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THE SCOPE AND LIMITS OF THE JURIDICAL PEOPLE

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ABSTRACT
In this review essay I discuss some of the aspects that I think are opportunities to further develop the theoretical contribution that Joel Colón-Ríos makes in his latest book *Constituent power and the Law* (Oxford University Press 2020). Accordingly, this review essay is divided in two sections. In the first section I argue that the perils of conflating sovereignty and constituent power are not limited to constitution-making instances but that they are also present in constitutional amendment episodes. In the second section I discuss two aspects related to the scope and limits of Colón-Ríos' theory: could constituent power be exercised through means other than constitution-making instances? How much should we trust referendums as effective means to determine the will of the people?

KEYWORDS
Constitutional change; constitution-making; constitutional amendment; constituent power; referendums; popular sovereignty; unconstitutional constitutional amendments.

We often hear that the concept of constituent power is a slippery one and one that is hard to grasp because of its political and/or sociological nature. It is often disregarded as a concept that has nothing to do with the law but as describing something that one would know it is there when one sees it. Often it is understood as a sort of supernatural force. In *Constituent Power and the Law,* Colón-Ríos rejects this idea and seeks to show how this conventional approach and understanding is not sufficient to fully grasp the concept of constituent power.[1] He argues that constitutional theory, by only and overly focusing on the political and extra-legal features of constituent power, has disregarded and failed to understand its juridical nature. Accordingly, Colón-Ríos sets out to show how constituent power indeed has a juridical nature. In so doing, he delivers a work of historical, theoretical and practical value.

[1] Joel Colón-Ríos, Constituent Power and the Law (2020).

In a way, *Constituent Power and the Law* demystifies the concept of constituent power by showing how it has travelled, how it has been treated across constitutional history and how constitutional theorists, political actors as well as courts in different contexts have deployed it. It does so while illustrating the legal effects that constituent power has had in the real world. In a nutshell, Colón-Ríos develops a theory of constituent power based on the distinction between sovereignty and constituent power–two concepts that are often conflated and/or used interchangeably. By distinguishing between these two concepts,[2] he convincingly argues that, on the one hand, constituent power may be exercised through legal means; and, on the other, that constituent power is almost by definition is a limited constitution-making authority—that is to say, one that cannot go beyond the established separation of powers and subject to judicial scrutiny.[3]

The practical value of *Constituent Power and the Law* lies in its conceptual clarity. By revisiting classic scholarship (among others, from Rousseau, to Sieyès, to Schmitt, to Kelsen, to Jellinek) Colón-Ríos manages to shed light on present pressing questions related, for example, to the theory and practice of the unconstitutional constitutional amendment doctrine. This feature, in my view, will make it an indispensable resource not only for legal scholars but also for judges and legal practitioners.

In what follows I discuss some of the aspects that I think are opportunities to further develop Colón-Ríos' theoretical contribution. Accordingly, this review essay is divided in two sections. In the first section I argue that the perils of conflating sovereignty and constituent power are not limited to constitution-making instances. In the second section I discuss two aspects related to the scope and limits of Colón-Ríos' theory: could constituent power be exercised through means other than constitution making instances? How much should we trust referendums as effective means to determine the will of the people?

The perils of conflating sovereignty and constituent power: going beyond constituent assemblies

As mentioned above, Colón-Ríos develops his theoretical contribution based on the distinction between sovereignty and constituent power. In his view, "[a] sovereign…is best understood as an individual or entity who enjoys an uncontrollable jurisdiction to transform its will into law. The exercise of constituent power, in contrast, only involves a constitution-making authority; it can only produce *constitutional* norms."[4] This distinction is of particular importance and one, that in my view, should be taken

[2] *Id.* at 226–259.
[3] *Id.* at 262–294.
[4] *Id.* at 225.

seriously. In his words: "...when the distinction between sovereignty and constituent power is blurred, the scope of the jurisdiction of the latter tends to be exaggerated, sometimes in dangerous ways."[5] In Chapter 9, Colón-Ríos explores the ways in which sovereignty and constituent power have been conflated in key works of the early 20th century (*e.g.* Jellinek and Carré de Malberg)[6] and illustrates such conflation and its perils both in authoritarian and democratic contexts (i.e. the military dictatorships of Chile and Spain, the constituent assembly called by Nicolás Maduro in Venezuela (2017) and the Constitutional Assembly of Colombia (1991))[7] to show that "the assumption of sovereign powers is not exclusive to entities operating in authoritarian contexts."[8]

From the detail in which he discusses the Colombian case (he dedicates 6 pages to it),[9] it seems that Colón-Ríos' main concern (apart from correcting the conflation of sovereignty and constituent power) is to correct the common understanding of constituent assemblies (*i.e.* constitution-making bodies) as actors with unlimited power so as to prevent runoff assemblies that may depart from democratic principles in dangerous ways—and, as mentioned before, he does offer a sound theory to justify imposing substantive limits to them. In this sense, Colón-Ríos' main focus are those situations in which a new constitution would be adopted, as opposed to situations in which constitutional change takes place within an already established constitutional order. Yet in my view, Colón-Ríos' warning also applies to high courts when engaging in constitutional review of constitutional amendments.

It is based on this conflation that, for instance in Mexico, the Supreme Court of Justice has refused to impose substantive limits to the amendment power. For instance, in the *Controversia Constitucional 82/2001*, a case where it had to decide on the constitutionality of the Indigenous Peoples Rights Reform of 2001, the Mexican Supreme Court rejected the idea that the amending power was subject to *any* type of judicially enforceable limits, arguing that the constitutional amendment "c[a]me from an organ that is the direct successor of the [o]riginal [c]onstituent power, vested with powers that would correspond to the latter, but that before disappearing... [the original constituent power] expressly transferred [to the] Reforming Power".[10] Through this interpretation, in practice, the Mexican Supreme Court has consequently put the amendment body for all practical purposes outside the law and beyond the separation

[5] *Id.* at 226.

[6] *Id.* at 227–238.

[7] *Id.* at 247–258.

[8] *Id.* at 249.

[9] *Id.* at 250–255.

[10] Suprema Corte de Justicia de la Nación [Supreme Court of Mexico], 6 Sept 2002, CC 82/2001, at 79 (Mex.)

of powers—that is, it has treated it as if it were the sovereign. This means that, as long as they comply with the process established by the constitutional amendment rule, Mexican representatives would be effectively able to depart from democratic principles without being subject to any kind of substantive scrutiny.

The similarities of the reasoning of the Mexican Supreme Court and the reasoning of its Colombian and Venezuelan counterparts are striking. Take for example the Colombian Supreme Court of Justice's ruling on the legality of the convocation of a Constitutional Assembly in 1990. The court argued that "the action of the primary constituent power [the constituent assembly] 'escapes any limits originating in the previous juridical order and, as a result, is free from any form of review that attempts to compare it with the precepts of that order'."[11] On the other hand, consider the Venezuela Supreme Court of Justice's reasoning in the ruling that decided on the legality of the [25 August 1999] decree in which the National Constituent Assembly arrogated ordinary legislative power during the constituent process of 1999 (discussed in Chapter 10).[12] In that case, the Venezuelan court expressed that "the claimant ignores that the Constituent power is autonomous, unlimited and indivisible".[13]

As mentioned from the outset, the book examines the work of authors that engaged in debates ultimately related to the doctrine of unconstitutional constitutional amendments, and it illustrates the ways in which different courts have treated certain concepts, showing the real political and legal consequences that affect the lives of many. Colón-Ríos, however, does not lay out how his theoretical proposal would operate in amendment episodes, which brings us to the next section.

The scope and limits of the Juridical People

The theoretical value of *Constituent Power and the Law,* as suggested above, lies in its clear distinction between sovereignty and constituent power. In Colón-Ríos' view, "[c]onstituent power is the power to create novel constitutional orders and it is in that respect no bound to positive law. Nonetheless, ...the exercise of constituent power will always be based on, and limited by, a commission. ... a constituent assembly authorized to draft (or even to enact) a new constitution will still be normally subject to the separation of powers and cannot exercise the ordinary powers of government."[14] For Colón-Ríos, that limit will be based on a constituent mandate contained in "a referendum question, which will refer to the nature of the task given by the true

[11] Colón-Ríos, *supra* note 1 at 252.
[12] *Id.* at 284–287.
[13] Cited in *Id.* at 286.
[14] Colón-Ríos, *supra* note 1 at 258–259.

sovereign (the people) to its commissioner (the constituent assembly)" and will be enforced by popular ratifications and/or courts.[15] For the most part, Colón-Ríos successfully achieves his main objective, but a question that remains open relates to the scope and limits of his theory. To be sure, this is less a criticism to Colón-Ríos' work than the signaling of an opportunity for further development.

The scope and limits of Colón-Ríos' theory are not entirely clear on at least two counts. First, it is not clear whether constituent power could be exercised through legal means other than constitution-making instances (*i.e.* ordinary legal means); and, second, the limits of referendums as effective means to determine the will of the people are not sufficiently examined. Throughout the book, the possibility of exercising constituent power seems to be exclusive to formal constitutional change (specifically to constitution-making) and bound to the idea that constitutional change only takes (or should take) place during extraordinary times. The attention that Colón-Ríos gives to constitution-making episodes,[16] raises the question of whether his theory (that is, the possibility of exercising constituent power through legal means) would include other forms of constitutional change (e.g. formal or informal and/or changes that take place through ordinary legal means). In other words, it is not clear what exactly can be understood as an exercise of constituent power and what cannot be understood as such.

Across the book, at times Colón-Ríos seems to suggest that constituent power is only exercised when there is a change to the material constitution in the context of a constitution-making episode (especially in Chapter 9 and 10). However, we know that fundamental constitutional change may take place outside instances where entirely new constitutions are created. In this sense, *Constituent Power and the Law* falls short of distinguishing between types of formal constitutional change and elaborating whether it would be possible to exercise constituent power through ordinary, less immediate, legal means. In my view, those latter types of means could potentially lead to important and deep transformations without necessarily entailing the adoption of a new constitution, but that due to the scope and nature of such transformations, they could be understood as engaging in the exercise of constituent power.

Take for example, the exercise of the right to vote. It is hard to imagine a better example than the right to vote to illustrate the way flesh and blood human beings can assume a juridical presence with an enormous potential of bringing about fundamental transformation in a constitutional order. Perhaps even more so than in the context of the very adoption of a new constitution. This would be the case of transformative presidencies that did not need to change the constitutional text to result in important transformations, such as the election of FDR in the United States. The idea of bringing

[15] *Id.* at 258–259, 262–294.

[16] See e.g. the discussion of the imperative mandate today *Id.* at 266–269.

about change through the exercise of the right to vote is somewhat similar to Sanford Levinson and Jack Balkin's theory of partisan entrenchment which mainly posits that fundamental or revolutionary constitutional change can happen through ordinary institutional means.[17] However, the question that remains unanswered is whether Colón-Ríos theory allows space to understand what we could call "mediated" exercises of constituent power.

Finally, provided that constitutional change may take place through means other than constitution-making, another outstanding question and a potential limit to Colón-Ríos' theory relates to the role of referendums. Under Colón-Ríos' approach, constituent referendums, as well as ratification referendums, play a central role in the possibility of identifying the limits to a constituent assembly as well as of enforcing them. The question in this regard is whether putting so much trust in referendums as effective proxies of popular sovereignty is granted. As we know, referendums do not happen in a vacuum and, therefore, are not free from the political context in which they are deployed. As such, referendums are inevitably prone to create conditions for politicians to stir public opinion in favor of their interests and agendas in ways that are not always necessarily aligned with the public interest. In this regard, one may think of the case of Brexit and the Leave/Remain campaigns in the lead up to the EU referendum in the UK in 2016 and its aftermath. Another example would be the 2016 peace agreement referendum [*plebiscito*] in Colombia.

The Brexit referendum raises questions regarding the reliability of this mechanism as a proxy for the exercise of popular sovereignty, particularly when considered against the backdrop of media coverage and its power to shape public opinion, as well as in light of the spread of misinformation (both by politicians and political bots on social media) that at the same time shape those opinions. For instance, based on an analysis of press coverage during the four-month Brexit referendum campaign, Levy, Aslan and Bironzo of the Reuters Institute for the Study of Journalism at the University of Oxford, reported that 41% of the coverage was pro-leave against 27% pro-remain.[18] Explanations for these figures could go from unfair access to media coverage to simply more political savviness from the Leave campaign. The dominant presence of the Leave campaign in the media, however, makes one wonder the extent to which preferences were shaped by it and if things would have turned out differently should the media coverage had been evenly distributed. Additionally, there is the issue of the role of political bots and social media in political campaigns that, as reported by Bastos and Mercea, has become

[17] Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 Va. Law Rev. 1045–1109 (2001).

[18] D. a. L. Levy, B. Aslan & D. Bironzo, *UK press coverage of the EU referendum* (2016), https://ora.ox.ac.uk/objects/uuid:8a0aac1f-8805-4ce4-96a8-207c1479c0c6 (last visited May 24, 2021).

a subfield in political science, among other things because of their potential detrimental impact on electoral politics, policy discussions and deliberations of contentious issues.[19] Howard and Kollyani show that the Brexit referendum was subject to political bot interference on Twitter.[20] In particular, they found that political bots had a small but strategic role in referendum conversations and that the family of hashtags associated with the argument for leaving the EU dominated.[21] Similarly to the uneven presence of the Leave campaign on traditional media, the issue of political bots and their power to shape preferences is something that, in my view, should be taken seriously if we are to use referendums as mechanisms to determine the will of the sovereign people.

The political campaigns leading up to the 2016 peace agreement ratifying referendum [*plebiscito*] in Colombia and the victory of the "No" campaign and the government's decision to implement the agreement regardless of the referendum results, is another example of the complexities that relying on this type of mechanism as a proxy of popular sovereignty might entail.[22] Aware of the painful reality of the Colombian armed conflict and without trying to oversimplify the issue, one could argue that political campaigns leading up to the peace agreement referendum were reduced to a political battle between President Santos and his adversaries—where the messages to the citizens oversimplified a rather complex issue to a dichotomic choice. Whereas on the government side, instead of socializing the content of the agreement the message was: if you vote yes, you vote for peace; if you vote no you vote for war; the No campaign's message was: if you vote yes, you vote for dictatorship, a coup d'état and/or "Castrochavismo" and/or constitutionalizing the "gender ideology".[23] Juan Carlos Vélez, the "No" campaign manager, reportedly admitted in an interview that the campaign strategy was to appeal to emotions rather than reason when stating: "we appealed to indignation, we wanted people to go out angry to vote".[24] Additionally, in

[19] Marco T. Bastos & Dan Mercea, *The Brexit Botnet and User-Generated Hyperpartisan News*, 37 Soc. Sci. Comput. Rev. 38–54, 40 (2019).

[20] Philip N. Howard & Bence Kollanyi, *Bots, #Strongerin, and #Brexit: Computational Propaganda During the UK-EU Referendum* (2016), https://papers.ssrn.com/abstract=2798311 (last visited May 24, 2021).

[21] *Id.* at 5.

[22] There is a growing literature focusing on the risks and benefits of the use of referendums in peacemaking and peacebuilding processes see e.g. Lauren Marie Balasco & Julio F. Carrión, *Required Consultation or Provoking Confrontation? The Use of the Referendum in Peace Agreements*, 55 Represent. J. Represent. Democr. 141–157 (2019); Katherine Collin, *Peacemaking referendums: the use of direct democracy in peace processes*, 27 Democratization 717–736 (2020).

[23] *La Pulla, El plebiscito sacó la peor porquería de Colombia,* El Espectador (2016), https://www.youtube.com/watch?v=A4VcX4FAIaY (last visited May 24, 2021).

[24] El Espectador, *La cuestionable estrategia de campaña del No*, ELESPECTADOR.COM, October 6, 2016, https://www.elespectador.com/politica/la-cuestionable-estrategia-de-campana-del-no-article-658862/ (last visited May 24, 2021).

the Colombian case, even though the referendum was not legally binding,[25] the government decided to continue with the implementation of the peace agreement regardless of the referendum results. The outstanding question in this regard is if, all things considered, the government acted against the will of the Colombian people. I am aware that, especially on issues of peacemaking and peacebuilding as is the case of Colombia, there are no simple answers. My only aim here is to highlight the risks of putting too much trust on referendums as proxies of popular sovereignty.

These two examples illustrate that oftentimes, the issues involved in referendums are politically divisive and perhaps, particularly prone to polarization. Perhaps, the problems and complexities I have outlined in the lines above speak more about the responsibility the actors involved in referendum campaigns (*e.g.* public officials and journalists) have when informing citizens about the issues involved in referendums, as well as about the rules regulating referendums, than to their potential effectivity as proxies of popular sovereignty. Yet, as politics is something inevitable in the operation of public law mechanisms, it is an element that, in my view, was somewhat absent in Colón-Ríos' account. This does not mean that referendums should not be used in processes of constitution-making or constitutional change, but that there is a need to further develop the ways in which they may be designed in order to make them reliable proxies of popular sovereignty.

As mentioned from the outset, *Constituent Power and the Law* offers a much needed demystified account of the concept of constituent power that, like all meaningful scholarly contributions, lays out new questions and opens up opportunities for further development. I have no doubt that this book will be discussed for many years to come.

[25] Corte Constitucional [Constitutional Court], 18 Jul 2016, Sentencia C-379/16 (Col.); Luis Jaime Acosta, *Corte Constitucional de Colombia avala plebiscito por la paz*, Reuters, July 19, 2016, https://www.reuters.com/article/colombia-paz-idLTAKCN0ZZ03H (last visited May 24, 2021).