

Rechts **Rg** geschichte **g**

Zeitschrift des
Max-Planck-Instituts
für europäische
Rechtsgeschichte

Herausgeber
Thomas Duve

Redaktion
Kathrin Linderer

Rg **16** 2010

Debatte

Thomas Duve	16	Verfassung und Verfassungsrecht in Lateinamerika im Licht des <i>bicentenario</i> Einleitung zur Debatte
Walther L. Bernecker, Rüdiger Zoller	18	Mimesis und fehlender Konsens Anmerkungen zur Verfassungswirklichkeit in Lateinamerika
Natalio R. Botana	22	Los pactos constitucionales del Bicentenario
Bartolomé Clavero	25	Original Latin American Constitutionalism
Manuel Lucena Giraldo	29	Three Meanings of Liberty on the Independence of Spanish America
Horst Dippel	32	Braucht Lateinamerika einen neuen Konstitutionalismus?
Juan Fernando Segovia	35	Die Entkräftung des hispanoamerikanischen Konstitutionalismus
Joaquín García-Huidobro	40	Der schwierige hispanoamerikanische Konstitutionalismus
Tamar Herzog	48	Constitution and Constitutional Law in Spanish America in light of the Bicentennial
Delia M. Ferreira Rubio	50	The Constitution – Latin America 2010
Paola Rudan	52	Una storia impossibile Duecento anni di Stato e democrazia in America Latina
Francisco J. Andrés Santos	55	Zum Thema »Verfassung und Verfassungsrecht in Iberoamerika im Hinblick auf die Zweihundertjahrfeier«
Pablo Ruiz-Tagle	59	El constitucionalismo iberoamericano en su bicentenario

Debatte

Horst Pietschmann	62	Anmerkungen zum Thema »200 Jahre latein-amerikanische Verfassungen«
Andreas Timmermann	66	»Failed presidencies«? Zur Debatte um zwei Jahrhunderte Präsidialismus in Lateinamerika
Manuel Chust Calero	69	Die Verfassung von 1812 und der iberoameri-kanische Konstitutionalismus Ein Vergleich
Alfonso Santiago	78	Constitutionalism and Spanish-American Bicentennial Constitutional norms and social reality: Juan Bautista Alberdi's thoughts and Argentina's historical experience
Abelardo Levaggi	82	Three Matters Concerning Argentine Consti-tutional History
Santiago Legarre	85	A Departure from the Rationale behind the American System in the Argentine Constitution
Susana T. Ramella	88	Die Re-präsentation der Volksrepräsentation bei der Zweihundertjahrfeier der Mai-Revolu-tion in Argentinien
Alberto David Leiva	91	Sovereignty and Federalism as Constituent Elements of Argentine Nationality
Cristina M. Seghesso de López	94	De Charcas al Río de la Plata Cultura jurídica y élites políticas revolucionarias (1809–1810)
Airton Cerqueira-Leite Seelaender	97	Verfassung und Verfassungsrecht in Brasilien (1824–1988)

Debatte

- | | | |
|--|-----|---|
| Luis Ossio Sanjinés, Lorena Ossio Bustillos | 104 | Kontinuität und historisch-konstitutioneller Umbruch
Der Befreiungsprozess in Bolivien 1809–1810 aus heutiger Perspektive |
| Eric Eduardo Palma González | 108 | Die moralische Frage bei der Bildung des Verfassungsstaats
Chile im 19. Jh.: ein katholischer, liberaler Staat aus praktizierenden Regierenden und Bürgern |
| Natalia Sobrevilla Perea | 111 | In Search of a Better Society: Constitutions in Peru |
| Rubén Darío Salas | 114 | Die konstitutionelle Grammatik: ihre Aussichten in Iberoamerika |
| Roberto Di Stefano | 117 | Religion, Politics and Law in 19th Century Latin America |
| Massimo Meccarelli | 121 | Die neue Phase der Rechtsgeschichte in Lateinamerika und Ansätze für einen historiographischen Dialog mit Europa |
| Heinz Mohnhaupt | 126 | Europäische Blicke von Europa über Europa hinaus und zurück
Zur Wahrnehmung südamerikanischer Verfassungen im 18./19. Jahrhundert |

Recherche

- | | | |
|--------------------------------|-----|---|
| Thomas Duve | 132 | Das Konzil als Autorisierungsinstanz
Die Priesterweihe von Mestizen vor dem Dritten
Limenser Konzil (1582/83) und die Kommunikation
über Recht in der spanischen Monarchie |
| Ezequiel Abásolo | 154 | La militarización borbónica de las Indias como
trasfondo de las experiencias políticas revolu-
cionarias rioplatenses |
| Eduardo Zimmermann | 166 | »Die Härten des Krieges mildern«
Die Rolle der argentinischen Bundesjustiz bei den
Provinzaufständen 1860–1880 |
| Rodrigo Míguez Núñez | 190 | Republikanischer Staat und indigenes Land:
Die Erfahrungen in der Andenregion im
19. Jahrhundert |
| Jesús M. Casal H. | 212 | El constitucionalismo latinoamericano y la
oleada de reformas constitucionales en la región
andina |
| Fernando Martínez Pérez | 242 | Amparos posesorios e interdictos contra la
Administración
Cultura jurisdiccional y revolución burguesa en España |

Kritik

- Daniel Damler** 258 **Das Meer im Recht**
Jack P. Greene, Philip D. Morgan (Hg.), *Atlantic History. A Critical Appraisal*
John H. Elliott, *Empires of the Atlantic world. Britain and Spain in America 1492–1830*
Bernard Bailyn, *Atlantic History. Concept and Contours*
Horst Pietschmann (Hg.), *Atlantic History. History of the Atlantic System 1580–1830*
- Jorge Alberto Núñez** 267 **De Imperios Atlánticos, revoluciones y senderos que se bifurcan**
Jeremy Adelman, *Sovereignty and Revolution in the Iberian Atlantic*
- Luigi Nuzzo** 269 **Aspettando Geneva**
Bartolomé Clavero, *El Orden de los poderes. Historias constituyentes de la trinidad constitucional*
- Juan Ferrer** 272 **Una receta para la diversidad**
Daniel Bonilla Maldonado, *La Constitución Multicultural*
- Marta Lorente Sariñena** 275 **Entre la conquista y D. Benito Juárez, ¿la república?**
Annick Lempérière, *Entre Dieu et le Roi, la République. Mexico, XVIe–XIXe siècles*
- Sergio Angeli** 277 **Justicia penal**
Alejandro Agüero, *Castigar y perdonar cuando conviene a la República. La justicia penal de Córdoba del Tucumán, siglos XVII y XVIII*
- Francisco J. Andrés Santos** 279 **Juristas *On His Majesty's Service***
Enrique García Hernán, *Consejero de ambos mundos. Vida y obra de Juan de Solórzano Pereira (1575–1655)*

Marginalien

Juan B. Cañizares Navarro	288	Cochabamba, Bolivien, Januar 1789 – August 1791 Ein Beitrag zu bildlichen Darstellungen unmenschlicher und entwürdigender Behandlungen
Miloš Vec	293	Juristischer Polyzentrismus Wie unterrichtet man vergleichende europäische Rechtsgeschichte?
Abstracts	302	
Autoren	304	

Religion, Politics and Law in 19th Century Latin America

When revolutions for independence broke out, religious life in the Spanish American world was ruled by the Indian patronage regime [*patronato*], which gave the monarch tight control over ecclesiastical institutions. Patronage included, among many other prerogatives, presenting candidates to the pope, appointing parish priests and doctrine teachers, the right to allow or deny the dissemination of council and pontifical documents (*exequatur*), and controlling tithes. The right to patronage had multiple origins: the initial pontifical concession, support for the churches, and its alleged inherence in sovereignty. In the 18th century, however, the idea that patronage was an attribute of the sovereign in its own right had become an almost indisputable opinion.

If the church is regarded as an institution with relative autonomy and a hierarchical structure of obedience with the pope as its head, it may be stated that the church as such did not exist in the Spanish colonies and that it was formed, not without difficulty, only throughout the 19th century. In colonial times, ecclesiastical institutions were so indissolubly intertwined with civil institutions that they may well be considered a segment of Indian bureaucracy. Bishops and prelates had to account for their administrative actions to the crown and no brick could be laid over another to build a church, hospital or hermitage without royal authorisation. The religious sword and the secular sword were two distinct but inseparable powers.

Revolutions transformed the concept of sovereignty by replacing its pluralistic, composite definition, typical of the Old Regime, by a mon-

istic one: The origin of power resided in the societies themselves. This would necessarily lead to a de-sacralisation of the concept of »citizen«, which throughout the 19th century would lose the religious features that the »subject« category used to have. On the other hand, since the Bourbons had insisted that patronage was an indisputable component of sovereignty, the new republics could not renounce it. This implied a myriad of political-legal problems: was this a prerogative to be enjoyed exclusively by the king and queen of Spain or by anyone who exercised sovereign power? Which of the new authorities created to substitute the Spanish ones should exercise it? How did the division of powers fit in its exercise? Should it be used by the legislative or the executive branch, or by both? In addition, controversies between centralists and federalists focused on whether patronage should be exercised by provinces, by central governments, or by both, with different scopes and powers.

These were not the only new problems in which religion had decisive or significant weight. In the colonial era, the political community was conceived as a portion of the Catholic flock ruled by the king of Spain; therefore, any issues associated with the church affected society as a whole, and dismantling the old order in any manner entailed a reform of ecclesiastical institutions. It should also be recalled that the juxtaposition between civil law and canon law placed important aspects of the civil life of citizens under ecclesiastical jurisdiction. On the other hand, revolutions broke out proclaiming the defence of »the religion of our forefathers«. It is correct to state that the legitimacy of religion

could not be done away with, but this could be understood as excessively pragmatic; it is more accurate to affirm no one actually thought power was dissociated from religion. In the first half of the 19th century no one believed societal reproduction could be possible outside the framework of collective morality based on religion.

The root of the problem was what to do with religion, what place religion should be given in a new order that required the reform of its institutions while keeping faith intact. It could not continue being the cornerstone of the social edifice, the material cementing the bodies that made up society. How could the inherited religious unanimity be reconciled with the idea of freedom of conscience, a key component of numerous revolutionary speeches? The creation of a relatively autonomous political sphere necessarily implied the creation of a truly religious sphere, nonexistent in the colonial regime. It implied modifying a traditional mental universe that foresaw the presence of religion not within a sphere but in all expressions of social life. In the institutional realm, it implied creating a rather centralised structure to manage the new religious sphere, instead of the plurality of powers and overlapping jurisdictions that was so typical of the old order.

Another problem: Could ecclesiastical institutions be reformed without the involvement of the pope? As a result of patronage, Spanish American churches had only had occasional direct communication with the Holy See. After the revolutions, the possibility of establishing communication became more complicated, both as a result of the papal condemnation of the uprising and of the Spanish diplomatic policy pressing the pope to refrain from receiving the insurgent emissaries. But, after the revolutionary

debacle, Rome revived keen to take control over all the churches in the Catholic world, be they churches it had once controlled or those that had never actually been under its aegis, such as those of the Spanish Americas. Hence the centralising work that the new republics were forced to conduct in the religious field, as well as in other spheres, coincided in different issues with Roman policy. The difference lay in the fact that Rome was unwilling to acknowledge the right to patronage as inherent in sovereignty: It intended to negotiate each agreement that would grant *ex novo*, as a gracious papal concession, certain carefully stipulated powers of patronage.

Hence, the discussion did not focus on the advisability to reform the church by centralising it or not, but on who would control the institution emerging from this process. The power struggle between followers of Roman policies and advocates of patronage law as inherent in sovereignty brought about two ways of considering relations between church and state in Spanish America: one of Gallican roots, contrary to the Pope's claims, and an intransigent one, which endorsed such claims. This debate went on throughout the 19th century, in some countries more violently than in others, as to whether patronage was inherent in sovereignty or rather the fruit of papal concession. In the 1820s a third position began to surface between these two: inspired in liberal ideas, this approach focused on the right to freedom of conscience, placing the church's plan of action within the emerging civil society and claiming the state's neutrality in religious issues. In other words, it defended the idea of freedom and equality for all faiths. These three models outlined in the first half of the 19th century express lines of thought; they are not categories into which people may be classified. Features of one or the other may be found within

the opinions of one person: Men with moderate liberal convictions may defend liberty, but not an equality of the faiths; that is to say, they may propose a place of privilege for Catholicism as the official creed while at the same time defending plurality in the religious field. Even elements from different models could be combined, as we shall see, in one constitution.

The liberal contention seemed useful to address another key issue in revolutions, such as immigration and capital movement. In general, the countries that emerged from the debacle of the Spanish Empire – after fifteen years of war – did so in hardship. Colonial jurisdictions had fragmented, commercial routes had dismantled, the control of business was in the hands of English merchants in many cases, fiscal funds were depleted, tax collection was difficult and the violence of revolutionary fighting persisted with internecine wars. Spanish American elites wished to insert their countries in the capitalist market that expanded under the leadership of Great Britain but found a stumbling block in the lack of infrastructure, capital, technology, specialised workers and know-how. A solution to the problem of building a nation could only be found in Europe, but not all over it: The widespread idea that the differences between Protestantism and Catholicism turned the former functional to capitalist development and made the latter resistant to it raised the issue of diversification in the religious field. The problem existed already, especially in port cities connecting ocean routes – Veracruz, Rio de Janeiro, Montevideo, Buenos Aires, Valparaiso, El Callao, Acapulco, Mazatlan –, where immigration had brought together small but influential foreign communities. Facing the future, it was deemed appropriate to establish constitutional orders encouraging immigration and foreign in-

vestment, especially those coming from Protestant Europe.

How could these projects be reconciled with the intention to maintain the patronage regime and proclaim Catholicism as the official religion of the State? Conflicts over the constitutional models to be applied followed a number of roads and gave rise to different options and compromise solutions. One example, among others, is the Argentine constitution of 1853, the basis of the one currently in force, which forced the State to »support« the Catholic faith and guarantee freedom of religion, while at the same time it provided for the manner in which patronage should be exercised; the Holy See, however, refused to recognise such patronage as an inalienable right.

Ultimately, the question at issue was what path to choose that would lead to secularisation, adaptation of religion and its institutions to the transformations usually associated with the idea of modernity: creation and separation of the religious and secular spheres – politics, science, arts –, development of the state and the market, loss of power by the religious authority outside its own sphere. Secularisation is not the progressive disappearance of religion, but its constant adaptation to structural and cultural changes brought about by modernity. But it is also a task: In the mid-19th century, the conflict between liberalism and masonry on the one hand, and the Catholic Church on the other, became stronger, especially since Pius IX, terrified by the 1848–1849 revolutions, abandoned his initial reform program, which had created illusions in many Catholic thinkers of liberal linking, to return to safer defensive positions.

In the 1870s secularisation as a task adopted the form of struggle for laicism, understood as the absorption by the state of institutions and

functions previously controlled by the religious authority. Thus, cemeteries, civil registries, education and health care were secularised in different countries. In Latin America, secularisation processes were very diverse, but in general they were based on the one being applied by the Third Republic in France and many of them adopted a strong positivist imprint. Faith in the motherland and in science was sometimes proposed as a complement and at other times as an alternative to traditional religion. Some of these secularisation processes extended to the first decades of the 20th century and became more radical. The reasons behind this should not necessarily be found in the strength or economic significance of the Catholic Churches opposing the secularisation process. Mexico and Uruguay are two examples of radical secularisation – extremely violent in the case of Mexico – to the detriment of churches that were incomparable as to their political, economic, social and cultural power. Other secularisation processes were moderate and incomplete, as in the case of Argentina. Here, fears by the elite facing the »social issue« and »maximalism« and, more generally, facing a flood of immigrants capable of definitely dissolving the already weak »national identity« at times when cultural nationalism pervaded the ideological atmosphere in the West, advised in favour of bringing the secularisation process to an end by the late 19th century. In short, an overwhelming majority of the immigrants arriving in the country were Catholic in name and there was nothing to be gained from new clashes with the church, led by Leo XIII and expressing

commendable concern for peaceful solutions to the social conflict.

In the midst of these dilemmas, Spanish American countries and churches celebrated the first centennial of their revolutions of Independence. After World War I, various factors – the crisis of liberalism and positivism, the incidence of spiritualist trends, concerns for national identity and social conflicts – tended, with the notable exception of Mexico, to strengthen the power of Catholicism in the public life of Spanish America, at least when compared to the power it had been granted during the secularisation era by the end of 19th century. The conciseness of this brief essay does not allow for further consideration of the whole 20th century. Let us just add that in Latin American life, the permeability between religion and politics as well as the conflicts around it determine long-lasting and complex features which are not simple to explain. Naturally the legal status of religion has changed dramatically since 1810, and the religious field has largely diversified, but the relations between religious institutions and the political power continue to be an unresolved problem giving rise to controversy and conflicts. Everything leads to the belief that structural deficiencies in Latin American countries and their recurrent economic and political crises, combined with long-standing cultural characteristics, have made it difficult so far to find a relation between religion and society that is both harmonic and satisfactory for most actors.

Roberto Di Stefano