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Announcements

Constituent Power - Papers by Joel I. Colón-Ríos, Associate Professor of Law, Victoria University of Wellington

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■ **"Five Conceptions of Constituent Power"**

Joel I. Colón-Ríos, "Five Conceptions of Constituent Power", 130 *Law Quarterly Review* 306-336 (2014)
Victoria University of Wellington Legal Research Paper No. 127/2017

JOEL I. COLÓN-RÍOS, Victoria University of Wellington - Faculty of Law

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In his history of 18th century North American constitutions, Willi Paul Adams maintained that the Oxford English Dictionary is "quite wrong" when it asserts that the term "constituent power", defined as "the power to frame or alter a (political) constitution", originated during the French Revolution. At one level, Professor Adams is undoubtedly correct that the dictionary entry is inaccurate. The term "constituent power", as he noted, was used in 18th century North America where, as early as in 1777, Thomas Young insisted that the people of Vermont were "the supreme constituent power", not to be confused with the "supreme delegate power" of the legislature. However, contrary to what Professor Adams and others have suggested, it is not in North America where the first formulations of constituent power occurred. In fact, the very term "constituent power" was deployed by English jurists and commentators well before the French and American revolutions and has since then played

different but related roles in the development of English public law (as well as in the development of public law in different constitutional traditions).

For example, in 18th century Great Britain, there was talk of “constituent powers” in the plural, to refer to the entire citizenry as a body superior to the ordinary legislative assembly. This is the case of a letter published in 1770, where “Junius” argued that the House of Commons had the duty of interpreting the will of the people and conveying it to the Crown, and if that interpretation was false or misleading, “the constituent powers are called upon to deliver their own sentiments”. The voice of the constituent powers, he said, was “rude, but intelligible; their gestures fierce, but full of explanation”. Despite the existence of these and even earlier uses of the term in English, there is a sense in which the accuracy of the entry of the OED cannot be disputed. It was during the French Revolution where a radical conception of the people’s exclusive constitution-making faculty, their sovereignty over the constitutional regime, was for the first time identified with the term constituent power. However, as this article will show, the French is not the only conception of constituent power that has played (or that plays) an influential role in modern and contemporary constitutional theory.

By unearthing the different historical uses and meanings attributed to constituent power, this article aims to improve our grasp of a concept that, while having its roots in a somewhat remote constitutional past, is increasingly present in contemporary constitutional theory. As will be seen, the term constituent power has been deployed in five major forms (each of which is connected to the others in interesting ways) since the 17th century: (1) to refer to the power of a sovereign parliament; (2) to refer to the constitution-making power of the Crown or the Imperial Parliament in relation to the colonies; (3) to refer to the right of the electors to instruct their representatives; (4) to refer to the power of resisting oppressive governments and replacing them with new ones; (5) and to refer to the ultimate constitution-making power of the people. This exploration into the origins and development of constituent power aims not only at challenging some long held assumptions in constitutional theory, but at increasing our understanding of contemporary questions about parliamentary sovereignty, common law constitutionalism, and the limits of constitutional change.

"Rousseau, Theorist of Constituent Power"

Oxford Journal of Legal Studies, 2016

Victoria University of Wellington Legal Research Paper No. 128/2017

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Rousseau has always had an uncertain relationship with the theory of constituent power. On the one hand, his distrust of political representation and support for popular sovereignty seems consistent with the idea that the people has an unlimited constitution-making power. On the other hand, if from those views about representation and sovereignty it follows that Rousseau is a proponent of direct democracy, then there seems to be no place in his thought for a theory that presupposes, above all, a separation between those who exercise a delegated authority (e.g. legislators), and those who possess an original constitution-making power (the people). In a legal order in which all laws must be directly made by the people such a separation is absent: the constituent and the legislative body are one and the same. It is therefore not surprising that Rousseau’s name is largely absent from contemporary literature on constituent power. In this paper, however, I will show that once Rousseau’s particular conception of law, as well as his distinction between sovereignty and government, are properly understood, one finds in his work not only the first major formulation of the theory of constituent power, but also a careful exploration of its implications for actual constitutional practice.

"Constituent Power, the Rights of Nature, and Universal Jurisdiction"

McGill Law Journal, Vol. 60, No. 1, 2014

Victoria University of Wellington Legal Research Paper No. 129/2017

JOEL I. COLÓN-RÍOS, Victoria University of Wellington - Faculty of Law

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This article provides an argument in favor of the exercise of universal jurisdiction in cases of serious environmental damage. In those cases, it is argued, the justification for the exercise of universal jurisdiction is as compelling as its exercise in the case of egregious human rights violations. In the context of serious environmental damage, courts exercising universal jurisdiction would be acting to protect the ability of present and future peoples to participate in the constitution and reconstitution of the states that make up the international community. Such a jurisdiction would rest on the authority of humanity as a whole rather than on that of any state or people.

"Constituent Processes and Democratic Ruptures"

"Constituent Processes and Democratic Ruptures" (2016) 64(2) American Journal of Comparative Law pp 505.

Victoria University of Wellington Legal Research Paper No. 130/2017

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This paper is a review of Gerardo Pisarello's book, *Procesos Constituyentes: Caminos para la Ruptura Democrática*. This book examines constitution-making as a global phenomenon, both from a historical and comparative perspective. The author of this paper proposes that a more decisive move from the descriptive to the normative would have been desirable, but concludes that Pisarello's book should become an obligatory point of reference for all scholars.

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Alumni include Sir Robin Cooke (1926-2006), one of the leading judges of the British Commonwealth. As Baron Cooke of Thorndon, he sat on over 100 appeals to the Appellate Committee of the House of Lords, one of very few Commonwealth judges ever appointed to do so.

Since 1996 the Law School has occupied the Old Government Building in central Wellington. Designed by William Clayton and opened in 1876 to house New Zealand's then civil service, the building is a particularly fine example of Italianate neo-Renaissance style. Unusually among large colonial official buildings of the time it is constructed of wood, apart from chimneys and vaults.

The School is close to New Zealand's Parliament, courts, and the headquarters of government departments. Throughout Victoria's history, our law teachers have contributed actively to policy formation and to law reform. As a result, in addition to many scholarly articles and books, the Victoria SSRN pages include a number of official reports.

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