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Announcements

Constitutional Law: Papers by Professor Joel Colón-Ríos, Professor of Law, Victoria University of Wellington.

Table of Contents

^top

LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES
VICTORIA UNIVERSITY OF WELLINGTON LEGAL RESEARCH PAPERS

"The Constitution of Puerto Rico"

Joel I. Colón-Ríos, "The Constitution of Puerto Rico" in Oxford Handbook of Caribbean Constitutions (Albert, O'Brien, Wheatle eds.) (OUP 2020).
Victoria University of Wellington Legal Research Paper No. 9/2021

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There are two main ways of thinking about what a constitution is. The first, and more legalistic one, focuses on form: a constitution is a document that contains rules that are more difficult to change than ordinary laws. This is what constitutional theorists usually refer to as 'the constitution in the formal sense'. The second approach, more political or philosophical in nature, identifies the constitution with the most fundamental rules of a particular constitutional order. These rules (such as those that establish the structure of the state or that regulate the process of law-making) can be contained in a formal constitution, but are sometimes found in unwritten customs or in other extra-constitutional rules. Constitutional theorists refer to this as 'the constitution in the material sense'. The first approach is naturally attractive to lawyers, as it allows one to identify 'the constitution' almost with the precision of natural science. The second approach, while interesting, is not always conducive to clear answers:

what is 'material' to one observer may appear to be 'non-material' to another.

In the case of Puerto Rico, however, identifying the formal constitution can be as hard as identifying - or trying to agree on- the content of the material one. True, there is a document titled 'Constitution of the Commonwealth of Puerto Rico' (Constitución del Estado Libre Asociado de Puerto Rico) but that document is far from containing all the written norms that have formal constitutional status in the island. This is a direct result of the evolution of Puerto Rico's territorial relationship with its metropolis, and was dramatically exemplified by the recent adoption of the Puerto Rico Oversight, Management, and Economic Stability Act, 2016 by the U.S. Congress (and Act that altered in fundamental ways the functions and powers of the ordinary institutions of government in the island). In this paper, I try to provide an answer to the question of 'What is the constitution of Puerto Rico?', by examining the ways in which constitutional norms emanating from the island legal system interact with U.S. legislation of constitutional significance, as well as with the juridical apparatus that regulates its relationship to the metropolis.

"The Forms and Limits of Constitutional Amendments"

'The Forms and Limits of Constitutional Amendments' (2015) 13(3) International Journal of Constitutional Law pp 567-574.
Victoria University of Wellington Legal Research Paper No. 10/2021

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There has been a recent explosion of academic commentary on the form and limits of constitutional amendments. This literature comes in various strands, some of which are driven by normative concerns about constitutional legitimacy, some of which focus on the effects of different types of amendment rules, and some of which examine the nature and legal status of the amending power. The articles contained in this symposium advance the state of knowledge on all those fronts. In this introduction, I provide a critical overview of these articles, placing special emphasis on the way they deal (or not) with the question of popular participation in constitutional change.

"Of Omnipotent Things"

Joel Colón-Ríos, "Of Omnipotent Things", 52 Conn. L. Rev. (2020, Forthcoming)
Victoria University of Wellington Legal Research Paper No. 11/2021

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To say that some constituent assemblies have acted as omnipotent law-makers, as not subject to the separation of powers and as able to exercise the ordinary powers of government, is an understatement. It is, in fact, the way in which many, if not most, constitution-making bodies have operated since the late 18th century. A famous historical example is the French National Convention of 1793, which despite having been called under an already constituted legal order and after having drafted a (later popularly ratified) constitution, declared a state of emergency, abolished the separation of powers, and proceeded to govern the country. In early U.S. constitutional history, some state constitutional conventions also assumed an unlimited law-making jurisdiction, and contemporary concerns about runaway conventions seem to be largely based on that possibility. Much more recently, in the late 20th and early 21st centuries, such type of power has been exercised by constituent assemblies in Latin America. All these entities went, in some way, beyond the adoption of novel constitutions and played legislative, executive, and sometimes even judicial functions. As a result, I will argue in this paper, they should not be understood as having engaged in the exercise of constituent authority, but of sovereignty plain and simple.

The distinction between constituent authority and sovereignty is not merely terminological; it points toward things that an entity tasked to exercise constituent authority cannot do. In addition to drafting a document that counts as a 'constitution' in the society at issue, constituent authority, the paper argues, would normally be subject to at least one implicit limit: it must not engage in ordinary governmental activity. An entity called to exercise constituent authority could, moreover, be subject to explicit limits as to the type of constitutional content it must or must not adopt. The traditional definition of sovereignty points precisely in the opposite direction: a sovereign is an individual or entity not subject to the separation of powers, capable of transforming any will into law. Part I of the paper develops the distinction between constituent authority and sovereignty through a critical analysis of Carl Schmitt's conception of dictatorship. Part II examines the way in which different constitution-making bodies, in Latin America and the U.S., have been conceived by theorists, politicians, and judges. These entities have been frequently understood as sovereign even though they were only

commissioned to create a constitution. In Part III, I consider the ways in which the limits on constitution-making bodies that arise from the argument presented in this paper may be put into practice.

"Constituent Power, Primary Assemblies, and the Imperative Mandate"

Joel I. Colon-Rios, "Primary Assemblies, Constituent Power, and the Imperative Mandate" in Elgar Handbook of Comparative Constitution-Making (Hanna Lerner & David Landau eds.) (Edward Elgar, 2019)
Victoria University of Wellington Legal Research Paper No. 12/2021

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During the late 18th and early 19th centuries, some constitutions were drafted and ratified in processes that had at their base meetings of neighbours in particular localities. Usually called primary assemblies, these local meetings facilitated practices inconsistent with the logic of representation, such as the preparation of instructions intended to bind the elected deputies. This chapter examines the ways in which primary assemblies figured in four historical constitution-making episodes: the creation of the first two French Constitutions (1791, 1793) and the subsequent creation of constitutions in Spain (1812) and Venezuela (1811). Through the analysis of these cases, we will see how the notion of primary assemblies as the main site of constituent activity, as well as the institution of citizen instructions, were replaced by a conception that attributed to local meetings of citizens the sole function of electing representatives considered capable of drafting a constitution. I then explore the ways in which primary assemblies, as well as a 'soft' version of the imperative mandate, could operate in contemporary constitution-making practices.

^top

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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.

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^top

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