Review

Constituent power and the law

Joel Colón-Ríos,

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If diagnoses over the last few years are to be believed, the rise of populism directly threatens the foundational values and institutions of western-style democracies. The electoral success of right-wing populist figures is often buoyed by the violent revanchism of their constituents. One high-profile response has been the re-emergence of ‘radical centrists’ in legacy media outlets and well-connected political bodies, who even-handedly decry both the revanchists and their left opposition (e.g. Brooks, 2016; Mounk, 2018). Such ‘radicals’ claim that only greater civic participation in our democratic institutions can defeat the populist threat. But their response seems to ignore the fundamental cause of populist agitation: a lack of trust in these political institutions. Hence their cries fall on disinterested – more accurately, disenfranchised – ears, and functionally hamper debates over how to address populist demands through creative alternatives to presently existing state forms.

An under-appreciated resource for thinking such alternatives can be found in constitutional theory: constituent power, the ability of people to create a constitution. If the legitimacy of all modern political institutions is built upon the consent of the governed, this power grounds all institutions in a given constitutional order, and its exercise can be understood as the political act *par excellence* (Rancière, 2005). Still, a paradox lies at the heart of constituent power: despite its formal illegality, its extra-legal character nonetheless exerts a profound influence on the constituted powers of legal and political institutions, without reducing to them. How, then, might such a concept allow us to creatively re-think our present political and legal arrangements? Or, as Joel Colón-Ríos asks, can *original* constituent power manifest itself after a constitution is put in place (p. 16)? In giving his answer, Colón-Ríos has written the high-theory constitutional analysis for our populist moment: a historically informed, theoretically nuanced investigation into the fraught relation between sovereignty, constituent power, and (constitutional) law that underpins contemporary political conflicts. While this

review cannot do justice to the richness of Colón-Ríos' monograph, what follows are some of its theoretical and practical high notes. In fact, if there is any fault in the book, it is that the overall conceptual investigation can sometimes get lost amidst all the fascinating historical and theoretical tracks the author lays out.

In his first three substantive chapters, Colón-Ríos details how the modern concept of constituent power emerged from the competing constitutional theories of Jean-Jacques Rousseau and Emmanuel Sieyès. Although Sieyès is the first to explicitly distinguish this power from constituted power, Colón-Ríos argues that Rousseau anticipates this distinction: upon situating sovereignty within a community, the Genevan political theorist then systematically argues for their formal independence from the government (p. 55). He further argues that, despite his reputation as an unapologetic proponent of direct democracy, Rousseau allowed for representation insofar as representatives were bound by the imperative mandate to carry out the will of the people, in pursuit of the general will (p. 63). Sieyès, in contrast, argued that representatives can act on their own for the good of the community, without being bound by constituents' specific instructions (p. 64). What this split between constituent and constituted power entails is a debate over who holds sovereignty. For Rousseau, the sovereign entity was 'the people'; for Sieyès, it was the then relatively recent invention of 'the nation' (p. 70).

The contest between Rousseau's constituent power of the people and Sieyès' constituent power of the nation resists any easy characterisation. While the former advocated integrating the constitution-making power of the people into the constitution itself, the latter maintained its extra-legality. For Rousseau, a constitution's legitimacy depended on the popular will to such an extent that he held that each generation had the right to reconstitute the state. Hence, any constitutional order 'always had a "provisional form"' (pp. 48–49). In contrast, for Sieyès, the ideal constitution 'would have "the terrible permanence of the laws governing the universe itself", but since human beings were imperfect, it needed to be open to piecemeal revision as opposed to entire replacement' (p. 81). In one sense, preserving the extra-legal character endows constituent power with a potent revolutionary potential. However, lest one concludes that Sieyès preserves the purity of this power, his preference for national sovereignty undercuts the robust democratic ethos that constituent power often connotes. Indeed, Sieyès maintained that some members of the political community were not citizens who could fully participate in self-governing, e.g. 'women, foreigners, and those who had no property to contribute to the public establishment' (p. 71). Admirably, Colón-Ríos attends to these theoretical disputes carefully and even-handedly: neither emerges as the unqualified superior, though Sieyès' direct, personal involvement with pre-revolutionary debates and post-revolutionary power struggles is likely of greater interest to the more institutionally minded theorist.

The subsequent three chapters explore how Sieyès' view of constituent power became the dominant account. In his overview of the various nineteenth-century

constitutions and theoretical debates that arose in the revolution's aftermath, Colón-Ríos attributes this dominance to two principles of exclusion and representation (p. 103). Both are consistent with Sieyèsian constitutional theory: that the nation is a distinct moral entity that can exclude certain people from direct political participation on the basis that they do not best represent the 'national will'; and thus, that constituent power can be legitimately exercised by representatives on behalf of the nation, without full citizen participation (pp. 102–103). This approach directly contrasts with the more Rousseauian principle of participation with its 'constant search for new channels of direct citizen action' (although the footnotes remind the reader that Rousseau himself was no proponent of universal suffrage) (p. 105). Colón-Ríos then examines three constitution-making moments – Spain (1812), Venezuela (1811), and Colombia (1886) – wherein the resulting constitutions are all consecrated through national sovereignty. These instances, he argues, reveal that if the nation is the holder of constituent power, then limits to the franchise become permissible, and elite capture of the mechanisms of constituted power becomes possible as well (p. 126).

These nineteenth-century debates over the identity of the constituent subject continued well after these constitution-making moments, attempting to concretise the abstract Sieyesian nation with a more concrete Rousseauian form, without accepting popular sovereignty (ch. 6). According to Colón-Ríos, the constitutional theorists who embraced the theory of constituent power usually sought to limit governments and their legislatures by appealing to an extra-legal constituent subject that retained an exclusive constitution-making jurisdiction (pp. 159–161). Still, perhaps due to its revolutionary potential, this power was not always welcomed within the discourse, and some theorists sought to contain it by placing it within the jurisdiction of established law-making authorities. Colón-Ríos surveys two movements that attempted to deprive constituent power of some of its salient features: the Spanish historical constitutional theorists, who argued that constitutions can only emerge through long historical processes; and the Franco-Spanish doctrinaires, who maintained that only reason itself was sovereign, rather than a monarch or a community (ch. 7). These chapters are rich with historical detail and analysis: historically minded comparative constitutional scholars of Latin America and Europe will find much of interest here.

Contemporary legal theorists will likewise find chapters 8 to 10 valuable, particularly Colón-Ríos' use of Carl Schmitt's constitutional thought. In these chapters, the author addresses the 'material constitution' – best understood as the principled political decisions detailing law-making within a constitution – as standing for the idea that a 'formal' written constitution does not exhaust the 'substance' of a constitution (pp. 201–205). In contrast to the approaches detailed in previous chapters, Colón-Ríos argues that this normative conception of the constitution vindicates a theory of constituent power whereby its fundamental principles can be protected from ordinary acts of law-making (p. 216). This leads to

his discussion in Chap. 9 concerning the relationship between sovereignty and constituent power: for Colón-Ríos, the latter is a precise deployment of the former – specifically, the constitution-making power of the sovereign – such that constituent activity cannot produce ordinary governmental acts (p. 226). This distinctive character of this sovereign act prompts him to argue that Schmitt's account of 'sovereign dictatorship' tracks with constituent power, because such a dictator is authorised to change the constitution rather than maintain it (p. 241). In light of this understanding of the relationship between sovereignty and constituent power, Colón-Ríos returns to the Rousseauian constituent power of the people, arguing that binding imperative mandates can be expressed through the law (p. 270). While not acting as a state organ *per se*, in exercising its sovereignty the electorate becomes a 'juridical entity' that can place unsurpassable limits on its constituent power (p. 280). Furthermore, because a sovereign act can only affect the material constitution, such activity functionally effects a total reform – or, to use another term, a revolution.

Closing his book, Colón-Ríos suggests several possible avenues for future research, such as the imperative mandate, primary assemblies, limitations on amending power, the (il)legality of informal democratic constitution-making, and the enforceability of constitutional mandates (pp. 301–305). Should anyone take up these proposals, one would hope they model their investigation on what Colón-Ríos has produced: a thorough treatment of the historical and legal record that clearly demarcates the emergent theoretical terrain, and rigorously argues for future development of its insights.

References

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