

Critical Historicity of Latin American and Caribbean Constitutionalism

Historicidade Crítica do Constitucionalismo Latino-Americano e Caribenho

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Abstract

The theme of the research presented here deals with the historicity of Latin American and Caribbean constitutionalism from the reading of critical thinking. In this sense, the study is delimited by the sociopolitical relationship between the struggles for liberation at its intersection with the constituent power and human rights, both based on popular sovereignty. In this way, the legacy of two constituent experiences (Haiti and Uruguay) is restored in order to know the importance of the ruptures with the colonial oligarchic model and to redefine the foundational milestones of the bicentennial of Latin American constitutionalism.

Keywords: Latin American Constitutionalism; Liberation; Critical thought.

Resumo

O tema da pesquisa aqui apresentado trata da historicidade do constitucionalismo latino-americano e caribenho a partir da leitura do pensamento crítico. Nesse sentido, o estudo é delimitado pela relação sociopolítica entre as lutas por libertação na sua intersecção com o poder constituinte e os direitos humanos, ambos fundamentados na soberania popular. Assim sendo, ganha sentido o resgate do legado de duas experiências constituintes (Haiti e Uruguai) no intuito de conhecer a importância para das rupturas com o modelo colonial oligárquico e redefinir os marcos fundacionais do bicentenário do constitucionalismo latino-americano.

Palavras-chave: Constitucionalismo Latino-Americano; Libertação; Pensamento Crítico.

1. Introduction

- *When you deposed me, you cut in Saint Domingos only the trunk of
the freedom's tree.
It will sprout again by the roots, for these are numerous and deep!*
Toussaint L'Ouverture

*"That the Indians in their villages govern themselves
(...) For me there is nothing more sacred than the will of the people
(...) My authority emanates from you and it ceases before your
sovereign presence
(...) United intimately, we fight against tyrants who try to desecrate
our most sacred rights
(...) The people of South America are intimately united by ties of
nature and reciprocal interests"*

José Gervasio Artigas

This article intends to systematize some results obtained from the research on Latin-American and Caribbean constitutionalism from the perspective of the critical legal reasoning. Initially, it should be recognized that those are still the partial results of a series of debates, scientific investigations and collective reflections promoted by the Centre of Emancipatory Studies and Practices – CESP (NEPE - UFSC)¹ in partnership with the research group “Critical Legal Thinking in Latin America” (UNESC)², which have sought to critically investigate the constitutional historicity in *Nuestra America* (MARTÍ, 2005).

Therefore, this proposal for (re) construction of a Latin American and Caribbean Constitutional History will not be restricted to the formal analysis of the Constitutions. The perspective seeks to establish the connection between the region's insurgencies, resistances, rebellions and revolutions against the colonial-mercantilist-capitalist model, which occurred in the turn of the 18th century to the 19th century, and the constituent experiences deriving from these processes in the first two decades of the 19th century.³

Thereby, the aforementioned researches have as a common foundation the premise that one of the tasks of critical thinking on the continent is: “to dis-cover” this

¹ In Portuguese: Núcleo de Estudos e Práticas Emancipatórias – NEPE, <http://www.nepe.ufsc.br>

² <http://www.unesc.net/portal/capa/index/620/10171>

³ For further information on the broad scenery of constitutionalism in the 19th century, see: WOLKMER, Antonio Carlos; RADAELLI, Samuel Mânica. *Refundación de la teoría constitucional latinoamericana: pluralidad y descolonización. Derechos y Libertades: Revista de Filosofía del Derecho y Derechos Humanos*, Madrid, v. 37, n. 2, p.31-50, jul. 2017. Cuadrimestral.

(these) history (histories) “co-vert” by the academic eurocentrism and by the coloniality that has spread among the various dimensions of the everyday life” (DUSSEL, 1993), reinforcing “[...] the existence of a Latin American liberating reasoning that is defined by a theoretical-practical struggle against a social-political situation of domination, oppression, exploitation and injustice” (WOLKMER, 2003, p. 24).

In this aspect, one of the objectives of this work is to redeem some of these “other” stories and (re) cognize their affiliation to a common past that comprehends a Latin American typical “nosotros” in all its complex diversity, from the struggle (s) of the oppressed, thereby composing a history from bellow (MALDONADO, 2015, p.28), since, as proposed by Thompson (NEGRO, 2001) in the same perspective of Walter Benjamin’s VIII thesis on history concepts: “[...] historical materialism, as far as possible [...] seeks to cut the history against the grain.”^{NT} (LOWY, 2005, p. 70).

In this sense, the theme that permeates the work is the matter of the need to (re)count and (re)cognize Latin American and Caribbean’s constitutional history, focusing on the theoretical constitutional aspect from a transdisciplinary perspective which incorporates the contributions from sociology, political science and history, whereas only through the plurality of perspectives within the human sciences one may truly understand the practical experiences that occurred on the eve of the founding period of the National States in Latin America.

For this reason, the investigation regarding the constituent experiences in Latin America verifies a conceptualization of constitutionalism profoundly permeated by ideas such as people’ sovereignty, liberation and complexity in the search for the democratization of social-political relations. However, this historical approach was covert by the Latin American’s public life grounds of justification, after all, the traditional north-European conceptual matrices characterized by the liberal-conservative of monistic-positivist bias were prioritized.

Thereafter, the theoretical constitutional breaches of other Latin American and Caribbean constitutionalism’s grounds of justification – in which the elements represent a theoretical proposal that emerge as a concrete hypothesis of transformation, so they must be rescued and recovered as a condition of critical intersubjectivity of the people’s sovereignty in the context of their struggle for liberation – shall be demonstrated.

^{NT} In the original in Portuguese: “escovar a história a contrapelo”.

Thus, the first part of this essay shall focus on the matter of (re)signifying the foundational milestones in the bicentenary' speech, mentioning, specially, that the celebrations for the emancipation's two hundred years anniversary have disclosed a hidden past of political insurgencies, which have resulted in constitutional experiences wasted by the epistemic coloniality of the constitutional reasoning.

From this framework, the second part of this essay shall be divided into two regional experiences – Haiti and the eastern band of the River de la Plata (now Uruguay) – that, in the first decades of the 19th century, indicate some important elements for the recovery of the constituents that were responsible for the transformation of the hegemonic relations with the metropolises on duty, as well as regarding the regional hegemonies that, at the time being, were already aiming to assert themselves, thus propagating the coloniality of power.

2. The Fundamental Milestones of the Latin American and Caribbean Constitutionalism's Bicentenary: a critical approach

In the foundational period of Latin American and Caribbean States there can be found facts related to the construction of legal institutions in the region, political processes and social struggles, conflicts over impoverishment, concentration of power and income, deep social inequalities, violence, slavery, coloniality, cultural hegemony of the metropolis (or hegemonic centres of political and economic power) and their representatives. Therefore, the issue regarding the State, Law, and the society may be better outlined through the delimitation of the studies of constitutionalism and the constituent processes in the regional setting, especially when this phenomenon is analysed beyond the merely conceptual borders of the legal field, verified as a result of a specific continental reality (with the inclusion of its complexities).

Thus, according to the Argentine constitutionalist Roberto Gargarella (2015, p.9), the Latin American constitutionalism is a significant rich field of study that has not yet been fully explored, which leads to an interest in deeper investigations concerning the distortions regarding the constitutional theory involved in this processes, amplifying the European or Anglo-Saxon matrices that influenced the constitutional phenomenon,

since they are not the sole elements that should be considered; after all, these matrices' unfolding's must be adequate to the set of divergent movements that involved the various regional social strata in the dispute over power, or even in the dispute over the hegemony of local political power (VILLORO, 2010).

This last element is indicated by Gargarella (2015, p. 09) as a capital one, for the relation between the social problems and the constituent processes, as a rule, translated into the trust in a list of rights and guarantees as elements of transformation, with the verifying of the "engine room" (GARGARELLA, 2015), that properly involves the organization of this political power, being forgotten. Consequently, the investigative request aims to concretize a historical analysis of the regional constitutionalism in its own scope as a concrete reality of structural formation of the National States, crossed by ills and distortions that form a specific model of constitutionalism.

In this sense, the constituent theoretical conception adopted by the present study visualizes the State's and the constitutionalism's crisis in the democratic intersection against the offensive of the deconstituent processes (PISARELLO, 2014), caused by broad periods of interference by the so-called oligarchic constitutionalism, reflexion that takes on a global facet against the democratic constitutionalism in the last decades (PISARELLO, 2014). The current stage comprehends the democracy inside the central problem that does not limit itself just to the search for the insertion of more rights to the legal catalogues, but properly the powers' restructuring and the disintegration of the political hegemonies.

Therefore, the constituent power, investigated from the perspective of Geraldo Pisarello (2011; 2014), is a phenomenon that shall be interpreted according to the political convergence originated from the social convulsion in the confrontation between the democratizing tendencies in opposition to the deconstituents or legitimating oligarchies of the stable order.

This posture is considered as noteworthy, since the research purposes to resume the main problematics that involved the Latin American society, and that is not just another historic task, but properly a reflection about the political and the legal through their originating problems and most emblematic confrontations. These elements aid in the affirmation of the continental constitutional reasoning and

determine the main matrices through which the said theme has been developed over its more than two hundred years of existence.

For that reason, the central issue that conducts the study is not only an approximation and a historical-structural survey of the socio-economic contradictions and their legal unfolding; it goes beyond, seeking the understanding of the constituent roots and their dimension of humanity, for the fundamentals which permeate these processes are found in the search for dignity through the requirement of non-deprivation to the satisfaction of basic needs. By understanding the constituent processes as political-legal struggles that are evidenced in several issues grouped by the sentiment of injustice and transformation, a specific conceptualization of constitutionalism is revealed, which is not catalogued by legislative devices and should be seen as an instituting statement, in a critical perspective (a proper theme of the constitution theory).

Thus, the Latin American and Caribbean constituent movements are perceived as political struggles for Rights, which precede the legal field by representing instruments of confrontation to the colonialism and the oligarchic constituents – that dictate Constitutional Law from the procedures and catalogues that determine their interests. Thereafter, these “institutionalized struggles” (SÁNCHEZ RUBIO, 2007, p. 27) for justice, previous and contrary to oligarchic interests, represent yearnings covert by the post-constituent constitutional coding, and reveal a true Latin-American and Caribbean tradition of fighting for Human Rights ((DE LA TORRE RANGEL, 2014, p. 10-26), or even, they affirm a fight for a dignified life and against the injustices.

In this task, the destabilization of the hegemonic political consensus by the instrumentalization of constitutionalism as a tool of transformation, based on the sovereignty of the people, becomes important. It is a matter of claiming and recovering the leading role of fundamental human rights demanded as a criterion of political justice in the peripheral regional reality, since in the constituent struggles the denunciations and also the concrete alternatives to the deficiencies, dominations and violence of the constituted power (to be understood as dominant hegemonic consensus) appear.

On this, as being verified that, in the last decades, Latin-American political society has been mobilizing itself in the sense of transformations that consider the

regional, social-historical and concrete reality's character⁴, opting for the resumption of the constituent power as the front of collective struggles for rights – be they the already acquired ones, be they “the new rights” – as guarantees for the imposition of globalizing neoliberalism (or oligarchical constitutionalism), it is worth to retrieve the sense of popular sovereignty in order to reclaim another socio-political agreement, more consistent with the factual reality and respecting those peripheral society's pluralism.

For this reason, it is appropriate to closely analyse each of the “regional constituent democratic cycles” – only the founding period being adequate to this study –, in order to perceive the ability to be a proposal of future (PISARELLO, 2014, p. 19) with elements of innovative character, to seek, through historical reflection, alternative constituent democratic possibilities in the framing of other paradigms for Human Rights as a global alternative (PISARELLO, 2014, p. 20). Furthermore, these alternatives should be explored according to their potential of offering concrete proposals for the State's crises, for the constitutionalism's crises, and for the factual needs of the subjects constructed as absent from their own history in Latin America and Caribbean.⁵

Hence, it is admissible to consider the openness made possible by the dimension of human demand as a standard of justice, present in the constituent political relations featured in the radical models (GARGARELLA, 2003, p. 312-320), in which appear the denied individuals' yearnings in the form of overcoming the structural matrices of domination of the hegemonic models of the State and of modern constitutionalism⁶. Thus, these experiences correspond to the alternatives of a critical constitutionalism (with its categories: democratic, pluralist, intercultural, decolonial, and egalitarian).

Thereby, it is through these interdisciplinary categories that one may explore a critical constitutionalism, since the regional constituent processes affirm a Latin-American or even Iberian- American⁷ constitutionalist tradition which is affirmed in the requirement of fundamental human rights as a political form, before a legal form, that

⁴ About this reference, please verify: MACHADO, 2011, p. 371-408, e; MALDONADO, 2015.

⁵ About the absent subjects and constitutionalism, see: MACHADO, 2012, p.93-110.

⁶ For a broad view on constitutionalism, see the chapter 1 of the following work: WOLKMER, Antônio Carlos. *Constitucionalismo e direitos sociais no Brasil*. São Paulo: Acadêmica, 1989.

⁷ This tradition is used analogously to the works that focus on a recovery of an Ibero-American tradition of human rights, developed by ROSILLO, Alejandro. *Los inicios de la tradición iberoamericana de derechos humanos*. México: Universidad Autónoma de San Luis de Potosí; San Luis Potosí/Aguascalientes: Centro de Estudios Jurídicos y Sociales Mispát, 2011. In the same sense: DE LA TORRE RANGEL, Jesús Antonio. *Tradición iberoamericana de derechos humanos*. México: Escuela Libre de Derecho; Porrúa, 2014.

must be retrieved and explored for verification of its ability to express the sovereignty of the free people.

Considering the aforementioned, the bicentenary of Latin American constitutionalism achieved the sporadic emergence of works on the subject, despite the fact that many constitutionalists have dedicated a considerable amount of their work in the last years to the study of the constituents from the first decade of the 19th century. The rise of these works reveals the concern for regional constitutionalism, but even so it is customary to ignore them in the chairs of constitutional theory, since the traditional doctrines privilege the North-Eurocentric matrices.

In contrast to the established, in 2015 the Argentine constitutionalist Roberto Gargarella concludes a profound research on the subject of Latin American constitutionalism in the last two hundred years (1810-2010), pointing out five periods: the first constitutionalism is the foundational one (1810-1850); the second one being the so called constitutionalism of fusion (1850-1890); the third, a period of crisis with the influence of the positivist reasoning; in fourth the period of social constitutionalism; and the fifth and last one called “new Latin-American constitutionalism”, at the end of the 20th century (GARGARELLA, 2015, p.10).

However, it should be noted that one should not agree⁸ with the starting point of this subdivision by the Argentine jurist, since it denies the importance of Haiti’s Constitution and the political influence that it had in the Latin-American independence processes. Even so, in close proximity to critical studies of Law, the author presents a central concern: the issue of inequality and its relation to power structures; with special regards to the disturbing need to think and organize democratic life (2015, p.11); therefore, seeks a redeem of the matrices of regional constitutional and political reasoning.

According to this study, the foundational period presents one of the ideas that has the most proximity with the critical characteristics previously referred, it is about

⁸ It is relevant to emphasize that Alejandro Médici’s (2015) method of research is closer to the objectives of the present work. Yet, the openness of the historical experiences provided by Gargarella’s research is undeniable. For a Latin-American constitutional criticism, see: MEDICI, Alejandro. Poderes y derechos en el constitucionalismo latinoamericano: el método de historicización de conceptos ellacuriano y la crítica del constitucionalismo regional. In: ROSILLO MARTÍNEZ, Alejandro; PÉREZ MARTÍNEZ, Ramón Manuel. *Historicizar la justicia: estudios sobre el pensamiento de Ignacio de Ellacuría*. México: UASLP, 2015. Alternatively: MÉDICI, A. *La Constitución Horizontal. Teoría Constitucional y Giro Decolonial*, CENEJUS/Univ. San Luis Potosí, Aguascalientes (México), 2012.

the idea of radical constitutionalism, which is opposed by conservative and liberal constitutionalism. In terms, Gargarella names:

El ideario constitucional radical, en cambio, tendió a proponer un diseño constitucional contrapuesto al ofrecido por el conservadurismo. Por un lado, en este caso se propuso la expansión del poder mayoritario (típicamente, congresos más poderosos, un Poder Ejecutivo subordinado a la voluntad popular, una rama judicial incapaz de desafiar las decisiones de la Legislatura, una organización territorial fuertemente descentralizada). Por otro lado, el radicalismo acostumbró subordinar los derechos individuales a las preferencias mayoritarias, por lo que, para muchos, su noción de derechos era simplemente ridícula. ¿Para qué servían los derechos consagrados constitucionalmente, sino para frenar las apetencias mayoritarias? El modelo radical, según entiendo, tuvo muy poca fortuna en la Latinoamérica del siglo XIX, aunque había sido enormemente influyente tanto en los Estados Unidos como en Europa, sobre todo hacia fines del siglo anterior. De todos modos, según diré, en latinoamericano se acostumbró a agitar el fantasma del radicalismo como una gravísima amenaza siempre latente, y oculta en la mente de unos pocos pero influyentes líderes locales (GARGARELLA, 2005. p. 307).

The author emphasizes that the scarce influence of this constitutional model in the two hundred years of regional constitutionalism is due to the revolutionary character of radical constitutionalism's ideals, because the use of the sovereignty of the people (understood by the author in the concept of majorities) to justify its power leads to problematize the private spheres of the empowered elites and touches basic subjects regarding the production of riches, such as the abolition of slavery, access to land and labor regulation. For this reason, and also by the constant alignment of the liberal and conservative standpoint in the defense of the political and economic interests that they most likely represent, the radical inclinations were doomed to little quantitative success; while some experiences merit reference by their potentialization of the constitutionalism's transforming character, such as the experiences of 1791-1805 in Haiti (the first country in America to abolish slavery); 1814 in Mexico, with Apztizangán's constituent and in the present territory of Uruguay, between 1813 and 1815, with the legal-political proposals of Jose Gervásio Artigas.

These three constituent experiences summarize the most advanced egalitarian ideas that existed in the Americas – and even in Europe – in that historical period, because in them were envisaged constitutional proposals that actually proposed

structural transformations in the political and economic power, since they included the social stratum of the oppressed in the political participation, and privileged the modification of the oligarchic and colonial agrarian structure through legal mechanisms, that reorganized the distribution of land for those who worked on it.

Thus, these constitutional movements that occurred in Latin America from north to south (recalling that Haiti was a French and Spanish colony) proposed the elaboration of mechanisms that could provide materiality and empower non-privileged sectors by regional economic political forces.

It should be noted that, because the research is still being developed, only its partial results, obtained from two historical experiences that demand to (re)situate the region constitutionalism's foundational milestones, shall be presented, since they represent a constitutional legacy with its own roots. The Haiti's case and the case of the eastern band of Rio de la Plata shall be especially considered in the following lines, for it is undeniable that these historical experiences reveal categories that have been subsumed to the community of subordinate's critical consensus' contingencies, who have reconverted the constitutive duality of modernity-coloniality/emancipation-domination and constructed political-legal processes extremely relevant to the constitutional realm throughout their liberation struggles.⁹

3. Haiti: The black Revolution and its Legacy to Latin American and Caribbean Constitutionalism

In recent years, we have strengthened and deepened the legal investigations related to the Latin-American Constitutionalism, with special regards to the recent innovations that have occurred in the course of the constituent processes of the first decades of the 21st century, as well as the challenges of its enforcement in a region characterized by coloniality and by dependent capitalism. In this direction, we resume the readings and

⁹ According to Enrique Dussel Liberation consists of: "Praxis de liberación, no praxis de emancipación. La primera logra que el esclavo sea libre, es decir, que llegue a ser lo que no era; la segunda permite, por ejemplo, que el hijo adquiera el estatuto de adulto, es decir, que obtenga los derechos que ya le correspondían. Liberación indica entonces un acto político de compromiso límite, de lucha, de crear lo nuevo. Emancipación significa una dimensión más bien jurídica, edulcorada, disminuida en su contenido de enfrentamiento a la vida. (DUSSEL, 2016, p. 144)

fruitful debates of Latin-American critical reasoning and incorporate the need of better knowing the stories regarding the insurgent experiences of our region to the legal debate.

From these concerns we direct our research to two great areas of Law, the History of Law and Constitutionalism, which is why, in this work, we propose the achievement of this conjugation, highlighting the decolonial bias and the need to redefine the foundational milestones of the traditional history of constitutionalism in our region.

Not by chance, according to our perspective, these landmarks are found in the Caribbean, a region that has been facing and resisting imperialist colonial domination since 1492. The documents from that time indicate that, on December 5, Christopher Columbus arrived at *Quisqueya*¹⁰ Island, where five large *Táínas* communities, organized in the form of *cacicazgos* were established. According to Frei Bartolomé de Las Casas¹¹, at that time, these communities had approximately three million inhabitants. From the beginning, the colonizers baptized the island as “La Española”, founded an European fortress and started one of the greatest genocides that we have news of. There was, at the colonies, a series of resistance processes of different forms and nuances. The most famous one, from that period in these islands, would be the insurgency led by Enriquillo, who between the years of 1519-1533 reorganized the *Táínos* in the high of the Mountain of Bahoruco, a territory free from the colonial domination and the slavery-based model, which resisted for more than a decade before being defeated. The “conquer” of the *Táínos and Arahucos* territories in that region practically meant its extermination.

In the region also inhabited another indigenous nation: the *Caribes*, a warrior people from the islands and seacoasts, who currently give name to the seas that bathe those islands, and that bravely resisted the European dominion. In this sense, the myth about the *Caribes* and their legendary Gran Can, King of the Kings, is still present to this day, since even though they were decimated during the conquest’s first century – period

¹⁰ Quisqueya’s origins circle back to the táina language and signified “mother of all lands”. See: SALAMANCA SERRANO, Antonio. *Teoría Socialista del Derecho*. Vol. I. Quito: Editorial Jurídica del Ecuador, 2011, p. 281. We owe Professor Salamanca a profound acknowledgment for his significant contribution to the conducting of this research on Haiti and the critical reflections about the Right to Revolution.

¹¹ About this matter, see: CASAS, Bartolomé de las. *O paraíso destruído: brevíssima relação da destruição das Índias: a sangrenta história da conquista da América espanhola*. [6. ed.]. Porto Alegre: L&PM, 1996.

in which 90% of this population¹² was exterminated – , this region, in particular two of its islands, through its black, mixed race, and what was left of the indigenous after the genocide people, achieved two unprecedented processes of imperial liberation that were victorious. We refer: (i) to the Revolution conducted by the black people in Haiti from 1791 onwards, that, against the monarchist Spain, the “imperial” England, and the “revolutionary” France, was the first country to abolish the slavery of human beings; and (ii) to the Cuban revolution, that faced Batista’s dictatorship and the interests of the money from United States of America to establish the socialism in that island in 1959.

In this regard, it is important to recall the relevance of the work by the Cuban Roberto F. Retamar,¹³ who rescues the history of the region's resistance in the literature of the 16th-17th centuries, especially in Shakespeare’s *The Tempest* (1611), in which the *Caliban* character summarizes and symbols in a brilliant fashion the “savage” slave, namely, the indigenous, the “barbarian” and the black insurgent (why not refer to the *cimarrones* and/or *quilombolas*) who never resigned themselves to colonial domination and slavery. This perspective will be essential to the construction of *Nuestra América*’s identity (MARTÍ, 2005). Since it was not different across the entire American continent, it was a model of geopolitical domination¹⁴. In short terms, the colonization was characterized by the unrestrained expropriation of natural resources and, above all, by physical, moral and spiritual violence against the people who inhabited here, whom became known, in a generic way, as indigenous, and that, in the last five centuries, have been practically decimated (MALDONADO, p.32).

¹² Accordingly, Dussel refers that: En efecto, en algunas regiones los indígenas vieron reducida su población en un siglo hasta un 10% de su número original. La violencia fue brutal; la civilización amerindia tuvo conciencia de haber caído en un hecatombe final – era el <<final de los tiempos>> del Quinto Sol; era el tlatzompan azteca, el pachacuti de los incas -, el paso a otra época. DUSSEL, Enrique. Política de la Liberación. História Mundial y Crítica. Madrid: Editorial Trotta, 2007b, p. 194.

¹³ RETAMAR, Roberto Fernández. Todo Caliban. 1ª ed. Buenos Aires: CLACSO, 2004.

¹⁴ In the words of Darcy Ribeiro: “The population size of the Americas’ Theocratic Empires of Regadios has been the subject of the most disparate assessments (...) Recent studies, based on the use of new sources and on more precise criteria leveraged this amounts to greater magnitudes. W. Borah (1962, 1964) estimated the pre-Colombian population of Central Mexico to be between 25 and 30 million, and H. Dobyns (1966) e P. Thompson (1966) situated that area’s population between 30 and 37.5 million, to which they added 10 to 13 million to Central America, and, also, 30 to 37,5 million for the Andean region. According to these evaluations, it would be admissible that the populations structured in the Theocratic Empires of Regadios reached an amount of 70 to 80 million inhabitants before the conquest. A century and a half later, those populations had been reduced to about 3,5 million, given the impact to which they were submitted.” RIBEIRO, Darcy. Configurações histórico-culturais dos povos americanos. Rio de Janeiro: Civilização Brasileira, 1975, p.21.

With the drastic and continuous indigenous extermination, from 1518 Spain begins to take African slaves to the *Española Island*, whom will continue working in the mines and, above all, will become the engines of the agricultural model for the export of sugar cane and coffee. As the west side of the island was more depopulated and the Spanish did not completely colonize that part of the island, many French pirates and merchants begin to use those coasts, founding villages and initiating the French invasion that will give rise to *Saint Domingue*. Formally, only a century later, with the Treaty of Ryswick, in 1697, the territory becomes a French colony, that:

Introdujo unos 20.000 esclavos por año como fuerza de trabajo para la producción de azúcar. Cambió el actor, pero Francia representaba el mismo papel en la relación del capitalismo imperial-colonial. El azúcar se convirtió en la principal mercancía de exportación y causa de explotación. Haití se transformó en el siglo XVIII en la zona con el mayor número de esclavos y el dominio colonial caribeño más importante de Francia en América. En 1720 Haití superaba ya a otros países en la producción de azúcar, por delante de Brasil, Jamaica, Barbados y Martinica [...] En 1789, la plusvalía robada a Haití por Francia suponía dos tercios de la economía francesa. Medio millón de esclavos negros explotados en 800 ingenios, añilerías y cafetales fueron parte esencial de la acumulación originaria para poner en marcha el capitalismo industrial europeo. (SALAMANCA SERRANO, 2011, p. 283)

Thereafter, we must understand the importance of this Caribbean colony in the scenario of world geopolitics during the 18th century. Known as the “Black Pearl of the West Indies”, “Hispaniola” or “San Domingo” will be the model of French colonial capitalist exploitation and will play a prominent role in political conflicts and tensions that will mark that era, since the metropolitan economy was completely based on the overexploitation of the work of slaves and in the agricultural model of *plantation* for export.

However, this model of domination over bodies and nature did not occur peacefully, the marks of colonial violence are still present, but also are the resistances to it. For this reason, we must remember the dozens of uprisings, rebellions, guerrillas and insurgent actions organized by the black people of San Domingo during the struggle for liberation until becoming Haiti. On this, see what Antonio Salamanca mentions:

Los levantamientos emancipadores fueron constantes durante los siglos XVII y XVIII. Testimonio de ello son: La rebelión del esclavo

Padrejen, en Por-de-Paix (1678); de Janot Marin y Georges Dollo, alias Pierrot (1691); de 300 africanos esclavos, en Quartier- Morin (1697); del esclavo Michel, en Bahoruco (1719); de Colas, el de una sola pierna (1724); de Plymouth (1730); de Polydor (1734); de Pompée (1747); de Médor (1757); de F. Mackandal (1751) [...] Noël, Isaac, Pyrrhus Candide, Telemaque Canga y Jacques (1775); de Santiago, Philippe y Kébinda, en Bahoruco (1785); de Jérôme, alias Poteau, en Marmelade (1786); de Yaya, en Trou (1787); de Bookman (1791), esclavo africano [...] junto con Jean François y Biassou inician el levantamiento negro. A ellos se unirán Toussaint L'Ouverture, Jean-Jacques Dessalines y Henri Christophe. (SALAMANCA SERRANO, 2011, pp. 284-285)

Having this insurrectional history, we understand that the people of these islands, incredibly rich and important to the colonial system, has tried to break the bonds of slavery many times and has risen in the struggle for freedom against European colonization.¹⁵ Paradoxically, the bastion country for the liberal illuminist tradition, the stage of the Revolution founded on the principles of Liberty, Equality and Fraternity, which for many will determine the transition to the modern era, and which would have founded the premises of Human Rights and Constitutionalism in the West, at that time, was the metropolis that exploited the islands so much. However, in that same period, a large part of the French people (represented by the third state), too, was exploited by the Clergy (first state) and the nobility (second state) in the absolutist model of Louis XVI, which goes into crisis and leads to the convocation of the General States. Since the ruptures of 1789, therefore, the French metropolitan territory has been in full sociopolitical turmoil, revolutionizing various social structures and haunting French elites and other European monarchies with its democratic-popular vein.

In this context, the colonial issue takes on a crucial aspect, usually forgotten by traditional hegemonic theories and even by critical authors, and will reflect on many of the ideological tensions and conflicts experienced in the European territory. In the constitutional scope, it will not be different. If in France (in blood, fire and guillotine) the people were trying to end absolutism and to build the Republic, in the case of San

¹⁵ The black people not only bravely resisted slavery, but also theoretically demonstrated the fallacies of racism. In this sense, it is important to recall the work of Joseph-Anténor Firmin (1850-1911), a Haitian anthropologist, journalist and politician. Firmin became known for his book **The Equality of Human Races**, which was written to rebut and criticize the book of the French writer Arthur de Gobineau - **An Essay on the Inequality of Human Races**. Gobineau's book affirmed the superiority of the supposed Aryan race and the inferiority of blacks and other people of color, Firmin brilliantly demonstrates the fallacies and inconsistencies of this "scientific-racism".

Domingo, the last decade of the 18th century was also revolutionary, and was characterized by the abolitionist struggle for liberation of slaves, overcoming color inequalities and building a new fraternal society.

If, in October 1789, the Declaration of the Rights of Man and the Citizen was practically approved by unanimity (only the King and part of the members who organized the monarchist counter-attack were publicly opposed), the issues brought by the Declaration were undefined and under strong attack from the counterrevolutionary forces. One of the main problems, without doubt, referred to the directions of the colonial issue. The high bourgeoisie, especially the maritime bourgeoisie that controlled the colonial market, the nobility and part of the clergy, did not welcome the possibility of losing control over the profits derived from the Black Pearl of the Caribbean, which is why the central axis (often veiled) was how to maintain the "order" and the "normality" in colonial territories. Or rather, how to prevent the principles of the French Revolution and the Declaration of Human Rights itself from being recognized in the colonies and, above all, extended to colored men (mixed race people) and slaves.

In defense of the universality of these rights were: the wing to the left of the Jacobins, some members of the clergy and the most humanistic bourgeois sectors, which, in the great majority, organized themselves or supported the Society of the Friends of the Black, an anti-slavery French organization, which defended the recognition of the Declaration's rights for men of color, as well as a gradual process of abolishing slavery in the colonies. On the other hand, their main opponents organized themselves in the *Massiac Club* and had one of the icons of this process as their representative: the lawyer Antoine Barnave, one of the founders of the Club of the Jacobins, initially a fervent democrat who became president of the Constituent Assembly and, throughout the process, betrayed his principles and collaborated with the royal family and the monarchists, including his acting as draftsman of the decree which dealt with the colonial issue:

In February, the president of the Massiac Club sent Barnave a memorandum on the colonial issue, which he had requested, and so it happened that, appointed on March 2, he had his report ready on March 8 [1790]. On that day, speaking to the Commission, he proposed everything that any reasonable inhabitant of the colony could expect. They should be allowed to elaborate their own Constitution and modify the Exclusive, submitting both to the

National Assembly. In drafting the decree, the words 'slave' and 'mulatto' were not used, since the Assembly would not bear to hear them [...] the bourgeoisie, not wanting to face the problem, sent this ambiguous Decree to Saint Domingo and hoped for the best. (JAMES, 2010, pp. 78-79)

The approved Decree was not only ambiguous, but as the Abbot Gregory – one of the main abolitionists of the period – had warned, provided, by its article 4, an extensive interpretation of rights that could be used by the mixed-race people, since it gave a right to vote to "all persons" over 25 years old who fulfilled certain qualifications as owners and residents. For fear of inflaming the debate, the Decree was approved like this and provided useful arguments for the abolitionists.

On the importance of this debate within the French Constituent Assembly, we shall see the following account:

The debate was one of the biggest that the Constituent had seen. Robespierre awakened the deputies to the fact that they were participating in a dangerous game in such flagrant violation of the principles upon which their own positions were based: [...] But the Assembly, on the defensive against the revolution, surrendered and on September 24 revoked the decree of May 15. On September 28, another decree ordered the departure of new commissioners for St. Domingo, and on September 29 the Constituent Assembly would no longer meet. (JAMES, 2010, pp. 83 e 86)

Meanwhile, in Saint Domingo, the racial conflict between mixed-race people and white people worsened and the first already had great victories in the places where they had allied with the slaves in the revolutionary struggle. Seeing the great chances of being defeated, the white farmers propose an agreement. On October 24, there is a conciliation in the colony between mixed-race people and white people. The slaves were betrayed by their bothers of color. However, "[...] six days after arrives the Decree of September 24, by which the Constituent had revoked all of the mulattos' rights, and once again putting their destiny in the hands of whites" (JAMES, 2010, p.105). In Paris, the closing of the Constituent had demonstrated that the bourgeoisie did not intent to recognize and extent the rights of man and the citizen to "men of color". However, this debate continued heated in the French capital, because the lefty-wings continued to support the literalness of the article one of the Declaration and the need to abolish slavery.

In this scenario, the tension in the colony intensified and the end of that month would later be remembered by the regress of Vicent de Ogé, one of the main mixed-race leaders in the Caribbean, from France. He organized, with the support of English and North-American abolitionists, a guerrilla of 300 militants that fought for the end of racial discrimination. After a few victories, the siege against Ogé is intensified on the island. On November 20 of 1790, he, Jean Baptiste Chavannes (important leadership in that period) and other 23 insurgents are captured on the Spanish part of the island. They are deported and delivered to the colonial authorities on the French side, being tortured and, on February 6 of 1791, sentenced to capital punishment by the “Wheel”, a torture instrument that allowed the agonizing exhibition of the doomed in public.

Ogé’s speeches and performance during the constituent in Paris were: “[...] the pride of all mulattos of Saint Domingo, and the evilness of his trial and execution was branded by iron and fire in the memory of the mulattos”. For this reason, we may say that: “It was the news of Ogé’s torture and death that gave all of France the full consciousness of the colonial issue”. (JAMES, 2010, p.81).

That defeat and the assassination of the mixed-race leader acted as a catalyst and, in the following months, the people was becoming organized and planned a great insurgency. Historically, authors indicate that the black revolution would have originated under the leadership of *papaloi*¹⁶ *Boukman*, a Jamaican slave who knew how to read and was known as the man of the book:

In the first months of 1791, within and in the surroundings of Le Cap, they were organizing themselves for the revolution. The voodoo was the environment of the conspiracy. Despite all prohibitions, the slaves traveled miles in order to sing, dance, practice their rites and talk [...] Boukman, a *papaloi* or high-priest, a gigantic negro, was the leader. As a farm’s foreman, he followed the political situation both among whites and among mulattoes. By the end of July 1791, the Le Cap’s and surroundings negros were ready and waiting. The plan was conceived in a massive scale [...] was not entirely well succeeded. But almost. The reach and the organization of this revolt show that Boukman was the first of that lineage of great leaders that slaves were to launch in such profusion and speed over the years that followed. (JAMES, 2010, pp. 91-92)

¹⁶High-priest in the Voodoo religion.

Until half of the year in the colonies the negroes and mixed-race press, without success, the French authorities for their rights. In August, the black uprising begins, which would mark the beginning of the revolution and intensify racial conflict in the Caribbean colonies, which, for the most part, were under this exploitation regime. Local authorities were almost giving in to an agreement with the mixed-race, a fact that was fastened by the arrival of the news concerning: [...] the law on the colonies of September 28, 1791. This law provided the colonies the right to decide about the status of the free colored men and of the free negroes” (JAMES, 2010, p.108). To complete, in early November, Boukman, the uprising’s main leadership is captured, arrested, tortured and assassinated. His head was displayed in public, with the intent to demonstrate what would happen to the insurgents. But, instead of frightening them, their leader’s death escalated the conflict: hundreds of farms are set on fire and many farmers are killed as a sign of revenge.

On November of 1791 new French commissioners are sent there in an attempt to impose the order, but they do not accomplish much success. Meanwhile, the news about the seriousness of the situation in the colonies reach France.

On March 24 [of 1792], by a broad majority, the Legislative issued a Decree giving full political rights to the colored men [mulattoes]. Some tried to reason that the Constituent’s decisions were sacred, but a deputy from the left [...] bravely declared the sovereignty of the people over the rights of formal assemblies. Three new representatives were indicated with full powers and broad force to enforce the decree and restore the order, and on April 4 the King’s signature transformed the decree into law. (JAMES, 2010, pp. 117-118.)

But the intensity of the social conflicts was not a peculiarity of the colony, on French soil the disputes over the Revolution’s directions continued. The royal family’s frustrated attempt to escape hastens the confrontation between the counterrevolutionaries (monarchists) and the radical Jacobin wing, who starts to identify itself more and more with the abolitionist cause.

[...] On August 10 [of 1792] they imprisoned the royal family, the Legislative was dissolved, and a new parliament, the National Convention, was convened. [...] What does this have to do with the slaves? Everything? On regular times, one could not expect French peasants and workers to have any interest in the colonial issue [...] But, in that moment, they had risen themselves. They attacked

royalty, tyranny, reaction and oppression of all kinds, which encompassed slavery. Race prejudice is superficially the most irrational one, and due to a perfectly understandable reaction, the workers of Paris, who were indifferent in 1789, by this point hated, above all, that part of aristocracy they called 'skin aristocracy' [...] On January 21, 1793, the King was executed. The revolutionary armies were then collecting victories, and the ruling classes of Europe were arming themselves against this new monster: democracy. On February began the war against Spain; after, against England [...] (JAMES, 2010, pp. 121 e 124).

The French revolutionary process' intensity, which leads to the imprisoning of the royal family and, months later, in 1793, culminates in the King's guillotine, terminating the absolutist model and the nobility's privileges. Democracy gains force, leading to the reopening of the constituent debate with heated debates in the Assembly, but, on the other hand, alerting the remaining foreign powers about the risks of this process' expansion over the European soil. England and Spain, two monarchies, declare war to the Revolution. In the Caribbean, this conflict had evident interests: take the main French colony and easily acquire all of its agricultural production.

In the territory of *Saint Dominique*, the French were divided between monarchists (the majority being farmers, slave owners) and republicans (army members led by Sonthonax). Besides that, they were trying to contain the black revolution that was marching in accelerated expansion, as well as defending the land border from the Spanish and their coasts from the British ships. It is in this scenario that:

Sonthonax returned to Le Cap, nearly ruined city [...] the slaves that had yet not rebelled, influenced by the revolutionary fermentation surrounding them, refused to remain slaves. They crowded the streets of Le Cap, elevated exalted as in a religious rally, and clamored for freedom and equality. [...] Surrounded on all sides and seeking support against enemies at home and abroad, **Sonthonax proclaimed the abolition of slavery on August 29, 1793.** (JAMES, 2010, pp. 128-129).

Even without permission from the metropolis, counting on the strength of the black army was the only chance left for the French to be able to resist the war against the English and Spanish monarchies in that colony. In this period, the British, with more than 7 thousand men, left Barbados and had already invested against Martinique, Saint Lucy and Guadalupe. The slaver farmers of Saint Dominique were clamoring for a British intervention in order to defeat the black rebels. In this period, the main black leader was

already the famous Toussaint L'Ouverture, who had not yet allied himself with the French army and remained rebelled in defense of abolition, since the republican government, already under the power of the Jacobins, had not yet addressed Sonthonax's decree. The external conflicts with the two great powers and the disputes over the directions of the process against the Girondins delayed and hampered any kind of deliberation:

This was the France to which arrived, in 1794, three deputies sent by Saint Domingo to the Convention: Belay, a black slave who had purchased his freedom, Mills, a mulatto, and Duffay, a white man. On February 3 they attended their first session. [...] **The next day, [04/02/1794] Belay, the negro, gave a long and passionate speech, associating the negros to the revolutionary cause and requesting the Convention to declare slavery abolished** [...] the Assembly rose up acclaiming. [...] Lacroix, that had spoken the day before, proposed the decree's draft: [...] **the National Convention declares that all men, without distinction of color, domiciled in the colonies, are French citizens and have all the rights secured by the Constitution!** (JAMES, 2010, pp. 138-139)

In this period, the British were controlling part of the island and, on July 5, took the capital Port Prince. There was little left for the total defeat of the French army in its main colony. However, by the end of May, the news about the National Convention's ratification of Sonthonax's decree and the consequent abolishment of slavery had arrived to the island. This was a central element for the change in the behavior of the black rebels. Led by Toussaint, they will join the French army to defend the principles of the Revolution, above all, their liberation. The former slaves "[...] imposed to the British the toughest defeat to ever occur to an expeditionary force of that empire between the periods of Isabel and the great War" (JAMES, 2010, p. 143), fiercely defended the island, and expelled them from their territory, which remained surrounded by the British naval force for a long period.

On the island's territory, the black army extended its victories against the Spanish, that against the various losses, on July 22, 1795, signs the Treaty of Basel with France. The treaty establishes the surrender of the Spanish part of the island to the French Republic in exchange for the peninsular territories occupied by the French (this delivery would only take place in 1800). On 1797, L'Ouverture took over the post of French army's commander in chief in Saint Domingo. Soon after, Sonthonax is called to France and leaves the leader Toussaint L'Ouverture as governor of the territory. Facing

countless defeats and a high number of casualties (reports show that about two-thirds of the British soldiers died in this confrontation), in 1798, Great Britain negotiates to end the conflict with L'Overture. With the promise of peace and that the island would not suffer any sort of British intervention, L'Overture pledges not to promote and support abolitionist uprisings and revolts on the other islands of the Caribbean, to a large extent controlled by the British.

Nevertheless, in this period, the political juncture on the French territory is modified. The most radical wing of the Jacobins was practically decimated and the bourgeoisie resumes the reins of the "revolution". At the end of 1799, after the coup of 18 Brumaire, the Consulate is established and Napoleon Bonaparte takes the power, and with him the French expansionism gains strength. France conquers virtually all of Western Europe and the North of Africa.

In the Caribbean island, the struggle regarding the complete liberation from slavery, throughout the entire territory, took until 1801. On May 9, L'Overture is able to control the whole island and approves a new Constitution, with an autonomist and abolitionist bias. After a decade of insurgency, a true *estado de rebelión, la voluntad del Pueblo, la hiperpotencia* (DUSSEL, 2006, p. 70), suspended the state of exception based on slavery and, as a synthesis of the Popular Sovereignty, was constituted as subject of its own history for the liberation.

Haiti's Constitution of 1801 will be the first Constitution of the Americas to abolish slavery and really put into practice the foundations of The Declaration of Human Rights and the Rights of the Citizen:

Dicha Constitución establecía en el Título II, Sobre los habitantes, que "no hay esclavos en el territorio", que "la servidumbre ha sido abolida para siempre", que "todos los hombres nacen, viven y mueren libres", que "todos los hombres pueden trabajar en todas las formas de empleo, sea cual sea su color", que "no existen otras diferencias que las virtudes y talentos, ni otra jerarquía que la concedida por la ley en el ejercicio de un cargo público"; que "la ley es igual para todos, si castiga o si protege" (art. 3, 4 y 5). Estos artículos están alineados con los ideales que orientaron a muchos actores de la revolución francesa, especialmente enciclopedistas y jacobinos, partidarios de la "igualdad de la libertad". Era una constitución republicana. Establecía la división de poderes y el reconocimiento de los derechos del hombre y el ciudadano. La autoridad legislativa estaba a cargo de una Asamblea Central, integrada por dos diputados de cada departamento, elegidos entre

los mayores de 30 años con más de cinco años de residencia en la colonia (art. 22). (ARPINI, 2009, p. 13)

Although this text is quite often forgotten, it can be considered the founding milestone of Latin American and Caribbean Constitutionalism, which will characterize its time. One may not idealize it, or even refer to it as being the best Constitution, but it was the one which terminated most inhumane exploitation model ever reported. Something that till these days constitutes the societies characterized by coloniality and by structural racism.

This Constitution does not declare the independence, but recognizes broad autonomy to the island's government and has strong anti-racist and anti-imperialist elements. Without a doubt, it was heavily influenced by the constitution of the Republican France of 1795, electing the republican principles as one of its central elements. It creates a national legislative power (art. 19-26) and a municipal one (art. 48 and art. 51). It strengthens the judicial power (art. 42-47), but limits the possibilities of imprisonment and home searches, regulating the abuse of authority. Still, it must be recognized that the organization of political power is extremely militarized and centralized in the governor's figure. As recognition of his work for the revolutionary cause, Toussaint is declared governor for life and has the right to appoint his successor. After him, the governor should have five years term, with the right to a reelection (art. 29). The Governor would be appointed by the Central (National) Assembly, something very close to the current model followed by some parliamentary countries. Trying to understand the contradictions and complexities of this Constitution, it is interesting to recall that the situation of Saint Domingo in that period can be seen as follows:

[...] el español está al este ...; el inglés al norte ...; los mulatos esperan en las montañas; los negros victoriosos en los valles; una mitad del elemento esclavista francés es republicano y la otra mitad realista; la raza blanca contra la mulata y la negra; la negra contra ambas; el francés contra el inglés y el español; el español contra los dos. Era una guerra de razas y de naciones" (Betances, R. 1975, 18). A esto habría que agregar la amenaza que representaban las intenciones de Napoleón que, como "artesano del nuevo imperio colonial francés", había anunciado sus intenciones de poner fin a "la revolución de la igualdad de la epidermis" que germinaba en el nuevo mundo (Gauthier, F. 2008, 38). (ARPINI, p. 14)

Even with various limits, the Constitution of 1801 reopened the debates about which would be the *Black Pearl of the Caribbean's* level of autonomy. In its imperial and Eurocentric prepotency, Napoleon and the French bourgeoisie would not forgive L'Ouverture's audacity. On February 1, 1802 a large French fleet (with 12,000 men), commanded by Emmanuel Leclerc, Napoleon's brother-in-law, and his wife Pauline, who owned large land in the colony, arrived on the island.

Faced with the demonstration that they would not respect the new Constitution and strong indications that slavery could be reinstated, black revolutionaries and generals, including Dessalines and Christophe (who would play a key role in the independence process) run the country to organize the black resistance, but formally are still attached to the French army. After a few months, in May, already accumulating defeats and many casualties by the yellow fever, Leclerc proposes a peace agreement. L'Ouverture accepted the terms of the agreement, resigned as governor of the island, and retired to his ranch, with the assurance that all the generals and high posts occupied by negroes would be maintained, and that slavery would not be reinstated. As on countless other occasions, European diplomacy used the trick of betrayal and a few weeks later, on June 7, they called him for an interview at the headquarters, where they captured and arrested Toussaint L'Ouverture. Then they put him in a French frigate that was already waiting for him at the port of Le Cap to send him to France.

When Toussaint got on board, he said a few words to Captain Savary, in which he had undoubtedly carefully thought, his last legacy to the people: **"When you deposed me, you cut in Saint Domingo only the trunk of the freedom's tree. It will sprout again by the roots, for these are numerous and deep!"** (JAMES, 2010, p. 303)

L'Ouverture was right, it was the cause of freedom, not that of pompous speeches in France or of liberal rhetoric, but that profound freedom won from the struggles of liberation of the black people against the slavery that motivated those people. The black people of the whole island did not accept that betrayal, not even the arrest of their leader, and rose up in arms. Native generals such as Dessalines, Christophe, Clairveaux and Pétion were central to the independence revolution's victory. On November 2, 1802, Leclerc, who was ill, died, but he already knew that he

had been defeated "[...] of the 34,000 French soldiers who had landed, 24,000 were dead, 8,000 were in the hospital and 2,000 remained [. ..]"(JAMES, 2010, p. 322).

Therefore, the only issue missing was the fuse. Leclerc knew that he could not follow Napoleon's orders to restore slavery, without first having destroyed the black generals who composed the French army. Rochambeau, the second in the French command scale, was succeeded by Leclerc. The reports indicate he was a racist to the extreme, whose first action was to break the "alliance" that Leclerc had with the mixed-race. Bonaparte sent him another 10,000 troops. He decided to "radicalize" and organized a ball with the mixed-race families of Port-Républicain and murdered all men of color. He shot and threw thousands of black men into the sea. He reinstated the persecution and the tortures on color grounds. He ordered to import 1500 dogs that would be used to hunt the black people. James mentions: "It is not possible to describe this war in detail. It was more a struggle of the people than of the armies. It was then a war in which racial divisions emphasized the class struggle: black people and mulattos against whites "(JAMES, 2010, pp. 324-325).

In France, L'Ouverture did not have the right to trial and remained in the dungeon, going hungry and cold until the day of his death, for Napoleon feared the effects that his trial and execution would have on the colony. On April 7, 1803, the icon of the Black Revolution, who dared to challenge the three main European empires of that time, died. The news of his death reached the Caribbean and was the trigger for the independence process, all plantations were burned and major cities burned in flames that year. On November 29, Rochambeau and his men withdraw from the island and surrender to the British, who already surrounded the island and had made a trade agreement with the black rebels (a new form of colonial domination). On this day, the revolutionary generals issued a preliminary proclamation of independence: "On December 31, the definitive Declaration of Independence was read in a meeting with all officers in Gonaives. To emphasize the rupture with the French, the new state was baptized of Haiti ". (JAMES, 2010, p.335).

Dessalines, leader of the independence revolution, after the death of L'Ouverture, crowned himself Emperor of Haiti in October 1804. The following year, in May 1805, the new Constitution of Haiti was promulgated, an indigenous name meaning

"land of high mountains ", which was resumed by the independentist to honor the natives of that island.

Haiti's second Constitution is not republican, nor democratic, on the contrary, it establishes a centralized and authoritarian power (eliminating practically all the bureaucratic organization and municipal powers of the previous constitution). Nevertheless, it also points to some central elements for the constitutional debate in the region. It gives continuity to the abolitionist rupture, because in its article 2 it states that "slavery is abolished forever." It prohibits the sale and purchase of properties for white men (article 12) and expropriates properties for the state, avoiding the return of the oligarchic latifundium.

It establishes in its art. 23, an elective and non-hereditary empire. It also establishes the freedom of creed and a secular state, remembering that the Constitution of 1801 appointed the catholic religion as the official religion of the State. In this sense, it recognizes (articles 14 and 15 of the general provisions) that marriage is purely a civil act and authorizes divorce (which was prohibited in the previous constitution), something that will only be authorized in Brazil in the second half of the twentieth century.

It is possible to continue the retrospective of Haitian history throughout the nineteenth century and the importance that this country had, for example, to inculcate the need to abolish slavery in our region and, thus, to enable the return of Simon Bolivar and the processes of independence in South America.¹⁷ However, the objective here is only to observe and understand how the first nation free of slavery had been built in the Americas and how its revolutionary experience influenced the Human Rights debate, in order to relate it to the History of Constitutionalism and, thus, recognize that it is the foundational framework of Latin American and Caribbean Constitutionalism. As describes Antonio Salamanca, one may not forget about Haiti, its purposed or veiled concealment, truthfully, hides the importance of the negritude's legacy for the constitutional debate, because:

¹⁷ For a careful and profound reading on black people in Latin America we recommend: GATES JR., Henry Louis. Os negros na América Latina. Trad. Donaldson M. Garschagen. Companhia das Letras: São Paulo, 2014.

El pueblo haitiano, negro, noble y revolucionario, se rebeló contra la esclavitud del capitalismo español y francés desde siempre. El resultado de esas luchas le formó su genuina identidad. Una religión, el vudú; una lengua, el creole, y el orgullo de ser la primera república de esclavos negros que dio el primer paso en la liberación de la esclavitud del imperialismo capitalista. (SALAMANCA SERRANO, 2001, p. 284)

Thus, in view of this complex history of anti-imperialist struggle, whose central axis was the liberation of the slaves to enable the sovereign construction of a free and egalitarian nation, we shall focus in knowing the history of another country, in the extreme south of the Latin American continent, that also constructed an original and forceful proposal that must be studied and better known for the critical (re) construction of regional constitutionalism.

4. The Indications of a Southern Constituent since the Private Sovereignty of the Free People - 1813.

The geographic space currently occupied by Uruguay, between Brazil and Argentina, a small extension classified by Pepe Mujica as follows “Mi país es pequeño y está en una esquina importante” in South America¹⁸ keeps indications of a significant constituent event founded on the sovereignty of the free people. By the banks of Rio de la Plata, Uruguay has reserved a past of struggles for the affirmation of its independent borders and, even before its consolidation as an emancipated state, already presented a bias of authenticity and originality in the regional constitutional reasoning.

Therefore, it is from the constituent experiences of the struggles of political emancipation in the region of the River de la Plata in the period between 1813 and 1814 that one intends to explore the object prioritized in this stage, entitled “Instrucciones del año XIII”, a legal-political document that is closely related to the constituent process of the River de la Plata; revealing elements covered by constitutional historicity.

For this reason, the instructions for year XIII refer to a foundational historical document, thus classified by Ana Ribeiro and Gerardo Caetano (2013, p.18): “Las

¹⁸ Interview to the TVE de España: <http://www.rtve.es/alacarta/videos/los-desayunos-de-tve/entrevista-jose-mujica-presidente-uruguay-desayunos/1847647/>

instrucciones de 1813 fueron epigonales, pues seguían la huella de otros documentos. Pero a la vez habrían de convertirse con el tiempo en un texto fundacional, referente de otros documentos”. Therefore, the highlighted political relevance is replaced by the constituent importance, in the context of its occurrence, not without before revealing its dimension of own foundation, including political and ideological character:

Más allá del contexto local, las instrucciones de 1813 emergen como un pronunciamiento político e ideológico, significativo en el marco de las revoluciones hispanoamericanas. En más de un sentido constituye una de las definiciones políticas más relevantes del ciclo artiguista, uno de los ejemplos máximos (junto con la primera etapa de la revolución mexicana de Hidalgo y Morelos) de una revolución popular luego derrotada. Perfilan una orientación política e ideológica de acentos radicales para su tiempo, que sintetiza algunos de los ejes imprescindibles del imaginario político que sustentaba por entonces el concepto de “soberanía particular de los pueblos” orientales: Independencia, República y Confederación. (CAETANO; RIBEIRO, 2013, p. 5)

In order to briefly attempt to describe the context of this political document and, thus, to sediment its constituent character, it is worthwhile to report the historical fact in which it was involved. Therefore, in 1812 the government of the then viceroyalty of the River de la Plata, at its headquarters in the city of Buenos Aires, convenes a constituent assembly¹⁹, with the intent to provide the reign with administrative stability, specially with the arrest of the Spanish King Fernando VII.

On the other side of the River de la Plata, the city of Montevideo was under siege by the insurgent army lead by general José Gervasio Artigas. In this context, from October of 1812 to March of 1813 the issue regarding the definition of the criteria to choose the congressmen that would be a part of the assembly, as well as the points of discussion, was installed. Then arises the political figure of José Artigas, who convenes the Easterners to what became known as the Congress of Tres Cruces, a region close to Montevideo, which corresponded to the camp of the military siege to this city.

¹⁹ En octubre de 1812 el gobierno de Buenos Aires pasó a ser ejercido por el Segundo Triunvirato, formado por el doctor Paso, Rodríguez Peña y Álvarez Jonte. Para corregir la situación de provisoriedad que había marcado el tránsito de la primera junta del año 1810 a la Junta Grande y de esta al Primer Triunvirato (integrado por Sarratea, Paso y Chiclana), se convocó a una Asamblea General de los pueblos del Virreinato, con carácter constituyente. Darse una carta constitucional en aquellas circunstancias implicaba definir un sistema político y optar por una forma de gobierno, lo que significaba – entre otras cosas – que se definiría el poder de la capital en el antiguo territorio virreinal. (CAETANO; RIBEIRO, 2013, p. 12).

Exactly in the middle of the military battle, in a war camp at Tres Cruces, united, the Easterners defined what authority of the assembly of Buenos Aires would be conditioned to the freedoms and rights established in a document named as “Ocho Puntos”; [they] were demands to the constituent assembly of Buenos Aires, as a political pact and not a mere submission to the authority of the capital of the viceroyalty.

Faced with these events, the constituents were chosen and the so-called instructions to the deputies were elaborated in the meetings; this document was a demand of the convocation made by Buenos Aires:

Este instrumento político no fue privativo de los orientales, pues todos los diputados tenían que portar instrucciones, como lo indicaba la convocatoria hecha por el gobierno central. De todos modos, las instrucciones de los diputados orientales adquirirán una especial notoriedad al ser rechazados. (CAETANO; RIBEIRO; 2013, p. 15).

To be true, the notable aspect of the 1813's instructions is not just the issue of the Buenos Aires' constituent, nor even its refusal which prevented the Eastern deputies from participating in this constituent assembly, but the very democratic composition of the document, a result of the congress of April 1813 in Tres Cruces, and of other processes of democratic bias that it originated from. After all, the instructions of the year XIII are, in reality, various documents with the same goal.

Nevertheless, the instructions given after the Tres Cruces congress are worthy of consideration. Plus, the phrase given by Artigas in 1813 in the "April Prayer" that opened the aforementioned Eastern Congress, consolidates the original democratic spirit of the documents: “[...] mi autoridad emana de vosotros y ella cesa ante vuestra presencia soberana”.

Moreover, from this intense political character, this historical document takes on “[...] un claro ‘color normativo’ y hasta con cierta pretensión ‘constituyente’ que instruye condiciones y exigências que los diputados orientales deberían defender en su accionar en la Asamblea General Constituyente.” (CAETANO; RIBEIRO, 2013, p. 21).

In this sense, according to the historical interpretative line of the authors privileged to date, the document of the year 1813 represented a true representative character of a "new democratic sociability", democratic and sovereign (2013, p.22), since against the monarchical regime, the instructions were legitimized in other regions

of the eastern band of the River de la Plata, even modified, and other determinations that changed the original document, signed in April 1813 in the camp of Tres Cruces, were added.

This idea of a new political sociability with democratic spirit in opposition to the monarchical regime are synthetized by Geraldo Caetano e Ana Ribeiro, who do not hesitate in highlighting in the context of insurgency:

[...] los pueblos se organizaban tal y como había dispuesto Artigas que se hiciese: “manden enhorabuena los Cabildos, y donde no los hubiera póngase un juez”. Ese híbrido entre las viejas instituciones y el mandato de un poder emergido del proceso revolucionario (el del caudillo nombrado “Jefe de los Orientales”) era la **expresión viva de un proceso en que la política se abría a la participación de nuevos actores sociales**, impregnando a la sociedad en su conjunto. Las instrucciones fueron producto de esa hora revolucionaria, caracterizada por el pasaje de un sistema de “política restringida” (en manos de pocos, con normas consagradas e indiscutidas) a otro en el que la política se derramaba en toda la sociedad en procura de la revisión de sus presupuestos morales y organizativos. En este contexto de politización generalizada, que al tiempo fisuraba el orden establecido se identificaba con la **praxis de la “soberanía particular de los pueblos”** en acción, fuel el contexto de “revolución conceptual” en el que emergieron las Instrucciones para los diputados orientales. (CAETANO; RIBERIO, 2013, p. 25, grifo nosso)

For this reason, the Instructions of the year XIII accompanied by the “Ocho Puntos”, are, by their own dimensions, insurgent in a context characterized by the authority of the viceroyalty and even by a monarchical regime, documents that in the constituent period distinguish a significant democratic and participative attitude to the regional constituent historicity. The very idea of private sovereignty of the people that, in the face of the determinations of the Congress of Tres Cruces, ended up modifying the original text of the instructions and elaborating from this other instructions to the Eastern deputies according to the local necessities²⁰, added to the democratic and even sovereign impetus of the narrative of the April Prayer given by Artigas, which can be

²⁰ It is interesting to recollect that, according to Ana Frega (2013) there are various versions of the Instructions of 1813, due to its democratic character, those signed by Artigas on April of 1813 were modified accordingly to the needs and demands of other eastern people. However, besides their participative democratic character, they also had in common the dimension of the rejection by the joint of government from the Constituent Assembly of Buenos Aires.

characterized as a true policy of liberation²¹, as obedient authority of the sovereign power of the people²².

Against this, the Uruguayan historian Ana Frega also highlights some important aspects of the Instructions; it is initially an expression of the exercise of the particular sovereignty of the people (2013, p.373), in which the people to which the author refers refer to human groups in the territory of the eastern band, struggling to break free from the aegis of the Cabildo of Montevideo, are constituted in free people in the revolutionary process consolidated as cycle artiguista²³ (1813-1820).

Still, such revolutionary process constituted in the struggle (FREGA, 2013, p. 373) is permeated by a constant political and social conjuncture in the southern border region, marked by instability. Here is important to consider that the territorial zone of the Eastern band was a space of intense geopolitical disputes on a regional level of dominance, and even international, what may be summarized in the famous phrase attributed to Artigas: “[...] **ni españoles, ni porteños o provincianos, ni portugueses o brasileños**. La tesis del “ni” avalaba el proyecto de unir la Provincia Oriental con las provincias argentinas y el Paraguay [...]” (CAETANO; RIBEIRO; 2013,p. 41, grifo nosso).

That said, the “Artiguista project” of establishing a new political institutionality from the emergence of a State characterized by the emancipatory form in relation to the powers on duty is demonstrated. In addition, Ana Frega remembers that “[...] los planteos plasmados en los documentos emanados del Congreso de abril de 1813 son una síntesis de las divergencias de los orientales con quienes negaban que la reasunción de la soberanía abarcada a todos los pueblos [...]”. Consequently, with the rejection of the eastern’s Instructions against the constituent Assembly in Buenos Aires, represented the affirmation of the document as a scream of autonomy against the “Portenha”^{NT} imposition of the Eastern.

However, the Instructions did not provoke only the members of the government board of the eastern band of the River de la Plata, since Montevideo properly

²¹ About the politics of Liberation, see Enrique Dussel: **20 Teses de política**. 1º Edição. Buenos Aires: Consejo Latinoamericano de Ciencias Sociales – CLACSO; São Paulo: Expressão Popular, 2007a. _____. **Política de la liberación: arquitectónica**. Madrid: Trotta, 2009.

²² Artigas says in the opening prayer of the Congress of April 1813: “[...] mi autoridad emana de vosotros y ella cesa ante vuestra presencia soberana”.

²³ REYES ABADIE, Washington. **El ciclo artiguista**. Colección Historia y cultura; 8. Montevideo: Universidad de la Republica, depto. de publicaciones, 1968.

^{NT} “Portenha” refers to the capital of the Argentinian Republic, Buenos Aires.

manifested itself as Cabildo: “[...] los revoltosos que están sitiando esta plaza están tan potentes que se atreven a imponer condiciones a Buenos Ayres” (FREGA, 2013, p. 374).

These instruments were not just political recommendations to the constituents sent to the capital of Argentina, Buenos Aires, after all, by imposing a condition of union pact in the constituent process, they affirmed a level of autonomy against the process of consolidating a tool for ordering the power. It is evident that, when enunciating a pact instead of a submission to the constituent of Buenos Aires, adding the democratic character of the formation and the elaboration of the instructions in its various versions against the monarchism of Montevideo taken by the “[...] leales españoles europeos y americanos [...]” known as “muy fieles” and, yet, the strong sovereign essence, verified by the content:

En conjunto, aun con las diferencias anotadas, las instrucciones a los diputados de Santo Domingo Soriano y Maldonado defendieron las ideas de independencia, libertad republicana, unión confederal y derecho a ratificar el texto constitucional, reafirmando el reconocimiento de la soberanía particular de los pueblos como base de la legitimidad del nuevo orden político. (FREGA, 2013, p. 378)

Nevertheless, the rejection of the Instructions by the government of Buenos Aires, added to the military defeats and the political realignment between Spanish and the Portenhos, forced Artigas to leave in the direction of the “gaucho pampa”, in what became known as *Exodus of the Eastern People*²⁴, consolidating a popular alliance amongst various popular sectors, in accordance with Ana Frega (2013, p.88):

En el transcurso de ese año, sin embargo, se produjo una realineación de fuerzas políticas y sociales que culminó con el retiro de las tropas artiguistas del sitio a Montevideo a comienzos de 1814 en vistas a la formación del “Sistema de los Pueblos Libres” entre los ríos Paraná y Uruguay.

In the same sense, Ana Frega continues, appointing the alliance between Artigas and his followers with the native people:

²⁴ SAN MARTÍN, Juan Zorrilla de; INTEMPERIE, Eliseo Salvador Porta. **El éxodo del pueblo oriental:** Fragmento de la epopeya de Artigas. Colección historia y cultura; 11. Montevideo: Universidad de la República, Departamento de Publicaciones, 1968.

El jefe de los Orientales procuró sumar a los guaraníes en la lucha por la soberanía de los pueblos [...] Uno de los resultados de esta alianza fue el reconocimiento – limitado – de los derechos de los pueblos misioneros, al disponer la Asamblea Constituyente en noviembre de 1813 que “los 10 pueblos de Misiones de la dependencia de las Provincias Unidas, nombren un diputado que concorra á representarlos. En la etapa radical iniciada en 1815, el artiguismo planteó y defendió la restitución plena de los derechos de los pueblos misioneros. (FREGA, 2013, p. 388)

Therefore, it is evidenced that the Instructions of the year XIII represent an important legal-political document with a strong substance and constitutional content, after all, they not only consolidated political ideas on the democratic realm, but also, were incorporated in a broad participative manner in the political process of ordering the powers, especially by proposing radical changes to the order of form of State, government and especially in instances as the economy, the society, the territorial disposition, among other themes.

Finally, this proposal aims to reveal the elements that contribute to the critical legal reasoning since the experiences of radicality in the Unitarian system of power of the period known as foundational [of nations], especially considered by this topic the nations of Meridional America. Even so, it is important to emphasize that the instructions represent indications of investigation that must be developed from both theoretical and methodological perspectives, in order to avoid the risks of misuse regarding the concepts outside the correspondent historical reality.

That said, it is preferable to treat the Instructions of 1813 as a project, in accordance with Ana Frega: (2013, p. 390): “[...] en la defensa de las ‘soberanías particulares’ – ‘pueblos libres’; [...] era también la expresión política de tensiones sociales, culturales y económicas por el control de los espacios locales y el logro de una cierta igualdad social”. Ultimately, a political project with constituent elements that visualize from the sovereign of people a liberating perspective for the South-American people, a true critical openness covert by constitutionalism’s traditional matrices, which must be visualized, studied, questioned, critically reflected, yet without forgetting their importance and meaning, as mentions Oscar Sarlo (2013, p. 396) about the relevance to “[...] el análisis conceptual de esos hechos históricos, porque en ellas aparece articulada una constelación de ideas clave para interpretar los hechos políticos que se estaba desarrollando”; e prossegue destacando os conteúdos: “Allí aparecen los términos

pueblo, libertad, soberanía, seguridad, independencia, confederación, ciudadanía, revolución y algunos más sobre los cuales giran todos los demás”. (SARLO, 2013, p. 396).

Consequently, it is not a matter of disentangling from historicity the founding origins of the regional constituent, it is simply a matter of exploring with an investigative approach the evidences of an originality and authenticity of facts of the Meridional historical reality, that reveal the liberating and constituent political potential of the *Nuestra America* people, also revealing the exteriority covert by the standard of whole constitutional reasoning and enabling the opening of paths for critical thinking from the reality itself.

Conclusion

The present study presented the theme of Latin American and Caribbean constitutionalism, in particular, some indications about the importance of the Haitian and Uruguayan experiences, pointing out some fundamental elements for the regional constitutional theory. Therefore, these enable the demonstration of the need to strengthen legal research that rediscovers the richness of processes for constitutional theoretical debates and their intersection with the social and political issues of the continent.

Thus, a convergence of marginalized subjectivities was verified, that operating by alien categories attempted to creatively transform social and political relations through constitutionalism. In this sense, the theoretical frameworks of the foundation of the experiences are the actual concrete reality permeated by internal and external ideas, a convergence or hybridization between the theoretical field and the living experience of the involved subjects, rescued here by a historical critical and decolonial social perspective.

Thus, what is presented in the post-bicentenary period of Latin American and Caribbean constitutionalism are varied hypotheses that deserve exploratory exploitation in its several angles and matrices, in the search for an understanding of regional institutional evolution, and in overcoming the matrices: cultural North-Eurocentric,

institutional matrix based on coloniality, and the search for alternatives to the voracious economic matrix of capitalism.

Finally, it is important to appoint that the recovery of covert experiences in the aspects that dimension a constitutional reasoning, proper in the eminence of the formation of the National States in the early 19th century, point to the possibility of revising the foundational milestones of continental constitutionalism, since the rebel subjects of that period constituted new facets to the powers and conformed new structures of social relations based on anti-imperialist, egalitarian and democratic principles.

Therefore, if democracy and Fundamental Human Rights have gone through more than two hundred years being interpreted and indoctrinated by illuminist matrices, perhaps the rescue and recovery of regional experiences offer not merely the derogatory denial of the phenomenon, but the critical subsuming of these matrices and the exploitation of their potential elements of transformation, as is the case of critical constitutionalism.

In order to finish this reflexive opening, it is a matter of recognizing the limitation of the classical liberal-conservative constitutional doctrines and the incompleteness of their world-view, the experiences that underpin this work were thought and germinated in a context of concrete needs of living subjects. Therefore, there is nothing more natural than searching for one's own matrices rather than using rhetorical mimicry. This is the challenge of Latin American and Caribbean constitutional theory, a challenge initiated by this research, which will continue the analysis of the disturbing contradictions and new developments revealed by the experiences of continental liberation.

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