LUIS BOTELLO-MONCADA*

Constitutional Challenges: Constituent Power and Plebiscitary Claims at Odds

Desafíos constitucionales: el poder constituyente y los alegatos plebiscitarios en conflicto

ABSTRACT

This paper elaborates on the scope of plebiscitary presidencies as disruptive forces between democracy and constitutionalism, emphasizing the procedures for convening the constituent power. Through a comparison of Venezuela (1999) and Chile (2019-2023), this paper deepens how plebiscitary outbreaks become linkages capable of dragging down constitutional fundamentals. A substantial aspect focuses on establishing why the request and effectiveness of procedures may vary under the notion of foundational power in constitutional analysis, as is the case with the right of resistance. The paper concludes that the distinction between the concepts of constituent power lies not in the force it deploys, but in the cirmcunstances preceding its convocation. Thus, the theory of constitutional moments plays a significant role in this study. In this sense, the paper emphasizes how plebiscitary tendencies pose a threat to constitutional designs. Rather than taking advantage of procedural channels to establisha new order, these tendencies tend to debase constitutional forms in favor of marked ideological interests.

* Lawyer from Universidad de los Andes and Economist from Universidad Externado de Colombia. Master of Laws (LL.M.) from Duke University, North Carolina, United States. Professor at the Faculty of Finance, Government, and International Affairs at Universidad Externado de Colombia. Managing Partner at Botello Moncada Abogados. For Gaby. "Where you go, I will go" (Ruth 1:16). Contact: luis.botello@uexternado.edu.co. ORCID: 0009-0000-4253-6485

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KEYWORDS

Constitution-making, constitutional design, plebiscitary presidencies, constituent power, constituted power, upstream and downstream constraints, constitutional moments.

RESUMEN

El presente trabajo explora el alcance de las presidencias plebiscitarias como fuerzas disruptivas entre la democracia y el constitucionalismo, priorizando los procedimientos de convocatoria del poder constituyente. Al contrastar los casos de Venezuela (1999) y Chile (2019-2023), el trabajo profundiza en cómo los estallidos plebiscitarios se convierten en encadenamientos capaces de arrastrar fundamentos constitucionales. Un aspecto sustancial se centra en establecer por qué la solicitud y efectividad de los procedimientos pueden variar bajo la noción de poder fundacional en el análisis constitucional, como es el caso respecto del derecho de resistencia. El trabajo determina que la diferencia entre las nociones de poder constituyente debe rastrearse no en la fuerza que despliega, sino en los escenarios que anteceden a su convocatoria, desplegando así por qué la teoría de los momentos constitucionales adquiere un papel significativo en este estudio. En este sentido, el trabajo subraya cómo las tendencias plebiscitarias suponen una amenaza para los diseños constitucionales, pues lejos de aprovechar las vías procedimentales para instalar un nuevo orden, tienden a degradar las formas constitucionales en favor de marcados intereses ideológicos.

PALABRAS CLAVE

Diseño constitucional, presidencias plebiscitarias, poder constituyente, poder constituido, restricciones ascendentes y descendentes, momentos constitucionales.

SUMMARY

INTRODUCTION

Authors such as Daryl Levinson and Stephen Holmes emphasize that constitutionalism aims to control public power[1]. This function is essential for recognizing the challenges that arise from the design, amendment, and constitution-making processes. These challenges come to light when any public branch promotes constitutional adjustments without defining the procedures in force.

For example, when the constituent power arises a core concern is noted in the lack of definition of the procedure that must be followed up to convene and execute constitutional tasks. Moreover, a pressing problem is related to the possible imposition of a new constitutional order where an exclusive and ideological outlook of the state comes into force, constraining the effectiveness of rights and diminishing controls on public power[2].

Therefore, constitutionalism must be considered an ongoing, unfinished project necessary for controling public power. With this in mind, this paper argues that while the imposition of procedures is pivotal, it is not always appropriate. Sometimes the constituent power must suddenly intervine as a unique means of redesigning constitutional orders. This highlights the distinction between the notions of constituent power, particularly the right of resistance and ordinary power.[3]

Along with differentiating between the notions of constituent power, closing the disparities between the episodes that precede the onset of this foundational force is fundamental. Bruce Ackerman puts forward the theory of the "constitutional moment", arguing that not all episodes where the power of reform erupts have the same intensities. Recognizing that the events where the power of constitutional reform emanates are different, then both the con-

1 Daryl J Levinson, *Looking for Power in Public Law*, 130 HARV. L. REV. 31, 31 (2016). For more details, see also footnote 8 of this paper, as authors such as Zachary Elkins, Tom Ginsburg and James Melton consider that constitutions seek to "limit the behavior" of constituted powers. Concerning Stephen Holmes' insights, see footnote 6 of this paper, as the author considers that constitutionalism aims to remove certain decisions from majorities because they can affect the rights of minorities.

2 A recent example of the above is illustrated by multiple pronouncements by the President of the Republic of Colombia, Gustavo Petro, related to the possible intention to promote a National Constituent Assembly. This case is relevant because it prompts this paper to point out that beyond the legitimacy of any proposal that emanates from the exercise of the executive, it is confusing when it is indicated that the process of convening should not be subject to the forms or procedures, ignoring the constitutional channels in force. For further details of President Gustavo Petro's statements, see María Alejandra Uribe, *Yo los invitaría a que mirarán menos la forma que el contenido: Petro ante constituyente*, W RADIO, Apr. 15, 2024, https://www.wradio.com.co/2024/04/15/yo-los-invitaria-a-que-miraran-menos-la-forma-que-el-contenido-petro-ante-constituyente/.

3 For more details, see section 2.1. of this paper.

stitutional moments and the notions of constituent power trigger fundamental insights into this paper.

The equation of constituent power and constitutional moments acquires greater complexities by including the variable of tensions between constitutionalism and democracy. This point is vital for the analysis because it lays the groundwork to differentiate between the spontaneous irruption of the constituent power or the interested injunction of a constituted power, which tends to originate from the executive power in presidential systems. The majority uproar as the only source of legitimacy is presented as a threat, not only because it could violate the rights of minorities and the opposition, but also because of the role of plebiscitary presidents as anathema against constitutional democracies.

By delving into the notions and moments of constituent power, this paper determines how the applicability of procedures may vary depending on the pre-constitutional circumstances and intensities triggered by its holder. While some relevant considerations underscore that the constituent power is "foundational, legally unlimited and sovereign",[4] other perspectives remark on its limits of content and procedure[5] as fundamental characteristics. This paper also contributes toa more consistent analysis by establishing that the scope of this unique power must be traced not in the force it deploys, but in the settings that precede its convocation. That previous moment sheds light on deciphering how plebiscitary claims become communicating vessels that exacerbate the tension between democracy and constitutionalism.

This paper, therefore, explores the notion of constituent power and how the plebiscitary profile of constituted powers can undermine the foundations of constitutional democracies. The document is structured as follows: Section 1 prioritizes the review of the tensions between constitutionalism and democracy. Specifically, section 1.1 studies the constituent power and constitutional moments, while section 1.2 describes plebiscitary presidencies. Section 2 delves into the processes of constitution-making and enactment, detailing the Chilean (section 2.1) and Venezuelan (section 2.2) cases to explain the control mechanisms provided to control public power. Finally, section 3 concludes.

4 Carlos Bernal, *Constitution-Making (without Constituent) Power: On the Conceptual Limits of the Power to Replace or Revise the Constitution*, *in* Constitutional change and transformation in Latin America 21, 24 (2019).

5 See sections 4.1. and 4.2. of Raffael N Fasel, *Constraining Constituent Conventions: Emmanuel Joseph Sieyès and the Limits of Pouvoir Constituant*, 20 International Journal of Constitutional Law 1103 (2022).

1. CONSTITUTIONALISM AND DEMOCRACY

Stephen Holmes states that constitutionalism is in a way anti-democratic, as it seeks to limit the majority power that derives from democratic decisions. The author states that "a constitution is Peter sober while the electorate is Peter drunk",[6] making it clear why some constitutional contents should not be subjected to the excessive power of majorities.

The above can be approached in another way. At first glance, one could focus on the functions of the Constitution, which serve to limit public power by imposing inter-organic controls through the system of checks and balances. If a constitution restricts public power, those who hold any kind of power could argue obstructions to the fulfillment of their functional duties. From there, occasionally, clamors arise from the majority, which are understood as the plea of a branch of public power (either the legislative or executive power) for greater democratic legitimacy based on its popular election[7].

According to Zachary Elkins, Tom Ginsburg, and James Melton, by limiting "the behavior of governments",[8] constitutions contribute to the "functioning of democracy (otherwise) the state operates for the short-term benefit of those in power or of the current majority".[9] Recognizing the benefits of self-government, Carl Sunstein considers that constitutions serve as guarantees to facilitate "democratic elections", constituting an "important aspect of freedom".[10] Additionally, the author specifies that constitutions create a kind of virtuous duality because "freedom requires self-government, and self-government makes it more likely that citizens will have good living conditions."[11]

After acknowledging that public discussion rather than the imposition of majorities[12] is a quintessential element of democracy, Stephen Holmes stresses that "popular sovereignty is meaningless without rules that organize and protect public debate."[13] This idea reveals the tension between majority views and the need to ensure that discussions run smoothly with respect for

6 Stephen Holmes, *Precommitment and the Paradox of Democracy*, *in* CONSTITUTIONALISM AND DEMOCRACY 195, 196 (Jon Elster & Rune Slagstad eds., 1988), https://www.cambridge.org/core/product/

7 For more information, see Section 2.2 accompanying this paper. It should be borne in mind the analysis developed by Juan Linz on the "problem of dual legitimacy", included in footnote 45 that accompanies this text.

8 Zachary Elkins, Tom Ginsburg & James Melton, *Conceptualizing Constitutions*, *in* THE ENDURANCE OF NATIONAL CONSTITUTIONS , 38 (2009).

9 *Id.*

10 Cass R Sunstein, *Introduction*, *in* DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO , 6 (2001).

11 *Id.*

12 Holmes, *supra* note 6 at 233.

13 *Id.* at 233–34.

minorities. It reaffirms the importance of the practical and theoretical insights of democracy and constitutionalism.

It becomes clear that public power is a living force involving challenges and threats. regarding the challenges, it is essential to better understand why reform procedures make it possible to strengthen constitutional designs, establishing themselves as mechanisms to guarantee that public power can be limited. As for threats, the majority affirmations pose a risk to constitutional democracies. In presidential regimes the executive tends to claim electoral support to the detriment not only of minorities and the opposition, but also of the adequate institutional balance, ignoring the constraints designed to control its constituted power.

Constitutional forms and procedures, therefore, are relevant in recognizing the long-standing tension between constitutionalism and democracy. Although these can be approached from different perspectives, this paper prioritizes two. The first provide context by focusing on the idea of constitutionalism as an instrument that seeks to control public power, including that held by the people as sovereign power. The second explores how plebiscitary claims represent this antagonistic relationship between constitutionalism and democracy, revealing structural problems to control public power.

1.1. Constituent Power and Constitutional Moments.

The insights stated denote the age-old conflict between the two opposing forces: the constituent power arising from the people and the constituted power represented by institutions[14]. Concerning the former, Sergio Verdugo affirms that it is a "supposedly unconstrained and absolute power to abolish a constitutional system and enact a new constitution,"[15] while the constituted power is restricted because it must comply with legal and constitutional mandates.

However, the notion of constituent power as "unlimited and uncontrollable,"[16] is not as simple as it seems. Joel Colón-Ríos specifies that there are five notions of constituent power, differentiating between basic notions and more

14 For the correct conceptual development of this paper, the constituted power is represented by the legislative and the executive alike, but the latter tends to embody plebiscitary trends. This paper then argues that plebiscitary presidents seek constitutional change for personal or ideological benefits, which challenges the constituent power in society. For a proper review of these considerations, see section 3 of this text.

15 Sergio Verdugo, *Is It Time to Abandon the Theory of Constituent Power?*, 21 International Journal of Constitutional Law 14, 15 (2023).

16 Joel I Colón-Ríos, *Carl Schmitt and Constituent Power in Latin American Courts: The Cases of Venezuela and Colombia*, Joel Colón-Ríos, CARL SCHMITT AND CONSTITUENT POWER IN LATIN AMERICAN COURTS: THE CASES OF VENEZUELA AND COLOMBIA, Constellations, 1–2 (2011).

complex visions[17]. Of the above, two are of special interest for the purposes of this document: the first alludes to the notions originally developed by Emmanuel Sieyès and "radicalized"[18] at a later stage by Carl Schmitt, aiming to clarify the scope of sovereign power. The second refers to the notion of constituent power as a right of resistance in situations of oppression by some constituted power.

Sieyès considerations on constituent power date back to the French Revolution, providing a conceptual and practical approach to the phenomenon of sovereign power overthrowing a constitutional order and promoting a new one. In the case of the sovereign power holder, Sieyès underpins the "nation, which is all-powerful and cannot be limited by any form of positive law[19]

The radicalization of Schmitt's vision can be understood in two ways. From this perspective, as Joel Colón-Ríos affirms, the constituent power cannot be constrained by procedures because it represents "an immediate will[20] The idea of not subjecting the constituent power to constitutional procedures or forms is substantial, and imposes a proper understanding of the separation and details of the notions about this type of foundational power.

To clarify , Raffael Fasel states that Sieyès notion cannot be narrowed with an unlimited constituent power. The author considers that the French thinker did not conceive of the constituent power as a "superpower[21]", as it has clear restrictions that deal with individual rights[22] or the mandates[23] received to develop in, for example, constituent assemblies.

This paper´sconceptual contribution entails that the vision of Sieyès and Carl Schmitt are not antagonistic, allowing them to complement each other based on concrete factual assumptions and highlightinh the difference where the right of resistance provides greater depth. When Raffael Fasel details that the French abbot's perspective does conceive limits, it enables this paper to understand circumstances in which power can somehow be controlled. In othe words: The real difference lies in the situations that precede the convocation, not in the nature of the constituent power. If an indomitable vision of constituent power is analyzed, closer to Schmitt's positions, it is understood

17 Joel Colón-Ríos, *Five Conceptions of Constituent Power*, 130 Law Quarterly Review 306 (2014). The author differentiates between notions such as: 1. The constituent power conferred on a "sovereign parliament", 2. The power that the "Crown or the imperial parliament" guarantees to the colonies to "give themselves their own constitution", 3. The power that invests representatives who must obey the dictates of the constituent, 4. The constituent power as a "right of resistance" and 5. Constituent power in the sense developed by Emmanuel Sieyès

18 Joel Colón-Ríos states that Sieyès' theory was radicalized when it was developed by Carl Schmitt. For more details, see Colón-Ríos, *supra* note 16 at 5.

19 *Id.* at 4.

20 *Id.* at 6.

21 Fasel, *supra* note 5 at 2.

22 For more details, see section 3.1. of *Id.* at 10.

23 For a comprehensive view, see section 3.2. of *Id.* at 14.

that the preceding constitutional setting requires a power that does not resist controls, approaching the notion of the right of resistance.

In this analysis, the constituent power´s right of resistance is fundamental because the sovereign power uses it to disrupt and subvert the pre-established constitutional order, claiming the importance of overthrowing oppressive forces. However, the notion of the right of resistance is more complex, conflicting, and contradictory if who alleges that right is a constituted power, revealing a constitutional aporia. It is contradictory if the one who alleges the power of resistance to an oppressive power is the holder of public power because then it could not be sustained how he accessed power in a regime that he later alleges as oppressive.

After presenting considerations on the two types of constituent power, the implications of constitutional procedures become apparent. Therefore, this paper affirms that the notion of inapplicability of procedures aligns with the notion of the constituent power as a right of resistance, insofar as it would make no sense that during times of oppression, constitutional forms were required to the power triggered in with immediacy to subvert the pre-established order. The same differs for the ordinary constituent power, which can be organized in constitutional moments of less pressure, as the success of a new constitutional agreement depends on the procedures understood both bottom-up and top-down[24].

From a practical perspective, constituent power is equally important to left- and right-wing ideologies. In Venezuela under[25] and in Chile under Augusto Pinochet[26], for example, sovereign power played a fundamental role in adopting drastic changes. Similar patterns have been presented in political projects in Ecuador, where the convocation of the constituent power was promoted by the executive branch even when "the 1998 Constitution did not provide for the convocation of a constituent assembly, so the assembly was convened through a referendum, outside of the established amendment process[27]

These cases provide a comprehensive analysis of the theory of "constitutional moments".[28] Bruce Ackerman remarks on the thesis that "democracy

24 This thesis is developed in section 3 of this paper.

25 See, for example, Colón-Ríos, *supra* note 16 at 3. (arguing that the constituent power has become a "powerful judicial instrument of the left in Latin America").

26 The analysis of Chile's sovereign power during the reform processes during the dictatorship of Augusto Pinochet is as important as it is challenging. For example: Joel Colón-Ríos states that the Military Junta "claimed that it held an omnipotent authority for the creation of the Law. (…) The Military Junta, in short, was not acting on a commission, but was wielding political power as a sovereign." For more details, see Joel Colón-Ríos, *9 Sovereignty and Dictatorship*, *in* Constituent power and the law , 250 (2020).

27 See footnote 63 of Joel Colón-Ríos, *The Juridical People*, *in* Constituent power and the law , 278 (2020).

28 *See* 1 Bruce Ackerman, We the People: Foundations (1991).

is dualistic", providing this paper with better insight regarding two times of constitutional relevance: the one that develops in casual moments or "normal politics" and those that the author coins as "constitutional politics".[29] The first refers to situations where the electorate ordinarily participates in elections or normal political episodes, while only in moments of greater tension is "constitutional politics" presented, a scenario where the "voice of the people" is revealed[30].

Constitutional moments are relevant to the debates raised here because they differentiate between the "constituent power of the sovereign, expressed in the Constitution, and the ordinary power of government officials",[31] where the former is activated in moments of crisis or very singular public interest.

Based on cases such as Venezuela (1999), Ecuador (2008) and Bolivia (2009), the implications of dualist democracy can be assesed. Bruce Ackerman explains that there are "rare moments when political movements succeed in hammering out new principles of constitutional identity that gain the considered support of a majority of citizens"[32]. This paper argues that in these cases the level of involvement of the citizenry through the moment of "constitutional politics" is not clear, as the will of a constituted power prevailed when convening and adapting to the constitutional design. That is a diffuse view because although the constituent power was able to express itself, it did so under the exhortation of a constituted power, such as the executive. Under the influence of the latter, the imposition of ideological preferences is deployed, excluding both minorities and the opposition and affecting a country´s democratic structure.

Although David Landau analyzes that this democratic denaturalization can occur because of the arbitrary imposition of strong leaderships that summon the constituted power[33], Sergio Verdugo considers that this result is "compatible with[34] Carl Schmitt's theory" of constituent power. Regarding this consideration, Sergio Verdugo determines that the activation of the constituent power requires a leader who acts through a plebiscitary democracy[35].

29 Michael J Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759 (1991).

30 *Id.* at 760.

31 *Id.*

32 Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE LJ 453, 545 (1989).

33 See infranote 18 accompanying this paper.

34 Verdugo, *supra* note 15 at 17.

35 *Id.* at 17–48. This statement by Sergio Verdugo is of particular importance for this paper, as it provides with the means to connect with the idea of plebiscitary presidencies. In other words, this analysis is based on the notion of plebiscitary tendencies to differentiate between the constitutional moment that erupts spontaneously or that which is exhorted or promoted by a constituted power. For a comprehensive approach, see subsection 3.2 of this paper.

There are other nuances in the cases of Colombia (1991) and Chile (2019-2023). By delivering insights about the constitutional moment that preceded the convocation of the National Assembly of Colombia in 1991, Manuel José Cepeda highlights the "arbitrariness, exclusion, and abuses of power[36] prevalent at the time, as well as Rodrigo Uprimny warns of the limitations of approving reforms[37-38] activism. Something similar happened in Chile due to citizen pressure demanding greater constitutional and economic guarantees, since the current system resulted from the Pinochet[39] regime.

Bruce Ackerman elucidates two stages in his theory of dualistic democracy. He acknowledges that in order to protect rights, the constitution must have democratic approval at an initial stage. For the author, the consolidation and approval of the superior text by the sovereign becomes essential, affirming then that the dualist constitution "is democratic first and, rights-protecting second".[40]

This twofold dualistic approach supports the recognition of the prevalence of the sovereign or the constituent power in a previous foundational stage. But who summons this foundational power? Does it genuinely emanate, or is it promoted by a constituted power?. While the basic answer is that it can erupt spontaneously or be convened by another power, this paper focuses on the study and implications when the convening power is a constituted one, as this poses unfathomable challenges for the proper constitutional design.

The constitutional challenge becomes clearer when acknowledging that presidential regimes are characterized by having greater elements in the control of the entire system: they define the budget of the branches of public power and can interfere in the appointment of judicial authorities, among others. In such contexts, David Landau asserts that "strongmen or individual

36 Manuel José Cepeda-Espinosa, *Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court*, 3 Wash. U. Global Stud. L. Rev. 529, 546 (2004).

37 See Rodrigo Uprimny, *La democracia: entre la soberanía popular y las instituciones constitucionales*, Cambio, May 2024, https://cambiocolombia.com/imaginar-la-democracia/la-democracia-entre-la-soberania-popular-y-las-instituciones. (stressing that "Colombia was experiencing a very serious crisis and there was a political deadlock since the reform mechanisms did not work well").

38 In particular, footnote 40 of Cepeda-Espinosa, *supra* note 36. It highlights that the total constitutional reform "began with a double purpose: (i) to promote democratic participation or the empowerment of citizens for direct and effective involvement in the public and private decision-making process (...)".

39 See Marcela Prieto & Sergio Verdugo, *Understanding Chile's Constitution-Making Procedure*, 19 International Journal of Constitutional Law 1, 1–2 (2021). (specifying that "although there is no academic consensus as to the gridlock's causes, many Chileans blame the Constitution. In any case, it is true that crucial issues associated with social and economic rights are still partly dominated by neoliberal norms that were part of the dictatorship's original design.")

40 Ackerman, *supra* note 32 at 453.

parties can manipulate temporary majorities in order to reshape the political system in a manner that is not conducive to competitive democracy."[41] This manipulation can erode the genuine will of the constituent power and undermine at the same time the individual rights of citizens.

Therefore, the strongest thesis deals with the phenomena of plebiscitary presidencies as channels for convening constituent power. As with Hugo Chávez, Evo Morales, Rafael Correa, and even Augusto Pinochet, plebiscitary tendencies were dominant, generating at the same time ideological imposition in the constitutional sphere. This paper argues that when the constituent power is promoted by plebiscitary profiles, it is highly likely that the constituent assemblies will ignore the forms or procedures to guarantee results where the general interest prevails over particular or group interests.

When plebiscitary tendencies are ignited in the convocation of the constituent power, it is not possible to affirm that a genuine moment of "constitutional politics" in Bruce Ackerman's terms emerges. This is problematic because, rather than being democratic, the new constitutional order is subject to the will of particular and ideological interests, while at the same time violating the guarantees and necessary constraints to protect peoples´ rights.

However, the idea of a plebiscitary power promoting drastic constitutional changes is not peaceful because it is not necessarily accepted as a coherent conceptual body. Gonzalo Ramírez points out that total revisions,[42] understood as reforms to the entire constitutional articles, generate friction and can be inadequate when they are carried out by a constituted power.

Supported by Pedro De Vega´s conceptual development , the central idea of Gonzalo Ramírez stresses that it is not possible for a constituted power such as the executive to advance this type of reform because, in that circumstance "the constituent power would resemble the constituted power".[43] One could consider that Gonzalo Ramírez repels the considerations of Joel Colón-Ríos and David Landau, insofar as the latter authors substantiate the idea under the figure of a strong presidential leadership that manages to impose itself to the point of marginalizing "opposition groups [and establishing] a competitive authoritarian regime that persists to this day."[44]

Rather than presenting a controversy, this paper acknowledges the two positions and understands them as complementary. Gonzalo Ramírez's idea can be understood as a normative vision (the way it should be), recognizing that in established democracies with full guarantees, there is no basis for a constituted power to seek total reforms without appealing to established

41 David Landau, *Constitution-Making Gone Wrong*, 64 Ala. L. Rev. 923, 925 (2012).

42 Gonzalo Ramírez Cleves, Los límites a la reforma constitucional y las garantías-límites del poder constituyente: los derechos fundamentales como paradigma. (2003).

43 *Id.* at 91.

44 Landau *supra* note 41 at 926.

procedures. Conversely, Colón-Ríos and Landau analyze certain Latin American experiences, where often plebiscitary positions have managed to comprehensively redesign the constitutional order.

1.2. Plebiscitary Presidencies

In presidential regimes, the executive usually claims greater legitimacy derived from its popular election. This consideration constitutes a necessary starting point to understand the scope of a presidential role, sometimes becoming so active as to convene the constituent power. This can be illustrated in the sense that presidents tend to consider that their elections endorse them with the exclusive representation of the popular will and that their mandates enjoy majority force to impose both reforms and political projects.

While a calm review would acknowledge that in constitutional democracies majorities cannot tyrannize minorities or the opposition, in presidential systems certain complexities are dominant and then must be carefully analyzed. Juan Linz studies how the presidential system contains structural elements that affect good democratic development,[45] including zero-sum elections, dual legitimacy, the time factor, and stability.

Regarding the problem of dual legitimacy, Juan Linz remarks that the coexistence of two popularly elected powers tends to be problematic. While the presidential power seeks to impose itself under the pretext of the legitimacy derived from its popular election, the legislative power can proceed in a similar direction. Such confrontations generate institutional blockages, where government agendas are limited in time.

Amid the majority's eagerness to impose itself on the other public powers and even to the detriment of the constitutional design, a constituted power summons the sovereign power for its own institutional benefit. It should be noted that it is not the uncontrolled sovereign power that stands as a legitimate source to subvert the pre-established constitutional order, but rather it is the voice of a public power convening it to rethink the constitutional design. One way in which this materializes is through the plebiscitary tendencies of a public power, as in the case of the executive.

This is a constitutional challenge because the head of government believes that holds public power unilaterally and without oversight.. He argues that his only source of legitimacy comes from direct consultation with citizens. That is to say: the executive is seen as a constituted power pretending to the sovereign power to establish a new constitutional order.

These majority allegations are not new. They date back to historical episodes of singular interest, such as those that founded the well-known "Jackson-Lincoln School". According to Richard Pildes, this position gave

45 Juan J Linz, *The Perils of Presidentialism*, 1 J. Democracy 51 (1990).

rise to the paradoxes of "plebiscitary presidencies".[46] Agreeing with this analysis, Bruce Ackerman acknowledges that, including Madison and Roosevelt, Lincoln generated a "complex interaction with other institutions and the people at large, managed finally to gain democratic authority to make fundamental changes in [the] higher law."[47]

After being elected president of the United States, Andrew Jackson argued that electoral majorities granted sufficient legitimacy to impose oneself on state decisions, even to erode the constitutional principles of the separation of powers. In his first message to the U.S. Congress, Jackson noted that "the majority is for governing,"[48] unveiling what he considered the founding principle of the system of government[49]

In the case of Abraham Lincoln, however, the analysis takes on other nuances. Opposing to the ominous decision that prohibited African Americans from claiming their rights and prevented Congress from outlawing slavery,[50] the candidate-at-the-time challenged the "judicial supremacy" of the Supreme Court. Confronted with this obvious error, Lincoln began to consider that it was improper for the decisions of the Court to interfere with the government chosen by the citizens.[51] His years in office revealed him to be an activist president, who assumed the role of interpreter of the Constitution.

For this paper, the executive branch´s interpretation of the Constitution is of singular importance, as it represents a challenge to the constitutional design that makes the judicial branch the holder of this function. Lincoln's case is as challenging as it is complex, given that his interpretative tendencies were wielded in the face of a mistaken decision of the Supreme Court, but also in the scenario of the American Civil War.

The greatest tension can be described as follows: while judicial supremacy guarantees judges the interpretation of the Constitution, the power to protect and defend the Nation rests with the presidential powers. Describing that function in terms of the "meta-principle of constitutional interpretation,"[52] Michael Stokes Paulsen notes that Lincoln rejected the Supreme Court's interpretations, arguing that judicial decisions were not acceptable when "they

46 Richard H Pildes, *Law and the President*, 125 Harv. L. Rev. (2012).

47 Ackerman, *supra* note 32 at 477.

48 Andrew Jackson, *First Annual Message*, (1829), https://www.presidency.ucsb.edu/documents/first-annual-message-3.

49 John Yoo, *Andrew Jackson and Presidential Power*, 2 Charleston L. Rev. 521 (2007).

50 Dred Scott v. Sandford, 60 U.S. 393, 634 (1856), (1856), https://www.law.cornell.edu/supremecourt/text/60/393.

51 Matt Karp, *How Abraham Lincoln Fought the Supreme Court*, JACOBIN, Sep. 2020, https://jacobin.com/2020/09/abraham-lincoln-supreme-court-slavery.

52 Michael Stokes Paulsen, *The Civil War as Constitutional Interpretation*, 71 U. Chi. L. Rev. 691, 695 (2004).

were destructive to the nation whose Constitution he had sworn to preserve, protect, and defend."[53]

Lincoln's constitutional interpretations had complex nuances; he even linguistically called for revolution. In his inaugural address he noted that "if, by the mere force of numbers, a majority should deprive a minority of any clearly written constitutional right, it might, in a moral point of view, justify the revolution--- certainly would, if such right were a vital one."[54] This vision is relevant to this paper because it resembles rhetorical guidelines with marked tendencies of Latin American presidents such as Hugo Chávez, Rafael Correa and Gustavo Petro[55], who on numerous occasions called for the revolution as a reaction to the decisions of other public powers.

Given the above, this paper specifies that plebiscitary presidencies constitute a vital element in constitutional mechanics, whether in convoking or irrupting the constituent power. Plebiscitary tendencies draw a difference in the perception and applicability of procedures for amendments or the making of new constitutional orders. Plebiscitary dalliances then become the meeting point or communicating vessel that exacerbates the tensions between democracy and constitutionalism.

2. CONSTITUTION-MAKING AND ENACTMENT

The processes for defining a constitutional design are of great importance because they help us in comprehending the stages of formulation and discussion by which the constitutional contents will be established. In the context of this paper, these constitutional processes are central because they allocate restrictions to limit public power, even when it comes to the convocation of sovereign power.

A fundamental aspect relats to how "actors must proceed in the formulation, discussion, and approval of the text".[56] It is not a minor matter whether one should take advantage of the current channels to promulgate a constitution, as the search for a conceptual and practical framework in the legal discussion establishes obligations of unrestricted compliance.

53 *Id.* at 693.

54 Collected Works of Abraham Lincoln. Volume 4 [Mar. 5, 1860-Oct. 24, 1861]." In the digital collection Collected Works of Abraham Lincoln. https://name.umdl.umich.edu/lincoln4. University of Michigan Library Digital Collections. Accessed June 29, 2024.

55 Multiple examples illustrate this consideration in Gustavo Petro's presidential current period in Colombia. On the balcony of May 1, 2023, President Petro indicated that "the attempt to restrict reforms can lead to a revolution." See Political Writing, *El Balconazo, Petro invited the working people to defend the government's reforms*, El Espectador, May 1, 2023, https://www.elespectador.com/politica/en-balconazo-petro-invito-al-pueblo-trabajador-a-defender-las-reformas-del-gobierno/.

56 Tom Ginsburg, Zachary Elkins & Justin Blount, *Does the Process of Constitution-Making Matter?*, 5 Annual review of law and social science 201, 4 (2009).

Without sufficient clarity on each stage supporting the development of the constitutional design, it is possible to spotlight that the process could be distorted at least due to the lack of coordination[57] that would guide the discussions. Along with the lack of constitutional coordination, there would be threats by interests, whether individual or collective, that manage to impose themselves without the necessary deliberations to nuance or suppress them in a context of broad discussion.

Regarding the tension between individual and collective interests, Jon Elster states that in constitutional creation and enactment processes, "constraints, individual motivations, and systems of aggregation" must be addressed[58]. After emphasizing the upstream and downstream restrictions, the author distinguishes between two stages in the constitutional creation process: the previous stage and the stage of "ratification" of the text.

Elster admits that the convening of constituent assemblies tends to be motivated, as they are not usually "self-created".[59] Whether it is institutions or individuals who promote the constituent assembly, ascending restrictions are imposed in advance to regulate the activities of its members and the contents of the constituent assembly. Downstream restrictions, on the other hand, establish mechanisms that guarantee ratification of the decisions and contents approved by the respective assembly, making it possible to ensure the legitimacy of the decisions adopted.

Upstream and downstream restrictions acquire greater relevance in highlighting that constitution-making and its subsequent promulgation have a direct impact on the distribution of public power. Donald Horowitz argues that interest groups could impose "asymmetric preferences" on the constitutional design[60], making the adoption of restrictions during the process of approving the text more complex.

The foregoing concern compels this analysis to address issues related to the actors involved in formulating and discussing the contents of the constituent assembly. It has already been recognized that they can be influenced by individual or group preferences; however, the topics of interest do not end there. A vital aspect is the level of "involvement" of civil society in the process of building the constitutional design.

57 In relation to the lack of coordination as a negative element for the proper development of the constituent assemblies, see footnote 64 of this paper.

58 Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 Duke LJ 364, 365 (1995).

59 *Id.* at 373.

60 Donald L. Horowitz, *Constitutional Design: Proposals Versus Processes*, *in* The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy 15 (Andrew Reynolds ed., 2002), https://doi.org/10.1093/0199246467.003.0002 (last visited Apr 23, 2024).

Leading literature emphasizes that constitutional designs are "more participatory if the mass public has more opportunities by which to both oversee and engage in the process."[61] This is a significant consideration because it takes Jon Elster's idea of top-down restriction, as it facilitates citizen participation to ratify the text that was formulated, discussed, and approved by the constituent assembly.

Citizen participation also translates into the possibility of intervening in the election and removal of constituent assembly members. The "involvement" of the citizenry allows for action to control the public power held by the constituted powers, which in their functional exercise can obstruct the legitimate actions of the constituent power. Moreover, as will be specified in the case of Venezuela, the plebiscitary president can prevent the constituent power from developing freely, distorting the concept and its scope.

Apart from the importance of society's involvement in the constitution-making process, this paper highlights that even citizen participation requires adjusting to clear channels of upstream and downstream restrictions. The main argument of this consideration revolves around the purpose of eliminating or mitigating individual and group interests, since the imposition of these could alter the result that is transferred in the text approved by the constituent assembly.

2.1. The Chilean Case as a Recent Constitutional Illustration: Are the Procedures Relevant?

Following the social protests that began in 2019, the call for a National Constituent Assembly became essential. The first step originated under "the agreement for social peace and the new constitution."[62] For the interest of this paper, it is relevant to point out that the final text prepared in the deliberations of the assembly was rejected. The determinants of this failure or the errors that marked the popular rejection are linked to the ascending and descending constraints, which illustrates the importance of the forms in the constituent processes.

By analyzing the relevance of the procedures of amendment and constitution-making, Tom Ginsburg and Isabel Álvarez consider that the failure of Chile's Constituent Assembly was the result of the weakness of the procedures adopted[63]. The authors point out that the flawed design of procedures

61 Zachary Elkins, Tom Ginsburg & Justin Blount, *The Citizen as Founder: Public Participation in Constitutional Approval*, 81 Temp. L. Rev. 361, 363 (2008).

62 To have a comprehensive view of the stages of the constituent process developed in Chile since November 2019, see Fernando Atria, *The Constituent Process and Its Future After the Plebiscite*, Santiago: The Common Home (2023).

63 Tom Ginsburg & Isabel Álvarez, *It's the Procedures, Stupid: The Success and Failures of Chile's Constitutional Convention*, 13 Global Constitutionalism 182 (2024).

prevented the efficient execution of upstream and downstream restrictions,[64] especially because the procedure adopted showed "uncoordinated and competing" actors with each other, which at the same time negatively impacted the subsequent stages of the process of the Chilean assembly[65].

Regarding the lack of coordination between the assembly´s actors and phases, a core point was unfolded by the absence of ascending restrictions in terms of Jon Elster[66]. In fact, three actors participated in the definition of the procedures, additionally involving the Constituent Assembly itself. While a first technical committee prepared the "constitutional reform proposal", the Chilean Congress later codified the proposal to modify the Constitution and "allow the constitutional reform process"[67] and, finally, "three external bodies and the Constitutional Convention itself were involved in the creation of different procedures"[68]. Along with this lack of coordination that marked the beginning of procedural errors, there were also shortcomings related to the concentration of representation of center-left movements and an "institutionally weak representation of the right."[69]

Additionally, Raffael Fasel believes that the Chilean process was characterized by a predominant vision of constituent power in Latin America in the sense that it cannot be limited. The author emphasizes that the founding power was "invoked by thirty-four delegates of the Chilean Constituent Convention who claimed that, as holders of the constituent power, they could not be limited to the drafting of a constitution and did not have to respect previously agreed-upon rules."[70] This vision reinforces part of the lack of coordination of the assembly members, on this occasion not necessarily because of the wrong design of the procedure, but rather, it is due to the dominant belief that they possess indomitable powers. This belief tends to result in a lack of control within the constituent process.

Mark Tushnet believes that the bodies responsible for drafting the constitution are usually under the influence of political or citizen interests. The former being the most complex because the "quality" of the final text can be affected[71]. This position is a relevant input, given that the level of involvement of the actors, whether they are politicians or ordinary citizens, contributes

64 See *Id.* at 183. arguing that "a set of erroneous procedures not only interacted negatively with each other, but also profoundly affected the decision-making conditions within the Constitutional Convention."

65 *Id.* at 183–184.

66 See Magpie *supra* note 58.

67 Ginsburg and Álvarez, *supra* note 63 at 183.

68 *Id.* at 183–84.

69 Guillermo Larraín, Gabriel Negretto & Stefan Voigt, *How Not to Write a Constitution: Lessons from Chile*, 194 Public Choice 233, 242 (2023).

70 Fasel, *supra* note 5 at 3.

71 Mark Tushnet, *The Politics of Constitution Making*, *in* Research Handbook on the Politics of Constitutional Law 143 (2023).

to the success or failure of the constitution-making or amendment process. As described in this paper, the Chilean case represented an error related to the procedures, since it had a fragile design even with a widely accepted process of constitution-making. That assertion is revealed by the "78.3% of Chileans voted in favor of starting a constitution-making procedure to replace the current Constitution".[72]

Luis García-Huidobro emphasizes that a structural error in Chile's constituent process was about the referendum proposal because that "constitutional politics aims to articulate institutional arrangements that frame future political competition."[73] By involving such strong political interests, political elites exploited their "dominant position"[74] to influence the development of the referendum, even affecting the democratic process.

These considerations lead to the following conclusion: the execution of "constitutional politics" in Bruce Ackerman's terms does not ensure that the decisions of the constituent power respond to public interests. That is to say: even though it is relevant to differentiate between the irruption of the constituent power spontaneously and the interested convocation of the plebiscite profile, the real difference emerges when the procedures for adopting a new constitution are rigorously followed.

Although citizens sought to amend the Constitution, alleging that it was the result of an oppressive regime, President Piñera facilitated reform channels. Therefore, it is not possible to argue that the right of resistance was exercised, and it is understood that the constituent power could have been controlled and organized with specific procedures. Beyond the deficiency that is grounded on the procedures wielded, the Chilean case represents the notion of traditional constituent power.

Although the original initiative for total reform arose from society and not from the imposition of a plebiscitary profile, the Chilean case of constitutional total reform is significant. This study concludes that, even when the procedures are deficient, exhausting them affords endorsement to adjust to free channels, but not under the abusive dictates of a constituted power.

2.2. Venezuela: Analyzing the Elements of an Abusive Constituent Power Based on a Plebiscite Profile Authorized by the Constitution

The Venezuelan case is of great constitutional importance, as it combines the phenomena of the plebiscitary president and the convocation of the con-

72 Sergio Verdugo & Marcela Prieto, *The Dual Aversion of Chile's Constitution-Making Process*, 19 International Journal of Constitutional Law 149, 149 (2021).

73 Luis Eugenio García-Huidobro, *Elite Non-Cooperation in Polarized Democracies: Constitution-Making Deferral, the Entry Referendum and the Seeds of the Chilean Failure*, 13 Global Constitutionalism 168, 181 (2024).

74 *Id.*

stituent power. Unlike the Chilean case, Venezuela exemplifies the thesis of this paper because it unfolds how the constituent power bursts in under the dictates of a constituted power to follow marked ideological interests.

As Renata Segura and Ana María Bejarano explain, structural fragilities have plagued the Venezuelan political system[75] . For example, the Caracazo of 1989 was an expression of discontent, where social unrest marked an uncertain course in the country. Along with social rebellion, poor economic performance added to a rarefied social and political environment. Characteristics that are similar to those crisis[76] that precede the adoption of new constitutional designs.

As a result, Venezuela enacted a new Constitution in 1999, which followed the one promulgated in 1961[77]. Hugo Chávez's rise to the presidency in 1998 was marked by a plebiscitary profile. From the the campaign he promoted the promise of directly consulting the Venezuelan people on transcendental decisions. The idea of a National Constituent Assembly, therefore, was central to his campaign talks and promises, which materialized in April 1999, when Chavismo obtained "123 seats out of 131."[78]

Chávez's markedly plebiscitary profile enabled him to initiate a "total reform that would have required negotiating with the opposition at the time"[79], making it possible to open a referendum to constituents to ask whether they agreed with a new constitutional process. The referendum as the quintessential plebiscitary instrument, was exercised at that time to rule upstream and downstream procedures designed under the whims of the executive. Referendums also have prevailed in Venezuela's fragile constitutional terrain, as described below.

At least two provisions of the 1999 Constitution are important to this analysis. The first refers to the provisions of Article 71, which states that "matters of special national importance may be submitted to a consultative referendum at the initiative of the President of the Republic in the Council

75 Renata Segura and Ana María Bejarano, "The Impact Of The Diffusion Of Power: An Explanation Of The Divergent Constituent Results In Colombia And Venezuela," *Constituent Power under Debate: Perspectives from Latin America* 11, num. 2 (2020): 69.

76 Ginsburg, Elkins, and Blount, *supra* note 56 at 10.

77 https://comparativeconstitutionsproject.org/chronology/

78 Mario J Garcia-Serra, "The" Enabling Law": The Demise of the Separation of Powers in Hugo Chavez's Venezuela", *The University of Miami Inter-American Law Review* 32, num. 2 (2001): 273.

79 Rosalind Dixon & David Landau, *116The Abuse of Constituent Power*, *in* Abusive Constitutional Borrowing: Legal globalization and the subversion of liberal democracy 0, 123 (Rosalind Dixon & David Landau eds., 2021), https://doi.org/10.1093/oso/9780192893765.003.0006 (last visited Jun 7, 2024).

of Ministers."[80] The prevailing design empowers the president to consult citizens directly through referendums, without constitutional review processes or express requirements.

If one remarks on the pre-constitutional conditions[81] that allowed the promulgation of the 1999 Constitution, it is possible to affirm the fulfillment of the maxim of Rosalind Dixon and David Landau, in the sense that the constituent power was used in an abusive manner, erecting "as legitimate anti-democratic Constituent Assemblies"[82]. Allowing the president to promote referendums directly embodies a plebiscitary profile and abuses a constitutional provision.

As Dixon and Landau explained, the referendum revealed an important strategy for this paper, as it was not expressly indicated what type of procedures or rules would control the 1999 national constituent assembly. As the authors indicate, the Supreme Court played a substantial role, as it not only granted constitutional viability to the basic notion of constituent power convened by then-President Chávez, but it also facilitated the implementation of weak procedural rules.[83]

This illustrates how the plebiscite profile was wielded as a vessel of the constituted power that overthrew the constitutional order. By ascending to power through the previous constitutional system, the plebiscitary president came up with ideological grounds to dominate the process of constitution-making. This case illustrates equally how a constituted power can alter the constitutional order through a plebiscitary profile at the expense of the required constitutional balance and, in addition, shows how procedures, even when adopted, tend to exclusively favor an ideological spectrum.

3. FINAL REMARKS

This paper examines the phenomena of plebiscitary presidencies as disruptive forces between democracy and constitutionalism. First, it reviews the tensions between democracy and constitutionalism, recognizing that the majority claims of the public powers, especially those from the executive branch, tend to affect the democratic balance where minorities and the opposition must enjoy guarantees. After recognizing that even the foundational power

80 Constitución de la República Bolivariana de Venezuela. JUSTIA. Venezuela. https://venezuela.justia.com/federales/constitucion-de-la-republica-bolivariana-de-venezuela/titulo-iii/capitulo-iv/#articulo-71

81 For a detailed approximation of the pre-constitutional conditions, see footnote 71 of this paper.

82 Dixon and Landau, *supra* note 79.

83 *Id.* at 124. The authors note that the Supreme Court "attempted to place some modest restrictions on its exercise, for example by requiring that Chavez include his proposed electoral rules along with the referendum, rather than simply promising to write the rules ex post."

-that resides in the holder of sovereignty- requires rules to organize "public debate," the analysis differentiates between the types of constituent power. This leads the analysis to focus on the ordinary constituent power and the one known as the right of resistance.

The paper makes a theoretical contribution by reconciling the visions of the constituent power of the abbé Sieyès and Carl Schmitt. While this paper warns that the former did not argue that it was a power against which controls did not proceed, Schmitt's standpoint describes foundational power as an uncontrollable force that bursts in at the call of the people. This reconciliation highlights that the difference between the notions of constituent power must be traced not in the nature or intensity of the force deployed to change constitutional designs, but in the settings that precede the call to awaken such a power.

This paper explores the theory of constitutional moments, focusing on Bruce Ackerman's insights into dualistic democracy and constitutional moments. While there is a moment that can be conceived as ordinary and takes place in normal democratic elections, other moments are also identified where the concept of constitutional politics came up to describe more critical episodes. At this time, different constitutional identities can be achieved, leading to total reforms with the constituent power as the main executor.

Although the distinction between the concepts of constituent power and constitutional moments discloses the main tensions between democracy and constitutionalism, this paper uses the phenomenon of plebiscitary presidencies as a guiding axis to demonstrate that constitutional anomalies arise when a dominant presidential presence undermines constitutional forms or procedures.

Two specific case studies are presented to link these insights. The Chilean experience was elucidated to recognize that the constituent power can burst in spontaneously and adapt to controls, in which case they were poorly designed. The Venezuelan case equips this paper to get an in-depth understanding of how the plebiscite profile uses existing prerogatives to impose itself in an abusive manner. One interesting point is how the plebiscitary president accommodatingly uses the constituent power to inappropriately break-in by alleging the use of foundational force.

Seen in another way: if constitutionalism controls and allocates public power, the constituent power claims powers that cannot be constrained because they are derived from an absolute sovereign: the people. That tension is relevant to this paper, as it enables the analysis to gain a clearer understanding to evaluate what kind of means or instruments guarantee the exhortation of that power, which is believed to be unlimited. This paper thus sheds light on the fact that plebiscitary tendencies serve to convene the constituent power, revealing even greater issues.

The conflict between the constituted and constituent power is complex. But it is more difficult to recognize when a constituted power uses the con-

stitutional prerogatives in force to convene the constituent power. It is not the same for the constituent power to burst in spontaneously than for it to be summoned by internal forces where the absence of guarantees for the expression of that sovereign power tends to prevail.

In either case -whether it erupts spontaneously or is activated by the president- the procedures are fundamental. This paper discusses that the procedures should not be seen only as limitations, but as guarantees to effectively coordinate the true interests of the sovereign power.

Debasing constitutional forms is a clear violation of the democratic order. Plebiscitary presidencies tend to unleash discursive snares that ignore the balance between public powers, obscuring the true meaning of the constituent power, which ends up being used to accommodate ideological interests. This can lead to the accumulation of public power without controls, even to remake the constitutional order, as is still experienced in countries such as Venezuela.

By analyzing constitutionalism as an instrument to control public power, this paper remarks on the importance of the executive's compliance with the Constitution and the law. When the checks on presidential power are diluted amid plebiscitary claims, the imposition of an abusive constitutional order drags down fundamental rights and public discourse.

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