CONSTITUTIONALISM AND DEMOCRACY IN LATIN AMERICA

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The objective of this short paper is to examine two of the most interesting (and ongoing) developments in Latin American constitutionalism: the doctrine of implicit limits to constitutional reform and the validation of constitutions of 'dubious' legal origins through the theory of constituent power. Particular emphasis will be given to Article 411 of the new Constitution of Bolivia, as it nicely captures both of these developments. The doctrine of implicit limits to constitutional reform provides judges not only with the power to strike down unconstitutional legislation, but also constitutional amendments that are deemed inconsistent with certain fundamental principles or with the constitution as a whole. The theory of constituent power posits that the people possess an extra-legal constitution-making power, which may be exercised at any moment and even in violation of the established constitutional order. Although mostly confined to academic discussions since the French Revolution, in Latin America (unlike in the Anglo-American world) constituent power has long been present in constitutional discourse.[1] *Nevertheless, the theory has been playing a central role in the re-balancing constitutionalism and democracy that has taken place during the last decades in several countries in the region.*

Le principal objet de cet article, en se servant comme fil conducteur des dispositions de l'article 411 de la nouvelle Constitution de Bolivie, est d'analyser dans ses grandes lignes, deux des développements les plus récents qui sont intervenus en droit constitutionnel en Amérique Latine. L'auteur s'intéresse d'abord à la doctrine dite 'des limites implicites des réformes constitutionnelles' et ensuite à la théorie 'des pouvoirs constituants' qui autorise la prise en compte par

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1 See for example Renato Cristi "The Metaphysics of Constituent Power: Schmitt and the Genesis of the Chile's 1980 Constitution" 21 *Cardozo Law Rev* 1749, at 1749. See also Gerardo Pisarello, *Procesos Constituyentes: Caminos Para La Ruptura Democrática* (Editorial Trotta, 2014).

le juge de Constitutions dont l'origine reste incertaine. La doctrine dite 'des limites implicites des réformes constitutionnelles' confère au juge le pouvoir non seulement d'écarter des textes qu'il estime anticonstitutionnels, mais aussi les amendements constitutionnels qui se révèleraient incompatibles avec des principes constitutionnels fondamentaux ou encore avec la Constitution prise dans son ensemble. La théorie du 'pouvoir constituant' postule que le peuple dispose en dehors du législateur, d'un pouvoir autonome d'édicter des principes de nature constitutionnels. L'auteur explique que ce pouvoir autonome peut être exercé à tout moment et si besoin est en totale violation de dispositions constitutionnelles déjà en vigueur.

Part of the importance of the increasing influence of the theory of constituent power and of the doctrine of implicit limits to constitutional reform is that these developments strike at the heart of constitutional theory: constitutional theory has devoted most of its energies precisely in determining how constitutionalism and democracy should be balanced in modern constitutional states.[2] The two traditional 'methods' of balancing these ideals are exemplified in the US and UK/NZ constitutional systems. The US constitutional system can be understood as representing the constitutionalist side: a constitution that is extremely difficult to change, a sort of perpetual constitution as Thomas Jefferson, a strong democratic critic of constitutionalism, once put it.[3] The justification for that kind of arrangement is that, after all, the constitution was adopted by 'the people' and it would not be appropriate to allow the legislature (always seen as capable of acting contrary to the people it is supposed to represent) to meddle with it any time a simple majority of legislators decide to do so. A very difficult amending process,

2 An important part of the debate has focused on the legitimacy of judicial review of legislation, as in that context the tension between constitutionalism and democracy can be seen with clarity. Some of the literature engaged in the debate includes Stephen Holmes, *Passions and Constraints: On the Theory of Liberal Democracy* (The University of Chicago Press, Chicago, 1995); John Hart Ely, *Democracy and distrust: A Theory of Judicial Review* (Harvard University Press, 1980); Mark Tushnet *Taking the Constitution Away from the Courts* (Princeton University Press, 1999); Richard D Parker *Here the People Rule: A Constitutional Populist Manifesto* (Harvard University Press, 1994); Michael Mandel *The Charter of Rights and the Legalization of Politics in Canada* (Thompson Educational Publishing, Toronto, 1994); Akhil Reed Amar, "The Consent of the Governed: Constitutional Amendment Outside Article V" (1994) 94 Colum L Rev 457; Sanford Levinson *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People can Correct It)* (Oxford University Press, New York, 2006).

3 Thomas Jefferson, it is well known, despised the idea of perpetual constitutions. He complained that "[s]ome men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched". Thomas Jefferson, 'Letter to Samuel Kercheval, July 12, 1816' in *The Portable Thomas Jefferson* (Penguin, 1975) pp 558-559.

one that requires constitutional amendments to be adopted by legislative supermajorities is normally seen as the way of achieving that objective.[4]

New Zealand and the United Kingdom have taken the opposite approach, giving democracy at least an apparent priority over the constitutionalist ideal. These constitutional systems assume that the legislature is the true representative of 'the people', and therefore attributes to it the right to alter all laws, regardless of their constitutional significance, through a simple majority vote.[5] Nevertheless, both the US and NZ/UK models can be criticized from a democratic perspective. The US model, for example, claims that by making the constitution difficult to change it is protecting 'the people' from their representatives. The problem, however, is that it is not clear that the constitution was actually adopted by 'the people', much less how -apart from acting through the elected legislature- 'the people' of the here and now is supposed to engage in an act of constitution-making. The UK/NZ system, on the other hand, makes the constitution very easy to change but, in so doing, allows the legislature to engage in fundamental constitutional changes without necessarily having the support of popular majorities. And, as the US system, it does not provide any way (short of voting in regular elections), for the people to participate directly in constitutional change.

I CONSTITUTIONALISM AND DEMOCRACY IN LATIN AMERICA

Despite their apparently stark differences, both the US and UK/NZ approaches are consistent with the dominant constitutionalist tradition, according to which, after a constitution is in place, all forms of law making must take place through the ordinary institutions of government (understood in this paper as including the

4 The amendment rule of the US Constitution is contained in Article V, which states in part: "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress".

5 Arguably, this is the case even of Section 268(2) of Electoral Act 1993, which requires certain legislative provisions to be altered only through parliamentary super-majorities or popular referendum, but is not itself entrenched (which, according to constitutional orthodoxy, means that they could be altered by a simple majority in Parliament).

legislature, or the legislature and the executive acting in concert).[6] The approach to constitutional change present in the new Latin American constitutions represents a direct challenge to that tradition, recommending a reordering of the way in which we currently conceive the relationship between constitutionalism and democracy. This approach is exemplified by Article 411 of the new Constitution of Bolivia. This constitution, as most (if not all) modern written constitutions, contains a procedure for constitutional change and, like most written constitutions, gives the legislature the power to adopt constitutional amendments subject to certain requirements that are more difficult to meet than those required for the adoption of ordinary laws (the typical requirement being a two-third legislative majority and/or a referendum). However, in addition to containing a more or less typical constitutional amendment rule, the new Constitution of Bolivia (as the news constitutions of Venezuela and Ecuador)[7] establishes a special procedure which must be used for *fundamental* constitutional changes:[8]

> The total reform of the Constitution, or those modifications that affect its fundamental principles, its recognized rights, duties, and guarantees, or the supremacy of the constitution and the process of constitutional reform, will take place through a sovereign Constituent Assembly (*Asamblea Constituyente originaria plenipotenciaria*), activated by popular will through a referendum. The referendum will be triggered by popular initiative, by the signatures of at least twenty percent of the electorate; by the Plurinational Legislative Assembly; or by the President of the State. The Constituent Assembly will auto-regulate itself in all matters, and it will approve the constitutional text by two-thirds of the members present. The entering into force of the reform will require popular ratification through referendum.

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6 This dominant conception was nicely captured by Ulrich Preuss when he wrote that, "the constitution is the final act of the revolution ... by making a constitution, the revolutionary forces are digging their own graves". Ulrich Preuss "Constitutional Powermaking for the New Polity: Some Deliberations on the Relations between Constituent Power and the Constitution" (1993) 14 Cardozo Law Review 635 at 641.

7 See Art 444 of the Constitution of Ecuador (2008) and Arts 347-350 of the Constitution of Venezuela (1999).

8 "La reforma total de la Constitución, o aquella que afecte a sus bases fundamentales, a los derechos, deberes y garantías, o a la primacía y reforma de la Constitución, tendrá lugar a través de una Asamblea Constituyente originaria plenipotenciaria, activada por voluntad popular mediante referendo. La convocatoria del referendo se realizará por iniciativa ciudadana, con la firma de al menos el veinte por ciento del electorado; por mayoría absoluta de los miembros de la Asamblea Legislativa Plurinacional; o por la Presidenta o el Presidente del Estado. La Asamblea Constituyente se autorregulará a todos los efectos, debiendo aprobar el texto constitucional por dos tercios del total de sus miembros presentes. La vigencia de la reforma necesitará referendo constitucional aprobatorio".

The first sentence of this provision makes an indirect reference to the doctrine of implicit limits to constitutional reform, to be discussed in the next section of this paper. That is to say, by suggesting that certain constitutional changes (ie changes of a fundamental nature) have to be adopted through a process similar to the one used to create the constitution in the first place (a Constituent Assembly) this Article implies that the ordinary institutions of government, acting through the ordinary amendment procedure, can only adopt minor (or non-fundamental) constitutional amendments. As we will see below, this approach is a direct challenge to both the US and UK/NZ models, as it requires certain constitutional changes to be adopted by an extraordinary body that comes as close as possible to the idea of a people giving themselves a constitution. At the same time, this provision suggests that if the institutions of government attempt to use the ordinary amendment process to alter the constitution in fundamental ways, their actions would be legally void. By so doing, it not only establishes a clear distinction between 'the legislature' and 'the people' (like the US model and unlike the NZ/UK one), but attempts to give that distinction actual practical implications in terms of popular participation in constitutional change.

II THE DOCTRINE OF IMPLICIT LIMITS TO CONSTITUTIONAL REFORM

In a certain way, what the previously quoted provision of the Bolivian constitution does is to constitutionalise the doctrine of implicit limits to constitutional change. In Latin America, this idea was first developed by the Colombian Constitutional Court in a 2003 decision that examined the validity of a set of constitutional changes supported by the government of President Alvaro Uribe.[9] Although the content of those reforms was mostly upheld, the case gave the Colombian Constitutional Court the opportunity to adopt the doctrine of implicit limits to constitutional reform (adopted by the Supreme Court of India in 1973 under somewhat different grounds).[10] In this case the Colombian Constitutional Court was asked to review the *substance* of the proposed constitutional changes

9 Sentencia 551/03, July 9th, 2003. The doctrine was recently applied, and developed, in Sentencia C-141 of 2010, where the Colombian Constitutional Court declared unconstitutional an amendment that sought to allow the President to run for a third consecutive term.

10 The Indian Supreme Court adopted the doctrine of the (unamendable) basic structure in the famous case of *Kesavananda Bharti Sripadagalvaru v State of Kerala*, 1973 (SUP) SCR 0001. The doctrine of implicit limits received one of its most important treatments in Carl Schmitt, *Constitutional Theory* (Durham: Duke University Press, 2008) [originally published in 1928]. For a extended analysis of the Indian approach, see Sudhir Krishnaswamy *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (Oxford University Press, India, 2011).

even though the Colombian Constitution (Article 241)[11] clearly stated that the Court could only invalidate a constitutional amendment on procedural grounds (*solo por vicios de procedimiento en su formación*). However, the Court attempted to show that in the context of constitutional reform, procedure and substance overlap with each other.

According to the court, competence (*competencia*, understood as the faculty to produce a determinate legal consequence) is a fundamental part of any procedure. When the constitution gives the court the power to examine whether amendments have been adopted according to the specific requirements of the amendment formula, it was argued, it is necessarily conferring that body the power to determine if the amending body is promoting changes it is not authorized to adopt. The question was then whether, under the Colombian Constitution of 1991, the competences of the amending power were limited. The court concluded that although the constitution did not contain any express prohibition on particular constitutional changes (as many constitutions do),[12] in any democratic constitution the power of constitutional reform is subject to certain *implicit* limits. The court reached this conclusion through the theory of constituent power (a theory that, as suggested earlier, lies at the centre of the new Latin American approach to the relationship between constitutionalism and democracy).

Constituent power means constitution-making power. Whoever has constituent power has the power to create the constitution of a new State, or to replace the constitution of an existing State with a new one. The theory of constituent power was first developed by Emmanuel Sieyes during the French Revolution.[13] Sieyes advanced a distinction between constituent power, which was understood as an unlimited power, not subject to any form of positive law and the institutions created through the exercise of constituent power (what he called the constituted powers, which included the legislature and the courts), that is, institutions that can only exercise the powers conferred to them by the constitution. Sieyes' theory was

11 Article 241(1) states that one of the responsibilities of the Constitutional Court is "Decidir sobre las demandas de inconstitucionalidad que promuevan los ciudadanos contra los actos reformatorios de la Constitución, cualquiera que sea su origen, sólo por vicios de procedimiento en su formación".

12 The most famous example is Art 79 of the German Basic Law, but express limits on the ordinary power of constitutional reform (sometimes called 'eternity clauses', as they seek to make certain constitutional provisions unchangeable) are very common in constitutions throughout the world.

13 Emmanuel Sieyes, *What is the Third Estate?* (Praeger, New York, 1963). For a contemporary discussion of the theory of constituent power and its implications for contemporary constitutional theory, see my book Joel I Colón-Ríos, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power* (Routledge, 2012).

further developed by Carl Schmitt, the controversial German jurist, who defined constituent power as "the political will, whose power or authority is capable of making the concrete, comprehensive decision over the type and form of political existence".[14] These fundamental political decisions generally refer to the basic structure of the state (whether it takes the form of a republic or a monarchy, of a unitary or a federal system, of a liberal democracy or a socialist order).[15]

Interestingly, Schmitt did not think that after these decisions are in place constituent power vanishes or is forever channeled through the constitutional amendment procedure. On the contrary, he maintained that even after being exercised, constituent power, as a legally unlimited power, continued to exist "alongside and above the constitution".[16] The theory of constituent power, in its Schmittian version, has long been present in Latin American constitutional theory and practice, and it played an important role in the decision of the Colombian constitutional court mentioned above.[17] In that case, the court maintained that the ordinary power of constitutional reform (regardless of whether it requires a popular referendum)[18] is to be understood as a *constituted power* and that meant that it could not be used to alter the fundamental political decisions in which the constitution rested as that would amount to "replacing the existing Constitution with a different one, something that can only be done by [the people in the exercise of their] constituent power".[19] The doctrine of implicit limits to constitutional reform has been applied a number of times in Colombia (the most notable being the 2010 case in which the Constitutional Court invalidated an amendment that would have allowed President Uribe to run for a third Presidential term).[20]

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14 Schmitt, above n 1, at 125.

15 Ibid at 77-78.

16 Ibid at 125-126.

17 For a discussion, see Joel I Colón-Ríos "Carl Schmitt and Constituent Power in Latin American Courts: The Cases of Venezuela and Colombia" (2011) 18(3) Constellations 365.

18 Referendums, by themselves, were not seen by the Court as mechanisms appropriate for the exercise of constituent power. This is arguably correct, as they usually lack the opportunities for deliberation provided by other mechanisms of constitutional change.

19 Sentencia C-551/03, supra note 9, at para 34. See also Gonzalo Ramírez Cleves, *Límites a la Reforma Constitucional en Colombia: El Concepto de Constitución como Fundamento de la Restricción* (Universidad Externado de Colombia, Bogotá, 2005) and Carlos Bernal Pulido, "Justification and Meaning on the Constitutional Substitution Doctrine" 11 International Journal of Constitutional Law 339 (2013).

20 Sentencia C-141/10.

It has since then migrated to countries such as Venezuela,[21] Peru,[22] and Costa Rica,[23] and, as we have seen, it was implicitly incorporated into the Bolivian Constitution in 2009 (even though it had been rejected by the Bolivian *Tribunal Constitucional Plurinacional* in 2004[24]). The importance of this doctrine, from a democratic perspective is that, in limiting government's power of constitutional reform, it requires fundamental constitutional changes to be adopted through the exercise of constituent power. In other words, the doctrine assumes that when fundamental constitutional changes -changes that amount to the creation of a new constitution- are proposed, the 'people', as the subject of constituent power, should be allowed to stand outside the constitutional order and determine whether the proposed changes are substantively desirable through highly participatory procedures (as only those procedures would be deemed sufficient to amount to an exercise of constituent power). This procedures will usually take the form of an elected Constituent Assembly, convened through popular referendum –the referendum sometimes being susceptible of being triggered through the collection of signatures (as in Bolivia, Venezuela, and Ecuador)-, that drafts a constitution which becomes valid only after being directly approved by the electorate.

III SOVEREIGN CONSTITUENT ASSEMBLIES

A Constituent Assembly consistent with what this paper has identified as the new Latin American approach to the relationship between constitutionalism and democracy is always conceived as a sovereign entity. This has been the case of the assemblies that drafted the current constitutions of Colombia, Venezuela, and Ecuador. This idea is also exemplified by the previously quoted Article 411 of the new Constitution of Bolivia. That provision refers to the Constituent Assembly as an "original Constituent Assembly" (*Asamblea Constituyente originaria plenipotenciaria*), and maintains that the Constituent Assembly "will auto-regulate itself in all matters". This provision encapsulates some of the most interesting debates in Latin American constitutionalism in the last few decades. The depiction of the Constituent Assembly as "original" has a particular explanation in the

21 See Supreme Court of Justice of Venezuela (Constitutional Chamber), Opinion No 53, 3 February 2009.

22 See Constitutional Court of Peru, Sentencia 050-2004-AI/TC.

23 See Supreme Court of Justice of Costa Rica (Constitutional Chamber), Res 2004-13353.

24 See Expediente 2004-09014-19-RDI.

Bolivian context, but in order to understand its meaning better it is useful to first refer to the Venezuelan constitution-making process, which took place in 1999.[25]

In 1998, Venezuela's newly elected government, led by President Hugo Chávez proceeded to implement that part of its political program that involved the creation of a new constitution. Controversially, they sought to do so through a Constituent Assembly, even though, as most liberal constitutions, the Constitution of 1961 (the constitution then in place) contained no provision for the convening of an extraordinary constitution-making body. Instead, it had an ordinary amendment rule that placed the power of constitutional reform in the hands of the legislature. Nevertheless, one of the first acts of the new government was the issuing of a decree that called for a referendum asking the population whether they wanted to convene a Constituent Assembly vested with the power to "transform the state and to create a new juridical order".[26] Not surprisingly, the constitutionality of the government's plan was quickly put to the test in the Venezuelan Supreme Court of Justice. The SCJ was asked whether a Constituent Assembly could be convened through a special referendum, bypassing the ordinary amendment process (and the legislature) altogether.

The court expressed that in those aspects about which the constitution was silent, like the possibility of convening a Constituent Assembly for the adoption of a new constitution, the people did not have to act through the established government institutions and could exercise its unlimited constituent power directly. In that sense, the requirements and limits established in the Constitution of 1961 regarding constitutional change were sought to regulate the procedures through which the legislature (ordinary government) could change the Constitution, and were not (and could not be) directed to the people as constituent subject. The court concluded that a special referendum was an appropriate method for determining whether the people wished to exercise their unlimited constituent power and that a Constituent Assembly was a proper mechanism for this exercise to take place. In following this approach, the Venezuelan judiciary was following the steps of the Colombian Supreme Court of Justice, which issued a very similar decision in 1990

25 For a discussion, see Michael Coppedge, "Venezuela: Popular Sovereignty versus Liberal Democracy" in Jorge I Domínguez and Michael Shifter, eds, *Constructing Democratic Governance* (2 ed, Johns Hopkins University Press, Baltimore, 2001); Edgardo Lander, "Izquierda y Populismo: Alternativas al Neoliberalismo in Venezuela" in Cesar Rodríguez Garavito, Patrick S Barret and Daniel Chavez (eds) *La Nueva Izquierda en América Latina: Sus Orígenes y Trayectoria Futura* (Grupo Editorial Norma, Bogotá, 2005).

26 Roberto Viciano Pastor and Rubén Martínez Dalmau, *Cambio Político y Proceso Constituyente en Venezuela: 1998-2000* (Vadell Hermanos, 2001) at 130.

(which authorised the creation of a new constitution through a Constituent Assembly).[27]

This judicial application of the theory of constituent power, exemplified in the Venezuelan decision but also in the Colombian theory of implicit limits to constitutional change, is unique in contemporary constitutionalism. It suggests that in matters of fundamental constitutional change, democracy trumps (that is, it is privileged over constitutionalism). In Colombia, the decree that authorised the convocation of the Constituent Assembly that drafted the Constitution of 1991 attempted to limit the power of that constitution-making body by establishing that the assembly could only consider changes related to a number of subjects. The Colombian Supreme Court of Justice invalidated those limits, stressing the absolute character of the constituent subject. In this sense, both the Colombian Supreme Court of Justice and its Venezuelan counterpart were attributing these constitution-making bodies with what is sometimes identified as 'original', as opposed to 'derivative', constituent power.[28] An 'original' constituent power is usually understood as a constitution-changing faculty that is not derived from any other power or institution. That is to say, it is the political power typically exercised after a revolution, and it is usually seen as involving a legal rupture, a violation of the rules of constitutional change contained in the previous constitution.

In contrast, 'derivative' constituent power is a power of constitutional change that can only be exercised because it has been authorised by the constitution, such as the ordinary power of constitutional reform (in this respect, a 'derivative' constituent power is a *constituted* power that has been attributed with a limited power of constitutional reform). This distinction played an important role in the process that led to the adoption of the new Constitution of Bolivia. Interestingly, although this constitution was the result of a series of important social changes, mass protests by indigenous peoples, labour unions, and other social movements, it was drafted by an assembly convened according to the rules of the previous constitution (the Constitution of 1967). In 2004, Vice-President Carlos Mesa, who assumed the Presidency after President Gonzalo Sanchez de Lozada left the

27 Sentencia 138, 9 November 1990.This approach, however, has not been successful elsewhere: the Honduras coup of 2009 was a reaction to President Manuel Zelaya's attempt to convene a Constituent Assembly appealing to the people's constituent power (and bypassing the ordinary process of constitutional change provided by the constitution).

28 See for example Luis Sánchez Agesta, *Principios de Teoría Política* (Editora Nacional, Madrid, 1983); Rodrigo Borja, *Derecho Político y Constitucional* (Fondo de Cultura Económica, México, 1991); Carlos Fayt *Derecho Político* (Ediciones Ghersi, Buenos Aires, 1982); Germán José Bidart Campos, *Derecho Político* (Aguilar, Buenos Aires, 1967).

country, promised a set of constitutional changes that included a provision allowing for the convocation of a Constituent Assembly.[29] The constitution was formally amended in 2004 to allow a two-thirds majority in Congress to convene a Constituent Assembly, and a law was passed in 2006 for the convocation of the assembly under Article 232.[30] The law approved by Congress, however, required the Constituent Assembly to make its decisions according to a two-thirds majority (arguably limiting its constitution-making power, allowing a one-third minority to block proposals favoured by the majority of the assembly's delegates).[31]

The issue then became whether the Constituent Assembly could exercise "original" constituent power, because if it could, it could very well disregard the two-third majority requirement. If, on the contrary, it had only a 'derivative' constituent power, it could only act according to the limits prescribed in the authorising law. Not surprisingly, the opposition argued that since the power of the Constituent Assembly came from Article 232 of the Constitution, it could not be considered a means for the exercise of 'original' constituent power. On the other hand, from the beginning of the process, Evo Morales' MAS argued that the assembly, through formally convened under Article 232, would be an 'original' Constituent Assembly with the mandate to "refound" Bolivia through the radical transformation of the juridical order.[32] Eventually, this debate ended up in the Supreme Court of Justice which determined that the Constituent Assembly only had a 'derivative' constituent power and that it was limited by the authorising law

29 For a recent account of this process, see David Landau, "Constitution-Making Gone Wrong", 64*Alabama Law Review* 923 (2013). See also Ruben Martínez Dalmau, *El Proceso Constituyente Boliviano (2006-2008) en el Marco del Nuevo Constitucionalismo Latinoamericano* (Editorial Enlace, La Paz, 2008).

30 Article 232 establishes: "La Reforma total de la Constitución Política del Estado es potestad privativa de la Asamblea Constituyente, que será convocada por Ley Especial de convocatoria, la misma que señalará las formas y las modalidades de elección de los Constituyentes, será sancionada por dos tercios de voto de los miembros presentes del Honorable Congreso Nacional y no podrá ser vetada por el Presidente de la República".

31 Ley 3364, 6 March 2006. In its Art 25, the law stated: "La Asamblea Constituyente aprobará el texto de la nueva Constitución con dos tercios de votos de los miembros presentes de la Asamblea".

32 Eduardo Gamarra, "Bolivia: Evo Morales and Democracy" in *Constructing Democratic Governance in Latin America* (Jorge I Dominguez & Michael Shifter, eds) (The John Hopkins University Press, 2008) at 129.

and the constitution.[33] The reference in Article 411 to the 'original' character of a new Constituent Assembly can be seen as an attempt of the delegates to make clear that any future Constituent Assembly would have a truly 'original' character.[34]

One may ask how can a Constituent Assembly such as the one contemplated by the Bolivian, Ecuadorian, and Venezuelan constitutions be seen as a means for the exercise of an 'original' constituent power if, after all, these bodies are authorised by the constitution. The answer to that question is that what these constitutions attempt to do is not to *authorise* the convocation of Constituent Assembly, but to provide an opening, a means of egress for the exercise of the people's original constituent power. In other words, they provide the citizenry with a mechanism that they *could* use to exercise their constituent power even though, at least in theory, that same power could be exercised through alternative, and perhaps more informal, mechanisms (the key point being that they must be mechanisms that attempt to replicate, as long as it is possible in the context of a large society, the idea of a people adopting a constitution). This very idea, the idea of constitutions that leave the door open for their own (potential) destruction, presents a direct challenge to the dominant conception of constitutionalism and is a world apart from the dominant approaches to the relationship between constitutionalism and democracy.

IV CONCLUSION

This paper has argued that a new approach to the relationship between constitutionalism and democracy has been developing in Latin America. This approach is characterised by an attempt to allow citizens to trigger important constitutional transformations that are to be adopted outside the ordinary institutions of government (a mode of proceeding that has been sanctioned by courts in places like Colombia and Venezuela), and by placing limits on the government's power of constitutional reform. The theory of constituent power, it has been shown, plays an important role in these developments, which, in a way, are profoundly related. In other words, to say that a legislature is unable to adopt

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33 For a discussion of the conflict around the 2/3 rule, which involved social unrest and also a decision of the Supreme Court of Justice declaring that the assembly was a 'constituted power', see Jorge Lazarte, 'La Asamblea Constituyente de Bolivia: De la Oportunidad a la Amenaza', *Nuevo Mundo Mundos Nuevos*, 2008, vol 8 Online. Available <http://nuevomundo.revues.org/42663?lang=en> (accessed 9 September 2009);

34 However, and as can be seen in the previous quotation of Art 411, before submitting the new Constitution to a referendum, Congress inserted into Art 411 a new two-third majority requirement. As a result, rather unusually, Art 411 refers to the Constituent Assembly as 'original', and at the same time limits its majoritarian character.

fundamental constitutional changes, is to say that the only way of legitimately adopting those changes would be through the exercise of the (original) constituent power. This means that when a Latin American court invalidates a constitutional amendment proposed by a legislature because it amounts to the creation of a new constitution, it is signalling to the people that the constituted powers have attempted to adopt constitutional changes outside their competence, that someone has tried to usurp their sovereignty. If those changes are truly desired, they would have to take place through the most participatory mechanisms possible, as only those mechanisms can be consistent with an exercise of constituent power by the people.