

# POPULAR SOVEREIGNTY AND CONSTITUTIONAL CONVENTIONS

## SOBERANÍA POPULAR Y CONVENCIONES CONSTITUCIONALES

### SOBERANIA POPULAR E CONVENÇÃO CONSTITUCIONAL

*Roberto Gargarella\**  
*Universidad de Buenos Aires*

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#### Summary

This article provides an insight about the constitutional conventions and their connection with the concept of popular sovereignty. The author states that the constitutional conventions require a high degree of legitimacy in order to make institutional changes possible, and thereof constitute as a tool that can transform the institutional capacities of the State. On this regard, he defends the conception of democracy and argues that it is crucial to promote debate and impartiality, and to achieve decisions that will affect everyone's interest. He starts by highlighting the importance of social struggles and its impact in constitutional reforms, arguing that they have a high potential of transforming particular social structures and entrenched injustices. He explains then the debate about mixing different constitutional visions by the importation-reception of institutions and jurisprudence from other countries, as well as the inherent value of these types of operations. Finally, he addresses the topic of pluralism and how constitutions should accommodate the claims of different groups and individuals; for this purpose he provides some detail about the historical responses considered by constitutionalism such as: *synthesis, accumulation, inaction and imposition*.

**Key words:** Constitutional Conventions; Pluralism; Sovereignty; Democracy, Reform.

#### Resumen:

Este artículo proporciona una visión sobre las convenciones constitucionales y su conexión con la noción de la soberanía popular. Señalo que las convenciones constitucionales requieren un alto grado de legitimidad para hacer posibles cambios institucionales y así constituirse en una herramienta que pueda transformar las capacidades institucionales. Para ello, defiendo la concepción de la democracia y sostengo

que es indispensable promover el debate y la imparcialidad para la toma de decisiones que afectan al interés de todos. Empiezo poniendo de relieve la importancia de las luchas y su impacto en las reformas constitucionales, argumentando que tienen un alto potencial de transformar determinadas estructuras sociales e injusticias arraigadas. Posteriormente, explico brevemente el debate acerca de la mezcla de diferentes visiones constitucionales ya sea mediante la importación-recepción de instituciones y las decisiones judiciales de otros países, y el valor inherente que este tipo de operaciones implica. Por último, hablo de pluralismo y cómo las constituciones deben adaptarse a las demandas de los diferentes grupos e individuos; para este fin proporciono algunos detalles sobre las respuestas históricas provenientes del constitucionalismo tales como: la síntesis, la acumulación, la inacción y la imposición.

**Palabras clave:** Convenciones constitucionales; Pluralismo; Soberanía; Democracia; Reforma.

#### Resumo

Este artigo proporciona uma visão sobre as convenções constitucionais e sua conexão com a noção de soberania popular. Ressalto que as convenções constitucionais exigem um alto grau de legitimidade para fazer possíveis mudanças institucionais e, assim, tornar-se uma ferramenta que pode transformar as capacidades institucionais. Para este fim, apoio a concepção de democracia e sustento que é indispensável promover o debate e a imparcialidade para a toma de decisões que afetam o interesse de todos. Inicio destacando a importância das lutas e seu impacto nas reformas constitucionais, argumentando que têm um alto potencial de transformar certas estruturas sociais e injustiças arraigadas. Posteriormente, explico brevemente o debate sobre a mistura de diferentes visões constitucionais, quer seja por importação-receção de instituições e

\* Abogado y sociólogo por la Universidad de Buenos Aires; Máster en Ciencia Política por la Facultad Latinoamericana de Ciencias Sociales (Argentina); Doctor en Derecho por la Universidad de Buenos; Master of Laws (LL.M.) y Doctor en Jurisprudencia (J.S.D.), ambos por la University of Chicago Law School. Cursó sus estudios postdoctorales en el Balliol College, Oxford. Actualmente es Profesor en la Universidad Torcuato Di Tella y en la Universidad de Buenos Aires. Además, es director de la Revista Argentina de Teoría Jurídica.

decisões judiciais de outros países, e o valor inerente que tais operações implicam. Finalmente, falo sobre pluralismo e como as Constituições devem adaptar-se às demandas dos diferentes grupos e indivíduos; para este fim proporciono alguns detalhes sobre as respostas históricas provenientes

do constitucionalismo, tais como: a síntese, a acumulação, a inação e a imposição.

**Palavras chaves:** Convenções constitucionais; Pluralismo; Soberania; Democracia; Reforma.

I shall take, as my starting point, the claim that there should be an intimate connection between the notion of popular sovereignty and Constitutional Conventions. The assumption is that we, as members of a community, use Constitutional Conventions in order to define the fundamental institutional aspects of our life in common. As a consequence, it is absolutely necessary that we take a decisive part in those events, under the assumption that “what affects all should be decided by all.” More precisely, and as result of the particular conception of democracy that it is here defended, I assume that a broad and inclusive debate is a crucial condition for obtaining decisions that are properly respectful of every person’s fundamental interests. Similar decisions may, eventually, be obtained through other means, and broad and inclusive debates may, occasionally, be conducive to improperly biased decisions. However, the assumption is, first, that there is no better way to maximize the chances of deciding impartially than through a broad and inclusive debate, and second, that impartiality is simply indispensable if we talk about a Constitution understood as a “compact among equals.”

In the study of Constitutional Conventions, I would first stress two main features that I associate with them. First, Constitutional Conventions need to have a *very special legitimacy* in order to be able to carry out fundamental institutional changes. So, that special legitimacy provides the ‘key’ that is necessary to make fundamental institutional changes possible. That special legitimacy, then, provides Conventions with *very special* -actually unique, unmatched -*institutional-transformative-capacities*.

The presence of these elements helps explain the conflicts that tend to arise in connection to Constitutional Conventions: Conventions that declare themselves “sovereign”; Conventions that

claim to have more powers than the incumbent government and act in consequence; governments or political groups that try to coopt the Convention; assaults upon Conventions; the use of force (even military force) against Conventions; etc. etc.

The extraordinary transformative capacities of Constitutional Conventions have also provoked a common and undesirable result: in many occasions, the two mentioned elements are decoupled in ways that we get extraordinary powers without extraordinary legitimacy. To state it more precisely, we get Conventions that claim to have extraordinary capacities for promoting institutional changes, but at the same time lack the extraordinary legitimacy needed to get the key to institutional changes.

This rupture between legitimacy and powers seems a typical fact of contemporary political life, given the way in which people have lost their republican capacities to “decide and control” in issues that are of utmost public importance. There is an assault upon representative institutions that also –if not mainly– tends to affect the most relevant representative bodies. Members of Constitutional Conventions, which are in need of a special legitimacy (given their public ambitions), usually obtain their legitimacy from common general elections. In this way, the actual legitimacy of members of Constitutional Conventions does not seem to be different, less superior, to the legitimacy of public officers, elected after general elections. In spite of this, elected representatives in a Convention claim to have superior attributes and dare to take, or threaten to take, extraordinary measures from their public posts.

The point makes it necessary to recall Bruce Ackerman’s precise intuition about the distinction between *constitutional moments* and *normal politics*. Ackerman calls our attention about the special

legitimacy of constitutional moments (Ackerman 1991). What is special about those constitutional moments is not the fact that they are the product of certain formal procedures, but rather that they are the product of and express a broad, intense process of popular mobilization and political activism. This is what makes constitutional moments so different from normal politics, and what gives them special legitimacy and special powers. This view about legitimacy is particularly appealing for those of us who defend a strong conception of democracy: legitimacy becomes thus connected with processes of inclusive public discussion and intense popular

mobilization, rather than with formal amendment procedures. This approach restores rationality and reasonability to the discussion around constitutional reforms.

For these reasons, those of us who favor large and profound constitutional reforms need to advocate for different kind of Constitutional Conventions, this is to say Conventions whose legitimacy is not merely based on formal legal procedures, but rather on their representative character, their diversity, their inclusiveness, their tight links with civil society, and the intensity and transparency of their public debates.

## DIFFICULTY AND IMPORTANCE OF CONSTITUTIONAL REFORMS

Herein, I shall defend the importance of constitutional reforms, as a means for favoring certain social changes and prevent the institutional system to work in favor of the preservation of entrenched injustices. To state this does not commit us to assume a simplistic view about the transformative capacity of legal reforms: it is not that by merely changing the law, we change reality. The point is rather the opposite: we should not neglect or misuse the limited transformative capacities of legal reforms.

Reforms are particularly important in contexts characterized by profound injustices: they may ensure legal protections to seriously disadvantaged groups and provide them with tools that may help them fight for their rights. In a recent work, Jon Elster has established that the majority of constitutional reforms emerge in times of crisis, which we may associate with the existence of profound social injustices and distress (Elster 2014). But, it should be added, precisely in those situations it seems particularly difficult to promote a meaningful reform, this is to say one with the capacity of challenging and modifying the prevalent injustices. And this is so for some rather obvious reasons.

The main reason I am thinking about is that, very frequently, reform-processes become in charge of the same people/group/class that are benefiting from the existent injustices. Obviously, if the reform has to be designed by the same individuals that may be affected by them, one should expect either improper

blockages or a biased reform that left some of the prevalent injustices unaffected. Presumably, those difficulties would become larger the more those injustices are entrenched -the more the institutional system is contaminated by them. Those biases and obstructions may appear during the drafting of the Constitution, but also during its implementation process.

Similar problems appear when the desired reform is directed to modify exactly part of the same institutional system that needs to get involved in the reform process. Typically, this is what has happened in Europe, after the numerous initiatives directed at remedying the so-called “democratic deficit” that affected the regional political organization. And this is also what happened in Latin America, after the numerous initiatives that appeared in the 1980s, directed at drastically reducing the powers of the President: those reforms were, in the end, blocked or diluted by the same Executive Powers under attack.

Of course, nothing that I said so far should be taken as an argument against constitutional reforms. Just the opposite: being aware of the level of the existing difficulties should make us also conscious about both the dimension of the required changes, and the amount of energies required by a serious process of constitutional reform. Clearly, the enormous motivations needed for carrying out a significant process of change do not appear magically -they cannot emerge from nowhere. Perhaps, the

perspective of substantive constitutional changes is only reserved to extreme social situations. In the history of Latin American constitutionalism, the more radical initiatives for constitutional reform appeared and were developed in situations of dramatic social distress: think about the Constitutional Conventions

of Ayala 1911 and Aguascalientes 1914, in Revolutionary Mexico (which would finally adopt its National Constitution in 1917); or -contemporarily- the different initiatives for constitutional reform in Bolivia, under the aboriginal leader Evo Morales.

## CONSTITUTIONAL MIXTURES, TRANSPLANTS AND GRAFTS

The discussions about ‘transplants’ in juridical material -referring to the possibility of ‘grafting’ ‘foreign’ institutions onto an existing constitutional body- calls our attention about the possibility of mixing different constitutional visions, and suggests the presence of strong tensions susceptible to being unleashed at the moment that the ‘graft’ or the ‘reception’ of the ‘foreign’ ideas or initiatives occurs.

The concept of ‘transplants’ has been studied from different perspectives in all of its variations. In any event, the discussion has basically tended to focus on two aspects of the issue: the importation of institutions or reception of judicial decisions from other countries, and the inherent value of these types of operations.<sup>1</sup>

The discussion about legal transplants and grafts has sometimes been improperly contaminated, with arguments that I shall not consider but mention, given their historical importance: very frequently, debates on the issue centered on the defense of nationalist values and the wrongness of ‘importing’ institutions from other countries.

The noted independence leader Simon Bolívar, like many others, repudiated the opposition’s fascination with the “exaggerated maxims of the rights of man,” maxims that he discredited because of their importation from France (Bolívar 1976, 12). Nevertheless, his insistence on localism did not get very far; all of the Bolivian constitutional projects were based either on English conservative constitutionalism or on Napoleonic authoritarian constitutionalism. Similarly, in Colombia, Miguel Antonio Caro and Ospina Rodríguez also rejected the importation of French ideas in the name of

nationalism. However, their claims for localism appear to be based, instead, on reactionary Hispanicism and Catholicism (Gargarella 2014). In the end, it was less a theoretical dispute than a politically opportunistic one, destined to disqualify, rather than discuss, the proposals of the opposition.

That said, nevertheless, it is necessary to add that at least one version of the discussion about ‘transplants’ and ‘grafts’ holds attractions for the purpose of considering the strengths and limitations of regional constitutionalism. This discussion is premised on the following general hypothesis: regardless of their origin, some grafts tend to be innocuous while others are not, depending on the bonds of kinship (the ‘genetic links’) that exist between the grafted material, the institutions, and the receiving constitutional ‘body’.

In order not to transform the aforesaid into a tautological statement, we can imagine the following situation. Imagine three very different kinds of constitutional projects faced off, one conservative (politically elitist and morally perfectionist), another liberal (anti-statist, defending checks and balances and moral neutrality), and the third radical (politically majoritarian and morally populist). Then, one might expect that many of the imaginable ‘interfaces’ between one project and another would be destined to failure or require that one of the projects yield to another. Historically speaking, liberals and conservatives, for example, were able to come to terms and collaborate on the drafting of many constitutions, due to the fact that the projects coincided greatly on many issues (both repudiated political majoritarianism, both proposed a firm defense of property rights, both

<sup>1</sup> Good discussions about the ‘value’ of importation, can be found in the *International Journal of Constitutional Law* (2003, vol. 1, n. 2); Tushnet (1999); Ackerman (1997); Kennedy (1997); Rosenfeld (1997); Ferejohn (1997); Balkin & Levinson (1998).

agreed, with little difficulty, on the implementation of anti-statist political economies) but, nevertheless, in everything related to religion, they were largely forced to smooth over their differences.

In many occasions, however, the combination between different constitutional models failed, or went through serious problems. And these difficulties were facilitated by at least two main factors: first, the importance of the differences between the projects at stake, and second, the fact that one of those models was already entrenched, and the other (or, more properly, institutions related to the latter model) were irresponsibly incorporated to the former, as 'grafts'. By 'irresponsibly' I mean incorporated without any serious consideration regarding the prevalent, existing institutions, and the 'resistance' they could offer before the incorporated 'novelties'.

In my opinion, this second case explains one otherwise inexplicable event in the history of constitutionalism, namely the apparition of 'social rights' and the difficulty they faced to become enforced by judicial authorities. The fact is the following: since the beginning of the 20<sup>th</sup> Century, numerous Western countries began to (sometimes massively) incorporate social rights into their Constitutions. However, during more than five decades, those rights became almost 'dormant clauses' and were treated as non-enforceable, second-class rights. Surprisingly or not, this fact took place in different countries, under different circumstances, at different times, and in spite of the important place that those rights occupied in the reformed Constitutions. How could this generalized phenomenon be explained? How could it be possible in countries that modified their Constitutions once and again and always insisted on their choice of social rights, and expanded the list of adopted social rights? One possibility to start explaining this phenomenon is through the idea of a 'failed' or improper 'graft'.

Take, for instance, the case of Latin America, this is to say a region that became noted because of the force of its constitutional commitment to social rights. Social rights arrived to the region early (since the Mexican 1917 Constitution) and since then they expanded in all countries, in all different Constitutions, during years. Those rights, however, were usually incorporated into 'hostile' constitutional bodies, modeled under the influence of liberal and conservative ideas, which seemed to be well-prepared to resist the 'arrival' of 'foreign', strange, alien 'grafts'. The 'receiving body', genetically linked to the liberal-conservative project, proved well prepared to rebuff the 'importation' of these foreign entities, leaving them in the hands of judges and courts. As expected, these latter did not recognize the significance of these new rights, to which they habitually ascribed the status of programmatic rights or secondary rights.<sup>2</sup> A similar story can be told regarding the introduction of 'participative clauses', above all during the prominent *second wave* of constitutional reforms in the 20th century.<sup>3</sup> To simplify a long story, if mechanisms 'promoting civic participation', like the plebiscite and referendum, are able to undermine the authority of existing parliaments, and these, in turn, remain (constitutionally) in charge of defining or promoting these very same participatory mechanisms, then there is small hope for the fate that shortly awaits these clauses.

What is being claimed here is that the 'insertion' of new rights or new institutions into strong, well-established 'bodies' requires a very special attention, so as to avoid the 'rejection' of the 'grafts'. One has to expect resistance and hostility from the institutions at place, particularly when those institutions and the elements that are going to be 'inserted' belong to different bodies or constitutional models. One cannot simply 'implant' cells from one body into a different one, assuming the compatibility between the two, or neglecting the capacity of the prevalent body to resist the incorporation of 'strange' cells.

2 How could one expect that judges, especially, would have any particular sensitivity to the interests of the most disadvantaged [classes], given the gulf -geographic, economic, and social- that isolates them and the close-knit bonds that the judges develop with the most powerful sectors of society? Judges and [legal] theorists, for their part, created special categories in order to directly render ineffective and drain these reforms of all vitality, assuring their relegation to the waste-bin. But, are these results in any way surprising? Could one expect any other reaction from the Judicial System? Its select members selected, endowed with the gift of stability, and characterized by the homogeneous background which is their trademark?

3 Beginning with the second wave, there were reforms in Ecuador, in 1978; in Chile and Brazil, in 1989; in Colombia, in 1991; in Paraguay, in 1992; in Peru and Bolivia, in 1993; in Argentina, Guatemala and Nicaragua, in 1994.

## HOW SHOULD THE CONSTITUTION DEAL WITH THE FACT OF PLURALISM?

In his book *Political Liberalism*, John Rawls called our attention about the fact that modern societies have become so complex that we can no longer expect everyone to share the same values and ideals. People tend to disagree -and to disagree profoundly- concerning their “conceptions of the good,” this is to say their more or less comprehensive religious, philosophical and moral beliefs. In his words, modern democracies are characterized by the *fact of pluralism*, where pluralism is a reasonable one, meaning that even though people disagreements are serious, they are very often based on genuine convictions. We then have profound disagreements among reasonable persons (Rawls 1991, 22-9). From a different perspective, and more concerned with legal issues, Jeremy Waldron has also been referring to -what he considers being- a fundamental characteristic of modern societies, namely the *fact of disagreement*, meaning that is a crucial fact that we profoundly and reasonably disagree about significant moral issues (i.e., about abortion, the personal consumption of drugs, etc.), and at the same time we want to continue living together (Waldron 1999).

The fact of pluralism is not something new, but rather something that has been characterizing our societies for a very long time. Perhaps, we became aware of this fact in the last decades, through the growing political importance of multicultural claims and multicultural studies. But the recognition of profound political and philosophical disagreements seems to be a distinctive fact of modern constitutionalism. This is, for example, how James Madison presented the issue in his famous *Federalist Paper* No. 10, when he examined the problem of factions:

The latent causes of faction are thus sown in the nature of man; and we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society. A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for pre-eminence and

power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good.

The problem, for Madison, for Rawls, and for all those in our times still interested in constitutional issues, has been the same, namely how to deal with such profound and still reasonable differences. How to accommodate the reasonable although in some cases opposite claims of different groups and individuals? The responses varied, in the history of constitutionalism, in some occasions depending on the relative political strength of the different groups (a fact that in numerous cases sufficed to explain the legal responses that were then adopted), but also in relation to the imagination and the different understanding and legal conceptions of the different groups. In what follows I shall mention four different responses to the problem of pluralism that we find in legal history, namely *synthesis*, *accumulation*, *inaction* and *imposition*.

The first response, *synthesis*, is related to the Rawlsian idea of an *overlapping consensus*, where different groups support a common solution for different reasons (reasons that are internal to their own favored comprehensive views). To find a synthetic agreement that all can share requires from each part an effort to leave aside or put between brackets some relevant aspects of its own claims. The second response, *accumulation*, appears when the different parts -finding it too difficult to reach a common agreement- decide to simply sum or put together (one on the top of the other) their different claims, leaving these claims totally or almost totally intact. The third response, *inaction*, appears when the different groups in charge of the reform cannot find a way out to their disagreements, so they decide to “leave things undecided” (Sunstein 1999, 3). The final response that I shall explore, namely *imposition*, implies that one of the involved groups manages to

enforce its own will thus displacing the demands of the rest.

- i. We find an interesting example of the first response -synthesis- in the U.S. initial constitutional debates concerning religion. The issue of religion was one of the most divisive matters among different groups, during the “founding period.” Previous to the Constitution, the prevailing looked like one of dire imposition: there was religious establishment in New England with the Congregational church, and in the South with the Anglican Church. Different sects, who had suffered from religious persecution in England, were now making pressure for the advancement of their own views, through the use of the State coercive powers. In the end, however, most social groups accepted a non-establishment clause (that was first accepted in Virginia and then incorporated into the Constitution),<sup>4</sup> because of entirely different reasons, including self-protection; reciprocity; tolerance; secularism; etc. not surprisingly, the case of the First Amendment represents perhaps the main example guiding Rawls’ reflections on public reason, state coercion and the overlapping consensus.
- ii. A good example of the second response -accumulation- appears in Argentina’s influential 1853 Constitution -which represents a typical case of how numerous Latin American countries dealt with the claims of opposite groups. At the time, in Argentina, as in many other Latin American countries, liberal and conservative groups confronted each other violently, over a number of issues. Two of these issues were then particularly important: religion and the powers of the Executive. Concerning the first issue, liberals favored religious tolerance, while conservatives proposed religious imposition. Concerning the second issue, liberals proposed a system of checks and balance, while conservatives preferred the creation of an overtly powerful Executive.

In the face of those conflicts, Argentina’s 1853 Constitution (which was the result of a compact between the two groups) decided, first, to provide a special status to the Catholic Church, through article 2 of the Constitution (“The Federal Government supports the Roman Catholic Apostolic religion”), and at the same time to declare religious tolerance, through article 14 of the Constitution (“All the inhabitants of the Nation are entitled... to profess freely their religion”). Second, and concerning the organization of powers, the Constitution established a system of checks and balances, which closely followed the U.S. model, and at the same time ensured special prerogatives to the President (related to the declaration of a *stage of site*, or the intervention into the affairs of local states), following the authoritarian Chilean Constitution of 1833. Even though the solutions implemented by Argentina’s 1853 Constitution were, in those respects, rather awkward, the fact is that they represented well the strategy of accumulation that most Latin American Constitutions adopted at that time.

- iii. There is an example of the third kind of response -inaction- in the Mexican constitutional debates of 1857. The two longer and more heated debates, during that Convention, referred to two issues: the adoption of a jury system; and religious tolerance. And it was in the second of those cases, where the delegates decided to go for inaction. The issue of religion was particularly pressing in the light of the enormous privileges enjoyed by the Church and the time, which moved many liberals to reject any initiative aimed at ratifying the unfair advantages that it had acquired during so many years. For instance, the delegate Zarco, one of the most important figures of the Convention, rejected the establishment of Catholic religion asserting -in contrast with his personal beliefs- that the role assumed by the Mexican church during all those years had been unacceptable. “[I]t has denaturalized Christ’s religion because

4 The First Amendment of the Constitution reads as follows: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances”.

it has declared itself the enemy of freedom; it has accumulated wealth impoverishing the country; it has deceived the people...it has defended privileges and money, disregarding the truths of Catholicism” (Zevada 1972, 38-9). In the end, however, liberals did not manage to ensure religious tolerance through the Constitution, given the differences that appeared not only with conservative representatives, but even within the liberal group. What the delegates decided to do, in the end -making it manifest the transactional character of the Constitution- was to *make silence* on the religious question, preventing, at least, the Constitution to become an *intolerant* document in this respect. They simply succeeded, in the end, in preventing the establishment of religious *intolerance*.

- iv. The response based on legal imposition was the most common among Latin American conservatives, during the 19<sup>th</sup> Century. During that Century, and particularly during the first half, numerous conservative groups managed to gain control over politics and enact their favored Constitutions, which unmistakably reflected their main concern: the decay of morals in the region. One of the most extreme examples in that respect was the 1823 Chilean Constitution, written by the conservative jurist Juan Egaña. Egaña and his Constitution were enormously influential in Chile and, most generally, in the region, in spite of the fact that the peculiar Constitution of 1823 was short-lived<sup>5</sup> Egaña’s Constitution included a strong executive which, in Egaña’s opinion, controlled “the entire administration, without the interference of the legislature, which has to enact only a few general and permanent laws and which will meet only after long intervals and during a very short time” (Silva Castro 1969, 86-7).

One of the president’s main functions was that of enforcing Catholic religion, which was established

as the country’s official religion. Also, and in order to ensure the imposition of the official religion, the Constitution created a “conservative Senate” in charge of controlling the “national morality and habits” and, more radically, accompanied its text with a substantive “Moral Code,” directed at regulating the moral life of Chile’s inhabitants even in its smallest details: in Egaña’s opinion, the “Moral Code” represented the highest and most meditated expression of his life-long theoretical reflections on morality.

The first part of the code was dedicated to religion and the need for protecting it (it regulated, for example, the way in which to celebrate the church’s public festivities as well as the relationships between the individuals and their confessors). In its second part, the code analyzed the family, its composition and the relationship among its members (it made reference to personal attitudes and behaviors including ingratitude, vanity, denigration, or the abandonment of ones’ parents). Its third part was related to education, which played a central role within Egaña’s project.

The code regulated the use of alcohol; provided for strict parameters to follow during private and public ceremonies; and established the prohibition of circulating pamphlets and leaflets without the previous authorization of a group of censors. The code also included strict sanctions against those citizens who “created political parties and frankly displayed their opinions, or those who gathered in public places”<sup>6</sup> Extreme as it was, the Code was very influential among Latin American conservatives: Simon Bolívar proposed a similar institution (he called it the “Moral Power”) in his famous *Letter from Jamaica* and in the Angostura Congress of 1819, without much luck.<sup>7</sup> Ecuador’s autocratic (for many, ‘theocratic’) president Gabriel García Moreno also advanced -but this time, successfully- a ‘moralizing’ plan, enforced by the State’s coercive powers, including a vast web of spies, who were in charge of controlling even the most private aspects of each

5 For instance, the Constitution became the main antecedent of the 1833 Chilean Constitution (in whose writing played a crucial role Egaña’s son, Mariano Egaña, and through him, the same Juan Egaña). The 1833 Constitution would become the most durable Constitution in Latin America’s 19th Century.

6 *Ibid.*, pp. 637-38.

7 In a letter to José Rafael Arboleda, from June 15th, 1823, Bolívar thanked Arboleda for his (rather isolated) defense of this new branch of power. See Bolívar (1937), vol. 1, p. 382.



person's life. The president was proud of the system that he enforced, because it allowed him to control all possible excesses. "I am alert, -he maintained- I have a system of spies and inspire fear [to my enemies]."<sup>8</sup> García Moreno imposed strict penalties to those

denounced by his agents, without much attention to the rights of the accused and to questions of due process, in general. The Constitution he promoted in 1869 came to legitimize his view and, thus, the consecration of the Ecuadorian State to Catholicism.

## FINAL WORDS

In the former pages, we examined some basic issues related to Constitutional Conventions, which may help us reflect on their possibilities and limits.

Still, however, we need to know and think much more, about an issue of primary importance in the life of our constitutional democracies.

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<sup>8</sup> Carrión (1959), p. 437.

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