states in which the internal boundaries of sub-state national units are not contested and are not dependent upon the action of external powers (e.g. Scotland), would not do for cases, such as BiH, in which external powers were highly influential upon the development and the outcome of a dispute over the territorial ground and the political space of competing ethnicities.<sup>33</sup> In view of these latter cases, constitutional theory should revise its foundational imagery by accepting that the 'assemblage of political powers who participate in polity formation' can be 'both from within and from without of fragile, and always tentative political boundaries'.<sup>34</sup>

Another crucial point of Oklopcic's argumentation concerns the conception of democratic constituent power itself. Oklopcic recognizes that several recent theoretical approaches managed to distance themselves from the Schmittian decisionist formula of a homogenous sovereign will, and they brought to the fore a set of normative promises (inclusiveness, participation, pluralism) which are valuable for democratic struggles against oppressive regimes and/or struggles aiming at social and economic emancipation.<sup>35</sup> However, apart from the fact that these approaches tend to overlook the territorial aspect of constitutional politics, they still have to face the thorny issue

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31 'The Territorial Challenge', 28.

32 'Constitutional (Re)Vision', 86-87. In his later article on the conflict in Ukraine, Oklopcic discussed at length theories of territorial rights, and he argued that this discussion provides us with a new way to address the 'paradox of constitutionalism', taking it not as 'a genuine puzzle' but as 'a symptom of the suppression of [the societal and disciplinary] anxieties' which 'prevent us from openly debating the pace, degree, and extent of the recalibration of the aggregates of constituent attachments' ('The Conflict in Ukraine', 679).

33 See 'Constitutional (Re)Vision', 90, referring to the views of S. Tierney, "We the Peoples": Constituent Power and Constitutionalism in Plurinational States', in M. Loughlin and N. Walker (n. 30), 229-245; 'Three arenas', 222.

34 'Constitutional (Re)Vision', 82.

35 See e.g., 'Constitutional (Re)Vision', 88-89, referring to A. Kalyvas, 'Popular Sovereignty, Democracy, and the Constituent Power' *Constellations*, Vol. 12, No. 2 (2005), 223; 'Three arenas', 214 ff., referring to J. Colón-Ríos, *Weak Constitutionalism: Democratic legitimacy and the question of constituent power* (Abingdon, UK: Routledge, 2012); and to C. Douzinas, *Philosophy and Resistance in the Crisis: Greece and the Future of Europe* (Cambridge: Polity Press, 2013).

which is pointed out by the paradox of constitutionalism; that is, the fact that the invocation of the popular will by the ones who move to overthrow an allegedly undemocratic regime can be affirmed only retrospectively.<sup>36</sup> Oklopcic believes that, despite this problem,<sup>37</sup> the vocabulary of popular constituent power may still have ‘salutary political effects’, ‘catalyzing participation, political inclusion and the quick stabilization of the nascent political order, with its rhetorical potential to persuade the security apparatus to switch sides’.<sup>38</sup> Nevertheless, he notices that, even in the arenas of democratic struggles, the theoretical construction of popular constituent power is based not on a logical necessity or on an ontological explanation, but on a ‘tacit consequentialist calculus’ which upholds ‘a globally valid trade-off’ between the aforementioned benefits and the ‘perils of increased solipsistic vehemence on the part of those who claim to fight in the people’s name’.<sup>39</sup>

When it comes to constitution-making in the arenas of national struggles taking place in ethnically divided societies, the underlying prudential calculus of constitutional theory may lean towards a different conclusion as regards the use of the vocabulary of democratic constituent power. Here the invocation of a constituent ‘we the people’ is ‘part of a nationalist ideal’ whose ‘point is not inclusion, but rather self-exclusion from the larger polity and often, other-exclusion from nationalists’ own, exclusionary project’.<sup>40</sup> In this terrain, it is also crucial to consider another major component of Oklopcic’s project, the distinction between instances of constitutional politics in the core (such as Scotland, Quebec and Catalonia) and in the periphery (such as Bolivia, BiH and Ukraine) of the international political order.<sup>41</sup> Despite their differences, a common element of the former instances is that no external intervention is invited or expected, as it might be the case with the periphery instances.<sup>42</sup> Furthermore, in the core instances, the demands for territorial reconfiguration could ultimately (and ironically) be read again in terms of the classic Sieyèsian conception of ‘a political desire to live together in a polity’ on behalf of associates who share a common national vision.<sup>43</sup> Such a desire is often absent or weak, and anyway all but unanimous, in what concerns the populations that are captured within the periphery cases of national struggles. Besides, in these latter cases, the (whichever) elements of a social, economic and/or political agenda cannot be combined with—in fact, they will often be damaged by—the invocation of a constituent ‘we the people’. The latter will always be counterfeited by

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36 ‘Three arenas’, 209-210.

37 Which becomes inflammatory in the cases of ‘abusive constitutionalism’; see our references in n. 4

38 ‘Three arenas’, 212.

39 *Ibid.*

40 *Ibid.*, 218.

41 *Ibid.*, 222.

42 *Ibid.*

43 *Ibid.*, 220.

the voices of ethnic minorities, and then by other minorities within the minorities, vindicating the redemption of their own national aspirations, undermining thus the viability of the wider political, institutional and constitutional project.

To be noticed that Oklopcic rejects the prospect of constitutional patriotism as a matter of a political doctrine that would be appropriate for enhancing constitutional faith in deeply divided societies as the one in BiH.<sup>44</sup> For Oklopcic, this doctrine ‘cannot compellingly respond to the problem of arbitrary delineation of territory’,<sup>45</sup> and, in any case, its invocation ‘can serve the hegemonic purposes of any political elite that has a delineated territory as its basis of power’.<sup>46</sup> In practice, constitutional patriotism may easily mesh with civic nationalism,<sup>47</sup> and it can have inflammatory effects, since it can be abused by a state’s ethnic majority, while, on the other hand, it can also be invoked by the politicians who represent sub-state national units.<sup>48</sup> The proposed alternative, ‘unencumbered agonism’, acknowledges (but it does not celebrate, as certain versions of agonistic democracy do) ‘the inescapable feature of ongoing political struggle to constitute and re-constitute political communities’.<sup>49</sup> Being aware of the ‘larger context of geo-political struggle’, unencumbered agonism does not strike out from the outset ‘under-articulated political desires for greater autonomy, even secession’.<sup>50</sup> The willingness to engage with such desires does not afford them an entitlement, but ‘it legitimizes a radical *aspiration*, and indicates the direction in which political negotiations should be moving’.<sup>51</sup>

In fact, unencumbered agonism shares in constitutional patriotism’s desire to ‘make affect safe for democracy’. But it does so not by concocting an affective and intellectual attachment to a constitution, or by imploring citizens to be ‘reasonable’, but rather by *airing* those radical desires and subjecting them to prudential yardsticks of viability and mitigation of violence. In such a way, those radicals will not, as Honig complains in the case of constitutional patriotism, be minoritized into silence and aggression, but will be given a genuine opportunity to ‘discharge’ their resentment.<sup>52</sup>

In any case, coupled or not by constitutional patriotism, the conception of

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44 See ‘The Territorial Challenge’.

45 *Ibid.*, 24.

46 *Ibid.*, 25.

47 *Ibid.*, 41.

48 *Ibid.*, 42-43.

49 *Ibid.*, 44.

50 *Ibid.*, 46.

51 *Ibid.*, 48.

52 *Ibid.* (omitting references and clarifying comments in the footnotes). In his later article on the conflict in Ukraine, Oklopcic made the case for ‘a constitutional duty to negotiate federalization in a good faith’ (‘The Conflict in Ukraine’, 681-684); cf. Z. Oklopcic, ‘The Migrating Spirit of the Secession Reference in Southeastern Europe’, *Canadian Journal of Law and Jurisprudence* Vol. 24, No. 2 (2011), 347.

democratic constituent power is prone to bracket the territorial aspects of constitution-making, and in doing so, it underestimates the role of external powers and the porous nature of the boundaries which separate them from internal constituent powers. Oklopcic's call for a 'fine-tuning of the radars of constitutional theory'<sup>53</sup> with this important feature of polity-formation presupposes a reversal in our usual way of constitutional theorizing. Instead of first being committed to particular 'normative desiderata' (here the ones that are inherent in the conception of democratic constituent power; i.e., inclusiveness, solidarity, participation, self-legislation etc.), and then attempting to graft these desiderata onto our 'foundational imagery' (here the one which concerns constitution-making), we could 'redescrib[e] the imagery first, and worr[y] about what happens to normative desiderata, later'.<sup>54</sup>

As Oklopcic's insistence on the significance of the vocabulary of popular constituent power in the context of democratic struggles shows, this reversal does not amount to abandoning our normative conceptions to the mercy of historical contingencies. Nor is it simply the case, on the other hand, that we should distance ourselves 'from the quasi-universal, essentially Western preoccupation with the idea of the constituent power of the people'.<sup>55</sup> The contextualizing move is an invitation for a '*provincialized* constitutional theory'; i.e., one which will address the experiences of those 'who have been betrayed by the concept' of constituent power, 'either because of their position within the global power matrix', or because of their encounter with 'constituent power's unsavoury "side effects"'.<sup>56</sup>

Oklopcic's call for a provincialized constitutional theory does not concern only the use of the vocabulary of democratic constituent power. In another article,<sup>57</sup> Oklopcic promoted the idea of a provincialization of constitutional pluralism, a theoretical approach which was originally developed for the case of EU and which could also become pertinent for the zones of nationalist conflicts in the (semi-)periphery of the international order, albeit not without a series of important adaptations. First, Oklopcic's provincialised version of constitutional pluralism does not take for granted loyalty to its existing federal incarnations, and it embraces the 'pluralism of radically divergent or disruptive constitutional visions – nationalist or other – as an ineradicable and legitimate feature of constitutional politics'; thus, 'provincialised constitutional pluralism must live with an ever-present possibility of "federal treachery"'.<sup>58</sup> Second, provincialised constitutional pluralism must allow for the recursive proliferation not

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53 'Constitutional (Re)Vision', 97.

54 'Constitutional (Re)Vision', 93.

55 'Three arenas', 233.

56 'Three arenas', 232-233.

57 'Provincialising'.

58 *Ibid.*, 350.

only of the first-order national aspirations which challenge the existing constitutional arrangement, but also of second- and even third-order national aspirations; i.e., ones which are nested within the political communities that raise first-order aspirations—thus, “[t]hose who claim that a current constitutional arrangement is just a political marriage of convenience will think twice before leaving if they know that would have to accede to a similar arrangement in “their” polity”.<sup>59</sup> Third, the provincialised constitutional pluralism points towards a ‘self-ironic ethos’ on the part of those who raise radical demands; that is, it calls them to see ‘the relative and tentative quality of their own categorical claim to ultimate political authority’.<sup>60</sup> Last but not least, there is also a call addressed to the external constituent powers which became part of the relevant political landscape: All pluralist demands must find their way into the political agendas and the decision-making processes of these external powers—something which in the case of BiH, for example, ‘would require the participation of Bosniaks, Serbs and Croats in the selection of EU representatives, in which case the representatives of the constituent nations would enjoy a veto on the appointment of the High Representative’.<sup>61</sup>

But what about the theoretical status of the possibility of having external co-constituent powers intervening in the first place? According to Oklopcic, adaptation to this strong possibility nowadays does not amount to postulating ‘an ontological condition of people-formation. We *can* imagine an act of self-constitution à la Sieyès, where symmetrical desires culminate in a new polity, *without* external constituent powers’.<sup>62</sup> However, this could be the case mainly with ‘an isolated, small political community’, and if constitutional theory wishes to address ‘present-day, territorial political communities’ and ‘the phenomena that bring about their profound reconstitution such as external military interventions, economic impositions, prolonged constitutional presence in the form of “international territorial administrations”’, then it should not underestimate the possibility of external co-constituent powers.<sup>63</sup> Again it seems that it is more a matter of a prudential re-configuration of our foundational normative conceptions, and not a quest for a radical paradigm change or, on the other hand, an issue of a mere application of traditional normative conceptions to exceptional empirical realities.

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59 Ibid., 356.

60 Ibid., 358.

61 Ibid., 361.

62 ‘Three arenas’, 223. The same has been observed by M. Tushnet, ‘Democratic founding: We the people and the others—A reply to Hans Agn , *International Journal of Constitutional Law* Vol. 10, No. 3 (2012), 862, 863. But see Oklopcic, ‘The Conflict in Ukraine’, 685-686, where he takes the involvement of external constituent powers as ‘ontically inevitable’, not clarifying whether this observation is restricted to conflict settings with a geopolitical interest or it is more generally valid.

63 ‘Three arenas’, 223. In fact, Oklopcic believes that, ‘[g]iven the power differentials between great powers and the often-weaker polities in the process of reconstitution’, even non-intervention ‘should be seen as a form of constituent commission’ (ibid. 223-224).

## Legitimate and Illegitimate Internationalized *Pouvoir Constituant* – But for Whom?

We should take seriously Oklopcic's contextualizing move and the concomitant call for a reversal in the modes of our constitutional theorizing. Nevertheless, in doing so, we may notice that the terrains of constitution-making in divided and conflict-prone societies contain some other elements, which may invite back the conception of democratic constituent power, appropriately contextualized, but also globally appreciated. One of these elements is the aspiration to avoid external and/or internal co-constituent powers imposing a constitution.<sup>64</sup> To argue for the inclusion of the voices of the pertinent peoples in the agendas of external powers which have to do with the ongoing constitutional operation of the relevant polities is, indeed, very important. However, before this, one might also focus on the constitution-making process itself, and he/she might raise concerns related with the legitimacy of external intervention already at this stage.

International law scholars who are particularly interested in the involvement of external powers in polity-formation have used the term 'internationalized *pouvoir constituant*' to indicate instances in which 'international actors were not only instrumental in bringing about a new constitution from a factual point of view but in which international law played an important role in governing the process of constitution-making'.<sup>65</sup> Such instances are classified into three sub-categories, according to the degree of external influence.<sup>66</sup> The paradigmatic case of *total influence* is that of BiH, in which the presence of the constituent people(s) in the constitution-making process was at best nominal.<sup>67</sup> On the other hand, we may speak of *marginal influence* when domestic actors seek voluntarily the support of foreign or international agents, keeping nonetheless control over the CM process, so that 'the national *pouvoir constituant* [...] is not restrained'—the constitution-making processes in South-Africa and in post-1989 East and Central Europe could be relevant examples here.<sup>68</sup> The intermediate sub-category of *partial influence* comprises cases in which the constitution-making process 'is to a certain degree directed by external forces in a procedural and/or a substantial way, while the ultimate power of drafting and adopting remains in domestic hands',

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64 Oklopcic had recognized the centrality of this problem already in his review of M. Loughlin and N. Walker (n.26), *International Journal of Constitutional Law* Vol. 6, No. 2 (2008), 358, 359.

65 Dann and Al-Ali (n.3) 424. See also M. Riegner, 'The Two Faces of Internationalized *pouvoir constituant*: Independence and Constitution-Making Under External Influence in Kosovo', *Goettingen Journal of International Law* Vol. 2, No. 3 (2010), 1035, 1038-1040 (distinguishing further between an internal and an external manifestation of 'internationalized *pouvoir constituant*').

66 See Dann and Al-Ali (n.3) 428-430.

67 *Ibid.*, 428-429.

68 *Ibid.*, 429-430.

so that ‘control over the constitutional process is shared’<sup>69</sup> – this category includes constitution-making instances as different as East Timor, Iraq, Soudan,<sup>70</sup> and Kosovo.<sup>71</sup>

Facing such variation of external influence upon the constitution-making process, the same international law scholars proposed a series of normative standards to be taken as (hopefully legalized) indicators of legitimate internationalized *pouvoir constituant*. In particular, Riegner, following Dann and Al-Ali,<sup>72</sup> suggested that external powers should be ‘as unobtrusive as possible’; that their ‘involvement should be transparent and geared towards specific aims, which are legitimate in themselves and do not seek to impose the self-interest of the external actor’; that such aims should include avoidance of ‘disproportional factional influence on the process’ and ‘insistence on inclusiveness’; and that ‘a limited, disinterested and clearly focused international involvement is more likely to occur if and when external actors are multi-lateral in nature, because they tend to be less driven by self-interest than individual states’.<sup>73</sup> Similar standards have been suggested by other scholars,<sup>74</sup> by the United Nations,<sup>75</sup> and by other international organizations involved in this field.<sup>76</sup>

These normative standards and the principles undergirding them (popular sovereignty, self-determination)<sup>77</sup> imply the conception of democratic constituent power. Its invocation is not meant here to preclude the intervention of external powers as such, but it frames the demand for self-restraint as regards the forms, the aims, the intensity and the extent of the action of these powers. This demand corresponds to the legitimate aspiration to avoid external and/or internal imposition of the constitution, if not to have a more broadly participatory constitution-making process. This aspiration is generally significant, not only in terms of international law,<sup>78</sup> but also because some

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69 Ibid.. 430.

70 Ibid.

71 See Riegner (n.66).

72 See Dann and Al-Ali (n.3) 460-461.

73 Riegner (n.66) 1060-1061.

74 See e.g., J. Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism* (Cambridge University Press, 2012), 257-258.

75 See Guidance Note of the Secretary-General: United Nations Assistance to Constitution-making Processes, April 2009, available at [https://www.un.org/ruleoflaw/files/Guidance\\_Note\\_United\\_Nations\\_Assistance\\_to\\_Constitution-making\\_Processes\\_FINAL.pdf](https://www.un.org/ruleoflaw/files/Guidance_Note_United_Nations_Assistance_to_Constitution-making_Processes_FINAL.pdf).

76 See e.g., International Institute for Democracy and Electoral Assistance, *Constitution building after conflict: External support to a sovereign process*, Policy Paper, May 2011, available at <http://www.idea.int/sites/default/files/publications/constitution-building-after-conflict.pdf>; Commonwealth Human Rights Initiative, *Promoting a Culture of Constitutionalism and Democracy in Commonwealth Africa: Recommendations to Commonwealth Heads of Government*, 1999, available at [http://www.humanrightsinitiative.org/publications/const/constitutionalism\\_booklet\\_1999.pdf](http://www.humanrightsinitiative.org/publications/const/constitutionalism_booklet_1999.pdf).

77 See Riegner (n.66), 1060; Cohen (n.75) 253-254.

78 See V. Hart, ‘Constitution Making and the Right to Take Part in a Public Affair’, in *Framing the State*, 20-54; T. Franck and A. Thiruvengadam, ‘Norms of International Law Relating to the Constitution-Making Process’, in *Framing the State* 3-19 (discussing the emergence of an international law

sort of local ownership and self-enforcement of the new constitutional settlement would be necessary for the latter's endurance in the long run.<sup>79</sup> I cannot expand upon the general parameters of this issue here.<sup>80</sup> Nor can I discuss the issue of whether and how the conflict-resolution aims and strategies of external intervention in the terrains of internationalized *pouvoir constituant* can be made compatible with the vindication of – at least some elements – democratic autonomy in the relevant constitution-making process, if the prospect of imposition is to be avoided. I take as granted that a version of Andrew Arato's two-stage and post-sovereign constitution-making process<sup>81</sup> would do for this purpose.<sup>82</sup>

What interests me here is to face a series of more fundamental challenges which persist in view of Oklopcic's analysis. Why are delimiting external intervention and preserving elements of democratic autonomy in the constitution-making process at all important when, in the difficult cases of internationalized *pouvoir constituant*, the principal interest of all constituent powers, internal as well as external, would naturally focus on the territorial moment and not on the constitutional-institutional moment of polity-(re)formation? And for whom might avoidance of imposition of the constitution be significant, if relevant at all? In conflict settings as the ones in BiH, Syria or Ukraine, any position regarding the legitimacy of this or the other source or form of external intervention (abstention from any intervention included) would automatically be translated into taking issue with this or the other side of the 'inter-national' contestation—the term 'inter-national' could refer here both to the conflicting ethnicities on the ground and to the competition of external powers in

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requirement that constitution-making be participatory). The requirement to avoid the imposition of a constitution finds additional support to the law of belligerent occupation, which does not allow the enforcement of permanent changes in the fundamental institutions of occupied states—this 'conservationist' principle is applicable even in our epoch of 'nation-building' operations; see on this Cohen, *Globalization and Sovereignty*, 222-265.

- 79 See Preuss 'Perspectives'; Z. Elkins, T. Ginsburg and J. Melton, 'Baghdad, Tokyo, Kabul...: Constitution-Making in Occupied States', *William and Mary Law Review* Vol. 49 (2008), 1139; N. Feldman, 'Imposed Constitutionalism', *Connecticut Law Review* Vol. 37 (2005), 857.
- 80 The literature on the impact of the constitution-making process upon its outcomes has become vast. For an earlier comprehensive account see T. Ginsburg, Z. Elkins and J. Blount, 'Does the Process of Constitution-Making Matter?', *Annual Review of Law and Social Science* Vol. 5 (2009), 201.
- 81 See Arato, *Post Sovereign Constitution Making*. According to this model, at a first stage a Round Table or some other forum of consensus-based negotiations generates an 'interim constitution', which regulates the rest of the constitution-making process, preferably under the supervision of a constitutional court. At the second stage, an elected assembly proceeds into the drafting of the final constitution through a process that gives large opportunities for democratic deliberation and citizen participation. The normative-theoretical core of Arato's project is to promote a pluralistic and constitutionalist approach to democratic legitimacy in constitution-making by not allowing any single institutional agent to raise claims to the embodiment of popular will.
- 82 See in this respect the observations of L. Miller, 'Designing Constitution-Making Processes: Lessons from the Past, Questions for the Future', in *Framing the State*, 601-665, 643.

the geopolitical theatre of the conflict.<sup>83</sup> In these circumstances, the invocation of democratic constituent power would, in the best case, be irrelevant and, in the worst case, damaging, due to the – potentially exclusionary and in any case inflammatory – effects of its nationalist version.

Besides, even if we accept that the appeal to democratic constituent power is appropriate to frame the demand for avoidance of imposition, we should also notice that the agents of the new constitutional order who perceive themselves as the losers of the territorial settlement will most probably exploit this appeal in order to lament the external powers intervening at the ‘founding moment’. Such lamentation will undermine faith in the new constitutional order, and it may feed the desire for a new settlement, either one leading to secession or one based on more centralized and thus oppressive institutional-constitutional arrangements.

Why should we not then dispense altogether with the conception of democratic constituent power in what concerns ethnically divided societies that have undergone some form of internationalized *pouvoir constituant*? In the course of the polity-formation process, why should we not focus on fulfilling the aforementioned standards taken as such and not as ingredients of a wider normative project which resurrects the conception of democratic constituent power in an unfavourable terrain? As a matter of the ongoing constitutional operation of the new polity, why should we not steer our efforts into ‘the hard work of political negotiations and strategizing that is necessary to achieve a common platform between the goals of democratic, social and national emancipation’<sup>84</sup> without risking to undermine the stability of the new constitutional order by invoking the ‘a-constituent’ or ‘multi-constituent’ traumatizing experiences of the past? Does not constitutional-theoretical prudence tell as much?

### **Some Thoughts on the Conception of Democratic Constituent Power in the Context of Divided and Conflict-Prone Societies**

Despite the analytical priority of the territorial moment in the discussion of the paradox of constitutionalism, in practice it would be very difficult to sever it from the constitutional-institutional moment of polity-formation. This is so, at least in the following sense: Any gains or losses concerning the territorial aspirations of the competing parties will entail – or at least, they will be connected by some parties with – stronger or looser consociational arrangements in the institutional order(s) that will be the outcome of the constitution-making process. This can apply even in the case of secession, provided (as is often the case) that ethnic minorities will remain

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83 See also in this respect Oklopcic, ‘Populus Interruptus’, 692-693 (pointing out the role of external powers in ‘the distribution of moral praise and opprobrium’).

84 Oklopcic, ‘Three arenas’, 222.

captured within the territory of the other state and that both states will preserve their interest for these minorities. Besides, even if we could structurally separate the territorial moment from the constitutional-institutional moment, we should accept that the former must somehow hint to the necessary self-enforcement dynamics of the latter. The voices of first-interested parties over the territorial dispute must at least be *tabled* and *heard*, notwithstanding the fact that the territorial negotiations could be driven by purposes other than *following* them – most importantly, peacekeeping and conflict-resolution purposes, which under specific circumstances may contradict certain or even all first-interested voices. On the other hand, even if we accept that the constitutional-institutional moment should generally be geared by the views and by the interests of the residents of the new polity, the organizational or other contribution of external powers to the internal constitution-making process will most probably remain indispensable. Without this contribution, a failure of the institutional negotiations would always threaten to un-make any progress in the territorial settlement.

Given the practical inter-connectedness of the territorial with the constitutional-institutional moment of polity-formation, a possible invocation of democratic constituent power by external powers themselves (as ironic as this may sound) could be a reminder that the negotiating table exists primarily – though not exclusively – for the sake of the first-interested parties; that it must include all relevant interests and voices; and that the latter, as agonistic, vital and non-dialogical as they might be, can ultimately be honoured either by sharing in a single – though by necessity pluralistic – constitutional project or by celebrating separatist passions in the form of warring nationalisms. This either/or conditionality leaves open all possibilities, as it should be the case with any constituent project, but it in-forms these possibilities with their rightful meaning at least in the eyes of the international community, if the ears of the (leaders of the) competing national communities remain closed. As regards the interests of the international community, rightfully *and* realistically conceived, the invocation of democratic constituent power highlights the fact that Dayton-style polity-formation processes may only artificially keep all the relevant parties on the table of negotiations, and that the latter will anyway have to produce a sustainable continuum of institutional practices and achievements before the eyes of the first-interested parties, if the polity-formation project is to have any real-world constitutional effect.<sup>85</sup>

Of course, the appeal of external agents to democratic constituent power under such circumstances could be taken as an expression of organized hypocrisy. On the other hand, a mere reference to a normatively neutral constitution-making process,

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85 See in this respect the comparison of the BiH and the Kosovo cases in C. Grewe / M. Riegner, 'Internationalized Constitutionalism in Ethnically Divided Societies: Bosnia-Herzegovina and Kosovo Compared', in A. von Bogdany and R. Wolfrum (eds), *Max Planck Yearbook of United Nations Law* Vol. 15 (2011), 1-64, 11-16.

taking place somewhere in this chaotic and value-indifferent world, could also sound cynical towards the global democratic need to avoid blatant injustices in the form of an imposed constitution. To take this need seriously means that the constitution-making process must be carefully designed so as to be really inclusive, representative and somehow participatory, notwithstanding the risks that such insistence might entail for the peace-keeping purposes of the polity-formation project as a whole. This notwithstanding conditionality should be voiced in a straightforward manner, and it should be translated into specific international law responsibilities to be fairly distributed among the internal and the external actors of internationalized *pouvoir constituant*.

Let us now take up the stance of the participant in the new constitutional order. Certainly a clean-slate approach as regards the founding moment may facilitate a forward-looking learning process which will be relieved of the nationalist burdens of the past and which will focus on rendering the new constitutional settlement efficient or, at least, enduring in historical time. But how realistic would be to expect that this approach will take hold? As citizens of homogenous societies do, the citizens of divided societies will also be afflicted by the ‘authority-authorship syndrome’, as Michelman termed it, i.e., the publicly influential tendency to link the authority of the constitution with its original popular endorsement.<sup>86</sup> If this was just a problem of normative-theoretical discourse, one might dispense with the authority-authorship syndrome by constructing ‘presentist’ accounts of constitutional legitimacy.<sup>87</sup> However, the syndrome will most probably persist in reality,<sup>88</sup> and citizens of divided societies that have undergone some form of internationalized *pouvoir constituant* are even more prone to be affected by its allure, insofar as the founding moment is for them historically close and present in its immediate consequences, while tainted by the involvement of external actors. On the other hand, the authority-authorship syndrome might have particularly grave repercussions here, because the widely perceived absence or compromised character of democratic constituent power at the founding moment will undermine faith in the new constitutional order.

Declaring that the conception of democratic constituent power is here redundant would be one way to deal with the authority-authorship syndrome, and a provincialized constitutional theory might well consider this possibility. However, every involvement with a syndrome bears the risk of repression, even more so

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86 F. Michelman, ‘Constitutional Authorship’, in L. Alexander (ed.), *Constitutionalism: Philosophical Foundations* (Cambridge University Press, 1998) 64-98, 67.

87 See e.g. C. Zurn, ‘The Logic of Legitimacy: Bootstrapping Paradoxes of Constitutional Democracy’, *Legal Theory*, Vol. 16 (2010), 191.

88 Michelman himself accepted that ‘referring legitimacy to authorship’ is unavoidable, although ‘we finally have no rationally defensible reason to do so’ (F. Michelman, ‘Reply to Ming-Sung Kuo’ *International Journal of Constitutional Law*, Vol. 7, No. 4 (2009), 715, 718).

when the syndrome concerns issues of paramount symbolical importance, as the issue of the – autochthonous or not, autonomous or heteronomous – origins of a constitutional polity is. The attempt to contextualize our foundational imagery by putting aside the conception of democratic constituent power may generate the suspicion of exceptionalism from global normative standards, and it may nurture parochialism as a matter of damaging ideological tendencies which anyway plague the societal and political orders of the (semi-)periphery. The suspicion of exceptionalism and the prospect of parochialism cannot be eliminated merely by means of an appeal to the benefits of a forward-looking deliberative constitutional enterprise that will make the first-interested parties reasonable enough to forget or simply not to repeat the mistakes of the past—Oklopic’s confrontation with constitutional patriotism is right in this respect, as in many others. Or to put it differently: If we are to see such a forward-looking constitutional enterprise materialized, not being burdened by the suspicion of exceptionalism, then we should better be prepared for a long, painful, potentially therapeutic but also possibly disruptive encounter with the reasons and with the historical realities which explain the failures of democratic constituent power at the founding moment. Only through such an encounter the participants may then become able to trace and to redeem the positive elements that might sustain the development of a reconstitutive dialogical enterprise in the future.<sup>89</sup> And this enterprise should be channeled through the materialization of the beneficial normative promises (inclusiveness, equality, mutuality, discussion, disagreement etc.) that inhere in the conception of democratic constituent power. An appropriate contextualization of the latter would here include the recognition of the existence of a multiplicity of constituent peoples, which should have an equal share in the process, and a call for focusing on the (consociational and ‘post-sovereign’) attributes of the latter instead of making appeals to mythical, past or future, popular subjects.

Admittedly, the difficulties in making such a learning process workable are tremendous, and the vocabulary of a homogenous constituent ‘we’ may always distort it. In any case, in divided societies that have undergone some form of internationalized *pouvoir constituant*, the tradition-building projection of democratic constituent power (what Habermas had once termed as recognition that the participants in a constitutional order ‘are “in the same boat” as their forbears’)<sup>90</sup> must have an intensely forward-looking character. However, the relevant learning process

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89 For two accounts of the dialogical or deliberative perspective in divided societies, see J. Dryzek, ‘Deliberative Democracy in Divided Societies: Alternatives to Agonism and Analgesia’, *Political Theory* Vol. 33, No. 2 (2005), 218; E. Tupaz, ‘A Dialogical-Republican Revival: Respect-Worthy Constitutionalism in Post-Conflict Northern Ireland, South Africa, and Southern Philippines’, *The Wayne Law Review* (2008), 1295.

90 J. Habermas, ‘Constitutional Democracy: A Paradoxical Union of Contradictory Principles’, *Political Theory* Vol. 29 No. 6 (2001), 766, 774-775.

cannot help preserving a dialectical relationship with the failures of the historical past. The conception of democratic constituent power can serve here, first, as a normative counterpoint in order to discern the procedural-institutional aspects of those failures. The same conception can become a signal of ‘a renewed awareness of being “stuck together” by the realistic impossibility to extricate oneself from the common constitutional framework’.<sup>91</sup> Of course, the ‘either/or’ conditionality, which is implicit in such awareness, would generate positive effects only if the formerly conflicting parties finally decide to assume the risks, the compromises and the synergies that are indispensable for constitutional co-existence under the terms of a provincialised constitutional pluralism. Such decision is foundational, but contrary to the Schmittian perception of constituent power, it is also by definition pluralistic, in the sense that it necessarily presupposes the multiplicity and the heterogeneity of constituent actors, ultimately the recognition of (inter-)national ‘otherness’ as a formative element of a comprehensive constituent will that is articulated through democratic processes and not through momentary and largely mythical and oppressive popular ‘acclamations’.

On the other hand, as we saw, Oklopcic’s approach to provincialised constitutional pluralism and his preference for unencumbered agonism over constitutional patriotism repel the prospect of repressing the airing of radical political visions, even of ones which revitalize the nationalist and separatist passions of the past, in the context of political struggles which have a (re-)constitutive character. Why should we then be afraid to activate the vocabulary of democratic constituent power, despite the fact that it can be abused to the same effect? To be sure, in contrast to agonism and to pluralism, the idea of constituent power may re-invigorate the oppressive version of a homogenous ‘we the people’. However, why should we not take the pains to openly juxtapose this version with the pluralistic and future-oriented version of a multiplicity of constituent peoples, antagonizing each other on an equal footing so as to reach – or fail to reach – a constitutional consensus? The promotion of the case for a pluralistic constitutional identity and the development of a self-ironic ethos, as Oklopcic connects it with a self-reflective stance with regard to radical-secessionist visions, are anyway indispensable for the performance of the institutions of divided and conflict-prone societies. Why would it then be unbearably imprudent to project this identity and this ethos to the issue of (re-)constituting these institutions through an inclusive, representative and participatory, here appropriately consociational but still democratic, constitution-making process? If the constituted powers of a multinational polity can be informed by – or can be finally dissolved through – the processes and the contingencies of agonistic constitutional pluralism, why can not the same approach be tested with regard to the conception of democratic constituent power? And if we

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91 Oklopcic, ‘The Territorial Challenge’, 48.

are, in general, ready to adopt a process-oriented and pluralistic account of the latter, abandoning once and for all the Schmittian decisionist formula of a unified sovereign-constituent will, then why could this account not be further developed, explained and promoted so as to accommodate *both* the consociational pluralism of internal constituent powers *and* the – under specific conditions inescapable, but by normative necessity restrained – involvement of external constituent powers in the context of internationalized *pouvoir constituant*?

In this context, one should certainly be ready to soften the case for constitutional autochthony. But this is not tantamount to abandoning the wager of democratic autonomy. At least this is so if we are still normatively committed to avoiding the prospect of imposed constitutions.

## Conclusions

The involvement of external powers in certain constitution-making processes is an inescapable feature of the post-Cold War international order. Traditional, principled distinctions, as the one between imposed constitutions and constitutions that have been adopted through an autochthonous and democratically autonomous constitution-making process, may be too simplistic for the theorization of the complex realities and of the (geo-)political necessities that arise from the historical episodes of internationalized *pouvoir constituant*. However, normative principles still matter. In what concerns the constitution-making process, the principles of self-determination and democratic participation can yield a series of normative requirements (citizen participation, inclusiveness and pluralism in representation etc.),<sup>92</sup> which as a whole point towards the conception of democratic constituent power. The latter frames the demand for self-restraint as regards the forms, the aims and the intensity of external intervention and also the need for a carefully designed constitution-making process which will combine the conflict-resolution and peace-keeping purposes with procedural elements of democratic (and here by necessity consociational) autonomy, so as to fend off the prospect of an external and/or internal imposition of the constitution. Besides, even in cases in which imposition was not avoided at the ‘founding moment’, the projection of democratic constituent power still indicates the – by historical and democratic fiat always existing, but also tentative and fragile – possibility of a re-foundational new beginning, which should this time be based on the agonistic co-

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92 See Hart ‘Constitution Making’; Franck and Thiruvengadam ‘Norms of International Law’. For the normative-legal combination of self-determination with democratic participation rights in the context of constitution-making, see UN Human Rights Committee, CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, 12 July 1996, CCPR/C/21/Rev.1/Add.7, paras 2 and 6.

operation of the formerly conflicting parties. More generally, in the context of divided societies that have undergone some form of internationalized *pouvoir constituant*, as in all other societies, the conception of democratic constituent power signifies that, even if we do not all share the same (historical and territorial) boat, we share the sea, and it is in our global navigation interests to combat instances of undemocratic piracy, be it in the form of an imposed constitution and/or in the form of a consequent constitutional paralysis.

Constitutional imposition may come in many forms. One of them can be the ‘unamendability’ of past mistakes. Another, more paradoxically, can be ‘solutions’ of long-standing disputes, whose consequences may not be controlled so as to be ‘amended’. These solutions may even have been adopted by the relevant peoples, for example, through a referendum, on account of necessities or vain hopes, no matter what. But they may also be prone, if not destined, to lead to a paralysis of the ‘resolved’ state, and thus to a definitive paralysis of the possibility for a (co-)existence of the peoples involved. This may perhaps lead to a new round of paternalistic solutions imposed this time on them, for them, by necessity alone.

The ‘either/or’ conditionality of any constituent project does not necessarily amount to a blackmail in all cases. It may also be carefully used as a driving force towards brave decisions, based on some form of a prudential calculus. Virtues, prudence and decisiveness to overcome what can be forgiven, and to remember what should be remembered, matter for the people as well as for their leaders. No one may guarantee the success of a solution. Yet many can forecast, sometimes on safe grounds based on solid past experience, a failure. As long as the ‘negativists’ do not contribute to that failure – Cyprus seems not to have learnt much in this regard, if one considers the selectivity of the memories of the people as well as of their leaders – the prudential calculus will this time have function within the new constitutional order. Sometimes prudence will not be enough. It may need to be supported by narratives, and when those are missing, by inspiring values. Democratic constituent power *may*, upon prudential calculations, be taken as one of such values. Especially when it never made its appearance in a place; and especially when the lamentation for its absence in the past does not obstruct its projection for the future.

Democratic constituent power is not so much a matter of founding moments, as it is an ongoing political project and projection. In the – not so rare but also not so widespread – ‘success’ stories in this regard, there is no reason for one not to celebrate and invest in this power, instead of instrumentalizing or disparaging it.

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