

Kent Academic Repository

Full text document (pdf)

Citation for published version

Sobrevilla Perea, Natalia (2010) In Search of a Better Society: Constitutions in Peru. *Rechtsgeschichte - Legal History*, 16 (2010). pp. 111-113. ISSN 1619-4993.

DOI

Link to record in KAR

<http://kar.kent.ac.uk/43224/>

Document Version

UNSPECIFIED

Copyright & reuse

Content in the Kent Academic Repository is made available for research purposes. Unless otherwise stated all content is protected by copyright and in the absence of an open licence (eg Creative Commons), permissions for further reuse of content should be sought from the publisher, author or other copyright holder.

Versions of research

The version in the Kent Academic Repository may differ from the final published version.

Users are advised to check <http://kar.kent.ac.uk> for the status of the paper. **Users should always cite the published version of record.**

Enquiries

For any further enquiries regarding the licence status of this document, please contact:

researchsupport@kent.ac.uk

If you believe this document infringes copyright then please contact the KAR admin team with the take-down information provided at <http://kar.kent.ac.uk/contact.html>

In Search of a Better Society: Constitutions in Peru

Rousseau advocated the theory that a constitution should be rewritten as often as needed in order to achieve happiness, and seemingly following this advice, Peruvians have repeatedly attempted to improve the conditions of their political system by doing exactly that. In the last two hundred years Peru has had over a dozen constitutions. This does not count the numerous provisory statutes put in place when normal constitutional order has been interrupted. Each was enacted with the ambition of providing institutional stability and to better reflect the needs of the country. The dream of improving society has continued to fuel the desire to write new charters well into the twentieth century.

At the core of the debate over constitutional order in Peru, is not only how suited the charter is to the particular reality over which it legislates, but also – and some would argue, even more crucially – the legitimacy with which a constitution was enacted. As the legal framework of the country, constitutions not only need to reflect the needs of a particular society, but must also have legitimacy. This can be achieved by virtue of their origin or it must be acquired through consensus. In Peru, constitutional change has been driven by conflict and civil war. Leaders have sought to legitimize their control over power with a new constitutional arrangement. Some have argued that a new charter was needed to better reflect the needs of the country, while others have questioned the legitimacy of the constitution being replaced. Very seldom, however, have there been attempts to govern without a constitution.

Unlike most countries of the continent, Peru will not celebrate its bicentenary of independ-

ence for at least another decade, as the country remained loyal to the crown when Napoleon invaded the peninsula. Constitutional experience therefore began when the 1812 constitution for the whole Hispanic Monarchy was enacted by vice-regal authorities. Peruvians participated in its writing from the very beginning, as five residents in Cádiz were chosen to represent the viceroyalty until the elected deputies arrived. Once enacted, the constitution was taken up as a banner for those who sought reform in Peru and contributed to the outbreak of revolution in Cuzco. By 1814, however, the restored King of Spain abrogated it.

Constitutional issues were central to the process of Peruvian independence in the 1820s. As one of the few American domains where the reinstated constitution was enacted that year, constitutional debate punctuated conflict. Internal and external actors competed for legitimacy with opinion divided between those who favored the constitution and those who were against it. This debilitated the defenders of the crown. During most of the war, Peru was split between an independent north and a loyalist south. Many hoped the conflict could end with an arrangement between the constitutional monarchy and those fighting for independence, but this proved to be impossible. In the midst of war, the northern section of Peru enacted a constitution in 1823, which bore great resemblance to the one of Cádiz, as amongst its main architects were many who had been part of that process as deputies and advisors. Their objective was to provide the new republic with a legal basis. The south remained under the 1812 constitution until news of its abrogation was received in

1824. Constitutional conflict deepened division between loyalists, benefiting their enemies and contributing to their defeat in December that year.

The Constitution of 1823, a highly theoretical charter, was never put into practice even in the liberated areas of Peru for reasons of war. After independence the country was under the dictatorship of Simón Bolívar. The famed liberator had grand illusions of creating a federation with all the countries he had freed. He believed this could be achieved by enacting a 'perfect' constitution. He attempted to do this in the one he wrote for Bolivia in 1826, which amongst other measures introduced a life-long presidency. The constitution was swiftly approved in Peru, but was never put into practice as the liberator's power in the country waned. The reaction against this charter led to new debate, which resulted in a new charter in 1828. The main reason for the need of a new arrangement was that the two previous ones had been agreed in processes that were seen as lacking legitimacy, in the one case because half of the country had been still under the rule of the Spanish and in the other because the constitution had been written by a foreign leader and imposed on the electoral colleges. The new charter hoped to do away with the issue of legitimacy, and to ensure its enduring suitability it incorporated within itself a proviso calling for its review in six years.

In 1834 changes were duly made and a new constitution was enacted. The constitution was considered to be new, even if it was in effect little more than a revision of the previous charter. Although both constitutions were seen by most as legitimate in origin, there were those in Peru who questioned their suitability describing them as extremely liberal; amongst other reasons for providing provincial governments with

relative freedom to govern themselves. Municipalities were strengthened and central government and presidential autonomy curtailed. Civil war erupted allowing the sectors linked to the military, enemies of liberalism, to question its legitimacy. So a decade after independence there was still no consensus over the best possible constitutional arrangement. The country was engulfed in a debilitating conflict, where those who thought it possible to unite politically with Bolivia succeeded in establishing a Confederation between the two countries. Following Bolívar's ideas, a new constitutional arrangement was seen as the way to bring them together. Only lasting from 1836 to 1839, the demise of the Confederation brought about the need of a new constitution, as those who had succeeded opposed the 1834 charter.

The constitution enacted in 1839 was much more centralist and provided the president with greater control over the state. In spite of constant opposition by those who considered it illegitimate in origin, it remained in place longer than any that preceded it. Heavily reformed in the context of recurrent civil wars, it was not actually changed until liberals succeeded in gaining power through revolution. The charter they enacted in 1856, according to conservative observers, veered towards radicalism. Claiming it did not reflect the realities of the country, revolution once again erupted. In a damage control effort, a new constitution was enacted by Congress in 1860. Some of the liberal innovations were maintained while the most radical proposals were reversed. Known as the moderate constitution, it has lasted the longest, surviving an attempt in 1867 to have it changed for the radical constitution it replaced. The success of this constitution was based on the consensus that it reflected the needs of society. Those who

questioned its legitimacy grew, over time, reconciled with it and reforms were implemented.

It was only in 1920 when Augusto B. Leguía promised radical change and a *patria nueva* in the context of the centenary of independence that a new constitution was enacted. To a large degree this was to accommodate the leader who eventually used the charter to cling on to power. With his demise the constitution was seen as illegitimate and was replaced by a new one in 1933. Often suspended in periods of military dictatorship it was only seen as needing replacing after the radical government of the armed forces made deep changes in Peruvian society during the 1970s. The 1979 constitution sought to incorporate some of these innovations and to provide a legal basis for a more inclusive society. It was a tragedy that just as it was enacted the country was engulfed in the bloodiest conflict to be experienced. More people died in Peru between 1980 and 2000 than in any of the preceding internal and external wars. An estimated 70,000 people perished, mainly in areas that were put outside the remit of the constitution. Constitutional order itself was eventually one of the casualties of this conflict as Alberto Fujimori alleged it was not possible to defeat the enemy

of the state within the existing legal framework. A new constitution was enacted in 1993 and confirmed in a referendum. After the fall of Fujimori many politicians and academics, who considered it illegitimate in origin, argued the 1979 charter should be returned. The 1993 constitution nevertheless remained and continues to be reformed.

The same pattern seen in the nineteenth century was repeated in the twentieth. Charters were changed either because they were considered illegitimate or because they were seen as not reflecting the needs of the nation. Change took place at a slower pace, but the reasons for new constitutions being enacted did not vary in the twentieth century. Powerful leaders who wanted to remain in power used constitutions first to implement change and eventually in a bid to hold on to the presidency. Constitutional change has been recurrent in times of conflict. For nearly two hundred years a suitable and legitimate constitution has been sought. The belief that a change in fundamental law can improve society has never been abandoned.

Natalia Sobrevilla Perea