TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI
VICTORIA
UNIVERSITY OF WELLINGTON

Victoria University of Wellington Legal Research Papers

Paper No 128/2017 **2017**

Editor, Professor John Prebble QC
Assistant Editor, Nina Opacic

Volume 7 Issue No 31, 2017

ROUSSEAU, THEORIST OF CONSTITUENT POWER

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Rousseau, Theorist of Constituent Power

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(Early draft, forthcoming in the Oxford Journal of Legal Studies)

Once almost exclusive to continental Europe and Latin America, the concept of constituent power is increasingly playing a number of different explanatory and argumentative roles in Anglo-American constitutional theory. Constituent power, it is usually said, is the legally unlimited power of creating (and re-creating) constitutions. In a democracy, constituent power rests with the people, which means that those subject to a constitution remain permanently free to alter or replace it. The ordinary institutions of government, in contrast, are mere constituted powers: they owe their existence to the constitution and are only authorised to act in accordance with its provisions. The objective of this paper is to show that the first systematic formulation of the distinction between constituent and constituted power, as well as the first exploration of its implications for actual constitutional practice, can be found in the work of Jean Jacques Rousseau. This is so, it will be argued, despite the fact that Rousseau´s work is largely absent from discussions about constituent power.

The best known expositions of the theory of constituent power are found in the works of Emmanuel Sieyès and Carl Schmitt.[1] The former used it as an essential part of his defence of the Third Estate's right to create a new constitution for France, and the latter saw a constitution as the expression of the fundamental political decisions of the constituent subject.[2] Neither of them referred to the work of Rousseau in their formulations of the concept.[3] In contemporary works that directly engage with the theory of constituent power, references to Rousseau are also rare, if they occur at all. Consider the following two examples. First, Andreas Kalyvas' 'Popular Sovereignty, Democracy, and Constituent Power', one of the first articles on the subject originally published in English.[4] Kalyvas argues that social contract theorists like

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[1] Emmanuel Sieyès, 'What is the Third Estate?' in *Political Writings* (Hackett Publishing Company, 2003) 49; Carl Schmitt, *Constitutional Theory* (Durham: Duke University Press, 2008).

[2] Schmitt (n 1) 77.

[3] Sieyès, it is worth noting, only referred to Rousseau once (and only indirectly) in his published writings. For a discussion, see Murray Forsyth, *Reason and Revolution: The Political Thought of Abbé Sieyès* (New York: Leicester University Press, 1987) 59. Schmitt did discuss Rousseau, but did not see him as presenting a theory of constituent power: 'That is Rousseau's theory of the "Contrat social". Indeed, he does not speak of a special and distinctive constituting power of the people.' Schmitt (n 1) 143.

[4] Andreas Kalyvas, 'Popular Sovereignty, Democracy, and the Constituent Power', 12(2) *Constellations* 223 (2005). For an earlier and important discussion on constituent power in English, see Miguel Vatter, 'Legality and Resistance: Arendt and Negri on Constituent Power', 20 *Kairos* 191-230 (2002).

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Lawson, Locke, and Sieyès went beyond the idea of sovereignty as a power of command. Instead, they saw sovereignty as the power to create new constitutions, as constituent power. Rousseau's name is entirely absent from Kalyvas' analysis.

Second, consider the essays contained in *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*.[5] This is the first (and only) collection of essays in English entirely devoted to the theory of constituent power. The book contains sixteen essays and it is divided into three main sections: (1) A Conceptual History of Constituent Power; (2) The Articulation of Constituent Power: Rival Conceptions; and (3) Extension and Diversification of Constituent Power. In the entire book, there are only two mentions of Rousseau, and neither of them explicitly considers his role in the development of the theory of constituent power.[6] Martin Loughlin's recent article, 'The Concept of Constituent Power', refers to the relevance of Rousseau's distinction between sovereignty and government for a proper understanding of the subject, but does not explore this point at length.[7] In short, one can safely assert that Rousseau's work does not figure in most discussions about constituent power.[8] Since my own work also evidences this absence[9], I will briefly venture into the reasons for this state of affairs.

First, Rousseau's political thought has been historically associated with some form of direct democracy. Stephen Ellenburg, for example, considers that '[p]opular sovereignty, the only

[5] Martin Loughlin & Neil Walker (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, 2007).
[6] These occur in Rainer Nickel, Private and Public Autonomy Revisited: Habermas' Concept of Co-Originality in Times of Globalization and the Militant Security State', ibid 149; and James Tully, 'The Imperialism of Modern Constitutional Democracy, ibid 320.
[7] Martin Loughlin, 'The Concept of Constituent Power' 13(2) *European Journal of Political Theory* 218 (2013) 228, 232. In *Foundations of Public Law,* Loughlin engages in extensive and valuable discussions of Rousseau's work but, again, Rousseau is not explicitly considered as a theorist of constituent power. Martin Loughlin, *Foundations of Public Law* (Oxford University Press, 2010).
[8] This also seems to be the case of non-English literature on constituent power. For example, Olivier Beaud considers Rousseau's work at different points in a very important book, but maintains that Rousseau did not elaborate a theory of constituent power (even though he argues that Rousseau's notion of the 'Legislator' comes close to the idea of a constituent power separate from the power of ordinary law-making). See Olivier Beaud, *La Puissance de l'État* (PUF, 1994) 234-240. Claude Klein, in his monograph on the subject, does not discuss at any length Rousseau's contribution to the development of the theory of constituent power. Claude Klein, *Théorie et Pratique du Pouvoir Constituant* (PUF, 1996). The same generally applies to Kemal Gözler, *Pouvoir Constituant* (Bursa, 1999), even though Gözler refers to Rousseau in the context of a discussion on the relationship between constituent power and the power of constitutional reform. A partial exception is found in Antonio Negri, *Insurgencies: Constituent Power and the Modern State* (University of Minnesota Press, 1999). According to Negri, for Rousseau 'the legislative [power] is always constituent power'. Ibid 199. See also Carlos Sánchez Viamonte, *El Poder Constituyente* (Buenos Aires: Bibliográfica Argentina, 1957) 196.
[9] [Left blank for peer review].

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'authority' Rousseau permitted, means direct legislative action by all citizens'.[10] J.L. Talmon, in his famous study on totalitarian democracy, wrote that '[t]here is nothing that Rousseau insists on more than the active and ceaseless participation of the people and of every citizen in the affairs of the State'.[11] In a similar way, but from a different perspective, Carole Pateman has written that 'Rousseau's entire political theory hinges on the individual participation of each citizen in political decision making…'[12] More recently, Joshua Cohen and Archon Fung have associated Rousseau with a participatory conception of democracy.[13] Popular participation is of course consistent with (and required by) the theory of constituent power, but not if it amounts to a system in which all citizens are continuously involved in the creation of all laws. That is to say, in a true direct democracy, the theory of constituent power is simply beside the point: in such an arrangement, constituent and constituted powers are indistinctly exercised by the people. As we will see, there is an alternative interpretation of Rousseau that does not lead to this conclusion, but it is very likely that his association with direct democracy is partly to blame for his absence in contemporary debates about constituent power.

Second, the meaning of some of the main concepts used by Rousseau have long being a subject of controversy. Perhaps the main two examples are the idea of the general will and the notion of the Legislator. The general will, which Rousseau insisted was always consistent with the common good and tended to be expressed whenever 'several men in assembly regard themselves as a single body'[14], plays an important role in his political writings, yet its exact meaning is still open to debate. The idea of the Legislator, the great lawgiver that 'dares to undertake the making of a people's institutions'[15] and gives the multitude its first body of laws, seems in direct conflict with Rousseau's insistence in a system in which citizens are the authors of the rules that govern them. These problems of clarity have of course not been an impediment to scholarly interest in Rousseau's work. However, if one is writing about the theory of constituent power, why spend time trying to make sense of Rousseau, particularly when his apparent support for direct democracy appears to make the distinction between the *pouvoir constituant* and the *pouvoirs constitués* largely irrelevant?

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[10] Stephen Ellenburg, *Rousseau's Political Philosophy: An Interpretation from Within* (New York: Cornell University Press, 1976) 159-160. See also James Miller, *Rousseau, Dreamer of Democracy* (New Haven: Yale University Press).
[11] J.L. Talmon, *The Origins of Totalitarian Democracy* (Penguin Books, 1952) 47.
[12] Carole Pateman, *Participation and Democratic Theory* (Cambridge University Press, 1970) 22.
[13] Joshua Cohen & Archon Fung, 'Radical Democracy', 10(4) *Swiss Journal of Political Scienc*e 23 (2004) 23-24.
[14] Jean-Jacques Rousseau, *The Social Contract* (Everyman's Library, 1973) 271.
[15] Ibid. 213.

As I will argue below, Rousseau should have always been seen as a theorist of constituent power more than a theorist of direct democracy. In his work, we can find a systematic analysis of the relationship between the constitution-making people and the constituted government, as well as detailed explanations about how a constitutional order based on a proper understanding of that relationship should be organised. Once Rousseau is understood in this way, it will be seen, an attractive constitutional theory begins to emerge and an important part of the problems of clarity identified above disappear. This paper will justify this thesis in three main parts. Part I examines Rousseau's conception of law. I will argue that Rousseau used the term 'law' (*loi*) to refer to the most fundamental rules of the political system (not to the many rules that we would today describe interchangeably as 'laws' or 'statutes'). In Part II, I examine Rousseau's distinction between the legislative power (*puissance législative*) and the executive power (*puissance exécutive*), and show that it is almost indistinguishable from that between the constituent and the constituted powers. Part III examines Rousseau's approach to the creation of a society first constitution (including the role of the 'Legislator') and his argument about the constitution-making power of each generation. Finally, in Part IV, I examine his institutional proposals for the exercise of constituent power.

I. Rousseau's Conception of Law

At first sight, Rousseau's political thought can be seen as having 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 of the constituent power of the people. On the other hand, if from those views it follows that Rousseau is a proponent of direct democracy, then there seems to be no place in his thought for a concept 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). As in an absolute monarchy or in a system of parliamentary sovereignty, 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. This probably explains why, as early as 1791, one can find Louis-Sébastien Mercier writing that, 'We may reproach Rousseau with not having recognised in a clear and positive way the *constituent power* as an original and necessary power'.[16]

[16] 'On pourroit reprocher à Rousseau de n'avoir pas su reconnoître d'une maniere claire et positive le *pouvoir constituant* comme un pouvoir primitif et nécessaire' (emphasis in the original). Louis-Sébastien Mercier, *De J.J. Rousseau, Considéré comme l'un des Premiers Auteurs de la Révolution,* vol. 1 (Paris, 1791) 58.

As will be explained below, even if operating under a different terminology, Rousseau provided a clear formulation of the constitution-making faculty that latter authors would refer to by the term 'constituent power'. This analysis must begin with a discussion that is often absent from the academic commentary on Rousseau: his particular use of the term *law*. Throughout Rousseau's political writings, the idea of law plays a major role. In fact, his claim that in a legitimate state every law must be directly ratified by the people is one of the best known aspects of his thought. As Cohen has put it: '[t]he most striking feature of Rousseau's institutional views and the one that naturally draws our attention is his endorsement of a directly democratic system of law-making…'[17] In a similar vein, Jeremy Waldron has written that 'People assume that Rousseau's conception of direct popular sovereignty in lawmaking is the ideal from a democratic point of view and that, even if we are not as scathing about representation as Rousseau was, we should nevertheless deplore representative lawmaking as a very distant second best.'[18]

Rousseau's support for directly democratic law-making is evidenced by one of the most famous passages found in the *Social Contract*: 'Every law the people has not ratified in person is null and void -is, in fact, not a law. The people of England regards itself as free; but it is grossly mistaken; it is free only during the election of members of parliament. As soon as they are elected, slavery overtakes it, and it is nothing'.[19] For Rousseau, slavery was always illegitimate, and the purpose of the *Social Contract* was precisely to find a way out of it. Rousseau was thus looking for a form of association in which, in obeying the law, individuals would be only obeying themselves and therefore maintaining their freedom. But his solution seems alien to the theory of constituent power because it appears to require that every single law, not only the constitution or the fundamental laws, results from a direct act of popular sovereignty. Only direct democracy, a form of government impracticable in all modern states and inconsistent with the separation between the constituent people and the constituted government, would be acceptable from this perspective, and all departures from that ideal would be at best necessary evils.

[17] Joshua Cohen, *Rousseau: A Free Community of Equals* (Oxford University Press, 2010) 132.
[18] Jeremy Waldron, 'Representative Lawmaking', 89 *Boston University Law Review* 335 (2009) 345.
[19] *The Social Contract* (n 14) 263.

Rousseau, however, clearly rejected direct democracy as a *form of government*, and he did it more than once. A few examples should suffice to prove this point: 'If we take the term in the strict sense, there has never been a real democracy, and there never will be. It is against the natural order for the many to govern and the few to be governed'.[20] 'It is unimaginable', he wrote, 'that the people should remain continually assembled to devote their time to public affairs, and it is clear they cannot set up commissions for that purpose without the form of administration being changed…Were there a people of gods, their government would be democratic. So perfect a government is not for men.'[21] Or, as he put it in the 'Discourse on Political Economy': 'Must the whole nation be assembled together at any unforeseen event? Certainly not. It ought the less to be assembled, because it is by no means certain that its decision would be the expression of the general will; besides, the method would be impracticable in a great people, and it is hardly ever necessary where the government is well intentioned'[22]. And these views were not presented with only large states in mind: '[T]hings cannot be carried on in this manner: on the contrary however small any State may be, civil societies are always too populous to be under the immediate government of all their members'.[23]

Rousseau thought that direct democracy was not only impracticable but undesirable, yet at the same time insisted that direct popular ratification was a necessary condition for the validity of law. The key to understanding this apparent contradiction lies in Rousseau's idiosyncratic conception of law. In every society, there is a multiplicity of rules that seek to regulate the behaviour of individuals. But not all those rules, for Rousseau, were to be described as laws. What makes a particular rule a law is its object: "[t]he object of the laws is always general", which means that "law considers subjects *en masse* and actions in the abstract, and never a particular person or action...[N]o function which has a particular object belongs to the legislative power".[24] The laws, he maintained, addressed only "the body of the nation".[25] As many commentators have noted, these passages suggest that laws must not privilege or punish

[20] Ibid 238-239.
[21] Ibid.
[22] Jean Jacques Rousseau, 'A Discourse on Political Economy' (n 14) 138.
[23] Rousseau, 'A Discourse on Political Economy', ibid 153. In his 'Dedication to the Republic of Geneva' (in 'A Discourse on the Origin of Inequality', Rousseau associates democracy with the 'rude constitution of primitive governments' and characterised it as one of 'the vices that contributed to the downfall of the Republic of Athens'. Ibid 35.
[24] Rousseau, *The Social Contract*, *supra* note 3, at 210.
[25] *Ibid*. at 206.

specific individuals or groups, that laws cannot be directed toward particular human beings.[26] That is to say, that Rousseau's conception of law comes accompanied by a strong notion of political equality. But these passages also mean that rules that govern particular activities or public functions -rules that we normally call laws- would not count as laws under Rousseau's use of the term.

In fact, most contemporary legislation lacks the generality that Rousseau sees as a necessary condition for the existence of a law. Contemporary legislation does not frequently address citizens as a collective body, but rather regulates things such as the practice of particular professions, or sets the standards for specific industries or economic activities, or organises different public services. These are rules such as '[a]n Act regulating the Liquor Trade or Limited Liability Companies, an Insurance Act, a Merchant Shipping Act'. [27] In his valuable introduction to Rousseau's political writings, C.E. Vaughan maintained that the previously mentioned Acts would not be laws under the argument presented in the *Social Contract*. For Vaughn, the reason was straightforward: these Acts sought to regulate 'particular person[s] or action[s]'[28] and were thus not addressed to the whole body of the nation. Even though Vaughan is right that those rules would not count as laws according to the view presented in the *Social Contract*, he would be mistaken if he is also implying that they would be regarded by Rousseau as simple nullities. As we will see shortly, in Rousseau's system there are other types of rules that, while perfectly valid (and therefore legally binding), are not to be described as laws.

What exactly is a *law* then? In the *Social Contract*, Rousseau wrote that 'Laws are, properly speaking, only the conditions of civil association'. He also stated that his only concern (in the *Social Contract*) were those rules that 'determine the structure of government', and placed special emphasis on the people's role in creating the 'constitution of the State by giving its sanction to a body of law'.[29] Statements like this suggest that Rousseau's use of the term law was limited to the types of rules that we would call 'constitutional laws'. In apparent agreement with this view, G.D.H. Cole has stated that for Rousseau, the 'laws consist not of the whole body of regulations to which the citizens are subject but only of the fundamental declarations

[26] See for example, Cohen (n 17) 135; C.E. Vaughan, 'Introduction', *The Political Writings of Jean Jacques Rousseau* (Oxford: Basil Blackwell, 1962) vol. 1, 28
[27] Ibid 66.
[28] *The Social Contract* (n 14) 210. All these Acts, Vaughn wrote 'are directed against –at the least, they injuriously affect- particular classes or groups of men'. Vaughn (n 26) 66.
[29] Ibid 211 ('Les lois ne sont proprement que les conditions de l'association civile') 226, 259.

of principle on which the entire social order rests'.[30] Other authors have a reached a similar conclusion, even though, like Cole, they have not fully explored its implications for Rousseau's wider constitutional theory.[31] For example, Frank Marini has stated that 'Too little attention has been paid to the fact that in Rousseau's terminology', laws are something 'close to what we would call constituent principles of the political society'.[32] More recently, Christopher Bertram has suggested that it is possible that for Rousseau laws were not equivalent to what we call legislation; that he might have reserved the term law to describe the 'constitutional framework' of society.[33]

I largely agree with those interpretations. In fact, in the *Social Contract*, Rousseau states that '[a]mong the different classes of laws, the political, which determine the form of government, are alone relevant to my subject'[34]. But this suggests that in addition to laws that govern the relationship between the sovereign people and the state (which Rousseau called *political laws*), there were other kinds of laws: *civil laws* that governed the relation between citizens or between individual citizens and the state, and *criminal laws* that governed the relationship of individuals to the law.[35] Since civil and criminal laws are not considered in any detail by Rousseau, it is

[30] Cole, 'Preface' (n 14) 364. This led Carlos Sánchez Viamonte, the Argentinian jurist, to suggest that what Rousseau called 'laws' we call today 'constitution'. Sánchez Viamonte (n 8) 196.

[31] See for example Roger D Masters, *The Political Philosophy of Rousseau* (Princeton: Princeton University Press, 1976) 339.

[32] Frank Marini, 'Popular Sovereignty but Representative Government', 11(4) *Midwest Journal of Political Science* 451-470 (1967) 459.

[33] Christopher Bertram, 'Jean Jacques Rousseau', *Stanford Encyclopaedia of Philosophy* (2010). Ethan Putterman is one of the few authors that carefully considers, and rejects, the view that Rousseau's reserved the term 'law' to what we would today call 'constitution'. He maintains that although 'a number of passages in *CS* give substance to this reading by implying that sovereign responsibility is restricted to constitutional lawmaking (*loix fondamentales*) exclusively', he points towards statements in his work that seems to point in the opposite direction. Ethan Putterman, 'Rousseau on Agenda-Setting and Majority Rule', 97(3) *American Political Science Review* 459 (2003) 464-465. Despite the many virtues of Putterman's work on Rousseau, even the statements he quotes (such as those that point towards the people having a role in the creation of 'criminal laws'), are not inconsistent with the idea of 'law' as always having a constitutional nature (as we will see shortly, Rousseau's notion of 'criminal law' was limited to a small number of rules of a highly general nature). In his more recent monograph on Rousseau, Putterman seems to be more agreeable to the view advanced here: 'More narrowly, the laws are a set of generalized formal rules relating to the structure of a legitimate state while executive or administrative decrees are a set of particularized commands relating to this structure's proper function'. Ethan Putterman, *Rousseau, Law and the Sovereignty of the People* (Cambridge University Press, 2010) 25-26.

[34] Rousseau, *The Social Contract*, *supra* note 3, at 226.

[35] Ibid 225-226. This view is also reflected in Jean Jacques Rousseau, 'Considerations on the Government of Poland and on its Proposed Reformation', April 1772 (ISN ETH Zurich) 30. 'You must have three codes, covering constitutional, civil and criminal law respectively; all three as clear, short and precise as possible'. He also thought that there was a fourth class of law, 'which is graven not on tablets of marble or brass, but on the hearts of citizens. This forms the real constitution of the State, takes on every day new powers when other laws decay or die out, restores them or takes their place, keeps a people in the ways in which it was meant to go, and insensibly replaces authority by the force of habit. I am speaking of morality, of custom, above all of public opinion; a power unknown to political thinkers, on which none the less success in everything else depends'. *The Social Contract* (n 14) 226.

not clear what type of provision he had in mind. It is nevertheless safe to assume that those civil and criminal laws would refer only to a small number of rules that are necessary in a particular political community, and would thus be part of that community's basic constitutional framework. [36] This conclusion seems consistent with the view he expressed in *Letters Written from the Mountain,* where he maintained that he took the 'constitution' of Geneva as 'the model of political institutions'.[37] He was referring to the Act of Mediation of 1738, which in addition to 'political laws', included a series of provisions that would clearly fall under the category of 'criminal'[38] and 'civil'[39] laws.[40]

In using the term law in this way, Rousseau was in fact operating under a long tradition of political thought, where 'law' was usually seen as something fundamental, something that lay outside the scope of the jurisdiction of government and that was directly connected to the basic organisation of political power. This is not the place to fully explore that tradition, but the best examples are perhaps provided by Marsilio de Padua and Johannes Althusius. 'The authority to pass laws', for Marsilio, 'belongs solely to the universal body of the citizens or its prevailing part'.[41] It is that body, he maintained, the one called to engage in 'the determination or institution of the offices and parts of the city'.[42] For the 14th century Italian author, the prince was not a law-maker, he only had the right to create rules to 'regulate the political or civil acts of men according to law'. [43] Similarly, for Althusius, 'the people first associated itself in a certain body with definite laws (*leges*), and established for itself the necessary and useful rights

[36] Ibid 226. With relation to criminal laws, Rousseau maintained that they are 'less a particular class of law than the sanction behind all the rest'. Ibid.

[37] Jean Jacques Rousseau, *Letter to Beaumont, Letters written from the Mountain, and Related Writings* (Christopher Kelly & Eve Grace eds) (Hanover and London: University Press of New England, 2001) 232-233. This of course does not mean that he agreed with the ways in which that constitution was being implemented by Genevan magistrates. See Helena Rosenblatt, *Rousseau and Geneva: From* the First Discourse *to* The Social Contract*, 1749–1762* (Cambridge University Press, 1997).

[38] See for example, Article 55 and Articles 33 (prohibiting acts that affected the public order and punishing the disobedience of judgments, respectively). *Règlement de L'Illustre Médiation pour la Pacification de Troubles de la République de Genève* (1738).

[39] See for example Article 34, *Règlement,* ibid., giving citizens and burghers the right to sell their own wine. *Règlement, ibid.* For the historical significance of this provision, see William C. Inness, *Social Concern in Calvin's Geneva* (Pittsburgh Theological Monographs, 1983) 89. In 'The Geneva Manuscript' (the first draft of the *Social Contract*), Rousseau described civil laws as the 'laws which regulate the respective duties and rights of citizens,…as far as domestic relations and the ownership of property are concerned.' Rousseau, 'The Geneva Manuscript' (n 14) 330.

[40] The idea that for Rousseau laws were always of a constitutional or fundamental nature is also supported by the fact that Rousseau counselled against the adoption of many laws, insisting that a well governed state 'needs very few laws', that some nations were not ready to have 'laws', and that very few nations had any laws at all. Rousseau, *Social Contract* (n 14) 211, 217, 222-223, 264.

[41] Ibid 68.

[42] Ibid 94.

[43] Marsilius of Padua, *The Defender of Peace* (Cambridge University Press, 2005) 52.

(*jura*) of his association'.[44] The prince is authorised to administer those rights, but 'is not supreme in relation to his subjects collectively, nor to law, to which he is himself subject'[45].

II. The Legislative (Constituent) Power, the Limited (Constituted) Government

Like Marsilio and Althusius, Rousseau maintained that laws, because of their subject matter, must be adopted by the people and not by those who have been called to exercise ordinary political power. That is to say, because laws regulate the conditions of civil association, Rousseau insisted that they required direct popular ratification: 'The people, being subject to the laws, ought to be their author: the conditions of the society ought to be regulated solely by those who come together to form it'.[46] In saying that all laws must be authored by the people, Rousseau was also saying that the adoption of a law was an act of sovereignty. Since for Rousseau the sovereign was 'a corporate and collective body'[47] composed of all the citizens on a particular state, only when all citizens come together and exercise their political power, an act of sovereignty, a law-making act, takes place. Rousseau thought that a situation like this, in which a sovereign people had an exclusive law-making authority, would normally be conducive to the adoption of good laws.[48]

Put differently, that being 'formed wholly of the individuals who compose it', the sovereign could be reasonably expected to act in accordance with the common good and not be blinded by particular wills that would favour the interests of specific individuals or groups.[49] A collective sovereign, in short, would always tend to act in conformity with what Rousseau

[44] Johannes Althusius, *Politica* (Indianapolis: Liberty Fund, 1995) 93.
[45] Ibid 120.
[46] *The Social Contract* (n 14) 271.
[47] *Ibid*. at 192. Rousseau explains the relationship between individual citizens and the sovereign in this way: "Suppose the State is composed of ten thousand citizens…the Sovereign is to the subject as ten thousand to one, i.e. each member of the State has as his share only a ten-thousandth part of the sovereign authority, although he is wholly under its control". *Ibid.* at 229.

[48] The same point is made by Marsilio de Padua. The authority to adopt laws, Marsilio wrote 'belongs to that from which alone the best laws can result'. For him, it was clear that laws should be adopted by 'the universal body of citizens or its prevailing part', because from 'the universal multitude there results a greater attention to a law's common utility, since no one knowingly harms himself'. Marsilio (n 43) 68, 69. See also Rousseau, *Émile* (Book V) ibid 335.
[49] Ibid 193-194. This is not the place to engage in a full discussion of the concept of the general will. Suffice to say that an important part of the energy that has been spent in trying to understand Rousseau's conception of the general will would have been saved if those efforts had been accompanied by an understanding that a 'law' (the positive expression of the general will) for Rousseau is not equivalent to what we could call a statute. See for example Gopal Sreenivasan, 'What is the General Will?', 109(4) *Philosophical Review* 545 (2000) 562, where things such as the regulation of a system of private medicine are identified as laws and therefore analysed in light of the concept of the general will.

famously called the general will. This is another way of saying that the people, and not any individual or elite, will usually be a better judge of the common good, a better judge of the constitution they should be subject to: '[W]ho can judge better than they the conditions under which they had best dwell together in the same society?'[50] Rousseau's sovereign, however, did not act every time a new legal rule needed to be issued. In both the *Letters* and the *Social Contract,* he maintained that the sovereign 'does not always show itself', that the people only made rare appearances in an already constituted commonwealth.[51] The reason for this is simple: the sovereign had 'no force other than the legislative power'[52] and thus only appeared when a body of law is created or altered. Moreover, since the sovereign 'cannot act save when the people is in assembly'[53], it would be unnecessary for it to be in a continuous session.

The people's legislative power is to be distinguished from the executive power, understood as the power comprising the 'administration of civil affairs and the execution of the laws'.[54] After the sovereign has adopted a body of law, Rousseau wrote, there 'still remains an infinity of details of administration and economy, which are left to the wisdom' of the executive power.[55] The actual functions of the executive power in Rousseau's project are seldom examined in the literature, and this has unfortunately resulted in important ambiguities about the institutional arrangements he was proposing. If the executive power merely 'executes' rules, then the assembled people would have to regulate many aspects of social and commercial life (a situation that Rousseau was at pains to avoid). Rousseau did attribute to the executive power the function of implementing the decisions of the sovereign (i.e. the laws), but this involved important *rule-making* activities.[56] The sovereign may have decided, for example, to adopt a political law giving all citizens the right to vote. The executive power thus has the obligation of creating an electoral system. The sovereign may have decided to adopt a criminal law that prohibits acts against the public order; the executive power thus has the obligation to define

[50] Rousseau, 'Dedication' (n 14) 35.
[51] Rousseau, *Letters* (n 37) 263; *The Social Contract* (n 14) 260.
[52] *The Social Contract* (n 14) 258. The question of how frequently should the sovereign act, however, 'depends on so many considerations that no exact rules…can be given'. *The Social Contract* (n 14) 259-260.
[53] Ibid.
[54] Rousseau, 'A Discourse on the Origin of Inequality' (n 14) 35. This conception is not dissimilar to that of other 18th century Genevans. This conception is not dissimilar to that of other 18th century Genevans. For example, Micheli du Crest argued that a 'democratic republic' was 'a free state, in which the people itself exercises the acts of sovereignty, without however exercising subordinate government, but remits this government to chiefs or officers who are accountable to it and whose administration it has the right to examine'. Quoted in Rosenblatt (n 37) 143.
[55] Rousseau, 'Discourse on Political Economy' (n 14) 138.
[56] The idea of an 'executive' that creates rules is of course consistent with the modern administrative state (where executives are routinely authorised to adopt secondary legislation).

the type of conduct that amounts to an act against the public order and to punish those who commit it.

The exercise of the executive power, accordingly, includes the issuing of decrees (*décrets* not *lois*) that relate to specific matters (such as the creation of a public education system[57]) or to particular individuals (such as sentencing someone found guilty of a crime[58]). The former type of decree would normally take the form of a statute in a contemporary legal system; the latter would take the form of a judicial determination. In implementing the decisions of the sovereign, the executive power was always to be exercised in 'the spirit of the law' or, if the law was unclear or non-existent, in the way most conducive to the 'public interest' (as that interpretation would conform to the general will, which is 'the source and supplement of all laws').[59] While the legislative power 'belongs to the people, and can belong to it alone'[60], the executive power was to be exercised by *government* (who acted through an individual or entity that Rousseau interchangeably identified with the terms 'magistrate' or 'prince').[61] Depending on the form of government, the executive power may fall in the hands of the entire citizenry (democracy), of a number of citizens (aristocracy), or of a single individual (monarchy).[62] Although different societies may be better served by different forms of government, Rousseau maintained that, generally speaking, the best form of government was an elected aristocracy, where 'assemblies are easily held' and 'affairs better discussed and carried out with more order and diligence'.[63]

Rousseau is in fact describing here a typical system of representative democracy, where the basic constitutional framework is seen as resting in the will of the entire people, who then elects

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[57] In his 'Discourse on Political Economy', Rousseau refers to public education as a matter to be regulated by government (that is, by decree and not by law). Ibid 149.
[58] Like Locke, Rousseau included the judiciary as part of the executive power. See for example, Rousseau, 'A Discourse on Political Economy' (n 14) 131; Suri Ratnapala, "John Locke's Doctrine of the Separation of Powers: A Re-Evaluation" 38(1) *American Journal of Jurisprudence* 189 (1993) at 189.
[58] *Ibid.* at 138.
[59] Ibid 138.
[60] Ibid 227.
[61] Ibid 228. Again, it is worth noting the similarity between Rousseau and Marsilio: 'For although the legislator…ought to determine which men should exercise what kinds of functions in the city, nevertheless it is the princely part that commands, and if necessary enforces, the execution of those decisions, as he does other matters of law. For it is more convenient for the execution of legal matters to take place through him than through the universal multitude of the citizens, since one or a few persons exercising the function of prince are enough for this business, in which the universal community would be unnecessarily occupied and would moreover be distracted from other necessary tasks'. Marsilio (n 43) 90. Althusius, too, thought in similar terms: 'Thus the administration and government of a commonwealth is nothing other than the execution of law'. Althusius (n 44) 139.
[62] *The Social Contract* (n 14) 235, 239.
[63] Ibid 239.

a number of officials that are expected to carry out public acts in a manner consistent with the constitution. Frequently depicted as the severest critic of representation, Rousseau only rejected it in the context of the exercise of the legislative power: '[I]t is clear that, in the exercise of the legislative power, the people cannot be represented; but in that of the executive power, which is only the force that is applied to give the law effect, it can and should be represented'.[64] Accordingly, when Rousseau wrote that the English people lived in slavery, it was not because they were not able to ratify in person rules such as the *Health and Safety at Work etc. Act 1974* or the *Data Protection Act 1988*.[65] Those are *decrees* that regulate particular activities and that plainly fall within the jurisdiction of the government of the day. Decrees of this type, as noted earlier, have to be consistent with the law, but do not have to be directly ratified by the people.[66] The reason Rousseau thought the English people lived in slavery was that Parliament also had the power to adopt *laws*, rules that altered the basic legal framework of the country, such as the *Septennial Act 1716* (which Dicey once presented as 'standing proof' of the sovereignty of Parliament).[67]

In other words, the problem was that the English Parliament routinely exercised the legislative power, that it illegitimately exercised a power that was not susceptible of representation. Put in the language of the theory of constituent power, the problem was that Parliament frequently operated as a constituent body and, as a consequence, the English people were being required to live under a constitution not created by them. Rousseau's distinction between the legislative and the executive power thus has a very close affinity (and to a large extent corresponds) to the distinction between constituent and constituted power. Sánchez Viamonte, the Argentinian jurist, was unequivocal in his support for this view, writing that what Rousseau called 'legislative power', we call today 'constituent power'.[68] Just as in contemporary societies the constituent people is usually seen as having the right to create any constitution it wants, Rousseau's legislative power involved the ability of creating any body of laws (laws whose

[64] Ibid 264.
[65] It is interesting to note that in 18th century France, an anonymous commentator described as a scandal 'the praises sung to Rousseau in an Assembly [the National Assembly of 1789] whose every decree was pronounced as null by the *Social Contract*'. Joan McDonald, *Rousseau and the French Revolution 1762-1791* (University of London, 1965) 120.
[66] Ibid 211. Even if a decree is popularly ratified, it should not be seen as an act of sovereignty: '…and even when the Sovereign commands with regard to a particular matter is no nearer being a law, but is a decree, an act, not of sovereignty, but of magistracy'.
[67] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (Indianapolis: Liberty Classics, 1982) 6. Rousseau was clearly familiar with the English system of government. See for example Rousseau (n 14) 267-268.
[68] Sánchez Viamonte (n 8) 196.

content could not be limited by the positive legal system). While Rousseau's executive power, as a constituted body, cannot alter the constitution, the sovereign people always had the authority to change it at will. 'There neither is nor can be', Rousseau famously wrote, 'any kind of fundamental law binding on the body of the people, not even the social contract itself'.[69]

Even though Rousseau's sovereign had an unlimited legislative (constituent) power, such a power cannot be accurately described as arbitrary. In fact, as noted earlier, the sole function of the sovereign was to adopt laws that applied to the whole body of the nation; a sovereign that engages in functions that have a particular object, is not acting as a sovereign but as a government (a situation that would be present in a democracy and that for Rousseau was at the very least 'inadequate').[70] Conversely, a government that acts as a sovereign is an illegitimate one: absolute monarchies were not legitimate, at least not when attributed with the power of altering the law.[71] Put in a different way, the people, in the exercise of their constituent power, could create any constitution it wanted (that is to say, could establish any form of government, a government that could adopt all sorts of rules as long as they are consistent with the law or constitution) but could never give away its ultimate law-making faculty.[72] And even if, as we will see below, the original establishment of a constitution may require the intervention of an individual constitution-maker (a gifted law-giver, of which Lycurgus provided one of the best examples)[73], the constitution would not become valid 'until it has been put to the free vote of the people'.[74]

The strong connections between Rousseau's thought and the theory of constituent power are not only reflected in his conception of sovereignty, but also exemplified in some of his more

[69] *The Social Contract* (n 14) 193.
[70] Ibid 236. In fact, he maintained that '[t]o be legitimate, the government must be, not one with the Sovereign, but its minister'. Ibid 211, fn 1.
[71] It is interesting to note that even Bodin thought that a sovereign monarch was limited by the constitutional law of the realm. Jean Bodin, *On Sovereignty: Four Chapters from the Six Books of the Commonwealth* (Julian Franklin ed.) (Cambridge: Cambridge University Press, 1992) 13, 18.
[72] Rousseau thought that the sovereign authority (the constituent power) is never transferred, not even in an emergency: 'If, on the other hand, the peril is of such a kind that the paraphernalia of the laws are an obstacle to their preservation, the method is to nominate a supreme ruler, who shall silence all the laws, and suspend for a moment the sovereign authority. In such a case, there is no doubt about the general will, and it is clear that he people's first intention is that the State shall not perish. Thus the suspension of the legislative authority is in no sense its abolition; the magistrate who silences it cannot make it speak; he dominates it, but cannot represent it. He can do anything; except make laws'. *The Social Contract* (n 14) 290-291.
[73] *The Social Contract* (n 14) 213.
[74] Ibid 214. Moreover, as we will see shortly, from then the constitution remains forever subject to re-constitution by an act of the sovereign.

practical institutional views, such as the establishment of a tribunate.[75] As explained earlier, Rousseau thought that 'the power of the magistrates extends to everything which may maintain the constitution, without going so far as to alter it'.[76] In order to protect 'the laws and the legislative power' from government, to protect the constituent power against the constituted powers, Rousseau proposed the establishment of a quasi-judicial body (*le tribunat*).[77] Like a contemporary constitutional court, the tribunate did not form part of the legislative or executive power[78] and did not have the right of initiative in respect to the adoption of laws or decrees: it was only able to prevent them from being adopted.[79] The main role of the tribunate would not be to limit the legislative (constituent) power of the sovereign people, but the ordinary power of government. The idea, in the last instance, was to prevent the dissolution of the State, which occurred 'when the prince ceases to administer the State in accordance with the laws, and usurps the Sovereign power'.[80]

III. The Practice of Constituent Power

Rousseau's separation of the constituent from the constituted powers becomes even clearer when one looks at his ideas about how government is constituted and how the sovereign may protect itself from governmental abuses. He thought that a government is originally instituted through a two-step process. First, the people, acting in a sovereign capacity, determines that 'there shall be a governing body established in this or that form'.[81] Rousseau states that 'this act is clearly a law', for it involves the creation of a constitutional structure (which may take the form of a democracy, an aristocracy, or a monarchy).[82] Second, the people 'nominates the rulers who are to be entrusted with the government that has been established'.[83] Rousseau says that this second act is not a law (since it is addressed to specific individuals, i.e. those that will

[75] Rousseau discusses the tribunate in Book IV of the *Social Contract*, which he mostly uses to describe in some detail the political system of the early Roman Republic. Nevertheless, in his discussion of the tribunate he considers the Roman tribunes along with other manifestations of this institution (i.e. the Council of Ten in Venice, the Ephors in Sparta). *The Social Contract* (n 14) 288. For a discussion, see David Lay Williams, *Rousseau's Social Contract: An Introduction* (Cambridge University Press, 2014) 176-180.
[76] Rousseau, 'Discourse on the Origins of Inequality' (n 14) 106.
[77] *The Social Contract* (n 14) 288. Rousseau also maintained that the tribunate would sometimes protect the government from the people (as the Council of Ten in Venice, which protected the government from rebellions or insurrections) or 'maintain the balance between the two'. Ibid.
[78] As noted earlier, for Rousseau, the judiciary was part of the executive power (see n 58).
[79] *The Social Contract* (n 14) 288.
[80] Ibid 255. As the reader will note, there is a clear similarity here with Locke's views about the dissolution of the state and the community's right of resistance. John Locke, *Two Treatises of Government: A Critical Edition with an Introduction an Apparatus Criticus* (Peter Laslett ed.) (Cambridge: Cambridge University Press, 1967) 197, para. 149.
[81] Ibid 267.
[82] Ibid.
[83] Ibid.

be in charge of the administration), but a decree, an act of magistracy. One may ask how can there be an act of magistracy (an act of the constituted power), before the government has been fully constituted; Rousseau's answer is that in this second act there is a 'sudden conversion of Sovereignty into democracy', so that the citizenry temporarily acts as a magistrate.

Rousseau nevertheless believed that the creation of a society's first constitution can seldom result from the act of an entire people: 'How can a blind multitude, which often does not know what it wills, because it rarely knows what is good for it, carry out for itself so great and difficult an enterprise as a system of legislation?'[84] 'Is it to be', he asked, 'by common agreement, by a sudden inspiration?'[85] It would be too much to ask a people that has never lived under a constitution to 'relish sound principles of political theory', 'to follow the fundamental rules of statecraft', and to exhibit the 'social spirit' that should be the effect (not the cause) of a good body of laws.[86] His solution to this problem was the 'Legislator', which he described as 'the engineer who invents the machine'.[87] This aspect of Rousseau's thought is frequently interpreted as an indication of the ultimate failure of his system of popular sovereignty: in the end, no people can give laws to itself. Rousseau's legislator has thus been described by Michael Walzer as 'simply the philosopher in heroic dress'[88], by Vaughan as a 'wonder-working magician'[89], and many others see it as a puzzle in an argument for popular consent.[90] In order to make sense of the figure of the legislator and understand its role in a theory of constituent power, three things should be noted.

First, Rousseau presented the legislator not as a necessary element for the creation of a legitimate state, but as a practical reality in light of the fact that a society that has never lived under a constitution will normally lack the ability to create one.[91] Second, as noted earlier, the

[84] Ibid 211.
[85] Ibid.
[86] Ibid 215.
[87] Ibid 212. The task of the legislator is not merely to draft a code of abstract justice (that could be done, Rousseau said, by the most novice law student), but to create a constitution that would suit the nation for which it is made (and this involved inquiring into variables such as the size of the population, soil and climate, national character, etc.). Jean Jacques Rousseau, *Letter à d'Alembert* (1758). The influence of Montesquieu in this aspect of Rousseau's thought is clear. See Baron De Montesquieu, *The Spirit of the Laws* (New York: Hafner Press, 1949) at 221-224. Nevertheless, Althusius made a very similar point in his *Politica.* Althusius (n 44) 149.
[88] Michal Walzer, 'Philosophy and Democracy', 9(3) *Political Theory* 379-399 (1981) 384.
[89] Vaughan (n 26) vol. 1, 31.
[90] See the discussion in Christopher Kelly, '"To Persuade without Convincing': The Language of Rousseau's Legislator' 31(2) *American Journal of Political Science* 321-335 (1987) 322.
[91] In fact, Rousseau did not mention the 'Legislator' once in the summary of the *Social Contract* included in the *Letters.* Rousseau, *Letters* (n 37) 232. He did not mention it either in the summary of the *Social Contract* contained in Book V of *Émile*. Rousseau, *Émile (Book V)* (n 14) 332-344.

legislator does not possess legislative (constituent) power: its sole faculty is that of drafting a constitution that will be valid only if ratified by the people.[92] Third, although Rousseau uses the term in the singular[93], there is no reason why the 'Legislator' cannot take the form of a collective entity or why, in the context of a small city-state whose members have somehow developed the capacity to adopt a body of laws (e.g. by exposure to the constitutional system of a neighbouring state), the legislator cannot be the people themselves. One must remember that the notion of a collective legislator that adopts the fundamental laws is also present in earlier authors. Marsilio de Padua, for example, maintained that 'the 'legislator' i.e. the primary and proper efficient cause of the law, is the people or the universal body of the citizens or else its prevailing part'.[94]

In fact, the idea that the legislator can be a collective entity is present in the *Letters:* 'In a State such as yours, where the sovereignty is in the hands of the People, the Legislator always exists, although it does not always show itself. It is assembled and speaks authentically only in the General Council [a body composed of all the citizens and burghers of Geneva]'.[95] 'Outside the General Council' Rousseau continued, the Legislator 'is not annihilated; its members are scattered, but they are not dead; they cannot speak by means of Laws, but they can always keep watch over the administration of the Laws…'[96] The legislator, in short, is the individual or entity tasked with the responsibility of proposing a body of laws to a constituent people.[97] It would serve the functions of what modern constitutional theorists usually identify as a constituent assembly. In fact, evoking modern and contemporary debates about the nature of the power of a constituent assembly (entities which have, often controversially, engaged in the exercise of the ordinary powers of government), Rousseau maintained that the legislator has 'neither magistracy, nor sovereignty'.[98] That is to say, in the same way that it is not authorised to adopt a constitution (only to propose it), it is not authorised to issue any decrees.

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[92] *The Social Contract* (n 14) 214.
[93] Rousseau also uses the terms 'Prince' or 'Magistrate' in the singular, even though they refer to 'the man or the body' entrusted with the executive power. Ibid 228.
[94] Marsilius (n 43) 66. See also ibid 90.
[95] Rousseau, *Letters* (n 37) 263. Interestingly, and reminiscent of latter formulations of the theory of constituent power, Rousseau described the General Council as 'neither established nor deputed by anyone; it is sovereign by its own authority: it is the living and fundamental Law that gives life and force to all the rest, and knows no other rights than its own. The general Council is not an order in the State, it is the State itself'. *Letters* (n 37) 246.
[96] *Ibid*. Rousseau was arguing here in favour of the right of remonstrance in his native Geneva. See n 98 below.
[97] An important problem here is, of course, how to determine who the 'constituent people' is. Rousseau's legislator does not provide a solution to that problem: even if an individual or collective legislator (and not the entire people) is to draft the constitution, the question of who should be entitled to ratify it remains. In this respect, Rousseau's conception suffers from a problem shared by all modern theorists of constituent power.
[98] *The Social Contract* (n 14) 213.

Now, regardless of the identity of the drafter of a society's first constitution, Rousseau thought that each generation had the right to re-constitute the state. In this sense, Judith Shklar's view that in Rousseau 'the sovereign *does* very little', and that '[i]t is he [the Legislator] the sole 'architect' of the edifice that the people maintains' is at best overstated.[99] Consider, for example, the following passage contained in the 'Geneva Manuscript': 'The laws, although received, only have a lasting authority so long as the people, being free to revoke them, nevertheless does not do so'.[100] A constitutional order, a form of government, always had a 'provisional form'.[101] Accordingly, and unlike other social contract theorists, Rousseau proposed a mechanism for the exercise of constituent power, for the potential 'revocation' of the laws and the creation of a new constitution. Being 'not enough for the assembled people to have once fixed the constitution of the State', he maintained that 'besides the extraordinary assemblies unforeseen circumstances may demand, there must be fixed periodical assemblies which cannot be abrogated or prorogued'.[102]

Both extraordinary and periodic assemblies could only be convened in accordance with the law: only a public meeting that complies with the forms established by the entire citizenry in their constitutional framework could be taken as authorised to pronounce the people's voice.[103] Rousseau's sovereign could create any constitutional content, but not any assembly could claim to be sovereign. In this respect, one can say that although the sovereign was not subject to any substantive limits found in positive law, it could only act according to certain *procedures* recognised by law.[104] There is no clear indication of how frequently periodic assemblies should

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[99] Judith N. Shklar, *Men and Citizens: A Study of Rousseau's Social Theory* (Cambridge: Harvard University Press, 1969) 181.
[100] Rousseau, 'Geneva Manuscript' (n 14) 324.
[101] *The Social Contract* (n 14) 268.
[102] *The Social Contract* (n 14) 259. These types of assemblies were later proposed by later authors, such as Thomas Jefferson. See Thomas Jefferson, *Writings* (Merrill Peterson, ed.) (New York, Library of America, 1984) 1402. When a sovereign assembly was convened, Rousseau maintained that 'the jurisdiction of government wholly lapses, the executive power is suspended, and the person of the meanest citizen is as sacred and inviolable as that of the first magistrate; for in the presence of the person represented, representatives no longer exist'. No surprisingly, he stated that '[t]hese intervals of suspension, during which the prince recognizes or ought to recognize an actual superior, have always been viewed by him [the prince] with alarm'. Ibid 261.
[103] *The Social Contract* (n 14) 259. That is to say, periodic assemblies would be 'authorized by their date alone', but any other 'assembly of the people not summoned by the magistrates appointed for that purpose, and in accordance with the prescribed forms, should be regarded as unlawful'. Ibid.
[104] It could be argued that since Rousseau's legislative power must be exercised in accordance to certain procedural rules, it is not really a 'constituent power'. One must nevertheless distinguish between the emergence of a majoritarian will to change the fundamental laws (which cannot be subject to any substantive or procedural requirements) and the transformation of that will into constitutional law. Even Schmitt, who described constituent power as an 'unmediated will', thought that "the formulation of a political decision reached by the people in

be convened, and as noted earlier, Rousseau maintains that in a well governed state, the Sovereign rarely needs to show itself. Even if it does not provide a conclusive indication of Rousseau's views, it is worth noting that in his native Geneva it was once agreed that the General Council would meet every five years (the General Council was also convened in times of crisis).[105] Rousseau's periodic assemblies were designed, as it where, to reproduce the two acts that take place when government is instituted for the first time. Not surprisingly, they would always put to the people two different propositions: 'The first is: "Does it please the Sovereign to preserve the present form of government?" The second is: "Does it please the people to leave its administration in the hands of those who are actually in charge of it?'''.[106]

IV. Assembling the Constituent People

As noted earlier, Rousseau was well aware of the practical impossibility, outside the context of a small city state, of convening an assembly in which all citizens sat. One must nevertheless recall that in the *Social Contract* he writes that despite being composed of at least 400,000 citizens, the people of Rome was frequently assembled.[107] In fact, in Book IV of that work, Rousseau provides a detailed description of the ways in which citizens of the early Roman Republic were organised (and voted) in different assemblies.[108] But what emerges from that description is a system that seems to privilege the status of wealthy citizens. Before moving further in the analysis, it is necessary to briefly consider the role of Book IV in the *Social Contract* because, on one interpretation, it runs contrary to key aspects of the reading advanced

unmediated form requires some organization, a procedure, for which the practice of modern democracy developed certain practices and customs". Schmitt (n 1) 132, 140. Rousseau's approach, by requiring a constitutional arrangement that facilitates the exercise of constituent power, is in fact consistent with certain features of the so called 'populist' constitutions of Latin America (which in addition to a formal amendment rule, establish a procedure for the convocation of a 'Sovereign Constituent Assembly'). See for example, Article 411, Constitution of Bolivia (2009).

[105] See Rosenblatt (n 37) 109.

[106] Ibid 269. In the *Social Contract*, Rousseau maintains that although citizens always have the right to vote on any proposals related to a change in the law, the making of proposals themselves was in the sole hands of government. *Letters* (n 37) 263-264*;* Rousseau, 'Dedication to the Republic of Geneva' (n 14) 35. Perhaps, as suggested by Cohen, Rousseau's statements against the popular initiative may be no more than an endorsement of the existing limitations in Geneva under the Act of Mediation. Cohen (n 17) 172-173. However, the idea that individual citizens should not have the power to propose changes to the law (i.e. the constitution) was probably driven by a practical consideration: such an arrangement would allow any citizen to require, at any time, the convocation of a constitution-making assembly of all the people. On this point, see also John T. Scott, 'Rousseau's Anti-Agenda-Setting Agenda and Contemporary Democratic Theory', 99(1) *American Political Science Review* 137 (2005) 141. This does not mean that a group of citizens should not have the right to voice their opinions about constitutional matters and request government to act on them. In fact, Rousseau argued in favour of the right of remonstrance in early 18th century Geneva. Rousseau, *Letters* (n 37) 263-264. On this reading, Rousseau's position would also be consistent with a system in which particular formalities must be met (such as the collection of a number of signatures) before a citizen proposal can be put to the vote of the entire people.

[107] *The Social Contract* (n 14) 259.

[108] Ibid 273-288.

in the previous pages. According to Rousseau, it was in the *Comitia Centuriata*, one of the three assemblies that operated in the Roman Republic, where the 'majesty of the Roman people lay'.[109] The reason was simple: unlike the other two assemblies, which excluded certain citizens (such as the rural tribes and the patricians) the *Comitia Centuriata* 'alone included all'.[110] It was that assembly, one could say, the one authorised to engage in the exercise of constituent power. However, given the way in which the voting took place (where the wealthy class voted first and had a majority of the votes), this entity was hardly an "assembly of the people". In fact, Rousseau wrote that 'in the *Comitia Centuriata,* decisions were regulated far more by depth of purses than by the number of votes'.[111] Moreover, and contrary to his early insistence in the distinction between sovereignty and government, he maintained that 'laws and the election of rulers were not only the questions submitted to the judgment of the comitia', but that the Roman people also exercised 'the most important functions of government'.[112]

These features of the Roman Republic, as described in the *Social Contract*, seem to point away from truly popular constitution-making bodies and towards attributing certain elites with high degrees of political power. They also suggest that the separation between legislative and executive power does not apply in a system where the sovereign assembly is controlled by the wealthiest citizens. No one has presented that argument more persuasively than John McCormick, who after a close reading of Book IV, describes Rousseau as an 'anti-populist contributor[…] to modern constitutional thought', who 'fairly explicitly prescribes institutions that enable rather than constrain the prerogative of elites within republics and popular governments'.[113] The exact role of Book IV in the *Social Contract* has long been a subject of debate, and this is not the place to resolve that controversy.[114] There are nevertheless at least three good reasons to believe that Rousseau was not presenting Rome as an *ideal* example of his theory. That is to say, that even if he was sympathetic of its constitutional arrangements, he was not suggesting that those arrangements were entirely consistent with the argument in the

[109] Ibid. 286.
[110] Ibid 286. It is unclear how many Roman citizens actually participated and voted in the *Comitia Centuriata* and how much space was actually available for large citizen congregations. For a discussion, see Lily Ross Taylor, *Roman Voting Assemblies: From the Hannibalic War to the Dictatorship of Caesar* (Ann Arbor: University of Michigan Press, 1966) at 52, 113.
[111] Ibid 285.
[112] Ibid 284.
[113] John P. McCormick, 'Rousseau's Rome and the Repudiation of Populist Republicanism', 10(1) *Critical Review of International Social and Political Philosophy* 3-27 (2007) 22, 3.
[114] See for example, McCormick, ibid 9; Vaughn (n 26) vol. 2, 109 fn 1; David Lay Williams, Rousseau's *Social Contract: An Introdution* (Cambridge University Press, 2014) 171; Chris Meckstroth, *The Struggle for Democracy: Paradoxes of Progress and the Politics of Change* (Oxford University Press, 2015) 13, fn 9.

Social Contract (in fact, even though he describes the English constitutional system as amounting to slavery, he favourably refers to several of its features at different points in his work).[115]

First, as noted earlier, one common thread through Rousseau's work is the idea that no particular form of government is suited to all peoples.[116] 'The science of government', he wrote, 'is nothing but a science of combinations, applications, and exceptions, according to times, places, circumstances'.[117] The very idea of understanding the practical implications of the argument of the *Social Contract* through Book IV is thus highly problematic. Indeed, when explaining that the Roman people was distributed into six classes, 'distinguished neither by place nor by person, but by wealth', Rousseau notes that '[w]ithout deciding now whether this third arrangement [the division of the people into six classes] was good or bad in itself, I think I may assert that it could have been made practicable' only by the character of the early Romans.[118] The closest Rousseau came to identify a specific form of government as consistent with the principles of the *Social Contract* was in his *Letters,* were he wrote that in the former book he took the Genevan Constitution, 'as the model of political institutions' and proposed it 'as an example to Europe'.[119] Second, even though he maintains that the *Comitia Centuriata* exercised both sovereign and governmental functions, it is not clear at all that he actually condoned this state of affairs. In fact, in the *Letters*, he wrote that he did 'not excuse the faults of the Roman People, I have stated them in the *Social Contract*; I blamed it for having usurped the executive power that it should have only held in check'.[120] Third, and finally, after noting that the organisation of the *Comitia Centuriata* into a system of classes favoured the wealthiest

[115] See for example, *The Social Contract* (n 14) 246, 267-268; *Letters* (n 37) 246, 252, 287-291.
[116] Chapter 8 of Book III of the *Social Contract* is thus titled 'That All Forms of Government Do not Suit All Countries', *The Social Contract* (n 14) 247-252.
[117] Jean-Jaques Rousseau, 'Letter to Mirabeau' in *The Social Contract and Other Latter Political Writings* (Voctor Gourevitch ed.) (Cambridge University Press, 1997) 269.
[118] Ibid 282.
[119] *Letters* (n 37) 233, 234.
[120] Ibid 292. In Book III of the *Social Contract,* Rousseau notes that the Roman people 'exercised not only the rights of Sovereignty, but also a part of those of government. It dealt with certain matters, and judged certain cases, and this whole people was found in the public meeting-place hardly less often as magistrates than as citizens'. McCormick, suggests that in this passage Rousseau condones the fusion of sovereignty and government in the Roman Republic. I don't think that is the case, since the purpose of the passage is to show that even in a large capital such as Rome, it was possible for an entire people to assemble. McCormick (n 13) 10. One can find different examples in Rousseau's work in which he praises a specific aspect of a political system, even if he considers that the political system itself suffers from a fundamental flaw. For example, when discussing mixed governments, he notes that in England, the different constituent parts of government are 'in mutual dependence' an arrangement he favourably compares to that of Poland, where 'the authority of each section is independent, but imperfect'. *The Social Contract* (n 14) 246.

citizens, he described that situation as 'extreme', and quickly moved to note a number of features that 'counter-balanced the influence of the patricians in the first class'.[121]

For these reasons, I don't think one should try to understand Rousseau's argument in the *Social Contract* (or even more problematically, his entire political thought) through the lenses of Book IV. The issue remains, however, that in most states (and certainly in contemporary ones), the idea of convening an assembly of all the people presents an important practical difficulty. Aware of this problem, Rousseau proposed two possible solutions. According to the first solution, different groups of citizens would 'assemble by turn' in the relevant locality or region (e.g. town, city).[122] Under this approach, each assembly would participate in the exercise of the legislative power by expressing its view on the two questions mentioned above. The votes of all the citizens participating in these assemblies, it seems, would be taken as the declaration of the general will, as an indication of the type of constitution that would serve the common good in that particular society.[123] Rousseau does not specify which rules would govern the assemblies' decision making processes, but one can assume that decisions would be made by majority vote. It is well known that for Rousseau, the only act that required unanimity was the social contract itself, even though he accepted that particular societies may establish that only qualified majorities should have the right to decide on 'grave and important questions'[124]. If the relevant majority answers the questions in the affirmative, a 'Legislator' (which, as noted earlier, could take the form of a collective entity) would have the task of proposing to the people a new constitution, which would be administered by the new set of elected magistrates.

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[121] Ibid 285. For an illuminating discussion, see Lay Williams (n 114) 171-176.

[122] *The Social Contract* (n 14) 260.

[123] In popular assemblies, Rousseau maintained, people are asked not whether they reject or accept a proposal, but to give their opinion as to whether the proposal advances the common good (i.e. whether it in 'conformity with the general will'). Ibid 275. In such a process, even those in the minority would end up subject to a law created by themselves: 'When therefore the opinion that is contrary to my will prevails, this proves neither more or less than that I was mistaken, and that what I thought to be the general will was not so. If my particular opinion had carried the day I should have achieved the opposite of what was my will; and it is in that case that I should not have been free. Ibid. Rousseau of course did not think that popular majorities were infallible (see ibid 202) but that if citizens honestly asked themselves whether a particular proposal is for the good of society (as opposed as for their own private good), it is more likely than not that they will make the right decision. For a discussion, see Cohen (n 17) 73-82.

[124] *The Social Contract* (n 16) 274, 275. In 'Considerations on the Government of Poland' he also considered this issue, arguing that between fundamental laws and mere acts of administration 'there are various intermediary cases in which the extent of agreement should be in proportion to the importance of the matter'. Rousseau, 'Considerations on the Government of Poland' (n 35) 28. Whether those super-majority procedures could be legitimately established by a simple majority, he does not say. For an excellent analysis of Rousseau's conception of fundamental laws, see Melissa Schwartzberg, 'Rousseau on Fundamental Law', 51(1) *Political Studies* 387 (2003).

The second solution was addressed to states so large that even multiple assemblies would not be enough to allow for the direct participation of all citizens. In those states, the people had no choice but to exercise their constituent power with the assistance of a "representative" body. As he noted in 'Considerations on the Government of Poland': 'One of the greatest disadvantages of large states, the one which above all makes liberty most difficult to preserve in them, is that the legislative power cannot manifest itself directly, and can act only by delegation'.[125] But in order for that situation not to amount to a form of slavery, it was necessary for delegates to be strictly bound by the instructions of their constituents. [126] He thus referred to 'the negligence, the carelessness and, I would even venture to say, the stupidity of the English nation, which, after having armed its deputies with such supreme power, has added no brake to regulate the use they may make of that power through the seven years of their mandate'.[127] The way in which those instructions would be transmitted to representatives is not made clear by Rousseau. However, it should be noted that at the time he was writing, there was a debate in Great Britain about whether communications (signed by the electors of particular constituencies) directing individual members of parliament to vote in particular ways should be legally binding.[128]

V. Conclusion

Even though Rousseau's political writings hardly figure in discussions about constituent power, a close reading of his work shows that he not only advanced a clear distinction between constituted and constituent power, but provided different institutional alternatives to facilitate the exercise of the latter. Rousseau was, I have attempted to show, speaking about constituent power all along. However, is there something that we can learn from Rousseau that we can't learn from Sieyès or, for that matter, from Locke? The answer to that question, I think, is a resounding 'yes'. First, Locke's distinction between the sovereign people and the ordinary institutions of government only has practical implications in the context of the original transition to civil society and in instances in which the government dissolves after seriously

[125] Rousseau, 'Considerations on the Government of Poland' *(*n 35) 16.
[126] Ibid 17. A similar point is made in the *Social Contract* after noting that sovereignty cannot be represented: 'The deputies of the people, therefore, are not and cannot be its representatives: they are merely its stewards, and carry through no definitive acts'. Rousseau (n 14) 263.
[127] Rousseau, 'Considerations on the Government of Poland' (n 35) 17.
[128] For a discussion, see Joel I. Colón-Ríos, 'Five Conceptions of Constituent Power', 130 *Law Quarterly Review* 306-336 (2014) 318-323. This debate reached its highest point in the election of 1774. It was in that context were Edmund Burke wrote his famous letter negating the binding character of constituent instructions. Edmund Burke 'Speech to the Electors of Bristol' (3 November 1774), *The Works of the Right Honourable Edmund Burke*. 6 vols. (London: Henry G. Bohn, 1854-1856) vol. 1, 446-448.

breaching the social contract. That is to say, even if the people is sovereign, Locke insisted that it could not be considered as such 'under any Form of Government,' because 'this power of the people can never take place till the government be dissolved'.[129] Not surprisingly, Locke did not propose any mechanism for the periodic exercise of the people's sovereign power.

Second, despite attempting to put some of Rousseau's ideas into practice and despite the undeniable value of his contributions to political thought, Sieyès arguably made too many concessions to the principle of representation.[130] Unlike Rousseau, he readily accepted the idea that constituent power could be represented. For Sieyès, '[s]ince a great nation cannot in real terms assemble every time that extraordinary circumstances may require, it has, on such occasions, to entrust the necessary powers to extraordinary representatives'.[131] Although Sieyès insisted that such representatives would be acting 'by virtue of an extraordinary commission from the people', he thought that 'their common will has the same worth as that of the nation itself'.[132] Accordingly, in 'What is the Third Estate?', there is no discussion of any specific mechanisms, such as citizen instructions or direct popular ratification, designed to control the power of extraordinary representatives. Murray Forsyth has thus written that one of the components of 'Sieyès' representative system was the idea that no elected occupant of representative office could be bound by an imperative mandate'.[133] Sieyès, Forsyth maintains, 'rejected the idea of instruction completely'.[134]

Sieyès' views on popular ratification of important constitutional changes are more ambiguous, and while some authors maintain that he in fact argued in favour of the popular ratification of the Constitution of 1791, it is not entirely clear that that was in fact his position.[135] In any case,

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[129] Locke (n 76).
[130] This does not negate the arguably participatory character of some of Sieyès' other proposals. See for example Marco Goldoni, 'At the Origins of Constitutional Review: Sieyès' Constitutional Jury and the Taming of Constituent Power', 32(2) *Oxford Journal of Legal Studies* 211-234 (2012).
[131] Sieyès, 'What is the Third Estate' (n 1) 139.
[132] Ibid.
[133] Forsyth (n 3) 130-131.
[134] Ibid 131.
[135] Lucien Jaume, for example, maintains that Sieyès insisted that the constitution of 1791 was submitted to popular ratification. Jaume, 'Constituent Power in France: The Revolution and its Consequences' in *The Paradox of Constitutionalism* (n 5) 70. Nevertheless, the text in which he appears to rely, (a passage in *Préliminaires de la Constitution*), was perhaps not a call for a referendum, but for a new constituent assembly elected with the specific purpose of adopting a new constitution: '[E[t portant, comme la représentation actuelle n'est pas rigoureusement conforme à ce qu'exige une telle nature de pouvoir, ils déclarent que la constitution qu'ils vont donner à la Nation, quoique provisoirement obligatoire pour tous, ne sera définitive qu'après qu'un nouveau pouvoir constituant, extraordinairement convoqué pour cet unique objet, lui aura donné un consentement que réclame la rigueur des principes'. Emmanuel Sieyès, *Préliminaires de la Constitution. Reconnoissance et Exposition Raisonnée des Droits de l'Homme et du Citoyen* (20-21 July 1789) 3. See also Forsyth (n 3) 102.

Sieyès might have been correct that neither the right to instruct representatives nor (perhaps) direct popular ratification (through referenda or citizen assemblies) is necessary or desirable for a proper exercise of constituent power. The point is, however, that in proposing those mechanisms, Rousseau was defending a *participatory* conception of constituent power that seems more consistent with contemporary democratic sensibilities (even if one thinks that an attractive institutionalisation of that conception would require mechanisms very different from those proposed by Rousseau). Such a conception would always be driven by the view that, even if the reality of large societies means that constituent power cannot be directly exercised by the people, the mechanisms that are used to exercise it should look as much as possible like instances of popular constitution-making.