

Rechtsgeschichte

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<http://www.rg-rechtsgeschichte.de/rg16>
Zitiervorschlag: Rechtsgeschichte Rg 16 (2010)
<http://dx.doi.org/10.12946/rg16/048-049>

Rg **16** 2010 48–49

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Constitution and Constitutional Law in Spanish America in light of the Bicentennial

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To reflect on Latin American constitutions and their current implementation is to remember the ever-present legacy of the Enlightenment and the French Revolution. Although during the 18th and early 19th centuries the former was adopted with great enthusiasm across the continent while the latter was widely rejected, in my opinion, their ideals permeate the attitudes of heads of state and the Latin American peoples, whether they are aware of it or not. The Enlightenment, in an undertone, and the Revolution, openly, stated that good laws – being guided solely by human reason (and the will of the people in the case of the Revolution) – not only reflected reality but were capable of changing it. If, on the one hand, a civilised country had good laws, on the other hand, good laws guaranteed the emergence of a civilised country. Many of the intellectuals of the time regarded law as a remedy for society, serving as an antidote to the chaos they criticized. Mistaking legal for social changes, French legislators guaranteed (legal) equality without proceeding to guarantee its (social) implementation, and set up assemblies that allegedly represented the will of the people, *inter alia*, through the exclusion of anyone who may oppose their actions or whom they considered unworthy of participation.

In the 18th and 19th centuries, it was believed that society was a *tabula rasa*, i. e. that it could be rebuilt from scratch, with reason as its sole guide. And since human reason was one and common to everybody, the revolution could – even should – be exported to other countries. Despite its local features and circumstances, this was a movement with universal aspiration, aspi-

ration entailing not only prestige but also responsibility (the »education« of others).

All of these legacies are present in many of the current constitutional debates in Latin America. In spite of post-modernism and post-colonialism, the belief in the power of law, or at least of the Constitution, as a remedy for society and the state is widely held in many countries of the region, where political reforms – particularly those appearing as revolutionary – (almost) always are expressed through constitutional amendments. Nevertheless, though the Constitution is presented as the remedy, as was the case with French revolutionaries, legal reforms rarely translate into social, political or economic changes. As mere declarations of principles and aspirations, Latin American constitutions promise far more than they can achieve, partly due to the lack of legislation or resources guaranteeing their actual implementation, and partly because they are considered, above all, rhetorical and political instruments. Finally, since the 1990s, constituent assemblies pretending to be original and plenipotentiary, whose mission has been to re-design the state, have been convened in Latin America. However, the determination to return to an initial (pre-social?) state and to a legal *tabula rasa* that had failed in the late 18th and early 19th centuries has also proved unsuccessful in the present. Although endorsed as truly democratic for guaranteeing the predominance of the »will of the people« above legal and social tradition, they are no more than a dream (or a nightmare, according to the beholder). Besides, at this point in time, it is clear that human reason is not

universal; each nation has its own history, traditions and challenges. No matter how much we try to export solutions from one country to another, universal principles can only be applied successfully if adapted to local conditions and needs.

These lessons are well-known, and, yet, they are ignored. This is due, in part, to the fact that resorting to the Constitution is viewed as a symbolic and rhetorical act. A clear and unequivocal message is sent to the members of society: the amendments sought are significant, even essential, for which reason they must be included in the document – the Constitution – that enshrines the social contract founding the state and providing it with legitimacy (not just legality). If a true change is impossible and the mechanisms are inadequate, at least there is an attempt to ceremoniously break with the past. One might wonder, however, why and how the Constitution was able to gain so much prestige as to justify this use and when this prestige will expire (or why has it not expired already) with the proliferation of constitutions and constitutional amendments.

More than two centuries ago Bolívar stated that governing the Americas was like plowing the sea. Latin American constitutionalism, as it has developed in many – albeit not all – of the countries in the region, demonstrates that the level of instability and conflict so typical of the 19th century is still present. Neither the government nor the law (or the Constitution) can put an end to this situation. After all, the law is a field of action: it requires players ready to obey certain rules, but it does not promise or guarantee results. What it actually does, and maybe this is the reason for its great appeal to current politicians and heads of state, is to provide legitimacy to what may have otherwise been rejected.

History has been conspicuously absent from all these debates. No matter how many references are made to the past, or how often it is named or mentioned, few people seem interested in learning from it, and maybe rightly so. After all, the fate of all constitutions is tied to the development of the social order they represent.

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