

INTERNATIONAL ASSOCIATION OF CONSTITUTIONAL
LAW (IACL-AIDC)

POLITICAL SENTIMENTS AND MORAL EMOTIONS IN
CONSTITUTIONAL LAW

August 9-10, 2022

Session 3

A historical account of constitutional emotions in Latin America

17:00 – 18:30

Chair:

Florencia Saulino (Universidad de San Andrés)

Speakers:

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The Latin American constitutions inspired by the political liberalism that emerged from the English, American and French revolutions contain provisions that express the will to follow a republican path. In particular in the preambles that precede the constitutional text and although they do not have mandatory force, they are programmatic; however they are taken by the courts for the interpretation of the mandatory provisions of the Basic Law. The Preamble sets out a series of objectives aimed precisely at the formation of the Argentine Nation.

There are six purposes listed by the Preamble, namely:

- constitute the national union;
- uphold justice;
- consolidate inner peace;
- provide for the common defense;
- promote general well-being;
- and secure the benefits of freedom

In Latin America, we find two founding patterns, which correspond to two opposite doctrines. On one hand Royal absolutism

- **Royal absolutism**

Main features:

- Supremacy of the crown
- Superiority of the State over all jurisdiction
- Supernatural origin of government (Divine authority of the King)
- The king possessed not only the sovereign rights but also the property rights; he was the absolute proprietor, the sole political head of his

American dominions. The Indies were treated as the direct and absolute possession of the king.

- The laws and institutions of Spanish America were modeled on those of Castile. Before the middle of the 16th Century the first 2 viceroyalties were created by the crown:

1. V. of New Spain (1535)

2. V. of Peru (1544)

- The Council of the Indies (Decree of Charles V - 1524)

The competence of the Council extended to every sphere of government: legislative, financial, judicial, military, ecclesiastical, and commercial.

The king was absolute lord of the Indies and the Council was his mouthpiece. All laws and decrees relating to the administration, taxation, and police of the American dominions were prepared and dispatched by the Council, with the approval of the king

The Council also exercised powers of censorship. No book treating of the Indies might be printed in Spain or in the colonies without its previous inspection, approbation, and license, and no books might be introduced into the Indies without its express permission.

- The Spanish model King Council provided a pattern for government in the colonies by the parallelism with the couple Viceroy Audiencia.

- The government of Brazil was in most respects identified with that of Portugal itself, and in America the new communities, like the early English colonies, were permitted to develop along their own lines without much interference from the crown.

- **The rise of Constitutionalism**

Faced with this conception at the beginning of the 19th century, the ideals of the French Revolution emerged as an alternative, based on the translation made by Mariano Moreno of "The Social Contract" by Jean

Jacques Rousseau. The civic virtue derived from the rule of law, the separation of powers, the supremacy of the Constitution, the transfer of ownership of the sovereignty of the monarch to the people who possesses the right to vote, development and acceptance of individual guarantees throughout constitutionalism. Thus, it is possible to identify the stage in the development of due process of law when individual guarantees started being enacted.

On March 4, 1801, at the age of 32 Mariano Moreno died on the high seas while in his way to England on a diplomatic mission. The Revolution thus lost one of the most enthusiastic defenders of freedom, a great promoter of the modern ideas of his time, a tireless fighter for indigenous rights, promoter of the public library and founder of the newspaper La Gazeta de Buenos Ayres.

He had studied at the University of Chuquisaca. There he befriended Bishop Terrazas, who gave him access to his library. It was in that same library that he first met the thinkers of the “age of enlightenment”. He was deeply impressed by Jean-Jacques Rousseau and in 1810 published his own translation of *The Social Contract*. Next, we transcribe the beginning of the prologue by Mariano Moreno that preceded that work.

Foreword to the translation of *The Social Contract*

The glorious installation of the provisional government of Buenos Aires has produced such a happy revolution in ideas that, shaken by an enthusiasm capable of the greatest undertakings, they aspire to a judicious and lasting constitution that restores their rights to the people, putting them at the shelter of new usurpations. The effects of this favorable disposition would be temporary, if the sublime principles of public law continued

mysteriously reserved for ten or twelve men of letters, who without risking their lives have not been able to make them leave their private studies. The most fervent desires vanish, if a master hand is not progressively chaining the events, and preparing, through the particular reform of each branch, the consolidation of a general good, which makes the advantages of the constitution palpable to each citizen and interests him. In his defense as in that of his own and personal good. This work is impossible in peoples that have been born in slavery, as long as they are not removed from the ignorance of their own rights that they have lived. The weight of the chains extinguished even the desire to shake them; and the end of revolutions among men without enlightenment is usually that, tired of misfortunes, horrors and disorders, they finally accommodate themselves to a state as bad as or worse than the first in exchange for being left alone and calm.

- **Government systems at work.**

The way the principle of separation of powers is being observed will be stressed. In addition, the behavior of the executive branch will be highlighted.

Argentine law as the core

I. - New trends under the transition to democracy

From “hyper-presidentialism” to the attenuation of presidentialism.

Source: European Western Constitutions (e.g.-: France (1958) Portugal (1975))

I.1- Experiences of “semi-presidentialism”

- Perú (1980/1992)
- Haití (1987)

I.2. - Reforms in the composition of the executive branch

- Argentine constitutional reform (1994)

I.3. - Amendments in the relationship between the Executive and the Legislative branches

- TheBrazilianConstitution (1988)
- TheBolivianexperience

1.4. - The use of institutional tools taken from parliamentary systems