

## In Which Sense Is Constituent Power Free? An Approach to the Concept of Political Liberty from David Hume's Work

¿En qué sentido es libre la potestad constituyente? Una aproximación al concepto de libertad política a partir de la obra de David Hume

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### Abstract

This article explores in the relationship between the concepts of liberty and constituent power, applicable to contexts of constitutional change in the contemporary world. Using a philosophically skeptical approach to the concept of liberty, the paper provides a reflection on the meaning of political liberty as applied to our everyday social interaction. In line with some of the traditions of classical and early modern thought, this work outlines the link between constituent power and liberty as a complicated relationship. As will be argued, it is not plausible to identify sovereign instances of political interaction as moments of full autonomy to establish long-term normative guidelines within a society. Contrary to what might be thought, however, the awareness of relative political liberty is a central element in the politically emancipatory performance of constitutional power.

**Keywords:** *Constituent power; freedom of the will; political liberty; republicanism; new Constitution.*

### Resumen

El presente artículo busca explorar una relación entre los conceptos de libertad y potestad constituyente aplicable a contextos de cambio constitucional en el mundo contemporáneo. Utilizando una aproximación filosóficamente escéptica respecto del concepto de libertad, el escrito reflexiona sobre el significado de la libertad política aplicada a nuestra interacción social cotidiana. En línea con algunas de las tradiciones del pensamiento clásico y moderno temprano, el artículo plantea a la vinculación entre potestad constituyente y libertad como una relación complicada. Como se argumentará, no es plausible identificar instancias soberanas de interacción política como momentos de total autonomía para establecer direccionamientos normativos de largo plazo en el seno de una sociedad. Contrario a lo que podría pensarse, sin embargo, la conciencia de la libertad política relativa es un elemento central en el rendimiento políticamente emancipatorio de la potestad constitucional.

**Palabras clave:** *Potestad constituyente; libertad de la voluntad; libertad política; republicanism; nueva Constitución.*

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## INTRODUCTION

The difference between original and derived constituent power seems to be relevant in the understanding that the legal community develops regarding its legal interpretative practice. The difference is useful because is simple: by alluding to one or another kind of constituent power, legal operators give a particular meaning to constitutionally enshrined legal provisions, thereby channeling specific political or moral disagreements through the codes of communication of law. This is what could be understood as one of the main functions of legal dogmatics: to provide simple and standardized solutions to problems of categorization and application of the law in force.<sup>1</sup> However, what may be useful or appropriate for the internal point of view of law is not necessarily plausible for the understanding of legal rules and principles from the point of view of other systems of communication<sup>2</sup> or modes of existence,<sup>3</sup> such as economics or politics. In the same way, what may be relevant for the functioning of the law - in operational terms - in normal circumstances, may become a methodological problem when the legal order has a kind of “identity crisis”. Is it relevant to distinguish between original and derivative constituent power when assessing a process of creating a new Constitution? What kind of relationship can be established between constituent power and constituted power to explain the political practice of legitimizing the rule of legality in a (global) society like today’s? What role does the concept of freedom play in the effectiveness of constituent power, and how should the manifestation of its political will be interpreted? In the following lines, I will explore an attempt to answer the questions just posed, exploring only the above considerations from one of the perspectives available in modern thought.

## CONSTITUENT POWER AND FREE WILL

Traditionally, in constitutional dogmatics, the distinction between constituent power and constituted power is based on the degrees of freedom available to the agent creating constitutional legal norms.<sup>4</sup> Thus, while the constituted power would be limited by the rules of competence that the constituent power defines for its institutional position, the constituent power would enjoy a privileged sphere of discretion: if there are eventually no rules of competence defining its attributions, the constituent power would be absolute, and it would be an absolute power because it would be fully free. It is tempting to make an analogy between this way to understand systems of norms and a scientific approach to the laws of causality: the term when the constituent operates would be - in this sense -analogous to the moment prior to the big bang; that initial moment when the universe we live in - we, as self-conscious beings - was gestated. According to today’s predominant scientific theories, there were neither detectable physical regularities or laws in the moment before the big bang, nor would there be

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<sup>1</sup> ALEXY (2007).

<sup>2</sup> TEUBNER (1988).

<sup>3</sup> LATOUR (2018).

<sup>4</sup> A relevant expositor of this perspective in contemporary constitutional dogmatics, influenced by Carl Schmitt, is the German jurist Ernst Böckenförde. See BÖCKENFÖRDE (2000).

technically speaking a “moment”. This, since time as a category would not exist (as the category of space). Only from that first explosion would it make sense to speak about physical laws and causality, about limitations to the interaction between particles of matter or photons of light. Thus, finishing with the analogy, the big bang would represent the beginning of a physical order constituted by laws, representing in this parallel the constituent power; on the other hand, the “instant” prior to the big bang would correspond to the constituent power, lacking laws that circumscribe its sphere of action.

As suggestive as the big bang analogy may seem in rhetorical terms, its value in theoretical terms is small. Physical laws differ sharply from laws in a normative sense;<sup>5</sup> for the purposes of this analysis, the main difference lies in the lack of a law-producing agent or physical regularities in the realm of big bang theories. Since the physical question of the moment prior to the big bang has no scientific meaning, the question of the interaction between particles or photons of light prior to that constitutive moment also loses scientific meaning. In other words, physics can only answer questions about the functioning of our universe, with its constitutive limitations and regularities systematized by means of causal laws. The question aiming at setting the difference between constituent power and constituted power, assumes a rule-producing agent in both moments, setting fully free will as the factor distinguishing between the two kinds of power.

Freedom as a differentiating criterion between constituent power and constituted power seems to be more closely linked in historical terms - in its modern version - to a discussion with a theological origin: that of free will. Attributing moral responsibility to an individual for the acts he or she commits involves assuming that acts are not mere events that happen to him or her, but that the person in question causes those acts.<sup>6</sup> This idea of free will as the condition for attributing responsibility can also be seen as a central element when constructing the idea of constituent power. Only to the extent that the agent is the author of norms in a context without constrictions can we talk about constituent power; if there are limitations (for example, those about habilitation or jurisdiction in order to modify constitutional laws), then we are dealing with a constituted power and, therefore, restricted in terms of its freedom.

Since the French revolutionary experience at the end of the eighteenth century (mainly due to the intellectual and political influence of the Abbé Sieyès), the theological sense of the free agent creating the norms that limit his will has been extended from the moral sphere of individual responsibility to the political sphere of collective action. The idea of free will attributable to a set of individuals is equally controversial as the free will of the individual. Mainly because this approach to the meaning of freedom assumes unity of agency, i.e., that the intention contained in the act of original rule-making is unique and undifferentiated. Along with the above, the idea of free will is controversial because of the very assumption of freedom: authors such as David Hume in the mid-eighteenth century raised the issue that to assume freedom of will as a requirement for attributing responsibility is not coherent. When an act is attributed to a person this implies recognizing the causality between an event and an individual's intervention in the world as the direct antecedent of that act. The idea of freedom posed by

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<sup>5</sup> KELSEN (1960).

<sup>6</sup> MOYA (1990); DAVIDSON (1995).

theology implies an interruption of this causal chain. Then, how to attribute an act to an agent if the assumption of freedom interrupts the causal sequence that makes it possible to recognize an act as linked to a particular individual?

The theological understanding of freedom has metaphysical implications that unnecessarily complicate the explanation of a phenomenon in itself complex: political action as a case of collective agency. Is the concept of freedom relevant to make sense of our practices of attributing responsibility (and intentionality) in the political arena? This article aims at answering this question affirmatively, but using a metaphysically austere tradition of political thought, trying to disentangle political liberty as a symbolically relevant construct to explain political action. In this regard, reference to the Anglo-Saxon pragmatist Wilfred Sellars is relevant to define the limits in which this work is set. Sellars differentiated between “manifest image” and “scientific image” of the world to define the meaning of our practices of social interaction which sometimes challenge our scientific understanding of the environment.<sup>7</sup> As this author points out, there is a field of critical and disciplined knowledge that, on the one hand differs from science, and on the other from common sense, This is a group of disciplines whose focus lies on the person, and which form the web of images from which the human being was historically conceived. This perspective, the manifest image, evolves in parallel to the scientific image, interacting with it and providing the discovery conditions from which scientific correlations become operative.<sup>8</sup> Then, the relevant point is to ask ourselves if it is possible to sustain the continuity between both images, in such a way that scientific understanding does not end up undermining the meaning we give to our interaction practices, as participants in them. Applied to the topic of constituent power, we should ask ourselves how to elaborate a concept of freedom that gives meaning to our political practices without this being built around a perspective that is incompatible with our scientific description of the world. In the following section, I will set out David Hume’s approach to this question in order to envision a possible understanding of the concept of political liberty that might satisfy such requirements.

## TWO “HUMEAN” CONCEPTS OF LIBERTY

Hume’s approach to the concept of freedom is set within the framework of a classic debate within modernity that extends up to nowadays: the one about the relation between freedom and determinism. Assuming a unified theory of causality, which does not distinguish between mental and material causation, the Scottish author develops the idea of necessity as a central aspect to understand his position regarding the aforementioned debate. From this differentiating criterion, Hume will propose a concept of freedom as opposed to what he calls the “doctrine of freedom”, a theologically rooted and predominant formulation in the context in which he develops his reflection.<sup>9</sup> Since it is relevant to understand the concept of necessity

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<sup>7</sup> SELLARS (1971), pp. 14 ff.

<sup>8</sup> SELLARS (1971), pp. 14 ff.

<sup>9</sup> For the purposes of this article, I will understand the meaning of the expression “theology” within the historical and intellectual context in which David Hume posits his theory. However, recognizing the common Christian theological root under which the contemporary discussion on the subject is raised, I will also assume the

and its link with causality in order to understand his position on the topic of freedom, it is appropriate first to briefly address this aspect of Hume's proposal.

As appears in section 2.3.1 of the *Treaty on Human Nature*, Hume rules out the possibility of discovering "an ultimate connection between objects, either through the senses or through reason". This, since it is not plausible "to penetrate so deeply into the essence and composition of bodies as to perceive the principle on which their mutual influence depends".<sup>10</sup> For the author, "we are only familiar with their constant union, and from this constant union arises necessity."<sup>11</sup> Necessity, therefore, consists of two elements that are indispensable to it: on the one hand, the aforementioned constant union, and on the other, the inference of the mind.<sup>12</sup> The notion of cause and effect is an idea that the mind creates from the constant union enables to feel necessity. The latter is, therefore, a perception, and not a conclusion of the understanding.<sup>13</sup> The unified theory of causality that Hume advocates understands that the "actions of the mind" exhibit the same kind of necessity as that perceptible in the relation between objects in the natural world. Human actions, as a consequence, would have the same elements inherent to necessity in the realm of "actions of matter". Since causality is an association mechanism between ideas originated in the perception of necessity, it is not pertinent to distinguish between different causalities according to the object towards which it is related; causality is a mental phenomenon, and as such it is not relevant to discriminate according to the concrete sphere in which it becomes operative. This is why Hume will affirm that the link between motives and actions is equivalent to that of causes and effects in the material world, being plausible to detect, both in the sphere of human actions and in that of the "actions of matter", the necessity arising from the continuous and uniform observation of consequences and their causes, thus discarding a distinction between physical and moral necessity.

Why the Humean doctrine about necessity with respect to the expressions of necessity/determinism bring with it to reject what Hume identifies as the doctrine of freedom? The author understands by the doctrine of freedom that theoretical position according to which there is a space of self-determination of the individual that allows defining the freedom of the will as the absence of causal constraints, both mental and physical. To the extent that this doctrine denies that our actions are governed by necessity, it also denies that our actions can be causally explained, reducing them to random events.<sup>14</sup> Since this would suppress the possibility of imputing an act to an agent (for without the notion of necessity no judgment can be made that isolates that particular existence which is labeled as the cause of the action), Hume

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plausibility of applying Hume's skeptical reading to the treatment of legal concepts that derive *lato sensu* from that same tradition.

<sup>10</sup> HUME (1998), p. 542-543.

<sup>11</sup> HUME (1998), p. 542-543.

<sup>12</sup> HUME (1998), p. 542-543.

<sup>13</sup> HUME (1998), p. 549.

<sup>14</sup> PITSON (2006), p. 218

argues that the doctrine of freedom must be discarded as a source that plays the role of correctly explaining human actions.

Why the doctrine of liberty, despite its inconvenient implications, is preponderant in the context of the debate where Hume takes part? He identifies three grounds on which to understand this phenomenon. First, the difficulty when persuading ourselves that the actions we perform are governed by necessity, such that when we perform an action, “it would have been absolutely impossible for us to have acted otherwise.”<sup>15</sup> Here Hume distinguishes between two meanings of the term “freedom”- central to this essay - in order to identify that element of the doctrine of necessity which usually causes repudiation and as a consequence a denial of its value as a theory. The author points out that the notion of necessity seems to suggest that there is something forced or violent in being causally determined to act as we actually do. However, we are not aware nor is there evidence to prove this hidden violence that apparently obstructs our daily actions. The above perception is the result of confusing two different aspects that are not linked to each other. It is here where the distinction between freedom of spontaneity and freedom of indifference becomes relevant to understand the scope of the Humean doctrine of necessity. While freedom of spontaneity alludes to that which is opposed to violence, freedom of indifference refers to a negation of necessity and of the notion of causality. For Hume, it is freedom of spontaneity that we are concerned to preserve, and his imprecise linkage to freedom of indifference has led to the erroneously justified rejection of the doctrine of necessity. This doctrine only denies freedom as a theoretical claim (or freedom of indifference), which posits the impossibility of causation and of the notion of necessity as foundations of the understanding of the interrelation between the objects of the world (objects among which we include ourselves). The freedom of spontaneity, therefore, runs on a separate track from that of indifference, and constitutes a concern that the unified theory of causality developed by Hume does not seek to denigrate.

The second reason that for Hume explains the dominance of the doctrine of freedom in the debate is linked to the existence of “a false sensation or experience even of the freedom of indifference”. This feeling is considered as proof of its real existence.<sup>16</sup> In line with what was stated in previous paragraphs, necessity from the Humean approach is not a quality of the agent, but of the observer, who commonly infers actions from our motives and character.<sup>17</sup> Therefore, certain “inner freedom” in the agent contributes little, to the discussion that can be conceived through imagination, insofar as the thinker who externally examines the action can infer its causes from the consideration of the motivational springs that affect the individual’s will.

Finally, Hume asserts that the influence of religion is decisive in understanding the relevance of the doctrine of liberty in the public forum.<sup>18</sup> The doctrine of necessity, he argues, appears to be harmful to religion and morality. However, this is due to a confusion by the

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<sup>15</sup> HUME (1998), p. 551.

<sup>16</sup> HUME (1998), p. 551.

<sup>17</sup> HUME (1998), p. 553.

<sup>18</sup> HUME (1998), p. 553.

proponents of the doctrine of liberty. Necessity is a prerequisite for the plausibility of institutions whose function is to regulate the conduct of the agents that develops in community. Human laws, according to the author, are based on granting rewards and punishments, and their effectiveness is presupposed by assuming that these affect the minds of the agents as motives, causing - considering the above - the actions considered good, and preventing in turn those qualified as bad.<sup>19</sup> If it were not possible to understand the interference of these incentives on the agents as causes (motives) of action, the result for the effectiveness of human laws would be regrettable. Indeed, the validity of these laws would be called into question, since they would not be made operative on the basis of the non-causal character of their guidelines in human actions. From Hume's perspective, the same would occur with divine laws, thus contradicting the suspicion that the doctrine of necessity generates among individuals linked to religion. In addition, to attribute responsibility to intentional agents for the actions they perform would be unfeasible, since without causation there would be no criterion allowing to discriminate between this type of behavior and those accidental or casual ones, which occur without the intervention of the agent's will. In short, necessity is a *sine qua non* condition for the ends that the doctrine of freedom itself claims to promote.

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It is clear that the will plays a central role in Hume's perspective on causality, as it constitutes the sphere in which necessity operates at the level of what he calls "mental actions".<sup>20</sup> Hume does not seek to set freedom as a topic on which it makes sense to pronounce concerning the will; his project, instead, consists in identifying the factors influencing the determination of the will of intentional agents on the basis of the elements that necessity allows us to detect in the regularity of human behavior, inferring by means of the above the perceivable constants. The author suggests that his position does not entail a modification of the dominant perspective in his intellectual context with respect to the will (contrary to what, from the sidewalk of the doctrine of freedom, would be the explanation for understanding the argumentative turn of the Humean proposal), but an extension of the methodology used for its study to the realm of material objects.<sup>21</sup> This is coherent with Hume's unified theory of causality, and seeks to highlight the independent character of the objects of nature that necessity plays at the cognitive level. In short, the author's view of causality arises as an answer to an erroneous description of the functioning of the will (contained in the doctrine of freedom) and extends from there to the elaboration of a general theory of causality, which has application both in the realm of human actions and in the sphere of interaction between objects of the natural world.

What, then, is Hume's position regarding freedom? The author seems to reject the plausibility of the freedom of the will in itself, insofar as this would entail the causal indetermination on intentional agents' actions and would also entail to deny the possibility of holding subjects liable when they perform behaviors valued as good or bad within a community.

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<sup>19</sup> HUME (1998), p. 555. See PITSON (2006) as well, pp. 218-219.

<sup>20</sup> HUME (1998), p. 554.

<sup>21</sup> HUME (1998), p. 555.

Hume, in this sense, would fit within what Ayer considers to be the group of authors who define freedom as the “consciousness of necessity”.<sup>22</sup> However, as the latter author points out, is not the aforementioned definition of freedom one that completely distorts the meaning of the term in the discussion on the subject? Indeed, one can be aware of the causes that impelling one to act as one actually acts, without this implying that one is free in the usual sense of the word (this is, in fact, compatible with a deterministic thesis). Hume is not insensitive to this criticism, and that is why he introduces the distinction between freedom of spontaneity and freedom of indifference already exposed, which Ayer echoes by pertinently maintaining that the relevant opposition is not that between freedom and necessity, but between freedom and coercion.<sup>23</sup> Indeed, it is at the level of interpersonal relations that the factor limiting the agent’s freedom can be found; violence so understood differs from the alleged force that the doctrine of freedom of indifference claims to perceive in the causal relations between events in the world.

### **FREEDOM AND COERCION: TOWARDS A REPUBLICAN APPROACH TO THE CONCEPT OF POLITICAL LIBERTY**

David Hume’s perspective explained in the previous section has an interesting yield when extrapolated to the context of political action.<sup>24</sup> His position on the freedom of the will makes it possible to elaborate an approach that delimits the metaphysical problem of freedom regarding the symbolic plane of action considered as “free”. This is the main contribution that can be deduced for these purposes from the distinction between freedom of spontaneity and freedom of indifference, which marks a break with metaphysical approaches to the topic of human freedom. Certainly not of free agents in the sense of being absent of all kinds of constrictions; political liberty is the reflexively conscious attitude of people who, identifying situations of symbolic coercion that restrict their scope of action, seek to intentionally perform those behaviors arising from what Hume calls their passions or, in a more neutral sense, from their motivational set.<sup>25</sup> It is in the realm of interpersonal relations that the constraints relevant to a concept of political liberty arise, and these constraints are constitutive of the social and institutional experience of liberty. In other words, political liberty is the horizon of emancipatory action of interpersonal relations posited in dynamics of domination, assuming that such dynamics of domination are, in fact, constitutive of those interpersonal relations.

The Humean concept of freedom of spontaneity certainly has elements assimilable to the republican tradition of early modernity, partially recovered in the Anglo-Saxon literature of the second half of the twentieth century, when the construction of the concept of freedom is

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<sup>22</sup> AYER (1982), p. 18.

<sup>23</sup> AYER (1982), p. 19.

<sup>24</sup> This article assumes that the exercise of applying Hume’s perspective on freedom of the will to the realm of political action is an exploration inspired by a Humean vision, and not a literal reading of a concept of the political developed by Hume.

<sup>25</sup> SMITH (1994).



understood as the absence of (arbitrary) domination.<sup>26</sup> As in the republican notion of political liberty, the concept of freedom of spontaneity allows to raise the question of the institutionalization of the practice of political action in a society through the legal translation of political liberty into the concept and practice of civil liberty. The distinction between constituent and constituted power thus acquires meaning when the question of political liberty is answered through the creation of institutions that are expected to channel instances of arbitrary non-domination between people who, in coordination, participate as equals in social interaction.

At this stage of the argument, it is necessary to introduce further distinctions in order to specify the role of freedom in institutional political action, in contrast to non-institutionalized political action. Reading Niccolò Machiavelli in this sense, it is necessary to differentiate between the moment of political action as a merely negative reaction to domination and the moment of political action as the process of establishing a regime of government. The Machiavellian distinction between event and form (and, more directly, between *fortuna* and *virtù*), gains practical application when we are able to differentiate between political action as a rejection of domination and political action as oriented towards the constitution of a form for governing.<sup>27</sup> It should be noted that in this interpretation of Machiavelli the moment of pre-institutional political liberty is a radical negation of domination, consisting therefore in a moment that in itself is not propositional, but radically negative. In other words, political action in its pre-institutional stage does not seek to impose a will, but to emancipate itself from relations of eventually arbitrary domination; the sense of political action at this level is, in this sense, completely negative, not positive.<sup>28</sup> As Miguel Vatter points out, resorting to Hanna Arendt, political liberty instantiated in this pre-institutional constituent power contains not merely a claim to the absence of domination, but the emancipation from any form of government.<sup>29</sup> Here the metaphor of the big bang acquires a political connotation, but it assumes a different meaning from the one I have already explained at the beginning of this essay: this metaphor can contribute to explain the meaning of constituent power in this pre-institutional moment precisely because the emancipatory impulse of political action at this level does not have a defined will. Constituent power, which indirectly provides the impetus for adopting a potential new form of government (and, with it, a new form of domination), lacks will beyond the negation of a constitutive order of relations founded on the practice of domination.

The first sense of constituent power as a pre-institutional political magnitude, developed in the previous paragraph, must be understood in the framework of what the republican optic recognizes as the constant iteration between emancipation and order. The reading of Machiavelli developed here identifies, then, not only a pre-institutional moment as a negation of an illegitimate order, but also an institutional moment for adjusting or establishing an order

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<sup>26</sup> In this regard see PETTIT (1997), SKINNER (1984).

<sup>27</sup> GNOLI & SASSO (2013), MACHIAVELLI (2016), VATTER (2000).

<sup>28</sup> I make the distinction on the basis of the categorization of the concept of freedom developed by Berlin. See BERLIN (1982).

<sup>29</sup> VATTER (2012), pp. 71 ff.; pp. 258 ff.

that processes this negative will.<sup>30</sup> In this second moment, political liberty ceases to manifest itself in a negative way and becomes the impetus for the adoption of a regime of government. The republican perspective as presented in these lines, therefore, assumes a dual and differentiated role of constituent power as the two faces of interaction with institutionalized power: on the one hand, as the negation of an order of domination; on the other, as the pretension of establishing a legitimate order (or, in contemporary terms, as a form of non-arbitrary domination anchored to the idea of legal dominion).<sup>31</sup> From the internal point of view of a legal order, the relevant notion of constituent power is this second meaning of the term: the concept of constituent power instituted to provide a self-referential closure to the institutionality of an order of government anchored in the authority of law, compatible in contemporary terms with the idea of a constitutional state of law.<sup>32</sup>

In short, there is a tension between the concept of constituent power and constituted power for the purpose of understanding the dynamics of political action and institutional consolidation of a legal order as a process in historical perspective. Constituent power as a pre-institutional power is radically negative, since it does not possess a definite will beyond the uprising against a form of government or, more precisely, against any form of government. At this level of political liberty, in the republican sense, freedom as the absence of domination could well be understood as freedom as the absence of government. However, given that this conjunctural moment of reaction to an order is a temporally limited contingency, the next step consists in the establishment of an actualized order: the un-instituted constituent power thus gives way to the constituent power instituted by the legal order, which seeks to establish itself as legitimate authority and open the way to a society where political liberty is institutionally consecrated as civil liberty. This process shows the iteration between emancipation and order that shapes the description of political action in a republican key: there is no stable order without the possibility of channelling dissatisfaction with respect to the terms of domination under which, necessarily, any form of government operates. The plebeian moment of un-instituted constituent power is, then, a condition for stabilizing the patrician moment of a juridical order.<sup>33</sup> In other words, an institutional order cannot claim stability if it does not embrace moments of instability as a constitutive part of its institutional history.

From the foregoing, it can be inferred that the concept of constituent power that uses the internal point of view to the institutional practice of law is a notion differentiated from the constituent power that explains the process of adjustment of a legal order. Indeed, when constitutional dogmatics distinguishes between original and derivative constituent power, it does so in reference to the political will that seeks to enshrine a form of government through law. This claim to sovereignty, in the republican tradition of early modernity, is alien to the notion of constituent power as a pre-institutional political event that channels the desire for freedom (of spontaneity) understood as the absence of domination. The question about the concept of constituent power that constitutional dogmatics usually points out from the internal

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<sup>30</sup> MACHIAVELLI (2012; 2016); SASSO (2016).

<sup>31</sup> VATTER (2012), pp. 245 ff.

<sup>32</sup> TEUBNER (1988); KJAER (2011, 2020).

<sup>33</sup> VATTER (2012), pp. 37 ff.

point of view of law is, therefore, a question about the will of the “sovereign” who wishes to establish or actualize an order. The distinction between original and derivative constituent power takes place within the limits of law and seeks to demarcate the boundary between the desire to govern and the desire simply not to be governed.

### CONSTITUENT POWER INSTITUTED AND POLITICAL LIBERTY

In the previous section we discussed in what sense the pre-institutional moment of constituent power is free; we also presented the negative character of the will channelled through this instantiation of the concept of political liberty. What should be pointed out now is in what sense the constituent power instituted by law is free, and how it will be defined.

The question of the political liberty of the constituent power instituted by law must be answered by assuming the impossibility of absolute freedom as the starting point of the argument. Considering the link between constituent power and sovereignty for the establishment (or continuation) of a form of government, the freedom of the political will channelled through this institutional instance is, by definition, limited. To use classical republican terminology, the patrician moment of constituent power instituted will be such, even when plebeian sectors hold partial or total power at that stage of a historical process. The establishment or actualization of an order to rule is, in attitudinal terms, contrary to the emancipatory impulse that explains the beginning of a constituent process in the first place.<sup>34</sup> In the instituted phase of a constituent process there is, moreover, a return to what might be called “circumstances of normality” in the dynamics of social interaction mediated by law. Under this scenario, interpersonal relations contingently constituted as relations of domination are elementary to understand the dynamics of political action. To claim that an instituted constituent power is fully free implies assuming that decision-makers operate in a context of absolute absence of relations constituted as ties of domination. Again, alluding to David Hume, the freedom of the will as consciousness of necessity should also lead us to understand political liberty as consciousness of the existence of constraints that restrict, arbitrarily or not, the spontaneity of social relations. It is here that the emancipatory potential of an instituted constituent power lies: in recognizing its limitations for the process of consecrating effective spaces of political liberty protected by law, instead of assuming the discourse of full autonomy as a narrative empty of content in the face of the factual circumstances in which the freedom of spontaneity operates in a political key.

Now, how to identify the will manifested through the exercise of the instituted constituent power? Given the historical juncture in which these lines are written, I will focus the answer in the case of a collegiate body as an instance of exercise of this kind of power. Taking into consideration that constituent power in this institutional stage entails the possibility of legitimizing the exercise of dominion through law, it is necessary to observe the conflictive and internally differentiated character of the will of any group of individuals oriented to the imposition of legal rules with the expectation of legitimizing power. The constituent power instituted, under this reading, is not a decision-making instance built on the unity of agency of

<sup>34</sup> *Ibid.*, pp. 272 et seq.; see also Gnoli and Sasso, pp. 79 et seq. (chapter IV).

those who exercise it. Since it is political conflict that defines the historical iteration between instability and order, it makes no sense to refer to political action with a teleological perspective oriented towards conflict resolution. The harmonization of conflicting interests is thus temporally limited. A good design of a form of government is characterized by achieving an institutional arrangement oriented to the stabilization of order, however, such stabilization will entail the occurrence of a subsequent political event that will inescapably bring the possibility of instability and, with it, of a “return to the origin” in terms of the demands for the legitimization of dominion.<sup>35</sup>

The dynamic nature of interests channelled through political action has consequently the variable articulation of those interests in the constitutional process, both in the exercise of the original constituent power and in the exercise of the derived constituent power. Is it correct, then, to attribute a propositional will to a collegiate body exercising any of the powers just mentioned? Yes, to the extent that a metaphysically austere approach is used to ascribe intentionality to it. A collegiate body composed according to the application of a democratic principle of representation and making decisions according to a democratic principle of majority (or supra-majority), does not possess a single constant will in diachronic terms. The absence of a single and indubitable will is not only due to the multitude of interests represented, but also to the non-existence of a single correct answer to the questions raised in the life in common.<sup>36</sup> Variable articulation of a diversity of interests entails, in turn, another relevant consequence: the distinction between allies and opponents is fluid and dynamic, due to the contingent nature of alliances in an institutional framework where what is at stake is the constant dispute for the recognition of spaces of political liberty understood as the absence of domination.

## FINAL REMARKS

The notions of constituent power and freedom from the point of view of non-institutionalized political action have a different connotation from the use of both concepts from the perspective of institutional political action. In the non-institutional moment of political action, the concept of constituent power allows us to refer to the negative will of a group of individuals who react to situations that systemically obstruct what, through a political reading of David Hume’s work, has been qualified as freedom of spontaneity. This understanding of political liberty finds a recognizable “family resemblance” with the republican tradition of early modernity, by understanding liberty as the absence of domination. The peculiarity of this non-institutional moment of political action is that it allows us to observe social contingencies where what prevails is a radically negative meaning of liberty in the republican sense, turning the desire for the absence of domination into the desire simply not to be governed. The search for instances of socialization where there are no ties constituted around the idea of domination is a fundamental intuition of modern republicanism, and Machiavelli’s work is a manifestation of this. However, the tension within the republican tradition itself is identified once it is realized

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<sup>35</sup> VATTER (2012), pp. 157 ff.

<sup>36</sup> MORALES (2010).

that the political events that postulate the absolute absence of domination are temporarily limited conjunctures: domination is an element implied in any form of social organization, also in those arising with the aim of putting an end to the dynamics of domination. This is why the rescue of republicanism in a contemporary key is centred on the search for an institutional design that makes it possible to distinguish instances of arbitrary domination from legal domination as a non-arbitrary scheme of domination. What both readings of republicanism (and I dare to say, the understanding of freedom developed by David Hume) share is that the freedom of the agents participating in political interaction is necessarily limited. This becomes clear when analyzing institutional political action, once the political event tending to the instantiation of the concept of constituent power in its radically negative moment has already taken place. In the institutional sphere, political action is constituted and mediated by law. From the legal perspective, the notion of constituent power acquires a differentiated meaning, inasmuch as the legally institutionalized moment of constituent power is intended to establish or actualize a form of government with a view to providing legitimacy to the exercise of sovereignty. In this institutional moment, therefore, political will does have a propositional content, consisting of granting legitimacy to an order that always presents the possibility of becoming (or becoming again) illegitimate.

The notion of free will provides a descriptively inadequate approach to explain political interaction. The concept of free will as applied to the political realm is analogous to what David Hume labels freedom of indifference, because it does not identify the constraints in social relations as a central element when defining the political meaning of freedom. The emancipatory potential of political action resides in the awareness of the existence of those arbitrary or non-arbitrary instances of domination that cross, *de facto* or *de iure*, the dynamics of social interaction. When the verification of freedom as a historically situated and unfinished construction that the promise of legitimization of an order, rests; in the same way, it is in the verification of the limited horizon of the fulfilment of that promise of political liberty that we find the anticipation of the contingency that will put that same order in check. Under the republican perspective, constituent conjunctures incubate the promises and expectations that will inevitably be defrauded and channelled through a destabilization of a form of government. Differentiating between an instituted constituent power and a non-instituted constituent power allows us to retain the importance of conflict as the constant in political action aimed at the institutional consecration of freedom among individuals who aspire to be recognized as politically equal. Forgetting the possibility of instability in the unpredictable political evolution of societies does not eliminate crisis scenarios; it simply contributes to deepening them. In the same way, omitting the dynamics of domination that run through social relations does not bring more freedom, but rather weakens the emancipatory potential of a constituent political will aimed at stabilizing a form of government that institutionally enshrines spaces of political liberty in social interaction.

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