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ON THE LIMITS OF ELITIST THEORIES OF CONSTITUENT POWER

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ABSTRACT
In times of crisis it is necessary to revisit the theorization of radical change and the mechanisms through which it can be realized in a peaceful and orderly manner. Joel Colón-Ríos's *Constituent Power and the Law* is a timely book that promotes our understanding of the concept of constituent power as well as of its juridical application. Despite its contributions, in this critical review I claim that, because the book is thought through an elitist democratic theory framework that presupposes the unitary nation-state, it excludes the republican theory tradition that is premised on the socio-ontological division between the powerful few and the many, and that conceives the periodic exercise of constituent power by the people as necessary to keep a republic uncorrupted. In addition, I take issue with Colón-Ríos's interpretation of Rousseau as a supporter of the direct exercise of foundational constituent power by the people in (silent) primary assemblies, and the resulting reduction of the people's exercise of constituent power to mere authorization and ratification—to the detriment of processes involving popular deliberative decisionmaking that lead to a mandate. Finally, I critically engage with his conceptualization of the 'material constitution,' arguing that the definition he applies is too broad to be useful. Including formal and substantive ordering rules and principles as part of the strictly material interpretation of the constitution, which emerges from power relations, conceals the specific contributions that the material framework brings to the study of constitutions and the law.

KEYWORDS
Rousseau; Condorcet; primary assemblies; material constitution

Interest on the constituent power and the prerogative to establish a new constitutional order arise historically alongside sociopolitical crisis. As decaying orders make desirable the attempt at structural innovations, and radical change needs to be juridically justified to be considered legitimate, ideas about the constituent power, its subject, origin, expressions, prerogatives, and limits, usually thrive within disintegrating regimes. Given the increasing consensus on the current 'crisis of democracy,' the untenable degree of inequality that has allowed for the accumulation of obscene

amounts of wealth in ever fewer hands alongside generalized precarity, and the emergence of ethnonationalist illiberal leaders and parties attempting to make tradition and the nation 'great again,' deeper knowledge about the historical conception of the constituent power and its juridical deployment seems necessary to think creatively about ways to get out of crisis without an outright revolution. Joel Colón-Ríos's *Constituent Power and the Law* provides us with important resources to understand constituent processes from the point of view of their successes and failures, both in terms of ideas and their implementation.

As its title indicates, the book is centered on the relationship between constituent power and legality. Casting a wide net, *Constituent Power and the Law* includes not only the better studied theoretical approaches to the concept of constituent power that developed in France and Germany, but also the Spanish and Latin American constitutional traditions. In his survey of theories of constituent power, Colón-Ríos begins with a brief review of early modern legal thought advocating for popular sovereignty, from Marsilius of Padua's *Defensor Pacis* (1324) to the English tradition of Johannes Althusius, George Lawson, and John Locke, and then centers on post-18th century ideas and constituent experiences. Even if the book takes Jean Jacques Rousseau, Emmanuel Sieyès, and Carl Schmitt as main intellectual resources to understand constituent power and its relation to the law, the most interesting chapters are devoted to the careful reconstruction of other, less known theoretical and juridical sources. Of special note is the treatment in Chapter 5 of the transformation of 'the people' into 'the nation' in processes of constitution making during the 19th century in Spain, Venezuela, and Colombia; the tracing in Chapter 7 of historicist and doctrinaire arguments rejecting constituent power developed by Gaspar Melchor de Jovellanos, Francois Guizot, and Donoso Cortés; and the analysis of the recent constituent processes in Colombia (1991) and Venezuela (2017) through the lens of Schmitt's theory of sovereign dictatorship in Chapter 9.

Despite the ambitious scope of the project and the enormous contribution of putting into dialogue different approaches to the constituent power that have developed since the 18th century in different countries, *Constituent Power and the Law* still remains within the contours of democratic theory and therefore, to my mind, unable to provide adequate tools for structural change. The selection and interpretation of authors within the democratic theory paradigm —which originates in the fiction of a unitary sovereign people— excluded two important contributions to the literature that do not necessarily fit in the popular sovereignty model that became hegemonic after the modern revolutions, and that today appears to be in crisis: 1) the ideas of authors working within the republican theory tradition, which begins not from unity but from discord based on the socio-ontological division between the powerful few and the many (Niccolò

Machiavelli being the most prominent),[1] and 2) the challenges posed to the theory and practice of constituent power by the recent constitutionalization of plurinationality in Ecuador (2008) and Bolivia (2009). By excluding the theories of republican foundings and constitutional renewals as well as the juridical existence of multiple peoples as potential bearers of constituent power within a shared territory, the book presents a tradition of constituent power that presupposes the unitary nation-state and is mainly elitist, conservative, and anti-populist, centered on stability, tradition, and representation, rather than on conflict, social change, and political action. In this manner, *Constituent Power and the Law* undoubtedly contributes to our understanding of why our constitutional models have been so impervious to structural change but does little to offer alternative tools to rethink constituent power for the 21st century. In what follows I address the critique to the 'popular sovereignty paradigm' through Colón-Ríos's particular interpretation of Rousseau and his conceptualization of the 'material constitution.'

The basic intuition that drives Colón-Ríos's analysis is that the relation between constituent power and the law is not only productive, but also "opens the way for radical forms of political participation" (p. 305), such as the exercise of constituent power by the people themselves in local assemblies. In order to theoretically ground this insight, he appeals to Rousseau's constitutional thought, which was one of Sieyès's most important influences, even if to develop an anti-Rousseauian model of representative government. In Chapter 2 Colón-Ríos reinterprets Rousseau as a radical democrat who was in favor of the people exercising constituent power through primary assemblies—even if he does not make direct reference to this mechanism in any of his texts. This bold reinterpretation of Rousseau, however, is not adequately substantiated with textual evidence but rather is based on a connection, against the grain, between the exercise of constituent power and scattered references Rousseau makes to the need for periodic assemblies of the people. As a theorist of constituent power, we could hardly classify Rousseau as a democrat since he gives the power to create a new constitution to a single Legislator (even if the text needs to be ratified by the people) and explicitly deprives the people of self-convoking as well as deliberating and proposing laws.

Colón-Ríos does away with the prominent figure of the Legislator developed in *The Social Contract* arguing that "Rousseau did not present the Legislator as a necessary condition for the creation of a legitimate state, but as a practical reality" and that "there is no reason why the Legislator cannot take the form of a collective entity or why... the

[1] For Machiavelli on constituent power see Filippo del Lucchese, "Machiavelli and Constituent Power: The Revolutionary Foundation of Modern Political Thought" *European Journal of Political Theory* 16.1 (2017): 3–23; Camila Vergara, "Machiavelli's Republican Constituent Power" in *Machiavelli's Discourses on Livy. New Readings,* edited by Diogo Pires Aurélio & Andre Santos Campos (Leiden: Brill 2021)

Legislator cannot be the people themselves" (p. 47). Even if it can certainly be argued that Rousseau did not conceive the Legislator as absolutely necessary, or necessarily as one individual, the idea that the people themselves could be the Legislator escapes the Rousseauian framework. The Legislator needs to "discover" the rules of society, which requires not only "a superior intelligence beholding all the passions of men without experiencing any of them" but also the capacity of "changing human nature" through a "sublime reason, far above the range of the common herd" (II.7). Moreover, the Legislator must "investigate the fitness of the people, for which [the laws] are destined" because some people, "like the foolish and cowardly patient who rave at sight of the doctor," may not be inclined to accept good laws to improve their faults (II.8). Rousseau clearly does not believe the masses can emancipate themselves by taking an 'observer position' to critically examine their society and design a system of regulation conducive to the expansion of liberty. His thinking is very much in line with Montesquieu's elitist constitutional thought, which argues some peoples, given their geographical location, climate, and costumes, are not suited to live in a free republic.

Rousseau's ideal model is not democratic Athens or plebeian Rome, but disciplined Sparta, a republic directed by the elite, in which the citizen-soldiers only assemble when convoked, to ratify laws put before them by their noble leaders. In this type of system, the power to ratify slides easily into a mere acclamation of the leader and pledge of support for the government, becoming a bonding ritual instead of an exercise of critical judgment. In the epistle dedicatory to the *Second Discourse*, Rousseau explicitly rejects the Roman model in which the people actively participated in the legislative process and the magistrates were excluded from popular deliberations, as well as the Athenian model in which everyone had "the power to propose new Laws according to his fancy." In Rousseau's ideal republic, the sovereign assembly is therefore silent, non-deliberative, and needs to be convoked by law or by a magistrate; self-convoked assemblies "should be regarded as unlawful" (III.13). The people have the power to ratify or veto only the law proposals from government; they are unable to argue against them or propose modifications. This plebiscitarian model, in which the power of the people is reduced to ratifying pre-made laws, does not allow for the channeling of radical change from below.

To be really sovereign, able to transform the constitutional structure when needed, the people need to have the prerogative to initiate binding legislation and constitutional reform, a power that was gained by the Roman plebeians with the passing of *lex Hortensia* in 287 BC, which eliminated the Senate's veto power over plebeian law. Neither Sparta nor Rousseau's ideal republic gave the common people the prerogative to direct government action or define the content of law. Giving the common people the power to ratify or veto basic law —something that it is only present in few

constitutions today, mainly as referenda for constitutional amendments and adoption of new constitutions— is qualitatively different from giving them the power to deliberate and autonomously decide on law and structural reform. The former is only a means to resist *further* oppression and legitimizes the current state of affairs, while the latter challenges de status quo, opening the possibility for the common people to change oppressive power relations and material conditions. While Rousseau, as part of the elitist conservative tradition, conceives the people as mere recipients of law, a sleeping sovereign that is consulted and encouraged to show its approval from time to time, plebeian thinkers conceived the assembled people as political actors who need to actively control the juridico-normative direction of society. Therefore, even if I agree that a democratic theory of constituent power for our times, in which technology makes universal participation possible, should require that the people themselves exercise foundational power through deliberative local assemblies, the stretching of Rousseau's theory to make him a supporter of primary assemblies that are able to exercise original constituent power does not provide firm theoretical ground to stand on, or institutional or procedural tools to materialize the exercise of the legitimate power to modify the basic structure.

If Rousseau is not the appropriate source to study the exercise of constituent power from below, neither is Sieyès. Despite the great impact of his political pamphlet "What is the Third Estate?", the most prominent constitutional thinker committed to incorporating mechanisms for the exercise of popular constituent power during the French Revolution was not Sieyès but Nicolás de Condorcet, the Marquis-turned-champion-of-the-people, who was elected to the National Convention and then appointed to preside over the commission that drafted the original constitutional project of the 1793 Constitution. Colón-Ríos argues that the idea of giving primary assemblies constituent power "represents a Rousseauian alternative to Sieyès's project," when it was really Condorcet who wrote extensively on this topic. *Le Girondine* —as Condorcet's constitutional project that was approved by the constitution committee of the National Assembly is commonly known— established a network of primary assemblies with binding power and a set of procedures to assure the correct aggregation of local decisions as well as enforcement mechanisms to assure the compliance of representative government.[2] However, in the approved but never implemented 1793 Constitution, primary assemblies did not have binding power or enforcement rules,

[2] The constitutional proposal on which *Le Gironde* was based on contained many other innovative proposals to empower the common people to control government. For an extended discussion of Condorcet's constitutional thought see Chapter 5 "Condorcet on Primary Assemblies" of my book *Systemic Corruption. Constitutional Ideas for an Anti-Oligarchic Republic* (Princeton: Princeton University Press 2020).

which allowed for them to be effectively reduced to mere electoral and consultative institutions, "precursors to the contemporary polling station" (p. 93), instead of sites for political action and constituent power. Since Sieyès was also in the constitution committee and was against giving primary assemblies the prerogatives to initiate legislation and exercise constituent power, the analysis of the discussions in Chapter 4 on constituent power during the French revolutionary period would have benefited from a deeper engagement with Condorcet's constitutional proposal alongside the mutilated version imposed by the Jacobins, as well as the argumentation deployed by Sieyès and Condorcet in those meetings regarding the imperative mandate and the exercise of popular constituent power. An examination of these discussions would have brought more forcefully to the fore the fundamental difference between popular 'consultative' inputs and binding resolutions, issue that has caused much controversy in recent participatory experiments such as the Citizen's Assembly in Ireland (2016) and the Citizen's Convention on Climate in France (2020). Moreover, centering the analysis on these exchanges between Condorcet and Sieyès would have established a sturdier foundation for positioning primary assemblies as legitimate bearers of democratic constituent power, rather than trying to build it based on a strained reinterpretation of Rousseau, who has thin democratic credentials and even outright anti-populist inclinations.[3]

The tendency to conflate ratification and deliberative decisionmaking reverberates in the historical discussions surrounding the imperative mandate and representation recounted in Chapters 4 and 5, debates that are then picked up again in Chapter 10, which is dedicated to contemporary constitutional orders. While Rousseau famously argued that the will of the people cannot be represented, Colón-Ríos shows in Chapter 4 how Sieyès attacked the direct exercise of legislative power by the citizens and supported representatives as surrogates for the nation—a line of thought that would help conceive representative assemblies as sovereign and open the door to usurpation. The rejection of delegation and binding instructions in favor of representation was also echoed in the constitution-making episodes during the 19th century in Europe and Latin America, which were "characterized by the early rejection of the imperative mandate and the exclusion of great majorities of the population from constituent activity" (p. 100). In Chapter 5 Colón-Ríos artfully traces in the discussion on the Colombian Constitution of 1886 how the imperative mandate begun to be identified with the *pouvoir commettant,* the power to authorize a commission. The Colombian

[3] For a discussion on Rousseau's anti-populist politics see John P. McCormick, *Reading Machiavelli: Scandalous Books, Suspect Engagements, and the Virtue of Populist Politics* (Princeton: Princeton University Press 2018), Chapter 4 "Rousseau's Repudiation of Machiavelli's Democratic Roman Republic" (pp. 109-143).

National Constituent Council, elected by the people to write a new constitution, was seen as "acting on an 'imperative mandate' from the Nation (even if its individual members were not bound by particular instructions of their constituents)" (p. 124). This idea of the 'commission as mandate' developed by focusing on its 'negative' aspect: the prohibition it imposes on the constituent representative organ to exercise ordinary governmental powers or any other function other than writing a new constitution. Colón-Ríos explores the limits of this equation between the constituent referendum and the imperative mandate in Chapter 10 through the case of Venezuela (1999), where the National Constituent Assembly, authorized by a constituent referendum to write a new constitution, exercised nevertheless not only constituent power but also sovereignty, transgressing the separation of powers by, for example, suspending and removing judges suspected of corruption (p. 285). Colón-Ríos convincingly shows how after 'the people' were transformed into 'the electorate,' their constituent action was successfully reduced to an electoral exercise of authorization and ratification. The examination of this discussion does not only clarify the important transmutations the concept of constituent power has suffered in the history of ideas and jurisprudence but also is extremely timely and relevant given the current challenges that are being mounted 'from below' to the established representative procedures, as the recent developments in the ongoing constituent process in Chile have shown; tens of thousands of active citizens, teenagers, and immigrants have turned to local cabildos to participate and exert extra-legal influence on the Constitutional Convention tasked with writing the new constitution.[4]

My final critique of this stimulating book that manages to successfully combine political theory and legal studies, has to do with the conceptualization of the 'material constitution,' which Colón-Ríos claims is "generally understood as including the norms that establish the basic structure of the state and that regulate the legal relations between state and citizens" (p. 186), the "equivalent to the constitution's fundamental content" (p. 194). This overly broad and ambiguous understanding of the material constitution —what is considered fundamental is in itself a political question— is explored in Chapter 8 through the works of the early 20th century thinkers Maurice Hauriou, Hans Kelsen, Carl Schmitt, Hermann Heller, and Costantino Mortati. However, Colón-Ríos interprets the material constitution as having a different meaning for each of these authors, with only Heller and Mortati referring to the concept directly as one that incorporates the relations of power in society. Paradoxically, Colón-Ríos defines the material constitution in non-material terms. By omitting the centrality of material

[4] For an account of the first year of the popular constituent process in Chile see my article "Burying Pinochet" *Sidecar–New Left Review* January 2021 <https://newleftreview.org/sidecar/posts/burying-pinochet>

conditions and power relations, and by focusing rather on the constitution's "basic structure" and "fundamental content," this conception of the material constitution allows for the confusion between the juridical structure that sustains and reproduces power relations and norms. This confusion seems unnecessary since neither Kelsen nor Schmitt discuss the 'material constitution.'

While Kelsen did not refer to the constitution as material but rather conceived it as the positive source of legality, Schmitt preferred the language of the "spirit" of the constitution to convey the substantive, essential elements that make up the constitutional identity. These formalist and essentialist conceptions of the constitution are not particularly material, and therefore including them as part of the tradition of the material constitution muddles our understanding of the concept, obscuring the specific contributions that a material lens could bring to the study of constitutions and the law. For instance, as I have argued in *Systemic Corruption*, material constitutionalism would allow us to engage in a dialectical analysis of the relation between power and the law —the material conditions of society and the legal, juridical, and formal provisions that (are supposed to) determine them. The constitutional ideology that emerges from this exercise would stand in contrast to Kelsenian legal positivism—which denies the political nature of constitutions and reduces their analysis to jurisprudence, excluding the application of law and its consequences in material terms— as well as to Schmitt's theory of the constitutional identity, which would later inform the interpretation of the constitution that developed in Germany after the 1958 Lüth case,[5] in which the 'material' aspect of the constitution was related not to the relation between power and law, but to the "expression of 'the substantive' in law,"[6] as a system of values centered on a pre-existing ethical "substance": the principle of human dignity.[7] Conceiving the material constitution as premised on a particular substance or essence, in which law carries normativity because it conforms to a determined spirit or set of principles, is quite different from conceiving the constitution as premised on the recognition that norms develop from power relations, and that the legitimacy of law should be determined depending on the role it serves in the material conflict between domination and emancipation in society.

From a material perspective, the vast majority of constitutional democracies today are *de facto* electoral oligarchies. Institutions, rules, and procedures work not for the benefit of the majority, but to protect and increase the economic and political power

[5] Lüth case, BverfGE 7, 198 (1958) B.II.1.

[6] Jacco Bomhoff, *Balancing Constitutional Rights: The Origins and Meanings of Postwar Legal* Discourse (Cambridge: Cambridge University Press, 2013), 74.

[7] 1949 German Constitution, Art. 1.1 "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority."

of elites; representative governments have tended, independently of who occupies the seats of political power, to legislate and regulate in their favor. As a result, today the richest 10% controls most of the wealth and productive capacities in almost all democracies around the world, including the United States. The oligarchization of democracy is a structural problem that demands structural solutions, a change of paradigm, a legal revolution as the first step to revert the patterns of accumulation and dispossession that are reproduced through the basic order. Such a transformation can only be legitimately carried out through the exercise of constituent power via clearly defined procedures aimed at enhancing deliberation and preventing manipulation. To this end, it is not only necessary to study the intellectual history of constituent power as a concept, but also its juridical application and the legal reasoning employed by assemblies and courts. *Constituent Power and the Law* is an important epistemic step in this direction, not only because it traces the discussions of the concept in political theory and jurisprudence but also because it hints towards rethinking constituent power from its popular exercise in primary assemblies, a radical idea that almost became law in revolutionary France and is in urgent need of reconsideration. The necessary normative, institutional, and procedural resources to materialize the constituent power's radical democratic potential are however not to be found in hegemonic practices and ideas, or in their reinterpretation. We need to look beyond elitist theories of constituent power, which attempt to suppress it or that allow a selected few to monopolize it, and move towards an interpretation of the constituent power 'from below' aimed at fostering and channeling the creative energy of the people to periodically renew the basic structure.