

SOVEREIGN ENCOUNTERS

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In this article, which is an edited version of my inaugural lecture at Te Herenga Waka – Victoria University of Wellington, I argue that the concept of sovereignty is crucial to understanding one of the main questions of constitutional theory: how can constitutions facilitate self-government and, at the same time, function as mechanisms for the limitation of political power? I do so by re-examining four different ways in which I have encountered the concept of sovereignty through my academic work.

I INTRODUCTION

In a 1960 lecture, entitled "Freedom and Politics", Hannah Arendt stated:¹

The famous sovereignty of political bodies has always been an illusion which, moreover, can be maintained only by the instruments of violence, that is, with essentially non-political means. Under human conditions, which are determined by the fact that not man but men live on the earth, freedom and sovereignty are so little identical that they cannot even exist simultaneously. Where men wish to be sovereign, as individuals or as organized groups, they must submit to the oppression of the will, be this the individual will with which I force myself or the "general will" of an organized group. If men wish to be free, it is precisely sovereignty they must renounce.

Most of what I will say here about sovereignty will appear to be in direct conflict with those ideas, but at the end of the article I will suggest that perhaps that is not necessarily the case. What do I mean by "sovereignty"? From a legal or constitutional perspective, I define sovereignty as the power to transform any will into law. Whoever is sovereign possesses an unlimited law-making power, a power not subject to any restraints. This notion, which reminds us of Thomas Hobbes' *Leviathan*,² is problematic in at least two ways.

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1 Hannah Arendt "Freedom and Politics: A Lecture" (1960) 14(1) *Chicago Review* 28 at 41.

2 Thomas Hobbes *Leviathan* (Christopher Brooke (ed), Penguin Classics, Harmondsworth, 2017).

On the one hand, in the contemporary world, there does not seem to be anyone that actually has that kind of power. New Zealand jurists have many times insisted on that point.³ In a world where governments are subject to international obligations, where even "sovereign Parliaments" can only legislate after going through complex processes that impact in important ways on the ultimate content of statutes, it is almost impossible to find an actual "sovereign": to find someone, some entity, that can *actually* adopt any law it wants. Put differently, the content of the law will not express the "will" of anyone in particular, but rather reflect the different interests and forces present in the social and political (domestic and international) context where it is adopted.

On the other hand, even if it were possible for there to be actual sovereign entities, the question would become why we would ever want such a thing to exist. Why would we want anyone, even if it is an elected assembly, to have the power to transform any will into law? In fact, one of the clearest indications that there is something wrong in a constitutional order is the existence of an institution with the power to do anything it wants. Such an entity, for example, would be able to engage in human rights violations, to intervene in the adjudication of disputes, to punish individuals for conduct that has not been classified as a crime, and so on. This is the "problem" of sovereignty: whoever has sovereignty is potentially an authoritarian, a would-be human rights violator, a potential dictator.

And yet, I will argue below that we should not give up on the concept of sovereignty. That, in fact, we do need to recognise an instance of sovereign authority if we want to limit the exercise of political power. How can this be? How is it that we need to retain the idea of sovereignty, the idea of an unrestrained law-making power, if we want a power that is *not* unlimited, *not* unrestrained? I have titled this article "Sovereign Encounters" because I will try to answer those questions by reflecting on the ways in which I have "encountered" the concept of sovereignty at different stages in my academic life.

II FIRST ENCOUNTER

The first encounter has to do with the Puerto Rican political status debate, which was very present throughout my undergraduate and law studies back in Puerto Rico. Then, as now, United States federal laws routinely applied in Puerto Rico, even though the island lacks voting representation in the United States federal legislature. That is clearly an undemocratic state of affairs, and is why Puerto Rico's current political status is generally seen as a "problem": as a *colonial* problem. But note that this debate (like all debates about decolonisation) is ultimately about sovereignty: about who has an unlimited law-making power over the island of Puerto Rico.

3 See Sian Elias "Sovereignty in the 21st Century: Another Spin on the Merry-Go-Round" (2003) 14 PLR 148; KJ Keith "Sovereignty at the Beginning of the 21st Century: Fundamental or Outmoded?" (2004) 63 CLJ 581; Lord Cooke "The Myth of Sovereignty" (2005) 3 NZJPIL 39; and Geoffrey Palmer "A chink in the armour of parliamentary sovereignty" [2022] NZLJ 181.

At the moment, it is the United States Congress which has that power, and the question is: should it be someone else?⁴ The claim by some groups in Puerto Rico is that the people of the island should be "sovereign": that Puerto Rico should become a sovereign country. That claim is, in the last instance, a claim about self-government, a claim about Puerto Rico being able to be ruled by its own laws. Nonetheless, it is also a claim about limiting the power of the United States over Puerto Rico. This is of course typical in colonial contexts. For example, when New Zealand became a *de facto* and then a *de jure* sovereign country (first by convention and then through formal constitutional independence) the result was not only that sovereign authority over New Zealand would thenceforth be located in Aotearoa, but also that the United Kingdom's law-making power over these islands diminished until it disappeared.

As in the Puerto Rico example, vesting sovereignty in New Zealand was, at least partly, a way of limiting someone else's power (the power of the Westminster Parliament). A similar dynamic may be present in the context of Māori claims to sovereignty under *te Tiriti o Waitangi*. Those claims do not seem to be about Māori demanding an unlimited law-making power, but about *limiting* the power of the Crown, either by preventing it from doing certain things or by requiring it to do others. When one thinks about sovereignty from this perspective, a type of power (a sovereign power) that is supposed to be absolute (and therefore dangerous) ends up playing the role of limiting the authority of some other entity.

Naturally, that does not mean that the problem of sovereignty, the problem of someone having an unlimited law-making power (a power that could be abused), disappears. Sovereignty is simply transferred to someone else. That is to say, the problem is still there, but, as I will argue, the concept of sovereignty itself provides a way out of it.

III SECOND ENCOUNTER

This brings me to my second "encounter" with sovereignty, which took place during my doctoral studies in Canada, carried out under the supervision of Professor Allan C Hutchinson. My doctoral research was about the theory of constituent power, and about how it allows us to understand the democratic legitimacy of constitutional orders. The theory of constituent power, whose origins are usually associated with the French Revolution, maintains that in every legal system there is someone who has the power to create a constitution or to alter the existing one in fundamental ways.⁵ In a democracy, that someone is "the people". A constitution is thus not simply the product of history (the kind of view advanced by Edmund Burke in the English constitutional tradition), but a human artefact

4 For a recent discussion, see Joel I Colón-Ríos and Yaniv Roznai "A Constitutional Theory of Territoriality: The Case of Puerto Rico" (2022) 70 *Clev St L Rev* 273.

5 See Joel I Colón-Ríos *Constituent Power and the Law* (Oxford University Press, Oxford, 2020).

that can be created and re-created by human beings.⁶ In English constitutional thought, the theory of constituent power has not been very influential, but this is not the case in continental Europe and Latin America.⁷

In my doctoral thesis I argued that the democratic legitimacy of a constitution depended on whether it contained an opening for the *future* exercise of constituent power.⁸ And for such an "opening" to be a *democratic* opening, it had, first, to in some way reproduce the kind of process that one would expect in a democratic constitution-making episode. Nowadays, one would expect a democratic constitution-making episode to include a referendum that asks the electorate whether they want to adopt a new constitution, followed by the popular election of delegates to a special constitution-making body (usually called a *constituent* assembly) which drafts a constitutional text that only becomes valid if ratified in a further referendum.⁹ My point was that a democratically legitimate constitution would be open to future replacement (or future fundamental changes) through a similar process: that it was not enough for it to be present only at the moment when the constitution was originally created. Second, and moreover, I argued that in order for such a process to channel the exercise of the people's constituent power, it had to be possible for it to be triggered from below; that is, by the people themselves (for example, by popular initiative).

That, of course, was not what one would see in written constitutions around the world: constitutions not only tend to be difficult (or very difficult) to change, but their change is usually put in the exclusive hands of ordinary legislatures. The typical amendment rule of a written constitution states something like this: "This Constitution can be amended by a resolution approved by two thirds of the members of each of the legislative chambers". In light of the prevalence of that kind of provision, I concluded that contemporary constitutions were characterised by a deficit of democratic legitimacy; they did not provide an opening for the future exercise of constituent power; they did not provide mechanisms for constitutional change or potential constitutional replacement like those present in a democratic constitution-making process.

6 During the French Revolution, that idea was embraced, and at the same time constituent power was attributed to "the nation". The concept of "the nation" was not originally conceived as equivalent to "the people", but nowadays these two notions are used interchangeably, and in the rest of this article I will just refer to the constituent power of "the people": see Colón-Ríos, above n 5, at ch 5.

7 For early references to the concept of constituent power in English constitutional thought, see Joel I Colón-Ríos "Five Conceptions of Constituent Power" (2014) 130 LQR 306.

8 Joel I Colón-Ríos *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power* (Routledge, Abingdon, 2012).

9 For reasons that I will explain, constituent assemblies have been historically conceived as *sovereign* entities.

At first sight, this conception of democratic legitimacy sounds very demanding, but around the same time I was writing my doctoral thesis, a number of constitutions began to appear in Latin America which included provisions like the following:¹⁰

The total reform of the Constitution [there is a less demanding process for what is called the "partial" reform of the constitution], or that which affects its fundamental premises, rights, duties and guarantees, or the supremacy and reform of the Constitution, shall take place through an original plenipotentiary Constituent Assembly, put into motion by popular will through referendum. The convocation of the referendum shall be carried out by citizen initiative, with the signatures of at least twenty percent of the electorate; by absolute majority vote of the members of the Pluri-National Legislative Assembly; or by the President of the State.

I naturally found this quite interesting, but what does it have to do with sovereignty? There were two main criticisms against these kinds of mechanisms, as well as against the kind of argument I was presenting in my thesis, and both of these criticisms were based on the notion of sovereignty. The first one was that by making possible the convocation of what would for all purposes be a *sovereign* entity, these mechanisms created a constant possibility that a democratic constitution would at some point be replaced by an undemocratic, rights-violating or authoritarian one. Secondly, it was said that by giving rise to a sovereign entity, an entity that could claim to act *as if* it were the people, these kinds of provisions would result in constitution-making bodies that went beyond the task they were given (that is, the creation of a new constitution) and interfered with the ordinary institutions of government.

In fact, throughout constitutional history (not only in Latin America, but also in continental Europe and North America) constitution-making bodies have frequently claimed to be the holders of sovereign power and have done things such as repeal or amend ordinary legislation, or remove and appoint judges.¹¹ The best example is probably the French National Convention of 1793, which was convened to give France a new constitution but ended up exercising all the powers of government, including the judicial one. Less dramatic examples can also be observed in more recent times in places like Colombia or Venezuela, cases to which I will come back shortly. This second encounter with sovereignty was thus not as positive as the first one: here the emphasis was on the risks, on the bad side of sovereignty, on the problem of sovereignty.

10 Constitution of Bolivia 2009, art 411:

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 ...

11 See Colón-Ríos, above n 5, at ch 9.

IV *THIRD ENCOUNTER*

In 2009, Professor Tony Smith contacted me, offering me a position at the Faculty of Law of Te Herenga Waka – Victoria University of Wellington. This led to my third encounter with sovereignty, in this case with the doctrine of parliamentary sovereignty, and it also led me to meet many wonderful colleagues and students who have contributed to my thinking on these very issues. One thing that I knew, or that I thought I knew, about the doctrine of parliamentary sovereignty was that a legislative body operating under it is like a (sovereign) constituent assembly in permanent session. This was the view put forward by Alexis de Tocqueville,¹² with which AV Dicey himself agreed and which he described as "a convenient formula for summing up the fact that Parliament can change any law whatever".¹³

This means that a sovereign Parliament can engage in fundamental constitutional changes any time it wants, that it can adopt ordinary laws and that, if it really wants to, it can also interfere with the exercise of the executive or the judicial authority. Of course, while this may be true in theory, it did not work that way in practice. For example, during the late 20th and early 21st centuries, the New Zealand Parliament engaged a number of times in what could be described as fundamental constitutional change. The New Zealand Bill of Rights Act 1990, the introduction of mixed-member proportional representation (MMP) in 1993 and the Supreme Court Act 2003 were all arguably the kind of changes that, if adopted elsewhere, would be considered fundamental. I was not in Aotearoa when those changes took place, but I suspect that, when Parliament adopted them, it did not really look like a "sovereign" entity: an entity that could simply transform any will into law (an entity, for example, whose mere wish to adopt a particular type of bill of rights was enough to result in that particular type of bill of rights).

Rather, in adopting these Acts, the New Zealand Parliament (or, in this context, the House of Representatives) went through a series of processes that in some way limited its ability to exercise its legally unrestrained power. In the case of MMP, those processes included a referendum. In the context of the New Zealand Bill of Rights Act and the Supreme Court Act, there was no referendum, but the consultation processes and discussions that took place before those Bills were enacted meant that, in practice, it would be odd to describe them as resulting from an exercise of an unrestrained law-making authority.

This is all very familiar but the (rather obvious) point I wish to make is that even though, legally speaking, the New Zealand Parliament is sovereign, *politically* it is not. This is something that was recognised by Dicey in the context of the Westminster Parliament. When Dicey described the English Parliament as a sovereign entity, he was very clear that that sovereignty had a strictly *legal* nature: it

12 Alexis de Tocqueville *Democracy in America* (Richard D Heffner (ed), New American Library, New York, 1956) at 74.

13 AV Dicey *Introduction to the Study of the Law of the Constitution* (10th ed, Macmillan, London, 1959) at 88.

simply meant that once Parliament acted, once there was an Act of Parliament, a law, that law could not be changed, repealed or invalidated by any other institution (unless Parliament had explicitly granted that power). But if Parliament is only *legally* sovereign (and I think this was an important part of Dicey's point), it means that it is not *fully* sovereign.

Sovereignty is ultimately about someone who holds a *political* power to transform their will into law. If Parliament only has *legal sovereignty*, it is because *political sovereignty* lies somewhere else. For Dicey, that someone was "the nation" or the electoral body. He thus wrote:¹⁴

But if Parliament be in the eye of the law a supreme legislature, the essence of representative government is, that the legislature should represent or give effect to the will of the political sovereign, ie of the electoral body, or of the nation.

...

Here we come round to the fundamental dogma of modern constitutionalism; the legal sovereignty of Parliament is subordinate to the political sovereignty of the nation.

This is why, Dicey said, there are some laws that, even if Parliament were legally entitled to adopt them, it would never adopt. An example might be a law that is so unjust that it may result in massive acts of civil disobedience, or in a revolution, or simply in an electoral defeat; or a law that abolishes democracy or that involves serious violations of human rights. Moreover, in the same way that there are laws that Parliament would never adopt, there are others that Parliament would be politically bound to adopt; for example, laws that were promised by the parliamentary majority during a political campaign.

None of this always works in the same way; for example, Parliament may sometimes fail to legislate in the way desired by the majority of the electorate. However, the point is that there is a limit to the extent to which Parliament would be willing and able to act in any specific context *because* its sovereignty is only legal, not political. This third encounter, the encounter with parliamentary sovereignty, was thus about understanding the different reasons why a law-making body, by the mere fact of possessing a legally unlimited law-making authority, is not necessarily a fully sovereign entity.

V *FOURTH ENCOUNTER*

The fourth and final encounter is about the way in which that idea applies, or not, to constituent assemblies, a question that I examined at length in *Constituent Power and the Law*.¹⁵ As I noted earlier, constituent assemblies are typically understood as sovereign constitution-making bodies. The reason is simple: they are specifically convened to exercise a power that belongs to the people (the constituent power), a power that is greater than that held by the legislative, judicial or executive

14 At 429–430 and 453.

15 Colón-Ríos, above n 5.

authority. Constituent assemblies are in fact convened to determine how all those other powers (which are usually called the constituted powers) will be exercised. From the perspective of legal sovereignty, this makes sense, because if the exercise of constituent power were subject to legal limits it would mean that societies would be unable to adopt certain types of constitutions. However, there is no reason why constituent assemblies must *also* be conceived as politically sovereign. In the same way that a sovereign Parliament is sometimes understood as a constituent assembly, a constituent assembly could be understood as a sovereign Parliament: as a legally, but not politically, sovereign entity.

Nonetheless, that is not what I want to say, because to maintain such a conception would be fundamentally to misunderstand what a constituent assembly is. In fact, what I want to argue is that a constituent assembly, properly understood, is *not even legally* sovereign. Why is that? Remember that a constituent assembly is tasked with the exercise of constituent power, but that power does not belong to the assembly, but to someone else; that is, to the entity that tasked the assembly. That entity is the people, the *sovereign* people. Accordingly, being called to exercise constituent power does not mean that one has sovereign authority. It more or less means the opposite: that there is a sovereign who cannot exercise constituent power by itself (it cannot assemble and draft a constitution) and has therefore tasked someone to do so on its behalf.

There is in this sense an important distinction that constitutional theory has historically failed to make: a distinction between constituent power and sovereignty. All sovereigns have constituent power, but not every entity that exercises constituent power is sovereign. This seemingly abstract and perhaps trivial distinction can have important practical implications. I mentioned earlier Colombia and Venezuela. In those two countries, in Colombia in 1991 and in Venezuela in 1999, constituent assemblies were convened. Once convened, those entities expressly proclaimed themselves "sovereign" and engaged, to different extents, in the exercise of the ordinary powers of government. For instance, they suspended the ordinary legislature and engaged in different degrees of intervention with the judicial branch. From the perspective of these constituent assemblies, this was entirely justified. Their members had been directly elected by the people to transform the constitutional order and could therefore act as if they were the people. If they thought the legislature, the executive or the judiciary was preventing the adoption of a new constitutional system or making the transition to it difficult, they could (in fact it was their duty to) take action against those institutions.

This mode of proceeding was challenged in the courts, and in both instances the judges determined that constituent assemblies, by virtue of being *constituent* assemblies, of having been tasked to exercise constituent power, were sovereign entities that could not be limited by law. Not surprisingly, that kind of view (which is by far the dominant view in Latin America) has given constituent assemblies a bad name.

This is reflected in the constitution-making process which took place in Chile in 2020–2022.¹⁶ When one examines the official documents related to that process, one finds no mention of the words "constituent power" or "constituent assembly" (the drafting entity, for example, was called a "Constitutional Convention"). The reason behind this seems to have been an attempt to avoid a "sovereign" constitution-making body of the kind other Latin American countries have experienced. In fact, the enabling rules of the Constitutional Convention (which were inserted as an amendment to the current constitution) explicitly state:¹⁷

The Convention, any of its members or a fraction of them, shall not vest in themselves the exercise of sovereignty, assuming other functions than those expressly recognised by this Constitution.

Chile thus attempted to avoid the confusion between constituent power and sovereignty by, at least to some extent, leaving behind the notion of constituent power. This would not have been necessary if constituent assemblies had always been understood as what they are: mechanisms for the exercise of constituent power, not sovereign entities.

This leads me to my final point, which is connected to my earlier comment that (despite what Dicey and de Tocqueville thought) there is a key difference between a sovereign Parliament and a constituent assembly. The difference is this: unlike sovereign Parliaments, constituent assemblies may be subject to *legally* enforceable limits. That is, in certain scenarios, a constituent assembly may be legally bound to adopt a certain type of constitutional content. What I mean is the following. Constituent assemblies are usually convened after a referendum that asks a question like: "Do you wish to convene a Constituent Assembly for the adoption of a new constitution?". But imagine, for example, a referendum question where the electorate is asked instead: "Do you wish to convene a Constituent Assembly for the adoption of a new constitution that establishes a unicameral legislature and a supreme bill of rights?". If constituent assemblies are sovereign, then they can *legally* disregard a positive answer to that kind of question just as a sovereign Parliament, like New Zealand's, can legally disregard (for example, by repealing an Act attributing "binding" character to a referendum) referenda results.

However, we now know that constituent assemblies are not sovereign. The question thus is: would a constituent assembly that has been convened after such a referendum be able to disregard the instruction to create a particular type of constitutional content? Or would the instruction or mandate contained in the referendum question be legally, that is judicially, enforceable? In the case of a

16 The process resulted in a draft constitution rejected by the electorate in a referendum. At the time of revising this lecture for publication, a new constitution-making process was underway in Chile.

17 Constitution of Chile 1980 (as amended in 2019), art 135:

Le quedará prohibido a la Convención, a cualquiera de sus integrantes o a una fracción de ellos, atribuirse el ejercicio de la soberanía, asumiendo otras atribuciones que las que expresamente le reconoce esta Constitución.

sovereign Parliament it is clear that a mandate contained in a referendum question *would not* be legally enforceable, at least under the orthodox (and arguably still dominant) conception of parliamentary sovereignty. But it is not so clear in the case of a constituent assembly, at least one that is convened in a country that already operates under a written constitution. In such a context, the ordinary role of the courts would usually involve the enforcement of another instruction from the people: the constitution itself. The constitution, after all, is a popular mandate that establishes different types of limits: for example, limits about the kind of ordinary laws that can be legally adopted. In this respect, and in relation to a written constitution, *the people are not merely a political sovereign* (as in Dicey's theory); they are simply "the sovereign". And in the same way that courts enforce the popular mandate contained in a written constitution against, for example, an ordinary legislature, courts could (or should) also be able to enforce the popular mandate contained in a referendum question against an entity tasked to exercise constituent power on behalf of the people.

We can see here how sovereignty, even a unified conception of sovereignty (one that does not distinguish between legal and political sovereignty), can serve to limit the power of a type of entity (a constituent assembly) that has historically been seen, almost by definition, as omnipotent. To my mind, this is a very good indication that sovereignty is still a valuable constitutional concept. The true sovereign, the people, only comes close to exercising its sovereignty during a constitution-making moment, when it tasks an institution (for example, a constituent assembly) to exercise the constituent power on its behalf. From then on, its "sovereignty", popular sovereignty, only serves to limit the political power of everyone else.

In the introduction, I suggested that my "defence" of sovereignty may after all be consistent with the type of critique advanced by Arendt. In fact, in the same lecture that I referred to at the beginning, Arendt said that "the freedom of one man or a group or a body politic can only be purchased at the price of the freedom, ie the sovereignty, of all others".¹⁸ I think that that is, in a certain way, also my view: to be free, one must free oneself from the sovereignty of others, but in so doing, one inevitably becomes sovereign. Perhaps once one has achieved that, the next task is to find a way of getting rid of sovereignty itself. Whether, in the context of a political system, that can be done without giving up the ideal of democratic self-government is a question for another day.

¹⁸ Arendt, above n 1, at 40.