

CONSTITUENT POWER AND STRUGGLES FOR REPRESENTATION IN A GLOBAL CONTEXT

A COMMENT ON HANS LINDAHL'S *AUTHORITY AND THE GLOBALISATION OF INCLUSION AND EX- CLUSION*

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ABSTRACT

In this brief comment, I deal with the role of constituent power in Hans Lindahl's considerations on struggles for representation in a global context. In his recent book "Authority and the Globalisation of Inclusion and Exclusion", Lindahl brings constituent power into play as a potential way of practising restrained collective self-assertion in conflicts over the boundaries of legal orders. I formulate three questions regarding this idea, which concern the difficulty of identifying subjects of constituent power, the issue of who can legitimately articulate and exercise constituent power, and the relation between constituent power and restrained collective self-assertion.

KEYWORDS

Constituent power, boundaries, inclusion, exclusion, legitimacy.

In this brief comment, I engage with the final chapter of Hans Lindahl's book "Authority and the Globalisation of Inclusion and Exclusion", which is entitled "Struggles for Representation in a Global Context". I will first reconstruct the main theses and then formulate a few questions, which concern the difficulty of identifying subjects of constituent power, the issue of who can legitimately articulate and exercise constituent power, and the relation between constituent power and restrained collective self-assertion.

On the very first page of the book, Lindahl raises the question of whether it is possible to develop a normative perspective on the formation of global legal orders - and the definition of their limits - that avoids both naïve universalism and questionable relativism. In his words: "Is an authoritative politics of boundaries possible that neither postulates the possibility of realising an all-inclusive global legal order

nor accepts resignation or political paralysis in the face of the globalisation of inclusion and exclusion?” (p. 1). The answer that Lindahl develops in the course of the book is, in short: yes, if we engage in *restrained collective self-assertion* – a notion that rests on two assumptions. First, a global hierarchy of public authority, such as a cosmopolitan democracy, is unlikely to ever be established or perhaps even impossible. This means that the problem of inclusion and exclusion arises in the context of multiple global legal orders that are subject to contestation and need to negotiate conflicts horizontally. Second, the boundaries of these global legal orders are de facto determined and re-determined through political struggles for recognition, which means that if we are interested in legitimacy, we need to ask if and how such processes could take a normatively acceptable form.

As I just mentioned, the solution proposed by Lindahl is restrained collective self-assertion. The idea is that legal orders should respond to contestations of their boundaries by, first, incorporating the demands of opposing parties as far as it is possible without giving up on their self-understanding and, second, where this reaches its limits, by tolerating difference – again, as far as possible. The purpose of the book’s final chapter is to consider different institutional solutions for putting this idea into practice. In a first step, Lindahl discusses techniques and practices that serve to negotiate conflicts between legal orders, such as the doctrine of the national margin of appreciation used by the European Court of Human Rights or the principle of complementarity invoked by the International Criminal Court. The analysis leads to the conclusion that these and other mechanisms indeed enable restrained collective self-assertion, but also support the claim formulated in previous chapters that the recognition that can be achieved in conflicts between competing identities is ambiguous because there always remains a tension between unity and difference. Moreover, the considered techniques and practices turn out to have piecemeal character. They address very specific problems and thus do not offer generalisable solutions. In particular, they do not provide avenues for non-state actors such as alter-globalisation movements to effectively articulate their claims for recognition.

Therefore, in a second step, Lindahl turns to the idea of global administrative law, which aims at a comprehensive institutional framework that regulates the decision-making of global governance bodies and increases their accountability – by enhancing transparency, for example. Some models of global administrative law also seek to establish deliberative settings that enable rule-subjected actors to participate in processes of standard setting. Again, Lindahl’s assessment is that while such proposals are in line with the idea of restrained collective self-assertion, their potential scope of application is rather limited. The problem is that while global administrative law offers a pathway to higher public scrutiny and possibilities for affected parties to make their voices heard, it does so only with regard to already existing, highly specialised legal orders. The “point of joint action” (p. 54) of these institutions is defined so narrowly that they simply lack the capacity to respond to the political

struggles for recognition directed at them in a satisfactory manner. An example that may illustrate this problem are demands for global distributive justice addressed at the World Trade Organization (WTO). The WTO is not in a position to process such claims in a meaningful way because its mandate is limited to the task of facilitating trade. Global administrative law cannot change the fact that the WTO lacks the necessary competences to engage in social policy.

Against this background, Lindahl in a third step brings a category into play that is associated with ideas of radical institutional change – namely, constituent power. This is the part on which my comments and questions focus – not simply because constituent power is what interests me most but because it emerges as the most promising approach in the chapter. For Lindahl, a constitution is “the master rule governing processes of inclusion in and exclusion from a legal order” (p. 394). In other words, constitutions establish procedures and institutions that determine the point and the boundaries of a particular enterprise of joint action. Since constituent power describes the capacity as well as the legitimate entitlement to bring about constitutions, it appears as a plausible starting point for a normative perspective on the formation of global legal orders. Perhaps we can solve the puzzle, so I understand Lindahl’s initial thought here, if we put the relevant decisions of inclusion and exclusion in the hands of an adequately composed constituent power. Unsurprisingly, it turns out that things are not that easy. One problem seems to be that unless there already is a constitution, there is no collective to which constituent power could be ascribed. Here, we encounter what Lindahl calls the “paradox of constituent power” (p. 401). In a nutshell, the paradox is that an exercise of constituent power requires us to pretend that we can presuppose what we are actually in the process of bringing about.

According to Lindahl, in order to establish a constitution in the name of ‘We, the people’, one has to speak on behalf of a collective that can only be the result of the founding act. Constituent power only emerges – or can be assessed as successful – if the addressees of the representative claim made by the *de facto* founders retrospectively identify themselves as the source of the constitution. In other words, an exercise of constituent power does not simply create a new structure of public authority but is an act of inclusion and exclusion because it defines who belongs to a political community and who does not – even though in doing so the protagonists pretend that the question of membership was settled all along. For this reason, Lindahl argues that constituent power is essentially a narrative achievement: “No constituent power without the power of narrative representation” (p. 404). This also implies, according to Lindahl, that constituent power involves a form of domination because the individuation of a number of people into a particular collective is necessarily an operation of unification and marginalisation that some impose on others – both on those who are defined as members and those who are classified as non-

members. Nevertheless, the fact that subjects of constituent power are narrative constructions opens up the possibility of detaching the category from its classical connection to the state. ‘We, the people’ do not have to be a nation.

What Lindahl then proposes is that we approach the globalisation of inclusion and exclusion through the lens of constituent power – and he discusses how the category needs to be reformulated for this purpose. This is where I have three questions:

1. Does the paradox of constituent power really arise in the context of global legal orders?

It seems to me that the paradox, or Lindahl’s account of it, relies on the hypothetical notion of a non-constituted initial situation, which finds no equivalent in today’s world – especially not at the supra-state level where we are, by definition, dealing with forms of constitution making that presuppose constituted entities, namely the states involved. Lindahl himself notes that constituent power beyond the state is “a *dependent* sense of constituent power” (p. 413, emphasis in original) because it relies on the capacity of the relevant states to enforce global legal orders – if necessary, by invoking their means of physical force. I agree with this assessment, but think that it should give rise to doubts whether we actually run into a paradox of constituent power at the supra-state level. In the context of a ‘levelling up’ of constituent power (Patberg 2017) we know in advance which states are involved and who their citizens are, which means that, in principle, it should be possible to structure such processes in a democratically legitimate manner. Since there already is an institutional context, there is no need for an extra-legal founding act associated with all kinds of unknowns to which we are perhaps unable to provide a non-paradoxical answer. Of course, difficult questions still arise, such as in what role citizens should act. In the European Union, for example, the subject of constituent power could be composed of EU citizens, of member state citizens, or even of citizens in both capacities. It is true that all of these answers imply that we define an outside, but not every exclusion is an unjustified exclusion.

2. How can we assess, if at all, whether a social group that articulates constituent power has a legitimate claim to exercise it?

If I understand Lindahl correctly, he ultimately rejects the view that I just sketched, according to which constituent power beyond the state can be conceptualized as derivative of domestic constituent power. One of the reasons is that Lindahl is concerned about transnational actors such as alter-globalisation movements that do not intend to speak in the name of one or several nation-state peoples but for other kinds of collectives. Both (peoples of) states and civil society groups are capable of engaging in the construction of narratives; they can both formulate claims to constituent power and present stories that explain where their presumed authority comes from. In that sense, they can both engage in the representational act that

Lindahl regards as crucial for constituent power. However, only states have the capacity to establish global legal orders backed by a monopoly of force. Now, Lindahl points out that alter-globalisation movements call into question the primacy states – but what follows from that? Not every actor who articulates a claim to constituent power automatically also has a legitimate entitlement to exercise it (see Niesen 2019). Lindahl focuses on the demands of vulnerable groups that are negatively affected by global legal orders and voice concerns that are justified – at least on the face of it. However, we can just as well imagine privileged citizens with more problematic agendas lamenting supposed exclusions and articulating claims to constituent power (e.g. far-right movements). Are there criteria that allow us to distinguish between claims to constituent power that deserve a positive response and that do not? To regard states as stepping stones for constituent power beyond the state has the advantage that they provide an institutional framework that, at least in principle, allows for the establishment of formal democratic procedures that secure the equal status of participants and can filter out illegitimate constitutional projects. I wonder what could deliver this function if we drop the primacy of states. Even if constituent power does not lie with states themselves but with their citizens, they are not easily replaceable.

3. Can constituent power actually address problems of inclusion and exclusion or does it not rather respond to a different issue? In other words: What, if anything, can constituent power contribute to the solution of conflicts over boundaries?

Initially, my expectation was that the chapter would at some point explain how constituent power enables, or can be a form of, restrained collective self-assertion. If I have not overlooked it, Lindahl does not comment on the relation between these concepts. While it seems obvious that constituent power implies *collective self-assertion*, especially if we understand it as a founding act embedded in the narrative construction of a political community, I wonder how the element of *restraint* could come in. If we simply re-describe the political struggles for recognition that interest Lindahl as competing claims to constituent power, we are back to square one. The question is whether constituent power can also be a way of *negotiating* between *competing* self-assertions. Here, I am sceptical. The category of constituent power is primarily instructive when it comes to how citizens should be positioned vis-à-vis public authorities. Imagine that we could have what Lindahl describes as impossible: an all-inclusive global legal order in which there are no conflicts about boundaries anymore. Even then, there would be a need for constituent power because it would still have to be made sure that public authorities do not take a life of their own but operate according to rules defined in democratic processes. There would still have to be a separation of powers between *pouvoir constituant* and *pouvoirs constitués*. What a model for the legitimate exercise of constituent power beyond the state can deliver are principles that explain how processes in which the

structure and competences of global legal orders are determined should be organized. However, this does not enable us to adjudicate between the self-assertions of different collectives that are not engaged in shared but rather in conflicting projects of constitution making.

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