

The limits of constituent power? Vice and illiberalism

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Joel Colón-Ríos has written a wonderful and insightful book.¹ It introduced me to a Latin American tradition of thinking about constituent power, albeit a tradition that draws heavily on French and German sources, about which I had not known anything substantive previously. I have learned much from it. Colón-Ríos explores various thinkers in this tradition in much detail and analytic care, and develops his own view of constituent power on the basis of his extensive reading of this tradition. I admit to some overall sympathy for Colón-Ríos's project of rehabilitating the notion of constituent power in light of certain possibilities of abuse that are inherent in traditional conceptions of constituent power, and for the method – a combination of historical textual interpretation and analytic jurisprudence – by which he engages in that project. The comments to follow will be given in that sympathetic spirit, and from the perspective of the political philosopher rather than that of the constitutional lawyer.

I have two connected but open-ended questions for Colón-Ríos, broadly concerning the political potentials of his conception of constituent power. The first concerns what one might call the educative politics of subject formation. The second concerns the connection between constituent power and political economy, especially given the juridification of the concept as Colón-Ríos has presented it, by which I mean the claim that constituent power is both *expressed through* law and *limited by* law. In particular, it concerns the possible political limits of the notion of constituent power in dealing with problems of political economy. I hope, at the end of this response, to suggest some further positive directions in which my thought was spurred by Colón-Ríos's book.

Let me get into these questions through articulating my reading of one motivation that underlies the overall project. Colón-Ríos develops his conception of constituent power in part against a concern for the illiberal potentials of an unbridled conception of constituent power. 'The people' were (or, perhaps, invoking a distinction that Colón-Ríos's book renders explicit, 'the nation' as an imagined and necessarily represented unity was) invoked in this fashion by the Jacobins, by Carl Schmitt, and by some of the nineteenth-century French and Spanish lawyers that Colón-Ríos canvasses in the middle part of his book. Constitutionalism is precisely meant to be a bulwark against unbridled power. Yet, Colón-Ríos argues in Chapter 7, it is no answer to this concern just to *reject* a distinction between constituent and constituted powers. Such a rejection tends to grant ordinary legal bodies unlimited powers of constitutional change, since in consequence one loses the theoretical resources necessary to claim that such ordinary bodies are usurping a kind of power that they do not possess. And this poses a deep threat to constitutional order in situations where those institutions are in danger of takeover by illiberal right-wing populist forces working (more or less) through that legal order. To be a bit provocative, one could call this the *new*

1. Joel Colón-Ríos, *Constituent Power and the Law* (OUP 2020).

paradox of constituent power: whether one accepts or denies a doctrine of constituent power, one ends up with a situation that enables unbridled political power of the sort that we all should be worried about now; indeed, the very problem that constitutionalism was meant to address. And, like the old paradox of constituent power, the new paradox is not *just* a theoretical puzzle, but one which arises from and which speaks to existing practical and political challenges faced by (supposedly liberal) constitutional democracies. So there is some motivation to find or to develop a notion of constituent power that can act as a middle path.

Colón-Ríos's solution is to propose an extraordinary, yet non-sovereign and thus legally constrained conception of constituent power. He does so through developing a line of thought that he finds in Jean-Jacques Rousseau, in contrast to traditional conceptions of constituent power that find inspiration in the work of the Abbé Sieyès. Insofar as constituent power, on Colón-Ríos's conception of it, is extraordinary, it cannot be exercised by ordinary institutions, thus avoiding the second horn of the paradox. Insofar as it is non-sovereign, it cannot be used to usurp the ordinary functions of government, thus avoiding the first horn. And so we find that middle path.

But why think that this conception of constituent power addresses the root causes of the problem of unbridled illiberal political power? Here enter my two questions for Colón-Ríos. Let me get to the first through raising some aspects of Rousseau that do not play a central role in his argument, before moving to the second.

I accept that Rousseau has an important and neglected distinction between constituent and constituted power, and that that distinction plays an essential role in Rousseau's story. Recall the opening line of the *Social Contract*: 'Men are born free, but everywhere they are in chains.'² The question of *SC* is how we move from that state of unfreedom to one of freedom. And establishing a social contract – a constitutional order – is a necessary part of that move. Yet it is only *part* of Rousseau's story of the move from unfreedom to freedom. The other part is the necessity of education for virtue. Why is such an education necessary? Because establishing a social contract, which requires the adoption of a general will, is impossible given the way in which people are *now*: driven by self-interest and unhealthy forms of self-love – that is, because people are vicious and unfree. As Rousseau details in his two Discourses, we have been *denatured* – alienated from ourselves, others and nature – by the development of the arts and sciences, by the institution of property, the division of labour and all the other social and political practices by which we dominate ourselves and others. Although human beings are 'naturally good', Rousseau writes, 'it is from ... institutions alone that men become wicked'.³ We are motivated by a self-love that can only be satisfied by comparative judgements with others, which fosters competition instead of cooperation, animosity instead of friendship and a constant yearning to be put above others that is inconsistent with the adoption of the general will.

But – and here's the rub – virtue is necessary in order that the people establish the right constitution. Without changing these fundamental features of human motivation and action, no formal set of rules or principles will be sufficient for self-determination

2. Jean-Jacques Rousseau, *The Social Contract and Other Later Political Writings*, ed Victor Gourevitch (CUP 1997) 41.

3. Jean-Jacques Rousseau, 'Letter to Malesherbes, Jan 12, 1762', in Christopher Kelly, Roger D Masters, and Peter G Stillman (ed), *The Confessions and Correspondence, Including the Letters to Malesherbes* (Dartmouth College Press, 2013), 575; Jean-Jacques Rousseau, *Oeuvres Complètes* 1:1136.

and self-governance. Yet having the right kind of constitutional order is part of what will make people virtuous. The creation of a good constitutional order depends on an education for virtue, but for the people to create a good constitutional order requires that they be virtuous. This is the paradox at the heart of Rousseau's thought.⁴

For Rousseau, the Legislator is the answer to this paradox, but his appeal to that figure is no easy way out of the paradox. Rousseau thus spills a fair amount of ink on the role of the Legislator and the particular talents and skills they must have, whether as an individual or as a collective.⁵ The Legislator, as Colón-Ríos notes, cannot just impose a constitution on a people, nor is their role *just* of presenting the constitution to the people for ratification.⁶ They must, rather, take on the larger task of *forming* a disparate set of self-interested individuals into a *people*, one where each individual does not seek advantage over others, but instead, in acknowledgment of their mutual dependence on others, wills the common good. That involves changing deep facts about human psychology; indeed, Rousseau even writes, 'changing human nature ... weakening man's constitution in order to strengthen it'.⁷

I will leave aside the fascinating details of how Rousseau proposes this process might occur and of the insightful moral psychology that underlies it – one which draws on an older Platonic conception of the Legislator and not just the Aristotelian/Thomist tradition on which Rousseau more explicitly draws and which Colón-Ríos mentions. The point is, as Rousseau says at the closing of Book II of the *Social Contract*, and as Colón-Ríos notes in a passing footnote, that an essential part of the constitution (indeed, in Rousseau's words, the '*real* constitution') is the law as it is 'graven not on tablets of marble or brass, but on the hearts of citizens'.⁸ (We might hear echoes of this claim in the material constitutionalists, particularly Heller, whom Colón-Ríos examines in Chapter 8.) If constituent power is the power to create and change a constitution, then, on this understanding of the constitution, constituent power is the power to create and change the souls of citizens. And this psychological change occurs in and through developing and participating in a constitution in the formal sense. Institutions shape psychology, which in turn shapes institutions.

So my first question to Colón-Ríos: is *this* aspect of the Rousseauian picture manifest in his story, and does he want it to be? I think there are places where it might – in the citizen assemblies and in the developing of mandates that he mentions, as well as,

4. 'For a nascent people to be capable of appreciating sound maxims of politics and of following the fundamental rules of reason of State, the effect would have to become the cause, the social spirit which is to be the effect of the institution would have to preside over the institution itself, and men would have to be prior to laws what they ought to become by means of them.' Rousseau (n 2) 71. See also Carol Blum, *Rousseau and the Republic of Virtue: The Language of Politics in the French Revolution* (Cornell University Press 1986) 112 and following.

5. In this interpretation of the role of the Legislator, I depart somewhat from the reading that Colón-Ríos sketches in Chapter 1. For Colón-Ríos, the Legislator is not 'a necessary condition for the creation of a legitimate state, but... a practical reality in light of the fact that a society that has never lived under a constitution will normally lack the ability to create one'. Colón-Ríos (n 1) 47. This sentence is, I suppose, literally true, but since, I take it, Rousseau isn't interested in metaphysical necessity, but in the practical necessities imposed by the tendencies of modern socialization, whether or not the Legislator is necessary *in that metaphysical sense* is neither here nor there. In other words, the Legislator is necessary *given the paradoxical situation in which humans find themselves*.

6. *Ibid.*

7. Rousseau (n 2) 69.

8. *Ibid.* 81. Colón-Ríos (n 1) 37 fn 35.

further, in the streets and in the complex engagements that are a necessary part of the ‘constitutional moments’ in which constituent power makes itself manifest and which themselves build towards whatever final and institutionalized constitutional structures arise from those moments. But should this educative aspect be made more prominent, and if so how, in the particular institutional proposals for the exercise of constituent power that Colón-Ríos supports?

Now, it may be that Colón-Ríos doesn’t think this educative part of Rousseau’s story essential. He might insist that the conception of constituent power he is developing is an ideal theory of how constituent power ought to be construed, and such an ideal theory may quite justifiably make other normative idealizations about the relevant capacities of agents and so on.⁹ In that case, Colón-Ríos might say, he is giving an account of constituent power not beholden to the demands of our current, non-ideal situation that I have sketched here. But that would seem to underplay the importance of the practical engagements that form at least a part of the intellectual history and the traditions of constitutional thinking from which Colón-Ríos is drawing. Further, one of the important moves in Colón-Ríos’s book is to locate constituent power in the terrain of what he calls ‘the people’ instead of ‘the nation’. The latter comprises an idealized unity. The former refers to the actual set of people who comprise a given community looking to make or remake their constitution for themselves. While it would not be inconsistent with this emphasis on the actual people rather than the idealized nation then to give an idealized account of the agential capacities of the people, it would sit a little uneasily, at least to my mind.

To return to the story of educative subject formation that I found in Rousseau, one might further think that this political education is practically necessary given the causes of the illiberalism that (at least as I have read him) Colón-Ríos’s interpretation of constituent power is meant to resist. That illiberalism is caused, on the one hand, by a particular *lack* of civic education, and increasingly, given that lack, by a positive ideological educative program by the likes of the Murdoch media, far right social movements, and the sordid depths of the internet. And, if we are to follow Rousseau in spirit as well as letter, we should not narrow our attention only to the most overt fascist or proto-fascist versions of this ideology as they are expressed in the pages of whichever Murdoch daily or whatever current ironically fascist podcaster is the preferred target of one’s disdain. Those ideologies, as we are coming to see more clearly day by day, are only the tip of a much larger iceberg that cuts to the very heart of our everyday social practices and ways of being. The ‘us-versus-them’ paradigm, the ‘in-it-just-for-ourselves’ commitments, the entire rat race mentality – it is those ways of thinking that are repeated back to us constantly by the material ways in which we are necessarily put in competition with others in order to get along in this world, whether in work, in education or in social life more generally. And that larger ideology is embedded in and sustained by a variety of institutions that sit outside a narrowly political, let alone narrowly constitutional, frame: the media, schools and universities, workplaces, civil associations. One need not accept all of my rather pessimistic diagnosis of the depth of the present problems we face in order to accept the basic point: to rely on a purely juridical notion of constituent power in the face of these types of phenomena cannot of itself address all of the causes of our problems.

This leads me to my second question: why think that *even* a notion of constituent power enriched in this way might actually address the root causes of the current problems? Are there limits to what the notion of constituent power can do? In particular,

9. See, e.g., Charles W Mills, ‘“Ideal Theory” as Ideology’ (2005) 20(3) *Hypatia* 165.

I want to invoke two related themes: that of the nation-state and of political economy. I am wondering whether the purely *domestic* notion of constituent power invoked by Colón-Ríos can in principle respond to these illiberal threats, which are increasingly the function of the operation of global finance capitalism in impoverishing actual people in favour of corporate wealth accumulation and protecting the interests of the owners of capital. To put things bluntly: what of the *political economy* of constituent power?

There are, of course, some contemporary theorists of constituent power, writing in the EU and elsewhere, who have attempted to move the traditionally domestic-focused conception of constituent power onto the transnational (regional or global) levels. And a smaller subset of those take seriously the political challenges raised by the globalization (and consequent privatization) of the economy. I don't propose to rehash the details of those debates here, though I will mention them again at the end of this response. But there are specific places in Colón-Ríos's book where these issues very naturally come up, and especially so given the particular tradition on which his book focuses.

Those spaces concern the more recent episodes of constitution-making in the latter half of the twentieth century in Latin America that are the most central case studies that Colón-Ríos uses both as illustrations of his theoretical claims and as historical inspiration for some of those claims. It struck me, in reading Colón-Ríos's otherwise detailed analyses of these episodes, particularly at the end of his book, that there is little reference to the colonial history of the region, which might be considered both as the implicit background that conditions these constitutional moments and, often, part of the direct causes of those moments. Can we understand the nature of those constitutional moments without reference to the way in which they were a direct response to decades of direct and indirect postcolonial foreign intervention in the name of 'protecting private property' (i.e. foreign extractive investments), in the light of centuries of extractive colonialism and political and cultural domination? (I am thinking here, for example, of recent events in Venezuela and Chile – 'not 30 pesos, but 30 years' – and, as I write these words, of the failed attempt in Chile to ratify a new and radical constitution under waves of misinformation and fearmongering on social media.)¹⁰

Perhaps more to the point conceptually, given that global finance capitalism and the foreign economic and political (if not any longer overtly military) interventions that support it *still* operate to cause rampant inequality and material and social impoverishment – increasingly, too, even in developed countries – can any constituent power limited to the boundaries of a state hope to address the root causes of the problems that gave rise to the constituent moment to begin with?¹¹ If constituent power is one expression of the power of the people for self-determination, for autonomy, then its exercise is to be contrasted to heteronomy, to external domination, whether of the monarch, the colonial power, or the market. In the case of the monarch and the colonial power, it is clear how an assertion of self-determination is to address heteronomy. But it is not perhaps so clear where the relevant cause of external domination is not a

10. See, e.g., the papers in (2020) 31 *Law and Critique*, edited by Emiliós Christodoulidis and Marco Goldoni. On the failed 2022 referendum, see, e.g., <www.reuters.com/world/americas/chile-battles-flood-half-truths-constitution-vote-nears-2022-08-29/>; <www.reuters.com/world/americas/chile-forced-back-drawing-board-after-new-constitution-scuttled-2022-09-05/>.

11. In a different vein and appealing to a different literature but making a similar point, see Olufemi O Taiwo, 'States Are Not Basic Structures: Against State-Centric Political Theory' (2019) 48(1) *Philosophical Papers* 59.

specific actor, but a social and economic system. And given the (relative) failures of the postcolonial constitutional moments of the twentieth century, given the ability of capital continually to reassert its dominance over all life, it is an open question whether even Colón-Ríos's insightful rethinking of the notion of constituent power can make it speak to the problems of our present moment.

It would be uncouth to close my remarks on this purely critical note, asking Colón-Ríos to do all the further intellectual work on top of the wonderful book that he has already given us. So, I will gesture towards some possible ways in which Colón-Ríos's conception of constituent power *might* be extended, quite naturally, to respond to my criticisms here. I think that it is politically, as well as theoretically, important that a way be found to do so. If constituent power represents the potential of *people* (and here I insist on the descriptive and inclusive meaning, as does Colón-Ríos – *actual living people*) to determine together the conditions under which they live and act, then to say that constituent power is necessarily incapable of dealing with the problems caused by rampant capitalism is to say that politics, now, is *necessarily* subservient to the market. But since the market is something that *we* have created and propagated, since capitalism is a social system that *we* have built, it cannot be something that is necessarily and totally resistant to the exercise of our agency. What we have made, we can destroy – even if, at this moment, we do not know how.

So, to the possibilities. The first is, quite obviously, to raise his conception of constituent power from the purely domestic framework to the global. This path of articulating a conception of *global constituent power* to ground a global constitutional order has been taken by Matthias Kumm, Neil Walker, Emiliós Christodoulidis and others.¹² There are obvious practical political and I think philosophical difficulties with such a proposal, though I wouldn't want to rule it out in advance. And insofar as such a path raises particular questions for how it is even possible to *institutionalize* constituent power in this global setting while ensuring that it does not, so to speak, step on the toes of sovereign (state) political orders, it may be a path to which Colón-Ríos's specific rethinking of the notion of constituent power has much to contribute.

But there are other possibilities short of such a global response, some raised by social movements in Latin America (and others around the globe) responding to the problems caused by capitalism and (neo-)colonialism. One of those, proposed by decolonial thinkers like Walter Dignolo and Samir Amin, is to establish *linkages* between various 'developing' economies while simultaneously *delinking* from the chains of finance and capital cartelized by the global North.¹³ Such proposals look to form a new basis for international relations outside the hierarchical structures that characterize current global politics, one that is not corrupted by the forms of power characteristic of capitalist colonialism. It is true that these decolonial possibilities have not traditionally been theorized in terms of constituent power. But, at their heart, they are political (and, as Dignolo emphasizes, epistemological and ethical – *educative*, in Rousseau's spirit) proposals that aim to establish an economy that serves social purposes rather than subsuming them, a social order in which economics is

12. See, e.g., Matthias Kumm, 'Constituent Power, Cosmopolitan Constitutionalism, and Post-Positivist Law' (2016) 14(3) *International Journal of Constitutional Law* 697; Neil Walker, 'The Return of Constituent Power: A Reply to Matthias Kumm' (2016) 14(4) *International Journal of Constitutional Law* 906; Emiliós Christodoulidis, *The Redress of Law* (CUP 2021).

13. See, e.g., Walter Dignolo, 'Delinking' (2007) 21 *Cultural Studies* 449; Samir Amin, 'A Note on the Concept of Delinking' (1987) *X Review* 435; Samir Amin, *Capitalism in the Age of Globalization: The Management of Contemporary Society* (Zed Books 2014).

subservient to politics rather than vice versa. And what is that but an insistence on the possibilities of constituent power to create and renew the fundamental constitutional terms on which people relate to each other?

Colón-Ríos's *Constituent Power and the Law* is an insightful and sensitive reading of a particular tradition of thinking about constituent power. It draws from that tradition a conception of extraordinary, but non-sovereign constituent power that has the potential to speak to the social and political problems we face in our present moment. Those problems run deep. And to address those problems we do need a conception of constituent power and of constitutional law – indeed, of law more generally – that is equally as deep, one connected to the different histories and forms of social, political and economic relation in which law finds its life. Colón-Ríos's book is an important contribution to that project.