Revista *Ratio Juris* Vol. 12 N.º 24 (enero-junio 2017) pp. 391-416 © Unaula

# NOTES ON PEACE. PURPOSE OF A CITIZEN-BASED CONSTITUTIONALISM*

RAÚL GUSTAVO FERREYRA**

Recibido: 28 de junio de 2016 - Aprobado: 28 de agosto de 2017
DOI: 10.24142/raju.v12n24a18

*Every man has within himself the entire human condition*
(De Montaigne, 2011, pp. 7 y 724)

## Abstract

Individuals exist and live their lives in society. Community balance and harmony can only be achieved in peace, i.e. in the absence of war and regulating violence with the law. The constitution of the state is the most celebrated piece to regulate the administration of state force—a language for peace. The highest law is the basis of the state and its rules establish a responsible control of peace. Constitutions play a decisive role as a procedural rule, as they attain and consolidate relative peace in a given community. Peace as an objective is the most

* This article is based on the presentation made on May 17, 2017 at the Auditorium of the Autonomous Latin American University, during the 2nd Latin American Meeting of Constitutional Law "Constitucionalismo y Neoconstitucionalismo," Medellin, Colombia. I wish to thank legal translator Mariano Vitetta, who translated this essay from Spanish into English, and professors Mario Cámpora, Vanesa Perez Rosales, Leandro E. Ferreyra and *diplomé en philosophie* Juan Ignacio Ferreyra for their valuable comments on the English version of this essay.

** Tenured Professor of Constitutional Law, School of Law, University of Buenos Aires. JSD, University of Buenos Aires.

valuable good in a community, as it guides all its citizens. The author labels "citizen-based constitutionalism" the process whereby all citizens in a "constitutional state" aim for relative peace with respect and care. Once relative peace is attained, growing and unfair inequality becomes a disaster which may disrupt the social peace achieved, and this is something that must be addressed (Ferreyra, 2015, 2016a, 2016b, 2017a, 2017b).

**Keywords:** Individual existence, Community, Peace, Constitution, Citizen-based constitutionalism.

## NOTAS SOBRE LA PAZ. PROPÓSITO DE UN CONSTITUCIONALISMO CIUDADANO

### Resumen

La existencia de los individuos solamente se explica si se realiza en sociedad. La armonía y el equilibrio comunitario pueden ser alcanzados en paz, ausencia de guerra y regulación de la violencia por intermedio del Derecho. La constitución del Estado se presenta como la pieza más celebrada para disciplinar la administración de la fuerza estatal: una lengua para la paz. La ley suprema fundamenta al Estado y con sus reglas estimula un control responsable de la paz. Así, la constitución desarrolla un decisivo papel como norma procesal: alcanzar y consolidar la paz relativa de una comunidad. La procura de paz constituye el bien más preciado en una comunidad, porque mantiene erguidos a todos sus ciudadanos. En este sentido, llámese "constitucionalismo ciudadano" al proceso que, con activa deliberación, incluye a todos los ciudadanos de una comunidad dentro del tipo "Estado constitucional", que, con respeto y esmero, definen la orientación hacia la paz relativa. Alcanzada ella, la desigualdad creciente e injusta se presenta como un flagelo con capacidad suficiente para afectar la paz social lograda (Ferreyra, 2015, 2016, 2016a, 2017a, 2017b).

**Palabras clave:** Existencia individual, comunidad, paz, constitución, constitucionalismo ciudadano.

## Introduction

Existence with life and cognition has been imposed on us as human beings. Coexisting, therefore, or existing with others is only possible when it is possible to combine all or a majority of citizens more powerful than each of the citizens individually. That combination should also be prevalent vis-à-vis the arbitrary individuality of each person. The power emerging from the congregation of individual citizens is labeled "constitutional law," which results from the instrument or device known as "constitution" and which does not have any single natural feature. This instrument establishes a given order and a corresponding development of community coexistence; it also regulates individual power, "brute force." (Freud, 2010). The purpose of the language of constitutional law is to reduce the sphere of the strongest, so that nobody is left to individual, irresistible brute force or to the mercy of factual powers. A constitution must articulate peace as the only process which authorizes the coexistence of citizens with equal dignity.

The basic idea underlying this text is to understand the language of the law as a code for peace. Such constitutional law, a result of a specific and artificial legal order, must hope to become the language that supports and develops unity in peace of a given community.

There is a point in discussing the language of constitutional law, as "human" things emerge in the evolutionary history of the hominid lineage we belong to with the emergence of language (Maturana, 1989). In the sphere of human existence, reality may well be paired with the configuration of language (Real Academia Española, 2016)[1] Therefore, to exert dominion over the production and variation of the words of the legal order is to create, maintain or change the legal provisions which are part of it, even if they do not define in full the complete domain of reality.

That language, the language of constitutional law, is the basic text for the existence in peace of citizens and public servants. To attain the objective that the statements of constitutional law are effective, they must be understood within the scene of linguistic domain and they must produce a recurring, intense and lasting association in the acceptance and development of the prescriptive determinations over human conduct. Within the framework of a style of writing free from despotism, community reality must be open to

1 By "language" I mean "system of verbal communication and written, typical of a human community."

the discourse containing constituent words. The governance of such reality is, therefore, subject to consensus, whether higher or lower, regarding the reference framework which must be preferred over all individual determinations regarding human conduct. Thus, the existence of citizens in the precise formation of the constituent language of the state should be the domain of reality (Maturana, 1989; Häberle, 2013).[2]

This work is normativist in nature, and with this I mean that this work responds to a model of law where only normative and non-normative statements are recognized as law when produced by the entity authorized to create or realize the pertaining legal order. That understanding is realized within a "citizen-based constitutionalism," where the supreme direction of the state order resides with the citizens, who generally have diverse and often opposing ideas. Citizens exercise such power by representation (always by means of elections and the representative) or occasionally in a direct manner. Formally, a citizen is a voter because he or she may take part in the production of the highest rule, with the condition that such citizen is called to cast his or her vote and certain basic rights be recognized. Despite the inexistence of an imperative provision, the illusion of direct democracy leads to consider that every citizen has a "millionth" share of power to draft the constitution, amend it and, above all, to try to defend it against the abuses of constituted authorities in charge of public powers and increasingly larger private powers.

This is not a general theory of peace, because there is extended consensus about the absence of any such doctrine. But it is possible to claim that a constitutional legal order would cease to exist as soon as it stops guaranteeing social peace. The constitutional state is the only instrument provided by human reason and experience to secure relative peace in a community. The constitutional state is created by citizens who must be considered equally free and is supported by such citizens through the process of democracy (a mere general consensus about general rules regarding who is the one

2 From the normative point of view, there are two very interesting seeds, one dating back to the 18th century and another dating back to the 20th century. Section 377 of the 1795 France Constitution provided: "The French people deposits this Constitution in the fidelity of the Legislature, the Executive, and administrators and judges; of family fathers, wives and mothers, young citizens, and the good sense of all French people." In turn, Section 41 of the 1991 Colombian Constitution sets forth: "In all education institutions, whether official or private, the study of the Constitution and Civic Education shall be mandatory. Democratic practices shall also be promoted to learn the principles and values of citizen participation. The State shall promote the knowledge of the Constitution." From the point of view of scientific theory, the work by Peter Häberle *Pädagogische Briefe an einen jungen Verfassungsjuristen* (2013) is a learned, original and honestly essential piece to teach constitutional law.

who shall rule)—this process opens, regulates, covers and distinguishes the circumstantial prevalence of a majority citizen opinion status until further notice. As a result, the constitutional rule, eminently procedural in nature, may be a true key to create and illustrate the process of social peace.

In addition, this article is not about the specific description of a given legal order. The only trace which may be recognized is my "South American citizenship." I might be able to put in my two cents based on my capacity as an external observer of the legal and political orders of South American nations. But I must be clear: I am not neutral, as I am an ardent advocate of relative peace. Peace exists or does not exist—it is not an epiphany or a divine revelation. Men have to build and support peace with grounds and in a progressive fashion. Other considerations would only be unlikely anecdotes or mere ramblings.

In that respect, some constitutional provisions of each of the South American nations are very interesting:

(i) Section 22 of the 1991 Political Constitution of Colombia provides: "Peace is a right and a duty which must be compulsorily observed."

(ii) Section 4 of the 1998 Federal Republic of Brazil states that its international relations are governed by this principle, among others: "VI. Defense of peace."

(iii) Section 3 of the 2008 Constitution of Ecuador lists the main duties of the state: ". . . 8. To guarantee for inhabitants the right to a culture of peace.…"

(iv) One highlight, considering how old it is, is the preamble of the federal Constitution of Argentina, which has been in force since 1853: "We the representatives of the people of the Argentine nation… with the purpose of… consolidating internal peace… for us, for our future, and for all men of the world who want to live in the Argentine soil, calling on the protection of God, source of all reason and justice, issue, enact and establish this Constitution for the Argentine nation."

(v) Section 145 of the 1992 Constitution of Paraguay provides that "…under equal conditions with other nations, a supranational legal order is admitted that secures the continuance…of peace."

Peace as used here means internal peace, relative to a given community—an extremely clear expression of political sovereignty and self-determination. Along these lines, internal peace is a condition for liberty, equality and solidarity, because as it is focused on coexistence it assumes the possible existence of the rest of the goods. A sovereign state is of course required to establish the appropriate procedures to settle any conflicts, which clearly evidences the determination of the monopoly, concentration and exercise of force (Kriele, 1980, pp. 54-55). The state also comprises the legitimate administration of force at a given time and space.

To accomplish the objectives stated in this text, I have divided this piece into three further sections. In section 2 I address the concept of peace and its connection with the law, while in section 3 I suggest an understanding of the peace process within the constitutional state. Last, in section 4 I offer some conclusions as an epilogue.

## On the Concept of Peace and its Connection with the Law

### Basic Claim

I make two forceful claims: the law is a human creation, and so is peace. Both are artificial in nature.

The law is essentially a system (Bulygin, 2006, p. 40) of rules about force, which becomes effective through the discourse of state powers and is the most suitable means to attain a minimum objective: relative peace, as it relates to a given community of men. In the context described, peace is the state of things in which there is conviction and determination not to use violence without centralized and monopolized regulation. The creation of the order rests with the participation of equally free citizens, who shall be subject to the very order created by them. A community may live in relative peace or submerged in a well of war of all against all or some against the majority, or vice versa. If men do not eliminate war (whether external or internal), war shall eliminate life on the Earth ("Manifiesto Rusell-Einstein. Una declaración sobre armas nucleares", 1955).[3] In the latter scenario, wi-

3 Max Born, Percy W. Bridgman, Albert Einstein, Leopold Infeld, Frédéric Joliot-Curie, Hermann J. Muller, Linus Pauling, Cecil F. Powell, Joseph Rotblat, Bertrand Russell and Hideki Yukawa: *The Russell-Einstein Manifiesto*, London, July 9, 1955: "We invite this Congress, and through it the scientists of the world and the general public, to subscribe to the following resolution: 'In view

thout any intention of being ominous or dramatic, "several millions of years would be needed for sea mollusks to produce something that resembles the man." (Bobbio, 2008, p. 13). Therefore, the law is one of the finest tools to try to settle disputes.

## Minimum Debate

It happened in time immemorial and finite spaces—once upon a time, there was a state without social laws. In the beginning of time and space on the Earth, the state of nature may have existed and it is likely that it was a state of things only governed by natural laws, i.e. laws which were not created by men. Men can harm or improve some of the effects of natural laws, but there may never be a social law regulating when the sun rises or when it sets, as there may never be a law abolishing or repealing gravity or the mechanics of heat and energy (Ferreyra, 2015, 2016, 2016a, 2017a, 2017b).

The law stems directly from human nature. It is the finest invention for the organization of human communities. Within its structure, constitutions are the most developed technologies supporting the entire architecture of the order hierarchically instituted through the gradual staggering of normative statements. The law is an order for the eradication, removal or limitation of violence to the maximum possible extent as a means to approach individual or plural conflicts which have taken place in a community of individuals. In regulating state power and defining citizen freedom, it is possible to structure an order to bring about peace, a relative peace. In other words, on the one hand, the law is the syntax of force and, on the other, it may be the adequate semantics of peace. Its morphology is always positive, understood as what it is, the fact of the existing authority, and it saves us from delving into metaphysical considerations. The task of the legal scholar is to describe and systematize the legal order, but the legal scholar should also criticize the law with "working arrogance" (Arlt, 1968), for the future amendment, repeal or abolition of the matter under study (Ferreyra, 2015, 2016a, 2016b, 2017a, 2017b).

---

of the fact that in any future world war nuclear weapons will certainly be employed, and that such weapons threaten the continued existence of mankind, we urge the governments of the world to realize, and to acknowledge publicly, that their purpose cannot be furthered by a world war, and we urge them, consequently, to find peaceful means for the settlement of all matters of dispute between them,' available at https://pugwash.org/1955/07/09/statement-manifesto/

The main conflict to be solved in a community is not to harm another, that nobody is harmed, or that everybody may be certain that they will not be subject to harm by others; the object of this otherness is the "citizen" or "state power." The citizen may be harmed as a result of the invasion of the citizen's sovereign sphere of freedom or because the authorities created to rule the community abuse or exceed in their strictly-regulated powers. Therefore, the only priority and minimum purpose of the law, its crucial meaning, is to determine, arrange and maintain peace; justice or welfare are not the main purposes of the law. These purposes could be subsequent, of course, but the main purpose of the law is to bring about peace, because without peace it is absolutely impossible to reach any of the ideal situations we as human beings desire to live in, with varying degrees of intensity (Bobbio, 2008, pp. 96-97). Peace is the minimum aim of the legal order; this conception is a result of joining the doctrine of legal pacifism. Peace is the necessary condition for any other purpose: liberty, equality or fraternity. The law, consequently, is an attempt to organize the relative peace of a given community (Ferreyra, 2015, 2016a, 2016b, 2017a, 2017b).

The distinctive feature of a "purpose" is the aim to be attained, the desire to reach a given end. A deliberate action or, in other words, the purpose to create and realize the law may be the basic architecture for the peace of the community. As I have argued, this position is framed within legal pacifism, as peace is the status in which unregulated violence is not used. However, it cannot be forgotten that the law is not a neutral instrument, given that its body of rules and its application is always based on philosophical and ideological premises. It is usually held that the law is an instrument for social control; in turn, the law is a tool which serves a rational purpose for men to try to reach peace within the existence in a community (Ferreyra, 2015, 2016a, 2016b, 2017a, 2017b).

With the law it is possible to obtain relative, but not absolute, peace as the law deprives the individual or group of individuals of the use of violence. Therefore, bodies are designed and powers are given to them to organize life in the state community. I am discussing a "peace" that may be defined as the "non-existence" of a conflict relationship characterized by the exercise of lasting and organized violence (Bobbio, 2008, p. 164). In this language, peace is the absence of an armed conflict. But, without minimizing this issue, I prefer to discuss "peace" insofar as it "avoids the worst of evils—violent death," and the good it aspires to is the "good of life," (Bobbio, 2008, p. 174), the highest of goods. This is why, in dogmatic studies, discussing

another type of goods has such good press: justice, welfare. However, the minimum condition is to actually avoid such evil. This evil must be eliminated or at least there must be an illusion that armed conflicts can be reduced as much as possible, as armed conflicts result in violent death and all types of evils and punishments which harm or degrade human life (Ferreyra, 2015, 2016a, 2016b, 2017a, 2017b).

A community with social laws is a society aiming at the survival and conservation of the social group. In this plan, each individual is given their own sovereign power, and the power and delimitation of each citizen is identified and demarcated in connection with the power of others. It should be noted that a society fully controlled by the law is an unattainable ideal, because observing and understanding the reality one can see that such reality has always been inconsistent with that ideal (Ferreyra, 2015, 2016a, 2016b, 2017a, 2017b).

I have argued that the peace to be attained by the law is not the absence of force, but the monopoly of state force to the benefit of the community with the law as a means. A definition taken from Luigi Ferrajoli describes the principle of peace as follows: "If the use of force is not governed by legal rules, such use is forbidden. Therefore, this means that the law is the rejection of unregulated force, and that unregulated force is the rejection of the law." (Ferrajoli, 2011, p. 445). Within this master plan, peace is the expectation of the regulated use of force. The proposal of the constitutional state is, therefore, to create valid and effective laws that stop conflicts, regulate force, thus bringing about peace. Ultimately, peace is not the absence of force, but the monopoly of state force in favor of the community (Ferrajoli, 2011, p. 445).

The principle of peace, even when it shows the negative expectation of the lack of unregulated use of force, soundly defines the demarcation criterion between the law and what is not law, but this has to be completed, according to Luigi Ferrajoli. Actually, to define the concept of peace in its relationship with the law, it is necessary to examine: (i) the existence of a primary guarantee, i.e. the prohibition of the unregulated use of force, and (ii) the parallel existence of a secondary guarantee which necessarily and immediately supplements the first guarantee, which is the limitation of the use of force in the form and the conditions established under the law, exclusively for the cases in which such prohibition is violated (Ferrajoli, 2011, pp. 837-838).

After having established the correspondence between the law and peace, it is now appropriate to discuss the constitution, as a key piece of the

state. The constitution is a unique legal concept in the existence of human beings. It is an instrument barely 250 years old (considering the Philadelphia Constitution as the first one, it is 230 years old), while *Homo sapiens* is 250,000 years old. Human beings have never before known any other invention similar to the constitution. As far as human knowledge and creation goes, constitutions are the best instrument to organize community life (Ferreyra, 2015, 2016a, 2016b, 2017a, 2017b).

The constitution, in fixing certain procedures, has the most valuable function which may be assigned to a legal rule or to the law—to promote peace. Constitutional principles have a procedural purpose, as the always tight relationship between citizens and the state will never be settled in full, so that is the reason why the constitution channels certain acts which may alleviate rigidity. The language of constitutional law, its objective expression in the world (labeled by many as "positive" expression), has the purpose of defining frameworks to collaborate with illusions about the hopes of a peaceful coexistence in which all citizens enjoy or may enjoy the almost unachievable "general welfare," in a society of citizens who are equals, but not only in terms of liberty (Ferreyra, 2015, 2016a, 2016b, 2017a, 2017b).

Without constitutional law—whether it flows from the written basic law or from the fact that this law assigns supreme ranking to international instruments of human rights within the state legal order—there is no constitutional state. Constitutional law is the basis, whether in terms of justification or legitimacy, of the constitutional state. Therefore, if we human beings are going to live together, we must accept the "language about a consistent tolerance and self-sacrificing respect," generally established under the constitution, which provides for a better mechanism towards peace, as such language entails the strict prohibition to harm another and the categorical promotion of helping others whenever possible. These claims are framed within an utilitarian context, in which there is also a prohibition to "spill blood" (Popper, 1995, p. 190) or to do every effort so that procedures secure that no blood is spilled. This way, corporal fight is substituted for civic debate; "the coup de grace of the winner over the loser is replaced by the vote and the willingness of the majority which allows yesterday's loser to become tomorrow's winner *sine effusione sanguinis* (with no shed of blood) (Bobbio, 2008, p. 19).

Each constitution provides a unique justification for the state (Ferreyra, 2015, pp. 344 y ss). Some countries use over 12,000 words in their constitutions, such as Argentina. The 1992 Paraguay Constitution uses more

than 25,000 words. Ecuador uses more than 54,000 words. Brazil uses over 76,000 words. Colombia has established the basis for the state in more than 40,000 words. This shows that all communities have their own models to establish the constitutional justifications of the state (Ferreyra, 2015, 2016a, 2016b, 2017a, 2017b).

"Secular books," (Valadés, 2016), i.e. our constitutions, contain different modalities to establish an order, to organize. But peace cannot be added innocently, as it is an informed action by every man who is fully aware of his rights. In the next section I discuss a theoretical model whose abstraction allows for the discussion of the constitutional justification of the state closely linked to peace. It is a construction focused on citizenship, on the inherent and unrepeatable individuality of every citizen. ciudadano (Ferreyra, 2015, 2016a, 2016b, 2017a, 2017b).

## As an Inventory

(i) The connection between peace and the law is fertile, essential and necessary.

(ii) Peace is the necessary condition for any other purpose: liberty, equality or fraternity. The law cannot be anything but the means to attain peace with order in a state community.

(iii) Legal provisions are essential, but the law has no capacity whatsoever to contain or stop a war or any other armed conflict. Politics make the law, and this is why the maximum decision is, at the same time, a hint of salvation. There must be a daily and ecumenical revolt against war: human rebellion is expressed by "a man who says *no*";[4] in this case, "*no* to war." War must be stopped.

(iv) Rejecting war entails opening to the existence of peace.

(v) The constitutional state is a state with social laws. These laws, through the instrument known as "constitution," provide the basis for the justification and organization of the state. The constitutional state, based on a basic law, may properly provide

4 *See* Camus (2013, p. 854).

for the procedures to reach, consolidate and develop peace in a community ciudadano (Ferreyra, 2015, 2016a, 2016b, 2017a, 2017b).

## Constitutional Justification of the State

### Key Claim

"Constitutional state" (Bonavides, 2011) means any entity with two natural constituent elements (territory and population) and two non-natural constituent elements (power and constitution). One of the non-natural constituent elements is the "basic device"—the supreme rule of state order, the stability and durability of which is intended to be established with adequate hegemony. In the constitutional state, all the law of the state must be genuinely authorized by the basic positive rule of its coercive order (Ferreyra, 2015, 2016a, 2016b, 2017a, 2017b).

### Constitution—Fourth Element of the State

The constitution is not an isolated worldly entity. It may be isolated for dogmatic study; i. e. to understand from an internal perspective its entity and describe its features. However, it performs its tasks with a higher or lower degree of effectiveness or achievement, within the state. As a result, there also is an external approach: the way in which the constitution is given and presented, how it rules and justifies the world of the elements of the state or the state itself. Creating the constitutional structure of the state is not an easy endeavor. That is why the conceptual guidelines regarding its "organization or order" are not a mere matter of faith or vocabulary—they are always open to demarcation and critical discussion (Ferreyra, 2015, 2016a, 2016b, 2017a, 2017b).

### Constitutional Rules

Selecting the constitutional device as foundation of the state is a political decision.

The constitutional foundation of the State is realized or may be realized through four principles or rules: subordination, variation, distinction, and action. None of these rules or principles is fully realized; this is why the-

se are "inchoate" rules or progressive-realization rules, or relative-realization rules. Moreover, I assume here that there are no ontological or structural differences between the principles and rules stemming from constitutional provisions. The differences are mostly based on style, while the legal literature generally prefers "rule." To be clear: in every literary work style and ideas are essential (Ferrajoli, 2012, pp. 11-50).[5]

So, these four principles or rules stemming from the constitution may be described as inchoate, because they are used to justify the regulation of the State or the limitation of its inherent power (Ferreyra, 2015, 2016a, 2016b, 2017a, 2017b).

### *Subordination Rule*

The rule of the legal subordination of the state through each of the instances set out in the constitution (normative supremacy, relationship with international law of human rights—ILHR—, judicial review and rigorous legality) is intended to establish certainty, i. e. reliable knowledge by citizens and public servants about the determination of the realm governed by the law and the other free realm, a world without legal rules. Citizens and public servants must realize the law of the constitution (Ferreyra, 2015, 2016a, 2016b, 2017a, 2017b).

Within the scope of their legal provisions, they represent that certainty in the state world—past, present and especially future—is linked and subordinated to an artificial rule: the constitution, which does not have any kind of metaphysical content. Certainty is always "certainty by somebody regarding something;" (Bunge, 2001, pp. 213-214) in this case, it is certainty by men about the legal order on which the state is based.

Based on the use of the subordination rule and its implications, all community life—including that of citizens in liberty and the tasks of public servants—should be governed by the constitutional order. Even if certainty may enlighten constitutional rules, it is not enough in itself to give rise to a

5 I do not assume the distinction between principles and rules based on their strength or weakness, respectively. This does not mean that the distinction is meritless. It must be said that its explanatory content is much more reduced than the one traditionally associated with it, as most principles tend to behave like rules, because they are "law about law," which represent sound normativity. I generally follow the view of Luigi Ferrajoli, included in "Constitucionalismo principialista y constitucionalismo garantista" (2012, pp. 11–50).

process of social peace; the foreseeability inherent in the subordination established by the constitution favors its consolidation and maintenance.

### *Variation Rule*

The constitution is certain about something: its methodical writing may only be expanded, restricted or revised through the procedure set out in the instrument itself. Only one language is authorized, through a self-referent model. The reform procedure sets forth that the constitution may be amended with due respect for its specific provisions, which may never be considered useless. The constitutional instrument structures and strengthens the architecture of the state, as it allows for the change of the highest rule, which is not a copy or imitation of any perfect or ideal entity. This is why we have to accept the constitution's own metamorphosis.

No change is authorized outside the channels provided for under the constitution. The authority created by the constitution cannot establish changes outside the political and legal procedure established in the constitution itself. Change is a huge possibility in the lives of men. Subjecting the possibility of amending the constitution to a key and immutable procedure, in a self-referent fashion, also grants certainty about human relations.

The foundations of provisions about the constitutional amendment do not exclude irrationality. They do grant certainty to normative variation. The possibility of changing, based on rules established beforehand, limits the law of the strongest or brute force, which discourage any peace process due to the inherent and unregulated violence they carry.

### *Rule about the Difference of Roles*

To legally create and maintain the collective body known as "state," some men will have to give orders, with powers to give adequate directions, and others will have to abide by such orders, whether by conviction or any other reason with some impact and determining the domination status.

We can draw a line between "constituent" law and "constituted" law. The constitution is produced and performed in "constituent moments"; the remaining legal rules with general scope are created by the federal Congress or the Executive; and only under exceptional circumstances, by the Judiciary.

At the very heart of the constitution, the horizontal separation of powers occurs within the republican house: accurate departments, with excluding and well-defined powers, with the purpose of producing or realizing the law.

Vertical separation of powers may take the form of federalism or unitarianism. Brazil and Argentina are examples of federal models. Colombia, Paraguay and Ecuador are unitarian models.

In the constitutional state, the separation of powers is the basic organizational rule. At the same time, it has been remarked that if the anthropological premise is "human dignity," (Häberle, 2003, p. 193), its organizational consequence must be democracy. Since there is no democracy without separation of powers, the connection is evident. The rule about the separation of powers justifies the existence of the constitutional state. But separating powers, decentralizing functions and designing controls do not secure a peace process. Therefore, the rule about the difference of functions and the corresponding creation of control mechanisms between different bodies —which I call a "grammar" of state power—has the evident purpose of contributing to attain what usually seems to be impossible or an utopia: subjecting power to pre-established game rules and, with that, an expectation of concentration, regulation and administration of violence. There is the illusion that there should not be unregulated force, but everybody knows that where there is power there is also a public servant willing to exercise state force which is not governed by legal rules. In this train of thought, peace is more of an illusion than a reality. Because where there is constituted power, there usually is a public servant decided to abuse and corrupt power.

### *Rule about Action. Basic Rights*

There are constitutions which, as foundation of "support" and "validity" of legal systems, are not limited to scheduling a set of procedures to enable the planning and deployment of coercion, which is a responsibility of constituted powers. Moreover, accepting that constitutions are not ends but means, the basic rights included in them govern the basic environment of a free community life; they are considered not only as individual rights, but also as objective rules of the system and, as such, formally and not materially, lines of action which must ensure the correct use of state force. This proposition entails the comprehensive understanding of the complexities showed by the realities created by these orders.

The Argentine federal Constitution, for example (mainly in the First Part, First Chapter: Declarations, Rights, and Guarantees; Second Chapter: New Rights and Guarantees; and in the Second Part, First Title, First Section, Fourth Chapter: Powers of Congress, section 75(22)[6]), contains a description of the state of things explained above, i.e. a state of things wished by the constituent lawmaker about basic rights.

Basic rights are ultimately significant rules or lines for government and citizen action. Domestic community peace based on the development of basic rights may entail the rejection of unregulated violence in an organized community.

## As an Inventory

(i) Animals are in the world; it is likely that they are "happy while they stay healthy and have enough food." (Russell, 2003, p.21). Men, in a way clearly different from animals, aspire to understand and observe the world. Men, guided by their always imper-

6 The constitutional reform of 1994 incorporated section 75(22): "Congress is empowered […] subsection 22: to approve or reject treaties concluded with other nations and international organizations, and concordats with the Holy See. Treaties and concordats rank higher than laws. The American Declaration of the Rights and Duties of Man; the Universal Declaration of Human Rights; the American Convention on Human Rights; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights and its Optional Protocol; the Convention on the Prevention and Punishment of the Crime of Genocide; the International Convention on the Elimination of all Forms of Racial Discrimination; the Convention on the Elimination of all Forms of Discrimination against Women; the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child. Such treaties, as approved, have constitutional status, and do not repeal any section of the first part of the Constitution and shall be deemed supplementary to the rights and guarantees enshrined in the Constitution. They shall only be denounced, if appropriate, by the federal Executive with the approval of two-thirds of all the members of each House. In order to attain constitutional ranking, the rest of the treaties and conventions on human rights shall require the vote of two-thirds of all the members of each House, after their approval by Congress. Law No. 24820—published in the Argentine Official Gazette of May 29, 1997— granted constitutional ranking to the Inter-American Convention on Forced Disappearance of Persons, adopted at the 24th OAS General Assembly, under section 75(22) of the federal Constitution. Law No. 25778 —published in the Argentine Official Gazette on September 3, 2003—, granted constitutional ranking to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, adopted by the United Nations General Assembly on 26 September 1998 and passed by law No. 24584. Law No. 27044 —published in the Official Gazette on December 22, 2014—assigned constitutional ranking under the terms of Section 75(22), federal Constitution, to the Convention on the Rights of Persons with Disabilities (UN). Nowadays the International Human Rights Law instruments with constitutional ranking are fourteen.

fect reason and based on the support of their experience which is always verifiable, try to exercise a certain type of domination over the world, so that the world becomes more friendly and so that it may be transformed. Nature shows a world as given; with their scientific or technological inventions, men generally try to improve the initial conditions by building other "artificial worlds." (Bunge, 1977, p. 9). State, law and constitution are all artificial entities, and so is the community known as "constitutional state."

(ii) Every state has a certain background, and every state background is unique. In order for men to exist with life, a certain structure of order is absolutely necessary for the responsible control of peace, even if that structure does not necessarily impose a state.

(iii) The constitution is the fourth element of the state. This is an original approach: there is a connection between the constitution and the entity it supports, the state. The law stemming from the constitution, or the validation of which is promoted and protected with the highest ranking, is the fourth element, identified as essential for the law of the state.

(iv) In a state based on a constitution, the inclusion of constitutional provisions is never comprehensive. The constitutional rules that support the state prescribe the state's subordination to the legal order, the need of authorization to reform the order, the distinction between the controlled functions of the branches of power, and they contain distinguished provisions on the operation of basic rights. The constitution, in fixing certain unique procedures, has the most valuable function which may be assigned to a legal rule —to promote peace. In the constitutional state, the constitution has an eminently procedural role, as the tension between individuals and the state, the conflict between citizens and authorities, which cannot be settled once and for all, is dissolved in favor of specific procedures which subordinate state action to constitutional law.

(v) In the previous paragraphs I have not tried to pursue an ideal type of constitutional state. I merely expect that the description

of the "determined normative model" may be extended and defined, for example, in South America.

## Epilogue

*First*. The language of constitutional law is commonly thought to be more precisely expressed or more precisely identified when reference is made to the provisions that derive from its own words, rather than by reference to a world outside its realm and beyond the rules of its lexical flow: a world lacking constituent language, the non-legal world. I, for one, claim that the language of constitutional law can be a code for peace. Its content is the secular literature[7] of the citizens who form the state community (Ferreyra, 2015, 2016a, 2016b, 2017a, 2017b).

Second. Constitutional law provides the basis for the state and has a supreme duty to fulfill —constitutional formal procedures must aim for and maintain peace. Without peace, there shall be no liberty or justice (Ferreyra, 2015, 2016a, 2016b, 2017a, 2017b).

*Third*. There are certain words nobody ever wants to be linked to, for example, "war," "terror," "racism," "death," "contamination." But certain other words are attractive: "tolerance," "maternity," "environmental protection," and of course "peace." With the exception of some Islamic theocracies or some Asian sheiks, it is impossible to find a system of state order which does not promote or otherwise pays homage to peace, even if that does not happen in actual practice (Ferreyra, 2015, 2016a, 2016b, 2017a, 2017b).

*Fourth*. I feel compelled to reproduce the following quote from Aleksandr Herzen: "with violence and terror religions and political views are spread, autocratic empires and inseparable republics are established, with violence one can destroy and clear the place, nothing more." (Herzen, 1977, p. 6).

*Fifth*. Violence may be likened with the figure of "gravedigger of history." (Bobbio, 2008, p. 20). Peace is a conquest —once conquered, peace

7 Normative statements always lead the citizen or public servant to a place of higher reverence or lesser "religiosity." Section 1 of the 1958 Constitution of France clearly identifies the separation between "the Church or any kind of religious worship and the constitutional state": "La France est une République indivisible, laïque, démocratique et sociale." There is no need for me to justify why I have chosen such a precious normative formulation. I have learned that "states of vital things" must be pronounced at the beginning, so it is correct that the principle against denominationalism is set in the first section of the constitution.

must be developed and kept, as it may be lost again (Ferreyra, 2015, 2016a, 2016b, 2017a, 2017b).

*Sixth*. Erasmus of Rotterdam, one of the main thinkers of all time, believed that peace was to be found in nature. Scared at the disaster of war, approximately 500 years ago he wrote a praise quoting Silius Italicus: "Peace, the best thing nature gave to men." (De Róterdam, 1964, p. 972). While I believe that harmony is not to be found in nature, as peace is artificial in nature —peace is a purely human creation—, I am certain that it is the best of the states of things in which the vital existence of men may develop itself (Ferreyra, 2015, 2016a, 2016b, 2017a, 2017b).

If we "curse" the person who invented war, (Marlowe, 1590), without defending any objective moral position, those who struggle for its absence or ending should be "praised." The approximate age of *Homo sapiens*, as an animal species, is 2,500 centuries, but the foundations of his progress in the latest five centuries could be considered much higher than during the previous 2,495 centuries. The development, perfection and expansion of writing has been key to deposit and transfer knowledge. In spite of this, an inflexible and appalling problem persists: "Shall we put an end to the human race; or shall mankind renounce war?" ("Manifiesto Rusell-Einstein. Una declaración sobre armas nucleares", 1955). There is not any opposition more radical and inspired than that; the continuance of the life of men could promote an enhancement of the conditions about his fragile existence, as the opposite —an armed conflict— contains our rebellion against its horrifying results: corpses, rapes, tortures, displacements, poverty, and exclusion (Ferreyra, 2015, 2016a, 2016b, 2017a, 2017b).

*Seventh*. Before concluding these notes, I wish to remember once again our humanist: "Only the human animal received the capacity to speak, which is the main conciliator of friendship relationships." (De Róterdam, 1964, p. 968). There is a lot in common between the purposes of this text, where I try to combine writing with legal analysis, with that quote. There is nothing surreptitious in these notes —just words towards peace, the peace of a republic with all its citizens focused on mutual benevolence and harmony resulting from the rational meanings of their words (Ferreyra, 2015, 2016a, 2016b, 2017a, 2017b).

*Eighth.* I wish that my words could be interpreted under one single conception: total uprising, full insubordination, absolute disobedience and strict rebellion against war or any other armed conflict, whether domestic or international, which destroys human life, as was and is the case of violent

encounters, the belligerence of men. This is why this text may be charged with being biased, as my opposition against war admits no rational cure or settlement (Ferreyra, 2015, 2016a, 2016b, 2017a, 2017b).

*Ninth.* All technological devices invented by men come with a "user guide." The constitution of the state is also a technological device, but without a user guide, as the constitution itself is the "citizen guide" for the development and maintenance of a constitutionalism in search of peace.

The constitutional state perhaps is an infinitely much more powerful creation than its appropriate materialization in the political community reality. To live the constitutional state to the fullest, pure constitutional pedagogy is a must. Years ago it was said that a "constitution does not make a state at all, except in the most literal meaning of the term, a true constitutional state." (Loewenstein, 1976, p. 161). I believe the crude description is the most appropriate approach, without the indulgent veneration of certain interpreters who have faith in a nonexistent official constitutional religion. That way, they forget about the possibility given by the "open society" (Häberle, 2008) either all of us realize constitutional law or constitutional law becomes just another arbitrary and irrational form of domination. I will not play with words now. Therefore, a purely theoretical statement such as the one included in section 2 shall suffice: without a constitution, there is no constitutional state, as the four rules explained here promote the illusion that citizens are equally free and that constituted power is an area of limited powers subject to rational control.

The constitutional state represents the sovereign political community, which is a self-referent model. The regulation, administration and planning of force by the state is made by a legal order, at the top of which is a constitution, an instrument which should contain the formalized, irrefutable, and united decision of all the citizens who form the people. The constitution, therefore, defines an excluding system of power for the entire community. This order defines, from a legal point of view, the validity of all the rules that are subordinated to it and that result from the state source. In turn, the constitutional order also defines the authorization for the possible application of rules from foreign source and, therefore, they can be placed at the top of the state system. Choosing this type or model of constituent order for the state also entails the rejection of any other type of order which may impact its logical supremacy, which will always be present in the political reality, as it is an insurmountable plot. In sum, the procedure to discipline, regulate and apply violence, in this type of state is basically decided by the constitu-

tional instrument. With the shaping of this constitutional power, the first assumption for the political community, i.e. peace, would attain a reasonable effectiveness standard, with the condition that citizens actively participate in the birth, development and deepening of such constitutionalism.

*Tenth.* The main idea underlying these lines is the preservation of human life. To that end, the radical elimination of war is "our supreme problem." (Kelsen, 1964, p. 47). There is no other idea more important than this one. Here, I do not offer any solutions. But I do provide basic guidelines to build community life in peace. In that context, all the constitutions of each and every nation in South America have very interesting provisions for the lasting and stable construction of a relative peace in every community.

It should be noted that the usefulness of our constitutions has been overestimated. Constitutions should not entail any act of magic; quite the opposite, their provisions should be drafted and confronted with —as we South Americans are not alone in this world —hegemonic, savage and planetary powers, which have neocolonial ideas (Zaffaroni, 2015, pp. 24-25) the purpose of which is only more domination and more injustice. Our constitutions should be free from myths and metaphors. They should also be free from prayer and magic. That way, the path would be free for rational discussion and dialogue.

The best way to prepare the present and enlighten the future is to have adequate clarity to act with energy and ultimately reach the citizen idea that constitutions are, in principle, "guides to attain relative peace in a community." The political life of any community will always develop with an imaginary of citizen conflicts, the totality of which will never be settled in full. Perhaps it is a bit ambitious to propose a "citizen-based constitutionalism" which is simply intended to attain relative peace. By love of truth, I believe it is a necessary condition for the existence of human life with dignity. The need for this kind of "citizen-based constitutionalism" allows us to think of procedures to avoid and regulate conflicts. It may be criticized with rigor, as it does not confront inequality. But such constitutionalism cannot be charged with not authorizing every citizen as an incorruptible individual, whose significant presence is the measure of all things that are and that will be; I am particularly discussing the state of things that presupposes peace. There must be citizens who decide openly, which is a basic requirement for their own existence in peace.

Community peace results from citizens being subject to the regulated and irresistible force of the state, mandated by the order established by

the constitutional instrument. There is nothing natural in this, as everything results from a device —the constitution. However, a second step in citizen-based constitutionalism is the outrageous, horrifying, evil and inhumane inequality affecting the citizens of an overwhelming majority of South American nations regarding wealth and natural and created assets, which unjustly privileges a notorious, reduced and select minority. To avoid breaking the harmony and balance of the peace reached as a basic foundation for constitutionalism, the challenge of inequality must be dealt with. The pattern of inequality in the possession of assets and wealth creates a problem which sooner or later explodes to the detriment of the peace reached, with social injustice.

The above lines may contain the seeds of truth. If that were the case, the reason must be that a certain degree of reason and experience may enlighten my daily existence, as happens with every man, for reason and experience are the only sources of scientific knowledge. Nothing contained herein is based on faith.

There is no explosion more foolish than the absence of peace. There is no experience more dreadful than war. The rejection of peace dehumanizes men and makes them incompetent to exist with dignity. In the absence of peace, the Earth becomes a place with no hospitality. The evil caused by war, a lasting and heartless armed dispute, is incurable and cannot be forgiven —it always places men in a road to nowhere.

The secular perspective expressed in this piece is aware of its limits, as I do not believe in any metaphysical divinity ordering peace and curing men from the evil of war. The experience of war renders men uncivilized, perverse, withered, hopeless and ephemeral. I therefore believe that only peace may verify and establish the key assertion in this essay about the possibility of developing a decent life project with adequate knowledge, at this time and in this space of our world.

The approach I have described in this article is certainly intended to be applicable throughout South America —even if it is our only imperfect narrative, the constitution is the only sound device with peace-oriented mechanisms which may provide answers to avoid the evil of war that throws men as mere biped, irrational, inexperienced and featherless entities. There is no mystery: our only "Providence" is the constitution and its procedures, whose accuracy takes the individual and the community closer to peace.

## References

Arlt, R. (1968). *Prólogo a Los lanzallamas*. Buenos Aires: Compañía General Fabril.

Bidart, G. J. (1995). *El Derecho de la Constitución y su fuerza normativa*. Buenos Aires: Ediar.

Bobbio, N. (1980). *Contribución a la teoría del Derecho*. Valencia: Torres Editor.

Bobbio, N. (2008). *El problema de la guerra y las vías de la paz*. Barcelona: Gedisa.

Bonavides, P. (2011). *Curso de Direito constitucional*. Sao Paulo: Malheiro.

Bulygin, E. (2006). Sobre el problema de la objetividad del Derecho. En N. Cardinaux, L. Clérico y A. D'Auria (Coords.), *Las razones de la producción del Derecho. Argumentación constitucional, argumentación parlamentaria y argumentación en la selección de jueces* (pp. 39-50). Buenos Aires: Departamento de Publicaciones de la Facultad de Derecho, UBA.

Bunge, M. (1977). *La ciencia. Su método y su filosofía*. Buenos Aires: Siglo XXI.

Bunge, M. (2001). *Diccionario de Filosofía*. México: Siglo XXI.

Bunge, M. (2009). *Filosofía política. Solidaridad, cooperación y democracia integral*. Barcelona: Gedisa.

Camus, A. (2013). *L'Homme révolté*. París: Gallimard.

Cicerón, M. T. (2009). *Obras políticas*. Madrid: Gredos.

De Montaigne, M. (2011). *Ensayos*. Buenos Aires: Losada.

Ferreyra, R. G. (2015). Elementos del estado constitucional. Recuperado de http://pensar.jusbaires.gob.ar/descargas/6

Ferreyra, R. G. (2016a). Manuscrito sobre una procura de paz en Colombia1-2. Dedicado al Prof. Dr. Julio B. J. Maier por su compromiso hacia la paz, la democracia y el saber. Bogotá: Instituto Latinoamericano de Altos Estudios ILAE. Recuperado de http://www.ilae.edu.co/Publicaciones/files/115185121_1.html

Ferreyra, R. G. (2016b). Manuscrito sobre una procura de paz en Colombia. Recuperado de http://www.revistastpr.com/index.php/rstpr/article/view/193

Ferreyra, R. G. (2017a). *La paz. Propósito de un constitucionalismo ciudadano* (ponencia). Derecho al Día. Oficina de Comunicaciones, Facultad de Derecho, Universidad de Buenos Aires, Buenos Aires, Argentina.

Ferreyra, R. G. (2017b). *La paz. Propósito de un constitucionalismo ciudadano* (ponencia). II Encuentro Latinoamericano de Derecho Constitucional "Constitucionalismo y Neoconstitucionalismo". Universidad Autónoma Latinoamericana, Medellín, Colombia.

Ferrajoli, L. (2004). *Razones jurídicas del pacifismo*. Madrid: Trotta.

Ferrajoli, L. (2011). *Principia iuris. Teoría del Derecho*, tomo I. Madrid: Trotta.

Ferrajoli, L. (2012). Constitucionalismo principialista y constitucionalismo garantista. En *Un debate sobre el constitucionalismo* (pp. 15-53). Madrid: Marcial Pons.

Foucault, M. (2011). *El coraje de la verdad. El gobierno de sí y de los otros. Curso en el Collège de France (1983-1984)*. Buenos Aires: Fondo de Cultura Económica.

Freud, S. (2010). *El malestar en la cultura*. Madrid: Alianza.

Garzón, E. (1983). Acerca de las limitaciones jurídicas del soberano. En AA.VV., *El lenguaje del Derecho. Homenaje a Genaro R. Carrió* (pp. 157-180). Buenos Aires: Abeledo-Perrot.

Häberle, P. (2003). *El Estado constitucional*. México: UNAM, Instituto de Investigaciones Jurídicas.

Häberle, P. (2008). La sociedad abierta de los intérpretes constitucionales: una contribución para la interpretación pluralista y "procesal" de la Constitución. *Academia. Revista sobre Enseñanza del Derecho*, *6*(11), 29-61.

Häberle, P. (2013). *Cartas pedagógicas a un joven constitucionalista*. Niedersachsen: European Research Center of Comparative Law

Herzen, A. L. (1977). *A un vecchio compagno*. Turín: Eunadi.

Hobbes, T. (2004). *Leviathan. Or the Matter, Forme & Power of a Common-wealth Ecclesiasticall and Civill*. Nueva York: Barnes & Noble.

Hobsbawm, E. (2006). *Guerra y paz en el siglo XXI*. Barcelona: Crítica.

Kant, I. (2013). *La paz perpetua*. Madrid: Tecnos.

Kelsen, H. (1964). *La paz por medio del Derecho*. Buenos Aires: Losada.

Kriele, M. (1980). *Introducción a la teoría del Estado*. Buenos Aires: Depalma.

Loewenstein, K. (1976). *Teoría de la constitución*. Barcelona: Ariel.

Maier, J. B. (2004). *Derecho Procesal Penal, fundamentos*, tomo I. Buenos Aires: Editores del Puerto.

Manifiesto Russell-Einstein. Una declaración sobre armas nucleares (1955). Recuperado de http://www.filosofia.org/cod/c1955rus.htm

Maquiavelo, N. (1993). *El príncipe*. Barcelona: Altaya.

Marlowe, C. (1590). Tamburlaine the Great, Part. I, Act II, Scene IV, Accurs'd be he that first invented war. Recuperado de http://www.gutenberg.org/files/1094/1094-h/1094-h.htm#link2H_4_0010

Maturana, H. (1989). Lenguaje y realidad. El origen de lo humano. *Archivos de Biología y Medicina Experimentales*, (22), 77-81.

Platón (2007). *Leyes*. Madrid: Gredos.

Popper, K. (1992). *La sociedad abierta y sus enemigos*. Buenos Aires: Paidós.

Popper, K. (1995). *La responsabilidad de vivir: escritos sobre política, historia y conocimiento*. Barcelona: Paidós.

Pound, R. (1993). A Comparison of Ideals of Law. *Harvard Law Review*, *47*(1), 1-17.

Proudhon, P. J. (1927). *La guerre et la paix*. París: Marcel Riviere.

Radbruch, G. (1944). *Filosofía del Derecho*. Madrid: Revista de Derecho Privado.

Rawls, J. (2001). *El derecho de gentes y "Una revisión de la idea de razón pública"*. Barcelona: Paidós.

Real Academia Española (2016). Diccionario de la Real Academia Española. Recuperado de http://lema.rae.es/drae2001/srv/search?id=byqNcMf7EDXX2NNLcBVl

Rosanvallon, P. (2015). *El buen gobierno*. Buenos Aires: Manantial.

Róterdam, E. (1964). Querella de la paz. De cualesquiera pueblos echada y derrotada. En *Obras escogidas*. Madrid: Aguilar.

Russell, B. (2003). *La conquista de la felicidad*. Barcelona: De Bolsillo.

Rousseau, J. J. (2001). *Du contrat social*. París: Flamarion.

Valadés, D. (2005). L*a lengua del derecho y el derecho de la lengua*. México: Academia Mexicana de la Lengua-UNAM, Instituto de Investigaciones Jurídicas.

Valadés, D. (2016). ¿Qué hacer con la Constitución? Recuperado de http://www.reforma.com/aplicacioneslibre/preacceso/articulo/default.aspx?id=81220&urlredirect=http://www.reforma.com/aplicaciones/editoriales/editorial.aspx?id=81220

Von Humboldt, A. (2011). *Cosmos. Ensayo de una descripción física del mundo*. Madrid: Consejo Superior de Investigaciones Científicas.

Zaffaroni, E. R. (2015). *El Derecho latinoamericano en la fase superior del colonialismo*. Buenos Aires: Plaza de Mayo.