ABSTRACT

The purpose of this dissertation is to critically assess the use of the jurisprudential approach to the problem of constitutional change developed by the courts of Colombia and Venezuela during the last wave of Latin American constitutional reformism. I attach to this approach the label of *Populist Jurisprudence*. The courts of Colombia and Venezuela have recovered the distinction between constituent and constituted powers developed by E.J. Sieyès and Carl Schmitt and applied it, first, to the episodes of constitution making that led to the adoption of the current constitutions of these countries and, second, during processes of constitutional change set in motion by populist presidents seeking to extend the number of terms in office for which they could run. Through detailed analysis of these processes of constitutional change this dissertation will show that despite the eventual capacity of populist jurisprudence to open the democratic regime to the participation of excluded political forces and to protect the democratic regime against attempts to usurp the constituent power of the people, its adoption by the courts is most likely to yield authoritarian results. Therefore, this critique of populist jurisprudence is an attempt to persuade Latin American constitutional judges of the need to put aside the conceptions of democratic legitimacy and constitutional change upon which they have been relying until now and move towards a new jurisprudential approach that is better suited to avoid the perils of authoritarianism.

A CRITIQUE OF POPULIST JURISPRUDENCE

Courts, Democracy, and Constitutional Change in Colombia and Venezuela

by

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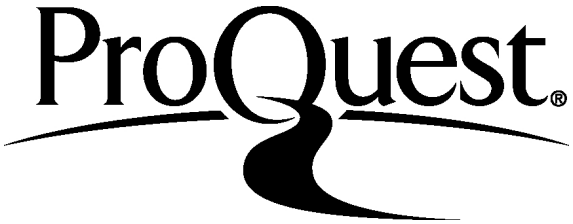

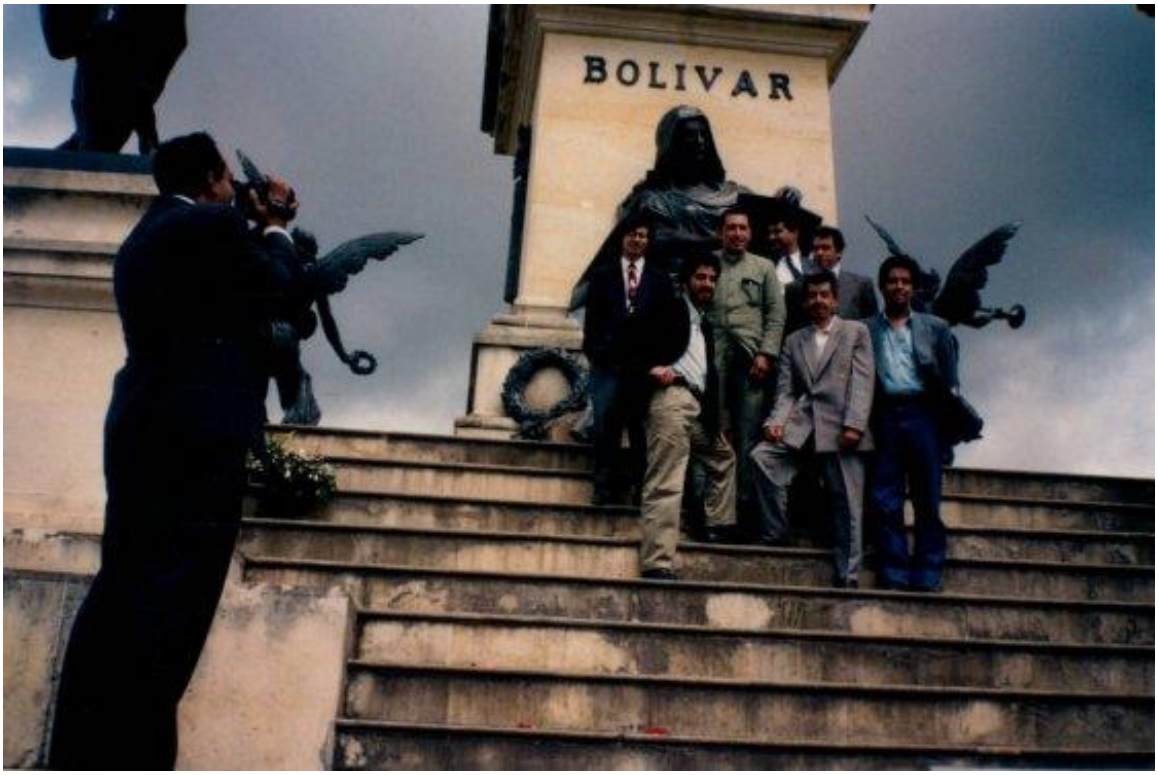

Hugo Chávez in Bogotá, 1994

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INTRODUCTION

1. Context

The Andean region of Latin America has been experiencing a wave of constitutional reformism that began in Colombia in 1991 and that eventually spread to Venezuela in 1999, Ecuador in 2008, and Bolivia in 2009. In all these cases the impetus for reform began as an attempt to redeem the principle of popular sovereignty and to improve the character of democratic politics in three particular ways: first, through a generalized commitment to the protection of economic, social, and communal rights that goes well beyond the traditional liberal emphasis on the negative liberties of the individual; second, by allowing traditionally excluded political forces to enter the realm of electoral competition with fairs chances of success; and, third, through the adoption of a variety of mechanisms of direct participatory democracy that the citizens can use to intervene in the making of fundamental political decisions.[1]

[1] For a characterization of Latin America's recent wave of constitutional reformism, see Gargarella (2013) and Uprimny (2011). On the Andean region in particular, see Segura & Bejarano (2004).

Serious efforts have been made in these countries to demystify the principle of popular sovereignty that is so often invoked by democrats across the globe but that only rarely political practice and institutions get to reflect.[2]

However, lurking behind this wave of democratization and constitutional reformism we find what Carlos de la Torre (2010) has called "the populist seduction". The rise to power of Hugo Chávez in Venezuela in 1998 gave place to a regional movement to reconceptualize democracy from the perspective of an extremely polarizing and combative style of politics that, under the excuse of returning political power to its righteous owner, i.e. to the people, condemns to irrelevance most of the fundamental principles of liberal democracy. The separation of powers, political contestation, public deliberation, political pluralism, the protection of minority rights, political alternation, the mediating function of the legislature and political parties, political decentralization, and the rule of law suddenly began to be seen as nothing more than illegitimate obstacles to the direct exercise of the people's sovereign powers.

Instead of working out a synthesis between liberal democratic principles and a more robust conception of popular sovereignty, contemporary Latin American populism reduces democracy to a mere electoral exercise through which the majorities are left free to advance and impose their agendas unencumbered by any institutional limitations or by the need to reach a compromise with those who are

[2] For an account of the ways in which the principle of popular sovereignty has been rendered irrelevant under modern representative governments, see Rosanvallon (2006).

labeled as enemies of the people.[3] The most salient and troubling result of this populist reconceptualization of democracy in the Andes is the introduction of an illiberal form of plebiscitary presidentialism[4] that tends towards the progressive concentration of power in the hands of the executive[5] and the gradual consolidation of authoritarian regimes.[6]

The countries of the Andean region have been recently governed over long periods of time by populist presidents that rely on the different mechanisms of direct participatory democracy to usurp, as Claude Lefort would put it, the empty space of power that democratic regimes are meant to keep vacant. Their direct appeals to the people erode the legitimacy of the instances of legal and political mediation that seek to secure a place in the process of political will formation for the plurality of voices and interests that compose modern political societies. As a consequence, the initial promises of democratic transformation that inspired this wave of constitutional reformism have remained mostly unfulfilled. Episodes of constitutional change that

[3] For an excellent analysis of the problems of understanding democracy in purely majoritarian and electoral terms, see Rosanvallon (2009: 43-64). The literature on the populist rejection of liberal democracy and its tendency to divide society into two antagonistic camps is vast and inexhaustible. See, for instance, Arato (2013), Canovan (2005), de la Torre (2010), Finchelstein (2014), Knight (1998), Laclau (2007), Müller (2014), Peruzzotti (2013), Rovira Kaltwasser (2014), Urbinati (1998), Weyland (2003), and Žižek (2006).

[4] This conception of plebiscitary presidentialism draws, especially, from the writings of Karl Marx (1973), Carl Schmitt (2009), Guillermo O'Donnell (1994), and Pierre Rosanvallon (2006). On the concept of illiberal democracy, see Zakaria (1997).

[5]On the Latin American trend towards the concentration of power in the hands of the executive, see Bejarano & Segura (2013), Gargarella (2013), Negretto (2013), Nino (1992), and Uprimny (2011).

[6] The concept of "competitive authoritarianism" developed by Levitsky & Way (2002) has proven useful for the study of Latin American political regimes under the control of populist forces. These are hybrid regimes that concentrate a great deal of power in the executive for the purpose of pushing the opposition out of most instances of political representation, but they still draw their legitimacy from repeated victories in fairly competitive electoral contests. For an application of this concept to the case of Venezuela, see Corrales & Penfold (2012).

were supposed to consolidate and improve democracy in the region have instead opened the door to the paradoxical establishment of authoritarian regimes under the pretense of advancing the democratic will of the people.

What is the source of this renewed enthusiasm for popular sovereignty in the Andean region of Latin America? Why did the principles of liberal democracy succumb so easily in most of these countries before the emergence of the populist seduction? Did any of these countries manage to resist it? Were there any successful attempts to strike a balance between the maintenance of the fundamental principles of liberal democracy and a serious commitment to the principle of popular sovereignty? After all, it is possible to isolate significant differences in the political trajectories of each of these countries during the last two decades.

Populist democracy has been stronger in Venezuela, Ecuador, and Bolivia than in Colombia. In those three countries, the populist seduction was at the center of the processes of political transformation that led to the adoption of their latest constitutions. Since their initial victory, the leaders of the emergent populist movements of these countries have never lost control of the government. Not only did they impose a new political hegemony from which traditional political elites have been excluded and, in some cases, completely reduced to insignificance; gradually, they have also tightened their grip on a plurality of political actors that were once autonomous from the executive power but now find themselves either coopted or incapable to act freely and effectively to preserve the space for political contestation that democracies require. Such is the case not only with institutions like the legislature and the judiciary, but also with groups of civil society. This is especially

evident in the case of Venezuela, which I will take as the paradigmatic example of populist democracy in the region.

The case of Colombia offers a different scenario, one in which the populist seduction has also been present but without the success it was able to achieve in the neighboring countries of the Andean region. The adoption of Colombia's actual constitution was not the result of a populist reaction against traditional political forces. It did respond to the demands of different sectors of political society for greater inclusion and participation, but not in a way that would exclude the traditional parties from the political scene. The constitution making process of this country followed a logic of negotiation and compromise between historically established elites and emerging political forces that was not replicated elsewhere in the region and that came close to the consolidation of a decent balance between the principles of liberal democracy and a more than rhetorical commitment to the principle of popular sovereignty. However, Colombia did lapse into a period of populist politics that seriously threatened the democratic achievements of its recently adopted constitution. But contrary to the cases of Venezuela, Ecuador, and Bolivia, liberal institutions were capable to withstand this populist push and successfully managed to prevent the advancement of its authoritarian tendencies.

How to explain these differences between Colombia and Venezuela? Key to my account of the political and constitutional transformations of these two countries will be the role of judicial institutions. Courts have been important political actors throughout the wave of democratic experimentation that is still ongoing in the Andes, to the point that their exclusion from any attempt to describe and understand the

recent political history of Colombia and Venezuela will only yield partial and unsatisfactory results. What was the role of the courts of Colombia and Venezuela during the processes of constitutional change that took place in these two countries? How did they fare in terms of democratic results? To answer these questions is the purpose of this dissertation.

2. Argument

The French Revolution introduced into the modern world a new principle of political legitimacy that still permeates our different views on what democracy should be. According to Eric Hobsbawm, if the British Industrial Revolution gave place to a new conception of the economy that radically altered the traditional social structures of both Europe and the non-European world, the French Revolution forged a new set of influential political ideas that travelled far beyond its place of origin: "France provided the vocabulary and the issues of liberal and radical-democratic politics for most of the world" (1996: 53). French revolutionary ideas heavily influenced the actions of the political actors that pushed for the independence of the Latin American republics against Spanish colonial rule and, even to this day, they remain at the center of the region's political discourse.[7]

The principle of popular sovereignty that inspired the latest wave of constitutional reformism in the Andean countries of Latin America is a clear example

[7] "The French Revolution is a landmark in all countries. Its repercussions, rather than those of the American Revolution, occasioned the risings which led to the liberation of Latin America since 1808" (Hobsbawm 1996: 54).

of the continued influence of revolutionary ideas in the region. The recent surge of populist mobilization and discourse in countries like Venezuela, Ecuador, and Bolivia draws heavily from the French revolutionary tradition in order to condemn the restrictions that liberal representative governments impose on popular participation. However, the revival of French revolutionary ideas in these countries since the 1990's reveals a somewhat paradoxical origin. Their return to contemporary political discourse in the Andes is not due to the strategy of a charismatic political leader, a contestatarian social movement, or a radical political party. In what would surely come as a surprise to radicals, populists, and revolutionaries of all stripes and colors, the justices of the Supreme Court of Colombia were the ones who recovered this powerful political ideology during the complex process of constitutional change that gave place to the Constitution of 1991.

At a time during which important sectors of political society were trying to broaden the scope of democratic politics in the country, the Supreme Court of Colombia turned to the revolutionary theory of the constituent power developed by E.J. Sieyès to justify a process of constitutional change outside the rules of amendment that the existing constitution established for that purpose. The revolutionary ideas adopted by the court not only altered in a drastic manner the character of the process of constitutional change in which Colombia was involved at the time; the intervention of the court also became a key referent for the populist political movements that were about to emerge in the neighboring countries of the Andean region and for the judicial institutions that were to review the legality of their actions. A few years later, the constitution making process promoted by Hugo Chávez in Venezuela radicalized the

Colombian experience; likewise, the Supreme Court of Venezuela followed in the footsteps of its Colombian counterpart.[8]

In the hands of constitutional judges in Colombia and Venezuela, French revolutionary ideas – partially reformulated through the lenses of Carl Schmitt's constitutional theory and populist conception of democracy – led to the development of a very specific type of jurisprudence that the courts of these countries now use to deal with situations of constitutional change.[9] Through *Populist Jurisprudence*, the courts of Colombia and Venezuela converted to the language of the law the revolutionary idea according to which, during extraordinary political moments, the existing constitutional order can be legitimately circumvented by the popular sovereign – i.e. by the people – in order to revisit its previous fundamental decisions on the type and form of the political regime. It is the commitment to the idea of the people as a homogeneous and unified entity with the capacity to express a coherent will and to remake the constitutional order without the assistance of legal and institutional instances of political mediation that gives this type of jurisprudence its name.[10]

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[8] Chávez visited Colombia after he was released from prison in 1994. During that visit, and with the assistance of the former leftist Mayor of Bogotá, Gustavo Petro, Chávez met with key figures of the Colombian constitution making process. Specially telling is the meeting that he held with Antonio Navarro, the leader of AD-M19 and former co-President of the Constituent Assembly. Navarro told Chávez to take maximum advantage of the revolutionary idea of the constituent power of the people in order to transform the political regime in a radical fashion and cut by its roots the hegemony of Venezuela's corrupt political elite (Cuesta Novoa: 2013).

[9] On the influence of Carl Schmitt on the courts of Colombia and Venezuela, see Colón-Ríos (2011). For an account of the affinities between revolutionary and populist conceptions of democracy, see Arato (2000: 237-239).

[10] The populist fiction of a collective entity called "the people" is likely to inspire the rejection of liberal democratic theorists. Some of them might even try to vanish the concept from our political vocabulary. Theoretically, I believe this would be the correct move. The obscurity of this foundational democratic

It is paradoxical that a court would adopt such an approach to constitutional change: through populist jurisprudence the courts end up undermining the principle of legality that they are supposed to enforce and protect. But this paradox begins to make sense once the basic principles of this type of jurisprudence are made explicit. Populist jurisprudence is based on a distinction between constituent and constituted powers that the courts can use either to remove all obstacles to the enactment of constitutional change by the people – as the subject of the constituent power – or to impose strict limitations on the capacity of political institutions and the citizens – as constituted powers that derive their existence and authority from a previous decision of the people – to reform the fundamental characteristics of the political regime. As I will try to show throughout this dissertation, the judicial instrumentalization of this distinction can contribute to the production of two types of results: most likely, the legal vacuum or revolutionary hiatus that it creates during processes of constitutional change will pave to way for the establishment of authoritarianism; however, it can also contribute to challenge the monopoly of traditional elites on political power and to protect the democratic regime from illegitimate attempts to usurp the voice of the people for partisan purposes.

The tension between the authoritarian affinities and democratic potentials of populist jurisprudence is especially evident in the recent constitutional history of

concept borders the realm of the mythical and the theological, and the analytical advantages of its use have proven to be fewer than the problems it creates. However, this concept remains strong in actual political practice and discourse. It is constantly invoked in every manifestation of popular sovereignty in Latin America and elsewhere. Therefore, I have decided to retain it under the assumption that its value for contemporary democratic theory is problematic unless reformulated, as I will briefly try to do in Part I of this dissertation.

Venezuela. This country is the paradigmatic example of the emergence of a radical populism with leftist connotations in the Andes. Since the arrival of Hugo Chávez to the presidency in 1998, Venezuelan political life has experienced a radical transformation. Chávez's leadership of a broad populist coalition allowed him to drastically alter the contours of Venezuelan democracy. He successfully embarked his country in a constitution making process that led to the adoption of the Constitution of 1999. His populist discourse and strategies were instrumental in overcoming existing constitutional restrictions in order to satisfy widespread popular desires for substantial political change. However, the processes of constitutional change advanced by the Chavista coalition have been characterized by a refusal to accept the procedural limitations that are required for the establishment of an institutional environment that makes room political pluralism, public deliberation, and democratic contestation. This populist approach to constitutional change has led to the polarization of Venezuelan political society and to the increasing centralization of political power in the office of the president.

Populist jurisprudence was instrumental for the opening of the country's democratic regime to the participation of traditionally excluded political forces, but it also contributed to Venezuela's trajectory towards authoritarianism. The sovereign constituent assembly through which the Chavista coalition finally put an end to the hegemony of the traditional political parties was made possible only after the Supreme Court adopted populist jurisprudence to sanction the validity of a mechanism of constitutional change that was not provided for by the existing rules of amendment. According to the court, the people, as the sole subject of the constituent

power, were not constrained by the constitution: they could legitimately disregard existing positive law to remake the political regime under which they were being ruled. The rules of amendment, claimed the court, were only in place to control the actions of the constituted powers. In this way, the Supreme Court put an end to the monopoly that the rules of amendment of the Constitution of 1961 granted to the legislature over the power to reform the constitution and made way for the constituent assembly that Chávez had promised to convene.

The Supreme Court was not trying to please Chávez. The adoption of populist jurisprudence was a way for this court to respond to the widespread popular demands for democratic openness and constitutional reform that the traditional parties in control of the legislature were refusing to hear. However, the court failed to perceive that the legal vacuum that it was creating was exactly what the Chavista populist coalition needed to gain unchallenged control over all instances of political power in Venezuela. Once the Supreme Court cleared the way for the constituent assembly, Chávez was left free to determine in a unilateral fashion the rules and procedures of the constitution making process and to use the assembly for purposes that went beyond the mere drafting of a new constitution. And though the court tried to intervene to prevent Chávez's abusive manipulation of the constitution making process, its initial recognition of the absolute sovereignty of the people became an impediment for its effective intervention. After all, the Supreme Court was only a constituted power while the constituent assembly was the extraordinary representative of the Venezuelan people.

The Venezuelan court was following, in good democratic faith, a precedent that was established by the Supreme Court of Colombia during the constitution making process that led to the adoption of the Constitution of 1991, but it failed to keep into consideration the particularities of the political environment into which populist jurisprudence was being imported. Constitutional adjudication does not take place in a political vacuum and Venezuelan democracy paid a heavy price by the court's ignorance of this fact. Despite some significant similarities, when the Supreme Court of Colombia first made use of populist jurisprudence it did so within the context of an entirely different process of constitutional change.

In the early 1990's, the justices of the Supreme Court of Colombia were faced with the task of deciding on the legality of an extraordinary constitutional assembly that was to be convened for the purpose of enacting a substantial reform to the country's political regime. The problem was that according to the Constitution of 1886 the power to reform the constitution was exclusively in the hands of the legislature. The rules of amendment did not allow for the use of any other mechanism of constitutional change. However, the political actors pushing for change refused to follow this path. The legislature was seen as an obstacle to the enactment of the reforms that the country badly needed. The traditional parties in control of the legislature were recalcitrant to open the democratic regime to the participation of new political forces and relied on their monopoly on the power to amend the constitution to maintain the status quo.

Against this resistance to change, civil society, emergent political forces, and the reformist factions of the traditional parties proposed the alternative of convening

an extraordinary assembly with limited powers to reform the constitution. Under the leadership of two reformist presidents from one of the traditional parties, an inclusive multiparty agreement was reached to convene an assembly that would allow these reformist forces to bypass the legislature. Initially, this assembly was not to be sovereign; its actions were to be supervised by the Supreme Court in accordance with the agreement that was reached by the political forces that were pushing for change. However, the court's review of this multiparty agreement altered the nature of the process of constitutional change.

Through populist jurisprudence, the court claimed that the Colombian people were free to enact constitutional change outside the rules of amendment established by the existing constitution. The constituted powers could not rely on positive law to prevent the actions of the sole subject of the constituent power. In this way, the court cleared the way for the convocation of the assembly. However, the court also ruled that if the people were actually expressing their desire to remake the constitutional regime then the assembly that was to represent them could not be limited in any way. As a consequence, the court announced that it was unable to supervise the actions of the assembly and declared it to have sovereign powers. Suddenly, Colombia found itself convening a sovereign constituent assembly instead of a limited constitutional one.

Thus, the court's use of populist jurisprudence gave place to a legal vacuum that left the assembly entirely free to adopt whatever constitutional regime it desired. From that moment on, the Supreme Court was no longer a participant during the constitution making process; legality ceased to be a variable that the assembly had to

consider to determine its course of action. However, this revolutionary hiatus did not lead towards authoritarianism, though the assembly did try to overstep the boundaries of its authority. The constitution making process in Colombia was not controlled by a majoritarian populist coalition; an inclusive and pluralistic constellation of political forces came together to negotiate the rules and procedures through which the assembly was to be elected, preventing in this way the risks of a sectarian constitution that would later materialize in Venezuela.

Expanding on the constitution making processes of Colombia and Venezuela that were just briefly introduced, this dissertation will show that the use of populist jurisprudence by the courts during these moments of extraordinary constitutional politics creates a problematic legal vacuum that can eventually surrender the entirety of the political space to the unilateral imposition of an authoritarian regime by political actors claiming to speak for the whole of the people. Through populist jurisprudence the courts rule themselves out of the constitution making process, depriving it of valuable legal mechanisms of constraint that can eventually be used to check the attempts of a political faction to usurp the constituent power. And though the case of Colombia shows that democratic constitution making can take place without the assistance of the courts, this is only a contingent scenario that provides no solid assurances. Courts should try to avoid the pitfall of the revolutionary hiatus that emerges from the use of populist jurisprudence if they want to remain active and legitimate political actors with the capacity to influence the constitution making process in a democratic manner.

Populist jurisprudence has also been used during episodes of constitutional change of a different nature. Since 1998, when the Brazilian Constitution was amended to allow for the reelection of then President F.H. Cardoso, a variety of Latin American populist presidents have sought to extend the number of terms in office for which they can run. Colombia and Venezuela are just two illustrations of a regional trend of which the latest example is the failed attempt of Bolivian President Evo Morales to reform the constitution through a popular referendum in 2016 to run for a fourth consecutive term.

While in Colombia populist jurisprudence was of fundamental importance for the prevention of a constitutional amendment that would have allowed former President Álvaro Uribe to run for a third consecutive term, in Venezuela it was used by the subservient constitutional chamber of the Supreme Tribunal of Justice to remove all the legal and institutional obstacles that were standing in the way of Hugo Chávez's desire to run for indefinite presidential reelections. The same tension between the authoritarian affinities and democratic potentials of populist jurisprudence that was made evident during the constitution making processes of these two countries came back to the fore a few years later under different political circumstances.

The rise to power of Álvaro Uribe in 2002 posed a difficult challenge to Colombia's democratic institutions. He placed populist politics at the service of the political right at a time in which this country was experiencing a widely felt security threat. During the two terms of his government, Uribe was able to divide Colombian society into two antagonistic camps: those who supported the president's all-out war

against the guerrilla insurgencies and those who did not. This antagonistic style of politics allowed Uribe to initiate a process of gradual cooptation of most political institutions that seriously threatened the viability of Colombia's liberal democratic regime. His popularity and the imminence of the security threat became the justifications for his attempts to bypass the constitutional limitations that were set in place by the constituent assembly to prevent the risks of excessive presidentialism and political exclusion.

Relying on his success on the war against insurgency, Uribe gathered great levels of popular support and presented himself and his policies as the only alternative for the survival of democracy. Accordingly, he managed to pass through the legislature a constitutional reform that allowed him to run for a second presidential term. And four years later, claiming that he needed more time to defeat the guerrilla insurgency, he once more mobilized the population and his majorities in Congress to reform the constitution, this time through a referendum, so he could run for yet another consecutive term. However, this proposal failed. Through populist jurisprudence, the Constitutional Court managed to shield the democratic regime against the power-grabbing ambitions of the president.

This time populist jurisprudence was not used to remove the obstacles that the constitution imposed on constitutional change; instead, the distinction between constituent and constituted powers became an instrument for their enforcement. According to the court, allowing a president to run for a third consecutive term was only possible by means of a constituent assembly. Such a reform could not be undertaken by the constituted powers through the rules of constitutional

amendment; only the people, as the sole subject of the constituent power, could revisit the fundamental decisions on the type and form of the political regime adopted in 1991. To do otherwise implied an illegitimate replacement of the constitution. If Uribe was certain of the people's support for his proposal, then his initiative of reforming the constitution by means of a referendum had to be abandoned.

The Constitutional Court responded to Uribe's appeal to the people by claiming that the constituent power of this collective entity could only be set in motion by means of a different mechanism of constitutional change. And, surprisingly, Uribe accepted the court's decision. Despite his immense popularity and the power he was able to concentrate during his two terms in office, he failed to entirely erode all the mechanisms that the Constitution of 1991 established to prevent the excessive concentration of power in the hands of the executive. Though he weakened the party system, Uribe failed in his attempt to fully destroy the political parties. In fact, even when the legislative majorities quickly aligned with his political project, a variety of political forces and sectors of civil society remained firmly opposed to Uribe's proposal and lent their support to the decision of the Constitutional Court.

Things were entirely different in Venezuela. Chávez was fully in control of both the legislature and the judiciary when he finally announced his project to reform the constitution in accordance with his project of Twenty First Century Socialism. This was a major constitutional reform that, if approved, would drastically alter the character of Venezuela's political regime. His objective was to replace the constitutional regime, not just to reform it, but according to the Constitution of 1999, this was only possible by means of a constituent assembly. However, Chávez decided

to submit his proposal to the citizens through a referendum, which included a provision that allowed for the indefinite reelection of president.

The Supreme Tribunal of Justice relied on populist jurisprudence to disregard the necessity to review the process through which the government was trying to reform the constitution. The direct relationship that the president was trying to establish with the subject of the constituent power could not be interrupted by the constituted powers, claimed the court. It was not for the court to decide on the validity of the government's proposal; the final word was to be spoken by the people at the voting booths in 2007. And though the citizens of Venezuela voted against the government's proposal, the pronouncement of the final word on this matter had to wait for another two years.

Chávez decided to give it another try in 2009, again through a referendum, only that this time his proposal was limited to the indefinite reelection of all elected public officials in Venezuela. And once again the TSJ gave him a free pass. According to the court, the possibility of indefinite reelections of the president did not amount to a replacement of the constitutional regime that was established in 1999, so it was not necessary to convene a constituent assembly for that purpose. The court found that the country's democratic regime could be strengthen through this constitutional reform, since it would allow the citizens to decide through their vote if a sitting president deserved to remain in office, instead of having a constitutional provision deny beforehand the continuity in power of a leader with whom the people are closely identified. In this way, the TSJ made evident the populist conception of democracy behind its jurisprudence on constitutional change: constitutional provisions are

obstacles to the establishment of a direct relationship between the executive and the subject of the constituent power; instead of establishing legal mechanisms to prevent the abuse of power, a democratic regime should rely on the capacity of the popular sovereign to keep the president in check through public opinion and a conscientious use of the right to vote. And this time the people of Venezuela voted in favor of Chávez's proposal.

As we can see, populist jurisprudence can be used to protect the democratic regime against authoritarian regressions but it can also become an instrument for its erosion. The alternative political paths followed in Colombia and Venezuela reveal that the courts can be important political actors during processes of constitutional change and that their actions have the capacity to influence their results. Therefore, throughout this dissertation, I will try to answer the following questions: How to explain the different outcomes produced by the use of populist jurisprudence? Is this type of jurisprudence compatible with the task of protecting the democratic regime that is usually assigned to constitutional courts? And, finally, should the courts of Colombia and Venezuela insist on their use of populist jurisprudence or is it time to rethink their approach to the problem of constitutional change?

An argument will be made against populist jurisprudence in general. Though it is possible to use it for the protection of the democratic regime, populist jurisprudence remains tied to the idea according to which the fundamental characteristics of the political regime can only be remade through the revolutionary action of the subject of the constituent power. That means that eventually, when the

courts consider that the popular sovereign is actually expressing its will to replace the constitution, legality will have to retrieve from the political space in which the future of the democratic regime is decided. The revolutionary hiatus in which the people exercise their constituent powers is ultimately unavoidable on the grounds of populist jurisprudence. Thus, populist jurisprudence will be shown to be the product of a problematic theory of democracy that underestimates the role that legality can play in the production of democratic outcomes and, for that reason, ends up facilitating the emergence of authoritarianism.

Despite the democratic potentials of populist jurisprudence and the influence of revolutionary ideas on the minds of Latin American judges, this dissertation is an attempt "to keep a cool head in the face of the ideals prevailing at the time" and "to swim against the stream" of Latin America's populist seduction, as Weber once recommended (1949: 47). The final objective, therefore, is to develop a critique of populist jurisprudence in order to make clear to Latin American constitutional judges that the authoritarian affinities of this approach to the problem of constitutional change are too great to be ignored and that it is necessary to rethink their political role on the bases of a different conception of democratic legitimacy.

3. Method

Recently, significant efforts have been made to come up with a theory of constitutional change by political analysts concerned with the fate of democratic regimes in Latin America. They have tried to tackle a very difficult question: What are

the conditions under which processes of constitutional change can be made to contribute to the improvement of the democratic character of Latin American political regimes? Or, to throw some light on the other side of the problem: How to prevent processes of constitutional change from eroding the democratic achievements of these regimes? Drawing on the work of contemporary Latin American political scientists, this dissertation will attempt to complement their approach to the problem of constitutional change by taking seriously the role of judicial institutions as political actors and the place of legality as a significant variable that cannot be ignored.

The work of Gabriel Negretto is perhaps the most important recent attempt to explain the dynamics of constitutional change in Latin America, but it is also a clear example of the exclusion of judicial institutions from the framework of analysis. According to Negretto, the outcome of a process of constitutional change, be it an amendment or a constitutional replacement, is determined both by the past functioning of the political regime that is being reformed and by the partisan interests and relative political power of the actors involved in the process. Participants in a process of constitutional change tend to have a shared interest in responding to the problems of the political regime; however, they also have a partisan interest in the adoption of political rules and institutions that increase their share of political power. In this sense, a successful theory of constitutional change requires that both cooperative and distributive dynamics be brought together into a single theoretical framework.

Though partisan interests are always the main motivation of political actors, their dominance can eventually be limited by the cooperative interests emerging from the historical situation from which the process of change is derived or by the existence of a power relation that makes compromise between the parties involved an unavoidable requirement. In the end, the democratic nature of the adopted constitutional structures will be reinforced in those situations in which partisan interests are attenuated by the need to cooperate (see Negretto 2013).

Attention to the history of democratic politics in countries like Argentina and Colombia makes explicit the relative success of Negretto's theory. In Argentina, significant episodes of constitutional change have taken place with the intention of consolidating the power of a dominant political party (as in Perón's constitutional reform of 1949) or as a strategy for the redistribution of power between the main political parties (as in the negotiation between Menem and Alfonsín that led to the constitutional reform of 1994). According to Negretto, the processes of constitutional change that took place in Argentina during those years can easily be explained in purely distributive terms, i.e. by focusing exclusively on partisan interests and the relative power of the political actors at the time of these reforms.

In these cases, there are no crises to be found as the source of the process of constitutional change, and for this reason, the only way in which purely partisan interests can be limited is through the need for compromise emerging from a situation in which no single political party is in a position to impose its will unchallenged by other political forces. This is what happened in 1994, while the opposite was the case in 1949, when a clearly dominant party was able to control the

process of constitutional change unobstructed by any other political actors. These episodes of constitutional change in Argentina, therefore, allow Negretto to conclude that in those situations in which partisan interests operate unobstructed either by a relative balance of power between parties or by the need to respond to a serious constitutional crisis, the most likely outcome of a process of constitutional change will be the emergence of exclusionary political structures and the concentration of power in the hands of the executive branch.[11]

Following Negretto, the constitution making process that led to the adoption of the Colombian Constitution of 1991 offers a different scenario. This process of constitutional change cannot be explained by means of a purely distributive theory of political power, as in the case of Argentina. Not only was absent from this case the presence of a single dominant party; there was also the need to respond to a serious political crisis in which the state was no longer capable of functioning effectively. In these conditions, cooperative dynamics were strengthen, allowing in this way for the adoption of inclusive political institutions and the attenuation of the power of the executive branch. The conditions under which the constitution making process took place allowed compromise to take precedence over partisan considerations, and, as a result, the democratic character of this country's political regime was improved.

As I will try to show in this dissertation through detailed attention to the cases of Colombia and Venezuela, this way of explaining constitutional change is very useful

[11] Ana María Bejarano and Renata Segura (2013) have come to the same conclusion regarding the constitution making process that led to the adoption of the Constitution of Venezuela in 1999. However, the case of Venezuela also shows that the need to respond to a serious political crisis has a lesser potential to induce cooperative dynamics than the presence of a relative balance of power between the actors involved in the process of constitutional change.

for those interested in Latin American democratic politics. However, something is missing. Episodes of constitutional change cannot be properly described and understood by means of this purely political approach. Negretto, for instance, limits his attention to the role of three political actors: presidents, legislators, and members of constituent assemblies (2013: 57), while others following a similar approach have tried to broaden the scope of significant actors by including social movements and paying more attention to popular politics (see Segura & Bejarano 2004). But this is not enough.

Processes of constitutional change are not necessarily driven by the purely political logic that analysts like Negretto, Bejarano, and Segura attribute to the participants on which they focus. There are other mechanisms of constraint besides the need to respond to a general political crisis and the inability of political parties to have their way without recourse to compromise that can eventually force political actors to curve their partisan interests and, therefore, contribute to the production of democratic outcomes. As the cases of Colombia and Venezuela will show, legality introduces an additional variable with the capacity of alter the course of distributive political dynamics. That is, legality and judicial institutions can either contribute to the production of cooperative dynamics or facilitate the conditions for a process of constitutional change based entirely on the unilateral advancement of partisan interests.

The purely political approach that I have been describing relies heavily on the presence of constraints that are internal to the process of constitutional change, i.e. it focuses on the relative power of the political actors involved in the process. These

internal constraints are rightly considered to be the most important mechanisms for the production of democratic compromises. However, for those interested in finding ways to prevent the risk of authoritarian regressions, it is necessary to go further. In the end, the presence of these internal mechanisms of constraint will always be contingent; they might easily be absent, depriving the process of constitutional change of much needed safeguards against authoritarian regressions. For this reason, it is necessary to think of alternative and complementary mechanisms that, by being external to the power relations between the main political actors, can eventually increase the chances of cooperative dynamics and democratic outcomes.

This is where courts come in. Contemporary democracies around the globe are increasingly turning to constitutional courts as guardians of the compromises between political forces that come together under the same political regime to compete for power within a shared legal framework (Issacharoff 2011). Latin American courts, for instance, have been active during recent processes of constitutional change and their interventions have had a significant impact determining the levels of freedom and constraint within which the most important political actors operate. And if this is the case, then purely political explanations of constitutional change need to be complemented by a more serious consideration of judicial institutions and the principle of legality upon which they operate. Legality, I will argue, can impact the strategic considerations of political actors in important ways and courts, specifically, can sometimes play a fundamental role either by improving the democratic character of the process of constitutional change or by reinforcing its authoritarian tendencies.

This dissertation is an attempt to deal, in general, with questions of the following sort: What is the impact that constitutional norms, and the interpretations that the courts make of them, have on the behavior of the most important participants in a process of constitutional change? Is constitutional legality an effective instrument for the prevention of authoritarian regressions? Is the participation of courts during these processes likely to increase the chances of improving the democratic character of political regimes? And if not, why? Fortunately, there is a rich body of literature in the field of comparative constitutional studies from which to draw in order to understand what courts can do during processes of constitutional change.

Just like processes of constitutional change cannot be properly understood in purely political terms, the results of the use of populist jurisprudence in Colombia and Venezuela could not be tested were we to assume that the law is a self-contained social system that operates exclusively on the grounds of its own internal logic. There is "a simple yet powerful insight" that any investigation on the role of legal institutions in contemporary democratic regimes cannot ignore: "constitutions neither originate nor operate in a vacuum" (Hirschl 2013: 2). Constitutional systems cannot be properly understood from the dogmatic and ahistorical perspective of traditional legal academia. More attention needs to be given to the social and political arenas within which these constitutional systems take place and operate.

Narrow studies limited to traditional questions of jurisprudence disregard fundamental questions concerning, for instance, the impact that constitutional decisions have in the real world; the way in which constitutions help shape political and national identities; the role of constitutional legality beyond its traditional

function of restraining power; and the identification of the actors and factors involved in processes of constitutional transformation (Hirschl 2013: 3). For this reason, Hirschl argues for the need to pay closer attention to the social sciences, since, in many ways, political scientists, sociologists, economists, and historians have contributed more significant insights than legal academia to the understanding of constitutional systems. The objective, therefore, is to approach the problem of constitutional change from an interdisciplinary perspective capable of bringing together the political and legal variables that influence the outcomes of these processes.

However, the methodology here suggested also requires that we cease to understand the political character of constitutional courts in simplistic terms. By this I mean the uncritical acceptance of an understanding of constitutional courts as merely countermajoritarian institutions that strive towards the establishment of a "juristocracy" (Hirschl 2004) or an "aristocracy of the robe" (Schmitt 2009) at the expense of the democratic character of the political regime and the principle of popular sovereignty. Let's consider the work of Ran Hirschl for a brief moment. He argues that the empowerment of constitutional courts by means of judicial review is the result of a strategy designed by political and economic elites to preserve their hegemony against the emergence of new political forces that challenge their liberal worldview. By empowering constitutional courts, these threatened elites can hold on to power even after they have been voted out of government. Courts are supposed to make this possible by enforcing the liberal constitutional order against the will of

emerging majorities.[12] However, these theories of "hegemonic preservation" cannot be easily generalized.

Though it is evident that in some cases these theories do hold significant explanatory power, there are others in which they do not. As I have argued somewhere else, constitutional courts can also function as counter-hegemonic institutions whose empowerment goes against the interests of established elites. In fact, constitutional courts can provide a viable alternative for those with little to no political influence to successfully advance claims and demands that would usually be ignored by traditional representative institutions (see Figueroa 2012a; also Rodríguez 2009; Schor 2004; Uprimny & García Villegas 2004). At the same time, they have proved successful in stopping the power-grabbing moves of authoritarian presidents in situations in which democratic political forces have been unable to do so (see Figueroa 2012b; Issacharoff 2014; Uprimny 2003). To put it in someone else's words: "Judicial review may be countermajoritarian but is not counterdemocratic" (Ginsburg 2003: 31).

Therefore, a call will be made to keep an open mind when it comes to the role of courts in contemporary democratic regimes. As Pierre Rosanvallon has repeatedly argued, contemporary democracies are getting increasingly complex. Democratic legitimacy can no longer be understood exclusively as the outcome of an electoral process through which the voters authorize their representatives to act in their behalf. Democratic regimes multiply the instances of representation to the point that

[12] For a similar argument based on a comparative study of judicial reforms in Latin America, see Finkel (2008).

even constitutional courts can now be understood as representative institutions. That is, constitutional courts can eventually – but only indirectly – increase the power of the citizens before political institutions by establishing an alternative and complementary system for the enunciation of the general will. They enrich democratic deliberation by providing a forum in which those who failed to win the electoral contest can be heard. After all, modern democracies are not only at the service of the "electoral people"; they need to make room for all of their citizens (see Rosanvallon 2009).

My argument does not intend to deny the many different ways in which these institutions can eventually hinder the practice of democracy. In fact, it will be shown how courts in Latin America have sometimes contributed to the adoption of authoritarianism. Also, this argument does not imply that the inclusion of the courts is the most important safeguard against the establishment of exclusionary and authoritarian regimes. To the contrary, it will be made clear that internal constraints (i.e. cooperative political dynamics emerging from the lack of hegemonic control by a single political force) are more effective and more easily accepted by democratic theorists than reliance on external controls such as courts. But given the need to respond to the challenge of the populist seduction, the project of improving Latin American democracies can benefit from the study of those situations in which courts do manage to become democracy-promoting institutions.

4. Outline

This dissertation is divided in three parts, and each part is divided in two chapters. The first part is strictly theoretical. It develops the concept of populist jurisprudence on which the courts of Colombia and Venezuela have relied to deal with the episodes of constitutional change that this dissertation will later describe and explain. Chapter one deals with the authoritarian affinities of populist jurisprudence and chapter two is an attempt to highlight its democratic potentials. The theory of the constituent power developed by E.J. Sieyès, and that was later recovered and radicalized by Carl Schmitt, is the source from which I will draw to formulate the concept of populist jurisprudence. By the end of the first part, it should become clear that the populist conception of democratic legitimacy at the heart of this jurisprudential approach to constitutional change is likely to yield more problems than advantages to constitutional judges committed to the consolidation and improvement of democratic regimes.

Part two describes the constitution making processes of Colombia and Venezuela. Chapters three and four will show how the use of populist jurisprudence by the courts of these two countries contributed to the democratic openness of their political regimes. In both cases, the break with existing legality that was sanctioned by these courts made it possible to convene extraordinary constituent assemblies with the capacity to bypass the resistance to change of the traditional political forces in control of the legislature. However, the revolutionary hiatus that ensued paved the way for an authoritarian constitution making process in Venezuela, an outcome that

could just as easily have happened in the case of Colombia. Were it not for the absence of a majoritarian populist coalition and the disposition of a plurality of political forces to reach compromises and engage in negotiation, the lack of legal constraints on the actions of the Colombian constituent assembly that resulted from the court's adoption of populist jurisprudence could have worked against the production of democratic outcomes in this country.

Part three presents the tension between the authoritarian affinities and democratic potentials of populist jurisprudence through the description of the political processes that were set in motion by populist presidents in both countries in order to amend their respective constitutions and be able to run for election for additional or indefinite terms. Chapter five will show that, in the hands of an independent constitutional court and under the right conditions, the distinction between constituent and constituted powers at the heart of populist jurisprudence can be an effective instrument to protect the democratic regime against populist attempts to usurp the voice of the people with a view to concentrate political power in the hands of the executive. The case of Colombia will illustrate this point. To the contrary, chapter six will show that populist jurisprudence can be easily turned into an authoritarian instrument by a court that has been coopted by the executive. The case of Venezuela reveals how the coming together of a populist government and populist jurisprudence gives place to an unfortunate scenario of plebiscitary presidentialism that erodes the minimal conditions required for the practice of democracy.

Finally, a conclusion will be offered.

PART I

THE TWO FACES OF POPULIST JURISPRUDENCE

Populist jurisprudence, as I propose to understand it, is a concept with a restricted meaning. First, it applies only to those situations in which constitutional courts are called to exercise their powers of judicial review over processes of constitutional change. And, second, it refers to the adoption by these courts of a populist conception of democracy strongly rooted in the writings of E.J. Sieyès and Carl Schmitt.[13] This populist conception of democracy is based on the distinction between constituent and constituted powers, as well as on the normative defense of a revolutionary hiatus in which the popular sovereign is free to exercise the constituent power outside any legal limitations and institutional constraints in order to reach a fundamental

[13] I take Schmitt's *Constitutional Theory* to be the most important theoretical source in the development of populist jurisprudence. Though the same could be said of Sieyès' pamphlet on the Third Estate, his commitment to representative democracy and to the protection of political and individual rights, together with his acceptance of natural law as the limit to the people's exercise of the constituent power, are not easily reconcilable with the radicalism of the doctrine I am trying to present. In any case, both Sieyès and Schmitt have explicitly influenced the constitutional courts of Colombia and Venezuela, as the analysis of their jurisprudence will clearly show. On the specific influence of Carl Schmitt on these courts, see Colón-Ríos (2011).

decision regarding the type and form of its political existence. The fewer instances of mediation intervene in the process of adopting the fundamental decisions of the people, the more democratic these decisions are considered to be.[14]

The use of the adjective "populist" to refer to this type of jurisprudence may seem arbitrary or out of place. Sieyès made a name for himself in the history of democratic theory mostly because of his writings on representative government, but also because of the influence of his revolutionary rhetoric on populist discourse and practice; to the contrary, the political sympathies of Carl Schmitt can hardly be said to be on the side of any democratic conception of the people.[15] However, the affinities between Carl Schmitt and populist democratic theory are significant, and they can be easily identified by means of a basic contrast with the liberal conception of democracy.

Contrary to the liberal view of a differentiated society with a plurality of interests, populists define the people as a homogeneous entity with a single and coherent will. Populists also make a very distinctive argument for a politics of the will in which the crowds directly express their sovereignty, while liberals insist on the importance of legal procedures, mediations, and compromises. Finally, populists share with Schmitt an understanding of politics as a struggle between enemies that liberals refuse to accept. There is, then, a set of striking similarities between Schmittian and populists conceptions of democracy that are reinforced by their

[14] On this populist conception of democracy, see Arato (2000: 237-239).

[15] On Schmitt's monarchical sympathies, see Cristi (2011). On the influence of Sieyès on populist discourse and practice, see Sewell (1994).

common lack of regard for the fundamental principles of political liberalism[16] (de la Torre 2010: viii-ix).

At least initially, the conception of democracy at the heart of populist jurisprudence does not seem to be compatible with modern ideas and sensibilities about what democracy should be. It is based on a return to premodern conceptions of the people as the incarnation of social and political unity and homogeneity. It assumes the existence of substantial entities and organic totalities that make no room for the forms of social and political conflict and the plurality and multiplicity of ideas and interests that characterize most modern societies.[17] It also rejects the complexity of modern democratic regimes for its proven capacity to slow down the process of political will formation and to give voice to the enemies of the people. Direct domination by the people is made impossible by the different procedures that modern democracies put in place to multiply the number of political participants during times of decision making.[18]

Modern conceptions of democracy revolve around very different understandings of popular sovereignty and the constituent power. Conflict, pluralism, and inclusion are considered key sources of democratic legitimacy that processes of

[16] Schmitt's radical critique of liberal democracy can be found in *The Crisis of Parliamentary Democracy* (1988); and his conception of the political as a struggle between enemies is central to his *The Concept of the Political* (2007). For a critique of Schmitt's antiliberalism, see Holmes (1993).

[17] On the premodern character of organic and substantial understandings of the people and society, see the work of Roberto M. Unger (1976).

[18] On the complexity of modern democracies, see Plotke (1997) and Rosanvallon (2006).

constitutional change can no longer ignore.[19] The idea is to protect "the incredible diversity of human aspiration, not suppress it" (Ackerman 1992: 12), and to allow for "the combined power of the many" (Arendt 2006: 206). But this objective cannot be reached without the assistance of legal and institutional instances of political mediation that the liberal tradition has always emphasized; they are indispensable to prevent the usurpation of political power by a faction that claims to speak for the totality of the citizens.

Modern democracies are based on a sense of compromise; as political regimes, they are fundamentally constitutional, legal, and moderate (Aron 1969: 40-49). This is why constitutional courts have assumed such a central role as political institutions: they are the guardians of the political balance without which modern democratic regimes cannot exist.[20] They are supposed to enforce the principle of legality to prevent abuses of power by political forces no longer committed to the logic of compromise upon which the democratic regime rests. It seems, then, that any attempt to retrieve the centrality of popular sovereignty cannot be pursued through a complete disregard of the basic principles of liberal democracy.

But, can courts rely on populist jurisprudence for this purpose? Can they assume the role of democratic guardians on the basis of a political theory that rejects legal and political mediation during moments of fundamental constitutional change? After this initial introduction of the basic tenets of populist jurisprudence it would

[19] On the centrality of conflict and pluralism in modern democracies, see Lefort (1988: 17-18). On the need to democratize popular sovereignty through greater inclusion, see Chambers (2004).

[20] On the role of constitutional courts as guardians of the democratic regime, see Kelsen (2009) and Issacharoff (2011).

seem obvious that the answer to this question should be no. However, things are not as clear as they initially stand. Not only did Schmitt take seriously the risks of usurpation of the constituent power by illegitimate political actors, against which he provided innovative solutions that have proven successful in recent times; the Sieyesian lineage of populist jurisprudence can also be used to disrupt the consolidated power of illegitimate political actors that refuse to open the political regime to the participation of a variety of political forces.

The following chapters will show that populist jurisprudence has two faces; or perhaps just one, an authoritarian face, which under very exceptional circumstances can be made to shift and present a more democratic semblance. On the one hand, there seems to be an elective affinity between populist jurisprudence and authoritarianism. This elective affinity derives from populist jurisprudence's commitment to a pure theory of democratic legitimacy that precludes the principle of legality and the judicial institutions that are supposed to enforce it from playing a mediating role during those moments in which the people are said to be exercising their constituent powers. The normative defense of a revolutionary hiatus – or, to put it in different words, of a state of nature – during episodes of constitutional change is more likely than not to leave the democratic regime unprotected against the actions of populist political forces trying to get a hold of power and erode the efficacy of fundamental liberal democratic institutions.

On the other hand, populist jurisprudence's affirmation of the distinction between constituent and constituted powers can occasionally provide constitutional courts with an opportunity to step in during processes of constitutional change in two

particular ways: either to remove the illegitimate obstacles that the constituted powers can eventually impose on the exercise of popular sovereignty, or to make sure that the constituent power is not easily usurped by political actors pretending to have a mandate from the people to alter the fundamental characteristics of the democratic regime.

In the end, however, populist jurisprudence will prove to be bad theory, at least from the modern democratic perspective described before. It will become evident that populist jurisprudence's commitment to the idea of a revolutionary hiatus as the only legitimate way in which the basic contours of the constitutional regime can be changed presents more problems than advantages, tilting the balance between the authoritarian affinities and democratic potentials of this concept in favor of the former.

Constitutional judges should be made aware of the risks and advantages of their own theoretical choices. The consequences of the adoption of any type of jurisprudence by the courts are always dependent on the political context in which constitutional adjudication takes place, as parts two and three of this dissertation will show. In this sense, a satisfactory answer to the question about outcomes that is being posed here can only result from the consideration of specific empirical situations. But without a clear understanding of the theoretical tradition upon which populist jurisprudence is built it will be more difficult to determine if its application to particular political contexts is desirable or not.

CHAPTER 1

AUTHORITARIAN AFFINITIES

There seems to be an elective affinity between the conception of democratic legitimacy at the heart of populist jurisprudence and the establishment of a highly centralized and exclusionary political order built around the figure of strong and charismatic personalities that see political pluralism, individual rights, the separation of powers, political alternation, and the rule of law as obstacles for the true expression of the people's political will. At its core, the Schmittian conception of the constituent power is a manifestation of a way of thinking about democracy that, in the name of the people, places too much power in the hands of those who claim to speak for them, and instills in political society an undesirable degree of polarization that favors authoritarian turns by reducing democracy to a mere exercise in electoral majoritarianism.

As I will try to show, initially from a strictly theoretical perspective, the adoption of populist jurisprudence is likely to turn the courts into powerless

spectators incapable of opposing the abusive instrumentalization of the mechanisms of constitutional change for the purpose of undermining democracy. Or, even worse, this type of jurisprudence can also become an ideal instrument for complacent courts that have become dependent on the government and are seeking to advance its authoritarian agenda.[21]

1. Populist Democracy and the Constituent Power of the People

The populist conception of democratic legitimacy becomes evident once we turn our attention to Schmitt's definition of the constituent power: "The constitution-making power is the political will, whose power or authority is capable of making the concrete, comprehensive decision over the type and form of its own political existence. The decision, therefore, defines the existence of the political unity in toto" (Schmitt 2008: 125). In a democracy, the power to make decisions regarding the fundamental aspects of the constitutional order can only be exercised by the people on a strictly political basis. To put it more clearly, the legitimacy of a democratic constitution is purely a factual matter.[22]

[21] On the concept of abusive constitutionalism, see Landau (2013b). The concept of "competitive authoritarianism" is also central to this analysis of the authoritarian affinities of populist jurisprudence. It refers to the establishment of a political regime that relies on great levels of popular mobilization in order to crowd out the opposition and concentrate political power in the hands of the executive while remaining, at least formally, competitive in electoral terms (see Levitsky & Way 2002).

[22] Schmitt is emphatic regarding the impossibility of imposing regulated procedures on the activity of the constituent power of the people. This is only possible in a different context such as that in which the king is the subject of the constituent power, but not in a democracy. The king can rely on institutional regulations allowing for a clearer expression of his political will, but this is made possible only because his power rests on non-political grounds (2008: 130).

When the people, as subject of the constituent power, decide to alter the fundamental aspects of the constitutional order in which they live, they do not have to adhere to the procedures established by the existing rules of constitutional change; these constitutional decisions do not have to be in line with any set of established prescriptions determining what is legitimate and what is not. To speak of the legitimacy of a constitution only makes sense in historical terms: constitutions depend on the decisive political will of whoever holds the constituent power, and in a democratic age such power belongs exclusively to the people (2008: 136). As Schmitt insists following Sieyès, the constituent power of the people exists in a state of nature and never subordinates itself; it is the source of all power that always "remains alongside and above the constitution". That is, it accepts no limitations and rejects all sorts of mediations as illegitimate (2008: 125-128).

But what exactly does Schmitt have in mind when he talks about the people? He distinguishes between two meanings of this term from the perspective of modern constitutional theory: the people as an unformed, nonconstitutional entity, and the people as a constitutionally formed and organized entity (2008: 279). The second definition and its implications will be explained in the following chapter. At this moment, it is the first definition that requires our attention, since it is here that Schmitt locates the idea of the constituent power of the people. In line with Sieyès' definition of the nation, Schmitt understands the people "as a unity capable of political action, with the consciousness of its political distinctiveness and the will to political existence" (2008: 127). It is a unity that exists outside constitutional structures and remains free to constantly adopt new forms. Its unity does not derive from legal

standards but from a different set of factors allowing it to recognize its identity. A people, to put it simply, can only exist politically in accordance with the principles of identity and substantive equality that Schmitt identifies as fundamental to democracies.

According to Schmitt, political democracy implies the possibility of making a distinction: being able to tell who belongs and who does not belong to a particular people. Again, this distinction cannot be based on legal proclamations, but on something more real and existential. In a democracy, citizens are not treated as if they were equal; they are actually and concretely equal (2008: 264). This is the sort of equality that is presupposed when citizens are said to have the same rights and duties in the political sphere (2008: 259). As was said before, democratic equality is substantial, not merely formal as in liberalism. But this substance can vary. It can be based on physical and moral similarity, on a conception of virtue, on religious convictions, on national homogeneity, or even on belonging to a class in the Marxist sense of the term. The idea is that some form of substantial equality is required if the democratic state is to exist. The liberal concept of humanity does not provide it with the adequate basis for its existence (2008: 263). Therefore, a clear implication of democratic politics, claims Schmitt, "is the rejection of all political influences and effects not originating from the substantial homogeneity of the people themselves" (2008: 266-267).

As we can see, Schmitt's understanding of the constituent power of the people relies on a logic of exclusion that is typical of the populist conception of democracy. Populism, after all, is antagonistic in character: it is "a form of identity building

organized around a friend/enemy axis. The very way in which the identity is constructed – if successful – opens up a process of political polarization that tends to divide society into two irreconcilable camps" (Peruzzotti 2013: 69). This particular conception of the people, then, does not refer to the totality of the citizens of a given political community; rather, it applies only to those that, in accordance with some substantive standard, can be said to share the supposedly defining characteristics of the people. "In other words, the people are not really what prima facie appear as the people in its empirical entirety; rather, as Claude Lefort put it, first 'the people must be extracted from within the people'" (Müller 2014: 485). The populist rejection of liberal concerns with social and political pluralism becomes evident at this point. Pluralism, following Schmitt, cannot be allowed in a democratic society because it weakens the unity and strength that it derives from the principle of substantial homogeneity. Pluralism's rightful place is the international arena, not within the democratic state[23] (Schmitt 2002: 308-312).

2. Exercising the Constituent Power

How is this homogeneous and politically conscious entity that Schmitt calls the people supposed to express its political will? According to Schmitt, "the people initiate their constitution-making power through some recognizable expression of their direct comprehensive will, which is targeted at a decision on the type and form of the

[23] For an attempt to rescue the Schmittian critique of liberal democracy without having to commit to his wholesale rejection of pluralism within the democratic state, see Mouffe (1998).

existence of the political unity" (2008: 130-131). However, as Schmitt recognizes, the people are an unstable and disorganized organ and, because of this, the process of expressing their will is highly problematic: the people's lack of stability and organization makes it very difficult to interpret correctly what they actually say. The will of the people can be easily mistaken, misrepresented, or falsified. And this, as Schmitt was well aware, is a consequence of the impossibility of imposing upon it any type of legal and institutional procedures.

The people can will whatever they wish and give themselves whatever constitution they want, free of any normative and legal limitations. And the traditional way in which this is done is by means of acclamation. The assembled multitude declares its consent or disapproval by saying yes or no to clear questions about fundamental political issues (2008: 131-132). Once this initial manifestation of political will takes place, the sovereign powers of the people are transferred to a constituent assembly or to the president directly in order to execute the people's mandate. But before we consider these two methods for the execution and realization of the people's political will, it is necessary to pay attention to one significant problem in Schmitt's populist rendering of this initial stage in the exercise of the constituent power.

By distinguishing between a stage of initiation and a stage of execution, Schmitt is conceding that the constituent power of the people cannot be fully exercised without the assistance of some instances of mediation. At the second stage, it is the president or a constituent assembly that assumes the task of deciding on the character of a people's political existence. However, Schmitt fails to see that even at

the stage of initiation some degree of legal and institutional mediation is also required. How else can the people say yes or no in regard to fundamental political decisions? Is this just a matter of people marching on the streets voicing their concerns or should some clear questions be posed so the people can answer? Who asks these questions? How are they framed? How can we know if the people are actually exercising their constituent power? Not much is said about this. What is clear is that the executive is called to play a privileged role during this stage of initiation by means of plebiscitary mechanisms that, from Schmitt's perspective, reduce political mediation to a minimum.

Unfortunately for Schmitt, this sort of politics of the crowds is insufficient when it comes to identifying the voice of the people. Sheer numbers on the street are not indicative of the people's political will, as Stephen Holmes has argued (1995: 8-9). Without clear rules of inclusion, aggregation, and representation it would be impossible to determine what the people are actually saying and proceed to the implementation of their will (Kis 2012). In fact, Schmitt's insistence on the exclusion of all instances of political mediation during this initial stage is mostly meant to allow the executive power to control the agenda of constitutional change and rally the masses in support of political transformations that would probably be rejected by those that the populist coalition identifies as the internal enemy.[24] Therefore, the

[24] The similarities between Schmitt's theory of democracy and Ernesto Laclau's understanding of populism as "a way of constructing the political" are sometimes striking, even though Laclau never acknowledges any Schmittian influences. These similarities are especially evident in the centrality that Laclau attributes to the role of charismatic leaders in the process of constituting the identity of the people and giving voice to their demands. Laclau, however, seems to differ from Schmitt in his refusal to accept an understanding of the people as a preexisting entity independent of the mechanisms by which populist identities are constituted (see Laclau 2007: 158-163). For a critique of Laclau's populist

Schmittian model for the initiation of the constituent power becomes an ideal instrument for pushing minorities and the opposition out of the process of constitutional change and for the construction of an electoral majority necessary for the legitimation of the ambitions of a charismatic politician. The reality of this threat should be taken seriously by modern democracies in order to stand against the authoritarian tendency to obscure and hide the mechanisms through which power is actually exercised (see Kelsen 2002).

Regarding the second stage, that of the execution of the mandate given by the people during the stage of initiation, Schmitt claimed that constituent assemblies are not the only democratic mechanism by means of which a process of constitutional change can move forward. In fact, his preferences were closer to a model of plebiscitary presidentialism that is supposed to reduce as much as possible the intrusion of different instances of mediation during the expression of the political will of the people (2008: 134). But since both methods are relevant for the study of contemporary processes of constitutional change in Colombia and Venezuela, it is necessary to first address them separately. Then, we will be in a better position to see how they can eventually be combined and the problems that such a mixture entails.

conception of democracy, see Arato (2013). For a critique of Laclau's theory of populism from a Marxist perspective, see Žižek (2006).

3. Plebiscitary Presidentialism

Perhaps it is best to begin with an exploration of Schmitt's theory of plebiscitary presidentialism in order to see how the problems that were already identified during the stage of initiation can also reappear during the stage of execution. Schmitt's argument identifying the president as the ideal conduit of the voice of the people is crucial in this regard. From his perspective, parliaments are the locus of liberal procedures that rely on discussion in order to unify the people by means of compromises between different parties and groups. But this faith in dialogue and debate seems to Schmitt to be highly problematic: it is a denial of the need for clear and expedited decisions and an obstinate rejection of the task of founding the polity on the basis of the substantial homogeneity that a democracy requires.

Also from Schmitt's perspective, the power of constitutional courts to review the validity of the people's fundamental decisions on the type and form of the political regime is unjustifiable. Courts, according to Schmitt, are democratically crippled by a countermajoritarian deficit; they constitute an "aristocracy of the robe" that lacks the legitimacy to control the political decisions of the people. Only the president, elected by the whole of the people to represent them as a political unity, has the capacity to establish direct and uncontaminated relationships with the popular sovereign, making this office the most suitable for the expression and realization of the constituent power (see Schmitt 2009). Neither parliaments nor the courts can legitimately claim to speak for the people. In fact, they are mere constituted powers that exist on the grounds of a previous decision by the constituent power. The

constitution, and the political institutions that it establishes, are not meant to interfere with the sovereign decisions of the people. To say it clearly with Sieyès, the constitution can only place limitations on the actions of the constituted powers (2003: 136-137).

The alternative of transferring to the president the task of executing the political will of the people, however, is highly problematic, and this for two main reasons. As Andreas Kalyvas has shown, Schmitt renounces the political significance of speech as a means of will formation. For him, the sovereign can consent but not decide. It is speechless, only capable of acclamation (Kalyvas 2008: 125-126). Schmitt's plebiscitary presidentialism comes very close to the model of delegative democracy in which "the president is taken to be the embodiment of the nation and the main custodian and definer of its interests (...) After the election voters/delegators are expected to become passive but cheering audiences of what the president does" (O'Donnell 1994: 59-60). Passivity and speechlessness add little to the project of securing the political power of the people and preventing its usurpation by the "invisible and irresponsible social powers" that Schmitt already recognized as capable of misdirecting and misrepresenting the voice of the popular sovereign (Schmitt 2008: 275). An unmediated expression of the people's political will is not necessarily democratic. Actually, it seems to be an impediment for the introduction of dialogue and the inclusion of the greatest number of participants in the process of deciding upon the fundamental characteristics of the political regime.

Margaret Canovan's analysis of the use of the mechanisms of direct democracy such as plebiscites and referenda is illustrative of the democratic limitations and

authoritarian risks associated with the model of plebiscitary presidentialism. We cannot equate the use of the mechanisms of direct democracy with a clear manifestation of the will of the sovereign people: they can easily turn into undemocratic instruments or be insufficient for making a claim about having a verdict from the people. We have to be aware of several problems recurrent in the practice of direct democracy. First, the electorate is not necessarily a people. Second, the electorate might be manipulated and intimidated, and referendums might be organized for the self-interest of those in government. Third, we have to keep popular apathy and confusion in mind. And fourth, both the questions posed to the electorate and the answers given to them might carry mixed messages that are hard to detect.

In sum, procedures of this sort cannot guarantee the identification of the people in action, as many populists seem to claim (Canovan 2005: 110-113). In order to make use of these mechanisms of direct democracy in a way that does not pervert the voice of the people, it would be necessary to put away the populist urge for immediacy and invite the participation of all political actors and institutions. In this way, democratic decisions on the fundamental aspects of the constitutional order can benefit from a degree of reflexivity that can hardly be found in purely majoritarian conceptions of democracy.[25]

Schmitt's theory of plebiscitary presidentialism relies on a somehow naïve characterization of the office of the presidency and a mistaken understanding of the

[25] On the conditions that might eventually allow for the democratic use of plebiscites and referenda, see Breuer (2008) and Tierney (2009). On the relation between reflexivity and democratic legitimacy, see Rosanvallon (2009: 183-189).

place of legislatures and constitutional courts in a democracy. Schmitt seems to have forgotten that just as legislatures and courts, the presidency is also a constituted power subordinated to the people, and, of the three classical branches of power, it is the one that poses the greatest threat to the democratic regime. In order to understand the roots of the association that Schmitt makes between plebiscitary presidentialism and democracy, perhaps it is in place to turn to Kelsen's thorough critique of the Schmittian theory of democracy.[26]

Schmitt's insistence on the role of the president as the ideal conduit of the voice of the popular sovereign rests on a problematic conceptualization of the people as a single entity unified around the principle of substantive homogeneity. According to Kelsen, this conceptualization of the people is more of a normative assumption than an adequate description of what actually takes place in modern societies (Kelsen 2009: 363). Social and political pluralism cannot be eliminated by normative fiat and, if this is the case, then the Schmittian theory of plebiscitary presidentialism becomes a dangerous apotheosis of authoritarian practices. A scientific approach to social and political reality, claims Kelsen, recommends the use of institutions of mediation such as parliaments and courts in order to make possible the consolidation of political unity between groups and individuals with heterogeneous characteristics.

The reality of social pluralism and heterogeneity within modern societies, Kelsen argues, makes Schmitt's thesis about the role of the president as the

[26] Kelsen's work as a political theorist is useful at this point because of its direct confrontation with the work of Carl Schmitt. However, this is neither an acceptance of Kelsen's strict juridification of the problem of constitutional change nor an attempt to justify his failure to address the questions about the constituent power (see Kelsen 2007a). For an argument in favor of the exclusion of the question on the constituent power from the concerns of legal theory, see Dyzenhaus (2007).

representative of the people's unity highly unlikely. In actual political life, presidents are elected under the pressure of strong political competition, therefore placing the president in a relation of dependence with political parties and factional interests. Under these circumstances, it is dangerous to claim that the president speaks for the whole people. As Kelsen has argued, the presidency is the strongest branch of political power. For this reason, it should be subjected to effective mechanisms of control that only the separation of powers and the rule of law can provide. Without the assistance of these mechanisms, the president can easily overstep the boundaries of his authority in order to suppress minorities and the opposition (2009: 323-325).

From this perspective, the importance of parliaments and constitutional courts for the functioning of democratic regimes becomes evident. The institutional handling of social and political pluralism that these instances of political and legal mediation provide constitutes an important alternative to the plebiscitary tendency towards the exclusion of oppositional forces from the political process and the usurpation of the empty space of power that Lefort saw as characteristic of modern democracies. Parliaments, for instance, provide a space for dialogue and the construction of compromises that, while allowing for the exercise of power and the drafting of laws in accordance with the majoritarian principle, secures the participation of minorities and oppositional forces in the political process, especially when the electoral rules are based on the principle of proportional representation.

In this way, parliaments can become an integrative organ and a filtering mechanism capable of approximating the will of the people more accurately than the simple commissioning of the president proposed by Schmitt. Also, under these

different circumstances, the mechanisms of direct democracy discussed above can be used in a more democratic way. Questions on the fundamental aspects of the constitution can be asked to the people in a clearer and more inclusive manner, instead of leaving it up to the president to completely control the relationship between the democratic state and the people (see Kelsen 2002).

Constitutional courts also become important for the purpose of filtering competing views on constitutional issues and preventing the usurpation of the voice of an inclusive and plural people. The judiciary, claims Kelsen, is the branch of power that is least involved in the dynamics of political competition. The fact that courts operate mostly within the confines of legal discourse and rationality makes them a more plausible candidate for assuming the role of mediator between the different interests of sometimes antagonistic parties and groups. In this sense, constitutional courts do not only play a jurisdictional role; they are mostly political institutions (Kelsen 2009: 305-308). However, under the Schmittian model of plebiscitary presidentialism courts cannot play a democratic role as active participants during processes of constitutional change. They lack the legitimacy to interfere with the desires of a populist president to establish direct and uncontaminated relationships with the people and, therefore, they cease to be adequate instruments for the prevention of authoritarian turns.

4. Sovereign Constituent Assemblies

Now that the model of plebiscitary presidentialism has been explained, it is necessary to consider the role that sovereign constituent assemblies play as mechanisms for the realization of the people's political will. They also have the potential to carry out changes to the fundamental aspects of the constitution in a way that is compatible with the populist theory of democratic legitimacy and the constituent power, as Schmitt himself recognized. In fact, they are the typical instruments of populist constitution making.

The use of sovereign constituent assemblies is based on the embodiment of the constituent power by a single institution and on the rejection of the differentiation between legislative and constituent powers. From this perspective, the absolute sovereignty of the constituent assembly requires the monopoly of all powers, including that of ordinary legislation. All instances of political mediation are precluded under the assumption that the constituent assembly operates in a state of nature (Arato 2012). This assumption, of course, also excludes any intervention by the courts that might obstruct the decisions of this sovereign body. Constituent assemblies are considered to have greater legitimacy and, therefore, greater powers than any other political institution. It is through these assemblies that the people exercise their original powers. Thus, any decision emanating from them cannot be questioned[27] (Landau 2013a: 929-934).

[27] To avoid confusions, it is important to distinguish between two types of extraordinary assemblies: on the one hand, there are the sovereign *constituent* assemblies typical of the populist conception of the constituent power; on the other, there are *constitutional* assemblies, that is, bodies of extraordinary

The influence of Sieyès on contemporary assumptions about the democratic nature and populist character of sovereign constituent assemblies is evident. In his argument for the liberation of the Third Estate from the oppression of the nobility, Sieyès claimed that the former had to rely on its majoritarian character in order to affirm the political equality of all citizens without having to make any compromises with the privileged orders. They were, in Sieyes's words, a malignant tumor in the body of the nation that needed to be neutralized (2003: 162). In this way, Sieyès made evident the absurdity of the nobility's minoritarian power and provided the arguments for the mobilization of all of the oppressed against their aristocratic oppressors. The establishment of a constituent assembly composed only by members of the Third Estate was the ideal mechanism to circumvent any opposition to the just demands of the great majority of the population.

By means of a body of extraordinary representatives endowed with whatever powers the sovereign wishes to give them, the true people would be able to assert their will and put an end to the undemocratic structures of the aristocratic regime. In this way, the constituent assembly becomes a surrogate for the subject of the constituent power. It does not need to have a plenitude of powers; just the powers that the popular sovereign decides to give it. However, the constituent assembly does stand outside the limitations of the established constitutional order. Its limits are not

representatives that do not have sovereign powers and, for that reason, maintain the differentiation between constituent and legislative powers. They also allow for the review of their decisions by the courts. Though, most of the time, they are also the result of revolutionary breaks with existing legality, i.e. they usually come about outside the existing rules of constitutional change, these assemblies are, at least initially, compatible with the liberal principles of the rule of law and the separation of powers. The difference between these two types of extraordinary assemblies will become clearer below and in chapter 3.

those of existing positive law but the conditions of the mandate given to them by the people. Limitations, therefore, can only be self-imposed, not external.

Sieyès, however, was too naïve about the implications of granting such a great power to these bodies of extraordinary representatives. He claims that there is no need to take many precautions against abuses of power (2003: 139). But surely history has shown how problematic this belief actually is.[28] Despite Sieyès' democratic motivations, his ideas regarding legitimate constitutional change are now a typical recipe for the adoption of unilateral and exclusionary constitutional structures. This model of constitutional change assumes, right from the start, the existence of a social and political divide that opposes two groups competing for political power. Most of the time, this is the opposition between the people and the oppressive elites. It also assumes that the people can act as a unified entity that is capable of expressing a single will, i.e. that the interests of this very complex majority represented by the idea of the people can be expressed coherently and without contradictions. Sieyès, for instance, claimed that the upcoming bourgeoisie of his time was the true representative of the nation, with "no other interest than that of the rest of the people" (2003: 110). This assertion, however, lacks empirical validity. In fact, it reveals the doubly exclusionary character of this model of constitutional change: the will of the people would not only ignore what the privileged orders have to say; it will also favor the interests and opinions of those claiming to speak for the people at

[28] On the risks of popular constitution making by means of sovereign constituent assemblies, see Arendt (2006); Landau (2013a); Partlett (2012).

the expense of the complexity and heterogeneity that characterizes the popular majority.

The emergence of a gap separating constituent assemblies from the political will of the people is a possibility that needs to be taken seriously for several reasons. Constituent assemblies tend to resist all limitations, not only before existing political institutions but also before the mandate they receive from the people. And though Sieyès said that these assemblies could only exercise the powers granted to them by the people, the chances are that once established they would be able to disregard those limits. As was explained before, it is very difficult to identify the voice of the people during the stage of initiation of a process of constitutional change. This initial mandate is always given in very broad and ambiguous terms, allowing the assembly great levels of discretion in its actions. At the same time, the idea of being the representatives of the popular sovereign induces these bodies of extraordinary representatives to deviate from the strict task of constitution making and to claim the power to issue ordinary legislation and usurp political functions that were not originally assigned to them by the people. Finally, being commissioned by the people to execute their political will, constituent assemblies can very easily disregard the need for the popular ratification of the constitution they are supposed to create, as Schmitt well knew (2008: 132).

5. The Two Methods Combined

Equally important in the consideration of the exclusionary and authoritarian tendencies of sovereign constituent assemblies is the fact that they have been the instrument of choice of charismatic leaders seeking to erode the fundamental principles of liberal democracy under the excuse of returning to the people their sovereign powers. The affinities between the model of plebiscitary presidentialism and the use of sovereign constituent assemblies become evident at this point.

As Angélica Bernal (2014) has shown, the leadership of populist presidents during moments of extraordinary constitutional politics should be a matter of concern. These "constituent presidents" think of themselves as the instruments by means of which the constituent powers of the popular sovereign can be exercised. They tend to provide the impulse for the initiation and completion of significant processes of constitutional change, and their power allows them to play a leading role in the crafting of the rules by which the members of the assembly are to be elected.

They also have a great deal of influence in the process of determining what the concerns of the assembly should be, especially since it is their popularity that provides most candidates with the platform to run for election. However, as it has been already explained, populist presidents operate on the basis of an exclusionary logic that considers the people to be only a part of the whole citizenry. The risks, therefore, are high: though these constituent presidents play an important role in creating the conditions for democratic constitutional change, the plebiscitary character of their authority makes it difficult to establish binding mechanisms in

order to prevent their abusive manipulation of the constituent assembly and of the process of constitutional change in general.

Now, presidential leadership of processes of constitutional change is always a risky business, but its risks can be better controlled once the process of constitutional change is grounded on a liberal conception of democratic legitimacy and the constituent power. Take, for instance, Bruce Ackerman's model of constitutional change under presidential leadership. In this model, the president plays a crucial role in mobilizing the citizens in order to adopt changes to the constitution, but this is done in a way that is radically different to the Schmittian model of plebiscitary democracy. First, it rests on a plural conception of the people that makes room for heterogeneity and difference. Second, it takes place within the structure of the separation of powers, allowing for the participation of the legislature, the judiciary, political parties, and citizens in the process of decision-making. And, third, it rejects the idea of a single person, entity, or institution as the holder of absolute sovereign powers (Ackerman 1998).

This type of presidential leadership could give place to a completely different kind of extraordinary assembly, in case it were needed to open the political regime to democratic reforms that the existing legislature refuses to consider. A *constitutional* assembly convened for the strict purpose of constitutional change after a process of political deliberation could eventually keep at bay the risks associated with the absolute powers of constituent assemblies and their manipulation by populist presidents. This assembly, even though it is the result of a presidential initiative, would be subjected to clear constraints, not only because its mandate would be

restricted to the crafting of a new constitution, but also because it will neither have the capacity to usurp the powers of the legislature nor the possibility to bypass the control of the courts.[29]

This, of course, is not to claim that something resembling Ackerman's model of presidential leadership can be successfully adopted outside of the United States or that it is free of the risk of authoritarian deviations. In the end, the possibility of channeling presidential leadership in a direction opposite to the Schmittian model of plebiscitary presidentialism will depend, to a great extent, on the willingness of political and judicial institutions to defend a pluralist conception of the constituent power and on the involvement of an autonomous civil society during the process of constitutional change. Also, and to a lesser extent, on the ideas and political style of the president that is actually pushing for a constitutional transformation.

6. Internal Constraints and Self-Limitation

It should be clear by now what the risks of the adoption of a populist conception of democratic legitimacy are when it comes to processes of constitutional change. However, this is not say that all episodes of popular constitution making will necessarily result in authoritarian outcomes. For instance, the distribution of power existing at the time of an episode of constitutional change can eventually give place to the establishment of a series of internal constraints that favor dynamics of

[29] This type of assembly resembles the convention model that characterizes Ackerman's model of revolutionary reform. For an elaborate theoretical approach to the convention model, see Arato (2016: Ch. 3).

cooperation between political actors. If no political actor is in a position of power allowing for the complete control of the process of constitutional change, and, for that reason, the composition of the constituent assembly or the legislature is representative of the different political forces existing at the time, then compromise and bargaining will be necessary, reducing in this way the predominance of partisan interests and the authoritarian risks that derive from the dynamics of populist constitutional change.[30]

At the same time, there are significant examples of episodes of constitution making in which the political forces pushing for change decide to adopt consensual mechanisms of self-restrain, such as judicial review of the actions of the assembly[31], in order to improve the democratic legitimacy of the new constitutional regime. The cases of Spain (Bonime-Blanc 2010), Eastern and Central Europe (Arato 2000; Preuss 1995), and South Africa (Arato 2009; Klug 2010) come to mind as examples of "post sovereign constitution making", i.e. processes of constitutional change that reject the idea of the embodiment of the constituent power by a single entity or institution and that invite the participation of different actors and instances of mediation in a process with multiple stages[32] (see Arato 2016). However, the internal mechanisms of

[30] On the role of internal mechanisms of constraint, see Negretto (2013) and Landau (2013a).

[31] Courts, it will be shown below, can under different circumstances operate as internal or external constraints during processes of constitutional change. They can be considered internal constraints in those cases in which the actors pushing for change consensually determine that they want to be supervised by a court, either an already existing one or a new institution created for the purpose. However, courts become external constraints when existing judicial institutions intervene in the process of change without an explicit invitation by the political actors.

[32] And, as my analysis of the Colombian case in the early 1990's will show in chapter 3, it is even possible to find processes of constitutional change that combine both the presence of internal mechanisms of constraint and the adoption of consensual mechanisms of restraint with elements typical of populist constitution making.

constraint emerging from a relative balance of power and the adoption of a self-limiting approach to constitutional change are highly contingent and path-dependent.[33]

And yet, several contemporary constitutional theorists are still, very much like Sieyès, approaching the problem of constitutional change without due regard for the risks of the populist conception of democratic legitimacy. Their insistence on populist constitutional change no longer follows the Schmittian model to the letter. Their sensibilities are closer to the pluralist conception of the people that I have associated with modern democratic regimes. However, they retain the populist normative defense of a revolutionary hiatus, and this for a variety of reasons.

First, they tend to hold considerably thicker conceptions of democracy than the one espoused by political liberalism. In many cases, this position implies an argument for the need to complement the idea of popular sovereignty with more resolute attempts to deal with the social question, placing them in direct confrontation with the elites that oppose such transformation of the status quo. At the same time, these authors associate liberalism with a restrictive conception of representative democracy at the service of the particular interests of the elites, forcing them to deny the compatibility of basic liberal principles with the exercise of popular sovereignty. Their commitment to popular sovereignty, therefore, seems to

[33] The emergence of internal constraints depends on the results of electoral competition, which are always difficult to predict. Also, the adoption of inclusive electoral rules, such as those that allow for proportional representation, seems to be dependent on political agreements between parties and participants that take place prior to the proper moment of constitutional decision-making. On the path-dependent character of a self-limiting approach to constitutional change, see Arato (2012).

demand a somehow strict adherence to the fundamental principles of the model of constitutional change derived from the writings of Schmitt and Sieyès.[34]

From this perspective, democracy requires a willingness to rid the political space of any obstacles to the actions of the popular sovereign, even when these authors are aware of the possibility of authoritarian turns. In the end, and this conclusion seems to follow, there is nothing we can do to prevent an eventual situation of democratic autophagy: constitutional provisions or the participation of existing legal and political institutions will not be able to stop a mobilized population in its attempts to destroy the democratic regime from the inside (see Colón-Ríos 2012; Schwartzberg 2007). As a purely theoretical contribution, they claim that the most we can do is to identify the normative requirements that make possible the differentiation between legitimate and illegitimate processes of constitutional change, and hope that the popular sovereign will adopt them as guiding principles for its actions. That is, there is only room for immanent mechanisms of constraint adopted by the people during episodes of extraordinary politics with the intention of securing the participatory, inclusive, and pluralist character of the process of constitutional change (Kalyvas 2008: 242). The constituent power, normatively speaking, should not be exercised arbitrarily; in fact, it should be subjected to an important procedural limit that establishes the need to include "all those who will

[34] For recent examples of this kind of literature, see Colón-Ríos (2012), Hirschl (2004), Kalyvas (2008), and Pisarello (2014). For a critique of processes of constitutional change in which the social question takes absolute centrality, see Arendt (2006). For an argument that takes the idea of social constitutionalism seriously but rejects the incompatibility between the principles of political liberalism and democratic rule, see Neumann (1957). As I will show in chapter 5, this populist conception of democracy is perfectly compatible with right-wing politics as well, a fact that should sound the alarms of those arguing for this model of constitutional change from the perspective of the left.

become subject to the constitutional regime" (Colón-Ríos 2012: 111). However, this procedural requirement should not be enforced externally, i.e. by institutions that have not been invited to the constitutional process by the popular sovereign.

In practical terms, this attempt to reject the exclusionary logic of the populist conception of the people and at the same time affirm the need for a revolutionary hiatus is highly problematic. Pluralist exercises of the constituent power require specific procedures that contribute to the production of democratic results, as someone like Colón-Ríos is ready to admit. He proposes that the subject of the constituent power, for instance, should adopt the following measures: proportional representation within a single, national, electoral district; prohibition for the delegates of the constituent assembly to run for office during the next legislative elections; a prohibition for current officials to sit as delegates; and the possibility for non-delegates to submit proposals to the assembly (Colón-Ríos 2012: 163-163). Surely, these measures could greatly increase the legitimacy of the process of constitutional change by promoting inclusion, dialogue, and cooperation.

But what are the actual conditions under which these measures and procedures are likely to be adopted? Not much is said in this regard. It is left to the constituent actors alone to decide if they want to adopt them. They work entirely as a regulative ideal, an attractive one I must say, but their applicability in practice is left entirely to chance. What if the popular sovereign fails to adopt them? What if the process of constitutional change falls entirely under the control of a single political faction with authoritarian tendencies? Why not allow existing institutions to intervene in order to persuade the political actors pushing for constitutional change

of the need to adopt certain procedures that are considered necessary for the production of democratic outcomes? Why not give greater consideration to the introduction of external constraints by way of constitutional courts?[35] In short, why make an absolute argument about the need for a revolutionary hiatus when we already have the knowledge of the many ways in which populist constitutional change can go wrong?

The protection and improvement of democratic regimes requires a more pragmatic approach, one that takes seriously the risk of the abusive instrumentalization of the democratic ideal. This pragmatic approach might eventually justify the idea of a revolutionary hiatus, for instance when it seems to be the only plausible alternative to break free from the consolidated power of a clearly authoritarian political regime. Existing political institutions might prove resilient to democratic change under those circumstances, so it would be logical to exclude them from the process. But even then, this is not always the case. The intervention of institutions belonging to authoritarian regimes has in several occasions proven compatible with attempts by emerging political forces to establish a new democratic regime, e.g. during the democratic transitions in Eastern Europe and South Africa.

Surely, the efficacy with which a court would be able to intervene in order to assist the process of constitutional change in the production of democratic outcomes will be greater when it can count on the support of a variety of political forces, as parts two and three of this dissertation will demonstrate. But even if they lack such a

[35] On the importance of external constraints such as constitutional courts in the context of fragile democracies still trying to consolidate their political institutions, see Issacharoff (2007).

support, there are still good reasons in favor of the court's intervention, especially when the process of constitutional change has been entirely coopted by an authoritarian faction. The chances of success of a court with the commitment to intervene in such cases will be grim, but that is not a good enough reason to refuse the great responsibility of protecting the democratic regime.

However, it should already be clear that courts will not be able to assume this role adequately if populist conceptions of democracy keep on structuring their understanding of constitutional change. The populist idea of the revolutionary hiatus requires the logical exclusion of courts from processes of constitutional change. Thus, they cease to be an alternative against authoritarian threats. Reliance on populist jurisprudence implies a complete surrender by the courts of the political space in which the type and form of the regime is being decided; it weakens the legitimacy of their claims to intervene, tilting the balance of power in favor of those seeking to usurp the voice of the people.

CHAPTER 2

DEMOCRATIC POTENTIALS

Despite the evident authoritarian affinities of populist jurisprudence, this is a concept that can also be employed for democratic ends. The distinction between constituent and constituted powers is meant to affirm the superiority of the people over existing political institutions, whose authority derives only from a prior constituent act of the popular sovereign. But it also attaches to these constituted powers the task of protecting the constituent power of the people against illegitimate attempts to usurp it. In this sense, the fundamental distinction between constituent and constituted powers is not only an instrument for revolutionary transformations; it is also the source of strict limitations to constitutional change.

Populist jurisprudence can reveal a democratic semblance at least in two particular ways, though both of them are not entirely unproblematic. First, the Sieyesian lineage of populist jurisprudence provides the courts with the tools to open the regime to the participation of political forces that have been illegitimately

excluded from the process of deciding what the basic characteristics of the constitution should be. This can happen, for instance, when the rules of constitutional change are used to secure the monopoly of a political elite over the power to reform the constitution, precluding any real and meaningful participation by the popular sovereign. During these situations, courts can rely on populist jurisprudence in order to affirm the superiority of the constituent power over the constituted powers and, with Sieyès, make an argument about how the rules of constitutional change are only binding on the latter. In this way, courts can exceptionally reintroduce the revolutionary hiatus during those moments in which it seems evident that the constituted powers are using the rules of constitutional change illegitimately for turf-protection or hegemonic preservation purposes.

It is already clear from the previous chapter what the risks of this revolutionary hiatus are. However, the pragmatic approach that was suggested before requires that we remain open to the particularities of the context in which constitutional change is to take place. Sometimes, this revolutionary break with legality might present itself as the only viable alternative to put an end to the exclusionary dynamics imposed by the ruling elites. But courts should know that this use of populist jurisprudence is a double-edged sword. The case of Venezuela in chapter 4 will reveal how an initial attempt by the courts to open the political regime to broader democratic participation through the creation of a revolutionary hiatus ended up surrendering the political space to authoritarian political forces. And while a similar experience in Colombia did not lead to the authoritarian outcomes of Venezuela, things could have easily gone that way. Therefore, I do not attempt to

recommend this Sieyesian course of action. In fact, I would advice against it. But this analysis of populist jurisprudence requires that we remain open to the particularities of each political context.

The second way in which populist jurisprudence can eventually present a democratic face is based entirely on Carl Schmitt's doctrine of implicit limits to constitutional change. According to this doctrine, the constituted powers can only use the rules of constitutional change to amend those provisions of the constitution that do not touch upon the fundamental character of the political regime. Once they try to alter the defining core of the political regime they invade the orbit of the popular sovereign. Only the people, through the revolutionary exercise of the constituent power, are entitled to replace the constitution and remake the type and form of the polity. Therefore, the distinction between constituent and constituted powers becomes an instrument that whoever is burdened with the task of protecting the constitution can use to determine when an attempt is being made to usurp the powers of the popular sovereign; it has the potential to reinstate the role of legality and constitutionalism as instruments for the protection and advancement of democracy.

Against Schmitt's objections to the role of constitutional courts in a democracy, his doctrine has been reformulated in recent times and applied by different courts with great success as an instrument for the protection of the democratic regime against authoritarianism.[36] Unfortunately, the conditions are not always adequate for the courts to adopt it. The exercise of the courts' powers of

[36] This doctrine is now known by the inelegant name of the "unconstitutional constitutional amendments doctrine". On the global spread of this doctrine and its variations at the different sites of reception, see Roznai (2013).

judicial review is not independent of the political context in which adjudication takes place. And even when courts decide to adjudicate on the grounds of this doctrine, this decision is not completely unproblematic from a democratic perspective. It clearly places too much power in the hands of constitutional judges, who can eventually abuse it either to forestall the people's legitimate aspirations for change or to erode the existing democratic regime. These problems need to be taken into account.

However, even when the courts manage to use this doctrine in a democracy-promoting way, a major difficulty remains: it takes constitutional courts all the way back to the problem of the revolutionary hiatus and its implications. By claiming that only the people in a revolutionary fashion can alter the fundamental aspects of the constitutional regime, courts end up creating an environment of political instability and uncertainty from which authoritarian forces can bask. The populist conception of the people, in the end, is highly ambiguous and can be easily manipulated, and the courts, without the assistance of clear rules of change crafted on the basis of an alternative definition of the people, do not have the means to determine in which situations the true subject of the constituent power is actually manifesting its desire to alter the fundamental characteristics of the constitutional order.

1. Sieyès and Democratic Openness

Modern democracies have always had an ambiguous relationship with its most important and defining principle, i.e. popular sovereignty. This ambiguity was already evident in the Declaration of the Rights of Man of 1789. According to Article III, "The

principle of all sovereignty resides essentially in the nation. No body nor individual may exercise any authority which does not proceed directly from the nation". Subsequently, Article VI adds to this definition: "Law is the expression of the general will. Every citizen has a right to participate personally, or through his representative, in its foundation". This classical formulation of the principle of sovereignty, however, was mostly interpreted in a way that gave primacy to the acts of the representatives, which, by coming together under the institutional form of the legislative body, assumed a monopoly over the powers of the popular sovereign. The exercise of the constituent powers of the people, instead, was relegated to exceptional circumstances. As Rosanvallon argues, since the times of the French Revolution the principle of popular sovereignty has mostly had a "virtual existence" (2006: 20).

This emphasis on representation is understandable. In the end, direct democracy is unfeasible; without political representation it would be impossible to at least approximate the ideals of inclusion and pluralism that characterize modern democratic sensibilities (see Plotke 1997). However, this is not a good enough reason to reduce popular sovereignty to the periodical election of representatives. The fear of an unorganized multitude that might eventually usurp the voice of the plural people gave place to an unacceptable democratic elitism that is too restrictive to do justice to the principle of popular sovereignty[37] (Rosanvallon 2006: 225-231).

[37] This type of democratic elitism is also evident at the level of constitutional politics. European constitutional scholars, for instance, complain that in countries such as England, France, and Germany, the democratic potential of the idea of the constituent power of the people has been entirely contained by representative institutions. See Loughlin (2007), Jaume (2007); and Möllers (2007).

Representative governments are compatible with forms of direct participation that can eventually contribute to increase the legitimacy of the regime.

Popular frustration against political situations of this sort can eventually justify a turn to Sieyès' revolutionary writings in order to open the political regime to the participation of excluded political forces. After all, what moved Sieyès to write his famous pamphlet was a feeling of resentment against the embargo that the privileged orders had established on the political rights of the largest part of the population, i.e. the Third Estate. The Third Estate was never given the chance to represent itself; its significant place in society was never translated into effective political power. Sieyès, therefore, wanted to put an end to the monopoly of the nobility on all public powers.

But Sieyès was no radical democrat. Instead, he argued for a representative form of government. In fact, his definition of the nation was central to the restricted conception of sovereignty adopted in the Declaration of the Rights of Man.[38] However, his writings had a radical tone that derived from his call to abolish all the distinctions that until that moment made it impossible for the greatest part of France to partake on the advantages of citizenship. His was a direct attack against the injustice of an existing political order that provided no institutional mechanisms for the fair political inclusion of the Third Estate in the process of deciding over the type and form of the constitutional regime. The force of the majority, he thought, was the only available mechanism for the establishment of public freedom in his country (Sieyès 2003: 120).

[38] The nation, according to Sieyès, is "a body of associates living under a *common* law, represented by the same *legislature*, etc." (2003: 97).

His inclination for institutional politics and the stability that it provides was not worth it if it came at the price of cheating the people of their political rights.

The hegemony of political elites that refuse to cede power to broad sectors of the population, therefore, is likely to push excluded political actors towards the adoption of Sieyès' revolutionary theory of the constituent power. According to this theory, a constitution is necessary for the organization and the existence of government, but a nation does not need a constitution to exist. The nation predates any political and legal structure: "The nation exists prior to everything; it is the origin of everything. Its will is always legal. It is the law itself. Prior to the nation and above the nation there is only natural law" (2003: 136).

It is from this premise that Sieyès derives the relation that should exist between the nation and the constitution. Constitutional laws emanate only from the nation and the bodies and structures created by the nation cannot touch the constitution. "In each of its parts a constitution is not the work of a constituted power but a constituent power". In this sense, the nation is never bound by the constitution: "It is clear that it was designed only for the government". "Government can exercise real power only insofar as it is constitutional. It is legal only insofar as it is faithful to the laws imposed upon it. The national will, on the other hand, simply needs the reality of its existence to be legal. It is the origin of all legality. Not only is a nation not subject to a constitution, it *cannot* and *should* not be (…)". Sieyès is deeply distrustful of any pretension of binding the nation to the constitution. Tyranny would have it easier if things were to be this way. That is why he insists so strongly on the

independence of the nation from "all civil forms". The nation, from his perspective, never leaves the state of nature (2003: 136-137).

Legality ceases to have democratic legitimacy once the constituted powers rely on it to preserve their hegemony. The popular sovereign can bypass existing institutions and legal limitations in order to retake control of the political regime and put an end to the democratic elitism imposed by the representatives. And, paradoxically, courts can eventually turn into the standard bearers of this populist conception of the constituent power, as part two of this dissertation will show. Courts can take the side of democratic openness by affirming the validity of the revolutionary hiatus when it seems clear to them that the constitution, by means of its rules of change, is being used to prevent the reforms that large sectors of the population would like to see implemented. By relying on this Sieyesian variant of populist jurisprudence, courts are left in a position to give legal sanction to the illegal actions of the popular sovereign and affirm the superiority of the constituent power over the constituted powers.

However, this is a risky democratic maneuver. How can the court know that those pushing for change are actually entitled to speak in the name of the people – or the nation, to put in Sieyès' terms? Is the revolutionary hiatus likely to contribute to the coming together of the different political forces that compose a people or is it prone to pit one group against the other, eventually reversing the illegitimate relationship of political domination that preceded the irruption of the revolutionary moment? As was shown in chapter 1, the authoritarian affinities of the revolutionary

hiatus should loom large on any pretension to improve the democratic character of the political regime by means of this populist strategy.

2. Populist Democracy and the Protection of the Constitution

There is a second way in which courts can eventually put populist jurisprudence at the service of democracy. It was already said that, from Schmitt's perspective, the people as the subject of the constituent power only appears as a revolutionary actor outside the limits of the constitutional order. However, there is a second conception of the people that is of fundamental importance when it comes to the protection of the fundamental decisions of the constituent power. Once the constitutional order has been established and the time for ordinary politics returns, the people assume the character of a constituted power that is also subjected to constitutional limitations. This is the Schmittian definition of the people as a formed and organized entity (Schmitt 2008: 279).

This is not to say that the people as subject of the constituent power disappears or dissolves; it always "remains alongside and above the constitution". But ordinary political life allows for the people to assume once more the role of a citizenry entitled to the exercise of certain competencies in accordance with the constitution. So what can the people, understood as a constituted power, actually do? According to Schmitt, once the idea of the people is understood as a constitutional category, it is forced to act by means of legal procedures and regulations. For this reason, it no

longer shares the absolute sovereignty of the subject of the constituent power (2008: 145-146).

In order to understand the scope of what the people as an organized entity can do, it is necessary to explain yet one more of Schmitt's fundamental distinctions: that between the constitution and constitutional laws. This should not be difficult to grasp, since it has been implicit throughout the analysis of Schmitt's definition of the people as the subject of the constituent power and because this distinction is also central to Sieyès' revolutionary discourse, as was seen in the previous section.

Schmitt understands the constitution as a complete decision over the type and form of the political unity. The constitution, therefore, refers to the type of political regime chosen by the constituent power. Constitutional laws, to the contrary, "are valid first on the basis of the constitution and presuppose a *constitution.* For its validity as a normative regulation, every statute, even constitutional law, ultimately needs a political *decision* that is prior to it, a decision that is reached by a power or authority that exists politically" (2008: 76). From this perspective, constitutional laws are not an actual part of the constitution. They should be understood only as those provisions that make it into the constitutional text but are ultimately unimportant for the existence of a given political regime. Therefore, the rules of constitutional change can only be used in regard to constitutional laws, not the constitution.

The constitution is inviolable; it is a fundamental decision taken by the people that cannot be legitimately altered by constituted powers that only exist as a result of the sovereign's will. As an example, Schmitt tells us that not even the English Parliament would have the power to turn England into a Soviet state. In a democracy,

such a fundamental decision regarding the type and form of the political unity can only be taken by the people as the subject of the constituent power, i.e. outside the established mechanisms of constitutional change (2008: 79-80). As a consequence, neither the people by means of the mechanisms of direct democracy established by the constitution nor any of the other constituted powers have the competence to alter the fundamental contours of the political regime adopted by the popular sovereign.

Concerned as he was with the very real possibility that someone might usurp the constituent power of the people, Schmitt established a three-track model of constitutionalism that distinguishes between constitutional replacement, constitutional amendments, and ordinary legislation (Arato 2011). In line with this model, the authority granted by the constitution regarding the capacity to make amendments has clear boundaries. "This means the authority for constitutional amendment contains only the grant of authority to undertake changes, additions, extensions, deletions, etc., in constitutional provisions that preserve the constitution itself. It is not the authority to establish a new constitution, nor is it the authority to change the particular basis of this jurisdiction for constitutional revisions" (Schmitt 2008: 150). That is, the rules of amendment can be used neither to eliminate nor annihilate the constitution adopted by the people. If the constitution is to be replaced, only the revolutionary action of the people can legitimately make it happen. From Schmitt's perspective, there can be no rules for the regulation of processes of constitutional replacement.

However, Schmitt's populist conception of democracy and the constituent power makes it impossible to use his three-track model of constitutional change in a

way that is compatible with modern democratic ideas (Arato 2011). As it was already explained in the chapter 1, Schmitt's acceptance of the people's inability to act, given their unstable and unorganized form, beyond the initial stage of acclamation, makes this entity incapable to protect their fundamental decisions from being illegitimately changed. Under Schmitt's theory of democracy, only the president can play this role given his proximity to the people and the nature of his office as the head of state. His rejection of the possibility of assigning any role to judicial instances in dealing with these important political issues, led him to make an argument for the need to confront these threats to the constitution by means of the exceptional mechanisms that necessarily correspond to the executive as the only political instance capable of dealing with situations of crisis in a swift and decisive manner. However, this medicine of militant democracy under presidential leadership, as Arato aptly puts it, is more likely to kill the patient than to save it, as the tragic faith of the Weimar constitution has made clear (2011: 337).

But the incompatibility of Schmitt's plebiscitary presidentialism with the task of protecting the democratic constitution from illegitimate attempts to usurp the voice and powers of the people does not require a wholesale rejection of his ideas on this matter. In fact, constitutional courts in different corners of the globe have assumed the role that Kelsen wanted them to assume as guardians of the constitution. Paradoxically, Schmitt's three-track model of constitutional change has become an instrument for the protection of democratic constitutions once the courts, and not the

president, adopted Schmitt's conceptual apparatus and turned it into the doctrine of "unconstitutional constitutional amendments".[39]

3. The Doctrine of Unconstitutional Constitutional Amendments

Contemporary constitutional democracies, following the example of the United States' rejection of British parliamentary sovereignty, have developed a useful fiction that has gradually taken hold, i.e. the idea that courts can eventually embody the original popular will in order to check democratic transgressions (Jacobsohn 2006: 463). This fiction is well established in the United States. If we follow Bruce Ackerman's description of the American constitutional tradition, we find that the Supreme Court assumes a preservationist role: it exercises its power of judicial review in order to protect the fundamental decisions of the people from being eroded by political elites that have not been granted broad and sufficient authority to alter the constitution. Democracy, from this perspective, requires that we distinguish between "the will of We the People from the acts of We the Politicians" (Ackerman 1991: 9-10).

However, the American Supreme Court is just an example of a general trend: the assumption by the courts of an active role in preventing the falsification of the voice of the people and the erosion of the democratic regime. The paradigmatic

[39] For an accurate analysis of the debate between Schmitt and Kelsen on who should be the guardian of the constitution, see Caldwell (1997). Many contemporary democratic regimes have followed Kelsen in this regard: there is a tendency towards the establishment of constitutional courts as a means to guard and protect the compromise between several political actors that seek to come together under a mutually acceptable democratic regime (see Issacharoff 2011).

example of a court's appropriation of the unconstitutional constitutional amendments doctrine is to be found elsewhere; this is a doctrine that the American jurisprudential tradition has been reluctant to develop.[40] The German Constitutional Court, for instance, adapted the Schmittian theoretical framework as an instrument for the protection of the democratic regime after the experience of Nazism. But for the purposes of this dissertation, the case of India is even more relevant. The Indian Supreme Court, as Jacobsohn claims, affirmed the existence of insurmountable limitations to the capacity of the constituted powers to amend the constitution as a result of the dictatorial ambitions of Indira Gandhi. Without the adoption by this court of the Schmittian idea according to which the basic contours of the constitution can only be changed by the people and not by the constituted powers' abuse of the rules of amendment, India's democratic regime would have been defenseless against the power-grabbing ambitions of an already powerful politician (Jacobsohn 2006: 471).

So what is the specific content of this doctrine? As always, it is a matter of context. But in general terms, this doctrine establishes that only the people, as the sole subject of the constituent power, can legitimately alter the constitution, i.e. the fundamental decisions regarding the form of the political regime. The constituted powers are the creation of the people and their powers are strictly limited to what the constitution authorizes them to do. Their authority is derivative and, therefore, their power is always limited. In this sense, they can only aspire to make changes to

[40] Though populist jurisprudence remains foreign to the American Supreme Court, constitutional theorists have made significant attempts to introduce a populist conception of democracy to the discussion on constitutional change. Even though the influence of Schmitt and Sieyès is barely recognized in these debates, populist constitutional discourse in the United States clearly shares a great deal of similarities with these authors. See, for instance, the work of Akhil Reed Amar (1988).

constitutional laws, i.e. those parts of the constitution that are not considered fundamental to the existence of the political regime adopted by the people.

This variant of populist jurisprudence offers a justification for the courts to try and place strict limitations on what the legislature, the presidency, and other political institutions – including the citizens when they act through the mechanisms of direct democracy authorized by the constitution – can do with the intention of protecting the fundamental decisions of the people against attempts at usurpation. To put it simply, this doctrine claims that the mechanisms of constitutional change established in the constitution cannot be used in a manner that threatens the continuity of the political regime adopted by the people. If the constituted powers use the rules of amendment for this purpose, then their actions should be declared unconstitutional. Constitutional theorists, therefore, have understood this doctrine as an instrument that can contribute to the preservation of democracy. Its use can be democratically justified in those parts of the globe that have been afflicted by dictatorial and authoritarian pasts (Halmai 2012), and, more specifically, in those countries whose constitutions lack explicit limitations to constitutional change and stringent rules of amendment (Jacobsohn 2006).

Constitutional regimes are sometimes shielded against the erosion of its defining characteristics by means of explicit limitations to constitutional change. The entrenchment of the value of human dignity in the German Constitution by means of eternity clauses is a paradigmatic example in this regard. But it is also possible to aim at the preservation of the constitutional regime through the adoption of rigid and demanding rules of amendment, as in the case of the famous Article V of the American

Constitution.[41] However, there are cases in which constitutions fail to adopt any of these alternatives to ensure their self-preservation. They neither adopt mechanisms of entrenchment nor stringent rules of constitutional change. At least explicitly, every clause of the constitution remains subject to change, and the rules of amendment established for that purpose do not make it very difficult to achieve such an end.

What are we to make of this last situation? How should political actors and citizens in general interpret this lack of entrenchment and of demanding rules of constitutional change? From the perspective of Schmitt's constitutional theory, it is not possible to assume from these circumstances that the rules of amendment can be used in a legitimate manner to alter any of the fundamental characteristics of the constitution. There are implicit limits to the power of amendment that derive from the fundamental decision of the popular sovereign regarding the type and form of the political unity. In this sense, the constituted powers cannot use the rules of amendment in order to turn a parliamentary democracy into a monarchy, to mention just an example. The adoption by the people of a democratic constitution, be it a presidential or a parliamentary democracy, imposes a set of restrictions that can only be overcome by the people themselves through the revolutionary exercise of the constituent power. But then the question comes up: How are we to know what these implicit limits to constitutional change are if the constitution itself is silent about it?[42]

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[41] For a critique of entrenchment mechanisms as futile against the risk of democratic autophagy and as a means to shift power from elected representatives to unelected courts, see Schwartzberg (2007). For a critique of stringent rules of amendment as obstacles to the expression of the popular will, see Ackerman (1998).

[42] The question about the existence of implicit limitations is especially relevant to Latin American constitutional democracies, since it has come up in several countries like Argentina, Brazil, Colombia, and Peru (see Roznai 2013: 682).

Constitutional courts, as guardians of modern democratic constitutions, have to face important challenges that question their legitimacy and capacity to make use of this doctrine. On the one hand, this doctrine faces the problem of how to define what these implicit limits to constitutional change are; on the other hand, it is also possible for this doctrine to end up providing the grounds for the courts' abuse of their powers of judicial review (Yap 2015: 122-123). The first problem refers to the difficulty that emerges once a court has to determine what the fundamental characteristics of the political regime established by the people are. What are the universal elements of democratic regimes? Is the parliamentary character of a constitutional regime out of the reach of the amending powers? What exactly are the defining elements of a presidential regime? As Roznai explains, there is a tension between a more or less intuitive acceptance of a common conception of what a constitutional democracy should look like and the particular variations that appear in specific political regimes and that can be of great importance to their constitutional identity and tradition (Roznai 2013: 714-715). If the constitution fails to make explicit the fundamental and unamendable elements of the regime, how are the courts supposed to do it? Supporters of this doctrine accept that it is problematic to grant that much power to the courts and, for that reason, they advice caution (see Dixon & Landau 2015).

In the end, there is no recourse to abstract definitions of democracy in order establish its universal or fundamental characteristics. The idea of democracy will always remain ambiguous. This fact alone poses a serious problem: constitutional courts can exercise their power to define what the fundamental aspects of the

constitution are in an abusive and arbitrary way, for instance, by forestalling the people's legitimate aspirations for change, by enlarging the sphere of judicial power in a self-interested manner, or by giving legal sanction to the political aspirations of an authoritarian government.[43] However, this doctrine can be a powerful instrument in the hands of democratically minded judges, especially when the constitution explicitly establishes a third track for constitutional replacements, i.e. when it provides for the alternative of convening a constituent assembly.

In the face of a recalcitrant or co-opted court, the constitutional possibility of convening a constituent assembly represents an instance of democratic openness or a means of egress through which popular desires for constitutional change can eventually be channeled. But this possibility also provides a democratic justification for the use of the unconstitutional constitutional amendments doctrine by courts that are truly committed to the protection and improvement of the democratic regime. According to Colón-Ríos, the idea of implicit limits to the power of reform is useful in order to isolate the situations of change that require greater participation by the citizens. In this way, the courts become guardians of competences that only pertain to the popular sovereign and that politicians and institutions are constantly trying to usurp. Courts can eventually rely on this doctrine in order to make sure that popular participation at the level of fundamental laws becomes an essential element of the constitutional regime (Colón-Ríos 2012: 132-139).

[43] The decisions of the supreme courts of Nicaragua in 2009 and Honduras in 2015, striking down presidential term limits that were established in the original constitutions, are a clear example of an abusive use of the doctrine of unconstitutional constitutional amendments (see Landau & Sheppard 2015). See, Martínez-Barahona (2010) for an account of a similar situation in Costa Rica.

As it should be evident by now, this democratic instrumentalization of populist jurisprudence is also highly contingent. It depends both on the existence of constitutional means of democratic openness and egress and on the political prudence and democratic intentions of the courts that adopt it. It is for this reason that the ultimate justification for the use of this doctrine is an appeal to political caution. Following Yap, courts should make an examination of the way in which specific constitutional changes have been achieved: "In view of the countermajoritarian danger of any such judicial exposition, this doctrine should only thus be enforced in states, with *malleable* constitutions, where the dominant party/coalition in power has unilaterally harnessed the amendment process to achieve manifestly unreasonable political outcomes" (Yap 2015: 136). These criteria for the use of this variant of populist jurisprudence become especially relevant in the context of hyper-presidentialism.[44]

Yet, half of the problem is still unresolved. The normative acceptance of these criteria, though controversial, can easily be justified once we assume a more pragmatic approach to the problem of how to protect a democratic regime. Allowing courts to use this doctrine during critical moments of constitutional change is definitely less problematic than the Schmittian alternative, i.e. to have the president decide by means of emergency measures what the fundamental characteristics of the constitution are. But Yap fails to take into consideration Ginsburg's political analysis

[44] See the stance taken by Carlos Bernal-Pulido regarding the adoption of this doctrine by the Colombian Constitutional Court: though he believes that the use of this doctrine fails to overcome normative democratic challenges, he still claims that it is justified in the context of hyper-presidential political systems such as Colombia (Bernal-Pulido 2013). On this, see chapter 5 below.

of judicial review: a court's exercise of the power of judicial review is more likely to take place in situations where political forces are diffused than where a single dominant party or coalition is in control of the government (Ginsburg 2003: 25). This political diffusion is exactly what is usually lacking in the situations that, according to Yap, justify the use of the doctrine of unconstitutional constitutional amendments.

When such a single dominant political coalition under the leadership of a strong and charismatic executive is in place, the chances that a court will successfully oppose the abuse of the rules of constitutional change are slim. Constitutional courts, it has been said, have become salient institutions in contemporary constitutional democracies due to their role as guarantors of fundamental compromises between heterogeneous political forces. When the distribution of political power remains diffused the courts will be able to draw support from one side or the other of the political spectrum. They will not be left entirely alone before political actors attempting to abuse the rules of constitutional change in order to impose an authoritarian agenda, as the case of Colombia will reveal in chapter 5.

But when a relative balance of power is lacking and a single political force manages to become dominant in both the executive and legislative branches, then the courts will have a hard time protecting existing democratic arrangements. In fact, this situation is mostly conducive to the eventual cooptation of the courts by the dominant political forces, as I will be trying to show in my analysis of the Venezuelan case in chapter 6. At this point, populist jurisprudence entirely losses its democratic edge and becomes an instrument for the advancement of authoritarianism by operating a simple reversal of emphasis: the role of the constituted powers as protectors of the

fundamental political decisions of the people is discarded in favor of a plebiscitary relationship between the president and the subject of the constituent power. That is, we are back to the absolute conception of popular sovereignty discussed in the first chapter.[45]

Populist jurisprudence, by means of the doctrine of unconstitutional constitutional amendments, has the potential to challenge authoritarian forces and oppose their attempts to usurp the voice of the people only under very special circumstances. However, when these special conditions are not met it can also become an undemocratic instrument. So a caveat is in order: courts will not necessarily stop authoritarianism by means of this doctrine, but constitutional judges with a democratic orientation should be aware of the intricacies of its application in order to be able to use it when the situation demands it. That is, political prudence advises a pragmatic approach to this other side of populist jurisprudence, but this is not to say that this doctrine is fully compatible with the plural conception of the constituent power at the heart of modern democratic ideas and sensibilities. It is, as we have already seen and will continue to see ahead, a double-edged sword.

[45] This reversal can take different forms. One of them is to invoke the "political questions doctrine", according to which processes of constitutional change are outside the scope of judicial control. In this way, courts can avoid tackling sensitive constitutional problems that might lead towards a head on confrontation with the government while claiming that the constitution belongs to the people and that it is up to them to change it as they will (see Jacobsohn 2006: 479). Other courts refuse to review processes of constitutional change by explicitly invoking the democratic principle, failing in this way to check the actions of authoritarian forces and renouncing all together the principle of constitutionalism. This is the case of the Hungarian Constitutional Court (see Halmai 2012).

4. Back to the Revolutionary Hiatus

This is not yet the end of the story. Even if the courts ever manage to be in one of those exceptional circumstances in which the use of populist jurisprudence is likely to produce democratic results by preventing authoritarian power-grabs, this approach to constitutional change still implies an ultimate commitment to the premise of the revolutionary hiatus that constitutional courts cannot shake, at least not if they stick to basic Schmittian ideas about democratic legitimacy. Any attempt by the courts to open the democratic regime and provide a way to include a plurality of political forces in the process of deciding over the type and form of the constitution requires not only that courts leave aside their populist approach to constitutional change; it demands a more elaborate design of the rules of constitutional change so the provision of a means of egress for popular participation does not end up paving the way for political forces claiming to speak for the whole of the people.

An example can be helpful at this point. Let's assume for a moment that the people of a given country wish to change the constitutional regime from a presidential to a parliamentary democracy. There is significant mobilization around this idea and a number of important and highly representative political parties manage to use the rules of amendment in order to pass a law through the legislature that convenes a referendum posing this question to the people as an organized entity. There is no need to attach any undemocratic intentions to the political forces pushing for this change. In fact, public opinion is broadly supportive of this proposal. However, the constitutional court can reasonably decide to rule the call for a referendum on this

topic unconstitutional. In the end, what is at stake is a fundamental decision on the type and form of the political regime. In line with Colón-Ríos, the court could be acting democratically if it rules that in order to allow for the real participation of the people in the process of making such a fundamental decision a constituent assembly has to be convened. The court just wants to make sure that this is a decision that comes from the people and not the politicians, to put it in Ackerman's terms.

However, two problems come to light at this point. First, the court can only claim to be acting democratically in this case if it makes available the route of the constituent assembly to the people. But if the rules of constitutional change do not provide for this alternative, then the court's use of the unconstitutional constitutional amendments doctrine will look as an undemocratic obstacle seeking to prevent the exercise of the people's constituent power. The referendum is unconstitutional, and the constitution does not provide any other options. The only alternative available to the court, if it is to take the side of the democratic transformation of the political regime, is to rely on populist jurisprudence in the problematic manner that Sieyès made known in his pamphlet on the Third Estate to make room for the democratic exercise of the popular will.

In this way, the court would be giving legal sanction to the people's disregard of existing legality and institutions in order to alter the political regime in whichever way they like. But it has already been explained how this scenario can easily open the door to authoritarianism, unless special circumstances allow for the emergence of internal constraints or the adoption of a self-limiting approach to constitutional change by the main political actors. The most a court can do in this scenario is to offer

some advice to the constituent forces about the procedures that are likely to increase the democratic character of an episode of constitutional change. In any case, and for democratic reasons, we are back to the muddy waters of the revolutionary hiatus.

In a second scenario, the court might rule the referendum unconstitutional within a context that provides for the use of constituent assemblies. This is the scenario that according to Colón-Ríos offers a democratic justification for the use of the unconstitutional constitutional amendments doctrine. However, the risks of the revolutionary hiatus remain real even in this scenario. The fact that a given constitution provide for the use of constituent assemblies does not necessarily amount to the existence of legal and institutional controls over the process of constitutional change. A constitution may provide for a way to convene the assembly, but if it does not go further in the regulation of this process the revolutionary hiatus will still be present. For instance, the constitution could perhaps establish that the legislature can ask the people by means of a referendum if they wish to convene a constituent assembly, but if the rules of constitutional change fail to establish basic rules on how to elect such an assembly and what its limits are, then the constituted powers can take the vote of the people in favor of the assembly as a blank check and proceed to use it in the problematic way that Sieyès recommended.

In both situations, the absolute conception of legitimacy typical of populist democracy, together with the risks that it entails, ends up controlling the way in which the constituent power is exercised. This theoretical return to the revolutionary hiatus is indicative of the serious democratic limitations of populist jurisprudence and its affinities with authoritarianism. The third track of the Schmittian model of

constitutional change, that of constitutional replacement, remains an unruly political space favorable to the usurpation of democracy's empty space of power unless a serious attempt to tie the exercise of the constituent power to the principles of democratic constitutionalism is undertaken.

One way in which this goal could be achieved is a more thorough formalization of this third track (Arato 2011: 335). The idea would be to adopt more detailed rules of constitutional change in order to secure the inclusive, pluralistic, and participatory character of processes of constitution making by means of constituent assemblies, rules that a court would be able to enforce. But this adoption of more detailed rules for constitutional replacement needs to come together with a total rejection of ideas that are central to populist conceptions of democracy, such as that of the People-as-One and the supposed incompatibility between popular sovereignty and legal and institutional instances of mediation.

However, this thorough formalization of processes of constitutional replacement remains until today a purely theoretical possibility, and it will remain that way until the liberal conception of democracy proves itself deserving of the loyalty of democratic political actors in those places in which it is losing the struggle for ideological hegemony. In the end, the reiterative use of populist jurisprudence in different parts of the globe is a sign of the control that populist conceptions of democracy exert on the minds of most political actors, including constitutional judges.[46]

[46] The intellectual hegemony of this conception of democracy is especially evident in Latin America, as David Landau rightly claimed (2013a: 931).

PART II

SOVEREIGN CONSTITUENT ASSEMBLIES

The two faces of populist jurisprudence described in the previous chapters are more easily understood once we descend from the realm of theoretical abstraction to that of historical reality. The highest courts of Colombia and Venezuela present us with paradigmatic examples of the use of populist jurisprudence as an instrument through which the judiciary may attempt to handle substantial processes of constitutional change. However, all such processes have their own particular characteristics; their differences are of significant importance for the purpose of testing the capacity of populist jurisprudence to prevent the authoritarian usurpation of democracy's empty space of power and contribute to the pluralist exercise of the constituent power of the people. The following chapters, therefore, will deal with the use of populist jurisprudence in the very particular context of legally revolutionary processes of popular constitution making, i.e. episodes of constitutional change characterized by the use of sovereign constituent assemblies as instruments to overcome the obstacles

imposed by highly restrictive rules of amendment on the exercise of the constituent power of the people.[47]

Sovereign constituent assemblies have been prominent mechanisms for the expression and execution of the constituent power of the people since the times of the French Revolution and, even to this day, they remain firmly rooted in the political imaginary of political actors all over the globe, particularly in Latin America. They are considered to be the embodiment of a people understood as a single and all-powerful entity with the capacity to recreate the constitutional order at will, unencumbered by existing legality and political institutions. As the cases of Colombia and Venezuela will show, sovereign constituent assemblies are powerful instruments at the disposal of democratic forces seeking to circumvent existing constitutional structures that are considered to be oppressive, exclusionary, and illegitimate. They create an alternative political space for the coming together of interests and ideas that have been previously excluded from the political game. Particularly, these sovereign constituent assemblies have proven their efficacy when it comes to putting an end to the democratic elitism that characterizes most representative regimes; through them, democratic political forces have been able to rescue the principle of popular

[47] The word "revolutionary" is used here in a strictly Kelsenian sense: "A revolution, in this wide sense, occurs whenever the legal order of a community is nullified and replaced by a new order in an illegitimate way, that is in a way not prescribed by the first order itself (…) From a juristic point of view, the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way which the former had not itself anticipated" (Kelsen 2007b: 117). For an argument both engaging and problematic in favor of constitutional ruptures of this sort, see Pisarello (2014).

sovereignty from the virtual existence to which it has been relegated by the primacy of traditional structures of political representation.[48]

However, such a great power can be easily abused. Sovereign constituent assemblies of this type are unpredictable; to put it in the words of Stephen Holmes, "a constituent assembly is a thermometer that drastically alters the temperature of the room" (1995: 156). In the absence of a plurality of political forces capable of establishing internal mechanisms of constraint, constituent assemblies are likely to disregard the voice of the opposition and minority groups and to usurp powers that have not been granted to them by an explicit mandate from the people. At the same time, they can be easily manipulated by a charismatic executive seeking to concentrate political power in his office and to advance a confrontational political agenda along the populist divide between friends and enemies. When this is the case, constituent assemblies become a vehicle for the authoritarian usurpation of the constituent power understood in terms of democratic pluralism.

The constitution making processes of Colombia and Venezuela analyzed in the following chapters share a great deal of similarities. Both constitutions emerged by means of a popular rupture with the strictly representative constitutional orders that preceded them. None of the constitutions existing at the time provided for the alternative of convening a constituent assembly in order to replace the constitutional regime. At the same time, both political regimes were characterized by the control of

[48] For an account of the ways in which the principle of popular sovereignty has been rendered irrelevant under modern representative governments, see Rosanvallon (2006). For an approach to this problem from the perspective of constitutional scholars, see the work of Loughlin (2007), Jaume (2007), and Möllers (2007) on the absence of real exercises of the people's constituent power in England, France, and Germany, respectively.

two traditional parties that were reluctant to reform the constitution through the legislature in order to widen the space of institutional political competition. Considerable popular mobilization and the pressure of public opinion were necessary in order to convene both constituent assemblies against the letter of the constitutions and the wishes of the traditional political class. Finally, given the dubious legality of this mechanism of constitutional change, the supreme courts of both countries were forced to step in and provide an answer to the viability of convening these constituent assemblies. In doing so, these courts affirmed the two basic tenets of populist jurisprudence, i.e. the distinction between constituent and constituted powers and the affirmation of a revolutionary hiatus in which the people, as the subject of the constituent power, are free to remake the constitutional order unobstructed by existing legality and institutions. As I will argue ahead, populist jurisprudence revealed its democratic face during the initial stages of these processes of constitution making through the courts' refusal to use existing legality as an obstacle to the legitimate aspirations for change of the citizens of both countries.

But the similarities between these two cases stop there. The commitment of these courts to populist jurisprudence produced very different consequences during the final stages of the constitution making processes. The reasons for this divergence in outcomes are to be found in the contrasting nature of the political crises that each country faced, the particular characteristics of the political actors pushing for change, the specific political dynamics that took place during the pre-assembly moment, and

the different degrees of pluralism and inclusion allowed by the rules for the composition of the constituent assemblies.[49]

Despite the widespread discontent of the citizens of Colombia with the traditional political elites of the time, the security crisis resulting from the inability of the state to respond to the attacks of different illegal armed organizations led to the adoption of an approach to constitutional change based on the ideas of compromise, inclusion, and pluralism. This approach to constitutional change was first made evident by the multiparty negotiations that preceded the convocation of the assembly and that gave place to a set of concerted rules on how the process was to be conducted. The most important result of these pre-assembly negotiations was the selection of an electoral rule that gave place to a highly inclusive and pluralistic body of extraordinary representatives.[50]

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[49] The following chapters accept the methodological premises suggested by Bejarano and Segura for the study of constitution making processes. The analysis of the constitution making processes of Colombia and Venezuela developed in these chapters begins with an interpretation of their preparatory phases, paying considerable attention to the causes of the political crises from which they sprang. Then, the analysis moves to the constituent moment proper, i.e. the decision-making stage in which the dynamics between the different participants are shaped in accordance with the rules selected for the process and the agendas that each party brings to the table. Finally, the analysis concludes with the description of the results of each constitution making process and with an assessment of their democratic credentials based on the level of political inclusion that they produce and the degree to which they manage to make room for political contestation (Bejarano & Segura 2013). The chapter on Venezuela will confirm their main argument, i.e. that participatory processes of popular constitution making do not necessarily contribute to the improvement of democratic regimes. However, the approach that I follow in these chapters goes beyond their adherence to strict political variables in order to highlight the importance of legality and judicial institutions for the purpose of gaining a fuller image of constitution making processes and their contribution to democracy. I have briefly developed this point in my review of Gabriel Negretto's recent work on institutional change (2013), which Bejarano and Segura follow closely. See, Figueroa (2014: 322-323).

[50] According to Urbinati & Warren, "the central feature of democratic legitimacy, of course, resides in the electoral system" (2008: 398). The process of defining the electoral rule for the conformation of a constituent assembly defines to a great extent the outcomes of a constitution making process. It determines the degree to which the plurality of interests and ideas that compose a given political society will eventually be included in the process of constituting the will of people.

Another important outcome of the pre-assembly moment was the decision of the parties to convene an *Asamblea Constitucional*, i.e. an assembly with limited powers under the supervision of the Supreme Court. But, surprisingly, the Supreme Court rejected this last possibility and decided to stay away from the constitution making process. In line with the basic tenets of populist jurisprudence, the court claimed that the assembly was absolutely sovereign and that the court, as the constituted power that it was, could not review the actions of the assembly. In this way, the court surrendered any claims to its legitimate participation during such an important constitutional moment. This, I will argue, was a politically irresponsible move that was not warranted by the circumstances, given the disposition of most political actors to subject the actions of the assembly to the control of the court. The Supreme Court missed an excellent opportunity to set an example for the Latin American region regarding the possibility of using the principle of legality during the process of enacting substantial democratic changes to the constitutional regime. Luckily, the risks generated by the refusal of the court to be an active participant in the process were counteracted, though not fully, both by the internal mechanisms of constraint that resulted from the absence of a single dominant party within the assembly and by the moderate style of leadership of the president.

Things were very different in Venezuela. Once the Supreme Court cleared the way for the conformation of a constituent assembly, the recently elected president took complete control over the conduction of the constitution making process. He unilaterally established the electoral rules by which the process was to move forward and managed to translate his great popularity into a landslide victory that resulted in

the conformation of a constituent assembly under the control of a single dominant party. The populist logic of exclusion prevailed throughout the entire process. The president of Venezuela and his political movement were entirely committed to the ousting from the positions of power of a political elite that was considered corrupt and that had imposed on the people the hardships of a neoliberal economic agenda.

Confrontation, then, and not compromise, was the guiding force behind a project of constitutional change that placed the social question at the center of the political agenda and for which the principles of legality, the separation of powers, and political pluralism were nothing more than illegitimate obstacles to the true expression of the people's constituent power. And though the Supreme Court tried to intervene with the intention of checking the abusive instrumentalization of the assembly, its initial commitment to populist jurisprudence left it in a position of political weakness before the populist coalition that was pushing for change. After all, it had previously recognized the basic tenets of the revolutionary hiatus and the inability of the constituted powers to limit the acts of the popular sovereign. In a few words, the court shot itself in the foot, and became incapable of controlling the authoritarian tendencies that the process of constitution making was taking.

Through detailed analysis of the constitution making processes of Colombia and Venezuela, the following chapters will be an attempt to show how populist jurisprudence can be used as an instrument for the democratic opening of constitutional regimes that have become impervious to legitimate demands for change, mostly because of the establishment of highly restrictive rules of constitutional amendment that give to the traditional political class the monopoly

over the power to alter the fundamental characteristics of the political regime. However, there is a price to pay: the initial use of populist jurisprudence for the democratic opening of the constitutional regime will eventually limit the ability of the courts to check the possible democratic transgressions in which constituent assemblies may incur. That is, populist jurisprudence is likely to push the courts to a position of political irrelevance throughout the process of constitution making, leaving the political space entirely unprotected against possible authoritarian deviations.

CHAPTER 3

POPULIST JURISPRUDENCE AND CONSTITUTION MAKING IN COLOMBIA

1. State Failure and the Crisis of Political Representation

The constitution making process that led to the adoption of the Colombian Constitution of 1991 is the result of a political crisis originated by the general failure of the state to fulfill its basic functions (Negretto 2013: 167). The state was unable to deal with three of the most persistent structural problems of Colombia: first, a situation of endemic violence and insecurity; second, the democratic deficit of the political regime; and, third, a political culture indulgent toward illegality (García Villegas 2009: 19). The inability of the state to deal with these problems gave place to

a profound crisis of legitimacy that Colombian political society tried to solve by means of a popular constitution making process.[51]

Through most of the second half of the twentieth century Colombia was plagued by a variety of illegal armed organizations that made evident the inability of the state to monopolize the means of violence and to create the necessary conditions for the establishment of a functioning democracy. The state was put against the wall by a triple challenge: first, the need to bring to an end the revolutionary violence of leftist guerrillas that had been active since the 1960's; second, the emergence of paramilitary organizations that arose as a reaction of different sectors of society, especially landlords, frustrated by the failure of the state to keep the guerillas in check; and, third, the increasing capacity of the drug cartels to corrupt the political class and to terrorize Colombian society in their fight against extradition (see Palacio 2003). The security threat generated by this triple challenge goes a long way towards explaining the perception of general political crisis that prevailed at the time. However, the democratic deficit of the political regime came to be seen as the underlying cause of the failures of the state.

The political crisis that Colombia was facing at the time was intimately related to the origins of the regime in a pacted transition (Bejarano 2011: 5). In 1957, the Liberal and Conservative parties came together to put an end to the short-lived

[51] Of course, this interpretation of the constitution making process is not always accepted. For instance, Consuelo Ahumada claims that the constitution making process was actually the result of a well-crafted political strategy on the part of an emerging neoliberal elite seeking to circumvent the legislature and the traditional political class in order to implement their political and economic projects. See, Ahumada (1996). However, this seems to be a problematic interpretation of the facts. On the inadequacy of interpreting the Colombian constitution making process as the result of a neoliberal strategy to achieve political and economic hegemony, see Figueroa (2012a) and Rodríguez (2009).

military dictatorship of Rojas Pinilla. By means of a consociational agreement known as the *Frente Nacional*, these two traditional parties tried to bring to a close a long period of bipartisan political violence and to restore the tradition of civilian rule at the heart of the country's political identity.[52] In this sense, the National Front was, first, a political agreement aiming at a democratic transition and, second, a peace accord between two traditional political parties with a long history of violent confrontation.[53]

The National Front successfully achieved these two objectives. However, it also planted the seeds of a new cycle of violence that persists even to this day. Despite restoring civilian rule, the National Front was a democracy-restraining pact. It was an "exclusionary, restrictive, and inflexible" agreement between two "elitist, patronage oriented, and internally mobilized" political parties that were highly distrustful of each other. The idea behind it was to institutionalize a system of mutual vetoes and power-sharing mechanisms in order to avoid future episodes of bipartisan violence (Bejarano 2011: 72; 125-126). The result, however, was the constitutional entrenchment of a series of mechanisms of exclusion that not only prevented other political forces from participating in electoral competitions but that also provided for

[52] The history of Colombian democratic politics is, to a certain extent, exceptional when compared to other Latin American countries. Despite the presence of constant political violence, Colombia has also had a long and relatively stable tradition of republican politics and electoral competition. Contrary to most Latin American countries, the coup d'état has not been the mechanism of choice for those who seek political power (see Posada Carbó 2006).

[53] There was a third central objective of the National Front that most commentators tend to forget: the National Front was also a serious reformist attempt to implement a developmental program that was meant to improve the life condition of the citizens and to modernize the governmental apparatus. On these three objectives of the National Front, see Gutiérrez (2007: 81-86). For a succinct description of the regime of the National Front from the perspective of constitutional history, see Plazas Vega (2010).

a complete cooptation of the judiciary by the two traditional parties (see Gutiérrez 2007: 91). In the words of Ana María Bejarano, "the lack of representation of the left within the parameters of the legally recognized party system simply threw the deep ideological cleavage among the different sectors of Colombian society outside the boundaries of the system, thus creating the opportunity for the production and reproduction of an armed insurgency on the left" (2011: 214).

The regime of the National Front, therefore, was highly exclusionary. But the crisis of representation generated by the exclusion of the left was also reinforced by the clientelist nature of the traditional parties and their inability to advance the reforms that the country needed. Prior to 1991, the political regime was characterized by a highly personalistic electoral system that did not offer to legislators the necessary political incentives to advance overarching institutional reforms at the national level. Legislators were elected not for their support to national platforms but for their capacity to recruit the votes of particular social groups within their own territorial districts. The lack of a national constituency gave place to a system of political incentives that moved the legislators to cater to the narrow interests of the reduced clienteles that elected them instead of aligning themselves with the non-territorial and more general concerns of the citizens.[54]

The inner fragmentation of political parties that resulted from the clientelist dynamics of electoral competition gave place to a phenomenon of "dual representation" that greatly contributed to the eventual "hypertrophy of presidential

[54] On the need to rethink electoral constituencies in order to make room for ideas and discourses that are not exclusively territorially defined, see Urbinati & Warren (2008: 396-397).

power". This perverse model of political representation consists, on the one hand, on the transformation of the legislative power into an expression of purely segmented and particularistic interests, while, on the other hand, burdening the executive power with the responsibility to represent by itself the more general and national interests of the population (see Pizarro Leongómez 2006). The executive power, elected from a single nationwide constituency, was left alone striving against the legislature for the enactment of substantial reforms that usually challenged the interests of local and regional power-holders (see Nielson & Shugart 1999; Archer & Shugart 1997).

The executive, however, was not strong enough to advance its national agenda against the obstructions of a fragmented legislature and divided political parties. The lack of coordination between these two branches of power gave place to another of the fundamental characteristics of the political regime that preceded the Constitution of 1991, i.e. the abuse of emergency powers by the executive. For a period of several decades, Colombia was constantly ruled through emergency decrees.[55] The executive not only had to overcome the obstacles of the system of dual representation in order to advance the modernizing agenda of the National Front; the greatest challenge was to contain the security threat that resulted from the left's violent rejection of the traditional parties' monopoly on political power. The National Front came to an end in 1974 without being able to control the sources of revolutionary violence. And by the 1980's the situation only worsened. The emergence of paramilitary organizations and the consolidation of an all-out war between the state and the drug cartels gave

[55] According to Rodrigo Uprimny, "Colombia was under state of siege for more than 30 of the 42 years from 1949 to 1991" (2003: 51).

place to a long "Hobbesian Night" that greatly contributed to the radicalization of this tendency (see Barreto 2011b). With the normalization of emergency measures, the weakness of the Colombian state was no longer in doubt: not only had the executive proven unable to control violence and political corruption; its abuse of the state of emergency also contributed to the deterioration of the capacity of judicial institutions to protect human rights and enforce the rule of law (see Cepeda 2004; Uprimny 2003).

Despite different attempts to avert the political crisis by means of substantial reforms of the political system, a combination of factors revealed the inflexible character of Colombia's representative regime. To a great extent, this inflexibility of the regime can be understood as a result of the narrow and restrictive conception of popular sovereignty at the heart of the Constitution of 1886, which allowed an important constitutional scholar to define the political regime of the time as a "democracy without the people". According to Valencia Villa, sovereignty under the previous Colombian constitution was located in one institution alone, Congress, and its exercise was out of reach to the people. Article 2 was the cornerstone of Colombia's representative democracy: sovereignty belonged exclusively to the nation, from which all public powers emerged, and it could only be exercised in accordance with the constitution.[56] That is, sovereignty did not reside with the people understood as a historical and sociological reality with the capacity to act by itself, but with the nation, a juridical abstraction that can only act through instances of legal and political

[56] Artículo 2, Constitución de la República de Colombia de 1886: "La soberanía reside esencial y exclusivamente en la Nación, y de ella emanan los poderes públicos, que se ejercerán en los términos que esta Constitución establece".

mediation.[57] As a consequence of this principle, Article 105 established that Congress was the representative of the nation as a whole and that its members were not responsible to anyone in particular for their decisions.[58] They were not legally forced to assume a responsive attitude toward popular demands, a principle that was reinforced by Article 179, according to which the vote of the citizens does not impose any obligations or mandates on those elected to public office.[59] Finally, the full realization of this democracy without the people came with Article 218, according to which the Constitution was to be amended only by Congress after a series of debates in both of its chambers.[60] No other alternative for the amendment of the Constitution was established; mechanisms of direct democracy such as plebiscites and referenda had no place within such a regime, and the same was the case regarding the possibility to convene a constituent assembly. This restrictive conception of sovereignty led Valencia Villa to claim that the Constitution of 1886 imposed on the people of

[57] On the ambiguity of the concept of sovereignty under the Constitution of 1886 in Colombia, see Barreto (2011a: 208-224).

[58] Artículo 105, Constitución de la República de Colombia de 1886: "Los individuos de una y otra Cámara representan a la Nación entera, y deberán votar consultando únicamente la justicia y el bien común".

[59] Artículo 179, Constitución de la República de Colombia de 1886: "El sufragio se ejerce como función constitucional. El que sufraga o elige no impone obligaciones al candidato, ni confiere mandato al funcionario electo".

[60] Artículo 218, Constitución de la República de Colombia de 1886: "La Constitución, salvo lo que en materia de votación ella dispone en otros artículos, sólo podrá ser reformada por un Acto Legislativo, discutido primeramente y aprobado por el Congreso en sus sesiones ordinarias; publicado por el Gobierno, para su examen definitivo en la siguiente legislatura ordinaria; por ésta nuevamente debatido, y, últimamente, aprobado por la mayoría absoluta de los individuos que componen cada Cámara. Si el Gobierno no publicare oportunamente el proyecto de Acto Legislativo, lo hará el Presidente del Congreso".

Colombia the "enlightened despotism of national representation" (1981: 14-22). The people, as it turns out, were nowhere to be seen.[61]

In several occasions, the particularistic dynamics that political clientelism imposed on the functioning of the legislative power ended up obstructing the reformist initiatives of the executive. But during those moments in which legislature managed to get in line with the executive's initiatives, the Supreme Court made use of its powers of judicial review in order to declare the unconstitutionality of the reforms and protect in that way its institutional prerogatives.[62] Popular frustration with the inflexibility of the regime and the stubborn protection of the status quo by the legislature and the judiciary reached its peak when the capacity of the drug cartels to infiltrate political institutions and terrorize Colombian society became evident. Through violent means and the establishment of illegal alliances with the political class, the drug cartels managed to influence the legislative activity of Congress and to prevent the approval of the policies suggested by the executive to confront their activities, e.g. extradition (see Sarabia Better 2003: 57-59). Congress, for these reasons, was seen as a totally ineffective and corrupt institution; the judiciary was also the target of popular scorn due to its reluctance to let go of its corporative privileges; finally, the executive had never looked so weak, especially after the assassination of three presidential candidates during the years of 1989 and 1990.

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[61] For an additional account on the history of popular sovereignty and the constituent power in Colombia, see Sáchica (1985).

[62] For an account of the opposition of the court to the constituent assembly proposed by President López, see Cajas Sarria (2008: 71). On the history of political reforms during the period that went from the establishment of the National Front to the adoption of the Constitution of 1991, see Sarabia Better (2003). On the general discomfort with the Supreme Court's attempt to establish a "government by the judges", see Buenahora (1991).

The extent of the political crisis that these events revealed to Colombian political society ignited a period of popular mobilization that condemned the inability of the political class to tackle the three structural problems of the country. Public opinion agreed on the need to bypass the restrictions imposed by the Constitution of 1886 on the direct exercise of the people's constituent power now that it was obvious to many that the strategy of piecemeal institutional reformism favored by the political representatives had proven to be a failure.[63] As a consequence of the situation of political unrest that the country was experiencing, a social movement led by students opened up the way for a constitution making process in which the executive and judicial powers, contrary to the legislature's self-interested defense of the status quo, assumed a leading role as supporters of a more robust conception of popular sovereignty.[64]

Three things were clear to the students: first, that Congress was a corrupt institution; second, that the constitutional limitations to the use of plebiscites and referenda were inadequate for a democracy; and, third, that there was a need for a constitutional assembly in order to reform the Constitution of 1886 (Lemaitre 2009: 90-91). The political crisis that Colombia was facing required the adoption of a more participatory conception of democracy without which the state could not regain its

[63] On the use of constitutional reformism as a way of coping with popular unrest while preserving the status quo, see Valencia Villa (2010).

[64] On the role of the student movement during the constitution making process, see Buenahora (1991); Carrillo (2005); Dugas (2001); Lemaitre (2009); Torres (2007). As has already been shown, the impetus for reform was always present in the agenda of the executive power. The student movement cannot be seen as the sole, or even the main, force behind the constitution making process that took place in Colombia. However, it provided the necessary spark for its initiation and contributed to some of the popular undertones of the process; it was a clear manifestation of the struggle against exclusion that took place in some countries of the Andes during the 1990's (see Segura & Bejarano 2004).

legitimacy. The student movement came up with the idea of casting an additional ballot during the elections that were taking place on March 11, 1990. This extra ballot gave its name to the movement, *La Séptima Papeleta*, since Colombians were voting for six different public offices and one ballot was provided for each of them. During that Sunday, a significant number of citizens supported the students' initiative[65] and said 'yes' to the proposal of convening a popular and pluralistic *constitutional* assembly with the specific mandate to reform, not to replace, the Constitution of 1886 along the lines of a more robust participatory conception of democracy.[66]

In order to force the electoral authorities to take these votes into consideration, the students invoked Article 2 of the Constitution of 1886 and interpreted it in a way that challenged the restrictive conception of sovereignty that attributed to Congress the exclusive monopoly of the power to reform the fundamental laws of the regime. The students no longer identified the subject of the constituent power as a fictional entity that can only act through instances of political and legal mediation; instead, they adopted a popular interpretation of the nation. From this perspective, the citizens of Colombia had the power to act in an unmediated

[65] Given the unofficial character of the ballot introduced by the supporters of the students' initiative, there are no definitive numbers on the voters' turnout. Some people say that around three million people introduced the ballot, while others claim that only over a million voted for the initiative. See, for instance, the discrepancy between Lemaitre (2009: 107) and Amador Villaneda (2005: 92).

[66] The original text of the Seventh Ballot read: "Para fortalecer la democracia participativa, vota por la convocatoria de una Asamblea Constitucional con representación de las fuerzas sociales, políticas y regionales de la nación, integrada democrática y popularmente para reformar la constitución política de Colombia?" It is important to notice that the objective of the student movement was not to convene a constituent but a constitutional assembly. That is, the idea was to reform the Constitution of 1886 by means of a popular assembly that the Constitution did not include as a valid mechanism of constitutional change. However, this was to be a *constitutional* assembly, i.e. it would be subjected to legal limitations and a clear mandate from the people. In this sense, the students and those who supported their initiative did not vote for a *constituent* assembly, i.e. an all-powerful body of extraordinary representatives with the capacity to act entirely unobstructed.

way in order to remake the constitutional regime in accordance to their will. With this extra-legal proposal to convene a constitutional assembly, the student movement gathered the support of reformist politicians from the traditional political parties, the most important newspapers of the country, the recently demobilized guerrilla of the M-19, and even that of the outlaws of FARC (Lemaitre 2009: 100-103). And, more importantly, it managed to transform the history of democratic politics in Colombia: it was the first time that the citizens of this country had made a call upon themselves to express their will as the righteous holders of the constituent power (see Valencia Villa 2010).

President Barco took the results as a political fact that could not be ignored. From Barco's perspective, the people had spoken in an unequivocal manner. Acting accordingly, he signed an Emergency Decree calling, this time officially, for a plebiscite that was to take place during the presidential elections of May of that same year, asking the citizens of Colombia if they wanted to convene a *constitutional* assembly.[67] The President had decided to support the students' initiative and now it was the turn for the Supreme Court to take a stand. However, the court's adoption of populist jurisprudence radically altered the nature of the constitution making process proposed by the student movement and supported by a plurality of political actors.

[67] Decreto 927 del 3 de Mayo de 1990. The text of the plebiscite convened by the President was exactly the same as that of the Seventh Ballot. The idea was to consult the citizens making sure that this time the electoral authorities would produce official results.

2. The Supreme Court and the Constitution Making Process

The constitution making process that gave place to the Colombian Constitution of 1991 cannot be easily classified. It does not exactly coincide with any of the two constitution making paradigms that are competing for primacy in the contemporary world, i.e. the populist-revolutionary model that characterizes most of the recent episodes of constitution making in Latin America and the post-sovereign model that emerged during Spain's democratic transition and that has been gradually perfected after the fall of the Communist regimes in Eastern Europe and during the South African constitution making process that followed the demise of the Apartheid regime.[68] In fact, the Colombian experience reveals an eclectic mixture of these two paradigms: even though most political actors seemed to agree on the need to pursue an inclusive, pluralistic, negotiated, and legally-bounded constitution making process very much in line with the post-sovereign paradigm, the Supreme Court's adoption of populist jurisprudence gave place to a legally revolutionary process characterized by an all-powerful constituent assembly, introducing in this way some of the elements of the populist-revolutionary model.

The constitutional order existing at the time required that the constitutionality of all the decrees produced by the executive under the state of emergency had to be

[68] Andrew Arato has touched upon the differences between these two models several times, though the emphasis of his work is on the theoretical development of the post-sovereign paradigm. See, for instance, Arato (2011: 324; 2009). On the constitution making episodes of Spain, the countries of Eastern Europe, and South Africa, see Bonime-Blanc (2010), Arato (2000), and Klug (2010), respectively. For a theoretical approach to constitutional change attempting to rescue the democratic potentials of the populist-revolutionary model, see the work of Colón Ríos (2012); Kalyvas (2005); and Pisarello (2014).

automatically reviewed by the Supreme Court. President Barco justified the constitutionality of the decree mentioned above adducing an intimate link between the plebiscite on the project to convene a constitutional assembly and the state of emergency under which the country was at the time. According to the executive, the plebiscite was a necessary measure for the solution of the political crisis of the country. Colombian institutions were no longer efficacious and the people had manifested their intention of reforming them outside of the rules of amendment established in the Constitution. But the stance taken by the Court before the constitutional status of Barco's emergency decree was highly ambivalent.[69]

The court embraced the argument of the executive and the students, but not wholeheartedly. The majority of the justices agreed on the existence of a close relationship between the plebiscite and the state of emergency. In their opinion, the state of emergency gave the president the faculty to organize a national plebiscite asking the citizens their opinion about the possibility of convening a constitutional assembly; at the same time, the president had the authority to command the Civil Registrar to provide official results on the plebiscite. According to the court, these extra-legal mechanisms were justified within the context of the country's acute political crisis: they were intended to provide new life to political institutions and to strengthen and relegitimize the state. The court interpreted the Seventh Ballot as a political fact that could not be ignored, a clear manifestation of the people's will to recover their constituent powers. The Supreme Court could not afford to take a legalistic stand before the proposals of the students and the executive. The incapacity

[69] Corte Suprema de Justicia de Colombia, Sentencia No. 59 del 24 de Mayo de 1990.

of existing institutions to respond to the demands for change emerging from all corners of political society suggested to the court a reformulation of the role of the judge: the interpretation of the executive's Emergency Decree required from the court a serious consideration of Colombia's social and historical reality, not a simple syllogistic confrontation between the content of the decree and the text of the constitution. In situations of crisis, so the argument went, the constituent power of the people can be activated against the rules of amendment provided by the constitution. The executive's decree was meant to facilitate this exercise of popular sovereignty.[70] In this way, populist jurisprudence made a timid initial entrance.

However, the Supreme Court did not uphold the executive's decree on these grounds. They were mere *obiter dicta*, i.e. non-binding opinions that are offered only to support the main argument of the court. Instead, the majority of the justices argued that the executive was not actually convening an assembly, at least not yet. He was only commanding the electoral authorities to count some ballots that could by no means produce any legal effects. The plebiscite was only a means for consulting the state of public opinion, not a mechanism through which the constitution was to be amended. Furthermore, they maintained that the state of emergency did not do away with the authority of the constitution, so any future decisions concerning the integrity

[70] The Colombian Supreme Court was turning away from traditional legal formalism and was now embracing a sociological jurisprudence that was more responsive to political change (Buenahora 1991: 152). Populist jurisprudence, at least in those cases in which the rules of amendment do not provide for popular mechanisms of constitutional change, seems to require a more sociological approach to legal interpretation by the judges. This is the case because they no longer have legal criteria at their disposal in order to identify a series of facts that they have to match with the letter of the law. Popular episodes of constitutional change like the ones that took place in Colombia and Venezuela defy the text of the constitution and bring to the attention of the judges the actions of an entity that cannot be seen or clearly identified, i.e. the people.

of the Basic Law would have to be adopted in accordance with its rules of amendment. The court was walking a very thin line trying to balance its political convictions with the requirements of the constitution. It upheld the normative character of the constitution stating that its rules of amendment had to be respected, but at the same time it made appeals to the principle of popular sovereignty in order to give strength to the citizens' demands for change. The Court was paving the way for a constituent assembly while trying to get to that end by remaining under the rule of law.

The plebiscite took place on May 27, 1990, the same day César Gaviria was elected as the new President of Colombia. Riding on the support of the people to the assembly[71], the new President signed another decree, again under the powers derived from the state of emergency, but this time calling for the election of the members of the assembly.[72] This decree was the result of a multiparty negotiation between the most important political actors of the time: Liberals, Conservatives, the MSN (a dissident faction of the Conservative Party), and the AD M-19 (a former guerrilla organization with a nationalist, populist, and socialist inclination that had recently deposed its arms).[73] The new executive insisted on the same thesis as before: this norm was

[71] On that day, 5.891.117 citizens expressed their opinion through the polls. The project to convene a Constitutional Assembly was approved by almost 89% of the voters while not even 4% of them opposed it. See, Santos Pérez & Ibeas Miguel (1995: 359).

[72] Decreto 1926 del 24 de Agosto de 1990.

[73] President Gaviria tried to bring to the negotiation process most of the different sectors of political society but failed to include the representatives of the UP (Unión Patriótica), a left-wing party intimately linked to the guerilla organization of the FARC and that gave its support to the constitution making process and whose presidential candidate had been recently murdered (Buenahora 1991: 184). For an interpretation of this arrangement between the parties as a severe blow to the democratic impetus of the process and a return to the consociational politics of the past, see Amador Villaneda

strictly related to the state of affairs of the country. It established the way in which the elections were to be conducted, the conditions that the candidates had to meet, the duration of the assembly, the topics it should address, and the limitations it should respect. The decree specifically established that the text of the reform adopted by the assembly had to be reviewed by the Supreme Court in order to verify its conformity with the mandate that the people had given it.

The government was hoping to use this concerted decree as the basic law under which the constitutional assembly would have to carry out its mission. It clearly established that the assembly could not change the term of the recently elected members of the legislature, in which the Liberal party – Gaviria's party – had a comfortable majority.[74] And though the leaders of both traditional parties in the legislature were opposed to the idea of a constitutional assembly that they rightly considered to be a threat to what they had managed to gain in the last elections, they had to capitulate given the strength that the initiative had taken. They could no longer afford to remain distant from popular demands.[75]

When the time came for the Supreme Court's review of this new emergency decree, the justices came up with a decision that surpassed the expectations of most

(2005). For an account of the historical origins and ambivalent ideological commitments of the M-19, see León Palacios (2012).

[74] The Liberal Party won 57,9% of the Senate and 59,8% of the lower chamber. The Conservative Party managed to remain as the second political force in the legislature with 33,3% of the Senate's seats and 31,2% of the seats of the lower chamber. See, Santos Pérez & Ibeas Miguel (1995: 347-348).

[75] For a clearer understanding of the ambivalence of the leaders of both the Liberal and Conservative Parties regarding the Constitutional Assembly and the possibility of losing their seats in Congress, see Humberto de la Calle (2004: Ch. 8 and Ch. 12).

political actors involved in the constitution making process.[76] The court assumed a paradoxical position: it was no longer the guardian of the constitution; on the contrary, it became its undertaker. It was evident that the court did not want to oppose the popular sentiment of the time. Popular opinion was overwhelmingly on the side of the constitutional assembly and the court felt the pressure. Consequently, the court completely forgot about its previous warnings regarding the need to respect the rules of amendment established in the Constitution of 1886 and decided to fully embrace populist jurisprudence.

The court accepted the justification that the executive had offered of the emergency decree: the constitutional assembly was a necessary means for the reformation of the country's chronically inefficacious political institutions. However, the court needed to come up with a sound argument in order to circumvent the restrictions that the rules of amendment existing at the time imposed on the prospects of popular constitutional change. The majority of the justices offered two types of arguments for this purpose. First, following the work of Hans Kelsen, the court claimed that the Constitution of 1886 was no longer valid given its total lack of efficacy to solve the political crisis of the country.[77] This lack of efficacy justified an exceptional use of the powers of the executive under the state of emergency, this time not as a mechanism for the protection of existing institutions but as a means to their transformation. This argument was clearly shocking to the justices that delivered the

[76] Corte Suprema de Justicia de Colombia, Sentencia No. 138 del 9 de Octubre de 1990.

[77] "A norm is considered to be valid only on the condition that it belongs to a system of norms, to an order which, on the whole, is efficacious. Thus, efficacy is a condition of validity; a condition, not the reason of validity. A norm is not valid because it is efficacious; it is valid if the order to which it belongs is, on the whole, efficacious" (Kelsen 2007b: 42).

minority opinion: they feared that under this expansion of emergency powers the constitution would be turned into a piece of paper with no authority to restrict the actions of the executive during such an unstable moment as a constitution making process.

However, it was the second argument provided by the majority of the justices that produced the most important consequences. The influence of the work of E.J. Sieyès and Carl Schmitt over the justices' conception of democratic legitimacy and understanding of the constituent power became evident at this point. The majority of the justices relied on the ambiguity of the principle of national sovereignty established in Article 2 of the Constitution of 1886 and gave it a populist twist that went beyond the idea of popular sovereignty sponsored by most supporters of the constitution making process. Through the adoption of populist jurisprudence the majority of the justices were able to claim that the will of the people cannot be subjected to any constitutional limitations. Based on this fundamental assumption, the court dismissed the authority of Article 218 and sanctioned the capacity of the citizens of Colombia to bypass the constitutional rules of amendment.

This is clearly what the government and the students were expecting from the court. But the justices in the majority went even further. In line with the two basic tenets of populist jurisprudence, the court declared unconstitutional the limitations included in the executive's emergency decree regarding the topics that the assembly could discuss once convened. They considered the assembly to be the representative of the people in their condition as subjects of the constituent power; for this reason, no restrictions of any kind could be imposed on the actions of the assembly.

Following this argument, the Supreme Court struck down the decree's provision that subjected the actions of the assembly to its control, giving away its own powers of judicial review. From now on, Colombia was to have an all-powerful *constituent* assembly. And, of course, this attribution of full sovereignty that the court granted to the assembly took the president by surprise. The assembly, he thought, could get too powerful and, therefore, dangerous without these restrictions (Gaviria 2004: 22). Both traditional parties had much to lose now that the control they had over the legislature was being jeopardized. The assembly, as a completely sovereign body, had the power to interfere with the functioning of the legislature and all the other constituted powers. From this moment on, the implementation of the political agreement consigned in the text of the emergency decree could not be enforced by legal means.

In this way, the Supreme Court's adoption of populist jurisprudence provided the final blow to the inflexible political regime produced by the Constitution of 1886 and to the control that the traditional parties managed to have over all positions of political power in the country. However, this was an unfortunate decision. It is one thing to rely on a robust conception of the principle of popular sovereignty in order to open the political regime to the participation of its citizens during important constitutional moments, as the court did by refusing to enforce the restrictive rules of amendment that existed at the time; it is an entirely different thing to use the idea of the people's constituent power to rule out the possibility of conducting a process of substantive constitutional change subjected to clear limitations that a judicial body can enforce. Sieyès himself accepted the possibility of limiting the power of

constituent assemblies in accordance to the mandate that they receive from the people. The Colombian Supreme Court, however, took away from the citizens the possibility to decide what kind of process of constitutional change they wanted.

On December 9, 1990, the citizens of Colombia came back to the voting polls to elect the members of the constituent assembly. But on that day they were also called to express their opinion about the political agreement that the executive included in the emergency decree reviewed by the court. According to the plans made by the executive in agreement with a plurality of political parties, the citizens could choose between two different ballots: they could express their support to the conditions established in the political agreement with the intention of limiting the powers of the assembly, and in that case proceed to elect its members, or they could reject the conformation of an assembly under the terms of the political agreement. However, since the court declared unconstitutional all those aspects of the political agreement aiming at the limitation of the powers of the assembly, the citizens only had the chance to express their approval or rejection of the constituent assembly in general and of the electoral bases for its composition. In the end, it was the court's commitment to populist jurisprudence, not the citizens through their vote, which actually decided what kind of assembly there was to be.

By the end of this initial phase all conditions were set for the possible emergence of a process along the lines of the populist-revolutionary paradigm of constitution making and the risks that it entails. Since the court had done away with all external constraints to the actions of the assembly, the only way in which this sovereign body

of extraordinary representatives could be kept in check against possible authoritarian deviations was through the establishment of the internal mechanisms of constraint that only a well-crafted electoral rule can provide. In this regard, the political agreement consigned in the executive's emergency decree was a success. The plurality of political parties that negotiated the political agreement came together around an electoral formula that provided to the emerging parties a fair chance to compete against the electoral machinery of the Liberals and Conservatives. The assembly was to be composed by seventy delegates elected from a single, national constituency in accordance with the system of proportional representation.[78] The Liberal party remained true to its clientelist style of politics and fragmented itself into more than forty electoral tickets designed to cater to their regional clienteles. The Conservative party followed a similar strategy, dividing itself into three electoral tickets. The emerging parties of the AD M-19 and the MSN refused to follow this electoral strategy and offered to the citizens a single and coherent electoral ticket. Given the national character of the electoral constituency, they were able to gather the support of all those citizens across Colombia's territory identified with their platform.

[78] According to Nadia Urbinati, "theoretically, proportional representation fulfills the democratic principles of equal political opportunity and control better than a majoritarian electoral system (single-member territorial constituency). As some of its earliest theorists argued, proportional representation better safeguards those principles because it resists the misleading identification of the 'right of representation' with the 'right of decision' that the majoritarian system implies. Whereas the majority retains the latter, the whole citizenry should not be deprived of the former" (Urbinati 2000: 761). For a similar argument, see Kelsen (2002).

The turnout at the polls for the election of the members of the assembly was low, lower than in the previous legislative elections.[79] One possible explanation for this low turnout is to be found in the reluctance of the traditional political class to support the constitution making process. Fearful of the threat that the assembly posed to their recent electoral gains, traditional politicians refused to mobilize their political clienteles. From a different perspective, some analysts have claimed that such a low turnout can be explained by the discomfort that important sectors of the population felt towards the government and political parties for the displacement of the popular bases that initially supported the process.[80] However, the results of the elections made possible the conformation of a pluralistic and inclusive constituent assembly, a fact that contributed to regain some of the democratic legitimacy that was lost by the limited role that the popular forces played during this second stage of the process.

The most important consequence of the electoral rule adopted for the conformation of the assembly was the absence of a single and dominant political force, which greatly contributed to avoid the usurpation of the constituent power by a majoritarian faction pretending to speak on behalf of the whole. The Liberal Party managed to win 35,7% of the delegates; AD M-19 came second with 27,1%; the dissident faction of the Conservative Party, MSN, won 15,7% of the seats; and the

[79] While the turnout to the legislative elections of March was of approximately 7.600.000 voters, only 3.710.500 citizens elected delegates to the constituent assembly. See, Santos Pérez & Ibeas Miguel (1995: 365).

[80] Oscar Mejía, for instance, makes a strong argument about how the leadership and control of the executive and the political parties ended up diminishing the sovereignty of the assembly and, therefore, its democratic legitimacy (2005: 205).

Conservatives, through its different electoral tickets, came fourth with 12,8% of the delegates. Also, a variety of minor political parties managed to elect a few delegates, adding to the pluralism and inclusiveness of the assembly the voice of different sectors of political society such as Christians, Indigenous groups, and minoritarian political movements from the left of the political spectrum such as the UP (see Santos Pérez & Ibeas Miguel 1995: 366). Finally, four representatives of recently demobilized guerrilla organizations were granted voice within the assembly, though, since they were not elected, they did not have the right to vote. These results made it impossible for the Liberal Party, the leading political force within the assembly, to unilaterally control the actions of this sovereign body. Confrontation, therefore, was not a sound political strategy; instead, a logic of negotiation and compromise became necessary.[81] The tripartite presidency of the constituent assembly became a clear symbol of this logic of compromise and negotiation.

The delegates, however, could not resist the temptation to declare the sovereign character of the assembly, even though it was not clear that such was the will of the citizens that elected them. The Supreme Court had decided beforehand that the assembly was the organ of the people's unlimited constituent power and that it was responsible before none of the constituted powers. Luckily, the balance of power that resulted from the plural composition of the assembly prevented the emergence of authoritarian impositions like the ones that characterized the actions of the Venezuelan constituent assembly, as will be shown in the next chapter. But the

[81] On the dynamics of compromise and negotiation that characterized the Colombian constitution making process and the importance that the lack of a single dominant force had in this regard, see the work of Bejarano & Segura (2013); Negretto (2013: Ch. 6); and Segura & Bejarano (2004).

Colombian assembly did incur in some abuses of power. A first sign of the authoritarian temptation was the initial confrontation between the assembly and highest administrative court of the country. This court admitted a lawsuit against the bylaws adopted by the constituent assembly to regulate its internal procedures and decided to provisionally suspend one of its provisions. The assembly promptly reacted against the administrative court, rejecting all interference by the constituted powers with its actions. Following the Supreme Court's decision declaring its absolute sovereignty, the assembly proclaimed its first constituent act. In it, the assembly established, first, that the bylaws recently adopted had a constitutional status and, second, that none of the actions of the assembly were subject to judicial review.[82] This was an initial symbolic gesture of no great consequence, since it only reinforced what the Supreme Court had already established. However, the assembly went even further when it decided to revoke the mandate of Congress.

The members of the AD M-19 and the MSN did not want the recently elected legislature to assume the task of implementing the new constitution, raising the concern of both traditional parties. This deadlock was overcome by another agreement between politicians. The Liberal Party agreed to revoke the mandate of Congress on the condition that the AD M-19 and the MSN accepted to impose on all members of the assembly the prohibition of running as candidates for the next parliamentary elections.[83] In this way, the traditional parties could put aside the fear

[82] Asamblea Nacional Constituyente, Acto Constituyente No. 1, Artículos 1-2. *Gaceta Constitucional* No. 69.

[83] Constitución Política de Colombia de 1991, Artículos transitorios 1, 2, 3.

of losing more of their power against these new rising political forces and their competitors could rest assure that a least a different legislature would implement the constitution.[84] But this significant incident made evident the authoritarian potentials of an all-powerful constituent assembly.

By means of a transitory constitutional regime, the assembly created a special legislative commission, popularly known as *El Congresito*, composed of 36 members selected by the assembly itself. This special legislative commission was charged with the task of approving or rejecting the legislative powers granted to the executive under the same transitory regime for the purpose of implementing some of the key institutional developments adopted by the assembly.[85] It was evident that the dissolution of Congress could eventually create an opportunity for the executive's abuse of the extraordinary powers granted to him through the transitory regime approved by the assembly. However, the special legislative commission was established following the same logic of political pluralism that characterized the constituent assembly, making it more difficult for President Gaviria to abuse his powers. At the same time, the moderation that characterized Gaviria's leadership throughout the constitution making process put these worries to rest.[86] But

[84] The Conservative Party did not agree to such arrangement. Its leader, former President Pastrana, resigned his position as delegate in the constituent assembly in protest, claiming that the assembly was abusing its powers and usurping those of the legislature. On this incident, see the work of Humberto de la Calle (2004).

[85] Constitución Política de Colombia de 1991, Artículo transitorio 6. For a brief historical account of this special legislative commission, see Calderón (2003). See also Santos Pérez & Ibeas Miguel (1995: 370-371).

[86] For a different account describing Gaviria's leadership during the constitution making process as an example of neoliberal authoritarianism, see Ahumada (1996).

unfortunately for the emerging political forces of AD M-19 and the MSN, their brief indulgence with the authoritarian temptation of revoking the mandate of the legislature, which had actually been elected by a greater number of citizens than the assembly itself, ended up backfiring, as it will be shown ahead.

With the exception of these two incidents in which the assembly came close to the authoritarian tendencies that usually result from the adoption of the populist-revolutionary model of constitution making, the Supreme Court's decision to remove all the external constraints on the actions of the assembly was mostly irrelevant. This was the case because the plural composition of the assembly that resulted from the adoption of a concerted electoral formula gave place to a complex logic of compromise and negotiation that imposed important internal mechanisms of constraint upon the assembly. To a great extent, the moderation that characterized the actions of all the participants in the constitution making process made it possible to tame the strengths of the constituent assembly, leading it towards the adoption of a new constitutional regime endowed with great levels of democratic legitimacy.

3. A Relatively Successful Democratic Experience

Despite the low popular support that the constitution making process had during its latest stages, especially since the final text of the constitution was not subjected to popular approval, Colombia's constituent assembly did manage to produce a highly consensual constitution along the lines of the mandate that was given to it by the citizens. This mandate was clear in the text of the Seventh Ballot: the will of the people

during those exceptional political times was to expand the sources of democratic legitimacy of the political regime by means of an extraordinary body of representatives composed in a pluralist, inclusive, and popular manner. In this regard, the Supreme Court played a positive role through the adoption of populist jurisprudence as a means to overcome the inflexibility of a political regime that made no room for popular participation during substantive processes of constitutional change.

But this is as far as the Supreme Court's contribution went. The credit for the democratic achievements of the process belongs to all the other participants. Their commitment to a pluralist exercise of the constituent power was evident in their initial attempts to tie their own hands and avoid future authoritarian temptations by means of a political agreement that they sought to enforce through means that were external to the assembly, i.e. the Supreme Court. However, populist jurisprudence made these external constraints ineffectual. For that reason, a retrospective look at the consensual beginnings of the process should magnify our appreciation of the foresight of its participants. Their agreement on an electoral formula that was designed to level the terrain of electoral competition between the traditional parties, emerging political forces, and minoritarian sectors of society, greatly contributed to the plural and inclusive composition of the assembly and to the provision of the internal mechanisms of constraint that resulted from the relative balance of power between the members of the assembly. The Constitution of 1991, therefore, was not an imposition but the result of fair democratic interactions between the representatives of a wide range of elements of Colombian political society. In this

sense, Colombia went to great lengths to distance itself from the "enlightened despotism of national representation" denounced by Valencia Villa.

But not only was the process highly democratic. The constitution adopted by the assembly on July 4, 1991, was also a great improvement when compared to the democratic limitations of the previous constitutional text.[87] A good example of the democratic improvement of the political regime was the adoption of a complex set of rules of constitutional amendment designed to avoid the restrictions that the Supreme Court tried to elude by relying on the risky principles of populist jurisprudence. The new constitution provides for three different tracks of constitutional change: Congress, referenda, and constituent assemblies.[88] Congress retains its power to reform the constitution through a more elaborate procedure than the one required to approve ordinary laws. But this initiative is also granted to a variety of political actors including the government, elected officials at the regional level, and ordinary citizens. Congress can also submit to popular approval, through the use of referenda, projects of constitutional change initiated by the government or by a group or ordinary citizens. Finally, Congress can also submit to the opinion of the citizens the project to convene a constituent assembly which, if approved, would suspend Congress' power of constitutional reform during the duration of the assembly. Together with a wide variety of mechanisms of popular participation that include, to mention just one, the citizens' capacity to revoke the term of elected

[87] On the impact of a pluralist and inclusive process on the production of a democratic constitution, see Bejarano & Segura (2013) and Chambers (2004).

[88] Constitución Política de Colombia de 1991, Título 13, Artículos 374-379.

officials[89], the Constitution of 1991 goes to great lengths to take the principle of popular sovereignty out of the virtual existence that it had under the previous constitutional regime.

Regarding the principle of the separation of powers and the more democratic functioning of representative institutions, the new constitution was also surprisingly democratic. The Constitution of 1991 adopted an improved version of the bicameral system of the past. In order to solve the problems of territorial representation described before, the constituent assembly provided for the election of the members of the Senate from a single national constituency, while the members of the lower chamber continue to represent local and regional interests. However, the composition of both chambers follows the principle of proportional representation in order to multiply the number of voices within the legislature. To this objective also contributed the creation of special constituencies reserved to the indigenous population. Finally, under the leadership of President Gaviria, the assembly increased the powers of the legislature to control the actions of the executive (see Negretto 2013: 186).

The assembly also took seriously the task of solving the traditional problems of the executive power in Colombia. The assembly prohibited the reelection of the president and fixed the length of the presidential term to four years, conscious as it was of the perils of excessive presidentialism (see Figueroa 2012b). At the same time, the assembly addressed the historical abuse of emergency powers that was characteristic of the previous regime. By means of greater congressional controls, the

[89] Constitución Política de Colombia de 1991, Título 4, Capítulo 1, Artículos 103-106.

mandatory review by the Constitutional Court of all the executive decrees produced under the state of emergency, and the introduction of strict temporal limits to the executive's use of these powers, the assembly successfully returned the conduction of the affairs of the Colombian state to constitutional normality.[90] Finally, the introduction of a second electoral round whenever the winner of the presidential elections fails to gather the absolute majority of the votes has greatly contributed to increase the influence of minoritarian parties before the government.

Perhaps the most important innovation produced by the constituent assembly was the creation of a Constitutional Court with strong powers of judicial review. This court has become increasingly important in Colombia as an effective mechanism at the disposal of ordinary citizens for the protection of their fundamental rights. At the same time, and at least during its first two decades of existence, the Constitutional Court has assumed an active political role through the establishment of strong alliances with groups of civil society that have not been able to advance their agendas through the ordinary political process.[91] The court's opening of new avenues for the transmission of traditionally excluded political ideas and agendas to those sites in which decisions are taken and implemented was of fundamental importance during the first decade after the adoption of the Constitution of 1991.

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[90] On the reform of emergency powers under the Colombian Constitution of 1991, see Barreto (2011b); Negretto (2013: 190); and Uprimny (2003).

[91] On the characterization of the Colombian Constitutional Court as a progressive institution see, to mention just a few examples, the work of Arango (2004); Cepeda (2004); Figueroa (2012a); Schor (2009); Uprimny & García Villegas (2004). For a more general argument highlighting the strengthening of the judiciary and the role of legal professionals as a counterweight to the excesses of technocratic control, see Palacio (2003: 339).

The provision established in the transitory regime that banned the delegates to the constituent assembly from running as candidates during the first legislative elections after the adoption of the new constitution was a costly one in terms of political pluralism. The emerging political forces of AD M-19 and the MSN performed poorly, mainly because they owed their political strength to the personalities that were sitting in the assembly. Consequently, the new legislature ended up once more under the control of the traditional parties.[92] Under these circumstances, the Constitutional Court, through its alliance with different sectors of civil society, came to fill the vacuum that was left by the absence of a plurality of political forces at the highest institutional levels. It established an alternative type of representation in order to give voice and influence to those who failed to place their representatives in the legislature.[93]

However, the constituent assembly did fail to resolve two of the most important problems in the history of Colombia's democratic politics: the persistence of different forms of violence and the crisis of political parties. From the perspective of the constituent assembly, the inability of the Colombian state to put an end to the chronical violence of the country was closely tied to an overall crisis of political

[92] The elections that took place on October 27, 1991, gave a clear victory to the Liberal Party. They managed to control 54% of the Senate and 53,4% of the lower chamber. The Conservative Party came second with 10% of the Senate and 14,3% of the lower chamber. AD M-19 only managed to win 9% of the seats in the Senate and 8,7% in the lower chamber. Finally, the MSN won 5% of the seats in the Senate and 7,5% of the seats in the lower chamber. See, Santos Pérez & Ibeas Miguel (1995: 374, 376).

[93] In this sense, the justices of the Colombian Constitutional Court are an example of the type of "functional representation" described by Pierre Rosanvallon. Within a more complex understanding of popular sovereignty, electoral representation is not the only mechanism for the expression of the people's interests and desires. There is a plurality of representative mechanisms that the simplistic majoritarian conception of sovereignty that characterizes the populist-revolutionary tradition has failed to recognize (Rosanvallon 2006: 383-388).

representation. In this sense, the Constitution of 1991 was an attempt to address these problems through the institutionalization of political pluralism and the broadening of democratic participation. According to Julieta Lemaitre, the constituent assembly tried to establish a political peace that aimed at removing the grounds upon which the guerrillas had justified their rebellion, i.e. the restrictions imposed on political participation by the consociational regime of the National Front. However, there was very little the assembly could do to put an end to the violence produced by the war against the drug cartels. The complete pacification of the country was an impossible task since the continuation of the war on drugs did not depend on a sovereign decision by the assembly. The international nature of this conflict placed stringent restrictions on the capacity of the constituent assembly to address this issue (see Lemaitre 2011; Palacio 2003: 343). Violence, therefore, continued to take place on these grounds. But the opening of the political regime to the participation of alternative political forces did contribute to delegitimize the armed struggle of those guerrilla organizations that refused to depose their arms. Since 1991, the citizens of Colombia are no longer prone to accept the justification of armed insurgency on the grounds of the supposed restrictions imposed by the regime on political participation.[94]

This persistence of the different forms of violence adds up to the failure of the constitution making process to contribute to the strengthening of political parties, for

[94] For an account that accepts the success of the constitution making process in terms of democratic openness at the same time that it assigns blame to the government for the complete alienation of the guerrillas of the FARC and the ELN from the process, see Fox, Gallón-Giraldo & Stetson (2010). However, these authors accept that these groups had no real intention of participating in the constitution making process without first extracting from the government a series of compromises that the latter simply could not accept (2010: 476).

instance, through the adoption of mechanisms of internal democracy (Palacio 2003: 339-341). Despite their victory in the first legislative elections after the adoption of the constitution and their continued control of the executive power during three presidential terms, i.e. from 1990 to 2002, the traditional political parties entered a period of continual erosion of their legitimacy that threatened the stability of the new democratic regime. The constitution making process put an end to decades of bipartisan politics and opened the political regime to the participation of alternative political parties. However, this democratic achievement was not exempt of risks: the crisis of the traditional parties created a dangerous opening for the emergence of populist forces with the potential to erode from within the democratic achievements of the constitution making process (see Gutiérrez Sanín 2007).

The combination of these two failures of the constitution making process will eventually generate serious challenges to the maintenance of Colombia's democratic regime. However, as it will be shown in chapter 5, the creation of a strong constitutional court will provide the means for the protection of the democratic regime against the temptation to address the persistence of violence and the crisis of the political parties through the adoption of populist politics.

CHAPTER 4

POPULIST JURISPRUDENCE AND CONSTITUTION MAKING IN VENEZUELA

1. Economic Discontent and the Crisis of Political Representation

During the greatest part of the second half of the twentieth century Venezuela was considered the most stable and functional democracy in Latin America. After a long history of civil unrest, military dictatorships, and personalistic leadership, this country was able to institutionalize a democratic form of government that lasted for over forty years. Within the framework of the Constitution of 1961, Venezuela was able to progressively consolidate a strong central state and a stable party system that, by relying on the abundance of resources that were flowing from the oil exports, managed to soften the edges of the ideological divide and establish a form of government that was supported by a solid democratic consensus (see Bejarano 2011). The political parties were the main protagonists of the Venezuelan political system. By drawing from the lessons learned after their first experience with

democracy during the period of the *Trienio Adeco* (1945-1948), the main political parties of the country (AD, COPEI, URD) decided to abandon a purely majoritarian conception of democracy that assigns to the electoral victors the authority to unilaterally impose their political agenda without considering what the losing parties have to say[95] (Coppedge 1994: 325).

As Bejarano claims, at the moment of the transition to democratic rule in the late 1950's, "the Venezuelan parties could count on a coherent, autonomous, resourceful state apparatus that was potentially usable by the civilian elites in order to uphold the newly created rules of the game". In this way, Venezuela would be able to institutionalize political contestation (2011: 58-59). Given the conditions upon and the history from which democracy emerged and was established, a party system was formed that satisfied most of the conditions demanded for the functioning of a modern democracy. These parties emerged through confrontation with the authoritarian regimes that predominated during the first half of the twentieth century, and were the target of systematic repression. At the same time, and in part because of the transformative effects of the oil boom, Venezuelan society began to witness the growth of the middle and working classes, compelling the emerging

[95] As most episodes in Venezuelan history, there are radically different interpretations of the failed period of democratic rule that followed the coup against General Isaías Medina Angarita in 1945 and that ended with yet another coup against the first democratically elected president in Venezuelan history, Rómulo Gallegos, in 1948. Some authors regard the *Trienio Adeco* as a period in which Venezuelan society took its first democratic steps and managed to establish the footprints of the more mature democratic period that was to come a decade later (see Arráiz 2011). Other authors, to the contrary, believe this period led to the total destruction of the nation that was being constructed by the military dictatorships that preceded it. In fact, these authors claim that AD's rise to power was motivated by power hungry politicians that were not really concerned with the modernization of the country and that managed to imposed a completely biased interpretation of Venezuelan history, falsifying the true opinion that the people of Venezuela had regarding the political system through which they had been ruled until then (see Derham 2002).

democratic forces to model themselves in the image of the modern political parties of Western Europe.

These parties, following the lead of AD, established themselves from early on as mass-based organizations. They sought support from the peasants, the workers, the middles classes, and even the rich; women were also a central target of these parties, since from the times of the *Trienio Adeco* they were given the right to vote. They managed to politicize civil society, extending their influence to the level of neighborhoods, unions, students, and business organizations (Bejarano 2011: 67-73). With a solid and consolidated state inherited from the period of authoritarian rule and the right conditions for the establishment of a competitive party system, the only thing that was needed was an agreement between the main political actors to respect and protect the rules of democratic competition.[96]

The political agreement negotiated in Venezuela in 1958, better known as the *Pacto de Puntofijo*, established the blue print of the institutional arrangement according to which the democratic regime was to operate (Bejarano 2011: 81). This pact was clearly elite-led. The political parties were the most important vehicles for the mobilization of the population against the previous authoritarian regime. However, and contrary to the typical prejudices against pacted transitions, the Pact

[96] Despite bitter confrontations between historians with different political orientations, there seems to be an agreement regarding the contributions of Guzmán Blanco, Cipriano Castro, and Juan Vicente Gómez to the promotion of state building in Venezuela. According to Ellner, these strong men finally "put an end to the nineteenth-century tradition of civil wars led by regional caudillos", contributing in this way to the establishment of a modern state (2008: 34-39). Ellner also recognizes, against the official interpretation of the Chavista government, both the radical democratic potentials of the *Trienio Adeco* (2008: 42-46) and the way in which Betancourt and AD toned down the populist and strictly majoritarian logic of the Trienio in order to establish a more stable democratic regime after 1958 (2008: 53).

of Puntofijo was not necessarily elitist or undemocratic. In fact, it made way for an inclusionary and competitive democratic regime. The main objective sought by the parties was to tame, not to bar, competition, and to control the military, having learned the lessons of their previous short-lived experience with democracy (Bejarano 2011: 94-96). The three major parties were active in the negotiation of Venezuela's pacted transition, and though the Communist Party was excluded from the negotiations, it was not banished from the realm of electoral competition.

The exclusion of the Communists from the negotiations brought serious complications for the survival of democracy in Venezuela. On the basis of this exclusion, significant sectors of the political left decided to take up arms against the regime. However, this decision was a political blunder, not only because the state was strong enough to defeat them in a short period of time, but also because it was a clear overreaction considering that the political regime had sufficient democratic credentials to discredit the armed struggle (see Ellner 2008: 64). The alienating consequences of this exclusion notwithstanding, the parties managed to agree on an open, flexible, and forward-looking pact that established the bases for a democracy that would last for several decades (Bejarano 2011: 108). The political parties were able to maintain their autonomy before the state; there were no attempts to reduce electoral uncertainty; and a government of national unity was established with the intention of preventing a purely majoritarian government by AD, but only during the initial years of the democratic regime. Beyond that, no power-sharing arrangements were made. The only restrictions imposed by the pacts were the commitment to a Minimal Program of Government that, however, was not carved in stone.

And yet, despite the initial democratizing energy of the political parties and the stability of political competition during a period of great economic exuberance, several factors emerged leading to the severe crisis that eventually resulted in the replacement of the Constitution of 1961. A bipartisan system was progressively established in Venezuela conducive to the monopolization of power by AD and COPEI and to the erosion of democratic life in the country. These highly centralized political parties grew more and more disconnected from their social bases and refused to pursue the necessary reforms for the improvement of the country's democratic regime. The gradual politicization of the different branches of power eroded the trust of the citizens in political institutions, specially the legislature and the judiciary; local and regional politics became completely subjected to the tight grip of the two traditional parties, preventing the emergence of new political forces with the capacity to add something new to the national debate and to force the political class to democratize the mechanisms for the selection of new leadership. On top of these factors, an economic crisis ensued as a result of the decline of the oil rent. Popular discontent exploded, and an alliance between political forces from the left and rebellious sectors of the military was forged, precipitating a democratic crisis without precedent in Venezuela.[97]

During the early 1990's, the so-called democratic model of Puntofijo began to crumble and a hegemonic struggle for the transformation of Venezuelan society took place (López Maya 2006: 14-18). This is the period in which Hugo Chávez rose to

[97] As Ellner has noted, this is the beginning of the civilian-military alliance promoted by Chávez, an alliance with which Venezuelans were already familiar since it had already taken place in 1958 against the dictatorship of Pérez Jiménez (2008: 48).

public prominence with his failed attempt to take control of the government through a military coup and his eloquent condemnation of the system of representative democracy and neoliberal economics that characterized Venezuelan politics at the time. The adoption of a strict package of economic adjustment by the recently elected president, Carlos Andrés Pérez, was a clear betrayal of the promises he made during his campaign of strengthening the state's control over the economy and increasing the levels of social expenditure. This measure was so unpopular that not even the president's party (AD) dared to give it full support, leading to a serious political deadlock that did nothing but contribute to the reinforcement of the already damaged reputation of political institutions.

Following a series of popular uprisings that many authors have attributed to Pérez's harsh implementation of neoliberal policies, and the disproportionate violent response with which the government tried to control them, the party system entered a serious crisis of legitimacy which people like Chávez and a variety of sectors from the political left tried to capitalize, the former by taking up arms against the government and the latter through legitimate electoral competition at the regional level. This latter alternative was made possible by a decentralizing reform that, after many years of frustrated attempts, was finally enacted in 1989 during Pérez's government. This reform made it possible for new political forces to compete for the control of certain public offices at the regional level against the traditional parties. Chávez, however, refused to play by the rules of the regime and in 1992 led a failed

military coup, an episode that made evident the cracks on the previous commitment of Venezuelan society to the preservation of the democratic regime.[98]

Though Chávez's coup failed, Pérez was later deposed by Congress and the Supreme Court.[99] But not even the return of Caldera to the presidency was able to repair the already damaged legitimacy of the Constitution of 1961 and the system of representative democracy that it had established. In fact, Caldera put the final nail in the coffin of the democratic model of Puntofijo. First, he gave continuity to the neoliberal policies of the previous government; second, he failed to make the political reforms that were needed to regain the legitimacy of a democratic regime on the brink of collapse[100]; and third, he granted pardon to Hugo Chávez, making it possible for the latter to organize himself politically, pursue the electoral route to power, and present himself as an appealing alternative for the millions of people that by now were completely disillusioned with the political system.[101]

With Chávez's victory in the presidential elections of 1998, the long period of crisis of the model of Puntofijo entered its final stage. From that moment on, the balance of the hegemonic struggle that began in the early 1990's was tipped in favor

[98] See, for instance, the speech given by former president Caldera in the legislature on the very same day in which the failed coup took place, adopting the same views and arguments employed by the Chavista rebellion (Caldera 2013).

[99] For an interesting journalistic account of the events that led to the fall of Carlos Andrés Pérez, see Rivero (2010).

[100] On the ambivalence with which Caldera attempted to reform the Constitution of 1961 and his complete rejection of the idea of convening a constituent assembly in order to bypass a legislature under the control of traditional parties holding tight to the status quo, see Combellas (2010: chapters 1 & 2).

[101] For the most comprehensive account of the decline and fall of the democratic model of Puntofijo, see López Maya (2006: Part I & II).

of an emerging ruling elite that is still holding fast to power. Chávez created his own political movement (MVR) and managed to bring together other parties from the left of the political spectrum like MAS and the PPT around an umbrella organization called the *Polo Patriótico* (PP). The alliance between these parties was beneficial for all of them. The MVR would gain the regional support that the other two parties had already constructed and the experience of their successful politicians, while MAS and the PPT would be able to ride on the wave of popular support around the charismatic figure of Chávez. But besides these purely electoral considerations, they all had important ideological similarities: nationalism, anti-neoliberalism, a popular inclination and, finally, the will to convene a constituent assembly in order to advance the profound political reform that the traditional parties had avoided for so long (López Maya 2006: 212-220). The constituent assembly was one of the central promises made by Chávez during his presidential campaign, and he quickly delivered.

The character of the constitution making process sponsored by Chávez is considerably different to all the previous experiences Venezuela has had with this kind of processes, though it is still possible to identify some elements that were not unfamiliar to Venezuela's constitutional tradition. A brief description of the origins of the constitutions of 1947 and 1961 can help us make sense of the process that led to the adoption of the Constitution of 1999.[102] Both of these constitutions were the result of violent ruptures with previous dictatorial and military regimes by means of a coup. Under these conditions, one could easily say that the democratic regimes that

[102] The following characterization of the origins of the constitutions of 1947 and 1961 is based on the very interesting work of Miriam Kornblith (1991).

followed were burdened right from the start with the need to justify the use of violence as a means to bring about democracy. Both constitutions also shared a similar content, since the 1961 constitution drew heavily from what was established in 1947. However, the differences between these two constitutions are more significant for the purpose of this analysis.

Following Kornblith, the main difference between these two constitution making processes is procedural. Though the Constitution of 1947 was the result of a highly participatory process in which publicity and public deliberation took on a very prominent role, it is also true that this process was highly conflictive. The majoritarian position of AD within the assembly, which also functioned as the ordinary legislature, quickly gave place to a tense environment of suspicion derived from the attempts of the majority to use the process as a way to strengthen its own political program. Long-term considerations hardly prevailed in these conditions, making it difficult for the different political actors within the assembly to reach a solid consensus upon which to erect a democracy for the future. The debates were highly ideological, and AD managed to use its majorities to impose its views. The resulting constitution, therefore, was born weak and fell shortly after.

Against this constitution making experience, the Constitution of 1961 was the result of a process of political learning that placed its emphasis on consensus and moved away from a purely majoritarian conception of democracy. The Constitution was enacted by the ordinary legislature three years after Venezuela found its way back to democracy. The process was also less participatory and ideologically charged. Instead, it was based on the logic of compromise derived from the political pacts

signed by the main parties. Agreements were reached and a commitment to the protection of the constitution was forged. As Kornblith has claimed, less participatory methods and a departure from purely majoritarian conceptions of democracy made possible a legitimate and strongly backed constitution that secured the survival of the democratic order for decades to come (1991: 74). Below, we will see how the process of political learning that took place in 1961 was reversed during the late 1990's, bringing once more to the center of the political stage highly problematic and conflictive conceptions of democracy and constitutional change.

These brief remarks on the history of constitution making in Venezuela reveal one of the most important characteristics of the process of constitutional change initiated by Chávez. It will become evident that the most significant improvement that this constitution making process brought to the Venezuelan tradition of democratic politics was its abandonment of the coup d'état as a means to political transformation. For the first time in its history, Venezuela was to have a constitution that was not the result of a violent confrontation between contending political actors. However, this rejection of violence was not accompanied by the commitment to compromise and the abandonment of a purely majoritarian conception of democracy that characterized the origins of the Constitution of 1961.

2. The Supreme Court and the Constitution Making Process

Before Chávez was sworn into office, the Supreme Court was drawn to the center of a political process in which a charismatic President-elect was seeking to refound the

political system with the support of a wide popular base and against the letter of a "moribund" constitution, as Chávez once called it.[103] The Venezuelan Supreme Court was now facing the same question with which its Colombian counterpart had to deal a few years before, i.e. how to open the space for a popular process of constitutional replacement when the existing constitution does not authorize the use of constituent assemblies for this purpose. The court was well aware of the strong desire for change of a majority of Venezuelans and of the determination of Chávez to find a way to bypass the legislature's reluctance to any kind of reform that would diminish the power of the traditional parties. At the same time, the court knew it was lacking the institutional prestige to oppose the demands for an assembly, being as it was an institution closely tied to the political system that was now crumbling.[104] With its back against the wall, the court decided to make way for the constituent assembly while at the same time trying to play a limiting role during the constitution making process. But, as we will see, its use of populist jurisprudence for this purpose ended up backfiring.

The Supreme Court was asked to consider the viability of the proposal of the President-elect to reform the constitution.[105] Chávez's idea was to call for a consultative referendum, a participatory mechanism that Congress included in the recently adopted Organic Law of Suffrage and Political Participation (OLSPP), in order

[103] For a characterization of Chávez as a constituent president, see Bernal (2014).

[104] On the lack of institutional prestige of the Venezuelan Supreme Court at the time, see Garoupa & Maldonado (2011).

[105] Corte Suprema de Justicia de Venezuela, Sentencia del 19 de Enero de 1999, Sala Político-Administrativa, M.P. Humberto J. La Roche.

to consult the opinion of the citizenry about the possibility of replacing the Constitution of 1961 by means of a constituent assembly. This initiative emerged as a means to bypass the restrictive rules of amendment that existed at the time. Though Article 4 of the Constitution of 1961 declared that the people were sovereign, it also qualified the extent to which these sovereign powers were to be exercised, i.e. only through the mediation of the organs of public power, which are elected by the people by means of the right to suffrage.[106] The meaning of this qualification of the principle of popular sovereignty was made evident by the rules of amendment. Article 246 established one single possible procedure for the eventual reform of the constitution: Congress or the absolute majority of the legislative assemblies at the federal level could initiate a process of general reform that only Congress could approve; the people could only participate as a ratifying force at the end of the process, by voting yes or no in a referendum to the proposal of the legislature.[107] Finally, the restrictive character of these rules of amendment was made evident in Article 250, in which the framers established that the constitution was inviolable and would remain in force in

[106] Artículo 4, Constitución de la República de Venezuela de 1961: "La soberanía reside en el pueblo, quien la ejerce, mediante el sufragio, por los órganos del Poder Público".

[107] Artículo 246, Constitución de la República de Venezuela de 1961: "Esta Constitución también podrá ser objeto de reforma general, en conformidad con el siguiente procedimiento:
1. La iniciativa deberá partir de una tercera parte de los miembros del Congreso, o de la mayoría absoluta de las Asambleas Legislativas en acuerdos tomados en no menos de dos discusiones por la mayoría absoluta de los miembros de cada Asamblea;
2. La iniciativa se dirigirá a la Presidencia del Congreso, la cual convocará a las Cámaras a una sesión conjunta con tres días de anticipación por lo menos, para que se pronuncie sobre la procedencia de aquella. La iniciativa será admitida por el voto favorable de las dos terceras partes de los presentes;
3. Admitida la iniciativa, el proyecto respectivo se comenzará a discutir en la Cámara señalada por el Congreso, y se tramitará según el procedimiento establecido en esta Constitución para la formación de las leyes;
4. El proyecto aprobado se someterá a referéndum en la oportunidad que fijen las Cámaras en sesión conjunta, para que el pueblo se pronuncie en favor o en contra de la reforma. El escrutinio se llevará a conocimiento de las Cámaras en sesión conjunta, las cuales declararán sancionada la nueva Constitución si fuere aprobada por la mayoría de los sufragantes de toda la República".

the event of an attempt to reform it outside of the mechanisms provided in it for this purpose.[108]

From the perspective of the petitioners, there were two possible alternatives for convening a constituent assembly. Either the existing mechanism of the consultative referendum was enough to put in practice the fundamental principle of popular sovereignty adopted by the Constitution of 1961, or it was necessary to first amend the constitution in accordance with its rules of change in order to include in its text the mechanism of the constituent assembly. The Supreme Court understood these two different alternatives as a manifestation of the tension between the principles of popular sovereignty and constitutional supremacy, and reluctantly decided in favor of the former. A decision in line with the second alternative identified by the petitioners, which ideally would allow for a reconciliation between the two constitutional principles that were now in tension (by first affirming the supremacy of the constitution and then, after the enactment of a reform in line with the rules of amendment, making room for the exercise of the principle of popular sovereignty through a constituent assembly), would hardly be accepted by the political forces pushing for change for one particular reason: at that time, Congress was still controlled by the traditional parties identified with the regime against which the constituent assembly was to be used.[109] This alternative, therefore, would only affirm

[108] Artículo 250, Constitución de la República de Venezuela de 1961: "Esta Constitución no perderá su vigencia si dejare de observarse por acto de fuerza o fuere derogada por cualquier otro medio distinto del que ella misma dispone. En tal eventualidad, todo ciudadano, investido o no de autoridad, tendrá el deber de colaborar en el restablecimiento de su efectiva vigencia".

[109] Though Chávez made it to the presidency with 56% of the popular vote in the elections of December 6, 1998, his political coalition failed to conquer a majority in the parliamentary elections held a month

the power of the traditional parties to maintain the status quo. Instead, the court decided to follow the example of the Colombian Supreme Court in 1990, and relied on populist jurisprudence in order to justify the first alternative identified by the petitioners, i.e. to ignore the text of the existing constitution and give legal sanction to the use of the consultative referendum as a means to initiate a popular process of constitution making.

Under a strict interpretation of the constitutional text, the court would have had to affirm the supremacy of the constitution and the primacy of the representative character of Venezuelan democracy. However, the court claimed that even though the constitution gave to the legislature the power to amend the constitution, it did not follow from this that the principle of popular sovereignty could only be exercised through its mediation. In this way, the court was able to depart from the traditional interpretation of Article 4, which, under the spirit of the Constitution of 1961, was established as a check on the exercise of popular sovereignty. Now, the court was claiming that though the people could delegate their constituent power to the legislature, this did not mean that they no longer were entitled to exercise it directly. In fact, following the ideas of Sieyès, the court claimed that the rules of amendment established in the constitution were only meant to regulate the exercise of the power to change the constitution given to the constituted powers; they were never intended to control the constituent power of the people. In line with the basic tenets of populist jurisprudence, the court affirmed the existence of a revolutionary hiatus that emerges

before on November 8, 1998. Despite the good electoral performance of the political parties supporting Chávez, the coalition of traditional parties managed to retain control of the legislature.

every time the subject of the constituent power feels the need to remake the constitutional order.

Finally, and as a last attempt to reconcile the principle of popular sovereignty with that of the supremacy of the constitution, the court argued that the Constitution of 1961 was still in force. In the end, the consultative referendum that the President-elect wanted to use in order to convene a constituent assembly was a mechanism provided by the existing legal order. According to the court, this small figment of legal continuity proved that the Constitution of 1961 was still authoritative and, as a consequence, the constitution making process that was about to take place was susceptible of control by means of the court's power of judicial review. The court, however, was deceiving itself. In fact, the court shot itself in the foot.

By adopting populist jurisprudence as an instrument for the democratic opening of the constitutional regime, the court ended up providing useful doctrinal ammunition to Chávez's quest for the consolidation of a new political hegemony.[110] The new president relied heavily on the rhetoric of classical populism in order to move his country away from a political system that he considered oligarchic and exclusionary; he was clearly unwilling to compromise with any institution and political actor associated with the model of Puntofijo.[111] Placing himself as the

[110] As Michael Coppedge has rightly noticed, this decision of the Venezuelan Supreme Court "provided legal cover for almost everything that followed; without it, the entire process would have been patently unconstitutional" (Coppedge 2002: 31).

[111] On Chávez's reliance on the rhetoric of classical populism, see Hawkins (2003). Ellner argues that the Chavista project has clear affinities with Latin American classical populism, but he also believes that Chávez went even further in his confrontational and conflictive approach to politics: "From the outset of his presidency, both his words and actions have explicitly favored the popular classes at the expense of the privileged sectors and have made clear that politics in Venezuela has become a zero-sum game that pits one against the other" (Ellner 2008: 172).

representative of the entire Venezuelan people and their widespread desires for change, Chávez now had the necessary tools for the initiation of a constitution making process modeled in accordance with his plans, making almost irrelevant any future efforts by the court to control the arbitrariness of the process and to contribute to the task of bringing the new political system closer to acceptable democratic standards.

The court was definitely central to the opening of the constitutional regime to the participation of new popular forces in the process of deciding on its fundamental aspects; it also played a crucial role in allowing Venezuela to leave behind a tradition of violent political change, an achievement that is especially relevant if it is kept in mind that the person leading this process had a history of using the means of violence to make his way to power. But the type of jurisprudence that made this possible annulled its chances to be a more relevant institution in the future. From now on, Chávez was ready to lead a personalistic and exclusionary constitution making process riding on the idea supported by the court of the unregulated constituent power of the people, and the results, as we will see, were unfavorable to the improvement of democracy in Venezuela.[112]

As Ricardo Combellas tells us in his memoirs of the constitution making process, right from the start Chávez made evident the image he had of himself as a charismatic

[112] For a similar interpretation of this decision of the Supreme Court of Venezuela, see Colón-Ríos (2011: 369-372). Though I share Colón-Ríos' appreciation for the way in which this decision contributed to the possibility of popular participation during the constitution-making process, I pretend to go further in order to explore the negative consequences of a doctrine that justifies the unregulated exercise of the constituent power of the people. As was said in the first part of this dissertation, populist jurisprudence has two faces, but Colón-Ríos' commitment to a populist-revolutionary conception of the constituent power precludes him from giving due consideration to the authoritarian risks of this doctrine.

caudillo (2010: 94). His desire to fully control the constitution making process in order to allow for the true expression of the people's constituent power became obvious from early on. Once sworn into office, Chávez issued a decree calling for a consultative referendum asking two questions to the people of Venezuela.[113] The first question asked the citizens if they wanted to convene a constituent assembly whose mandate would be to transform the state and create a new legal order aiming at the effective functioning of a social and participatory democracy. The second question asked the citizens to grant to the president, after consulting with the economic, social, and political sectors of Venezuelan society, the necessary authority for the establishment of the guidelines according to which the assembly was to be elected. It should be remembered that Chávez had the firm intention of using the assembly as a means for building a coalition against a legislature that was not on his side, making it possible for him to control a democratically elected body through which he could carry on his mission as the embodiment of the popular will[114] (Segura & Bejarano 2004: 228). The court tried to get in the way of the president's desires, though without success.

[113] The initial questions, in their original formulation in Spanish and to which the citizens of Venezuela had to answer yes or no, were the following: 1. ¿Convoca usted una Asamblea Nacional Constituyente con el propósito de transformar el Estado y crear un nuevo ordenamiento jurídico que permita el funcionamiento de una Democracia Social y Participativa? 2. ¿Autoriza usted al Presidente de la República para que mediante un Acto de Gobierno fije, oída la opinión de los sectores políticos, sociales y económicos, las bases del proceso comicial en el que se elegirán los integrantes de la Asamblea Nacional Constituyente? See, Consejo Nacional Electoral de Venezuela, Resolución Nº 990217-32 del 17 de Febrero de 1999.

[114] Segura and Bejarano describe this constitution making process as an extreme example of the model of delegative democracy described by Guillermo O'Donnell: "the president is taken to be the embodiment of the nation and the main custodian and definer of its interests... After the election voters/delegators are expected to become passive but cheering audiences of what the president does" (Segura & Bejarano 2004: 228; see O'Donnell 1994: 59-60).

The Supreme Court was asked to decide on the validity of a resolution by the National Electoral Council (CNE) setting the date for the referendum called by the president.[115] The petitioner claimed that the referendum could not be presented to the people of Venezuela without making some corrections to the questions, something the CNE had failed to do by uncritically accepting the questions proposed by the president. He feared that the questions were too vague, and that, if they were to be accepted as the guidelines for the constitution making process, there was a great risk that a single political force would control the assembly. In the opinion of the petitioner, this was a threat to the democratic aspirations of the people of Venezuela.

The first question of the referendum did not specify any limitations to the changes that the assembly was to enact. It pointed towards the realization of a social and participatory democracy, but did not say anything about the protection of fundamental rights and the improvement of representative institutions, etc. The assembly, therefore, could argue that it was free to do away with such arrangements, but the court rejected that possibility. From this moment on, the court would try to deemphasize the conception of popular sovereignty adopted in its first decision and to give more strength to the principle of constitutional supremacy that it timidly tried to assert at the end of its previous ruling. Now the court was trying to be bolder, pointing out to the political actors in this process that the use of the referendum to convene a constituent assembly was only possible because it was a mechanism

[115] Corte Suprema de Justicia de Venezuela, Sentencia del 18 de Marzo de 1999, Sala Político-Administrativa, M.P. Hermes Harting. The petitioner in this case was Gerardo Blyde, the actual Mayor of the municipality of Baruta. He became known in Venezuela for the constant petitions he made to the Supreme Court in order to check the actions of the president and the CNE during the initial stages of the constitution making process. He has been a noted member of the opposition since the rise of Chávez to power.

established in the existing legal order and that, from this perspective, the Constitution of 1961 was still controlling the process of change. The assembly would not be free to alter the basic structure and principles of the democratic state; it would only have the power to improve them.

Concerning the second question, the court found that as it was formulated it violated the right to participation of the Venezuelan people and that, if left as it was, it would completely transform the nature of the referendum, turning it into a plebiscite. The right to participation was being denied to the people of Venezuela because the second question did not specify the bases of the electoral procedure. Giving a blank check to the president to determine the electoral guidelines of the process implied that there would be no decision of the people in this respect. At the same time, since the second question was not framed as a consultation but as a call to support the president and delegate on him alone the definition of the contours of the process, the court found that the second question was unconstitutional and that it had to be reframed taking into consideration the opinion of the court. With this decision, the court was trying to regain some control and to make evident to the president its determination to provide and enforce a legal framework for the process. It left no doubt of its renewed impetus when, five days later, a new decision was issued at the request of the same petitioner clarifying the meaning of the last one: "the constituent assembly, by being linked to the spirit of the constitution that is now in force, is

limited by the fundamental principles of the democratic state, and this is a binding interpretation".[116] But the court had a hard time enforcing its decisions.

The CNE issued a new resolution calling for the referendum, this time including in the second question the bases for the electoral procedure and the initial by-laws proposed by the president.[117] But one of these guidelines was in clear defiance of the court's last rulings. According to the CNE's resolution, the constituent assembly was to have original powers. Once more, at the request of the same petitioner, the court had to act in order to prevent a vote that would legitimate such scenario. The court ordered the CNE to remove that sentence from the by-laws of the electoral process, arguing that it was in violation of the court's previous decisions.[118] And though the CNE complied, the court had already lost the horserace it had entered against the president. The CNE and the president were forced to include the bases of the electoral process in the second question of the referendum in order to protect the people's rights to participation, but in the end the president was free to unilaterally decide (see Brewer-Carías 2010: 54). No negotiation between political parties took place in order to reach some sort of agreement about how the electoral process was

[116] Corte Suprema de Justicia de Venezuela, Sentencia Aclaratoria del 23 de Marzo de 1999, Sala Político-Administrativa, M.P. Hermes Harting.

[117] The text of the second question now read: ¿Está usted de acuerdo con las bases propuestas por el Ejecutivo Nacional para la Convocatoria a la Asamblea Nacional Constituyente, examinadas y modificadas por el Consejo Nacional Electoral en sesión de fecha Marzo 24, 1999 y publicada en su texto íntegro, en la Gaceta Oficial de la República de Venezuela Nº 36.669 de fecha Marzo, 25 de 1999? See, http://www.cne.gob.ve/web/documentos/estadisticas/e010.pdf

[118] Corte Suprema de Justicia de Venezuela, Sentencia del 13 de Abril de 1999, Sala Político-Administrativa, M.P. Hermes Harting.

to be conducted.[119] And though one could say that the citizens finally gave their agreement to what the president proposed, they actually had no say in the process of defining the text of the referendum.[120]

The inability of the court to establish itself as an effective external constraint during the initial phases of the process had important consequences, and its weakness was only accentuated by the time the assembly was finally convened. Many authors have shown how the electoral rule unilaterally adopted by the president and accepted by the voters gave place to an exclusionary constituent assembly that, being controlled by a single faction, lacked the sort of internal constraints that only diversity and pluralism can provide[121] (Brewer-Carías 2010: 55-57; Landau 2013a: 941-942; Segura & Bejarano 2004: 230). With only 60% of the vote, the Chavista movement managed to win 95% of the seats. Only 4 out of the 128 members of the assembly did not belong to the Chavista coalition; they were independents with no direct association to the traditional parties. This was a clear departure from the lessons of the constitution making process of 1961 and a return to the notion of majoritarian democracy that Kornblith identified as the most important reason for the weakness

[119] According to Michael Coppedge, "a blue-ribbon panel was appointed to draft the text of the referendum and design an interim electoral law, but Chávez disregarded its report and dictated the terms of the referendum himself" (2002: 18).

[120] The referendum finally took place on April 25, 1999. With an abstention rate of 62,35%, the first question was approved by 87,75% of the voters. The second question received the approval of 81,74% of those who voted. See, http://www.cne.gob.ve/web/documentos/estadisticas/e010.pdf

[121] The Chavista coalition was far from monolithic (Ellner 2008: Ch. 6-7). However, the internal tensions of this political movement do not compensate for the lack of political pluralism within the assembly. This is especially the case given the strong type of leadership that Chávez exerted over its members.

of the Constitution of 1947. Though the court was able to force both the president and the CNE to take some corrective actions, it did not succeed in ridding the minds of citizens and politicians on the winning side of the electoral contest of the classical conception of the constituent power that the court had espoused in its first decision. A purely majoritarian and exclusionary notion of democratic legitimacy would control the process from now on, allowing the assembly to act unencumbered by any limitations and to fulfill its mission of transforming the political system in such a way as to consolidate a new hegemony without making any compromises. [122] Paraphrasing Nadia Urbinati, the electoral rule selected for the composition of the assembly indicates a problematic identification of the "right of representation" with the "right of decision" that a majority must surely retain (Urbinati 2000: 761). That is, it prevented the representation of a plurality of voices within the assembly in order to bolster the decision-making powers of the Chavista majority.

The assembly declared itself sovereign right from the start and this move was strongly backed by Chávez during his inaugural speech before its members (Chávez 2013: 81). As a result, the court was to be ignored by the assembly during the rest of the constitution making process. Things hardly could have been any different. Besides having opted for a problematic jurisprudence that did not contribute to the fulfillment of its role, the court did not have the strength to fight this fight, especially against a

[122] The court tried to impose greater legal restrictions on the electoral process discussed above, confronting a defying president that claimed that the only rules the process had to follow were those included in the text of the referendum. He rejected any other controls emerging from previous legality and insisted that the constitution making process was not the result of any legal continuity but a radical break with the past in accordance with the original constituent power of the people. On this confrontation between the President and the Supreme Court, see Corte Suprema de Justicia de Venezuela, Sentencia del 21 de Julio de 1999, Sala Político-Administrativa, M.P. Hildegard Rondón de Sansó.

president that did not miss any chance to remind everyone associated with the Constitution of 1961 and the democratic model of Puntofijo that if they stood on the way of the revolutionary changes he was advancing, violence could always be an alternative (Chávez 2013: 58). The assembly, as he understood it, was living proof of his final victory over the constituted powers. Now he was in total control and no one could oppose him (2013: 81; 89). As we will see, Chávez was right.

The constituent assembly worked towards the consolidation of a new hegemony, planting the seeds of the abusive conception of constitutionalism that from now on would characterize the Chavista government (see Landau 2013b: 203-207). In its confrontation with the constituted powers the assembly obtained an easy victory. Arguing that the support of the people had endowed it with original powers that went beyond the mere drafting of a constitution, the assembly issued a series of decrees for the reorganization of the judiciary[123] and the legislature.[124] The judiciary quickly surrendered and, when the vice-president of Congress challenged the assembly's intervention of the legislature, the court was no longer willing to enforce its previous decisions. From that moment on, the court fully embraced the original conception of the constituent power defended by the president and the assembly, and began to develop a new doctrine that would eventually strengthen the grounds of Chávez's political project.

[123] See, Decreto para la Reorganización del Poder Judicial, *Gaceta Constituyente*, No. 10, Agosto 18 de 1999.

[124] See, Decreto de Regulación de la Funciones del Poder Legislativo, *Gaceta Constituyente,* No. 13, Agosto 25 de 1999; No. 16, Agosto 30 de 1999.

The court, in a decision that involved the members of all its different chambers, accepted the assembly's intervention in the affairs of the judiciary and recognized that the latter was plagued by a series of vices that needed to be corrected.[125] This decision represents a shift in the balance of power within this institution that would eventually end up in the resignation of its president and the alignment of the court with the assembly and the executive. Most members of the political-administrative chamber of the court, from which all previous decisions regarding the constitution making process had emerged, made explicit their disgust with this sudden shift and wrote a series of dissenting opinions denouncing the refusal of the court to enforce the necessary limits on the acts of the assembly. This last moment alignment of the court with the assembly was, according to the president of the court, a sign of the weakness of the judiciary before the other branches of political power and a legitimation of the attempts of the assembly to usurp powers that the people did not grant it in the referendum. From the perspective of the court's president, by accepting the intervention of the assembly the court had decided to dissolve itself and, therefore, renounced the last reserve of dignity it had before public opinion.[126]

When the time came for the legislature to oppose the all-embracing powers of the assembly, a different Supreme Court was in place. Its president had resigned and her replacement was fully in line with the executive and the assembly. The decree through which the assembly intervened and reorganized the legislative power was

[125] Corte Suprema de Justicia de Venezuela, Acuerdo del 23 de Agosto de 1999 sobre el Decreto de Reorganización del Poder Judicial.

[126] See Cecilia Sosa's dissenting opinion, Corte Suprema de Justicia de Venezuela, Acuerdo del 23 de agosto de 1999 sobre el Decreto de Reorganización del Poder Judicial.

challenged before the court by the president of the lower chamber of Congress, arguing that the assembly was not an organ of government and that, by intervening the legislature, it was not only violating the terms of its mandate but also the principles of separation of powers and political representation, cornerstones of the democratic state.[127] The court, however, did not see things that way.

In this decision, the court introduced a novel jurisprudential development that would eventually prove central in providing legal justification for the actions of the assembly: the doctrine of the supraconstitutionality of the assembly. According to this doctrine, the assembly stands above the existing constitution. Its only limitations are those imposed by the people in the referendum and, as the by-laws of the constitution making process did not explicitly claim any subjection of the assembly to the existing constitutional order, the assembly was free to intervene the constituted powers in order to transform the Venezuelan state. According to the by-laws approved by the people, the only limitations to which the assembly was subjected were the values and principles of the country's republican history, international treaties currently in force, the progressive character of fundamental rights, and the necessary guarantees provided by the democratic order.[128]

When the court had the chance to review the by-laws of the process proposed by the president, it failed to suggest an electoral rule with the potential to bolster

[127] Corte Suprema de Justicia de Venezuela, Sentencia del 6 de Octubre de 1999, Sala Plena, M.P. Iván Rincón Urdaneta. The petitioner in this case was Henrique Capriles, the leading figure of the opposition to the Chavista regime, at the time vice-president of Congress and president of the Chamber of Deputies.

[128] On the theory and practice of imposing supra-constitutional limitations to the power of changing the constitution, see Roznai (2013).

political pluralism. It also failed to impose on the president the need to reach an agreement with the country's main political actors on how to elect the members of the assembly. At the same time, through populist jurisprudence the court completely undermined the authority of the existing constitution to control the constitution making process. In sum, the court proved unable to impose any limitations on the constituent assembly. Now, under new leadership, the court could easily accept the existence of a number of ethereal limitations and still make room for an all-powerful constituent assembly.

Following Sieyès, and contrary to Schmitt's more radical conception of the constituent power, the court placed the assembly somewhere above existing law but below a series of principles that were supposed to guide its transformative activities. However, the adoption of this Sieyesian conception of the constituent power was nothing more than a symbolic gesture meant to ease the concerns of those preoccupied with the establishment of an all-powerful constituent assembly. In practice, no limits were imposed on its actions. The court explicitly rejected the previous rulings of its political-administrative chamber by claiming that the assembly did have original powers that went beyond the mere drafting of a new constitution; from this perspective, the assembly also had the authority to preside over the transition towards a new democratic regime and, therefore, it could intervene the existing constituted powers. In this way, the road was finally cleared for the consolidation of a new hegemony that, against the backdrop of the Constitution of 1961, was not the result of a political consensus but the authoritarian imposition of an emerging elite.

3. The Rise of Abusive Constitutionalism

After a hasty drafting phase that made little room for significant deliberation[129], the people of Venezuela finally approved the new constitution through a referendum on December 15, 1999.[130] This constitution adopted a strong combination of centralism and presidentialism that allowed for the reelection of the president and reduced the instances of political mediation through the establishment of a unicameral legislature. It abolished the Supreme Court and gave place to a new Supreme Tribunal of Justice (TSJ) with a constitutional chamber endowed with strong powers of judicial review. Mechanisms of popular participation were adopted that were traditionally excluded from the Venezuelan political system, such as referenda and plebiscites, giving the citizens the option of recalling the authority of elected public officials and making it mandatory to get the approval of the population for the adoption of any constitutional change. Of special relevance for the future was the crafting of a new set of rules of constitutional change that now make it possible to convene a constituent assembly in order to replace the constitution without forcing a break with legal continuity.[131] However, the recently adopted constitution did not go into force right away. The assembly enacted, after it had fulfilled its mission of drafting and approving a

[129] On the brief period of discussion of the new constitution by the assembly, see Combellas (2010: 154) and Brewer-Carías (2010: 60-64).

[130] With an abstention rate of 55,63%, the Constitution of 1999 was approved by 71,78% of the voters, while only 28,22% voted against its adoption. See, http://www.cne.gob.ve/web/documentos/estadisticas/e012.pdf

[131] Constitución de la República Bolivariana de Venezuela de 1999, Título IX, Capítulo 3, Artículos 347-349.

constitution, a parallel transitory regime that was judiciously used by Chávez to consolidate his power.[132] And the new court was instrumental in making this possible.

Against the contemporary tendency of adopting constitutional courts as a means to guard and protect the compromise between several political actors that seek to come together under a mutually acceptable democratic regime, the constitutional chamber of the new TSJ had no political compromise to protect and enforce, given the exclusionary and unilateral character of the constitution making process. In this context, the court returned to the particular version of populist jurisprudence developed by the now extinguished Supreme Court during the last stages of the constitution making process, i.e. to the doctrine of the supra-constitutional character of the assembly, in order to justify the assembly's engagement in activities of government after the people had already adopted the constitution it drafted. The assembly issued a transitory regime[133] that was not approved by the people and through this regime it managed to designate the members of the new court, dissolve the legislative power and establish a special legislative commission known as *El Congresillo* to assume its functions, take control of regional and local instances of political power, and appoint the new members of

[132] Michael Coppedge notes how during the initial years of Chávez's presidency the primacy given to a conception of democracy based entirely on the legitimacy provided by electoral victories led the new president towards a gradual erosion of all instances of horizontal accountability (2002: 16-18). The transitory regime that the constituent assembly enacted as a parallel constitution was instrumental for the achievement of this objective.

[133] See, Régimen de Transición del Poder Público, *Gaceta Oficial de la República de Venezuela,* No. 36.857, Diciembre 27 de 1999.

the National Electoral Council.[134] The assembly also issued an electoral statute for the regulation of the coming elections of the members of both the national assembly and other regional and local public offices (see Brewer-Carías 2010: Ch. 2). "By the time the ANC ended its functions, there was not a single national power, other than President Chávez himself, that had not been appointed by a body that was 93% Chavista" (Coppedge 2002: 31).

These provisions of the assembly were promptly challenged before the new TSJ. Once more the doctrine of the supra-constitutional character of the assembly, understood as a consequence of its original constituent powers, provided the jurisprudential grounding that both Chávez and the assembly required. But this time it came with a twist.[135] The assembly was now seen as a supra-constitutional entity working in parallel with the new constitution. This doctrine had already been successful in ridding the assembly of the shackles imposed by the previous constitution; now, it allowed the assembly to do the same before the constitutional order it had recently adopted. The court understood that the transition towards a new constitutional order was divided in two different phases: the first one culminated with the approval of the constitution in the referendum of December; the second, still

[134] The influence of the Colombian constitution making process over the leaders of the Chavista movement is more than evident at this point. Not only did the Supreme Court decide to follow its Colombian counterpart by adopting populist jurisprudence; the dissolution of Congress and the establishment of the *Congresillo* were inspired by the Colombian experience. However, Chávez took the populist and authoritarian elements of the Colombian process a great deal further. Contrary to the Colombian case, the Venezuelan special legislative commission was endowed with greater powers and its composition did not follow the principle of political pluralism that characterized the Colombian one. In the Colombian case, this special commission was not used as a mechanism for the crowding out of the opposition and the establishment of a new hegemony in control of all instances of public power.

[135] Tribunal Supremo de Justicia de Venezuela, Sentencia del 28 de Marzo de 2000, Sala Constitucional, M.P. José M. Delgado Ocando; Sentencia del 28 de Marzo de 2000, Sala Constitucional, M.P. Jesús Eduardo Cabrera Romero.

ongoing, would last until the day of the election of the members of the institutions recently created by the assembly. During this second phase, said the court, the assembly was still the repository of the constituent power of the people and had the authority necessary to see the constitution making process to its proper end.

As the court developed the argument in the two decisions analyzed here, the assembly had two possible options to design the transitory regime: it could either incorporate the transitory regime in the constitution and submit it to popular approval or implement it through a different body of norms that would not be submitted to popular approval. The assembly chose to do both and the court defended this decision. The members of the new constitutional chamber claimed that the assembly still had the authority to issue constituent acts and saw no problem whatsoever with the fact that these new decisions, while having the rank of constitutional norms, were never approved by the people. To argue otherwise, said the court, was only a sign of the dogmatism and formalism of a group of constitutional lawyers with hidden agendas and committed to the status quo.[136]

From now on, the constitutional chamber of the TSJ would rely on the basic tenets of populist jurisprudence not with the intention of bypassing the obstacles to popular sovereignty imposed by an illegitimate constitution; instead, populist jurisprudence was used to justify the court's reluctance to enforce a recently adopted constitution whose legitimacy the court did not question. This paradoxical doctrinal shift can only be understood once the political ideas of the emerging regime and what

[136] For a more thorough discussion of the role of the TSJ regarding the transitory regime, see Brewer-Carías (2010: 79-85).

it was expecting from the TSJ become clear. In the end, the populism of the Chavista movement was not only the result of its disdain for the legality and institutions of the model of Puntofijo, but a more comprehensive rejection of the basic ideas at the heart of modern constitutional democracies. As one of the most important legal philosophers in Venezuela (at the time a member of the constitutional chamber) once claimed in a Gramscian key, the task of the law consists in promoting the homogeneity of the dominant group and creating an environment of social conformity useful to the project of the ruling elite (Delgado Ocando 2004: 71), though at the time he did not imagine he would ever have the chance of using the law in such a way so as to consolidate a new political regime closer to his heart.

We will examine this abusive instrumentalization of constitutional law in greater depth in chapter 6. For now, it suffices to say that the Supreme Court's adoption of populist jurisprudence was initially conducive to the opening of the political space to the participation of popular democratic forces previously excluded from the process of deciding on the fundamental aspects of the regime according to which they were going to be governed. However, under the circumstances that led to the replacement of the Venezuelan Constitution, the initial virtues of the adoption of populist jurisprudence were quickly outweighed by its vices. It led the Supreme Court to a position of political weakness and irrelevance that prevented its participation as a legitimate democratic actor during the constitution making process. At least it is safe to say that this decision was not very strategic: it ended up providing the arguments for the legitimation of an all-powerful and exclusionary constituent assembly determined to set the bases of a political regime with authoritarian

proclivities. At the same time, the constitutional chamber of the recently created TSJ later adapted this type of constitutional jurisprudence in order to justify its refusal to enforce the constitution and make way for the gradual consolidation of a new political elite in control of most instances of public power.[137]

Once the constitution making process was finally over, the conditions were set in Venezuela for a new type of political regime that relies on great levels of popular mobilization in order to crowd out the opposition and concentrate public power on the executive while remaining, at least formally, competitive in electoral terms (see Corrales & Penfold 2012). Of course, this is not to say that the Supreme Court could have prevented these authoritarian outcomes by the simple adoption of a different type of jurisprudence. Perhaps the force of the Chavista movement was such that no jurisprudential approach to constitutional change could have prevented what took place in Venezuela. But if the objective was to use the principle of legality in a democracy-promoting way, populist jurisprudence proved to be a poor choice.

[137] There is a great wealth of academic literature describing the way in which Chávez and his supporters managed to get a hold of most political institutions in Venezuela, especially the judiciary, making irrelevant the principle of the separation of powers that the Constitution of 1999 includes in its text. See, for instance, Brewer-Carías (2010); Castaldi (2006); Coppedge (2002); García-Serra (2001); Garoupa & Maldonado (2011); Human Rights Watch (2004).

PART III

THE "AQUILES HEEL" OF THE CONSTITUTION

Despite the gradual expansion of democratic regimes through Latin America since the 1980's, there are good reasons to be skeptic about the widespread optimism with which the recent wave of constitutional reformism experienced in the region has been received. Roberto Gargarella, who recently published a much needed history of Latin American constitutionalism, has raised a red flag in an attempt to signal to the authoritarian tendencies at the heart of the region's contemporary constitutions. He claims that Latin American legal activists have given obsessive attention to the region's evident advancement in the protection of social rights, while more traditional issues regarding the organization of political power remain ignored or uncritically taken for granted. The democratic success of constitutional reforms, argues Gargarella, rests on the constitutional reformers' awareness of the mutually dependent relationships between the dogmatic and the organic components of the constitution, i.e. between its commitment to the protection of rights and the way in

which it divides and organizes political power. The structure of political power in which a reform for the protection of rights comes to be included has the potential of hindering or fostering its success, and this is specially the case when it comes to the executive, which in the Latin American tradition is clearly the *primus inter pares* within the constitutional structure (Gargarella 2013: 159).

The relationship between democratic constitutionalism and presidentialism has always been problematic. Presidentialism relies on an idea that cannot be easily reconciled with the importance that political pluralism assumes in our contemporary understandings of democracy, i.e. the president as the embodiment of national unity. Carl Schmitt's argument posing the president as the guardian of the constitution is paradigmatic in this regard. The president is the only public official elected by the whole of the people and, contrary to the legislature and other instances of political mediation, it stands in a privileged position that allows for the establishment of a direct and uncontaminated relationship with the popular sovereign.

For this reason, Schmitt saw the office of the president as the gravitational center of the state. While the legislature is the location of multiple political opinions that are supposed to be filtered through endless dialogue and bargaining, the president speaks with one voice. In this sense, the president is better situated than the legislature for the swift adoption of the decisions that the implementation of the will of people and the strengthening of political union require. No one has expressed this idea better than Marx: "The elected National Assembly stands in a metaphysical relation to the nation, but the elected President stands in a personal relation to it. No doubt the National Assembly manifests in its individual deputies the multifarious

aspects of the national spirit, but the President is its very incarnation. Unlike the Assembly, he possesses a kind of divine right; he is there by the grace of the people" (1973: 162).

But unlike Schmitt, who thought that this personal relation between the president and the people made it the perfect candidate for the protection of the democratic regime, Marx saw the office of the president as the "Achilles heel" of the constitution. Democratic presidential regimes are based on a dual source of democratic legitimacy that can eventually become highly destabilizing. The fact that both the president and the legislature are elected directly by the people gives place to an inherent tension between these two branches of power that usually ends up being resolved in favor of the former. Eventually, when a society shows signs of being unwilling to rule itself as a result of the divisions generated by the irreconcilable interests of the different political parties within the national assembly, the conditions are met for the final victory of the president, as Marx learned after the establishment of the French Second Empire.

This lesson remains valid today, as the work of Juan Linz on presidential regimes has made evident: "a president frustrated by legislative recalcitrance will be tempted to mobilize the people against the putative oligarchs and special interests, to claim for himself alone true democratic legitimacy as the tribune of the people, and to urge on his supporters in mass demonstrations against the opposition" (1994: 63). Therefore, presidential claims regarding his role as the true representative of the people can eventually become the vehicle for the authoritarian usurpation of power

and the exclusion of dissident political forces from the process of determining the will of the people.

This is specially the case when the executive power is in the hands of populist leaders, as political developments in Latin America have shown. The recent wave of constitutional reformism across this region reveals a troubling tendency towards the centralization of political power around the office of the executive.[138] The governments of Álvaro Uribe in Colombia and Hugo Chávez in Venezuela are clear examples of the authoritarian deviations that the leadership of populist presidents can produce. Though representing opposite sides of the political spectrum, both of these presidents have relied on a populist political style whose most salient characteristic is the attempt to link the state and civil society through mechanisms that do not correspond to the rule of law and that show no respect for liberal democratic procedures (de la Torre 2010: 10). With different objectives in mind, both Uribe and Chávez have favored an illiberal conception of democracy[139] that has been able to prosper under conditions of a profound crisis of the party systems of these two countries.[140]

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[138] Several authors have observed this tendency. See, for instance, the work of Bejarano & Segura (2013), Gargarella (2013), Negretto (2013), and Uprimny (2011).

[139] The concept of illiberal democracy can be easily interchangeable with Carl Schmitt's populist conception of democracy. Following Rosanvallon, illiberal democracy reveals a preference for plebiscitary mechanisms for the expression of the popular will and a rejection of the institutions of representative government; it adopts a view of representation as embodiment or incarnation of the people in a single leader; and it assumes, in line with the tradition of revolutionary monism, that one person can become many and that the many can actually become one. The result of the legitimating practices of this model of illiberal democracy, claims Rosanvallon, is the increasing personalization of power and a complete disregard for the principles of political pluralism (2006: 176-213). On the concept of illiberal democracy, see also the work of Zakaria (1997).

[140]This crisis was especially acute in Venezuela. Surprisingly, the weakness of the Colombian parties, when compared to the history of its Venezuelan counterparts, allowed them to survive the crisis of the

The populist leadership of these two charismatic personalities has moved these countries towards a hyper-presidentialism[141] that, in the case of Colombia, sought to respond to a serious security threat originated by the perennial inability of the state to monopolize the means of violence, while in Venezuela the objective was to complete the revolutionary transformation of the political regime by an emerging elite committed to the resolution of the social question. Both Uribe and Chávez tried to justify their disregard of liberal mechanisms for the limitation of executive powers under the assumption that their privileged relation with the popular sovereign endowed them with the legitimacy to pursue their agenda unmolested by the constitutional principles of the separation of powers and the rule of law. At the same time, and in a way that Gargarella has shown to be characteristic of contemporary Latin American constitutionalism, they claimed that these traditional constitutional controls are not the only way in which a president can be kept in check. In line with the illiberal conception of democracy that has characterized populist leadership since the times of Louis Bonaparte, they have argued in favor of popular and informal mechanisms of control such as the influence that public opinion exerts on the rulers and the popular verdict of the citizens over the merits of their governments at the voting booths (Gargarella 2013: 162-164).

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state, given their lax and decentralized character and their reliance on informal mechanisms of negotiation and bargaining. Though lacking full support, they still provide political continuity and stability to Colombian politics, while in Venezuela they have become largely insignificant after the emergence of the trend of personalism and populism that hit the country by the end of the 1990s (Bejarano 2011: 215).

[141] For a description of Latin American hyper-presidentialism, though mostly based on the Argentinian case, see Nino (1992).

The most salient consequence of this plebiscitary presidentialism of both Uribe and Chávez was their rejection of the presidential term limits adopted by the constitutions of their respective countries.[142] Presidential term limits seem to be incompatible with the illiberal conception of democracy that populist leadership tends to favor. As John Carey has shown, the debate over presidential reelection in Latin America oscillates between two opposite poles. Since the birth of the Latin American republics constitutional restrictions on presidential terms have been common, and they eventually became the norm by the middle of the twentieth century. The fear of an excessive concentration of power and its potential abuse contributed to the emergence of an anti-caudillo principle that has occupied a central place within the Latin American constitutional tradition. However, the last decade of the twentieth century saw the tide turn in favor of presidential reelection. The need for effective leadership and the full realization of the democratic principle became the most salient justifications of these reforms. Supporters of this view usually argue that "the possibility of immediate reelection increases politicians' responsiveness to citizen demands and allows voters the freedom to retain popular incumbents" (Carey 2003: 119).

Carey tries to introduce some nuances to this polarity when he claims that presidential reelection might not be so problematic from the democratic point of view when, as in the case of Menem in Argentina, the reform is the result of a negotiation with the opposition. In these situations, the adoption of presidential reelection might

[142] This phenomenon is not limited to these two countries. The problem of presidential reelection has recently turned into a central political issue in countries like Bolivia, Ecuador, Honduras, and Nicaragua, to mention just a few salient examples.

come together with the strengthening of the legislature and the judiciary. However, when this constitutional reform is adopted in a plebiscitary fashion, the chances are that the concessions that former President Menem had to give to the opposition will be absent and the power of the executive will be greatly increased[143] (Carey 2003: 131).

This distinction between negotiated reforms and plebiscitary impositions is useful for the analysis of the cases of Colombia and Venezuela. While Uribe had to negotiate with a variety of political forces during a difficult legislative process in order to be able to run for a second term, and then failed to use the plebiscitary alternative to impose his way to a third term, Chávez, after an initial plebiscitary attempt that failed, managed to mobilized the voters to support his desire to reform the constitution through a second referendum in order to allow for the indefinite reelection of the president.

While Chávez had no resistance from instances of political mediation and was able to advance his goal without compromising with the opposition, the difficulties that Uribe faced during his dealings with a legislature not completely under his control did manage to curtail the expansion of executive powers in Colombia. However, the end result of their political maneuvers was similar: in both Colombia and Venezuela the introduction of presidential reelection contributed to the elevation

[143] This is not to say that the use of plebiscitary mechanisms such as referenda to reform the constitution is necessarily undemocratic. Constitutional referenda could eventually be made compatible with a pluralist conception of democracy under the assumption that they meet "the tests for meaningful participation and open-mindedness set by deliberative standards" (Tierney 2009: 382). However, Margaret Canovan's concerns with the possibility of equating the use of these mechanisms of direct democracy with a clear manifestation of the will of a plural people should be kept in mind (2005:110-113), especially when these mechanisms become the instrument of choice for presidents looking to remove constitutional limitations to their term in office.

of the executive branch above all others, to the erosion of the horizontal and vertical controls on presidential powers established by their respective constitutions, and to the reduction of the spaces necessary for the protection of political pluralism. Contrary to populist democratic arguments in favor of presidential reelection, and partially confirming the reasons behind the importance that the anti-caudillo principle has assumed in the Latin American constitutional tradition, the governments of both Uribe and Chávez have proven, once again, that Kelsen was right when he claimed in his polemic against Schmitt that of the three classical branches of political power the president is the most likely to overstep the boundaries of his authority (Kelsen 2009: 323-325).

As Gargarella argues in a somehow Kelsenian fashion, this type of plebiscitary presidentialism suffers from two evident problems: it overestimates the capacity of the people to control power and underestimates the capacity of the executive to overcome limitations. "On the one hand, these new defenders of hyper-presidentialism suddenly abandon the radical skepticism that characterizes their approach to legislative and judicial controls when they turn to examine popular controls. In effect, when they refer to popular formal and informal checks, they transform their skeptical view into a very optimistic attitude". But popular controls are not necessarily in a better position to keep the president in check, as Schmittians would have it. This Schmittian view of hyper-presidentialism needs to be rejected on both descriptive and normative grounds: it might easily end up favoring powerful interest groups in proximity to the president; it reduces the chances of advancing a more deliberative type of politics in order to prevent the mistakes of this presidential

decisionism[144]; and it creates an evident risk of human rights violations (Gargarella 2013: 163-164).

There is, however, a significant difference between the processes of constitutional reform advanced by Uribe and Chávez: the existence of judicial checks in Colombia and their absence in Venezuela (Penfold 2010: 1-3). In the case of Colombia, an independent and powerful Constitutional Court emerged from the constitution making process of 1991. This institution effectively challenged the advancement of populist authoritarianism in Colombia when, after declaring the constitutionality of one immediate reelection, struck down a law passed by the legislature convening the citizens to decide through a referendum if the constitution should be amended in order to allow the president to run for a third consecutive term.

Contrary to the case of Venezuela, in Colombia the weakening of the political party system was not as severe by the time Uribe rose to power. Though he managed to gain the support of a majority of the political class, there was still significant resistance to his desire to continue in power. Uribe's inability to entirely coopt the political system contributed to the preservation of the independence of the Constitutional Court and to its decision to challenge the president's attempt to amend the constitution for a second time. To a great extent, the victory of the Colombian Constitutional Court over a highly popular and powerful president confirms

[144] This is precisely the critique that Kalyvas develops against Schmittian plebiscitary presidentialism and that can also be found in O'Donnell's model of delegative democracy. Plebiscitary presidents tend to silence the popular sovereign, turning the citizens into a passive and cheering crowd capable of acclamation but unable to deliberate. See, Kalyvas (2008: 125-126) and O'Donnell (1994: 59-60). Schmitt himself was aware of the risks mentioned by Gargarella, when he recognized that the speechlessness and passivity of the popular sovereign could eventually facilitate the usurpation of political power by "invisible and irresponsible social powers" (Schmitt 2008: 275).

Ginsburg's general prediction: "*Explicit constitutional power of and access to judicial review will be greater where political forces are diffused than where a single dominant party exists at the time of constitutional design"* (2003: 25).

However, what makes this decision especially exceptional was the court's instrumentalization of populist jurisprudence to put a stop to the power-grabbing ambitions of an already powerful president. Following to the letter the fundamental Schmittian distinctions between constituent and constituted powers and between the constitution and constitutional laws, the court claimed that a reform allowing for the second reelection of the president went against the fundamental decision made by the popular sovereign in 1991. According to the court, a constitutional reform such as this one would give place to a constitutional regime in which the powers of the president are too great to allow for the effective functioning of a whole set of principles of fundamental importance in a constitutional democracy, such as the separation of powers, political alternation, the rule of law, and political pluralism. Such a replacement of the constitution could only take place through the activation of the replacement track, i.e. by means of a constituent assembly. Through populist jurisprudence, the court imposed itself as a political actor with the authority to define what the popular sovereign has actually decided and the ways in which it can act. It took away from the president's hands the power to decide on these matters and rejected his claims to be the true representative of the people.

Things were very different in Venezuela. In this case, the president was in a better position to advance his populist agenda. Thanks to the complete control that he managed to obtain over the constituent assembly, the Venezuelan constitution

already provided for the possibility of one immediate presidential reelection. Also, the Chavista coalition was in complete control of the unicameral legislature, assuring that all presidential initiatives could easily be passed into law. But more importantly, the constitutional chamber of the new Supreme Tribunal of Justice was already fully aligned with the government by the time Chávez decided that the survival of his "revolution" required a constitutional reform allowing for his indefinite reelection. Contrary to the Colombian Constitutional Court, its Venezuelan counterpart relied on populist jurisprudence not to challenge the attempts of the president to concentrate more and more power in his hands, but to clear the way for the establishment of a direct and unmediated relationship between the president and the popular sovereign.

The jurisprudence of constitutional change adopted by the Venezuelan TSJ relied on a populist conception of democracy that assigns a central role to charismatic leadership as a necessary vehicle for the formulation and implementation of the will of people. As a consequence, the TSJ found no legitimate place for instances of legal and political mediation in the process of determining what the popular sovereign actually wants. In this sense, the rules of amendment became irrelevant for the TSJ. The president was to be left free to pursue the revolutionary transformation of the country in any way he wanted, and it was up to the citizens to decide, through public opinion or, mostly, at the voting booths, if the vision that the leader had of the country was democratically sound. Democracy, from this point of view, is reduced to a simple plebiscitarian and majoritarian exercise devoid of the substantive principles that the constitution proclaims.

The following chapters will trace the processes of constitutional change advanced by Uribe and Chávez in their respective countries in order to test the potential of constitutional courts and populist jurisprudence to deal with the "Achilles Heel" of the constitution in a democratic manner. As in the second part of this dissertation, populist jurisprudence will reveal its two faces, i.e. democratic and authoritarian. However, it will also become evident that, ultimately, the fundamental Schmittian premises of populist jurisprudence open the door for the eventual return of a revolutionary hiatus from which authoritarian populist forces can easily bask. Constitutional judges should be aware of this risk and consider if reliance on the democratic potentials of populist jurisprudence is a sound alternative or, to the contrary, it can compromise the democratic character of the political regime in the long run.

CHAPTER 5

POPULIST JURISPRUDENCE AND PRESIDENTIAL REELECTION IN COLOMBIA

1. The Advent of the Populist Temptation

Historically, populism has not been very successful in Colombia. Besides the two short-lived experiences of Gaitán's populist movement during the 1940's and Rojas Pinilla's attempt to challenge the consociational agreement of the National Front during the 1960's and 1970's, both of which failed to capture state power, the absence of populism has been a defining element of Colombia's history of democratic politics. These two episodes of populist politics had a brief duration, did not achieve total autonomy in their relationship with the traditional political parties, and took place within contexts of political violence that prevented them from reaching their full potential (Pécaut 2000: 45).

As it turns out, the social and political characteristics of Colombia have made it almost impossible for populism to succeed. First, the social fragmentation that results from the country's geography, the multiplicity of urban centers, and the inability of the state to establish control over the entire territory, have worked against the consolidation of the myth of a united people. Second, a long tradition of bipartisan politics has occupied the position that myths of national unity usually have as the source of the citizens' political identity. Loyalty to the traditional parties gave place in Colombia to the emergence of two deeply rooted political subcultures working against the possibility of an overarching foundational myth. And, third, the historical prevalence of private mechanisms for the management of the economy has significantly curtailed the powers of the state to intervene in the process of production and the allocation of resources[145] (Pécaut 2000: 46-50).

The consequences of this absence of populism in Colombia have been significant. Pécaut, for instance, claims that the failure of populist movements facilitated the eruption of violence that has characterized this country for decades (2000: 60), while Palacios goes as far as saying that Colombian political violence is in fact the result of this absence of populism (2011: 121). For the former, the history of political violence in Colombia during the twentieth century has more to do with a strategy of political accommodation on the part of a political elite that sees populism as an even greater threat to their hegemony and the continuation of the economy under the control of the private sector than violence could ever be. For the latter, the

[145] For very similar arguments on the absence of populism in Colombia, see Palacios (2011: 59-108) and Bejarano (2013: 327-328).

absence of important populist experiences has kept the state and the traditional political elite from gaining the allegiance of the popular classes to their political project and the capacity to prevent eventual armed insurrections.

Venezuela under the government of Rómulo Betancourt is an example in this respect. Betancourt's populism was instrumental for the objective of isolating important sectors of the population from the influence of revolutionary organizations that, without this popular support, were unable to survive (Palacios 2011: 127). Palacios claims that while the bias of Colombia's liberal institutions towards the interests of capital has cohabitated with political violence, the reformist and populist traits of the Venezuelan state have greatly contributed to the delegitimation of violence (2011: 133).

An important conclusion that seems to follow from the failed history of Colombian populism is that even during those moments in which the party system enters an acute situation of crisis that is supposed to facilitate the emergence of a populist project, the existence of widespread violence makes it impossible for populism to succeed (Pécaut 2000: 68). A situation of violence like the one that characterizes Colombian history generates considerable social and political divisions that prevent the idea of a united people from taking hold in the population. At the same time, it weakens the state to the point that it can no longer be used as an efficient instrument of social and political intervention.

However, this supposed incompatibility between populism and violence does not necessarily hold once the former concept is delinked from the concerns for state intervention and economic redistribution typical of classical Latin American

populism. As recent scholarship on the subject has shown, populism is not necessarily tied to a specific sociopolitical project. Instead, it can manifest from both sides of the ideological spectrum, to the point of being compatible, for instance, with a neoliberal agenda. Understood in this way, populism has more to do with a particular political style than with the presence of a predetermined set of elements such as social structure, class relations, or economic projects.[146]

The two terms of Álvaro Uribe's presidency (2002-2010) are an example of the ways in which violence and populism can coexist and even reinforce each other. The severe blow that the opening of the political system dealt to the traditional political parties after the adoption of the Constitution of 1991 cleared the way for the eventual emergence of a populist political project with good chances of success. In fact, after 2002 it was no longer possible to speak of a bipartisan political system in Colombia. The reformist and democratizing spirit of the Constitution of 1991 created "the institutional conditions for a rebellion against political parties in general", and led to the adoption of a new type of politics based on the resurgence of caudillismo (Gutiérrez Sanín 2007: 493-498). And though emerging political forces have managed to consolidate their political structures to a good extent, e.g. the left and the Christian minority, the erosion of the dominance of the traditional parties has mostly favored a transitional group of professional politicians formed within the ranks of the traditional parties but that decided from now on to run as independents (Gutiérrez Sanín 2007: 478-483).

[146] On this approach to populism, see the work of Carlos de la Torre (2010), Alan Knight (1998), and Kurt Weyland (2003).

Álvaro Uribe was one of these professional politicians that abandoned the sinking boat of the traditional parties. The hegemony of the Liberal Party came to a close after the eruption of a political scandal that revealed the use of illegal funds from the drug cartels to finance the campaign of President Samper (1994-1998). The Conservative Party was also discredited after the peace talks that President Pastrana (1998-2002) initiated between the government and the FARC ended up in complete failure. The political left, to the contrary, was initiating the process of consolidation of a political organization that soon would grow to become a serious alternative at the national and local level. However, during the first presidential elections of the twenty first century in Colombia, they were barely able to compete. Out of this combination of persistent political violence and the crisis of the party system emerged the figure of Álvaro Uribe. After a political career within the ranks of the Liberal Party, Uribe ran for president as an independent, and once the Conservative Party adhered to his campaign, he managed to easily defeat a candidate from the Liberal Party that public opinion inevitably associated with the political scandal that threatened to put an end to the presidency of Samper.[147]

Following Ana María Bejarano, Uribe's rise to power is a visible anomaly in the history of Colombian politics. Though not a case of populism in the traditional sense, Uribe did make an instrumental use of populism with the intention of consolidating an "extremely conservative political project" within the context of a serious security

[147] The elections took place on May 26, 2002. Uribe won the presidency after the first round of elections with 53% of the votes. Horacio Serpa, from the Liberal Party, was second with 31%, and Luis Eduardo Garzón, representing a coalition of leftist political organizations, came third with 6%. For complete results, see http://web.registraduria.gov.co/2002PRP1/e/vpresidente0.htm?1

crisis (2013: 323-324). Bejarano describes the "Uribe phenomenon" as a hollow instance of populism: though he made use of populist style and discourse in order to politicize the fears of insecurity of the people, propel himself to the presidency, and initiate a process of gradual concentration of power around his office, he did not place any emphasis on class divisions and social and political inclusion, nor did he try to use the state as an instrument of economic intervention and redistribution[148] (2013: 332-333).

According to Carlos de la Torre, populism, old and new, is characterized by five elements: first, a Manichean vision of society; second, the central figure of the leader; third, the presence of a coalition of emergent elites with popular sectors; fourth, a tension between top-down mobilization and autonomous demands; and, fifth, an ambiguous relationship with democracy (2010: 199-200). Populism, therefore, can be understood as an alternative form of mediation between the state and civil society; an illiberal political style that, while holding fast to a unitary conception of the people, relies on a logic of exclusion that radically polarizes the citizenry; a process of political will formation concerned with immediacy rather than discussion, reflexivity, and institutional mediation. All of these characteristic elements of populism were present during Uribe's long government.[149]

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[148] Bejarano seems to reject the move towards the thinner conception of populism espoused by people like Carlos de la Torre, Alan Knight, and Kurt Weyland. She still links populism to a very specific socioeconomic project. However, her description of Uribe's instrumentalization of populism, or "hollow populism", is entirely compatible with an approach that focuses strictly on political style. For a more categorical refusal to identify Uribe's politics as an example of populism, see Dugas (2003) and Galindo Hernández (2007).

[149] "Colombia has been independent since 1819. Since that time, no one else – not even the handful of dictators – had stayed in power for as many years in a row as Uribe" (Posada Carbó 2011: 138).

Uribe, for instance, did stress a Manichean division of society based on the moral categories of good and evil, order and chaos. The enemy was anyone he considered to be an obstacle to the victory of the state over terrorism, grouping under this category not only the guerrillas of the FARC and the ELN, but also NGO's, journalists, intellectuals, opposition politicians, and even the Supreme Court (Bejarano 2013: 333-334). In line with this, Uribe's political achievements can be better understood as a successful attempt to become the personification of a terrorized people, as Bejarano would put it (2013: 329). During the years that Uribe managed to remain in power, the context of political violence gave great strength to his populist style, and the polarization that resulted from this discourse contributed to the continuation of violence.

One argument that is used to deny Uribe's membership to the populist club is his neoliberal view of economics and the state. The failed constitutional reform that he tried to pass during his first year in government by means of a referendum is often taken as a clear example of a political project aiming at the reduction of public expenditure and the bolstering of the efficacy of a state apparatus that is kept from excessive intervention within the affairs of civil society. However, this first manifestation of a plebiscitary understanding of democracy was conceived by Uribe as a fundamental step towards the mobilization of the population against the internal enemy, bringing to light the populist traits of Uribe's leadership.

Uribe's 2003 referendum against corruption and politicking originated as a campaign promise. Together with his bow to fight terrorism[150] with an iron fist, Uribe's campaign platform also gave priority to the fight against corruption and excessive expending. Both promises, however, were connected. Uribe was hoping to get control over those funds wasted in personal privileges for legislators and clientelistic political practices in order to redirect them towards the military. However, the president's proposal included three controversial issues that made it very difficult for Uribe to amend the constitution through the strictly congressional track: "the structural reform of Congress, its imminent dissolution, and the threat of early elections" (Breuer 2008: 78). These measures were highly unpopular within the legislature, for obvious reasons. Just like Chávez in 1999, Uribe was now trying to replace Colombia's bicameral Congress with a unicameral legislature. Though justified as a measure to make government more efficient and austere, it did not escape to anyone that this move was also a way to reduce congressional mediation and increase the decision-making powers of the executive.

After Uribe's electoral victory, Congress quickly aligned with the executive. Though the Liberal and Conservative parties had the highest number of seats in both chambers of Congress, they were far from being able to control the legislative process. After the legislative elections of March, 2002, political fragmentation was greatly

[150] The use of the term "terrorism" is indicative of the significant shift that Uribe brought to Colombian politics. See, as an example, the collection of Uribe's speeches on the need to put an end to the legal system's recognition of political crimes (Botero Campuzano 2007). Guerrilla organizations, claimed Uribe, could no longer be defined as altruistic criminals concerned with the correction of an unjust state of affairs within a society to which they belong and would like to improve; to the contrary, they have placed themselves outside of the social contract and cannot make any claims to be a part of the people.

increased, and a variety of political organizations, most of them the recently created electoral vehicles of professional politicians with a past linked to the traditional parties, were now in control of a significant number of seats, contributing in this way to the emergence of a scenario of diffused political power. Despite the support that a majority of political forces gave to Uribe's government, his controversial proposals regarding congressional reform were not likely to be passed by the legislature. For this reason, Uribe decided to bypass Congress through the direct democratic mechanism of the referendum, hoping that his skyrocketing popularity would help his reforms go through (Breuer 2008: 79).

However, the reactive nature of constitutional referenda in Colombia still made it highly difficult for the president to establish "direct and uncontaminated" relationships with the citizens. According to Article 378 of the Constitution of 1991, the president may initiate a process of constitutional reform by means of a referendum, but his proposal has to pass through Congress first, and if approved, then the citizens can vote on it.[151] Reactive referendums, according to Breuer, are those in which the executive cannot bypass the mediation of the legislature in order to appeal to the people directly. The institutional design of this mechanism of constitutional change adopted by the Colombian constituent assembly made the use of referenda "less prone to populist misuse" (Breuer 2008: 84). Uribe, for instance, had to

[151] Artículo 378, Constitución de la República de Colombia de 1991: "Por iniciativa del Gobierno o de los ciudadanos en las condiciones del artículo 155, el Congreso, mediante ley que requiere la aprobación de la mayoría de los miembros de ambas Cámaras, podrá someter a referendo un proyecto de reforma constitucional que el mismo Congreso incorpore a la ley. El referendo será presentado de manera que los electores puedan escoger libremente en el temario o articulado qué votan positivamente y qué votan negativamente. La aprobación de reformas a la Constitución por vía de referendo requiere el voto afirmativo de más de la mitad de los sufragantes, y que el número de éstos exceda de la cuarta parte del total de ciudadanos que integren el censo electoral".

capitulate before Congress, and his initial proposal to establish a unicameral legislature was replaced by a reduction of the number of members of each congressional chamber.

But before the citizens could vote on the new version of the government's proposal, one more obstacle had to be overcome. Under the new Colombian constitution, all constitutional referenda have to go through the review of the Constitutional Court before the citizens can express their opinion at the voting booths.[152] The court upheld most of the proposals included in the law convening the referendum, striking down just a few of them.[153] However, after congressional and judicial mediation, Uribe's referendum suffered considerable changes. Finally, when the time came for the citizens to vote, Uribe failed to surpass the electoral threshold required for the approval of his proposals. Though most voters said yes to all the questions in the referendum, Uribe's project of constitutional reform failed to mobilized the 25% of the electoral census that the constitution requires for the successful use of this mechanism. In the end, only one of Uribe's proposals eventually made it into the constitution.

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[152] Artículo 241, Constitución de la República de Colombia de 1991: "A la Corte Constitucional se le confía la guarda de la integridad y supremacía de la Constitución, en los estrictos y precisos términos de este artículo. Con tal fin, cumplirá las siguientes funciones: (…) 2. Decidir, con anterioridad al pronunciamiento popular, sobre la constitucionalidad de la convocatoria a un referendo o a una Asamblea Constituyente para reformar la Constitución, sólo por vicios de procedimiento en su formación".

[153] Corte Constitucional de Colombia, Sentencia C-551 de 2003, M.P. Eduardo Montealegre. In this decision the Constitutional Court developed for the first time its version of the Schmittian doctrine on the existence of implicit limitations to constitutional change that will be analyzed in the following section of this chapter, or, to use the terminology of the court, the "substitution of the constitution doctrine". However, the court did not use it to strike down any of the articles of this law. It merely appears as an indication to the government of the willingness of the court to enforce strict limitations to the powers of constitutional reform granted to the constituted powers. For an accurate description of the Schmittian roots of this decision, see Colón-Ríos (2011).

This evident failure to use the mechanisms of direct democracy in order to bypass institutional mediation could be interpreted as an indication of Uribe's distance with populist political style. Uribe's reluctant negotiation with Congress and his acceptance of the Constitutional Court's decision to remove several questions from the text of the law convening the referendum might lead political analysts to discard the referendum of 2003 as an example of populist strategy (Dugas 2003: 1132). At least during the initial years of his government there was still room for doubt. Dugas, for instance, claims that Uribe lacked a charismatic aura; that he made no serious efforts to "cultivate political support among the masses"; and that his *consejos comunitarios* were merely passive listening exercises to the complaints of citizens in the regions rather than a scenario for "electrifying public orations" (2003: 1118). Time, however, would eventually dispel these doubts.

After this initial defeat before the system of horizontal and vertical controls established successfully by the Constitution of 1991, Uribe increased his efforts to mobilize his impressive popularity against these instances of political mediation. His presidency was used to concentrate power in the hands of the executive in close relationship with the military, a tendency "clearly inimical to democracy", as Ana María Bejarano has pointed out (2013: 338). His subsequent attempts to reform the constitution and do away with its limits on presidential reelection are the clearest example in this regard. Though it is true that with Uribe "there was no glorification of the people but rather of 'the leader'" (Bejarano 2013: 337), the populist appeal to the sovereign will of the people was instrumental in his quest to defeat the enemies of the state. Like no one before him, Uribe put to the test the resilience of Colombia's

democratic culture and institutions, directing all his energies towards the instrumentalization of a populist conception of the constituent power that was clearly at odds with the principle of political pluralism at the center of the Constitution of 1991 and the complex institutional safeguards that it requires for its implementation.

2. The Constitutional Court as Guardian of the Democratic Constitution

Presidentialism has been a constant characteristic of Colombia's democratic history. However, constitutional designers in this country have been acutely aware of the potential for abuse that is inherent to this institutional alternative. For this reason, immediate presidential reelection has been mostly proscribed from Colombian constitutions. Besides the brief lifetime of nine years of the Constitution of 1821, in which immediate presidential reelection was allowed, the historical rule has been the possibility of one nonconsecutive reelection after an intervening term out of office. The strong commitment of the country's political elites to the principle of the separation of powers, and their view of immediate reelection as a destabilizing factor conducive to political violence between rival factions that cannot find any other institutional alternative to compete against the "constitutional monarch", come a long way towards explaining Colombia's historical refusal to allow for the continuation of presidents for more than one term.[154]

[154] On the history of presidential reelection in Colombia, see Castro (2005). For a classical account of the evolution of presidential power in Colombia, see Vázquez Carrizosa (1979).

In fact, the Constitution of 1991 radicalized this historical trend. The constituent assembly recognized the constraints that the country's tradition imposed on constitutional experimentation and decided to maintain the presidential regime. The structural problems that the assembly was trying to face seemed to require the strength and decisiveness usually associated with presidentialism. However, the republican instincts of most members of the assembly, their agreement on the need to allow for the alternation in power, and the uncertainty that the emergence of new political forces introduced to the electoral calculations of most political actors, kept in check the temptation to grant too much power to the executive. The recent history of abusive government by means of emergency decrees and the need to democratize political power in accordance with the clamors of the population, inclined the constituent assembly towards the adoption of the "anti-caudillo principle" as one of the guiding ideals of constitutional design. In line with this, the assembly decided to prohibit presidential reelection in all its forms.[155] The president did retain significant power, but when compared to the previous constitutional arrangement, he was now clearly under greater institutional constraints. The constituent assembly made a great effort to increase the powers of Congress and created a complex institutional structure that included a powerful Constitutional Court and a variety of autonomous institutions of control.[156]

[155] The original formulation of Article 197 of the Constitution of 1991 read: "No podrá ser elegido Presidente de la República el ciudadano que a cualquier título hubiere ejercido la Presidencia […]".

[156] For a general account of the debates of the Colombian constituent assembly on presidential powers, see Negretto (2013: Ch. 6). For an account of the discussions that led to the prohibition of presidential reelection in particular, see Figueroa (2012b: 448-453).

But the arrival of Álvaro Uribe to the presidency in 2002 changed things to a great extent. After two years in power, Uribe's emphasis on security had become highly popular. He consolidated the support of the Conservative Party and managed to weaken the official opposition of the Liberal Party by drawing to his side an important number of its members in Congress. Uribe made evident that the attempts of the constituent assembly to strengthen the party system and to put an end to the predominance of clientelistic political practices had failed. Intra-party divisions and political fragmentation made it possible for a highly popular and charismatic president to recruit the support of the majority of Congress through the traditional mechanisms of pork barrel politics. Only the left and a diminished Liberal Party took on the task of opposing the president.

Half way through his presidency Uribe dropped all pretenses and, through his supporters in Congress, introduced a project of constitutional reform that sought to allow for the immediate reelection of the president for one consecutive term.[157] As Jaime Castro points out, this was the first time in Colombia's history that a president seeking reelection dared to propose a constitutional reform for his own immediate benefit (2005: 80). Uribe was finally revealing his personalistic conception of politics and presenting himself not just as the only person with the capacity to defeat the

[157] According to Valencia Villa, Álvaro Uribe initiated a trend of authoritarian reformism that systematically eroded the democratic nature of the regime established by the Constitution of 1991 (2010: Ch. 4). This first attempt to do away with restrictions on presidential reelection should be understood as one of the most salient examples of such a trend.

guerrilla insurgents, but also as the privileged vessel of the undeniable will of the people to be led with a firm hand by someone in whom they trusted.[158]

However, the members of his political coalition quickly recruited the support of democratic theory in order to show that the reform they were advancing did not respond to the power grabbing ambitions of the president or to the need to reelect an extraordinary man such as those that history rarely offers. Instead, they claimed that the possibility of an immediate presidential reelection strengthened the democratic credentials of the constitutional regime by allowing the citizens to evaluate the performance of the government through their vote. They also argued that the prohibition of presidential reelection was a troubling sign of a deep distrust of the popular will, which under a true democratic regime should always be above the law. The country's democratic culture, they claimed, was mature enough to get by without such electoral restrictions. In sum, there were no reasons to fear for the future of the democratic regime (see Figueroa 2012b: 455).

Especially significant for the purpose of revealing Uribe's populist approach to democracy and constitutional change was the book that José Obdulio Gaviria, one of Uribe's closest advisors and perhaps the most important political ideologue of his government, wrote to defend the democratic credentials of presidential reelection (Gaviria 2004). In this book, Gaviria made a passionate argument defending a conception of democracy that was based on the fundamental importance of political

[158] Roberto Camacho, one of the supporters of this project of constitutional reform in the lower chamber of Congress, made explicit the personalistic nature of the project: "We, Colombians, are not in favor of reelection, we are in favor of Uribe's reelection, so we can solve our problems once and for all. Of course this is a personalistic project, because it is about a person who happens to be at the right place, at the right moment, and who was able to interpret that place and that moment correctly (…)". See, *Gaceta del Congreso*, No. 370 of 2004.

leaders and their direct interaction with the people. His main concern was that of establishing the necessary political conditions for true leaders to be able to govern and advance their ideas. A rule that prohibits reelection, he claimed, goes against the core of the democratic principle that dictates that only the people, and not the constitution, are entitled to decide on the matter of who their leader should be.

From Gaviria's perspective, constitutional limitations on presidential reelection are clearly illegitimate: they get in the way of the implementation of the popular will. In his argument, he opts to vow before the rules of amendment, to which he refers as "the rules of the game", but his understanding of these rules is purely formalistic. As long as an amendment is past following the procedure established in the constitution, then it should be adopted. He rejects the more substantial conception of constitutional change according to which there are implicit limitations to the power of constitutional reform that the rules of amendment grant to political actors. In this sense, Gaviria's book both embraces and rejects Schmitt's populist conception of democracy and constitutional change. He adopts Schmitt's plebiscitary understanding of the president as the true representative of the people but refuses to accept that the fundamental characteristics of the political regime adopted by the people during the constitution making moment cannot be reformed by means of the rules of amendment. As long as the president is able to mobilize the majority of the population in support of his political project, the constitution must make way.

Though the issue of presidential reelection was sensitive enough to mobilize the opposition against it, Congress finally approved Uribe's project of one consecutive

reelection.[159] Gaviria's arguments carried the day both in Congress and before the tribunal of public opinion. The only obstacle left before Uribe could, for the first time in the country's history, assume the dual condition of sitting president and presidential candidate, was the challenge to the validity of this reform that a citizen took before the Constitutional Court. The court, however, upheld the validity of the reform, though not without first asserting its powers before the executive and the legislature.[160]

In this decision, the court made a thorough analysis of the legislative process through which this amendment was passed and found no reasons to declare it unconstitutional. However, it did find that some of the provisions of the act through which this amendment was passed implied an abuse of Congress' powers of constitutional reform. Though the plaintiff argued that the whole act of Congress entailed an illegitimate substitution of the Constitution, the court found that not the introduction of presidential reelection for one consecutive term but the power given to the highest administrative court of the country to transitorily regulate, in case Congress did not do it, the system of guarantees that the opposition managed to include in the amendment in order to be in a position to compete in equal terms with the sitting president during the elections, went against the fundamental principle of the separation of powers as established by the popular sovereign in 1991.

Regarding the central issue of presidential reelection, the court found that it was entirely compatible with the presidential regime established by the Constitution

[159] See, Acto Legislativo 02 de 2004, Congreso de la República de Colombia.

[160] Corte Constitucional de Colombia, Sentencia C-1040 de 2005, M.P. Manuel José Cepeda *et al.*

of 1991. The prohibition of reelection, claimed the court, is not an essential element of presidentialism within a democratic regime. The court considered the fundamental elements of the presidential government to be the following: the direct and popular election of the president, his dual condition as head of state and head of government, and the fixed character of his term in office. Presidential reelection, then, did not alter any of these fundamental traits of the regime that the Colombian people had established in 1991. Besides, the regime of guarantees that Congress adopted with the intention of balancing the playing field between the president/candidate and the other candidates was a clear sign of the legislature's attempt to prevent an excessive concentration of power in the hands of the executive. Only the powers granted to the administrative court to regulate this system of guarantees threatened the fundamental principle of the separation of powers, since they implied an illegitimate intrusion of the judicial branch within the faculties of the legislature.

The court, however, did make an important warning: presidential reelection does not alter the fundamental elements of the Colombian constitutional regime as long as it allows only for one consecutive term. Any attempt to introduce a project of constitutional reform aiming at the possibility of a second reelection would be considered by the court to be unconstitutional. A second reelection, according to the court, would completely disfigure the political regime that the people established in exercise of their constituent power. It would grant too much power to the executive and erode the capacity of the established institutional system to sustain the democratic commitments of the country's political regime. In this way, the court reaffirmed its willingness to assert the Schmittian doctrine of implicit limitations to

constitutional change that it had already announced in its 2003 decision on Uribe's referendum.

This doctrine is one of the possible variants of populist jurisprudence, one with a significant democratic potential, as the court would demonstrate five years later by putting an end to Uribe's attempt to remain in power for an additional term. The populist trend that Uribe initiated in 2002 was far from being over after he managed to reform the Constitution in accordance to his wishes.[161] In 2006, again after the initial round of elections, Uribe defeated Carlos Gaviria, the candidate of the now consolidated party of the political left, the *Polo Democrático Alternativo* (PDA).[162] Uribe's impressive popularity, together with the president's own conviction to be the only one capable to defeat the insurgent organizations and finally pacify the country, resulted in the initiation of yet one more process of constitutional change.

A new political party came into existence in 2005, *Partido Social de Unidad Nacional*, popularly known as *Partido de la U*, an evident reference to the president's last name. Though Uribe did not run for the presidency as this party's candidate, he did encourage its creation. This party brought together a wide variety of politicians supportive of Uribe's political project and it very quickly managed to become the

[161] After the court's decision to uphold the constitutional reform, the text of article 197 of the Colombian Constitution now read: "Nadie podrá ser elegido para ocupar la Presidencia de la República por más de dos períodos".

[162] The presidential elections were held on May 28, 2006. Uribe, running through his own *Primero Colombia* political movement, won by a landslide with 62,35% of the vote. Carlos Gaviria took 22% of the vote, while the Liberal Party, again with Horacio Serpa as its candidate, came third with 11,83%. See, http://web.registraduria.gov.co/resprelec2006/0528/index.htm

main political force within Congress.[163] From within this party, in 2008, emerged the idea to convene a national referendum asking the citizens of Colombia to approve a constitutional amendment allowing the sitting president to run for a second consecutive term. However, this time Colombia's political class was not so enthusiastic about it. Important political leaders that had previously supported Uribe's government were no longer willing to postpone their presidential ambitions, as was the case of Germán Vargas Lleras, leader of *Cambio Radical*, the fourth largest party in Congress. At the same time, this initiative radicalized the Liberal Party and the PDA in the opposition. Even the political movement led by the former mayor of Bogotá, Antanas Mockus, was opposed to another reelection.

In the words of Posada Carbó, "the referendum process was a long, cumbersome, and unfortunate affair that cast a deep shadow over Colombian politics for more than two years" (2011: 140). By the time the supporters of the referendum began to collect the necessary number of signatures required by law to submit a citizens' initiative to Congress, the negative impact of Uribe's second term upon the country's political system was becoming clear to most observers: "The plebiscitarian mood surrounding the president and his enormous, impervious popularity began to raise concerns about the future of Colombian democracy" (Posada Carbó 2011: 141).

Once reelected, Uribe had the opportunity to use his nomination powers to expand his influence over an important number of the institutions of control created

[163] The legislative elections took place on March 12, 2006, two months before Uribe won his reelection. The coalition of parties supportive of Uribe's government was in the majority of both chambers of Congress, but they still could not simply impose the president's agenda. Both the Liberal Party and the PDA, the main oppositional forces within the legislature, retained an important number of seats. For the exact composition of Congress during Uribe's second term, see http://pdba.georgetown.edu/Elecdata/Col/leg06.html

by the Constitution of 1991. By 2009, the president had managed to coopt important institutions such as the Office of the Ombudsman and the disciplinary chamber of the *Consejo Superior de la Judicatura*. He also managed to encroach his influence in other important institutions such as the Office of the Criminal Prosecutor, the National Electoral Council, the Office of the Comptroller, the Office of the General Attorney, and, to a lesser extent, the Constitutional Court. Uribe was successful in placing individuals that were close to his political ideas as heads of these institutions, though this success did not necessarily assured the president their subservience (see García Villegas & Revelo 2009). At the same time, Uribe undertook a gradual process of vertical concentration of power consistent in the capture of important programs of social assistance and local administrations (see García Villegas & Vargas 2009).

Despite this process of concentration of power, Uribe failed to completely align all political institutions with his project, and the Constitutional Court became the most salient example of this failure.[164] The promoters of the referendum were able to collect enough signatures to have Congress debate the initiative, which eventually became law.[165] However, this law convening the people of Colombia to vote on the proposal to allow for a second reelection had to pass the review of the Constitutional Court before the citizens could express their opinion, and the court declared it unconstitutional on strict formal grounds.[166] The court found that the promoters of the referendum incurred in several financial irregularities while campaigning for the

[164] For an example of the fears that Uribe had managed to erode the independence of the Constitutional Court, see Rubiano (2009: 135-136).

[165] Congreso de la República de Colombia, Ley 1354 de 2009.

[166] Corte Constitucional de Colombia, Sentencia C-141 de 2010, M.P. Humberto Sierra Porto.

initiative, and considered that these provided enough reasons to declare the law unconstitutional. But the court also moved to a second level of analysis that revealed numerous procedural violations of the legislative process to which Congress has to abide. Finally, the court found pertinent to move to yet another level of analysis that made evident its willingness to rely on populist jurisprudence as an instrument for the protection of the country's democratic constitution.

Following on the warning that it had already made in its decision of 2005, the court understood that a second reelection amounted to a substitution of the constitution adopted by the people of Colombia in 1991. In a very Schmittian fashion, the court claimed that neither Congress nor the citizens through a referendum were entitled to use the power of constitutional reform provided by the rules of amendment to subvert the fundamental characteristics of the constitutional regime. As constituted powers, they could not introduce a reform that, as in the case of a second presidential reelection, would surely turn the political system into something foreign to the original will of the constituent power. Though a secondary element of presidentialism, a second reelection would place too much power in the hands of the executive at the expense of the institutional system that was required for the maintenance of democracy. The Colombian Constitution, according to the court, placed implicit limitations to the power of reform of the constituted powers, and the only legitimate way in which these limitations could be overcome was through the highest track of constitutional change provided by the original constituent power, i.e. a constituent assembly.

The court proved that a second reelection would amount to an illegitimate substitution of the constitution by means of a detailed analysis of the effects that the introduction of one immediate reelection produced upon the institutional apparatus of the country's political regime. The court basically repeated what was said above: the president had managed to reduce the independence of important institutions of control and expand his political influence over the legislative and judicial branches of power. Though slight, the court found that the concentration of power in the hands of the executive was evident. As a result, the court had no doubt that a second reelection would further erode the system of checks and balances and the principles of separation of powers and political alternation that were central to the constitution. After two terms, the power of the executive reaches a point in which it is no longer compatible with these fundamental aspects of the constitutional order, especially since the project of reform did not include the necessary institutional alterations that were needed to tame the possible authoritarian deviations of a president in his third term. For these reasons, claimed the court, the project of reform under review amounted to an unconstitutional constitutional amendment, to put it in terms now made popular by comparative constitutional scholars.

It might come as a surprise that such a popular and powerful president as Uribe decided to accept the ruling of the Constitutional Court.[167] But there is a good explanation for the capacity of Colombian democratic institutions to resist the

[167] For an attempt to establish a contrast between the success of the Colombian Constitutional Court in posing a challenge to the "consolidated power" of president Uribe and the less effective methods adopted by the constitutional courts of South Africa and Thailand, see Issacharoff (2014).

populist push of Álvaro Uribe. First, there is the reactive nature of constitutional referendums in Colombia. As the previous analysis of Uribe's failure to reform the constitution through his 2003 referendum shows, the different stages of institutional mediation that are required for the use of this mechanism of direct democracy prevent its instrumentalization for the purpose of satisfying the urge for immediacy and the majoritarian conception of democracy that characterizes populist politics.

Second, there is the role that the constituent assembly gave to the Constitutional Court as guardian of the democratic constitution. Since its emergence in 1991, the Constitutional Court has used its broad powers of judicial review in a way that greatly increased its authority and legitimacy before the public. The court has been of fundamental importance in keeping alive the promises of the Constitution of 1991, especially through its progressive jurisprudence on matters involving the protection of individual and social rights. It has also intervened repeatedly to curb the powers of both Congress and the President, preventing them from illegitimately usurping the political space that a pluralist and inclusive democracy requires. This use of its powers has allowed the court to accumulate a significant political capital that, during crucial political moments such as the one just described, allows it to intervene as an important political actor that the other branches of power cannot simply ignore.[168]

However, there is a third reason without which the Constitutional Court could not have played the role of guardian of the political compromise between the

[168] For the best account of the process through which the Constitutional Court has established its authority and legitimacy, see Uprimny & García Villegas (2004). See also Figueroa (2012a) and Schor (2009).

democratic forces that gave place to the Constitution of 1991, i.e. the maintenance of an electoral rule based on the principle of proportional representation for the conformation of Congress. This type of electoral rule has contributed to the gradual weakening process experienced by the traditional parties, a process that favored the irruption of Uribe's populist politics. But the fragmentation of the party system that has characterized Colombian politics since 1991 also had the effect of providing the conditions of political diffusion that allowed the Constitutional Court to gather the necessary institutional support to use its powers of judicial review against a powerful and popular president. The plural composition of a legislature in which opposition to the president's attempt to remain in power in the name of people was still possible, provided important political support to the court's decision and made the president think twice before challenging its authority. To this extent, political parties proved that, despite their legitimacy crisis, they were still capable of providing some continuity and stability to Colombian politics, as Ana María Bejarano has argued (2011: 215).

Finally, it is important to highlight the way in which populist jurisprudence proved to be an important institutional instrument for the purpose of appropriating the myth of the people in order to oppose and defeat Uribe's populist understanding of democracy and the constituent power. Support of Uribe's continuity in power rested on one basic assumption: that mere legal formalities, as the promoters of the referendum continually argued, "should not be allowed to thwart the people's will" (Posada Carbó 2011: 140). However, the court based its decision to declare the referendum unconstitutional on one of the most original variants of Carl Schmitt's

populist conception of democracy, i.e. that the rules of amendment cannot be used to alter the fundamental decisions made by the people at the time of constitution making. To Uribe's claim to be speaking in the name of the people, the court responded that the people could only speak by means of a constituent assembly. For this reason, the court had to protect the original will of the subject of the constituent power against the attempts of the president to usurp democratic power. In sum, the court successfully challenged Uribe's populist push by erecting itself as the keeper of the people's will.

Attention to the combination of these different factors can be helpful in order to understand the success of the Constitutional Court, and perhaps they should be taken into account in future attempts to provide judicial answers to populists problems. But even if they are not replicable elsewhere, "this victory of institutions over the personal ambitions of a powerful president clearly makes Colombia a unique case in the region" (Bejarano 2013: 346).

3. Reintroducing Populism through the Back Door?

When used to enforce implicit limitations to the capacity of the constituted powers to reform the constitution, populist jurisprudence can be a powerful instrument in the hands of judges concerned with the protection of the democratic regime. Comparative constitutional scholars seem to agree on this conclusion: the cases of India and Colombia have become paradigmatic in this respect. Jacobsohn, for instance, relies on the Indian case to make an argument in favor of the use of the doctrine of implicit

limitations to prevent strong and authoritarian leaders, like Indira Gandhi, from usurping democratic power (2006: 471-474). Bernal-Pulido's analysis of the Colombian case makes a similar argument. Though he considers it to be a clearly counter-majoritarian instrument at odds with the principle of democratic legitimacy, he takes a pragmatic approach when he claims that this doctrine is justified "within the context of hyper-presidential political systems, such as that of Colombia" (Bernal-Pulido 2013). In a similar fashion, Gábor Halmai has concluded that the use of this doctrine is especially relevant in those parts of the globe that have been afflicted by dictatorial and authoritarian pasts, and regrets the refusal of the Hungarian Court to adopt it (Halmai 2012).

However, different things can go wrong with this doctrine. Judges can employ it to preserve the hegemony of an elite threatened by the advance of emerging political forces, as Hirschl (2004) has elegantly argued, and worse yet, it could even be used in an abusive manner in order to unilaterally remove from the constitution the presidential term limits adopted during the constitution making moment, as in the case of Honduras (see Landau & Sheppard 2015). In a similar way, the Supreme Courts of Costa Rica and Nicaragua struck down prohibitions on presidential reelection arguing that they went against the "basic right" of the president to be reelected and the right of the citizens to vote for the candidate of their choice. In these two cases, former president Arias and President Ortega appealed to politically sympathetic courts once they realized that the legislature would not support them in their attempts to reform the constitution (Martínez-Barahona 2010). So, "there is evidence that this implied basic structure doctrine has tended to expand through time

as courts find more parts of the constitution to be basic, and it would seem that this doctrine is also used (or abused) by the judiciary for turf-protection purposes" (Yap 2015: 123).

For these reasons, most comparative constitutional scholars make an argument for judicial restraint when it comes to the application of this doctrine.[169] Through its constant use judges might become the very usurpers that this doctrine is meant to keep in check, either by gradually removing more areas of the constitutional regime from the reach of the popularly elected representatives or by going as far as declaring, in a clearly absurd fashion, that parts of the original constitution are actually unconstitutional. But as important as this problem might be, there is another situation that deserves attention and that comparative constitutional scholars have barely stopped to consider.

The legitimacy of the decision that allowed the Colombian Constitutional Court to put an end to Uribe's populist push was based on a very particular characteristic of this country's constitutional regime, i.e. the legal recognition of constituent assemblies as the highest track of constitutional change through which the essential or fundamental characteristics of the regime can eventually be altered.[170] This is one

[169] For an elaborate and explicit formulation of this problem, see the recent work of Dixon & Landau (2015).

[170] Constitución de la República de Colombia, Artículo 376: "Mediante ley aprobada por mayoría de los miembros de una y otra Cámara, el Congreso podrá disponer que el pueblo en votación popular decida si convoca una Asamblea Constituyente con la competencia, el período y la composición que la misma ley determine. Se entenderá que el pueblo convoca la Asamblea, si así lo aprueba, cuando menos, una tercera parte de los integrantes del censo electoral. La Asamblea deberá ser elegida por el voto directo de los ciudadanos, en acto electoral que no podrá coincidir con otro. A partir de la elección quedará en suspenso la facultad ordinaria del Congreso para reformar la Constitución durante el término señalado para que la Asamblea cumpla sus funciones. La Asamblea adoptará su propio reglamento".

of the most attractive characteristics of contemporary constitutionalism in the Andean region of Latin America, since most constitutions around the globe fail to provide the means for their own substitution. A highly popular president such as Uribe could not simply be opposed through a dogmatic exercise in legality; the Constitutional Court could not appear to be closing the door to future constitutional reforms that might have a clear support from the people. Uribe could legitimately try to amend presidential term limits for a second time, but the mechanism that he used for this purpose was the wrong one.

According to the court, the people can only speak through a constituent assembly; all other mechanisms of constitutional change have a lesser democratic pedigree since they are meant for the exercise of the limited power of reform of the constituted powers. In this way the court claimed that the constitution fulfills the legitimacy principles of democratic openness and political participation developed by someone like Colón-Ríos (2012: 57). However, does this mean that we are back to the risks and uncertainties of an all-powerful constituent assembly that is free to remake the constitutional regime unobstructed by any legal and institutional constraints? The answer is not clear.

The process to convene a constituent assembly is not entirely regulated in Colombia, and future populist movements can exploit these legislative silences.[171] A constituent assembly can be convened after the successful completion of a complex

[171] Besides Article 376 of the Constitution of 1991, the process to convene a constituent assembly was regulated by Congress through a *Ley Estatutaria*, i.e. a type of law that requires absolute majorities for its approval and reform due to the nature of the issues it regulates. Article 152 of the Constitution of 1991 requires from Congress that the mechanisms of political participation be established through this type of law. Accordingly, Congress passed Ley 134 de 1994. The process to convene a constituent assembly is regulated in Title VI of this law, articles 58-63.

process of several steps. First, Congress has to pass a law calling the citizens to express their opinion on whether or not to convene a constituent assembly. This assembly could be convened for either of two objectives: the partial or total reform of the constitution. Second, this law should include the number of delegates, the electoral system to be used, the powers and attributions of the assembly, and the term limits that it should respect. Third, this law should pass the review of the Constitutional Court before the citizens can go to the voting booths. Fourth, one third of the national electoral census has to go out and vote. Fifth, the rules approved by the citizens cannot be altered. And, sixth, neither the date for this popular consultation nor that for the election of delegates may coincide with any other electoral event. It is clear, then, that the complexity of this process does not make things easy for the populist hijacking of the constituent assembly.

However, a populist president with a majority in Congress could possibly adopt the electoral rule that better fits his purposes and decide that the assembly, once its delegates are elected, will be sovereign. Theoretically, this is within the powers of Congress during the initial stage of the process. Nothing is said in the constitution or in the law that regulates constituent assemblies about the need to adopt a proportional electoral rule, for instance. The same is the case with the powers and faculties of the assembly. There is no legal obligation to subject it to limitations besides the need to respect the duration of its term and its inability to alter the rules approved by the citizens in the referendum. Finally, even if Congress produces a law that allows for the establishment of a pluralist and inclusive constituent assembly, no institution has the authority to enforce the rules of the process in case the constituent

assembly decides to ignore them. The law convening the referendum could give to the Constitutional Court the power to review the actions of the assembly in accordance with the rules approved by the people, but then again, it does not have to.

Could the court assume the role of an effective external constraint during an eventual constitution making process even when there are no explicit legal grounds on this issue? Perhaps. But the Sieyesian and Schmittian roots of the court's jurisprudence on constitutional change hang as a bad omen. Once a constituent assembly is in place the court will no longer have, according to its own precedents, any doctrinal justification to intervene. Of course, these considerations belong to the realm of political speculation and historical contingency. If a constituent assembly is ever convened through the rules of change of the Constitution of 1991, it is possible that strictly political variables such as the diffusion of powers within a context of party fragmentation could by themselves prevent the emergence of a purely majoritarian, and possibly authoritarian, constituent assembly. But if a scenario resembling that of the Venezuelan constitution making process becomes a possibility, the populist conception of democracy at the heart the court's jurisprudence of constitutional change will only reinforce the claims of its main political actors to speak in the name of the people and, therefore, to be in a position in which they can legitimately impose a new political regime without paying any attention to the plurality of voices that any truly democratic exercise of the constituent power is meant to consider.

CHAPTER 6

POPULIST JURISPRUDENCE AND PRESIDENTIAL REELECTION IN VENEZUELA

1. The Radicalization of Populist Politics

Contrary to the difficulties that it has experienced in Colombia, populism has been able to prosper in Venezuela. Three factors come to mind to explain the success of populist politics in this country. First, Venezuela has had a long history of political personalism and militarism. Throughout the 128 years between 1830 and the establishment of the democratic regime in 1958, Venezuela only had five civilian presidents whose combined periods in power barely amount to seven and half years. During that period, the country was mostly ruled by strong dictators whose long stay in power contributed to the establishment of a vertical and authoritarian political culture that survives even to this day (Palacios 2011: 127-128). Second, this authoritarian tradition successfully consolidated a strong central state with the capacity to control political violence and to intervene effectively in a variety of areas

of social life (Bejarano 2011: 74). The strength and reach that the Venezuelan state managed to achieve by the beginning of the twentieth century has favored the construction of a myth of national unity that populist leaders can eventually manipulate with the intention of mobilizing the citizens. And, third, the availability of vast oil resources has turned the Venezuelan state into a "magical" instrument with the capacity to provide for all of its citizens without demanding too much from them, e.g. in terms of taxation, setting the ideal conditions for a successful implementation of populist projects (see Coronil 1997).

These three structural characteristics of Venezuelan political life came together to facilitate the successful implementation of Chávez's model of radical populism. This model relies on an explicit rejection of neoliberal economic guidelines and the adoption of nationalist, statist, and redistributive economic policies similar to those of classical Latin American populism. It also implies a total rejection of liberal democracy and an attempt to refound the nation on the bases of direct democratic practices directed at the plebiscitary acclamation of the leader (de la Torre 2010: 146-152). However, this model of radical populism took place as a reaction to varying political circumstances. For this reason, Chávez's populist government is better understood as a "steady radicalization process" that moved from an initial moderate stage in which the focus was more on political proposals like the adoption of a new constitution to further radical stages with an emphasis on socio-economic issues (Ellner 2008: Ch. 5).

This radicalization of Chavista populist politics took place in three different stages. The first stage was the formation of a national popular movement whose main

objective was to secure the presidency and to write a new constitution. The second stage took place during Chávez's first government, aiming at the establishment and consolidation of a vertical structure of power compatible with Chávez's political personalism. However, this stage also includes an attempt to promote mechanisms of social and political participation, though in a way that maintained a tension between bottom-up and top-down political dynamics. Finally, there was a third stage, which took place during Chávez's second administration. This stage represents the ultimate displacement of participatory democracy under the president's new socialist model. Chávez's top-down approach to politics ended up prevailing over the democratizing practices that he hesitantly supported during the second stage, with the obvious result of strengthening his power. This took place at the same time as the president was consolidating his control over all other branches of government. Gradually and steadily, this radicalization of populist politics resulted in the dismantling of democratic institutions and the restructuring of the presidency as an unaccountable institution (López Maya & Panzarelli 2013: 256-258).

These different stages of populist radicalization can be made evident through detailed analysis of Venezuela's recent constitutional history. The Constitution of 1999 was the result of a highly exclusionary and conflictive constitution making process. For this reason, it failed to become an acceptable political framework for a significant number of political actors. This constitution has managed to avoid the faith of the short-lived Constitution of 1947 for a combination of two reasons: the broad popular support that the new ruling elite has enjoyed until very recent times and the inability of oppositional parties to recover from the severe blow that they received

after the emergence of the Chavista phenomenon. However, this new constitution has not been able to provide the Venezuelan political system with the stability that derives from a broader democratic consensus. Its legitimacy, it can be argued, is certainly restricted. And though this observation was already obvious right after the constitution was adopted, the intensification of conflict that followed came to confirm this diagnosis.

The constitution making process made possible a radical displacement of the traditional elites from power, but the political system remained competitive. On July 30, 2000, Venezuela held its first electoral contest after the adoption of the Constitution of 1999, which came to be known by the public as the "mega elections". On that day, the citizens of this country elected state governors, the members of the new unicameral National Assembly, and, once again after only a year and half since Chávez's first victory, the president. Chávez managed to ratify his popularity and was again victorious in the presidential race.[172] His party and the emerging political forces that accompanied him during the constitution making process also managed to secure the governorship of most of the states and to get control of the new National Assembly, even though the opposition was able to get enough seats to force negotiations in order to pass legislation requiring super-majorities.[173] Though the

[172] Chávez won by a landslide with 59,76% of the national vote. The opposition presented two candidates. Francisco Arias came second with 37,52% of the vote, and Claudio Fermín ended the race with a distant 2,72%. See, http://www.cne.gob.ve/web/documentos/estadisticas/e015.pdf

[173] The Chavista coalition won over 52% of the seats, according to the data provided at the webpage of the Venezuelan National Assembly. The CNE does not have any public data on this legislative election. Other unofficial sources differ, most of the time increasing the size of the Chavista coalition. http://web.archive.org/web/20070408051748/http://asambleanacional.gov.ve/ns2/lista-dip-partidos.asp

opposition was weak, it was also evident that there was room for them to find their way back to power through the electoral route. However, the opposition became impatient and was soon taken by an undemocratic impulse that eventually backfired.

Venezuelan politics took on a popular shift, with both governmental forces and the opposition turning to the streets. Political mobilization increased exponentially and, as both sides confronted each other on the streets, the way of dialogue and institutional negotiation was forgotten. The year 2002 represents a turning point in Venezuelan politics. In that year the opposition failed in its attempt to regain power by means of a coup. It also failed in its attempt to bring down the government by promoting a strike in PDVSA that was supposed to deny the government the income produced by the exploitation of the country's vast oil resources. Finally, in 2004 the opposition tried to remove Chávez from office by means of a failed recall referendum from which the president came out victorious[174] (see López Maya 2006: ch. 11-12). All of these actions ended up reinforcing Chávez's hegemony and isolating the opposition to the point that in the legislative elections of 2005 the latter decided not to participate and therefore surrendered the complete control of state institutions to the forces aligned with the government.[175]

[174] This referendum saw an increase in the number of citizens coming to the voting polls. 59% of the voters were in favor Chávez's continuity as president, while 40% voted to remove him from office. See, http://www.cne.gob.ve/referendum_presidencial2004/

[175] This was clearly the greatest political blunder in which the opposition ever incurred since the rise of Chavismo in Venezuela. Instead of relying on their position in the legislature to gradually construct a viable political alternative and to extract compromises from the governmental forces, they moved towards a disloyal opposition that only contributed to Chávez's radicalization and to the erosion of the capacity of institutions to channel political and social conflict (see Ellner 2008: Ch. 5).

The most important consequence of this period of conflictive politics was the radicalization of Chávez's political project. Though right from the start Chávez was inclined towards the concentration of power in the hands of the executive and towards the direct interaction between the president and the people without the mediating role of other political institutions, his populist rhetoric was somehow balanced in its attacks on private property and the free market (see Chávez 2013). At the same time, though he managed to control the constitution making process, the text that was approved was considered by him to be mild, offering too many guarantees to the opposition.[176] But everything changed after the series of events that began in 2002.

Of special significance in this process of Chavista radicalization was the role of the Supreme Tribunal of Justice regarding the events that led to the failed coup of 2002. At the time, the TSJ was not yet completely controlled by Chávez. There were still enough justices politically close to the opposition preventing the complete subordination of this court to the executive. This was a polarized court, a fact that was evident in the political character of its rulings. When the time came to consider the responsibility of the four military officials that were involved in the failed coup against Chávez, the TSJ decided that there were no legal grounds to rule against them. [177] This decision enraged the president, and with the court's ruling as

[176] As Marco Palacios has rightly noticed, after the excesses of his initial presidential campaign and the constitution making process, Chávez actually presented himself as a moderate and pragmatic leader that was willing to postpone the formulation of his most radical social and economic views (2011: 143).

[177] Tribunal Supremo de Justicia de Venezuela, Sentencia del 14 de Agosto de 2002, Sala Plena Accidental, M.P. Franklin Arrieche Gutiérrez.

justification, he made it his priority to remove all the justices associated with the opposition and to pack the court with judges committed to his political project.

For this purpose Chávez had at his disposal the transitory regime enacted by the constituent assembly a few years before. The judiciary was at the time being administered through this transitory regime, while the mechanisms established in the constitution for this purpose were still inoperative. At the same time, the National Assembly passed a new Organic Law of the Supreme Tribunal of Justice in 2004. This law drastically increased the number of justices of the TSJ, gave the National Assembly the faculty to appoint judges by a simple majority, and established the procedures and grounds for their removal. Relying on this new law, Chávez was able to pack the court and to secure control over its powerful and recently created constitutional chamber (see Castaldi 2006; Human Rights Watch 2004).

Chávez now considered his political project to be completely irreconcilable with that of the opposition. He also came to realize that he needed to have greater control over his political bases. As a consequence, his initial commitment to participatory democracy was weakened at the expense of greater political centralization[178], and now that the National Assembly and the TSJ were entirely under his control[179], he was free from all institutional intrusions. Chávez no longer saw any

[178] For an account of how Chávez contradictorily tried to reconcile popular participation with greater levels of political centralization, undermining the democratic character of his revolution, see Ellner (2008), Ponniah (2011), and Wilpert (2011).

[179] These legislative elections were held on December 4, 2005. The main oppositional parties of AD, COPEI, and *Primero Justicia*, refused to participate under the assumption that the CNE was biased in favor of the government. As a result, no members of the opposition were elected to the legislature, and the Chavista coalition managed to control it entirely. The abstention rate went over 74%. Again, there is no official information available on this election. See, http://www.ipu.org/parline%2De/reports/arc/2347_05.htm

resemblance between his political project and the text of the constitution he had managed to bring to life (see López Maya 2012). From now on, Venezuela would slide towards an authoritarian path inspired by a more radical political ideology: Chávez's Twenty-First Century Socialism.[180]

This new radical doctrine represents the final evolution of Chávez's political thought, a point at which he arrived after realizing that his initial attempts to advance social and economic reform by means of a "third way" that was supposed to leave the capitalist system unscratched were doomed to fail. Chávez brought back from the dustbin of a recent past the term "socialism" with the intention of hinting towards a structural alternative to the existing capitalist order. However, he claimed that his socialist program was radically different to that of the Soviet regimes of the twentieth century. A socialist project in Venezuela would have to reject the centralism and authoritarianism of its Soviet forefathers, but it would also have to go beyond mere state capitalism. In fact, Chávez did not have a clear definition in mind when he decided to adopt these new banners. He only knew that this "socialism for the twenty first century" had to be invented through trial and error and adjusted to the particular conditions of his country. But as Marta Harnecker explains, this new model did have three basic components: "economic transformation; participative and protagonistic democracy in the political sphere; and socialist ethics 'based on love, solidarity, and equality between women and men, everybody'", which according to Chávez have been

[180] For an analysis of Chávez's move away from simple nationalism and towards his doctrine of 21st century socialism, see Eastwood (2011) and López Maya & Lander (2011).

the basic ideas of socialism since Biblical times. Above all, it was supposed to be a "fundamentally democratic" type of socialism (see Harnecker 2010).

In pursue of this new objective, Chávez came up with a political strategy based on a series of five "constituent engines". His radical program of reform was to be implemented, first, by means of enabling laws granting him powers to rule by decree for long periods of time; second, through campaigns of moral, economic, political, and social education; third, by the adoption of a new "geometry of power" across the national territory; fourth, through greater reliance on what he called the "communal power"; and fifth, by advancing a radical reform of the Constitution of 1999 (Lander & López Maya 2008: 199). However, Chávez quickly lost sight of the "fundamentally democratic" character of his socialist model; he was overtaken by a sense of urgency and immediacy that made him slide towards a greater concentration of power around his office and forced him to reduce the mechanisms of political participation to mere plebiscitary instruments for his ratification as the undisputed leader.

Despite having total control over the National Assembly, Chávez made it a priority to receive the faculty to rule by decree. He was no longer willing to indulge in parliamentarian dilettantism, not even when the legislature was fully under the control of his supporters. He also put an end to pluralism within his political movement when, in 2007, he managed to unify his bases of support around his new political party, *Partido Socialista Unido de Venezuela* – PSUV, a move that gravely impacted the quality of internal democracy within his movement. Finally, this tendency towards political centralization eroded the importance of social organizations and exacerbated the tensions between the government and the social

movements that supported it. In sum, Chávez was now on a quest to coopt all democratic spaces and to consolidate his position as the only authorized voice of the people.

In 2006, Chávez won his third presidential election in eight years.[181] The constitution that Chávez brought to life after he first came to the presidency already allowed for one consecutive reelection and a presidential term of six years.[182] But as soon as he was able to secure another six years in power, Chávez took it upon himself to reform the constitution in a plebiscitarian fashion in order to allow for the indefinite reelection of the president. The future of his vision of a socialist Venezuela seemed to him to depend on his continuity in power, and as will be shown in the next section, the particular variant of populist jurisprudence that the TSJ had already begun to develop during the last stage of the constitution making process was instrumental in making this possible. Thought he was forced to go before the people in two occasions between 2007 and 2009 to finally have this reform approved, both times the TSJ's abusive instrumentalization of populist jurisprudence was put to the service of Chávez's authoritarian ambitions.

[181] Chávez's electoral strength continued to grow. During the presidential elections of December 3, 2006, Chávez improved his last electoral results, this time receiving 62,84% of the votes. The opposition supported Manuel Rosales, former governor of the State of Zulia, who came second with 36,9% of the votes. See, http://www.cne.gob.ve/divulgacionPresidencial/resultado_nacional.php

[182] Constitución de la República Bolivariana de Venezuela de 1999, Artículo 230: "El período presidencial es de seis años. El Presidente o Presidenta de la República puede ser reelegido, de inmediato y por una sola vez, para un período adicional".

2. The Supreme Tribunal of Justice and the Consolidation of Authoritarianism

The abusive instrumentalization of populist jurisprudence through which the TSJ paved the way to Chávez's indefinite presidential reelection was not simply the outcome of the president's ability to coopt the court. It was also the result of a deliberate attempt to reformulate the way in which the role of constitutional law within a democratic regime had been understood in Venezuela. Right since its beginnings in 1999, the constitutional chamber of the TSJ maintained a doctrinal approach to constitutional law that systematically eroded legal and institutional constraints to the exercise of political power in order to remove all obstacles to the political and social revolution that the people of Venezuelan were conducting through the leadership of their president. And two justices were at the heart of this radical reconceptualization of constitutional law: José Delgado Ocando, who sat at the court from 1999 to 2004, and his son, Arcadio Delgado Rosales, who came to the court in 2005 as a replacement of two different justices until in 2010 he was finally properly appointed by the National Assembly.

As was briefly indicated in chapter 4, Delgado Ocando brought to the constitutional chamber of the TSJ a very particular conception of the law as an instrument for the consolidation of a political hegemony. He claimed that this is the use that has been given to the law throughout the entire history of liberal democratic regimes. However, from the perspective of his revolutionary legal philosophy, the role of the law does not change once the revolution has managed to defeat the liberal regime. The law, under these different circumstances, should make way for the

consolidation of an emerging revolutionary hegemony; it should be put at the service of the revolution just like, in the past, it was used to advance the interests of the liberal elites (Delgado Ocando 2004: 113).

This is clearly a thesis that produces important consequences for the field of constitutional law, since it renders legality entirely irrelevant during moments of democratic constitutional change. Once the revolutionary subject has been set into motion, constitutional law must give way so as not to frustrate the achievement of its goals. In line with the populist conception of democracy initiated by E.J. Sieyès and Carl Schmitt, Delgado's revolutionary legal philosophy is based on the basic idea according to which the constituent power cannot be regulated by existing legality (2004: 116).

However, the democratic credentials of this revolutionary legal philosophy are very much obscure, and not only for its adscription to problematic Schmittian ideas. Under Delgado Ocando, the classical conception of the constituent power is considerably transformed. He introduced to this doctrine an outmoded Leninism that radicalizes the authoritarian features of Schmitt's democratic populism. This Leninism resembles Schmitt's political ideas in that it involves a longing for dictatorship and an argument for political centralism, both of which are supposed to make possible the establishment of an unmediated relationship between the charismatic leader and the people. But contrary to Schmitt's more conservative preferences, through Delgado Ocando the justification for the concentration of power

in the hands of the charismatic leader varies: he has to be committed to the cause of social emancipation.[183]

From this perspective, the people as subject of the constituent power no longer retains the malleable character that it assumes under Schmitt's constitutional theory. Instead, it takes on the unequivocal Marxist form of a revolutionary subject that draws its legitimacy more from a problematic philosophy of history than it does from the fulfillment of democratic procedures.[184] Dictatorship is then necessary because the oppressed people are incapable of transcending the morality and consciousness of the hegemonic elites; in fact, the oppressed are an obstacle to their own emancipation. For Delgado Ocando, a charismatic leader needs to emerge with the capacity to assume the cause of the people and make it succeed. The people should trust this leader and delegate on him their political agency. Even the suspension of public liberties is justified in order to make possible the consolidation of a new revolutionary hegemony and the emergence of a new man (2004: 155-164).

Delgado Ocando's son, Arcadio Delgado Rosales, added to his father's revolutionary legal philosophy his own reading of Schmitt's populist conception of democracy. According to Delgado Rosales, Venezuela needs to move away from liberal democratic conceptions of both the state and society, which he considers to be

[183] The revolutionary legal philosophy of Delgado Ocando is an interesting example, perhaps the most radical one, of the "hybridization" of Marxism and populism that characterizes the political projects of Latin American presidents such as Chávez, Correa, and Morales. See, Carlos de la Torre (2010: 202).

[184] This Marxist philosophy of history is based on an idea of progress that is ultimately incompatible with more traditional democratic conceptions of the people. As Ulrich Preuss rightly notices, this philosophy of history assumes an idea of a privileged agent of progress, i.e. the proletariat, that makes it possible for minorities, such as the revolutionary vanguard, or more pertinent yet to the case at hand, an authoritarian leader, to claim a right to govern on the grounds of their better knowledge of the direction that history should take in order to put an end to capitalist oppression (1995: 65-67).

instruments of hegemonic domination that prevent the establishment of a just political order. He relies on Schmitt to argue in favor of a "total state", i.e. the fusion of state and society[185] (Delgado Rosales 2012: 14). The target of his attack is the system of representative democracy. Any instances of political mediation that get between a political leader and the people, preventing them from fusing into a single totality, need to be done away with. A democracy only deserves its name if the people are able to freely exercise their sovereignty unencumbered by representative institutions and in that way improve the lot of the oppressed popular classes. But the people – and in this he seems to follow his father closely – are in need of political guidance, a fact that makes the figure of the charismatic leader indispensable for the implementation of a truly participatory democracy (2012: 28). The law, therefore, cannot contradict the will of the people, or to put it more clearly, the will of the charismatic leader (2012: 41).

This messianic and revolutionary reinterpretation of Schmitt's theory of the constituent power clearly influenced the rulings of the TSJ's constitutional chamber in 2007, when Chávez failed to get his project of Twenty-First Century Socialism approved by the people in a referendum, and then again in 2009, when Chávez finally managed to gather the necessary popular support to reform the constitution to allow

[185] In a democracy, claimed Schmitt, state and society penetrate each other: "What had been up to that point affairs of state become thereby social matters, and, vice versa, what had been purely social matters become affairs of state". According to Schmitt, democracies are insatiable in their desire to control the individual. For this reason, democracies try to do away with all the typical liberal distinctions and antitheses that separate society from the state, i.e. the autonomy of the religious, economic, cultural, legal, and scientific domains vis-à-vis the political sphere. In this sense, there is an evident contradiction between democracy and the liberal constitutional state (Schmitt 2007: 22-23).

for the unlimited reelection of the president and of all other elective officials in the country.

The referendum of 2007 was Chávez's first attempt to get the last constituent engine of his program of radical reform running. The initial government's idea was to reform 33 articles of the Constitution of 1999. Chávez explicitly stated the objectives of this reform in the project that he presented before the National Assembly on August 15, 2007. First, it was time to take apart the "superstructure" that up to that day was still sustaining the "reproduction" of capitalism in Venezuela. Second, it was necessary to leave representative democracy behind in order to bring to life a more participatory democracy. Third, there was the need to give way to the construction of a new type of socialism built on Venezuelan roots, and which should draw from the lessons of Venezuela's original inhabitants, the traditions of the afro-Venezuelan communities, and the teachings of the heroes of the war of independence. Fourth, Venezuela had to challenge existing imperial hegemony and offer an alternative for the construction of new international power blocs. Fifth, it was time to recognize new forms of property and to include the "factual right to property" of all Venezuelans as a means to redistribute collective wealth. Finally, it was imperative to allow for the continuity of the president in office.[186]

The National Assembly, however, decided to add another 36 articles to the project of reform. Taken all together, it was difficult to find a unifying principle behind

[186] Anteproyecto para la Primera Reforma Constitucional. Propuesta del Presidente Hugo Chávez. Agosto de 2007. In http://www.nodo50.org/plataformabolivariana/Externos/AP-RefConst.pdf

the variety of proposals that the Chavista coalition intended to present before the citizens in order to reform one fifth of the Venezuelan Constitution. For instance, the National Assembly introduced four different articles aiming to reform the necessary requirements for the use of popular referenda. Their objective was to make more difficult to successful use of these mechanisms of direct democracy by raising the percentage of the electoral census that was required to assist to the voting booths, a proposal that could hardly be reconciled with the proclaimed objective to improve democratic participation. There was also an attempt to turn the armed forces into an explicitly popular and anti-imperialist institution. Finally, to add just one more example of the character of Chávez's program of reform, a proposal was included to grant the president the power to establish new authorities across the territory that would probably end up colliding with the already elected regional and local authorities of the country.[187] However, the proposal that drew the most attention from the public, precisely because it was of vital importance to Chávez, was the president's desire to reform article 230 of the Constitution of 1999. Chávez was asking to extend the presidential term to seven years and to allow for the unlimited reelection of the president (see Lander & López Maya 2008: 201-205).

If it were possible to bring together the variety of reforms that were being proposed to the people of Venezuela around some sort of unifying principle, it would have to be the president's desire to concentrate more power in his hands and to do

[187] These three examples of the proposals that were added by the National Assembly go a long way towards confirming Javier Corrales' characterization of Chávez's political party – PSUV. According to Corrales, "the PSUV helps the executive branch to weaken checks and balances, treat the opposition unfavorably, and reduce the autonomy of civil society" (2015: 38).

away with the separation of state and civil society. Even the most moderate political analysts in the country, which were at the same time critical and supportive of Chávez's experiment, saw in this program of reform an instrument for the erosion of participatory democracy that could eventually embark the country in the direction of authoritarianism.[188] In fact, the very process through which this project of reform was presented before the citizens was a clear sign of the reality of the threat that the radicalization of populist politics presented to the future of Venezuelan democracy.

Following Edgardo Lander, the whole political process through which Chávez's radical project of reform was finally submitted to the people's decision was indicative of the government's preference for a plebiscitary conception of democracy. In fact, it highlighted the unwillingness of Chávez and his political allies to deliver on their promises about the need to improve Venezuela's democracy on a participatory basis. The government's proposal was the result of the confidential work of a presidentially appointed commission. Then, when the proposal was discussed and enlarged by the National Assembly, no efforts were made to involve civil society and the social movements supportive of the president in the process. At the same time, the proposal was discussed and approved in a hurry by a legislature completely controlled by the executive. This urgency worked against the objective of inducing broad national deliberation on the contents of the proposal. Far from promoting participation and deliberation, the whole process was conducted with the intention of having the citizens approve a substantial transformation of the political regime as

[188] This is the case of Edgardo Lander, Luis Lander, and Margarita López Maya. For a different account of this project of reform, see Wilpert (2007), for whom the democratic spirit of Chávez's Twenty-First Century Socialism cannot be doubted.

a mere act of faith regarding the intentions of its leader. To say it in Lander's words, the whole process was an attempt to strengthen the constituted powers at the expense of the constituent power (Lander 2008: 136).

There were also considerable doubts about the legality of the process of constitutional change initiated by the president. Title IX of the Constitution of 1999 established three different types of constitutional change: amendment, reform, and replacement. These tracks of constitutional change were meant for different purposes. The amendment process, for instance, should be followed in order to add or to modify one or more articles of the constitution without altering its fundamental structure.[189] The process of reform, to the contrary, allows for more substantial constitutional change. The purpose of a reform is the partial revision of the constitution and the substitution of one or more of its articles without modifying its basic structure and principles.[190] Finally, the process of replacement provides for the possibility of convening a sovereign constituent assembly with the capacity to transform the state, create of a new legal order, and draft an entirely different constitution.[191] Chávez and his supporters in the National Assembly chose the second track of constitutional change as the mechanism through which to incorporate the

[189] Constitución de la República Bolivariana de Venezuela, Artículo 340: "La enmienda tiene por objeto la adición o modificación de uno o varios artículos de esta Constitución, sin alterar su estructura fundamental".

[190] Constitución de la República Bolivariana de Venezuela, Artículo 342: "La Reforma Constitucional tiene por objeto una revisión parcial de esta Constitución y la sustitución de una o varias de sus normas que no modifiquen la estructura y principios fundamentales del texto Constitucional".

[191] Constitución de la República Bolivariana de Venezuela, Artículo 347: "El pueblo de Venezuela es el depositario del poder constituyente originario. En ejercicio de dicho poder, puede convocar una Asamblea Nacional Constituyente con el objeto de transformar el Estado, crear un nuevo ordenamiento jurídico y redactar una nueva Constitución".

program of Twenty-First Century Socialism into the constitutional text, i.e. the process of reform. But the radical character of the proposal submitted to the people in the referendum could hardly be said to leave intact the structure and basic principles of the constitution, which are explicit limits that the process of reform cannot surpass.

However, neither the government nor the constitutional chamber of the TSJ saw things this way. In fact, the readiness of the TSJ to support the government's decision to bypass the track of the constituent assembly and therefore deny the subject of the constituent power greater control over such a momentous process of constitutional replacement, was an evident sign of the lack of autonomy of the TSJ before the executive (Lander 2008: 137). The TSJ did nothing more than contribute to the government's plebiscitarian approach to constitutional change; instead of posing a challenge to Chávez's consolidated power, the court relied on populist jurisprudence to clear the government's way towards a greater concentration of power.

The proposal was challenged on several occasions on both procedural and substantive grounds, and the TSJ declared all these challenges legally groundless.[192] It would be impossible to cover here all the arguments the plaintiffs brought before the court. However, it is possible to extract one fundamental argument that ran

[192] From the several decisions issued by the Constitutional Chamber of the TSJ on this matter, the following three are enough to understand the court's jurisprudential approach: (1) Tribunal Supremo de Justicia, Sentencia del 07 de Noviembre de 2007, Sala Constitucional, M.P. Francisco Antonio Carrasquero; (2) Sentencia del 27 de Noviembre de 2007, Sala Constitucional, M.P. Luisa Estella Morales; (3) Sentencia del 29 de Noviembre de 2007, Sala Constitucional, M.P. Arcadio Delgado Rosales. The TSJ issued these decisions in response to the challenges that different citizens presented against the government's project of constitutional reform. One of them, it should be worth mentioning, was brought before the court by *Primero Justicia*, the opposition party of Henrique Capriles.

through the myriad of legal claims presented by the plaintiffs. They adopted the same Schmittian argument that the Colombian Constitutional Court developed in order to oppose the populist push of president Uribe and claimed that the government's proposal was an attempt to substitute the Venezuelan democratic regime for a socialist one. A political regime shaped in accordance with the basic contours of Chávez's Twenty-First Century Socialism was entirely incompatible with the principles of political pluralism, separation of powers, political alternation, and democratic decentralization adopted by the Constitution of 1999. In fewer words, it was said that both the president and the legislature were usurping the people's constituent power by refusing to advance such a radical project of reform through the highest track of constitutional change. What they were proposing could only be done by means of a constituent assembly so the people of Venezuela could have the chance to engage in proper deliberation about the virtues and vices of a socialist state.

For instance, they claimed that allowing the president to appoint new territorial authorities would imply a return to a strict political centralism that fundamentally alters the objective of improving democracy at the regional and local levels. They also claimed that raising the electoral threshold for the validity of referenda went clearly against the constitutional objective of promoting participatory democracy. And, more importantly, the plaintiffs made a strong argument trying to highlight the incompatibility between a pluralist democratic regime and the indefinite reelection of the president. Both the method of reform and its objectives were understood by the plaintiffs as a clear proof of the president's power-grabbing ambitions: regarding method, taking the track of reform was a fraudulent strategy on

the part of the constituted powers intended to cheat the subject of the constituent power from exercising its legitimate faculties; regarding content, the government's socialist program was mainly an excuse to concentrate power in the hands of the executive.

The TSJ, however, was not persuaded by these arguments. In line with the revolutionary legal philosophy developed by the Delgado family, the court refused to enforce the rules of constitutional change in order to force the government to take the route of the constituent assembly. Instead of adopting the basic tenets of populist jurisprudence to enforce the explicit limitations to the faculty of the constituted powers to replace the constitution through the track of reform, the TSJ gave them a radical plebiscitarian twist that repudiated the intermediary role that legality is called to play in order to avoid the usurpation of the people's constituent power.

Surprisingly, the TSJ refused to consider the substance of the plaintiff's arguments. According to the TSJ, the rules of constitutional change did impose strict limitations on the actions of both the executive and the legislature and, eventually, the constitutional chamber had the power to review their acts in order to establish if they went against the letter of the constitution. However, the process of constitutional change initiated by the government and accepted the National Assembly had not yet produced any legal effects for the court to review. The court claimed that it could only review "definitive legal acts" and not the intermediary steps required by the constitution for the final enactment of a constitutional reform. There was still a procedural stage to fulfill before the acts of the executive and legislative branches finally achieve the legal status required to activate the TSJ's power of judicial review,

i.e. their approval by the people through a referendum. According to the majority of justices of the constitutional chamber, the process of constitutional reform is a complex one that does not produce any legal effects until it is carried to its completion, and since the citizens had not yet voted, there was nothing for them to review.

With this argument the TSJ removed all legal obstacles to the establishment of a direct and uncontaminated relationship between the president and the people. On the one hand, it gave total freedom to the executive to submit his proposals directly to the citizens unencumbered by the requirements imposed by the rules of constitutional change. On the other hand, the TSJ left it entirely to the citizens to determine the validity of the project of constitutional reform. There were no institutions in between with the capacity to stir the process in a more democratic direction and prevent the abuse of the rules of constitutional change to satisfy the executive's desire to strengthen his position as a "constitutional monarch". The only option left for those who wanted to challenge the legality of the president's proposal was to wait for the people to speak. If the electoral results were unfavorable to the government, then the problem was solved. But if the reform were to be approved by the citizens, then there would actually be a "definitive legal act" that the court could not refuse to review.

But is it realistic to think that a court will actually declare unconstitutional a reform that the citizens have already approved, especially when such a powerful president is deeply invested in it? The argument of the court actually left the constitution, and the political regime that it established, completely unprotected. The

variant of populist jurisprudence developed by the TSJ made the constitution superfluous, especially the institutional mechanisms that were adopted in 1999 for the purpose of amending, reforming, and replacing the political regime. Just as the members of the Delgado family had envisaged in their writings on the revolutionary instrumentalization of constitutional law, all the obstacles that prevented the fusion of the leader and the people were actually removed, bringing Venezuela closer to the total state that these legal philosophers had been longing for.

Unfortunately for the government, the results of the referendum did not go their way.[193] In the end, the strictly plebiscitarian character that Chávez imprinted to the process ended up alienating the government's popular bases and political allies that had been excluded from the drafting and design of the proposal. As a result, Chávez was forced to reconsider his personalistic approach to politics and he publicly expressed his determination to "revise and rectify" the path of his political revolution (Lander & López Maya 2008: 213). The success of what was to come depended on his willingness to learn from this failure.

In 2009, Chávez decided to give another try to his plebiscitary approach to democratic politics.[194] After failing to consolidate his grip on power following the citizens'

[193] The referendum took place on December 2, 2007. Both blocs of questions (Bloc A included the proposals of the government and Bloc B those that were introduced by the National Assembly) were rejected by the voters, the first one by 50,7% of the total vote, and the second by 51,05%. This was the first and only time Chávez ever lost an electoral contest, to the point that he angrily described the results as a "pyrrhic victory" of the opposition and publicly accused his political allies, governors and mayors included, of failing to do what was required for the approval of the reform (see Lander & López Maya 2008: 212). For results, see http://www.cne.gob.ve/divulgacion_referendo_reforma/

[194] "In general, all the elections followed a plebiscitarian logic. In the regional and local elections, Chávez with some frequency named candidates who have little political support in the area, turning

rejection of his radical project of political reform, Chávez came back with a different strategy. This time he submitted to the citizens' approval a much simpler proposal: to amend the constitution in order to allow not only for the unlimited reelection of the president, but also for that of all other elected public officials in the country.

Since the Venezuelan Constitution prohibits to the National Assembly the discussion of a project of reform that has already been rejected during the same constitutional period[195], Chávez and his supporters introduced a slight modification to this new proposal. First, instead of presenting it as a constitutional reform under the terms of article 342, the government and the National Assembly decided to follow the amendment track provided by article 340. In this way, the government and the legislature were trying to underscore the differences between this project and the one that was rejected in 2007. Second, by introducing to this project of reform the possibility of indefinitely reelecting all elected public officials in the country, both Chávez and his supporters would be able to claim that what the citizens were going to approve or reject was not the same proposal of the last referendum.[196] However,

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the elections into a 'plebiscite of confirmation' for himself and his government. (…) The plebiscite-laden presidency, shaped by this ongoing campaign, made it harder for society to exercise any watchdog role over the state and threatened the continuity of democratic institutions in Venezuela" (López Maya & Panzarelli 2013: 252). This plebiscitarian logic was clearly not limited to elections; it was also central to Chávez's use of constitutional referenda.

[195] Constitución de la República Bolivariana de Venezuela, Artículo 345: "Se declarará aprobada la Reforma Constitucional si el número de votos afirmativos es superior al número de votos negativos. La iniciativa de Reforma Constitucional que no sea aprobada, no podrá presentarse de nuevo en un mismo período constitucional a la Asamblea Nacional".

[196] The extension of the proposal to include the possible indefinite reelection of all other elected public officials besides the president not only responded to a legal strategy to ease the possible concerns of the TSJ. It was also politically convenient to overcome the resistance that Chávez found at the regional and local levels in 2007, and that contributed to the failure of his proposal of constitutional reform. This time, governors and mayors would have a significant incentive to rally support to the president's new proposal.

what the government and the legislature could not entirely prevent with this different strategy was the emergence of a substantive problem that the TSJ had refused to settle in 2007, i.e. does the adoption of the indefinite reelection of the president through the amendment track involves an illegitimate replacement of the basic structure of the Venezuelan political regime?

This time the TSJ was not able to dodge this substantive problem by means of the obscure formalistic strategy that was employed in 2007.[197] The plaintiffs that challenged the project of constitutional amendment were quick to learn from the lessons of their previous failure. Knowing that the court would refuse to review the constitutionality of the project of amendment on the grounds that it would not be a "definitive legal act" while the citizens' approval in a referendum was still pending, they adopted a different strategy and asked the constitutional chamber to interpret, in purely abstract terms, the meaning of several articles of the Constitution of 1999, with article 6 being the most important one. This article proclaims the democratic, pluralist, alternative, participatory, and elective character of the Venezuelan government.[198] It also introduces something resembling an eternity clause to the Venezuelan Constitution, since it is said that these characteristics will "always" define the country's government. According to the plaintiffs, an interpretation by the TSJ of this fundamental constitutional provision would contribute to settle, once and for all,

[197] Tribunal Supremo de Justicia de Venezuela, Sentencia del 3 de Febrero de 2009, Sala Constitucional, M.P. Arcadio Delgado Rosales.

[198] Constitución de la República Bolivariana de Venezuela, Artículo 6: "El gobierno de la República Bolivariana de Venezuela y de las entidades políticas que la componen es y será siempre democrático, participativo, electivo, descentralizado, alternativo, responsable, pluralista y de mandatos revocables".

the controversy and uncertainty that this attempt to remove all limits to presidential reelection was generating in Venezuela's political society.

More concretely, the TSJ was asked to decide if an amendment allowing for the unlimited consecutive reelection of all elected public officials, especially of the president, implied a substitution of the constitution's basic principles and structure. Is such an amendment incompatible with the democratic principle of political alternation? Does it threaten political pluralism? If that were to be the case, could the government and the legislature use the amendment track? Is it not required by the rules of constitutional change that such fundamental alterations of the political regime be adopted through the replacement track, i.e. by means of a constituent assembly?

In this case, the TSJ found that the unlimited reelection of the president was perfectly compatible with the political regime adopted by the Venezuelan Constitution.[199] Relying on the authority of Alexander Hamilton's ideas in Federalist No. 72, the constitutional chamber made explicit, once again, its preference for a plebiscitarian conception of democracy in which the president and the people take on a privileged political role unimpeded by instances of legal and institutional mediation. According to the TSJ, indefinite consecutive reelections are not only compatible with the democratic form of government but they also contribute to its strengthening. On the one hand, this possibility provides an important incentive for responsible government and allows the citizens to pass political judgment over the president's

[199] This was not surprising. During the period of ten years between 2005 – the year after Chávez was able to pack the TSJ – and 2015, the TSJ issued 45.474 rulings, and not one of them went against the government (Corrales 2015: 44).

performance. If the citizens think he did a good job then the president will be rewarded with another term in office. This is a mechanism that permits the citizens to take advantage of the presence of experienced and tried leadership, which is not easy to find. On the other hand, the Venezuelan Constitution allows for recall referendums to be used as instruments to prevent the abuse of political power by elected officials such as the president. Through this mechanism, citizens could promptly oust him from office and put an end to his administration.

However, the TSJ did not attempt to consider the risks that the indefinite permanence of one individual in office entails to the system of separation of powers. This omission seems to indicate that the traditional constitutional mechanisms that were designed to keep political power in check were of no great importance for the justices of the constitutional chamber. Instead, it reveals a very particular preference for popular and informal mechanisms of control, such as the influence that public opinion exerts on the rulers and the capacity of the citizens to judge over the merits of their government at the voting booths, both of which greatly overestimate the ability of the people to keep the executive in check (see Gargarella 2013: 162-164).

Finally, the TSJ dismissed any threats to the constitutional principles of democratic alternation and political pluralism by simply claiming that as long as the electoral system continues to make competition possible, the possibility of unlimited reelections does not harm it. Contrary to the Colombian Constitutional Court's assessment of the effects that Uribe's two terms had on the country's democratic system, its Venezuelan counterpart did not stop to consider if Chávez's already long stay in power had impacted the possibility of exercising a viable political opposition

or whether the executive had managed to coopt an important number of legal and political institutions.

Since the opinion of the TSJ was that the introduction of unlimited presidential reelections was perfectly compatible with the form of government established by the Venezuelan Constitution, it then followed that the government and the legislature were correct in their decision to follow the amendment track. No constituent assembly was necessary once it became clear to the constitutional chamber that the possibility of reelecting the president indefinitely does not alter the basic structure of the constitutional regime. In this way, the TSJ completed its eclectic development of populist jurisprudence. In line with the revolutionary legal philosophy described before, the TSJ refused to follow the Schmittian doctrine on the existence of limits to the capacity of the constituted powers to change the constitution and, instead, used it to boost the ability of the president to remake the constitution in accordance to his will.[200]

3. When the Rules of Change Become Inoperative

Contrary to what someone might think after the previous description of Chávez's successful attempt to consolidate his power by means of tinkering with the constitution, the rules of change that were adopted in 1999 by the Venezuelan

[200] On February 15, 2009, Chávez's project of constitutional amendment received the support of the citizens: 54,85% of the voters supported the proposal and 45,14% rejected it. For the official results, see http://www.cne.gob.ve/divulgacion_referendo_enmienda_2009/

constituent assembly are quite complex.[201] The successful implementation of constitutional amendments and reforms requires, first, that the National Assembly, the President, or a considerable number of citizens take the initiative to submit a proposal to be discussed by the legislature. Then, the proposal needs to be discussed and approved by the National Assembly in accordance with the requirements that the constitution and the law establish for this purpose. These requirements are much stricter in the case of constitutional reforms. Finally, the proposal has to be submitted to popular approval through a national referendum. However, the whole process has to satisfy an important substantive requirement, i.e. projects of amendment or reform cannot modify the fundamental structure of the constitution.

According to this, amendments and reforms in Venezuela are dependent on the successful completion of a reactive political process that forces the constituted powers to build a consensus before any changes to the constitution can be introduced. Executive, legislature, and citizens are expected to discuss and negotiate in order to prevent unilateral constitutional impositions. The only branch of government that is not explicitly invited to these processes of constitutional change is the judiciary. However, its participation is implied not only because any citizen can go before the TSJ to challenge constitutional amendments and reforms, but also because the judiciary is the obvious enforcer of the substantive requirement that the constitution imposes on the constituted powers whenever they activate the rules of amendment and reform. In sum, the Venezuelan Constitution does not make it easy for a

[201] Constitución de la República Bolivariana de Venezuela, Título IX.

charismatic and ambitious president to concentrate political power through the manipulation of the rules of amendment and reform.

The case of Álvaro Uribe in Colombia is an example of how difficult it is for the executive to successfully concentrate political power after so many instances of legal and political mediation have intervened in the process of constitutional change. However, in Venezuela the system of check and balances and the separation of powers established by the constitution were never implemented. The authoritarian populism of the Chavista movement and the political blunders of the opposition came together to erode in its entirety the safeguards that were meant to prevent the usurpation of the voice of the people by a single political faction. The government was able to come out victorious of the polarizing hegemonic struggle that began when Chávez first came to the presidency. And once he was able to secure control of both the legislature and the judiciary, the complex rules of amendment and reform that were included in the constitutional text quickly became inoperative. Both the National Assembly and the TSJ became nothing more than mere notaries ready to rubber-stamp the executive's proposals, a subservience that made possible the establishment of a plebiscitary and illiberal relationship between the president and the citizens.

Populist jurisprudence was instrumental in allowing the TSJ to fulfill this role. Once democratic legitimacy is understood as the outcome of a plebiscitary relationship between the president and the people, the Schmittian thesis of the unregulated nature of the constituent power emerges as an instrument with the capacity to remove all legal and institutional obstacles to the establishment of this

relationship. In fact, the Venezuelan case is a clear example of the potential that populist jurisprudence has for the justification of the inaction of a coopted constitutional court under an authoritarian regime that, as in the case of the Chavista experiment, concentrates political power in the name of the people.

This is not to say that the TSJ could have easily followed the path of its Colombian counterpart in 2010. At least formally, the Venezuelan constitution provides explicit grounds for the protection of the basic structure of the political regime by means of judicial review. The substantive provision that warns the constituted powers about the use of the amendment and reform tracks to alter the fundamental characteristics of the constitution can only be read in this way. But even if the TSJ had decided to enforce this provision, this would not have been easy given the total control that Chávez had over the National Assembly. To repeat what has already been said, judicial review against a powerful executive is more likely to be used successfully in a context of political diffusion than in one of completely consolidated power, as the confrontation between Álvaro Uribe and the Colombian Constitutional Court would indicate. In the case of Venezuela, the TSJ would have had to face a very powerful and charismatic president entirely by itself, given the lack of political fragmentation within the legislature. It needs to be remembered that courts are fragile institutions, especially in a context resembling that of Venezuela. However, such difficulties cannot justify the position adopted by the constitutional chamber of

the TSJ, which was more than willing to place its powers of judicial review at the service of an authoritarian regime.[202]

There is, however, another reason why the adoption of the more democratic variant of populist jurisprudence developed by the Colombian Constitutional Court can eventually turn into a problem in Venezuela. Let's pretend for a moment that the TSJ decides to take seriously the Schmittian idea about the existence of limits to the power of the executive and the legislature to amend or reform the constitution. As a result, the constitutional chamber issues a decision declaring unconstitutional the government's proposal to allow for the indefinite reelection of the president. Such an amendment would alter the fundamental structure of the Venezuelan system of government. If the government really wants to pursue this project of constitutional change, it has to activate the replacement track and convene a constituent assembly in accordance with the existing rules of change.

However, this scenario does not seem to offer any guarantees against the illegitimate usurpation of the voice of the people by the president and his party. Contrary to the silence of the Colombian Constitution in this regard, there is an explicit provision in Venezuela prohibiting the constituted powers from placing limitations to the sovereignty of the constituent assembly.[203] In a situation in which the government controls the legislature and the electoral council, a sovereign

[202] On the different roles that courts play in authoritarian regimes, see Shapiro (2008). On the specific case of Venezuela, see Corrales (2015) and Brewer-Carías (2010).

[203] Constitución de la República Bolivariana de Venezuela, Artículo 349: "El Presidente o Presidenta de la República no podrá objetar la nueva Constitución. Los poderes constituidos no podrán en forma alguna impedir las decisiones de la Asamblea Nacional Constituyente (…)".

constituent assembly becomes an ideal vehicle for the unilateral imposition of an authoritarian political regime, especially when a constitutional tribunal is explicitly prohibited from intervening. And even in a context in which the opposition has significant representation within the legislature, the faith of the constituent assembly would depend entirely on the electoral performance of the political actors, a situation in which powerful populist leaders excel.

The populist conception of democracy behind the Chavista experiment has pushed Venezuela to a situation of democratic decay that is mostly explained by the erosion of the party system (Bejarano 2011: 247). The radical refusal on the part of both the government and the opposition to acknowledge the democratic and stabilizing potentials of compromise and negotiation is also an important factor in this regard. Unfortunately, the rules of constitutional change do not seem to offer a viable way out of the democratic crisis that ensues once a populist government has managed to concentrate that much power in the hands of the president. As things stand, the only way out of this authoritarian straightjacket would be the patient and gradual improvement of the opposition's electoral performance with the intention of balancing the scales with the government and forcing it to negotiate. Toying with the rules of constitutional change would only work to the advantage of the ruling party, and pursuing an extralegal alternative would probably result in political violence and all-out authoritarianism.

Venezuela needs to look back on its not so distant history in order to learn from the lessons of the pacted transition that allowed for the establishment of democracy in the country. Negotiated transitions, history seems to show, have been

conducive to democracy in several occasions, as the cases of Venezuela in 1958, Spain in 1978, and South Africa in 1994 make evident. Perhaps this mechanism can once again become useful in order to move Venezuela away from the authoritarian populism of the present and bring it closer to an inclusive and pluralistic democracy.

CONCLUSION

1. The Paradox of Populist Jurisprudence

Democracy needs to be defended against the authoritarian risks that come with the spread of populist ideas. Of course, citizens in general and the different associations that coexist in modern civil society should assume responsibility and step in whenever democratic regimes are at the brink of authoritarian regressions. But this is not to say that political institutions have no role to play. Constitutional courts have been established all over the globe precisely to prevent this type of scenarios. Their task is to keep in check democratic transgressions that in many occasions have strong popular support. In the end, authoritarianism cannot be justified even when it has been given a popular blessing. However, populist jurisprudence does not provide constitutional courts with the adequate bases for the assumption of such a role.

This is so because of the paradoxical character of populist jurisprudence. The populist conception of democratic legitimacy at the heart of this type of jurisprudence is incompatible with the establishment of external constraints to limit the exercise of

the constituent power of the people; it turns courts into irrelevant political actors during moments of extraordinary constitutional politics. Though the constitution making processes of Colombia and Venezuela show that courts can rely on populist jurisprudence to make room for legal revolutions in a context in which the rules of constitutional change are used to maintain the status quo at the expense of greater democratic participation, the revolutionary hiatus that follows from the adoption of this jurisprudence precludes further reliance on the principle of legality to assist political actors in the production of democratic outcomes. To put it clearly, courts commit political suicide once they turn to populist jurisprudence: by excluding themselves from the process of constitutional change, they remove one possible institutional safeguard against the risk that a faction ends up usurping the name of the people to establish an authoritarian regime.

Recent episodes of constitutional change in Venezuela, as illustrated in chapters 4 and 6 of this dissertation, demonstrate that these risks are real. Instead of maintaining a romantic belief in the capacity of the multitude of individuals and associations that compose the popular sovereign to act in a manner that is consistent with our current democratic ideas and sensibilities, serious efforts should be made to establish institutional safeguards with the capacity to channel the exercise of the constituent power in a democratic direction. But in order to rethink the role of constitutional courts as political actors that can contribute to the improvement of democratic regimes it is first necessary to resist our theoretical prejudices.

As was stressed in the introduction, constitutional courts can provide an alternative instance of political representation that multiplies the number of voices

and interests that come into play during the process of forming the political will of a democratic people. We can no longer take for granted the unquestioned idea that depicts courts as counterdemocratic institutions. The paradoxical nature of populist jurisprudence derives exactly from this prejudice: even constitutional judges operate under the assumption that the democratic exercise of the constituent power requires that courts and legality be removed from processes of constitutional change.

Now, throughout this dissertation I have stressed the importance of assuming a pragmatic approach to the problem of constitutional change and the role that courts are called to play during these episodes. Despite the general critique of populist jurisprudence that was advanced here, I was also forced to acknowledge that the outcome of the use of this type of jurisprudence is not necessarily the establishment of authoritarianism. As was argued in chapter 3, it is possible that processes of constitutional change from which the courts have excluded themselves after the adoption of populist jurisprudence result in the improvement of the democratic regime. However, the democratic outcomes of the Colombian constitution making process were only possible because of the radical difference between the conception of democratic legitimacy that influenced the actions of the most important participants in the process and the one adopted by the Supreme Court.

The plural conception of democratic legitimacy that was briefly developed in Part I of this dissertation was evident in the disposition of Colombian political actors to negotiate the rules and procedures of the constitution making process. These rules and procedures gave place to a plural, inclusive, and highly representative constituent assembly that, despite its absolute sovereign powers, was forced to follow a logic of

political compromise that resulted in the adoption of a more democratic constitutional regime. In this case, the internal mechanisms of constraint that result from the absence of a hegemonic political force with the capacity to impose a constitution in a unilateral manner proved to be of fundamental importance to prevent the risks of populist constitution making that were to materialize in the Venezuelan case. However, this was only a contingent result. In fact, the absence of external constraints was missed during those moments in which the constituent assembly felt the need to overstep the boundaries of its authority. From a pragmatic perspective that rejects the romantic idealization of the popular sovereign, the fate of a process of constitutional change should not be left to chance. The authoritarian affinities of populism should not be underestimated, either by the courts or by political theorists.

There is, however, one good reason why judges could prefer to insist on the use of populist jurisprudence. As I tried to show in chapter 5, populist jurisprudence can eventually be used by democratically minded constitutional judges to oppose the attempts of a political faction to usurp the voice of the people and claim the right to exercise the constituent power to transform the constitutional regime in an authoritarian fashion. Populist jurisprudence, under the guise of the doctrine of unconstitutional constitutional amendments, has the potential to challenge the claims of charismatic and authoritarian political leaders to represent the will of the popular sovereign in order to erode the principles of liberal democracy that are meant to prevent abuses of power. The adoption of this variant of populist jurisprudence allowed the Constitutional Court of Colombia to claim, against a powerful executive,

that the rules of constitutional amendment cannot be used to replace the political regime established by the popular sovereign. In this case, the Colombian court assumed the role of guardian of the democratic will of the people by claiming that the popular sovereign can only revisit its fundamental decisions of the past through the same mechanism that it used to adopt the existing constitutional order. Only through the more demanding track of constitutional replacement, i.e. through a constituent assembly, is it possible to claim that the people are actually manifesting their desire to change the basic structure of their constitution. In this way, the court averted the authoritarian pretensions of the executive power.

But this variant of populist jurisprudence is still ultimately committed to the problematic conception of democratic legitimacy according to which the popular sovereign can only exercise its constituent powers in a revolutionary fashion; it reintroduces the revolutionary hiatus through the back door. This democratic application of populist jurisprudence affirms the role of legality as an instrument that makes it possible to debunk false claims about having a mandate from the people to replace the constitution, but remains attached to the idea that once the people activate the track of constitutional replacement that allows for the establishment of a constituent assembly, then their actions should be left free from illegitimate obstructions by the courts.

Populist jurisprudence has only a limited democratic reach: it can contribute to open the constitutional regime to the participation of forces traditionally excluded from the process of political will formation by removing the obstacles that ensure the hegemony of the political elites, or it can put a stop to the authoritarian ambitions of

a populist president by forcing him to adopt a more demanding mechanism of constitutional change to prove that he actually has a mandate from the people. But once populist jurisprudence has achieved either of these objectives, it forces the courts to retrieve from episodes of extraordinary constitutional politics.

If constitutional courts are to intervene throughout the entire length of a process of constitutional change and contribute to the adoption of democratic decisions, the absolute rejection of legal and institutional mediation that follows from the adoption of populist jurisprudence cannot become a rule of thumb. Constitutional judges need to embrace the project of constitutionalism even during moments of extraordinary politics. The principle of legality should take the place of a regulative ideal that the courts can try to enforce even during those moments in which it is evident that most sectors of political society feel the need to replace the constitutional regime. Otherwise, the risks that are inherent to the revolutionary hiatus will always come to haunt the democratic aspirations of those who push for substantial constitutional change.

2. Further Research

The objective of this dissertation has been to develop a critique a populist jurisprudence. This critical approach, however, suffers from a considerable limitation. I have only brought to light the overall authoritarian affinities of populist jurisprudence and its sporadic democratic potentials. The focus has been on the description of the outcomes of its application. But how can the courts of Colombia and Venezuela move past populist jurisprudence? How can they assert the principle of

legality and the project of constitutionalism during episodes of extraordinary constitutional change? Is it possible to avert the eventual reemergence of the revolutionary hiatus? Something, though not much, has been said on this regard. This critique is an attempt to offer a diagnosis; its results hint towards the need of taking considerable corrective measures. However, the step from a critical to a propositive stance will have to wait for a different occasion.

The most I can do at this moment is to suggest some possible guidelines for future efforts to come up with a more democratic jurisprudence of constitutional change. I believe that Colombia and Venezuela went to great lengths during their constitution making processes to develop a new approach to this problem. The drafters of both constitutions were aware of the problems that pushed them towards a revolutionary break with the rules of constitutional change of the constitutions they were trying to replace. Instead of adopting rules of change like the ones that granted the legislature the monopoly over the power to reform the constitution, they decided to include the replacement track of the constituent assembly on which they had previously relied to bypass the restrictions imposed on popular participation. By doing this, Colombia and Venezuela took the first steps towards the closure of the revolutionary hiatus they once created. For the first time in the history of these two countries, there was an explicit constitutional authorization to convene the extraordinary organ through which the constituent power has been traditionally exercised in Latin America.

The drafters of the constitutions of Colombia and Venezuela seem to have finally taken some distance from the teachings of E.J. Sieyès and Carl Schmitt.

Contrary to the theories on the constituent power developed by these two authors, the constitutions of Colombia and Venezuela now provide explicit and clear rules on how to initiate a process of popular constitutional replacement. However, these attempts to constitutionalize the exercise of the constituent power only cover the stage of initiation that was described in chapter 1.

The second stage in this process, i.e. the execution of the constituent power, remains an unruly terrain in both cases. In fact, the Venezuelan Constitution is still very much attached to the populist and revolutionary conceptions of democracy that I have criticized throughout this dissertation. There is an explicit provision that prohibits the intervention of the constituted powers with any decisions of the constituent assembly. And while this is not the case in Colombia, in both cases there is an absence of regulation on the fundamental aspects of the process of constitutional replacement that facilitates the eventual manipulation of constituent assemblies for authoritarian purposes.

The legitimacy of the actions of constitutional courts derives from the existence of a normative framework that grants specific powers to these institutions. Judicial activism is not easily justified in democratic terms. When the courts try to intervene during processes of constitutional change without explicit authorization from the system of positive law, their actions can easily appear to the public and to the political actors involved as a manifestation of illegitimate judicial overreaching. And things are even worse when there are not rules to enforce. This would be the case in Colombia and Venezuela as things stand to this day. When there are no explicit rules on how to execute the constituent power, the populist conceptions of democracy

and the people remain at the disposal of political forces eager to occupy democracy's empty space of power. There is not much a court can do in this scenario since any attempt to intervene would be legally groundless.

Two questions then come up: How would a detailed regulation of the stage of execution of the constituent power look like? And, is it even desirable from a democratic perspective to regulate this process? The first question poses a series of challenges that cannot be confronted here. Any attempt to tackle this question would require detailed knowledge of the political history and constitutional traditions of the country for which such a regulation is to be developed. In this sense, this is a question that can only be answered on a case-by-case basis, something far beyond the scope of this work. The second question, however, can receive a somehow tentative or conditional answer. The authoritarian regressions experienced in Venezuela and other countries of the Latin American Andes suggest that this is a project that needs to be properly considered. However, this call for the thorough formalization of the track of constitutional replacement is likely to meet strong resistance from most quarters in the field of democratic and constitutional theory.

It is possible for any regulation of the exercise of the constituent power to become a straightjacket for democratic action. The drafters of these rules of constitutional change cannot possibly foresee the different situations that in the future might mobilize political actors towards the adoption of a new constitutional regime. Our political ideas and sensibilities are constantly changing and the regulation we once thought appropriate for the enactment of democratic constitutional change can eventually become an obstacle for the realization of

legitimate popular aspirations. In these situations, the formalization of constitutional replacements can give place to new revolutionary breaks with existing legality and we would be back to the problem we were trying to solve. It is evident, then, that this is a highly complex problem, one that constitutional and democratic theorists have been trying to solve for a long time without success.

However, the adoption of broad and flexible rules of constitutional replacement can gradually reinforce in the minds of political actors that idea according to which the principle of legality is not necessarily incompatible with democratic action. A set of rules that makes explicit the need to conduct the process of constitutional change in an inclusive, plural, and consensual manner has, at least, the potential to remind us of the need to follow democratic principles if we are to obtain democratic results. And, on the basis of those rules, it is possible to incorporate constitutional courts as reflexive institutions with the capacity to appeal to the forces of change and suggest an approach to the question on how to replace the political regime that stirs clear from the populist seduction and authoritarian temptations.

I am well aware of how unsatisfactory these closing remarks are. This is why I bring them up as a suggestion for future research. As was mentioned before, the objective of this dissertation was to offer a critique of populist jurisprudence on the basis of its consequences for the protection and improvement of Latin American democratic regimes. I do not think that Latin American constitutional judges have given enough thought to the implications of the populist conception of democracy at the heart of their jurisprudence on constitutional change. I like to think that by making them explicit in this dissertation I can contribute to the instigation of a

dialogue from which, perhaps someday, the answers to the questions I did not address can be finally obtained.

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