The Newest-Oldest Separation of Powers

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Xenophon Contiades and Alkmene Fotiadou (eds.), *Participatory Constitutional Change: The People as Amenders of the Constitution* (Routledge 2017).

Separation of powers is a basic idea within constitutional theory.[1] The principle of separation of powers, as described by Montesquieu in his *The Spirit of the Laws*, famously centred around three governmental branches: legislative power, executive power and judging power. This separation of powers was needed for preventing abuse of power, because, '*c'est une expérience éternelle que tout homme qui a du pouvoir est porté à en abuser*'.[2] In order to prevent this abuse of power, it would be necessary, according to Montesquieu, to organise the government in such a way that power would check power. In other words, this separation of governmental powers results in a power-block.[3]

In a famous article at the *Harvard Law Review* entitled 'The New Separation of Powers', Bruce Ackerman argues against exporting the American separation of powers system of an independently elected presidency to check and balance a popularly elected congress, but rather calls in favour of a 'constrained parliamentarianism' model, in which a prime minister and his or her cabinet are authorised to remain in power as long as they can retain the support of a democratically elected chamber of deputies. Other independent institutions, including a constitutional court, take a checking function.[4] In her article 'The

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[1] For a comparative reconstruction *see* C. Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford University Press 2013).

[2] C. Montesquieu, *De l'Espirit des lois* (Gonzague Truce ed., Vol. I, Paris 1961) p. 162.

[3] *See* e.g. J.T. Brand, 'Montesquieu and the Separation of Powers', 12(3) *Oregon Law Review* (1932-1933) p. 175. For a critical perspective *see* L. Claus, 'Montesquieu's Mistakes and the True Meaning of Separation', 25(3) *Oxford Journal of Legal Studies* (2005) p. 419. For other justifications of the doctrine *see* e.g. J. Waldron, 'Separation of Powers in Thought and Practice', 54 *Boston College Law Review* (2013) p. 433.

[4] B. Ackerman, 'The New Separation of Powers', 113(3) *Harvard Law Review* (2000) p. 634.

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"Newest" Separation of Powers: Semipresidentialism', Clindy Skach has claimed that actually, the constitutional model which is being imported by new democracies around the world is neither the constrained parliamentary model nor American Presidentialism model but rather semipresidentialism, which is most often associated with the French Fifth Republic.[5]

The various theories and models I have just mentioned focus on *horizontal separation of powers* between different political actors and governmental branches. In this short essay, I want to focus on another type of separation of powers, a *vertical* one, between *the people and the government*. This separation of powers is the oldest but at the same time the newest as it is awarded recent flourishing in constitutional design.

In traditional constitutional theory, a distinction is made between *constituent power* and *constituted power*, formulated by Sieyès, in his famous pamphlet *What is the Third Estate?* on the eve of the French Revolution.[6] Constituent power is the power to create a constitution. Constituted power is a power created by the constitution. A constitution cannot constitute itself and it presupposes a constitution-making power. This power cannot itself be constituted. This separation between constituent and constituted powers is the very first separation of powers (hence, 'the oldest separation of powers'), which is prior to the separation of constituted powers.[7] As Andrew Arato correctly notes, 'all conceptions of power division among different agencies and institutions were conducive to the development of yet another power that in extraordinary setting plays a constituent role, whether an entirely separate form or a combination where all or most of the existing state powers have to participate in its operation'.[8]

Thus, after the establishment of the constitution, the constituent power retires into the clouds, in a way, and all governmental power is then exercised under the constitution, through the different constituted governmental organs. As Barshack writes, 'through separation of powers the Political expels omnipotence – the sacred communal body, the constituent power which transcends separated powers – to the corporate, absent realm'.[9] However, as I have argued elsewhere, this external

[5] C. Skach, 'The "Newest" Separation of Powers', 4(4) *International Journal of Constitutional Law* (2007) p. 93.

[6] E.J. Sieyès, 'What is the Third Estate?', in *Political Writings* (Hackett Publishing Co Inc 2003) p. 136.

[7] In his study on the development of constituent power, Egon Zweig demonstrates that logically, popular sovereignty may be derived from Montesquieu's separation of powers. E. Zweig, *Die Lehre vom Pouvoir Constituant: Ein Beitrag zum Staatsrecht der französischen Revolution* (1909). *See also* D. Kelly, 'Egon Zweig and the Intellectual History of Constituent Power', in K.L. Grotke and M.J. Prutsch (eds.), *Constitutionalism, Legitimacy, and Power: Nineteenth-Century Experiences* (Oxford University Press 2014) p. 332.

[8] A. Arato, *The Adventures of the Constituent Power* (Cambridge University Press 2017) p. 76.

[9] L. Barshack, 'Notes on The Clerical Body of The Law', 24(3) *Cardozo Law Review* (2003) p. 1151 at p. 1161.

power of the people to create, shape and change their constitutional order, is not exhausted but may always revive in 'constitutional moments' of higher law-making, in Ackerman's sense.[10] In such extraordinary constitutional moments this 'sleeping sovereign' that has the power to change the constitutional order may awake and exercise its astonishing power.[11]

Thus, 'the people', as the sovereign, possess the power to revise the constitutional order. This power is external to the constitution. Thus, on the one hand, the inclusion of this power within the constitution may be regarded as a declaration of a pre-existing power or right.[12] On the other hand, there is often a need for a limited revision. The authorisation of a special amending authority to amend the constitution by a special procedure is a constituted authority, authorised and regulated by the constitution. However, by creating a special procedure for constitutional amendment, the constituent power itself is not constituted. As Carl Friedrich argues, constitutional amendment provisions, no matter how elaborate they may be, never supersede the constituent power.[13] Accordingly, the problem of how to reconcile this absolute separation of powers (between constituent and constituted powers) reaches its climax with constitutional amendment powers.[14]

I have argued that one indeed ought to distinguish between the people's *primary* constituent power, which is the extra-constitutional constitution-making power and the *secondary* constituent power, which is the constituted constitution-amending power.[15] I have also claimed that one should distinguish between various levels of secondary constituent powers along a spectrum. According to this theoretical construct, the more similar the democratic characteristics of amendment powers are to those of the primary constituent power, which is closely linked to popular sovereignty, the less it should be bound by limitations, as opposed to amendment processes that are more comparable to regular legislative power.[16]

[10] Y. Roznai, *Unconstitutional Constitutional Amendments – The Limits of Amendment Powers* (Oxford University Press 2017) Ch. 4. On such constitutional moments of higher lawmaking *see* B. Ackerman, *We The People: Foundations* (Harvard University Press 1991) p. 185-186.

[11] On the history of the distinction between sovereignty and government in political thought *see* R. Tuck, *The Sleeping Sovereign* (Cambridge University Press 2016).

[12] On the terminology of 'right' and 'power' and this context, *see* Roznai, *supra* n 10.

[13] C.J. Friedrich, *Constitutional Government and Politics – Nature and Development* (Harper & Brothers Publishers 1937) p. 117.

[14] *See* e.g. T. Pereira, 'Constituting the Amendment Power – A Framework for Comparative Amendment Law', in R. Albert et al., *The Foundations and Traditions of Constitutional Amendment* (Hart Publishing 2017) p. 105.

[15] Roznai, *supra* n 10. *See also* Y. Roznai, 'Towards A Theory of Constitutional Unamendability: On the Nature and Scope of the Constitutional Amendment Powers', 18 *Jus Politicum – Revue de Droit Politique* (2017) p. 5.

[16] Y. Roznai, 'The Spectrum of Constitutional Amendment Powers', in Albert et al., *supra* n. 14.

These various conceptual distinctions raise a thorny question: what are the implications of an amendment process which includes a direct involvement of the people, such as a direct popular referendum? Are the people in this capacity acting as the sovereign constituent power or as a limited constituted organ?

On the one hand, the people in this capacity act as a constituted organ. It is a legal competence defined in the constitution and regulated by it. If all powers derive from the constitution, then the amending power – even when exercised by the people themselves – must be regarded as a *constituted power* just like the legislative, judicial, or executive powers.[17] The people here represent a legal organ of the state. An example could be Switzerland, where 100,000 people eligible to vote have the right to propose constitutional revisions. Notwithstanding this direct involvement of the people within the amendment procedure, *jus cogens* norms of international law impose limits to partial or total constitutional reforms.[18] Jeffrey Lenowitz elaborated on this approach: 'while a constitutional amendment, even one produced by a popular referendum, can alter the constitution, its process is dictated by the constitution and thus it leaves the normative superiority and sovereignty of the constitution intact'.[19]

On the other hand, the people in this capacity arguably act in their constituent power capacity and are therefore unlimited. An example of such an approach can be found in Ireland, where according to the prevailing jurisprudence of the Irish Supreme Court, the people are the creator of the Constitution and the supreme authority. Accordingly, constitutional amendments made by the people in a referendum that expresses their will becomes the fundamental and supreme law of the land. Such an expression of the people's will is unlimited and cannot be reviewed or nullified by courts.[20]

It thus appears that 'the people' may be regarded in two distinct capacities: as a source of absolute power (primary constituent power) and as a constitutional

[17] M. Suksi, *Making a Constitution: The Outline of an Argument* (rättsvetenskapliga institutionen, 1995) p. 5 at p. 10-11.

[18] *See* G. Biaggini, 'Switzerland', in D. Oliver and C. Fusaro (eds.), *How Constitutions Change—A Comparative Study* (Hart Publishing 2011) p. 303 at p. 316-317. On the question whether there is scope for an 'unconstitutional amendment doctrine' to constrain the scope of popular initiatives in Switzerland *see* R. Dixon, 'The Swiss Constitution and a Weak-Form Unconstitutional Amendment Doctrine?', *UNSW Law Research Paper* 75 (2017) at <ssrn.com/abstract=3057229>, visited 16 April 2018.

[19] J.A. Lenowitz, *Why Ratification? Questioning the Unexamined Constitution-making Procedure* (PhD Thesis, Columbia University 2013) p. 85.

[20] *See* e.g. A Kavanagh, 'Unconstitutional Constitutional Amendments from Irish Free State to Irish Republic', in E. Carolan (ed.), *The Constitution of Ireland: Perspectives and Prospects* (Bloomsbury Professional 2012) p. 331. *See also* Y. Roznai, 'The Theory and Practice of "Supra-Constitutional" Limits on Constitutional Amendments', 62(3) *International and Comparative Law Quarterly* (2013) p. 557.

organ established by the Constitution for its amendment (secondary constituent power).[21] Claude Klein remarks that here lies 'the crux of the problem of the theory of the amending power'.[22]

It is precisely here that the recent publication *Participatory Constitutional Change: The People as Amenders of the Constitution*,[23] edited by Xenophon Contiades and Alkmene Fotiadou and published under Routledge's series on 'Comparative Constitutional Change', finds its importance. Bringing together leading scholars in the field, this publication touches upon fundamental questions which go to the root of constitutional thinking.

The collection describes and analyses the shift in modern constitutional design towards more inclusive and participatory mechanisms, by which the people can assume (or re-assume) their constituent role and be actively involved in constitutional change. It is structured in the following manner.

In the editors' introduction, they describe the aims and the structure of book, which concern the recent constitutional-design trend of citizen-led constitutional change. While each chapter focuses on different aspects of this trend, the common aim of the different chapters is to answer the question of 'what constitutional designers should take into consideration before embarking on a direct-democracy enhancement journey'.[24]

After this introduction, the editors provide what they term 'a synthetic approach' to address the question how amendment formula goals are connected to participatory constitutional change. They provide a continuum of civic engagement in constitutional amendment according to the various ways in which people engage in constitutional change. They also address the challenges and risks of such engagement, for example when fundamental rights are at stake or when the elite manipulates such mechanisms, and the paradox according to which the inclusion of the people within amendment procedures may render the process more demanding, thus paradoxically distancing the people from constitutional change rather than promoting their role in it.[25] The second part of the book presents theoretical and historical aspects of popular participation in constitutional change. Paul Blokker critically discusses forms of popular participation in constitutional politics while analysing theoretical and normative rationales for this phenomenon (Chapter 2). Jan-Herman Reestman traces the historical

[21] C. Klein, 'Is There a Need for an Amending Power Theory?', 13 *Israel Law Review* (1978) p. 203 at p. 213.

[22] *Ibid.*

[23] X. Contiades and A. Fotiadou (eds.), *Participatory Constitutional Change: The People as Amenders of the Constitution* (Routledge, 2017).

[24] *Ibid.*, p. 2.

[25] X. Contiades and A. Fotiadou, 'The People as amenders of the constitution', in *Participatory Constitutional Change*, p. 9.

development of referendums in France from 1958 (Chapter 3). The third part explores lessons from Switzerland and California, two states with a long direct-democratic experience. Thomas Fleiner explores the system of direct democracy in Switzerland, with is benefits and risks (Chapter 4), while Claudia Josi compare mechanisms that limit the people's will in Switzerland and California, an issue which touches upon the delicate balance between democracy and constitutionalism. Whereas I earlier mentioned that in Switzerland the people are regarded as a limited constituted organ, Josi claims that in light of recent examples in which direct democracy has conflicted with individual rights, the existing restriction to respect *jus cogens* norms of international law is insufficient and should be extended to the core of fundamental rights (Chapter 5).

The fourth part of the book explores new innovative trends in popular involvement. Björg Thorarensen deals with the innovative and participatory constitution-making process in Iceland, which was described by scholars as the 'world's first crowdsourced constitution',[26] pointing also, importantly, to its shortcomings (Chapter 6). David M. Farrell, Clodagh Harris and Jane Suiter analyse the Irish Constitutional convention of 2012-2014, which gave 'ordinary' citizens, selected randomly, a leading role in constitutional change (Chapter 7). The fifth part of the book deals with the dilemma of introducing constitutional mechanisms into a system in which the use of referendums has been exceptionally rare, such as Luxembourg (Jörg Gerkrath in Chapter 8) or where there was a total lack of referendum for nearly four decades, such as in Greece (Alkmene Fotiadou in Chapter 9). The final and sixth part of the book explores EU aspects of popular participation. Dario Elia Tosi traces the development of EU integration referendums (Chapter 10), and Helle Krunke examines the recent trend of popular participation as a struggle between the nation-states and the EU (Chapter 11). The book's structure makes the reading enjoyable, understandable and smooth.

The common theme of the chapters, which emphasises constitutional design that includes a special role of the people themselves in constitutional change, corresponds with recent voices from academia. According to such voices, fundamental constitutional changes, episodical by their nature, should take place through the most popular participatory process possible, which allows citizens the opportunity to propose, deliberate, and decide upon such changes. Constitutional regimes must leave a door open for the constituent power to re-emerge.[27]

In addition to its theoretical, comparative and conceptual contribution, this volume is extreme timely and carries practical importance because, as Stephen

[26] S. Suteu, 'Constitutional Conventions in the Digital Era: Lessons from Iceland and Ireland', 38 *Boston College International and Comparative Law Review* (2015) p. 252.

[27] A prime example would be J. Colón-Rios, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power* (Routledge 2012).

Tierney puts it, Europe has entered the 'age of the referendum'.[28] Consider, only recently, the Turkish constitutional referendum on the replacement of the parliamentary system by an executive presidency and a presidential system (16 April 2017),[29] the referendum on Catalonian independence referendum of October 2017,[30] the Brexit referendum in the United Kingdom on 23 June 2016,[31] the Irish referendum of May 2015 on the amendment which would legalise same-sex-marriage,[32] or the Scottish referendum on independence of September 2014.[33] One can add to this partial list the 2005 referendums in several EU Member States on the ratification of the Treaty establishing a Constitution for Europe with a positive vote in Spain and Luxembourg, yet a negative vote in France and The Netherlands.[34]

Indeed, this book focuses on Europe. And here, the main remark I have concerns the jurisdictions covered in this volume – mainly France, Switzerland, Iceland, Ireland, Greece, Luxembourg, and European Union. The only jurisdiction that is non-European is California, which is examined in comparison to Switzerland. Yes, I can see the value of a European-centered book, as Europe surely has some unique features including, inter-alia, membership in or affiliation to a strong supra-national organisation, long-standing and established democratic culture, and promotion of the rule of law, democracy and fundamental rights as part of the European heritage. Is there something else unique about Europe which explains people's direct participation?

As Helle Krunke explains in the book's final chapter, one may claim that Europe presents a unique area for investigating direct democracy mechanisms, in light, for example of the economic and financial crisis; the establishment of 'new' democracies in East and Central Europe; a reaction to EU integration, as direct democracy can be regarded as a tool to upholding the nation state and as a

[28] S. Tierney, 'Europe is entering the "age of the referendum", but there is nothing to fear for European democracy if referendums are properly regulated', *Democratic Audit UK Blog*, 22 October 2014. On Tierney's work on referendums *see* e.g. S. Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford University Press 2012).

[29] *See* e.g. B. Duran and N, Miş, 'Turkey's constitutional referendum and its effects on Turkish politics', 58(3) *Orient* (2017) p. 52.

[30] *See* e.g. D. Turp, et al., *The Catalan Independence Referendum: An Assessment of the Process of Self-determination* (IRA 2017).

[31] *See* e.g. S. Vasilopoulou, 'UK Europscepticism and the Brexit Referendum', 87(2) *The Political Quarterly* (2016) p. 219.

[32] *See* e.g. Y. Murphy, 'The marriage equality referendum 2015', 31(2) *Irish Political Studies* (2016) p. 315.

[33] T. Mullen, 'The Scottish Independence Referendum 2014', 41(4) *Journal of Law and Society* (2014) p. 627.

[34] N. Startin and A. Krouwel, 'Euroscepticism Re-galvanized: The Consequences of the 2005 French and Dutch Rejections of the EU Constitution', 51 *Journal of Common Market Studies* (2013) p. 65.

'competition' between the states and the EU over democratic legitimacy, or vice versa as a means for the EU to achieve greater democratic legitimacy.[35] However, as Krunke admits, this explanation is not exhaustive, as the general tendency is taking place outside Europe as well.

Indeed, the recent trend of including participatory mechanism of the people in constitutional change exceeds European borders. Increasingly, political communities around the world experiment with participatory forms of constitution-making and constitutional amending, such as in British Columbia (2004) and Ontario (2007), where deliberative citizen assemblies were initiated in order to deal with electoral reforms. In Thailand, a referendum was used in August 2016 to approve the new Constitution.[36] In Latin America, for example, referendums have been used increasingly to strengthen populist leaders,[37] and in 2014, Israel has adopted a Basic Law: Referendum, according to which a referendum will be conducted if the Israeli government adopts a decision or signs an agreement stipulating that the laws, jurisdiction, and administrative authority of the State of Israel will no longer apply to a certain geographical area. In other words, it shall apply when an agreement or unilateral decision involves withdrawal from any territory. This Basic Law is considered a dramatic change in the understanding of constitutionalism in Israel thus far.[38] Similarly, in African constitutions, 'public participation has become a "must have" in recent constitutional reforms and the vast majority of processes have at least pretended to respect this norm as part of their roadmap – primarily so as to subsequently be viewed legitimate'.[39] Thus, having studies on other jurisdictions from Asia, Australia, Africa, Latin America and the Caribbean, which do not appear in the volume, could have been valuable.[40]

[35] H. Krunke, 'Sovereignty, constitutional identity, direct democracy? Direct democracy as a national strategy for upholding the nation state in EU integration', in *Participatory Constitutional Change*, p. 191-192. One can add to this a counter-response to constitutional change through the judiciary. *See* Contiades and Fotiadou, *supra* n. 25, p. 11.

[36] D. McCargo, S.T. Alexander, and P. Desatova, 'Ordering Peace: Thailand's 2016 Constitutional Referendum', 39(1) *Contemporary Southeast Asia: A Journal of International and Strategic Affairs* (2017) p. 65.

[37] D. Altman, 'Latin America', in M. Qvortrup (ed.), *Referendums Around the World* (Palgrave Macmillan 2018) p. 185.

[38] *See* e.g. M.S. Wattad, 'Israel's Laws on Referendum: A Tale of Unconstitutional Legal Structure', 27 *Florida Journal of International Law* (2015) p. 213. An English translation of the Basic Law is available at <knesset.gov.il/laws/special/eng/BasicLawReferendum.pdf>, visited 17 April 2018.

[39] T. Abbiate, M. Bockenforde and V. Federico, 'Introduction', in T. Abbiate, M. Böckenförde, V. Federico (eds.), *Public Participation in African Constitutionalism* (Routledge 2017) p. 1.

[40] For an older study on the referendum device in various regions such as Australia and New Zealand, American States, Western Europe, Eastern Europe and the ormer Soviet Union, *see*

On the other hand, each of these jurisdictions could fill an elaborated volume in its own, merely on the question of people's involvement in constitutional change. Thus, perhaps there is some beauty and efficiency, after all, in having a more concise book on some of the recent trends of popular participation in constitutional change. This allowed to editors to include deep, elaborated and rigorous case studies of each country. Indeed, Ian Cram rightly stated that 'one of the collection's main strengths is the breadth of expert analysis it offers'.[41] At the same time, it allowed the editors to keep the book at a reasonable length (212 pages) that is manageable and relatively easy to read and, I must add, enjoyable to read.

However, even within Europe, the inclusion of some other jurisdiction in the study could have been beneficial. What about Italy, Spain or Portugal? What is the role of people's direct participation in constitutional questions within Eastern Europe's wave of populism, for example in Hungary and Poland? What about Denmark, that has an elaborated procedure of people's approval of constitutional change by Parliament (and which is briefly mentioned in Thorarensen's chapter)? And what about Germany, as a contrast? Famously, the German constitutional system, does not include the referendum design because, as Ackerman puts it, 'since the Nazi disaster, the Germans have avoided [the referendum] like the plague'.[42] But has the recent popular trend made its way to German constitutional debates?

I would have liked to see a broader collection simply to contrast the recent trend of participatory instruments, as suggested by the book, with another argument according to which:

> 'participatory mechanism and direct democracy to open up decision-making processes to the public at the national level… has in reality been extremely limited within Western Europe during the last twenty years. … where citizens' initiatives exist, it is usually the result of along institutional tradition that is well entrenched in the constitution (Ireland, Italy). … there certainly haven't been any great developments in terms of mechanisms of direct democracy over the last decades at the national lever, and the use of referendums is still limited to a few countries to a great extent (Ireland, Italy and Switzerland)'.[43]

D. Butler and A. Ramsey, *Referendums Around the World: The Growing Use of Direct Democracy* (The AEI Press 1994). For a more recent study that provides factual data on referendums around the world, and includes the Caribbean, Latin America and Africa, *see* Qvortrup, *supra* n. 37.

[41] I. Cram, 'Book Review – Participatory Constitutional Change: The People as Amenders of the Constitution', 66(2) *International and Comparative Law Quarterly* (2017) p. 516 at p. 517.

[42] Ackerman, *supra* n. 4, p. 669. *See also* C. Möllers, 'We Are (Afraid of) the People: Constituent Power in German Constitutionalism', in M. Loughlin and N. Walker (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2008) p. 87.

[43] C. Bedocl, *Reforming Democracy: Institutional Engineering in Western Europe* (Oxford University Press 2017) p. 72-73.

Again, perhaps this is not necessarily a point of criticism but of a praise, as reading the book left me with a taste of wanting more of the same. Perhaps another volume with the missing countries and some updates would fulfil my (and I assume of others) desire.

Returning to the deeper theoretical issue, in their chapter on 'the people as amenders of the constitution', the editors write that 'formal amendment rules often attempt to furbish constitutional amendment with the symbolic force of the original exercise of the constituent power'.[44] This appears to me as a crucial point. When constitutional amendment processes include the people's direct involvement through mechanisms such as referendums, this is an attempt to imitate a constitutional moment in which the people's constituent power is incarnated. As Xenophon Contiades and Alkemene Fotiadou explained in another study: 'The people are traditionally considered to have spoken during the exercise of the pouvoir constituant. Amending formulas may be described as replications of the constitutional moment where the pouvoir constituant was exercised, being attempted simulations of that primordial, constitution-making function … This original constitution-making process is embellished with great symbolic force, the reproduction of which during every constitutional revision would be unfeasible. Yet, desire to somehow preserve the spirit of that moment is often apparent in constitutional arrangements that risk sacrificing practically for symbolism'.[45] Through the formal mechanism of referendum constitutional amendment formulas aim to create an environment in which the people are 'awaking', in a sense, to resume their role as constituent authors.[46]

Accordingly, this is more than a symbolic feature. And here I wish to return to the point with which I opened this essay. The oldest separation of powers between the people and the government (constituent and constituted powers) is now re-emerging in the form of people's direct involvement in constitutional change. Cheryl Saunders noted that 'people now expect actually to be involved in the constitution-making process and not just symbolically associated with it'.[47] This is correct also regarding constitutional amendment.

Direct participation mechanisms of the people provide citizens with the tools and option to function as another 'gatekeeper' in approving or rejecting constitution-making or constitutional reform.[48] It can provide a check on the

[44] *See* Contiades and Fotiadou, *supra* n. 25, p. 15.

[45] X. Contiades and A. Fotiadou, 'Models of Constitutional Change', in X. Contiades (ed.), *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* (Routledge 2012) p. 417 at p. 430.

[46] Roznai, *supra* n. 16.

[47] C. Saunders, 'Constitution-Making in the 21st Century', 1 *International Review of Law* (2012) p. 2.

[48] Z. Elkins, T. Ginsburg and J. Blount, 'The Citizen as Founder: Public Participation in Constitutional Approval', 81 *Temple Law Review* (2008) p. 361 at p. 367.

other governmental branches. As Andreas Auer recently stated, 'the governing bodies, particularly government and parliament, have to accept the fact that the people … may make binding decisions they disapprove and dislike'.[49] Indeed, many times voters have voted with the government, but often the majority vote against government's recommendations.[50] And such people's involvement can often be dramatic.

Consider the following examples in which major reforms were rejected by the people. In 2013, a slim majority of Irish voters rejected a proposal to abolish the Senate and reconstitute the legislature as a unicameral parliament.[51] In Italy, in December 2016, voters overwhelmingly decided against a major constitutional reform that would have modified the Senate's structure, the constitutional status of the regions, and the confidence relationship between the government and Parliament.[52] That same year, with Brexit, the people themselves through a direct vote triggered major turmoil when they voted for the UK to leave the European Union.[53] Later in the same year, in Colombia, a majority of voters rejected a peace plan carefully negotiated by the political elites to end decades of civil war.[54] This trend seems to represent 'a rebuke to the governing elite'.[55] To my mind, this manifests the revival of the vertical separation of powers between constituent and constituted powers, placing the people themselves as a check on the power of governments.[56] Is this a positive phenomenon? Time will tell, but thanks to studies such as the one produced by Contiades and Fotiadou we can better understand and evaluate this phenomenon and design improved procedures to handle its shortcomings.

All-in-all, this contribution, edited by two of the world's experts on constitutional change, is a timely, valuable and an important contribution. It was justly selected as one of I-CONnect Blog 2016 Book Recommendations.[57]

[49] A. Auer, 'Editorial – The people have spoken: abide? A critical view of the EU's dramatic referendum (in)experience', 12 *EuConst* (2016) p. 397 at p. 402.

[50] M. Qvortrup, 'Western Europe', in Qvortrup, *supra* n. 37, p. 19.

[51] J. Fitzgibbon, 'Ireland's decision to retain the Seanad is not the end of the country's political reform process', *LSE European Politics and Policy (EUROPP) Blog*, 9 October 2013.

[52] G. Pasquino and M. Valbruzzi, 'Italy says no: the 2016 constitutional referendum and its consequences', 22(2) *Journal of Modern Italian Studies* (2017) p. 145.

[53] Vasilopoulou, *supra* n. 31.

[54] A.M. Matanock and M. García-Sánchez, 'The Colombian Paradox: Peace Processes, Elite Divisions & Popular Plebiscites', 146(4) *Daedalus* (2017) p. 152.

[55] *Ibid.*

[56] As Qvortrup writes, referendums have tended to have the effect of 'a democratic safeguard' against overzealous politicians and hasty legislation. *See* M. Qvortrup, 'Two Hundred Years of Referendums', in Qvortrup, *supra* n. 37, p. 263.

[57] R. Albert, '2016 Book Recommendation: Contiades & Fotiadou on "The People"', *International Journal of Constitutional Law Blog*, 28 December 2016.

The power of the people to shape and reshape their constitutional order is one of the most ancient questions of popular sovereignty.[58] The questions concerning the manner by which the people can directly be involved in constitutional change, with its advantages and challenges, remain central in contemporary constitutional debates. Anyone interested in questions of the nature and scope of popular sovereignty and people's role in constitutional change, including constitutional scholars, political scientists and constitutional designers, would find a great value and use in this rich and enlightening contribution, which is – to my mind – simply another step in an ongoing study, which thanks to the various contributions of the volume, can be further advanced.

[58] *See* D. Lee, *Popular Sovereignty in Early Modern Constitutional Thought* (Oxford University Press 2016).

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