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THE SOVEREIGN IS HE WHO HOLDS CONSTITUENT POWER?

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ABSTRACT
This essay reviews Joel Colon-Rios "constituent power and the law". It focuses on four main issues: The distinction between constituent power and sovereignty; the populist exercise of constituent power; the limited secondary constituent power; and the question whether the primary constituent power is indeed unlimited. Through the discussion, the comment will highlight the strengths of the book and its contributions to the literature and jurisprudential practice concerning the nature and possible limits of the constituent power.

KEYWORDS
Sovereignty, Constituent Power, Delegation, Amendment Power, Kenya, Israel, Judicial Review of Amendments

I. DISTINGUISHING SOVEREIGNTY FROM CONSTITUENT POWER

Imagine the following scenario. On September 16, 2020, the Israeli public media corporation "Kann" published a call for songs to be submitted to the 2021 Eurovision Song Contest, at the end of which more than 220 songs were submitted to the professional committee. Out of all the submissions, the professional committee selected 9 songs that were uploaded to the network's website for public voting. In January 2021, three songs performed by Eden Alena were uploaded to the site, which went up to the next stage, for the audience to choose from: "La La Love", "Set Me Free", and "O La La". In the first place, the audience chose "Set Me Free" with 71.3 percent of the vote. However, a number of Knesset Members (the Israeli Parliament) did not like the choice of the audience, and became more attached to the "O La La", which they perceived as less political. Therefore, immediately after the public voting, the Knesset quickly enacted, while exercising coalition discipline, Basic Law: O La La for the 2021 Eurovision Song Contest, according to which the song to be presented at the 2021 Eurovision Song Contest

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is actually "O La La" won third place, with 11.5 percent of the vote. Does the Knesset have the authority to enact such a basic law, carrying a constitutional status?

While there was no shortage of continental literature on the concept of constituent authority, for example in German,[1] and French,[2] Anglo-American literature ignored the subject for many years. In England, apparently, it was a byproduct of the absence of a formal written Constitution, and in the United States due to the perception that Article V of the Constitution converted the revolution in a democratic way to change the Constitution. But after this long hibernation, the issue of constituent power returned to the forefront of constitutional theory. Only in recent years, a number of new books focusing on the nature and scope of constituent power have been published.[3] One of them is the recent book by Joel Colón-Ríos – *Constituent Power and the Law*,[4] a leading theorist of constituent power, who as already published an influential book on the subject matter.[5]

It is, in my opinion, the most comprehensive study of the intellectual history of the concept of constituent power. The reader will find in it history, theory and comparative insights. It is a study that comprehensively documents and examines the use of the concept of constituent power by thinkers, jurists, and politicians in the modern and contemporary history of constitutionalism. The book seeks to challenge the conventional view according to which constituent power is an unlimited power, acting outside the law. Colón-Ríos demonstrates how the exercise of constitutive power may actually be limited by law and emphasizes its juridical character. A central argument is that constitutive power and sovereignty must be distinguished.

One of the book's greatest contribution is in its discussion not only of theories that are usually associated with debates concerning sovereignty and constituent power (such as those of Sieyès, Schmitt, Rousseau, Locke, Lawson, Kelsen, Jellinek and de Malberg) but in exposing the readers to thinkers and politicians who are generally unfamiliar to English-speaking readers (to mention few: Mortati, Donoso

[1] Egon Zweig, *Die Lehre vom Pouvoir Constituant: Ein Beitrag zumStaatsrecht der französischen Revolution* (J.C.B. Mohr, 1909)

[2] Claud Klein, *Théorie et pratique du pouvoir constituant* (P.U.F., 1996)

[3] See, for example, Mikael Spång, *Constituent Power and Constitutional Order - Above, Within and Beside the Constitution* (Palgrave Macmillan UK, 2014); Andrew Arato, *The Adventures of the Constituent Power - Beyond Revolutions?* (Cambridge: Cambridge University Press, 2017); Matilda Arvidsson, Leila Brännström, Panu Minkkinen (eds.), *Constituent Power - Law, Popular Rule and Politics* (Edinburgh: Edinburgh University Press, 2020); Lucia Rubinelli, *Constituent Power – A History* (Cambridge: Cambridge University Press, 2020); Markus Patberg, *Constituent Power in the European Union* (Oxford: Oxford University Press, 2020); Héctor López Bofill, *Law, Violence and Constituent Power - The Law, Politics and History Of Constitution Making* (Routledge, 2021).

[4] Joel Colón-Ríos, *Constituent Power and the Law* (Oxford: Oxford University Press, 2020) [Hereinafter: CPL].

[5] Joel Colón-Ríos, *Weak Constitutionalism - Democratic Legitimacy and the Question of Constituent Power* (Routledge, 2012).

Cortés, Guizot, Taparelli, Lumbreras, Sánchez Agesta, Melchor de Jovellanos, Rocio, Caro, and Fernández Concha). It reveals a wide literature – from eighteenth, nineteenth, and twentieth centuries - that has so far escaped the Anglo-American theoretical debates on constituent power.

The scope and breadth of the book is truly astonishing. From Rousseau's and Sieyès' views (chapters 2+4) in France, through constitution-making episodes in Spain (1812), Venezuela (1811), and Colombia (1886) (chapter 5) to various approach of nineteenth-century authors and politicians concerning who is the holder of the authority to fundamentally change the constitution. It engages with possible boundaries of constituent power through the perspective of Spanish and French doctrinaires (chapter 7), the notion of the material constitution, through the work of Mortati, Haurious and Heller, among others, and with the jurisprudence of courts acknowledging the notion of unconstitutional constitutional amendments (chapter 8). It then analyses the distinction between constituent power and sovereignty, the former being a limited faculty to create only constitutional (and not judicial or executive) content (chapter 9), a distinction I shall return to. Finally, it looks at the "the people" as holders of constituent power analyzing constitution-making powers and imperative mandates, by looking at the Venezuelan 1999 constitutional process.

It is truly an encyclopedic resource on constituent power. And it is an important resource because of the complexities of the concept of constituent power, as phrased by the Parisian law professor Julien Oudot in 1856 that sometimes it is a powerful dictatorial act that imposes its power on the governed, sometimes it is a revolution acceptable to the citizens, and in other cases it is a pre-organized authority within the constitutional order framing how this power may be exercised. The proper answer to the question "what is constituent power"?, Oudot wrote, "whatever you do not want it to be, dear reader!" [6]

Precisely on this point, I found Colón-Ríos' contribution extremely helpful, as he argues that constituent power is not everything that one might want it to be. Constitutive power is distinguished from sovereignty. The two concepts are very often confused. For example, Andreas Kalyvas defines "the sovereign as the one who determines the constitutional form, the juridical and political identity, and the governmental structure of a community in its entirety. The sovereign is the original author of a new constitutional order and sovereignty qua constituting power manifests itself in a genuine process of constitutional making..."[7]But the two concepts are not identical. As Colón-Ríos writes:

[6] Julien Oudot, *Conscience et Science du Devoir: Introduction à une Explication Nouvelle du Code Napoléon* (A. Durand ed., 1856), 397

[7] Andreas Kalyvas, 'Popular Sovereignty, Democracy, and the Constituent Power' (2005) 12(2) Constellations (2005), 223, 226.

> A sovereign can produce constitutional laws and even engage in ordinary legislative or executive activity; it has an unlimited discretion to determine its own competences, it is the *Kompetenz-Kompetenz*. But when an entity, such as a constituent assembly, is authorized to adopt a new constitution, even if this occurs outside of the constitution's amendment rule, it does not become 'the sovereign'. It rather exercises a special jurisdiction which may be substantively unlimited (i.e. it can adopt any constitutional content) but is still subject to a commission: that of making a constitution.[8]

He shows how during the 19th century, various scholars have embraced the idea of extra-parliamentary constituent organ that would have exclusive constitution-making jurisdiction, and thereby limiting the constituent power of ordinary governments and legislatures. Yet, at the same time, this extra-parliamentary organ, authorized to exercise constitution-making power, should be prohibited from exercising any of the ordinary governmental powers.[9] As he elaborates:

> Sovereignty...is the unlimited jurisdiction to transform any will into law; the sovereign is the source of, and is not subject to, the separation of powers. It can engage in executive, legislative, judicial, and constitution-making acts. The kind of uncontrolled jurisdiction attached to sovereign power is usually exercised during periods where a political actor (frequently an authoritarian one) becomes a de facto sovereign, usually under the pretext that society needs to be saved from a perceived emergency. Constituent power is an element of sovereignty. Accordingly, whoever is the source of the sovereign power also enjoys constituent authority. But unlike the exercise of sovereignty, the exercise of constituent power within an established constitutional order will always take place based on a commission. To the extent that that commission only authorizes the relevant entity to engage in the task of drafting (or at most of enacting) a new constitution, it requires that in creating novel constitutional content, the entity commissioned with constituent authority respects the established separation of powers. That entity can, of course, propose a constitution that separates powers in novel ways, but cannot exercise the executive, judicial, legislative powers itself.[10]

This approach may carry significant practical implications as various constituent assemblies have been exercising what David Landau calls 'ancillary powers' such as legislating, organizing elections, and constituting other state institutions, which can often be used to consolidate powers in the Constituent Assembly in manners that can be used to undermine democracy.[11] Another implication may be the judicial invalidation of constitutional acts which are – in fact not constitutional but legislative or judicial in nature. For example, in a decision of the Czech Constitutional Court concerning an ad hoc constitutional act that terminated the term of office of the

[8] CPL, 26.

[9] CPL 151.

[10] CPL 263.

[11] See David Landau, '"Ancillary" Powers of Constituent Assemblies' (presentation presented at a conference in honor of Mark Tushnet, June 19, 2021).

Chamber of Deputies of the Parliament of the Czech Republic, and called for early elections in a specific situation, the constitutional court held that by its content, it is not a statute; rather, an individual, specific decision, dressed in the form of a constitutional act: "an ad hoc constitutional act (for an individual case) is not a supplement or an amendment to the Constitution," but is in fact a breach of the Constitution. Emphasizing: "If the Constitutional Court is forced to answer the question of whether Art. 9 par. 1 of the Constitution also authorizes Parliament to issue individual legal acts in the form of constitutional acts (e.g. to issue criminal verdicts against specific persons for specific actions, to issue administrative decisions on expropriation, to shorten the term of office of a particular official of a state body, etc.), the answer is – no!"[12]

Or, consider recent jurisprudential developments from Israel. On May 23, 2021, the Israeli High Court of Justice (HCJ) delivered an important decision setting and defining the limits for the use of Basic Laws – laws of a constitutional ranking – for the purpose of solving temporary political and coalition problems.[13] Without elaborating on the complexity of the Israeli constitutional system,[14] the significance of the case is that the HCJ set out a detailed test for disqualifying amendments to the Basic Laws that are in fact a misuse of the title 'Basic Law'. According to President Esther Hayut, at the first 'identification stage', the court should examine whether the Basic Law or its amendments carry the characteristics or features of a constitutional norm. In this context, the court suggests three tests that may assist the court in this identification: first, stability – whether the arrangement is of a temporary nature whose applicability is predetermined in time or whether we are facing a stable, forward-looking permanent arrangement; second, generality – whether it is a norm with general structural applicability or a norm that has personal characteristics; third, constitutional fabric – whether the arrangement is consistent with the nature of those issues that have been regulated in the Basic Laws. This is not a closed list of tests, and each case must be examined ad casum.[15] In the second stage, to the extent that the petitioner has been able to demonstrate that the characteristic of the arrangement does not comply with one of the abovementioned

[12] Czech Constitutional Court 2009/09/10, Case Pl ÚS 27/09, Constitutional Act on Shortening the Term of Office of the Chamber of Deputies. Cited in Yaniv Roznai, 'Legisprudence Limitations on Constitutional Amendments? Reflections on the Czech Constitutional Court's Declaration of Unconstitutional Constitutional Act' (2014) 8(1) Vienna Journal on International Constitutional Law 29, 32.

[13] HCJ 5969/20 Stav Shafir v. The Knesset (May 23, 2021) (ISr.). See

Yaniv Roznai & Matan Gutman, 'Saving the Constitution from Politics: The Israeli High Court of Justice and the Misuse of Constituent Power Doctrine' VerfBlog (30 May 2021), https://verfassungsblog.de/saving-the-constitution-from-politics/

[14] For elaboration, see Suzie Navot & Yaniv Roznai, 'From Supra-Constitutional Principles to the Misuse of Constituent Power in Israel' (2019) 21(3) European Journal of Law Reform 403.

[15] Shafir v. The Knesset (n 13), para. 37 to President Hayut's judgment.

tests, the burden then shifts to the government to point to a justification for including the arrangement in a Basic Law.[16]

In a manner similar to the 'constitutional fabric' test - and perhaps much will be written on the distinction between the two positions - Justice Dafne Barak-Erez proposed to adopt, as a third characteristic in the identification test, the criterion of "differentiation" from the other authorities. And so she wrote:

> This means that the Knesset, while exercising its constituent authority, is not empowered to replace the role of any of the other three governing bodies - the executive, the judiciary and the legislature. Therefore, misuse of a basic law in this respect will, as a rule, be a situation in which there is an attempt to label as 'Basic Law' an arrangement that seeks to clearly 'invade the territory' of one of these authorities. A Basic Law, by virtue of its definition, as intended to constitute a chapter in the constitution, cannot replace the decision of the executive branch (for example, by a constitutional provision determining the appointment of a person to a specific role, or granting a license to a particular entity); a Basic Law cannot replace a court in giving a decision in a legal proceeding (for example by way of acquittal or conviction); a Basic Law cannot even include an operative arrangement requiring an ordinary legislation (such as tax relief).[17]

This position of Justice Barak-Erez is backed by many years of constitutional theory, as we learn from Colón-Ríos' book, that distinguished constituent power from sovereignty, whereby the former is obligated to maintain the separation of powers and cannot exercise ordinary governmental powers such as legislative, judicial or enforcement; it must establish or create constitutional norms: "Sovereignty was a total power to transform any will into law; constituent power was about the adoption of new constitutions."[18]

II. FROM OSCAR ORBAN TO VICTOR ORBÁN

In chapter 6, on the Identity and Limits of the Constituent Subject, Colón-Ríos tells the story of Oscar Orban, a Professor of Public Law in Liège during the late 19th century. According to Orban, in order for the division of sovereignty into constituent and constituted powers to effectively limit, exercising constituent power must include direct popular intervention.[19] If by definition, constituent power is exercised vis-à-vis constituted institutions, it is required that 'the people' can exercise constituent power outside the ordinary governmental institutions, for example through the right to change the constitution through popular initiative.[20] This

[16] Ibid., at para. 43

[17] Ibid., at para. 23 to the judgment of Justice Barak-Erez.

[18] CPL 84.

[19] Oscar Orban, 'Des Immunités Constitutionnelles' (1895) 3 Revue du Droit Public et de la Science Politique en France et a L'étranger 193, 209; cited in CPL 150.

[20] ibid. 213–214; cited in CPL 150.

popular initiative mechanism for constitutional change by the citizens is beneficial for two reasons: protecting its non-delegable character from being exercised by governmental institutions – i.e. limiting the constituent power of the ordinary governmental branches, and providing a mechanism for a constitutional change that constituted institutions or officials are reluctant to pursue. It is a manifestation of the distinction between people and government.[21]

Imagine if this was the prevailing approach in Hungary, a country that has experienced not one but two constitutional revolutions in less than 30 years, without popular participation and with a constituent process controlled solely by parliament. Consider, for example, the tectonic shift in the Hungarian constitutional landscape in 2010. A government led by Prime Minister Viktor Orbán was elected with the support of a two-thirds majority in Parliament and thus with the ability to amend the constitution. The goal of Prime Minister Orbán was to construct a new political, economic, and social system. As he stated in a public speech in 2014: "the new state that we are constructing in Hungary is an illiberal state, a non-liberal state. It does not reject the fundamental principles of liberalism such as freedom ... but instead includes a different, special, national approach."[22] Within nineteen months of the election, the 1949 Constitution (that was transformed in 1989 to a liberal-democratic one) was amended twelve times, for partisan and political purposes, before it was replaced in 2011 by a new "Fundamental Law" that became effective in 2012. This transformation from a liberal to a non-liberal regime was made possible due to the Fidesz party's possession of a two-thirds majority in parliament, which allowed it to misuse the amendment process and ultimately to unilaterally replace the constitution for partisan political interests.[23]

This constitutional transformation is an exemplar of the populist constitutional project that is built, among others, on two main characteristics: majoritarianism as the tool of governance and instrumentalism as a political strategy.[24] Populism, as a constitutional project, seeks not only to speak on behalf of 'the people' and arguably to correct past injustices but also to radically change the rules of the game. The tool for achieving this change is through majority decision-making rule that expresses – for the populist – the will of the people. Political majority is a relatively uniform entity that conservative populism compares to the whole nation – the winner takes it all. The majority represents the people, and since the people is the sovereign so

[21] Cited in CPL 150-151.

[22] Office of the Prime Minister, Prime Minister Viktor Orbán's Speech at the 25th Bálványos Summer Free University and Student Camp, July 26, 2014, http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-25th-balvanyos-summer-free-university-and-student-camp

[23] See Gary Jacobsohn & Yaniv Roznai, *Constitutional Revolution* (Yale University Press, 2020), 75-101.

[24] See Paul Blokker, 'Populism as a Constitutional Project' (2019) 17(2) International Journal of Constitutional Law 536, 541-547

the majority is sovereign and any limitations on its power are illegitimate. Hence, populism is built on an extreme approach of majoritarianism and hostility towards political pluralism and separation of powers.[25] This claim, to be the sole representative of the people, becomes even stronger when the political majority controls the constituent power as incorporated within the constitutional rules of change. That way, populist constitutionalism tends to collapse the distinction between ordinary politics and constitutional politics, which is manifested in a constant and frequent change of constitutional norms and rules in the context of day-to-day politics. When the government controls the amending process and uses it for its own partisan interests, this creates not only a crisis for the status and rule of the constitution, but also turns the entire constitution-making process to a unanimous, partisan and monistic process, instead of one that aims for a broad consensus.[26]

Oscar Orban's approach was meant precisely to limit Victor Orbán's populist constitutional project.

III. A LIMITED SECONDARY CONSTITUENT POWER

A recurring theme in the book, is the question of the relationship between original/primary and derived/secondary constituent power. As the book correctly notes, increasingly, the jurisprudence of courts around the world have acknowledged that the constitution's material core, or fundamental principles, are beyond the scope of the secondary constituent power.[27] The basic idea is that the constitutional amendment power is not unlimited. The amendment power is a delegated legal competence which acts as trustee of the people and therefore is limited both explicitly and implicitly. Firstly, it is limited by those explicit limitations / eternity clauses stipulated in the constitution. Secondly, the body which holds the constitutional amendment power in trust cannot use it to destroy the constitution from which the body's authority derives in the first place. The amendment power is the internal method that the constitution provides for its self-preservation. By destroying the constitution, the delegated amending power thus undermines its own *raison d'être*. Amending the constitution in a way that would destroy the old and create a new constitution would be an action ultra vires. Also, since every constitution consists of a set of basic principles and features, which determine the totality of the constitutional order and the "spirit of the constitution" and its identity, the constitutional amendment power cannot be used to destroy those basic

[25] Nadia Urbinati, 'The Populist Phenomenon' (2013) 51 Raisons politiques 137, 139, 146-153; Nadia Urbinati, Populism and The Principle of Majority, in Cristóbal Rovira Kaltwasser et al. (eds.), *The Oxford Handbook of Populism* (Oxford University Press, 2017), 571, 572.

[26] Blokker (n 24), 545-547.

[27] CPL 192-193.

principles. The alteration of the constitution's core would result in the collapse of the entire constitution and its replacement by another. This decision, however, is not left for the delegated organs, but for the people's primary constituent power and is ought to be taken via proper channels of higher-level democratic participation and deliberations.[28]

However, this theory becomes complicated when the amendment formula itself includes the people through, for example, a popular referendum. Would an exercise of constituent power through such popular mechanisms be subject to limits and to judicial review? This question becomes burning as more and more amendment formulas include the people.[29]

Consider these four related (but somewhat different) approaches:

According to one approach, as manifested by courts in France and Ireland, when the people are directly involved in the constitutional amendment process, there are no limitations on the amending power and the court will not review the decision by the 'sovereign' people itself.[30]

According to a second approach, as manifested by an obiter dictum of the Slovak Constitutional Court, when striking down an amendment to the Constitution for violating the substantive core of the Constitution. According to the Court, its decision on the judicial review of constitutional amendments "were constrained by the original constituent power (i.e. the people), which could confirm or reject them by constitutional referendum."[31]

A third case is that from Peru. The Constitutional Court has admitted for processing a claim of unconstitutionality against a constitutional reform that passed by a referendum.[32] The court repeated that Congress' power to reform the constitution is not one of unlimited character, since it must observe the limits both formal and material characterizing the design and structure basic of the Constitution of 1993. Congress, by exercising its reforming power cannot disrupt the identity or essential structure of the Constitution, which is due to the fact that the constitutional reform laws are the creation of 'a Constituted Constituent Power'. There is a serious suspicion of alteration of the constitutional identity, the court notes, if the reform affects human dignity, the people's sovereignty, the democratic rule of law, the republican form of government and, in general, political regime and form of State.

[28] I elaborate on this in Yaniv Roznai, *Unconstitutional Constitutional Amendments – The Limits of Amendment Powers* (Oxford University Press, 2017).

[29] See Xenophon Contiades & Alkmene Fotiadou (eds.), Participatory Constitutional Change The People as Amenders of the Constitution (Routledge, 2017).

[30] See e.g. Richard Albert, Malkhaz Nakashidze, and Tarik Olcay, 'The Formalist Resistance to Unconstitutional Constitutional Amendments' (2019) 70 Hastings Law Journal 639, 661-665.

[31] Judgment PL. ÚS 21/2014, para. 177. See Tomáš Ľalík, 'The Slovak Constitutional Court on Unconstitutional Constitutional Amendment (PL. ÚS 21/2014)' (2020) 16 European Constitutional Law Review 328.

[32] EXP.00013-2020-PI / TC, 31.1.2021, https://tc.gob.pe/jurisprudencia/2021/00013-2020-AI%20Admisibilidad.pdf

So far, the court examined reforms that were adopted by Congress. However, what if the reform has been approved through a referendum? In this case, it is arguably the holder of the sovereignty who is summoned to give his verdict regarding any proposed constitutional amendment. The court holds that it must establish a position and to listen to the parties, in relation to the possibility of exercising control of validity of constitutional reforms that have been adopted through referendum. The court must determine whether the control of constitutionality of reform that have been approved by referendum is feasible, and if so to what extent. It would also be necessary for the court to clarify whether the constitutional reforms enacted by a popular referendum are limited by material limits. It remains to be seen what the court will decide.

The fourth approach, is that of the High Court in Kenya. On 13 May 2021, a panel of five High Court justices unanimously adopted a significant ruling[33] disqualifying the Constitution of Kenya (Amendment) Bill, 2020. The bill aimed to implement President Uhuru Kenyatta's so called "Building Bridges Initiative (BBI)" and was supposed to be the most significant change to the state's governmental structure since the constitution was adopted in 2010. The High Court ruled that the constitutional amendments are unconstitutional and, most importantly, that the so-called Basic Structure Doctrine applies in Kenya. What is interesting, for our matter, is that according to the court, the sovereignty of the people in its constituent capacity is expressed in the following three layers:

1. Primary Constituent Power – the extraordinary power to draft or radically change a constitution. This is, in the tradition of Sieyès, the immediate expression of the people. This authority is free and independent of any constitutional restrictions and is unlimited by the constitutional rules and procedures of the previous Constitution.
2. Secondary constituent power – constitutive authority for constitutional changes which are not material and therefore do not change the basic structure of the constitution. In Kenya, this power "is exercisable through a referendum subsequent to public participation and Parliamentary process" and may be exercised only in accordance with the procedure set forth in Articles 255-257 of the Constitution.
3. Constituted power – those limited powers created by the Constitution and derived from it. It is a delegated authority limited by the Constitution.

[33] Republic of Kenya in The High Court of Kenya at Nairoby, Constitutional and Human Rights Division Petition No. E282 of 2020, David Ndii & Others v Attorney General & Others (13.05.2021), https://www.afronomicslaw.org/sites/default/files/pdf/BBI%20Consolidated%20Judgment%20-%20Final%20Version%20-%20As%20Delivered.pdf; see Yaniv Roznai, 'The Basic Structure Doctrine arrives in Kenya: Winds of Change for Constitutionalism in Africa?', VerfBlog (19 May 2021), https://verfassungsblog.de/the-basic-structure-doctrine-arrives-in-kenya/

> In Kenya, this limited power to amend the constitution is in the hands of the parliament.

The basic structure doctrine, according to the court, protects fundamental aspects of the constitution from amendment by the secondary or constituted constituent power. In other words: the essential features of the constitution that form the basic structure can only be changed through the people by exercising the primary constitutive authority.

The Court's reasoning on this dimension of primary constitutive authority marks an extremely important development. In Kenya, the court states, this power can be exercised in four stages:

1. Civic education to provide the public with sufficient information regarding the possibility of participating in the process of establishing or amending the constitution;
2. Public participation, in which the people share their positions on constitutional issues;
3. Deliberations in a Constituent Assembly for the formulation of constitutional ideas through representatives specially elected for establishing or amending the Constitution;
4. A referendum for the adoption or rejection of the constitution or the amendments to the basic structure of the constitution.[34]

If constitutional theory regarded the people in its 'original constituent power' capacity as either the initiator of the process but not necessarily its executor,[35] or alternatively, its ratifier in the end,[36] the Kenyan judgment is crucial in elaborating that for constitutional moments to truly manifest the people's will, popular participation in constitutional moments should not be limited to a solely 'yes' or 'no' vote in a referendum but should extend to the stages before, throughout, and after the process of constitutional change. As I claimed elsewhere, "it is the manifestation of 'we the people', not simply 'oui, the people'."[37]

But the Kenyan judgment leaves open the question whether the manifestation of 'primary constituent power' is limited or not. To that question I now turn.

[34] Ibid., at para. 474 of the judgment.

[35] For this distinction see, for example, Colón-Ríos, *Weak Constitutionalism* (n 5).

[36] For an analysis, see Jeffrey A. Lenowitz, *Why Ratification? Questioning the Unexamined Constitution-making Procedure* (Submitted in partial fulfillment of the requirements for the degree of Doctor of Philosophy, Columbia University, 2013).

[37] Yaniv Roznai, '"We the People", "Oui, the People" and the Collective Body: Perceptions of Constituent Power', in Gary Jacobsohn and Miguel Schor (eds.), *Comparative Constitutional Theory* (Edward Elgar, 2018), 295-316.

IV. AN UNLIMITED PRIMARY CONSTITUENT POWER?

In chapter 6, Colón-Ríos shows us that various authors (such as Durán y Bas, Taparelli, and Mellado), claimed that "constituent power itself may be subject to substantive limits", mainly the exercise constituent power is accompanied by "natural law obligations that advance some conception of the common good."[38] Colón-Ríos is correct in this reading of constituent power based on these, and other scholars such as Hauriou and Sieyès. But when discussing possible limits to constituent power, there was one issue missing from the book – the notion of international or supra-national law.

Indeed, from the perspective of international law, it is quite clear that a state must meet its international obligations regardless of local legislation that contradicts them, whether it is ordinary or constitutional legislation.[39] Thus, for example, Article 27 of the Vienna Convention on the Law of Art in 1969 states that "a state may not rely on the provisions of internal legislation as justification for non-compliance with a treaty." In its 1932 opinion, the Permanent Court of Justice noted that a state could not use its constitution as an excuse to evade an obligation under international law or a valid treaty. Likewise, the European Court of Human Rights has also ruled, in a number of cases, hat it has the power to discuss constitutional legislation and examine its compliance with the European Convention on Human Rights. Thus, for example in the judgment of Sejdie and Finci v. Bosnia and Herzegovina, the European Court of Human Rights ruled that the constitutional provisions restricting the right to be elected to people belonging to the Bosnian, Croatian or Serbian nationalities are discriminatory, violate the European Convention on Human Rights and must be amended. Similar decisions regarding constitutional provisions that are inconsistent with human rights treaties have been made in regional human rights courts in America and Africa. Another example is the 1984 Security Council Resolution 554, which established the 1983 South African Constitution, which established apartheid, contradicts the principles of the UN Charter, including racial equality, and declared the new constitution "null and void." Do these decisions signal the death of sovereignty, Sovereignty RIP in the words of Don Herzog?[40] Perhaps not, as these limitations apply mainly in the external juridical sphere and have difficulties in affecting the legal validity of constitutional norms domestically.[41] Yet, I was hope to see more discussion on the question of international law, which is not entirely a recent question.

[38] CPL 160.

[39] See Yaniv Roznai, 'The Boundaries of Constituent Authority' (2021) 52(5) Connecticut Law Review 1381, 1394-1399.

[40] Don Herzog, *Sovereignty, RIP* (Yale University Press, 2020).

[41] See Yaniv Roznai, 'The Theory and Practice of 'Supra-Constitutional' Limits on Constitutional Amendments' (2013) 62 International & Comparative Law Quarterly 557, 560.

I wish to suggestion another limitation: the very concept of constituent power may carry other certain inherent limitations, by the fact that at the basis of the theory of constituent power is the power of the people to create and recreate their constitutional world. In order to protect the very idea of constituent power; in order for constituent power to be exercised in the future and to allow and facilitate the people's exercise of constituent power, those rights which form the basis of constituent power must be protected. In other words, the exercise of constituent power cannot result in the abolition of rights such as freedom of expression and assembly, and political rights, which are necessary in order for constituent power to reappear in the future. The exercise of constituent power must maintain its "capacity to rethink and constitutional order as a whole." Minimum core of rights that are necessary for constituent power to be exercised and re-exercised must be kept. Furthermore, the exercise of constituent power must be consistent with the idea of "the people". An exercise of constituent power that results in the alienation of groups in the society undermines the very *raison d'être* of constituent power. If 'the people' or some parts thereof are excluded from the polity and are no longer able to exercise constituent power, this should influence the legitimacy of the constitution-making process. One cannot use 'constituent power' in order to undermine the very notion of 'constituent power'. This limitation, is of course one of legitimacy, not of legality.[42]

V. CONCLUSION

So, returning to the question with which I opened this essay, can we, by exercising constituent power, decide who is the winning song for the Eurovision song contest? In his book, Colón-Ríos provides a strong response: constituent power only involves a constitution-making authority:

> Constituent power is the power create novel constitutional orders and it is in that respect not bound by positive law. Nonetheless, ... the exercise of constituent power will always be based on, and limited by, a commission. Unlike a true sovereign, an entity authorized to exercise constituent power cannot transform any will into law, but only produce constitutional law. ... A Constituent Assembly authorized to draft (or even to enact) a new constitution will still be normally subject to the separation of powers and cannot exercise the ordinary power of government.[43]

Whereas sovereignty is the power to create any legal content free from the constraints imposed by the separation of powers, constituent power is the faculty to create only constitutional content, and accordingly, agents possessing constituent

[42] Roznai, 'The Boundaries' (n 39), 1404-1406.
[43] CPL 259-260.

power do not exercise governmental, legislative, executive, or judicial functions.[44] Constituent power is not the shir exercise of force, just like a bank robbery with a gun. It is a juridical act; a special type of act with a special juridical task – that of creating constitutional norms. So, to conclude, "The constituent authority may be many things", Richard Kay writes in his article on Constituent Authority, "but it is not anything we want it to be."[45]

Thank you, Prof. Colón-Ríos, for writing such a magnificent book, that would be a valuable resource to anyone interested in the concept of constituent power, for years to come.

[44] CPL 226

[45] Richard S. Kay, 'Constituent Authority' (2011) 59 American Journal of Comparative Law 715, 761