

The Genesis of Latin American Constitutionalism

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Abstract

The aim of this article is to analyze whether Latin American constitutionalism was already present at the birth of the continent's nation-states. To do this, it is necessary to understand how the first independencies took place, of the Republic of Haiti and the Republic of Paraguay, contextualizing the two historical moments. It defends the idea that Latin American constitutionalism is identified by its anti-colonial character, i.e. organization focused on the interests of its populations, indigenous, Afro-descendants and other traditional peoples, with regulation that allows access to the land and nature of these populations and does not limit the action of the State for foreign interests. In order to achieve this objective, both the Latin American society of independence and constitutionalism were analyzed, and the first two nation-states to be constituted in Latin America, Haiti and Paraguay, were chosen, as well as the process of their constitution and destruction, both of which present the characteristics of the construction of Latin American constitutionalism, both of which faced the metropolises and the new colonialities, and both of which were destroyed. The article concludes that the destruction of the two nation-states occurred for the same reasons as the difficulties in implementing the advances of Latin American constitutionalism in the late 20th and 21st centuries. The article aims to raise a discussion about the origins of Latin American constitutionalism that will allow us to expand our research into the subsequent process of formation of Latin American constitutional societies, through the 19th and early 20th centuries.

Keywords

Latin American Constitutionalism, Haiti, Paraguay,
Latin American Independencies

1. Introduction: Why Are the Constitutions Referred to as Latin American?

There is a very extensive theoretical production on Latin American constitutionalism, which is often referred to as “new” or “neo”, but there is no consensus on its beginning, its genesis. Roberto Viciano Pastor (2012), in a work he shares with many other authors, calls it new and develops the idea that it is new in relation to European constitutionalism and not to itself, denying that there is an “old” Latin American constitutionalism, as if the previous were a reproduction of the European, and therefore, does not deserve the adjective Latin American. He also says that the new is born with the Venezuelan Constitution of 1999, because it is the first with effective popular participation. In this conception, the novelty is practically Andean and understands that there was a universal constitutionalism (European) and in 1999 Latin American innovated it with the three Andean constitutions: Venezuela, Equator and Bolivia. Contrary to that, from the beginning of constitutionalism there is a permanent search for a Latin American alternative. This article will discuss only a part of this search’s trajectory, with the two first countries to reach independency, Haiti and Paraguay, both clearly anti-Europeans.

What characterizes Latin American constitutionalism is not only the fact that a constitution was written in Latin America by constituents from the region, but that its content reveals social formations that on the one hand are different from those in Europe, and that on the other have a regional identity. Thus, to earn the title of Latin American, constitutions must have a marked identity that differentiates them from other regions of the planet. It is necessary to understand these differences and identities, which are not always clear, because the peoples of Latin America, thought of in terms of indigenous and Afro-descendant diversity, among others, are very vast despite the fact that the states are so similar to each other. The colonial process that brought all the countries in the region together is the first point of identity: colonial formation. The second point, derived from colonialism, is the form of exploitation of labor, which is slave-like and genocidal, and the third is the profound extractive exploitation of nature, whether mineral or vegetable, which implies an anti-people control of land and nature.

At the beginning of the 20th century, with the creation of welfare states, there was a change in European constitutional theory, which began to defend the existence of a normative force (Hesse, 2010) in approved constitutional texts. This “new”, to which Latin America made a strong contribution with the Mexican Constitution of 1917, had already been part of Latin American anti-colonial thinking since Haiti, 1804, so it is another Latin American characteristic that should be highlighted. In other words, when Konrad Hesse developed his theory of the normative force of the constitution, Latin America was already fighting for the direct application of constitutional norms, not only in the 20th century with the Mexican Constitution of 1917, but before that, in Haiti, Paraguay, in the Bolivarian constitution of Chuquisaca and even in the lost argument in Brazil,

which failed to prevent the maintenance of slavery with the Charter of 1824.

What characterized the continent's constitutionalism at the end of the 20th century, and drew the attention of theorists, was the inclusion of more or less autonomous rights for indigenous and other traditional peoples and a strong protection of nature, often referred to as the environment. These two rights, peoples and nature, contradict each other and oppose the individual rights protected by the European constitutionalist tradition. This inclusion of peoples with non-individual rights and protections or rights of/over nature that restrict individual land ownership rights is what gives the essential Latin American character of these 20th and 21st century constitutions, starting with Brazil's of 1988 (Souza Filho, 2017). These rights are antagonized by individual rights because they are, in essence and existence, collective rights, understood not as the sum of individual rights, but as belonging to a community or human group, determined in the case of peoples and indeterminate in the case of nature and, consequently, land. These characteristics are the hallmark of anti-coloniality, which is why they are so difficult to apply.

The constitutions that innovated in the formulation of this content can therefore be called new because although the rights of peoples and nature, and anti-colonialism, had already been discussed since the birth of the nation states at the beginning of the 19th century, they were not explicit. Although most of the founding constitutions were formally very similar to the European ones, the germ of the discussion about the national state being a protector of local social specificities and limiting individual ownership of land and the accumulation of wealth was present. This argument was victorious in both Haiti and Paraguay, which is why we chose these two births, which, incidentally, are the first.

This article aims to study the birth of this constitutionalism in the independencies. To do so, it will analyze the moment of birth of the nation states and the forces or social actors present at that time. Two typical cases will be analyzed: the constitutions arising from the Haitian War and the absence of a constitution, i.e. a written text with the name of constitution, in Paraguay. These two cases are paradigmatic of the anti-colonial struggle and help us understand the genesis of Latin American constitutionalism.

2. The Birth of Latin American Nation States

Latin American and Caribbean states were born under the yoke of colonialism and under the pressure of organic slavery. The genesis of Latin American constitutions and their constitutionalism is present in the discussion of the conditions of formation of independent societies because they had to face the debate on slavery and land occupation, making it difficult to apply the liberal models that were being presented in Europe. The discussion of land occupation is very present in the formation of Latin American societies, in contradiction to the liberal occupation of North America (Fitzmaurice, 2014). In Latin America, the metropolises kept land under absolute control, as well as slave labor. At inde-

pendence, the elites wanted to maintain this control and slavery, which is why they disagreed with the original peoples, the peasants and the “Liberators”, and in Brazil, after independence, land was just as controlled as before, and was inaccessible to workers (Varella, 1998). In several countries, this discussion has led to incompatibilities with European or North American constitutionalism, or at least strong differences, demonstrating the inadequacy of exogenous constitutional theories. That’s why the discussions, or rather, the discussion about the birth of the new independent countries, their legal form and political organization has its own traits that have since indicated what would become the Latin American constitutionalism that is so explicit in the 21st century.

When we analyze the constitutions and constitutional speeches of Bolívar, Toussaint L’Overture, Francia, Artigas, San Martín, Martí and Morelos, the inadequacy of the European and North American proposals becomes clear. Even in Brazil, where independence and the Constitution were made by a Portuguese heir and there seems to have been no debate or resistance, this concern can be felt, half hidden in history¹. Even though the positions that took local reality into account were defeated or betrayed, these marks remained and were revealed in other historical moments, such as in Mexico and Bolivia. They were also revealed in the laws that made up the legal world of each country, such as the Land Law, Law 601/1850, in Brazil (Silva, 1996).

The contradictions between colonialism and independence, freedom and slavery, nature and production for export, hegemonic societies and traditional societies—all strongly present in the genesis of Latin American constitutionalism in the 19th century—can unveil the innovations that took place at the end of the 20th and 21st centuries, culminating in the Mexican Constitution of 1917, the Andean Constitution of the 21st century and the Cuban Constitution of 2019. Some authors, following a classification by Fajardo (2004), maintain that the “new” constitutionalism was born at the end of the 20th century and is improved in steps or moments that grow by recognizing the existence of peoples up to the state’s self-recognition as plurinational. This trajectory, understood in this way, leaves history short and hides the rich debates and struggles in the formation of national states at the beginning of the 19th century and even at the end of the 18th century, failing to consider the extraordinary black revolution in Haiti. This is why it is necessary to go back to the origins, forgetting the word “new” and the rapid evolution of the 20th and 21st centuries, to understand the deep origins of Latin American constitutionalism in the struggles for independence. In this transition period (from the 20th to the 21st century) a symbiotic relationship was established between the degree of external opening and liberalization and the expectations of democratic opening (de la Rosa, 2016).

The discussions, debates, anxieties and practices of the formation of modern states in Latin America were absent from European discussions and from the

¹In Brazil at the beginning of the 19th century, José Bonifácio discussed including in the Constitution the distribution of land for all, the end of slavery and the recognition of the rights of indigenous peoples, but the Emperor promulgated a Constitution typical of coloniality.

writings of European and Eurocentric theorists, who generally couldn't see in the constitutional legislative tangle of the 19th century anything other than an automatic and literal reproduction of the constitutions of the so-called old world. European constitutionalists who study Latin American constitutions are surprised by the solutions found to give life to the rights of peoples and nature, land, especially in the 20th and 21st centuries. The 19th century is forgotten, as if there were no debates or practices in the formation of nation states. Reading the Spanish [Bartolomé Clavero \(1994\)](#), [Viciano Pastor \(2012\)](#) and [Martínez Dalmau \(2009\)](#), as examples, demonstrates this admiration and at the same time incomprehension of the origin of these plurinational constitutions, pioneers in recognizing the rights of peoples, challenging the old criteria of autonomy, but maintaining a necessary national sovereignty.

European authors of constitutional law who are not Americanists show a certain disdain for Latin American constitutions, such as Professor Maurice Duverger who published an extensive book in 1978 on *Constitutions and Political Documents* ([Duverger, 1978](#)) without any reference to the Mexican Revolution and Constitution. Today it is clear that in 1917 Mexico wrote one of the most important founding legal texts of Social Welfare and state intervention in the economic and social orders, as well as a constitution with normative force. The Mexican Constitution of 1917 fully deserves the adjective of Latin American, with its anti-colonial character, despite having been betrayed so many times.

With the break-up of dictatorships in Latin America in the 1980s, Iberian jurists started to take a closer look at the constitutions that began to emerge, such as the Brazilian constitution of 1988 and then the Colombian constitution of 1991. These two constitutions impressed with their clear protection of indigenous rights and their extension to people of African descent, as well as their recognition of rights to the environment, the legal name for nature. Important Portuguese and Spanish constitutionalists began to study these constitutions and extended their study to other constitutions on the continent. The Sevillian Bartolomé Clavero dedicated several books and articles to the subject, always concerned with indigenous issues. Another Sevillian, Joaquín Herrera Flores, organized master's and doctoral courses in Spain with an emphasis on Latin America, with Latin American subjects, professors and students². In Portugal, constitutionalists such as [Canotilho et al. \(2018\)](#) have also focused their studies mainly on the Brazilian constitution.

From this dense discussion and the explicit novelties brought by Latin America, which didn't just remain in the Brazilian and Colombian constitutions, but spread across the continent to the more finished constitutions of Ecuador (2008) and Bolivia (2009), which defined the states as plurinational and guaranteed, directly in Ecuador and indirectly in Bolivia, the rights of nature, it became clear that there were anti-colonial Latin American peculiarities and identities between them, to the point of talking about Latin American constitutionalism.

Land, its occupation and the rights related to it, were discussed infra-con-

²Official courses at the Pablo de Olavide University in Seville, Andalusia, Spain.

stitutionally in the 19th century, but gained constitutional status in 1917 in Mexico, which then spread to the continent, finally recognized as a collective right to the environment or nature, and gaining what was called a social function. Free and collective labor relations, women's rights and restrictions on the individual and patrimonial right to immovable property, both urban and rural, were also gaining ground in the constitutions with increasing normative force.

These innovations and differences, however, are not flowers without stems hovering in space with no connection to the concrete struggles against 500 years of colonization. The limited time frame of Latin American constitutional studies ends up overshadowing the practices and debates that have taken place over the last two hundred years. That is why it is necessary to look for the genesis of Latin American constitutionalism in the struggles for independence, which is a continuous process from Tupac Amaru and Sepé Tiaraju to the rights of nature in the Ecuadorian constitution of 2008, passing through Zumbi dos Palmares and Toussaint L'Overture and constitutional texts such as the Haitian constitutions of 1804, Mexico in 1917, Bolivia in 1938, Francia's negative constitution and Bolívar's constitutions. In this sense, the Bolivian Constitution of 2009 may not be understood if we don't know about the Constitution of 1938, the Revolution of 1952 and the Bolivarian Constitution of Chuquisaca of 1826. Understanding this history helps to understand the difficulty of implementing the continent's beautiful constitutions.

3. Latin American Societies and Independencies

At the time of the arrival of the first Iberian caravels, between the fifteenth and sixteenth centuries, the population of the continent was, at moderate estimates, 70 million people, distributed among thousands of peoples organized into small groups or large empires (Stannard, 1992). The population of America in 1500 was larger than that of Europe. Grondin and Viezzer note that the American population was 67 million and 61 million were killed (Grondin & Viezzer, 2018). The chroniclers of the time report these genocides. Fray Bartolomé de Las Casas, in his vast work, recounts the causeless murder of millions of people in just a few years (Las Casas, 2011). According to the United Nations, 45 million indigenous people live in Latin America today³. These figures, while not a demographic study, indicate that colonization in the Americas was unparalleled violence, amplified by the tragedy of the Africans who were kidnapped and brought over in subhuman conditions.

University of London historian Kenneth Morgan estimates that in the four centuries of the African slave trade, more than 12 million people arrived in the Americas (Morgan, 2017). The author explains the difficulty of defining this number because the trade, especially in the 19th century, was clandestine. This figure, added to the Europeans, Asians and North Africans who arrived on the

³Agencia Brasil (2014). UN report shows increase in the number of indigenous people in Latin America. Published on 9/9/2014.

<http://agenciabrasil.ebc.com.br/internacional/noticia/2014-09/relatorio-da-onu-aponta-aumenta-d-o-numero-de-indigenas-na-america>.

continent, can give an idea of what population replacement was like, with serious cultural consequences. On the one hand, indigenous genocide and, on the other, forced immigration and miscegenation shook local societies to the point of destroying existing empires and exterminating free peoples. It can be said that neither the arrivals nor the replacements remained unscathed by cultural mutations. Some, like the black Africans and indigenous peoples attracted, were perversely forced to forget or hide their cultural origins, their language, their religiosity and their art (Moura, 1994). Others simply began to live differently from their own countries and their children learned things that were unthinkable in their parents' country.

Nonetheless, people weren't the only ones to have gone through this process of mutation and replacement. Nature, non-humans, too. The colonial economy was perversely extractive or agricultural. The mines of gold, silver and other metals, which were fundamental to the formation of the metropolis' wealth, were devastating to nature and most of the labor, whether slave or serf, was indigenous, which imposed changes on their social orders. The other part of the colonial economy, export agriculture, also destroyed local nature. The large plantations in the fertile lowlands employed African slave labor. Both the extraction of minerals and large-scale agricultural production, therefore, had perverse consequences for nature, imposing a rigid regime of control over land to guarantee access only to large landowners. On the other hand, the metropolises quickly and violently appropriated the knowledge of the natives not only for the location of mines but also for the use of domesticated plants that came to make up European cuisine and literally kill the continent's hunger, such as potatoes, corn, tomatoes and to add glamor to their parties and theaters: tobacco and cocoa.

It can be said that America underwent a transformation of people and nature with the colonies, even this separation between people and nature was a concept brought over from Europe. Those who didn't succumb to colonialism, those who evaded it, fled or hid, continued to live in harmony, like the indigenous peoples, the so-called escaped slaves and other peoples who retreated into the interior, mixing, planting and harvesting the generous fruits of nature, learning to live with it and maintain it.

Two Americas then came into existence: colonial America, which excluded nature, exploited labor in slave-like fashion and formed accumulable wealth and controlled the land only for large-scale agricultural production; another, distant, hidden America, which kept nature preserved and coexisted with it, sheltering indigenous peoples, with their languages and traditions, and which also sheltered new peoples, escaped or disillusioned from the colonial world, such as the quilombolas⁴ and other peasants, practicing subsistence agriculture, maintaining biodiversity.

⁴Under the Brazilian slave regime, enslaved people who resisted oppression and escaped forced labor gathered together in Quilombos, where they lived in freedom from slave oppression. Quilombolas, today, are the people who make up the remnants of the Quilombos, maintaining their ethnic, ancestral and social identity that distinguishes them from the rest of society.

The group made up of non-integrated America (resistant or surviving indigenous peoples, kidnapped Africans and their children who could no longer or did not know how to return to their homeland, but did not want to or were not welcome in the hegemonic, colonial society) wanted to distance themselves from the colonial world and although they maintained certain relationships, they preferred silence and invisibility (Moura, 1981). Part of this group went on to live on the periphery of the colonial system, with difficulty retaining their identity, while others moved away, repudiating any rapprochement and rejecting colonial advances. This part of America, after independence and closer to the 20th century, grew in population and number of peoples with the arrival of whites; half-whites; half-blacks; quasi-indigenous, who, deceived or repentant, were also leaving aside the organized or civil state and immersing themselves in an intimate life with nature; the caboclos, who settled wherever they could, and without the right to land became squatters, occupiers, “invaders” in colonial terminology, providing for their own needs—free, without hunger, without money, without rights. Like the indigenous and quilombolas, these squatters claimed the land and became traditional or tribal peoples, according to Convention 169 of the International Labor Organization (ILO). These peoples in the 20th century, despite being seen as huge reserves of labor, were, and continue to be, unwelcome because they occupy the land that will be needed for the expansion of hegemonic society. All of them together, although they don’t form a homogeneous group, maintain interests that are very close to the essence of Latin American constitutionalism: they are peoples, they demand collective rights and they need the land as nature to maintain themselves as they are and they call it land, home, house, with codenames such as mother-earth, mother-nature, tekoha or pachamama, among many others. They are anti-colonial, they fight for the land, but above all they fight for a way of life which, even if they are not clearly aware of it, is anti-colonial and anti-capitalist.

At the end of the 18th century, non-colonial Latin America was made up of indigenous people and quilombolas who wanted to keep Europeans at bay and prevent them from taking over their lands and themselves as workers. Not that they didn’t take part in the independence process, they largely did, but as soldiers, believing that independence meant freedom and autonomy. In general, they weren’t fooled by the Liberators, but by the governments that followed.

The other America, devastated by mineral extractivism and extensive, monocultural agriculture, was made up of slave owners and workers and other peripheral people, the colonial society. To manage the colonies, the metropolises maintained overseers, smallholders, administrators, police officers, bureaucrats, called free men or good men. Always men and always white or almost white, apart from the Europeans directly linked to the metropolis. This formed a caste that Spanish America called the Creole elite (*élite criolla*), and Brazil called the aristocracy, mostly made up of European descendants. Some went to study in

Europe and returned to occupy important positions in the colony, always under the direction of Europeans by birth, almost nobles (Ramos, 2014).

In some colonies, especially the French, part of this elite was mulatto, the children of a forced and criminal miscegenation and trained to support slavery. The Creole elite gradually became landowners, mining concessionaires, minority partners in exports and wealthy merchants. In many places, they began to distance themselves from the interests of the metropolis and began to dream of independence. This elite was influenced by the Enlightenment and the European ideas they mirrored, but the content of freedom and equality in their speeches and practices took on a color of its own, especially since in America freedom and equality would have to confront the issue of race and overcoming slavery (Ramos, 2014), which was not at issue in Europe.

The slaves, servile or more or less salaried, always dependent, subjugated and mistreated, lived in terrible conditions. The employees, throughout the colonial period and even afterwards, with the constitution of national states, were generally recruited by force as African or indigenous slaves or (sort of) voluntary immigrants. That's why there was permanent communication between the two Americas, meaning that the free people of the former were always threatened with being violently dragged as unfree into the colonial world, just as many hoped to return or enter freedom, and sometimes succeeded.

Slaves who returned to freedom and agricultural workers who left the plantation, often with debts, and who went on to become squatters far away, in hiding, ended up forming autonomous societies that were systematically fought and criminalized by the colonial power and later by the constitutionalized national states, usually with great violence. When the workers left the colonial world, by flight or trickery, forming a new people or joining an existing one, such as the quilombolas, they were always threatened for being on forbidden land. The metropolitan authorities hunted them down without scruples, and the nation states tried to "integrate" them with policies banning land use, land regularization and assimilation into wage labour. Wars against peasants, indigenous peoples and quilombolas are numerous and often poorly told, all ending in massacres and imprisonment.

Both Americas had an interest in independence and promoted or participated in the creation of national states and their constitutions, forming or contributing to an anti-colonial constitutionalism. They all spoke of freedom, but surely each of them gave the term a different meaning. Humboldt notes that "in terms of commerce and politics, at the time of the independence discussions, the word freedom expressed only a relative idea" (Humboldt, 1814). There were countless indigenous uprisings, all radically against the metropolis, without proposals for integration, legislative changes or recognition of rights. The struggles were against colonization and for the maintenance of the original societies and the attempt to expel the invaders, that is, also against the Creoles, directly identified with colonization and foreigners. One of the great examples of this indigenous resistance

is the so-called rebellion of Tupac Amaru and Tupac Katari in Upper Peru, which for a time maintained the independence of La Paz, in the 18th century (Lewin, 1967).

During the three centuries that preceded independence, therefore, a peculiar society was formed: while in Europe society was organized based on individualism, rationalism, freedom and equality, in America racist conceptions against blacks and indigenous peoples were deepened and institutionalized, and slavery was expanded. This colonial social formation, based on slave labor and exogenous administration, generated sources of discontent that shaped different reactions. Each social actor reacted differently, but with a certain standardization throughout Latin America.

At the beginning of the 19th century, the leaders of the Creole elites formed in the European Enlightenment demanded independence in order to continue and develop their businesses freely. There were strong internal divisions, but everyone defended the need to organize national states with formal guarantees of civil rights and the structuring of powers. Among these leaders, there were those who thought they could associate with the Europeans, with the old or new metropolises, and those who preferred a deep independence without colonial ties, at least initially (Arciniegas, 2009). These forces, led by extraordinary generals and leaders such as Bolívar, San Martín and Artigas, promoted the wars of independence in Spanish America and proposed constitutions that could resemble the peoples they were organizing, but they faced internal opposition from other members of the elite who systematically removed them from power in the new states created once the Spanish army was defeated. Latin American anti-colonial constitutionalism served to defeat the metropolis but was not implemented by the Creole elite in power because it revived coloniality, with the maintenance of anti-popular control of the land, slavery, submission to indigenous peoples and dependence on foreign markets.

The theory of state forged by these Enlightenment leaders, especially Bolívar and Artigas, although it may formally resemble the approved constitutions and the ideas of European theorists, is very far from the practice applied by the rulers, with exceptions. To give a simple example, the freedom envisioned by Bolívar and Artigas was abolitionist and guaranteed land rights for the indigenous people. This was not the practice on the continent.

Before proper independence, the struggles were permanent and generally forgotten “... *la hicieron los negros. Los nombres de sus caudillos han quedado ignorados*” ([*independence*] was made by the blacks. The names of their leaders have been ignored), said Arciniegas (2009). The white elite’s attempts at independence were marked by a strong intellectuality and the dream of building a country free not only from colonialism, but also from internal differences, as led by Tiradentes in Brazil and Francisco de Miranda (Martínez, 2001) in Venezuela, among others. In 1929 José Carlos Mariátegui called these states semi-colonial because, although they had their own government, they were subordinate to for-

eign interests (Mariátegui, 2010).

This broth of contradictions resulted in different constitutional proposals, with different visions of states and politics, some of which already had Latin American characteristics, with anti-colonial proposals in defense of freedom, anti-slavery and better use of the land, thus respecting nature and peoples. Independence and its constitutions were marked by the contradictions of the two Americas, but above all by the internal contradictions of colonial America, which translated into constitutions with a Latin American character and pro-colonial governments.

Each independent country in Latin America had its own specific characteristics. The major historical moments in the construction of Latin American constitutionalism, in order of importance, were: 1) Haiti's war of independence; 2) Paraguay's independence; 3) the independence of the countries that were part of the great homeland dreamed up by Bolívar; 4) Mexico's independence; 5) José Martí and Cuba's independence; 6) the independence of the Viceroyalty of the Plata; 7) Brazil's independence. The contributions of Haiti and Paraguay will be analyzed.

4. French Freedom and Slavery in *Saint Domingue*

“... *the colony of Saint Domingue was, by far, the richest colony a colonial power has ever had*” (Gruner, 2012). Saint Domingue experienced the largest black war in the Americas. The former slaves confronted the three European powers of the time, France, Spain and England, and terrified the American world by warning of the risk of a black uprising, inspiring Hegel to write the *Dialectic of the Master and the Slave*, according to Buck-Morss (2005). At least two great Latin American novels of the 20th century tell this story, *El reino de este mundo*, by Cuban Alejo Carpentier and *La isla bajo el mar*, by Chilean Isabel Allende. The long war fought on the island (1791-1804) was entirely promoted by Africans and their non-mulatto descendants, it was the most authentic and precise war for freedom: a war of slaves against masters (Aristide, 2013). The absolute majority of the population was enslaved, the few fugitives lived in the mountain ranges, the marrons, and were mercilessly persecuted and killed by the French administration. The Creole elite, made up of a few whites and mulattos, served the interests of the French landowners who rarely lived in America and maintained economic power in the metropolis.

One day, at the end of the 18th century, the slaves led by Toussaint L'Overture dawned breaking shackles, declaring the end of slavery because all men were free as they should always have been, repeating what was written in the Declaration of the Rights of Man and of the Citizen. They chorused with the citizens of Paris and considered themselves French citizens. In fact, L'Overture had discovered that in the Metropolis the people had made a revolution, and that society was free, equal and fraternal. He raised the flag of the Revolution and confronted anyone who resisted. The landowners and slaves, the whites, fled or died; the

free mulattos and the white elite, foremen, bureaucrats, followed the fugitives or joined the ex-slave revolutionaries reluctantly and fearfully.

The war that would turn Saint Domingue into the independent, sovereign and Latin American Republic of Haiti had begun. But that wasn't quite how Toussaint L'Overture imagined it. He was amazed by the French Revolution and never tired of repeating its slogan. For him, liberty, equality and fraternity were all that the enslaved Africans throughout America could wish for. He imagined that Saint Domingue would remain a piece of revolutionary France, free and fraternal. There was no reason for it to be an independent territory, it would be a part of free France, not least because it was already aware of the greed of Spain and England and as a French territory it would be much stronger. He tried several times to make an agreement with France but was told that slavery had not been abolished. Enlightened, free and revolutionary France struggled between declaring the end of slavery and changing the regime of the colonies that guaranteed it high revenues or maintaining slavery and opening up a deep internal contradiction. In the end, it won on the economic front, but politically it continued to oscillate between being explicit in its denial of freedom or justifying its hostility to L'Overture for other reasons. After all, L'Overture was deceived, imprisoned and killed in France by Napoleon (James, 2013).

The free men, former slaves, had no way of returning to Africa and the land they had been forced to adopt, Saint Domingue, they had always known as part of France and could continue to be so as long as everyone was free. It might have been different if L'Overture's army had been made up of indigenous people who treated the French as invaders. The blacks were fighting against slavery and the French had made a bloody revolution for freedom. All this fitted in with the ex-slave General's logic. Of course, he was in solidarity with the French people, but he hadn't counted on the fact that the racism built up to maintain the ethics of slavery had sunk so deep into Europe that he couldn't admit that part of it was run by blacks.

In 1793, after all, the abolition of slavery was proclaimed, and the Black War could have ended. Hostilities, however, continued. L'Overture proclaimed himself Commander-in-Chief of the Colony, but France did not accept. England and Spain also maintained hostilities. A black nation state was unacceptable; it was no longer independence that was at stake, but systemic colonial racism. To end the international disputes, in 1801 L'Overture called a Constituent Assembly with representatives from all over the island and promulgated the Haitian Constitution of 1801 (Duarte & Queiroz, 2016).

Latin America's first constitution was written without any outside interference, by the free will of the Haitian people and under the direction of a victorious military. But its first article stated: "Santo Domingo in all its extension, and (it mentions the adjacent islands), form the territory of a single colony, which is part of the French Empire, but which is subject to its own laws. In other words, L'Overture proclaimed independence, but not separation from France; it trusted

that Paris would be the capital of free countries and people”.

Napoleon did not sanction the Constitution and did not accept L'Overture as head of the colony. To re-establish “French authority”, he sent an expedition with 25,000 men under the command of General Leclerc. War broke out again and the expedition failed completely. With no other way out, France called L'Overture to Paris in 1803. Deceived by Napoleon, he was arrested and taken to a dungeon where he died. Revolt and discouragement overtook the island, but General Jean-Jaques Dessalines, also a former slave, second in the hierarchy and L'Overture's successor, took command and declared independence, calling for a new constitution (James, 2013). The Constitution of independent Haiti was promulgated in May 1804. It was the second constitution in Latin America and the Caribbean (James, 2013). It was the first independent, popular, anti-colonial and anti-slavery nation state in Latin America.

The Haitian people and generals learned that the leaders of the French Revolution, the illustrated, rational and liberal Europeans, wanted them only as slaves, not even as an autonomous colony. They could not be citizens. History would hold yet another disappointment for them: they were not recognized as an independent nation by any European power, not even by the United States of America. They felt the weight of freedom and the reprisals for the anti-colonial struggle, above all they felt the weight of racism.

These two constitutions are the fruit of Latin American constitutionalism in essence, and not just because they were written in Latin American territory, by Latin Americans by birth or forced adoption. Both predate the Spanish Constitution of Cadiz, 1812, which influenced constitutional legal thinking in Spanish America. They even predate the Charter granted by Napoleon to Spain, called the Constitution of Bayonne, written by Napoleon before he invaded Spain in 1808.

The two are very similar, although the former declared itself a colony of France and the latter declared itself an independent empire. The constitutional idea of independent Haiti was that the Constitution would effectively govern the lives of the people and would therefore have normative force. For this reason, every time there was a need to change national life, the Constitution was changed, not by amending it, but by rewriting it. Thus, Haiti had many constitutions in the short period before the other Latin American independencies: 1801, 1804, 1805, 1806, 1807, 1811, 1816.

Haiti became an important country in the process of Latin American independence not only because of its example of struggle and persistence. Simon Bolivar found shelter there, received protection, financial aid, weapons and even a printing press, and pledged to abolish slavery in every independence he promoted (Lynch, 2010). Although he was not recognized by the European powers, he was respected and acknowledged by Latin Americans. But not only that, it was probably from Dessalines' ideas that Bolívar envisioned the Republic of non-hereditary presidents for life, which he defended and applied especially in

the Constitution of Chuquisaca.

The Antilles, where the Spanish first arrived in 1492, was the epicenter of indigenous genocide. Santo Domingo, Puerto Rico, Cuba and Jamaica had their original populations practically wiped out by physical liquidation or forced miscegenation. This explains why the independence struggles do not feature indigenous people, only the social groups that were part of the colonial process. The Haitian War is black, of enslaved workers! But it is essentially anti-colonial. That's why the society that was born there can be considered the origin, the genesis, of Latin American constitutionalism. Haiti's subsequent development is also essentially anti-colonial or post-colonial. The great powers formed in the colonial and slave-owning vacuum, France, England and then, in the 19th century, the United States of America, did not accept Haitian independence and, with their economic blockade and constant provocation of litigation, kept it in permanent internal and external tension.

Haiti's prosperity in the first decades of independence, based on self-subsistence agricultural production, was recognized by Humboldt as the most appropriate for the independent Antilles (Humboldt, 1960). To grant independence to the former colony in 1825, the French government demanded the payment of 150 million francs to compensate the former slave owners. The other countries, including the United States, claimed that they could only recognize Haiti's independence after France. The local government, pressured even militarily, gave in and agreed to pay in five installments, to pay the first of which it took a loan of 30 million francs from France itself. In 1838 France reduced the debt, which was unpayable anyway, to 60 million (Grafenstein, 2011). Independence was reaffirmed, but the country was bankrupt, in debt and without access to foreign markets. The new metropolises destroyed the prosperity described and praised by Humboldt. The confrontations and provocations continued until, in 1844, the island was divided in half and the Haitians were expelled from the eastern side, which formed the Dominican Republic. Then, in 1854, with the discontent of the population, an authoritarian and autocratic regime was set up for "the joy of the international and racist community", as Johanna von Grafenstein (2011) would say.

The happy kingdom of this world, born in a terrible war for the dream of freedom that was so close after the bloody revolution in the metropolis, succumbed because it dared to be equally free, did not accept colonialism, did not believe in racism and sought its own path of development. How can we not call these first constitutions Latin American? How can we not say that those liberators did not think and practice a Latin American constitutionalism? It's true that they weren't indigenous, but they weren't the Creole elite either. Haiti learned the hard way the evils of post-colonial colonialism, which are ultimately the same as those of slavery. Haiti was a victim, before and after independence, of colonialist racism and because it refused to produce the wealth of others, it was prevented, once again by force, from building the wealth of its people.

5. Paraguay and Constitutionalism

A long way from the Antilles, in the heart of South America, another country was rising in anti-colonial independence and would also pay dearly for its boldness.

The Province of Paraguay, subordinate to the Viceroyalty of the Plata, was halfway between the rich mines of Potosi, in Upper Peru, and the exporting port, Buenos Aires. Located between the Paraná and Paraguay Rivers, it was a vast territory occupied by many independent indigenous peoples, mainly the Guarani people who extended their domains from the bases of the mountain range, beyond the Chaco, to near the Atlantic coast and the Uruguay River to the south. The region and the Guarani people were at the heart of the Jesuit experiments in colonization without settlers, in Meliá's expression, called the Missions. The Guarani people, made up of skilled farmers, developed the cultivation of yerba mate, peanuts, corn and manioc, among many other things (Susnik, 1981). In the Jesuit reductions of the Missions, they developed skills in smelting, cattle breeding, ceramics, civil construction and spinning cotton fabrics that would be extremely useful during independence (Palález Padilla, 2015).

The political reaction that occurred in Spain when Napoleon handed over the Spanish crown to his brother Luis in 1808, following the abdication of Kings Charles IV and Ferdinand VII in Bayonne, was repeated in all the colonies. The Buenos Aires elites took different positions, sometimes in defense of Ferdinand VII, who claimed to have been wronged, sometimes in defense of the Court of Cadiz and, in some cases, with anti-colonial independence proposals. In the region, two other powers helped to complicate the political picture: Portugal, which had an interest in the Cisplatine region, and England, an enemy of France and Spain, which was trying to control the Río de la Plata.

The left bank of the Uruguay River (now the state of Rio Grande do Sul and the Republic of Uruguay) was controlled by General José Artigas, who accused Buenos Aires of maintaining an alliance with Portugal and Spain. Artigas proposed independence without conditions, the abolition of slavery and the distribution of land to all so-called Americans, indigenous and black, and the virtual expulsion of foreigners (O'Donnell, 2012). He also refused to hand over Colonia del Sacramento or the Cisplatine Province to Portugal. Artigas, with a popular army, well organized but poor, would accept nothing less than the organization of an entire nation, which included not accepting the concentration of power in Buenos Aires, nor the alliance with England, nor the rapprochement with Portugal whose government was in Rio de Janeiro (Ramos, 2014).

This struggle against Buenos Aires and Portugal represented in all its fullness what Bruschera (1971) called the dialectic of Ibero-American emancipation, on the one hand "*the patriciate of the capital cities*" and on the other "*the feeling of liberation of the peoples, interpreted by the great caudillos*" in the search for "*continental historical being*". The independence of South America and the so-called liberators supported this "feeling of liberation", but they were all be-

trayed as soon as the Creole elites found themselves free of the Spanish. The order of the “patriciate” prevailed, as the author concludes, but the only country in South America where the anti-colonial liberation of the peoples won out was Paraguay, under the command of Dr. José Gaspar Rodríguez de Francia (Bruscherá, 1971).

In the turbulent years between 1811 and October 1814, when the former Viceroyalty of the Plata was fading away and Buenos Aires was trying to maintain control and domination, facing internal and external struggles and having to make alliances and agreements with England and Portugal, the province of Paraguay was distancing itself. Political activity in Paraguay was intense. At first, the majority defended loyalty to King Ferdinand VII, but now there was a call for complete independence. From the outset, Dr. Francia made eloquent and dense speeches against any colonial alignment, proposing total independence. Francia was gaining supporters mainly among the people, peasants, small landowners, all Americans and, of course, opposition from foreigners and sectors of the economy more closely linked to the metropolis. With great skill, Francia was able to remove the leaders who were not convinced by the Republic, Independence and the “feeling of liberation of the peoples”. Under Francia’s leadership, the Republic was proclaimed to deny any relationship with the monarchies and, finally, independence was declared from both Spain and the River Plate, Buenos Aires.

In 1813, the first National Congress was held, with a thousand voters, representatives from all regions, with massive peasant and popular participation, and a very comfortable dominance for Dr. Francia. This Congress approved the “Reglamento de Gobierno” (government regulation). This document had constituent characteristics and used terms from Roman antiquity and French modernity. It used the word Republic (República del Paraguay) for the first time and appointed the government as a Consulate of two members, Dr. José Gaspar Rodríguez de Francia and Pedro Juan Caballero, with equal powers, but who would alternate each year in the direction of the State. The document is much more than a draft constitution, but deals mainly with the form of government and the powers of the consuls. There are 17 articles, the last of which consolidates a Congress of a thousand suffragettes, like the one that was approving the Regulation, guaranteeing that any change could only be established by that Congress. It was constitutionalism in practice.

The Province of Paraguay became an independent country, organized itself according to the interests of the population and constituted itself into a Republic, the first in South America. The first Constituent Congress, in 1813, did not draft or approve a constitution as such, as we have seen, but it was organized according to universal suffrage and most members were representatives of workers, officials and artisans. There were two months of meetings and Asunción was experiencing a climate of nation-building (Guerra Vilaboy, 1981). The proposal to set up an independent national state, according to the possibilities,

abilities and will of the people and the nature in which they had to live, markedly rural, with respect for the other America, indigenous, without slavery or servitude, was sketched out in the Paraguay of Francia and his successors, which is why it can be said that this was the cradle of Latin American constitutionalism in South America.

It was Dr. Francia's first year in office. A law was enacted on March 1, 1914 (Resolución Consular) that directly attacked the Creole elite made up of Asunción's commercial oligarchy and resident Spaniards, known as peninsulares. The law, whose preamble stated that it was a "*necessary measure to facilitate the progress of the sacred cause of freedom of the Republic against the machinations of its enemies*", prohibited marriage between a European man and an "*American woman known and reputed to be Spanish*", white, therefore, disallowing marriages between Europeans and only allowing them to marry "*indias de los pueblos, mulatas conocidas y negras*" (indians of the villages, known mulattoes and blacks) (Areces, 2010). This policy was contrary to the unsuccessful whitening of the population, but it intensified racism in other countries such as Brazil. From then on, the siege against foreigners, Spaniards and other Europeans was tightened to such an extent that before long most of them had moved to Argentina and Brazil, where they generally maintained economic interests and supported coloniality.

On October 3, 1814, another Congress with a thousand deputies, highly representative of the nation, with a large participation of peasants, determined new forms of government, ending the Consulate and appointing Dr. Francia Supreme Dictator of the Republic for five years, by the expressive margin of more than 85% of the votes.

The discontent of the elites was visible and Francia, with the renewed support of Congress and the popular classes, continued to invest against economic and ecclesiastical interests. Needing to maintain his nation-building policy, five years later Francia was unanimously elected Perpetual Dictator of the Republic by Congress.

The two terms, Consul and Dictator, don't have the same connotation as they do in the 21st century; they are terms taken directly from ancient Rome. Therefore, the titles were probably determined by the erudition of Dr. Francia, whose personality and culture are expressed in one of the most important works of fiction in Latin American literature: *Yo, el Supremo*, by the Paraguayan Roa Bastos. The idea of a perpetual mandate, generally not hereditary, was repeated in the countries that were created after independence, such as Haiti, Paraguay and, later, in the Bolivarian-inspired Constitution of Chuquisaca. The idea was defended by Bolívar in his letters and other writings (Bolívar, 2007), mainly for South America, because of the liberators' distrust of local elites who could return to the colony or make agreements with new metropolises against the interests of the people. This was also the fear of Francia, who had the absolute support of the people, both for his stripping of material goods and for his dedication to effec-

tively solving the country's problems. General José de San Martín, the other liberator, creator of republics such as that of Chile, at the end of the struggles when he returned to Argentina and finally had to go into exile in Spain, considered that the Latin American national states should restore the monarchies (Lynch, 2009), with American dynasties, otherwise the interests of the local Creole elites would make neo-colonial agreements against their peoples and in favor of the old or new metropolises returning to command the new countries, as in fact happened.

Paraguay became increasingly isolated and suffered hostilities from its neighbors. With control over the land and production, Francia directed the work and organized the people to meet their needs and guarantee defense against possible attacks. The country quickly became self-sufficient in cotton, cattle and cereals and started an industry based on smelting, weaving and ceramics. The missionary experiences were being put to good use. In a long letter dated December 25, 1820, Francia addressed Commander Fernando Acosta to ask him to call on the Brazilian authorities to recognize Paraguay as an independent Republic and to stop encouraging the theft of cattle and other goods to the detriment of the people's food. This letter demonstrates the hostility of the neighbors towards the prosperity of independent Paraguay, making it clear that a Latin American path to development had been found that did not depend on the European metropolises.

The legislation implemented by Francia had a Latin American character, opposed to any colonialism, and tended to protect independence from the constant hostilities of its neighbors. There is little knowledge in Latin America of this victorious experience which transformed a small, isolated country, with no way out to sea except through hostile territories, into the most important South American power.

In 1840, Doctor Francia died. Despite the social commotion that ensued, the succession was smooth and maintained the state policies that had already been established. Carlos Antonio López took over the government and ordered the legislation to be updated. In 1844, the Government Regulations of 1813 were rewritten, called *Ley de Administración Pública*. It wasn't called a constitution, although it looked like one and Paraguayan constitutional theorists call it one. The title of perpetual dictator was removed, and the ruler was renamed President of the Republic, with a 10-year mandate. The election would be by majority vote, considered to be half of the votes plus four.

In 1862, 50 years after independence, Carlos López's son Francisco Solano López took over as president. The country had no debts, was already a major industrial and manufacturing center, had developed river navigation and railways, but it was a closed country with practically no foreign trade. Solano López, a man of culture and educated in Europe, tried to open the country by proposing friendship treaties with its neighbors, which were generally never ratified (Areces, 2010).

Paraguay and its independence had gone too far. Its neighbors despised and coveted it. So began the fratricidal war known in Brazil as the “Paraguayan War” and in Paraguay as the Great War or the War of the Triple Alliance. The fact is that Brazil, Argentina and Uruguay, borrowing from England, went to war against Paraguay, which resisted heroically. It was five years of destruction. The figures for the massacre are controversial, but none are humanely acceptable. Nidia Areces estimates that 60% - 70% of the population died as a result of the war, of every five killed only one was a woman, and in some parts the ratio was even higher. She notes that the imbalance in the post-war population occurred not just between sexes, but between generations. Not only that, but cultural collections, libraries, archives and places were lost, as well as the ban on the use of the Guarani language. In addition, part of the territory was lost (Areces, 2010). It was the price of non-submission.

Vivian Trias (1975) states that Francia and the two López proved that a liberating development model was feasible in Latin America, and that it took “*an implacable and brutal war*” to stop it. To this day, the story of this Great War is poorly told in Latin America precisely because it was a different development model from colonialism and subsequent coloniality, its way of constituting the nation state, discussed and created together with the people. That’s why it’s important to understand this process in the study of Latin American constitutionalism.

With Paraguay destroyed and diminished in its territory, in 1870 the first legal document with the name of Constitution, the Constitution of the Republic of Paraguay, was discussed and sanctioned. The rich experience of Latin America’s markedly anti-colonial and popular independence had been destroyed by a relentless war. The new Constitution followed the European constitutionalist tradition, very similar to the Argentine and Spanish ones, there was no longer any novelty or threat, Paraguay was destroyed.

6. Conclusion

The independence of Paraguay and Haiti were examples of the defeat of the colonial and neo-colonial elite. The two independences were never assimilated by the new powers. There are, however, profound differences between them. Haiti is African, Paraguay indigenous. Haiti was born out of a long war against the empires and was destroyed by the economic strangulation and racism of coloniality; Paraguay was born out of the contempt of coloniality, not without resistance and struggle, and was destroyed 60 years later by a war of extermination that shames the victors (Trias, 1975). The war of destruction is present in both processes, the economic siege in both. In this sense, these two state social formations express in their beginnings the attempt to put into practice a profound and clear proposal for Latin American constitutionalism, that is, to constitute a popular, anti-colonial nation state in which the land serves everyone.

L’Overture adopted constitutionalism with a French-style constitution; as we

have seen, Dr. Francia chose to organize the Paraguayan state without the need to draft a constitution. If we start from the purely formal principle that a constitution is a law that bears the name of Constitution and establishes the organization of the State and the guarantee of individual rights, then Paraguay was not constituted by a constitution but by a Government Regulation dictated innovatively by Francia. However, what matters most for the constitution of the state in Paraguay is the People's Congress that defined it and not the written document that resulted from it. Nor does it follow the constitutionalist model to create an independent state as a colony of France. In this sense, the Haitian Constitution of 1801 was not a constitution either, but it gave birth to an anti-colonial constitutional idea that came to fruition in 1804.

However, leaving formalism aside, constitutionalism is the structuring, based on hypothetical popular self-determination, of national states with defined hierarchies and rights recognized in express legality. Of course, this self-determination is imagined, hypothetical, because it is the expression of the hegemonic force at a given historical moment and not necessarily the will discussed, consulted and determined by the people. In the case of the two independences, however, the states that were formed were popular in the sense that they were erected by the sovereign will of the people, otherwise Haiti would not have won the War of Independence and Paraguay would not have resisted the military siege for so long.

In Latin America, almost all independence constitutions expressed this Latin American essence focused on the peoples, but as soon as power was assumed, its principles and materiality were forgotten and the rules of common or civil law on land and people came into force, denying collective rights, without protecting nature and caring little for the people, in most cases maintaining slavery, despite the formal proclamation in the constitution of freedom as a right for all. Coloniality was thus maintained in the practice of a constitution with no normative force, exactly the opposite of Paraguay "without a constitution" and Haiti with its declaration of colonial freedom.

When you read the constitutions of the late 20th and 21st century, you can feel that they are a kind of revival of the old popular causes of the early 19th century, repeating the contradiction between the will of the people and the will of the elites. The difference between the formative Constitutions and those of the late 20th and 21st century is that the popular and anti-colonial essence has been written from a learning experience of two hundred years of frustration, with indigenous protagonism. In Paraguay and Haiti, the will of the people prevailed in practice, regardless of whether the constitutions were right or wrong. In the constitutions of the late 20th century, the will of the people was directly challenged to establish the text of the constitution, and it succeeded more and more explicitly. Putting this popular will into practice, however, is another matter, because the anti-colonial forces remain strong, active and dominant. When the internal defeat of the elites seems definitive, external economic or military forces come in.

That's why, when we see the difficulties in implementing Latin American constitutions, from Brazil's in 1988 to Bolivia's in 2009, we should remember history and reinforce the idea that Latin American constitutionalism was born with the two national states that were formed in the name of and for the people who needed them.

Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

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