LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES

VICTORIA UNIVERSITY OF WELLINGTON LEGAL RESEARCH PAPERS

Vol. 1, No. 4: Oct 17, 2011

JOHN PREBBLE, EDITOR
Professor of Law, Victoria University of Wellington, Honorary Research Fellow, Monash University
john.prebble@vuw.ac.nz

Announcements

Issue No.4 Special Issue: Constitutionalism and Democracy as Conflicting Ideals, papers by Joel I. Colón-Ríos

Table of Contents

The Second Dimension of Democracy: The People and Their Constitution

Joel I. Colón-Ríos, Victoria University of Wellington - Faculty of Law

^top

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

"The End of the Constitutionalism-Democracy Debate"

Windsor Review of Legal and Social Issues, Vol. 28, 2010
CLPE Research Paper No. 3/2009
Victoria University of Wellington Legal Research Paper No. 19/2011

JOEL I. COLÓN-RÍOS, Victoria University of Wellington - Faculty of Law
Email: joel.colon-rios@vuw.ac.nz

There is something strange about the literature produced in the 1990s by North American constitutional theorists on the relationship between constitutionalism and democracy. The problem, I believe, has two different roots: an excessive focus on the legitimacy of judicial review and an insistence in defending the constitutional status quo. On the one hand, the emphasis on judicial review usually ended up obscuring what should have been at the center of the debate: the way in which ordinary citizens could or not re-constitute the fundamental laws under which they lived. On the other, these approaches rarely involved recommendations for institutional changes (other than the occasional proposal for the abolition of judicial review) in the constitutional regimes they were operating. These 'happy endings' were particularly surprising, since one would think there must be many ways of upsetting the 'balance' between constitutionalism and democracy in favor of the latter. In fact, it would be astonishing that constitutional traditions which originated in an attempt to protect certain institutions from the passions of disorganized multitudes would not be wanting, even a bit, from the point of view of democracy. With these limited ends, it is no surprise that the constitutionalism-democracy debate appears to have stagnated.

This paper will advance a different approach to the debate, one that emphasizes popular participation in constitutional change and that recommends institutional transformations that would contribute to the realization of democracy in contemporary constitutional systems. I begin by reviewing the works of Ronald Dworkin, Jeremy Waldron, and Bruce Ackerman. The take of these three authors on majority rule, judicial review, and constitutional amendments, exemplify very well the shortcomings of the literature on constitutionalism and democracy. The implications of Dworkin's constitutional theory are fatal for any democratic project: the prettification of a constitutional regime that is reputed to rest on the 'right' abstract principles. Waldron's approach, although attributing to 'the people' the right to have the constitution they want, ends up identifying people and legislature, thus neglecting any actual participation of citizens in constitutional change. Ackerman's constitutional politics, although insisting in keeping citizens and representatives separate, replaces the flesh and blood human beings that live under the constitutional regime with a mythical 'People' (always with a capital P) whose acts are identified ex post facto.

In contrast to these theories, I propose a conception of constitutionalism according to which the constitution should remain permanently open to important transformations. Under this

'weak' constitutionalism, there is no such thing as a 'good' or 'finished' constitution, contrary to what Dworkin's analysis implies. Only such a conception of constitutionalism, I believe, is consistent with a serious commitment to the democratic ideal. However, this supposes that democracy is not exhausted in legislatures and daily governance, but that it extends to deliberating and deciding on the very content of the constitution. In this respect, and in contrast to Waldron, I will defend a distinction between two dimensions of the democratic ideal: democracy at the level of daily governance and democracy at the level of the fundamental laws. By their very nature (daily vs. episodical), each of these dimensions demand different levels of popular engagement. Finally, I consider the institutional implications of this approach to the constitutionalism-democracy dilemma. Unlike Ackerman, I suggest a series of mechanisms designed to allow for the actual participation of ordinary citizens in the constitution and re-constitution of government.

"De-Constitutionalizing Democracy"
California Western Law Review, Vol. 47, No. 1, 2010
Victoria University of Wellington Legal Research Paper No. 20/2011

JOEL I. COLÓN-RÍOS, Victoria University of Wellington - Faculty of Law
Email: joel.colon-rios@vuw.ac.nz

Democracy and constitutionalism seem to be in tension with each other. This line has been repeated a thousand times, usually with the purpose of proving it false. The prevailing orthodoxy is that constitutionalism and democracy are so related that they are two sides of the same coin; any tension between the two is more apparent than real. This dominant view presents constitutionalism as the embodiment of democratic principles, such that a 'constitutional democracy' is considered to be the true realization of the two ideals. However, there is a more neglected strand of thought which challenges this effort to conflate the differences between constitutionalism and democracy. This paper seeks to provide a more searching account of that heterodox approach. It will show that constitutionalism and democracy can only be treated as synonymous or mutually-constitutive if the idea and practice of democracy is divested of its most basic components, namely, democratic openness and popular participation. In contrast to much contemporary work, the paper defends the proposition that it is only a 'weak' form of constitutionalism, one in which democracy is de-constitutionalized in important ways, that can be rendered consistent with the basic thrust of the democratic ideal.

"The Legitimacy of the Juridical: Constituent Power, Democracy, and the Limits of Constitutional Reform"
Osgoode Hall Law Journal, Vol. 48, p. 199, 2010
Victoria University of Wellington Legal Research Paper No. 21/2011

JOEL I. COLÓN-RÍOS, Victoria University of Wellington - Faculty of Law
Email: joel.colon-rios@vuw.ac.nz

What conditions must be met for a constitutional regime to be considered legitimate from a democratic perspective? This article argues that the democratic legitimacy of a constitutional regime depends on its susceptibility to (democratic) re-constitution. Under this view, a constitution must provide an opening, a means of egress for constituent power to manifest from time to time. In developing this argument, the article advances a distinction between ordinary constitutional reform - understood as subject to certain limits- and the exercise of constituent power through which a society produces novel juridical forms without being subject to positive law. The article concludes by providing examples of mechanisms that may be used as means for the exercise of constituent power and that, if available, would provide

a constitutional regime with a strong claim to democratic legitimacy.

"New Zealand's Constitutional Crisis"
New Zealand Universities Law Review, Vol. 24. No. 3, 2011
Victoria University of Wellington Legal Research Paper No. 22/2011

JOEL I. COLÓN-RÍOS, Victoria University of Wellington - Faculty of Law
Email: joel.colon-rios@vuw.ac.nz

New Zealand is undergoing a constitutional crisis. The crisis, however, is not a direct result of the absence of a written constitution, of an entrenched and supreme Bill of Rights, of the place of the Treaty of Waitangi in the country's legal order, or of retaining (or abolishing) the institutions of the monarchy. Pressing as some of those issues might be, New Zealand's constitutional pragmatism has been able to address them in a piecemeal fashion, avoiding at the same time any serious risks of political or constitutional instability. The crisis is far from being unique to New Zealand: it is in fact shared by the constitutional systems of the world's most advanced democracies. In a nutshell, New Zealand's constitution suffers a profound crisis of democratic legitimacy: how to understand New Zealanders as authors of their constitution, if the constitution rests on rules and conventions that were not adopted by the people and, more importantly, cannot be altered through democratic procedures? How can we make New Zealand's constitutional regime legitimate from a democratic perspective?

In answering these questions, this article will advance a conception of democratic legitimacy which rests on two criteria. First, a democratically legitimate constitutional regime must provide an opening for constituent power to manifest from time to time. Second, the constitution must operate under a conception of constitutional reform according to which fundamental changes must take place through the most participatory procedures possible. This conception of democratic legitimacy, although informed in important ways by concepts developed in the tradition of written and entrenched constitutions, can be applied in a meaningful way to a constitutional system such as that present in New Zealand. As the paper will argue, New Zealand's constitutional thought, in contrast to its English counterpart, has embraced in important ways a distinction between Parliament and people, attributing the latter with a superior power of constitutional reform. Once that distinction is accepted, a democratically legitimate constitution, a constitution susceptible of being changed through the exercise of constituent power, becomes a real possibility.

"The Three Waves of the Constitutionalism-Democracy Debate in the United States: (And an Invitation to Return to the First)"
Willamette Journal of International Law and Dispute Resolution, Vol. 18, p. 1, 2010
Victoria University of Wellington Legal Research Paper No. 23/2011

JOEL I. COLÓN-RÍOS, Victoria University of Wellington - Faculty of Law
Email: joel.colon-rios@vuw.ac.nz

In the United States, the constitutionalism-democracy debate has taken many forms, it has come in different waves: the first wave focused on whether present day majorities should be allowed to abandon the constitutional forms created by the founders, the second on the legitimacy of judicial review and on selecting among different theories of constitutional interpretation, and the third - which, as I will argue later, comes closer to the first wave of the debate - on the exclusivity or (non) exclusivity of the Constitution's amendment rule. Although those engaged in each of these waves made important contributions to constitutional theory, there was something special about the first wave. Freed from the questions of interpretation and the never ending controversy over the legitimacy of judicial review of legislation, the protagonists of that debate were able to consider the relationship

between constitutionalism and democracy in its raw form: Should popular majorities be allowed to alter the Constitution? This paper will argue that contemporary constitutional theorists have moved away from this question, considering it only in a weakened form. The paper invites those interested in democratic constitutionalism to re-visit the first wave of the debate with a new, fresher perspective, one in which the actual participation of citizens in constitutional change is a priority.

"Review Essay: What Makes the International Investment Rules Regime Undemocratic?"

German Law Journal, Vol. 10, No. 8, pp. 1309-1320, August 2009
Victoria University of Wellington Legal Research Paper No. 24/2011

JOEL I. COLÓN-RÍOS, Victoria University of Wellington - Faculty of Law
Email: joel.colon-rios@vuw.ac.nz
MARTIN HEVIA, Universidad Torcuato Di Tella - School of Law
Email: mhevia@utdt.edu

In Constitutionalizing Economic Globalization, Schneiderman mounts an attack on 'new constitutionalism.' New constitutionalism has been described as 'the political/juridical form specific to neoliberal processes of accumulation and to market civilization.' It is a pre-commitment strategy that prevents future governments from taking measures contrary to the political project of neoliberalism by 'removing key aspects of economic life from the influence of domestic politics within nation states.' New constitutionalism manifests itself through a web of international treaties that provide stringent legal protection to foreign investment (such as the investment chapter of the North American Free Trade Agreement (NAFTA) and the international regime of Bilateral Investment Treaties (BITs)). These agreements usually contain a series of legally-enforceable mechanisms that limit the power of government and legislatures to intervene in the market, binding them to a version of economic liberalism and narrowing in important ways their field of political possibilities. New constitutionalism involves a set of rules that act as a 'disciplining check on democratic deliberation.'

In this review, we would like to focus in what we think is Schneiderman's main claim through Constitutionalizing Economic Globalization and his principal criticism of new constitutionalism: that nobody asks the people whether they think it is worth it for their country to become a party to this web of international trade treaties. Schneiderman argues that this results in limiting their representative's decision making power and their capacity to regulate the economy. For him, this is a big cost in terms of collective self-government. We want to suggest that Schneiderman picks the wrong target: the real problem for collective self-government is not 'new constitutionalism,' but the inherent aristocratic nature of representative democracy. New constitutionalism is just another undemocratic product of an anti-majoritarian scheme.

Moreover, we think that Schneiderman's focus on the fact that investment and trade treaties impose limits on the scope of a state's legislative jurisdiction tends to obscure the deficiencies of representative democracy. These kinds of limits, after all, are not exclusive of this type of agreement, but of international treaties in general and are usually thought as a legitimate exercise of state power. This is why we think that the strongest parts of Schneiderman's analysis are those instances in which he directly attacks the investment rules regime in substantive terms (the injustices and bad results its produces, etc.), rather than his emphasis on the limits the regime imposes on democratic and majoritarian processes. Schneiderman may or may not be right about his attacks on neoliberalism; in any case, that is where the action lies. Even when they constitute a central part of investment treaties (and in that respect one might even characterize them as substantive), voluntarily imposed

constraints on the decision making power of a country´s democratic institutions through international treaties are not necessarily problematic from a democratic perspective.

"The Second Dimension of Democracy: The People and Their Constitution"
Baltic Journal of Law and Politics, Vol. 2, No. 2, 2009
Victoria University of Wellington Legal Research Paper No. 25/2011

JOEL I. COLÓN-RÍOS, Victoria University of Wellington - Faculty of Law
Email: joel.colon-rios@vuw.ac.nz

This paper argues that procedural and substantive approaches to democracy fail to address the question of the democratic legitimacy of a constitutional regime. Taking Ronald Dworkin and Jeremy Waldron as a point of departure, the paper contends that procedural and substantive democrats approach democracy at the level of daily governance (which has to do with the adoption of ordinary laws and the administration of a state's bureaucratic apparatus) as if it exhausted the democratic ideal. As a result, they not only ignore democracy at the level of the fundamental laws (which deals with the relation between citizens and their constitution), but the question of democratic legitimacy altogether. After examining the undertheorized distinction between these two dimensions of the democratic ideal, the paper builds on the recent work of Sheldon Wolin and concludes that democracy at the level of the fundamental laws should be conceived as a moment in the life of a polity, the moment in which ordinary citizens exercise their power to (re)constitute the juridical order and legitimate their constitution.

^top

Solicitation of Abstracts

The Victoria University of Wellington was founded in 1899 to mark the Diamond Jubilee of the reign of Queen Victoria of Great Britain and of the then British Empire. Law teaching started in 1900. The Law Faculty was formally constituted in 1907. The first dean was Richard Maclaurin (1870-1920), an eminent scholar of both law and mathematics. Maclaurin went on to lead the Massachussetts Institute of Technology as President in its formative years. Early professors included Sir John Salmond (1862-1924), still one of the Common Law's leading scholars. His texts on jurisprudence and torts have gone through many editions and remain in print.

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 Judicial 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.

Victoria graduates approximately 230 LLB and LLB(Hons) students each year, and about 60 LLM students. The faculty has an increasing number of doctoral students. Ordinarily there are ten to twelve students engaged in PhD research.

Victoria University observes the British system of academic ranks. In North American terms, lecturers and senior lecturers are tenured doctrinal scholars, not legal writing teachers. A senior lecturer corresponds approximately to a North American associate professor in rank.

Submissions

To submit your research to SSRN, sign in to the **SSRN User HeadQuarters**, click the My Papers link on left menu and then the Start New Submissions button at top of page.

Distribution Services

If your organization is interested in increasing readership for its research by starting a Research Paper Series, or sponsoring a Subject Matter eJournal, please email: **RPS@SSRN.com**

Distributed by:

Legal Scholarship Network (LSN), a division of Social Science Electronic Publishing (SSEP) and Social Science Research Network (SSRN)

Directors

LAW SCHOOL RESEARCH PAPERS - LEGAL STUDIES

BERNARD S. BLACK
Northwestern University - School of Law, Northwestern University - Kellogg School of Management, European Corporate Governance Institute (ECGI)
Email: **bblack@northwestern.edu**

RONALD J. GILSON
Stanford Law School, Columbia Law School
Email: **rgilson@leland.stanford.edu**

Please contact us at the above addresses with your comments, questions or suggestions for LSN-LEG.

^top

Links: Subscribe to Journal | Unsubscribe from Journal | Join Site Subscription | Financial Hardship

Subscription Management

You can change your journal subscriptions by logging into **SSRN User HQ**. If you have questions or problems with this process, please email **UserSupport@SSRN.com** or call 877-SSRNHelp (877.777.6435 or 585.442.8170). Outside of the United States, call 00+1+585+4428170.

Site Subscription Membership

Many university departments and other institutions have purchased site subscriptions covering all of the eJournals in a particular network. If you want to subscribe to any of the SSRN eJournals, you may be able to do so without charge by first checking to see if your

institution currently has a site subscription.

To do this please click on any of the following URLs. Instructions for joining the site are included on these pages.

- **Accounting Research Network**
- **Cognitive Science Network**
- **Corporate Governance Network**
- **Economics Research Network**
- **Entrepreneurship Research & Policy Network**
- **Financial Economics Network**
- **Health Economics Network**
- **Information Systems & eBusiness Network**
- **Legal Scholarship Network**
- **Management Research Network**
- **Political Science Network**
- **Social Insurance Research Network**
- **Classics Research Network**
- **English & American Literature Research Network**
- **Philosophy Research Network**

If your institution or department is not listed as a site, we would be happy to work with you to set one up. Please contact **site@ssrn.com** for more information.

Individual Membership (for those not covered by a site subscription)

Join a site subscription, request a trial subscription, or purchase a subscription within the SSRN User HeadQuarters: **http://www.ssrn.com/subscribe**

Financial Hardship

If you are undergoing financial hardship and believe you cannot pay for an eJournal, please send a detailed explanation to **Subscribe@SSRN.com**

^top

To ensure delivery of this journal, please add **LSN@publish.ssrn.com** **(Legal Scholarship Network)** to your email contact list. If you are missing an issue or are having any problems with your subscription, please Email **usersupport@ssrn.com** or call 877-SSRNHELP (877.777.6435 or 585.442.8170).

FORWARDING & REDISTRIBUTION

Subscriptions to the journal are for single users. You may forward a particular eJournal issue, or an excerpt from an issue, to an individual or individuals who might be interested in it. It is a violation of copyright to redistribute this eJournal on a recurring basis to another person or persons, without the permission of Social Science Electronic Publishing, Inc. For information about individual subscriptions and site subscriptions, please contact us at **Site@SSRN.com**

^top

Victoria University of Wellington Faculty of Law Research Papers are available by volume and issue number at: http://www.victoria.ac.nz/law/research/default.aspx . Cite this paper as 4 VUWLRP 2/2014.Â Thanks also to my research assistants Michael McGowan and Cathy Nijman. 1 The WTO agreements include the Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr.Â Fikentscher, GATT Principles and Intellectual Property Protection, IIC STUDIES IN INDUSTRIAL PROPERTY AND COPYRIGHT LAW 11, at 101-26 (Friedrich-Karl Beier & Gerhard Scgricker eds. (1989). 45 GATT panel decisions were non-binding, unless adopted unanimously by the GATT Council. 9. Legal Studies is the journal of the Society of Legal Scholars (SLS). It aims to include a varied range of scholarly articles in each issue, including doctrinal, conceptual and socio-legal analyses and seeks to publish work which truly represents the broad range of interests across all legal scholarship. The journal warmly welcomes contributions from all those who wish to reach a broad international and UK readership. Suffolk University Law School's Legal Studies Research Paper Series (part of the Legal Scholarship Network on SSRN) contains abstracts and papers developed by the faculty of the Law School that are focused on scholarly research. The series includes published articles, accepted articles, and working papers.Â The series includes published articles, accepted articles, and working papers. Please direct questions about the series to its co-editors, Professor Carter Bishop and Professor Rebecca Curtin. To submit a paper to the series, or if you have any questions about the submission process, please contact AnnaKatherine Wherren, Legal Research Librarian, by phone at extension 8384 or by email. When submitting a paper by e-mail, please include the following: an abstract The University of Sydney Law School. Legal Studies Research Paper Series No. 19/03. February 2019. Legal Personhood and Liability for Flawed Corporate Cultures. Jennifer Hill. This paper can be downloaded without charge from the Social Science Research Network Electronic Library at: http://ssrn.com/abstract=3309697. Electronic copy available at: https://ssrn.com/abstract=3309697.Â 1 Conference on Corporations and Other Legal Entities for Society and Future Generations, Victoria University of Wellington, Faculty of Law and Clarke Program on Corporations and Society, Cornell Law School. 2 See BlackRock, Larry Finkâ€™s Annual Letter to CEOs, A Sense of Purpose, Jan. 12, 2018; Peter Horst, â€˜BlackRock CEO Tells Companies to Contribute to Society. Catherine j. iorns magallanes. This paper can be downloaded without charge from the Social Science Research Network electronic library at: http://ssrn.com/abstract=1971455 . Victoria University of Wellington Faculty of Law Research Papers are available by volume and issue number at: http://www.victoria.ac.nz/law/research/default.aspx . Cite this paper as 3 VUWLRP 35/2013. Electronic copy available at: http://ssrn.com/abstract=1971455.