

Original Latin American Constitutionalism

I. A tale of some origins

In 1811, the Articles of Confederation of the United Provinces of New Granada, later called Great Colombia (*Nueva Granada* or *Gran Colombia*) set forth the transfer, from the Provinces to the Union, of »the no-body lands« in conjunction with »all the lands that may be considered nullius for being uninhabited« already allotted to the Federation. The significance of lands being barren and uninhabited is dubious since the provision continues, »this shall cause no dispossession, vexation or offence whatsoever to the wandering tribes or nations of uncivilised Indians that are located or have settled in those territories«. In the succeeding Article, the precaution follows »we will be able to enter into treaties and negotiations with them [the Indians] over these objects, protecting their rights with all the humanity and philosophy that their current imbecility requires, and in consideration of the ills already caused to them, without any blame on ourselves, by a conquering nation«. Such benevolence shall be maintained »unless their hostility forces us into a different course of action.«

Almost one month later, at the end of 1811, also within the greater New Granada, Venezuela sets up its own Confederation, but its Articles of Confederation adopt a different approach towards indigenous peoples. This constitutional document does not require the Provinces to transfer the territories with the annexed indigenous population, but, rather, to pursue a certain policy in this regard so that »those citizens that have been called Indians to date« may understand »the close link they have with all the other

citizens«, overcome »the despondency and rusticity to which the previous state of affairs has subjected them«, assert »the rights they are entitled to simply for being persons equal to all those of the very humankind«, and proceed to »distribute and title the lands that had been granted to them and which are in their possession, so that the said lands are divided on a *pro rata* basis among the family men of each town, who can dispose of them as true owners.« Additionally, from now onwards, without needing to wait for such integration into common citizenship through the privatization of property, »the laws that in the previous [colonial] Government granted certain protective courts and privileges of minors to the aforesaid naturals [Indians] are hereby repealed.« Specifically, for »those previously called Indians«, it is forbidden »to provide services against their will to coadjutors or priests of their parish.«

Thus, the Constitution of Great Colombia of 1821 ignores the presence of indigenous peoples as such, as is again the case with the 1830 Constitution of Colombia, which now stood alone. On the other hand, theoretically still within the Great Colombian Confederation, Ecuador contemplates Indians' presence in its Constitution of 1830. Under the heading »Civil Rights and Guarantees«, and as a final exception, the Ecuadorian provision prescribes as follows: »This Constituent Congress appoints the venerable parish priests as tutors and natural fathers to the Indians, invigorating their ministry of charity in favour of this innocent, abject and miserable class.« Thus, what Venezuela tried to constitutionally suppress in 1811, Ecuador enshrined in its Constitution of 1830.

2. Moral of the tale

There are more similarities than differences in this clearly Latin American tale, and this is true even between Venezuela and Ecuador. The first point in common is the constitutional presumption of territorial dominion over independent peoples to the extent of denying them the right to their own territory: *barren, nullius, uninhabited lands*. States establish themselves as if they had contiguous borders to one another while, at the same time, they recognise the existence of whole territories which in fact they do not control or which they even plainly ignore, and this is not deemed to undermine or impair their title, each State's title, to those territories.

There is another constitutional presumption in common, one evidenced in adjectives such as *wandering, uncivilised, imbecilic, despondent, rustic, minor, innocent, abject, or miserable*. Some of these adjectives were strict legal categories denoting a status or condition of degradation and subjection as long as the person were culturally indigenous. The Venezuelan threshold of common citizenship is in fact postponed. It requires losing the condition of indigenoussness, which loss is mainly manifested through the privatization of property and the implied disappearance of the indigenous community. For the moment, and for the whole tale, the suspension of all constitutional guarantees applies. Not even a strict title to ownership is recognised: *lands that had been granted to them and which are in their possession*. And there is room for wars of aggression in the event of resistance: *unless their hostility forces us into a different course of action*.

Considering all the elements in common, the differences, albeit striking, are incidental. Even though the possibility of entering into negotia-

tions with indigenous peoples by means of *treaties* is laid down, so-called Indians are always placed in a position of degradation and subjection to the power of the State in terms that do not always turn out to be transitory. Apart from that, we are witnessing a constitutional drive that proclaims its intention to recognise rights and the determination to provide guarantees by establishing powers for the sake of non-indigenous people as well as of indigenous people who had ceased to be Indian.¹

3. Lesson learned

What kind of constitutionalism combines the purpose of guaranteeing rights through powers with the additional intention of subjecting, without any guarantee whatsoever, part of the mankind it tries to reach, the indigenous part which was the majority at the time? A category of constitutionalism has already been coined to identify it: *colonial constitutionalism*, the one established to ensure settlers' interests and subsequent dominion through rights vested and guaranteed to just this sector of the population to start with. This category of colonial constitutionalism has been so far applied to the Americas, not still to the whole of them but to the United States and not taking into consideration indigenous peoples in the American continent but just the *federal territories*, i.e., territories without constitutional autonomy currently overseas.²

In other regions, there has been a more consistent use of the category *colonial constitutionalism*, specifically in India, the Asian subcontinent, where there is a research group, the Calcutta Research Group, headed by Ranabir Samaddar, which has turned the dependence on

1 BARTOLOMÉ CLAVERO, *Freedom's Law and Indigenous Rights: From Europe's Oeconomy to the Constitutionalism of the Americas*, Berkeley 2005. Given the nature of these pages, I hope the reader will understand and forgive my being self-referential and in addition expedient to conclude. The Spanish original is available online: <http://clavero.derechosindigenas.org/wp-content/uploads/2009/10/>

1810-originalidad-constitucional.pdf.

2 E. ROBERT STATHAM, *Colonial Constitutionalism: The Tyranny of United States' Offshore Territorial Policy and Relations*, Lanham 2002; complete and confront with GARY LAWSON and GUY SEIDMAN, *The Constitution of Empire: Territorial Expansion and American Legal History*, New Haven 2004.

British *colonial constitutionalism* into a key of the constitutional history of independent India itself. Thus, colonial constitutionalism is composed of a set of devices that was and may still be operational for the purposes of subjecting part of the population to conditions of dependence without due guarantees under a constitutional system, a system characterized precisely for providing them.³

Continuity between colonial times and constitutional times with respect to the development of constitutionalism itself is also becoming a key issue for the United States. There it is understood that colonialism lies in the relation between the British metropolis and the British colonies and not in the relation of the British people, in both the metropolis and the colonies, with the indigenous peoples of the Americas. In this context, the mordant of *colonial constitutionalism* is completely lost.⁴

No attempt to apply the most integral conception of the Calcutta Group in the Americas has been made yet. Obviously, it cannot be made just like that, even if for the fact that in the Hispanic case there was no metropolitan constitutionalism before the 1812 Cadiz Constitution that would extend to the colonial world. Nevertheless, the colonies had an institutional conglomerate of corporate pieces, jurisdictional articulations and cultural strata that were not effaced from the map because constitutionalism came into place.⁵ And this colonial network is the context where the constitutional Hispano-American project on dominion over the indigenous people manifested in the Great Colombian tale has been shaped and established.

Later on, for a certain time, Hispano-American Constitutions opted for discretion or silence on the presence of indigenous peoples, overlapping with the *colonial constitutionalism* that has

still not been completely discontinued. Constitutional discretion or silence on indigenous peoples is also a form of constitutional stricture. At the beginning, candidness was the original feature. At present, silence is over and loquacity is again the norm. It serves as a reminder of indigenous presence throughout constitutional history with a colonial background. In the Americas, colonialism, in short, is an integral element of constitutionalism, but an underhand one.⁶

4. And lesson to be learned

Historiography, more than history itself, has caused the colonial element to disappear from constitutional mapping. The tale of Great Colombia is the most explicit example to the contrary, but it is far from being the only one.⁷ It can serve as a laboratory trial to make up for experience. It is not necessary to resort to other cases to draw useful conclusions that do not prove hasty.

Constitutional historiography, rather than actual constitutional history, has built since independence a constitutionalism practically cloned from that of Europe and, as a result, a society substantially in line with its European counterpart. In so doing, historiography severs not just a member of the body allowing orthopaedics, but a vital organ bringing about death, i. e., the full fiction of a constitutional history, thus, all summed up, impossible.⁸

The constant presence of indigenous peoples throughout constitutional history, some of them independent for a long time while others still so to date, and others with autonomous communities keeping their own institutions, is not a forgotten element to be added now. This

3 RANABIR SAMADDAR, *The Materiality of Politics*, vol. I, *The Technologies of Rule*, London and Delhi 2007, 19: «Colonial constitutionalism was designed to reinforce the material aspects of colonial rule» and, for Samaddar, even of constitutionalism in itself.

4 DANIEL J. HULSEBOSCH, *Constituting Empire: New York and the Transformation of Constitutional-*

ism in the Atlantic World, 1664–1830, Chapel Hill 2005.

5 Istor. *Revista de Historia Internacional* 16 (2004): *Historia y derecho, historia del derecho*, ed. by CARLOS GARRIGA.

6 BARTOLOMÉ CLAVERO, *Geografía Jurídica de América Latina: Pueblos Indígenas entre Constituciones Mestizas*, México 2008.

7 *Pronunciamientos indígenas de las Constituciones americanas*,

ed. by BARTOLOMÉ CLAVERO (as of 2007), online: <http://www.alertanet.org>; to date, also online: <http://clavero.derechosindigenas.org>.

8 Regarding the case of the United States, BARTOLOMÉ CLAVERO, *Why American Constitutional History is not Written*, in: *Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno* 36 (2007) 1445–1547.

presence necessitates an amendment to constitutional historiography in depth and as a whole if it intends to be true history and not a complacent mirror of the supremacist obstinacy of

non-indigenous people, the old colonial people, in the Americas.

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