

“New” constitutionalism, old problems: democracy and authoritarianism in Latin America

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DOI: <https://doi.org/10.25058/1794600X.2460>*

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“Novo” constitucionalismo, velhos problemas: democracia e autoritarismo na América Latina ■

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Fecha de recepción: 10 de junio de 2024
Fecha de revisión: 8 de agosto de 2024
Fecha de aceptación: 11 de septiembre de 2024

DOI: <https://doi.org/10.25058/1794600X.2460>

Para citar este artículo:
de Freitas Carpenedo, A., de Souza Machado de Castilhos, A., & Camargo, R. (2024). “New” constitutionalism, old problems: democracy and authoritarianism in Latin America. *Revista Misión Jurídica*, 17 (27), 95 -107.

ABSTRACT

The present work aims at analyzing two problems, which have been verified for a long time in Latin America, and the proposal for their overcoming from a specific epistemology: the lack of consolidation of democracy and authoritarianism, seen from the so-called “new” Latin constitutionalism. American From the research problem (“has the ‘new’ Latin American constitutionalism been able to solve the historical problems related to democracy and authoritarianism in Latin America?”), the objective is to verify how the region and its institutions have sought to maintain democratic values. Indeed, Latin America has in its history long periods of dictatorships, false democracies, oligarchic and autocratic governments, interspersed with brief periods of democracy. As theoretical references, the works of Roberto Gargarella (*La sala de máquinas de La Constitución: dos siglos del constitucionalismo en América Latina (1810-2010)*) and Waldo Ansaldi and Verónica Giordano (*América Latina: la construcción del orden*) are adopted. As a method of approach, the methodology of historical sociology is chosen, which acquires relevance

* *Artículo de reflexión.*

Work funded by Project 1.407/2023: “Auxílio Pesquisa do PROAP – CAPES”.

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to think about the processes of Latin American democracy and authoritarianism in a long-term logic, capable of demonstrating whether the political problems of the region constitute, or not, historical regularity. It is concluded that Latin American constitutionalism has not been able to overcome the historical culture of authoritarianism in the region. The absence of deeper ruptures with established power structures and the lack of true democratization of political and social processes have resulted in a fragile democracy subject to constant crises.

KEY WORDS

Latin American constitutionalism; Democracy; Authoritarianism; Latin America.

RESUMEN

El presente trabajo tiene como objetivo analizar dos problemas, constatables desde hace mucho tiempo en América Latina, y la propuesta para su superación desde una epistemología específica: la falta de consolidación de la democracia y el autoritarismo, vistos desde el denominado “nuevo” constitucionalismo latinoamericano. A partir del problema de investigación (“¿el ‘nuevo’ constitucionalismo latinoamericano ha podido resolver los problemas históricos relacionados con la democracia y el autoritarismo en América Latina?”), el objetivo es verificar cómo la región y sus instituciones han buscado mantener los valores democráticos. De hecho, América Latina tiene en su historia largos períodos de dictaduras, falsas democracias, gobiernos oligárquicos y autocráticos, intercalados con breves períodos de democracia. Se adoptan como referentes teóricos los trabajos de Roberto Gargarella (La sala de Máquinas de la Constitución: dos siglos de constitucionalismo en América Latina (1810-2010)) y Waldo Ansaldi y Verónica Giordano (América Latina: la construcción del orden). Como método de abordaje se optó por la metodología de la sociología histórica, que adquiere relevancia para pensar los procesos de democracia y autoritarismo latinoamericanos en una lógica de largo plazo, capaz de demostrar si los problemas políticos de la región constituyen o no regularidad histórica. Se concluye que el constitucionalismo latinoamericano no ha logrado superar la cultura histórica de autoritarismo en la región. La ausencia de rupturas más profundas con las estructuras de poder establecidas y la

falta de una verdadera democratización de los procesos políticos y sociales han resultado en una democracia frágil y sujeta a crisis constantes.

PALABRAS CLAVE

Constitucionalismo latinoamericano; Democracia; Autoritarismo; América Latina.

RESUMO

O presente trabalho visa à análise de dois problemas, há muito verificáveis na América Latina, e da proposta de sua superação a partir de uma epistemologia específica: a falta de consolidação da democracia e o autoritarismo, vistos desde o dito “novo” constitucionalismo latino-americano. A partir do problema de pesquisa (“o ‘novo’ constitucionalismo latino-americano tem sido capaz de resolver os problemas históricos referentes à democracia e ao autoritarismo na América Latina?”), objetiva-se verificar como a região e suas instituições têm buscado manter os valores democráticos. Com efeito, a América Latina tem no seu histórico grandes períodos de ditaduras, falsas democracias, governos oligárquicos e autocráticos, intervalados por breves períodos de democracia. Adotam-se como referenciais teóricos as obras de Roberto Gargarella (La sala de máquinas de la Constitución: dos siglos de constitucionalismo en América Latina (1810-2010)) e de Waldo Ansaldi e Verónica Giordano (América Latina: la construcción del orden). Como método de abordagem, opta-se pela metodologia da sociologia histórica, que adquire relevância para pensar os processos de democracia e autoritarismo latino-americanos numa lógica de longo prazo, capaz de demonstrar se os problemas políticos da região constituem, ou não, regularidade histórica. Conclui-se que o constitucionalismo latino-americano não tem sido capaz de superar a cultura histórica de autoritarismo na região. A ausência de rupturas mais profundas com as estruturas de poder estabelecidas e a falta de uma verdadeira democratização dos processos políticos e sociais têm resultado em uma democracia frágil e sujeita a constantes crises.

PALAVRAS-CHAVE

Constitucionalismo latino-americano; Democracia; Autoritarismo; América Latina.

1. INTRODUCTION

The "new" Latin American constitutionalism emerges as a response to the difficulties of consolidating democracy in the region. Despite advances in the field of constitutional theory, there are still old problems that persist, such as the fragility of democratic institutions and the recurrent authoritarianism. Thus, the present study aims to analyze the relationship between this so-called new way of thinking about constitutionalism and the historical problems of democracy and authoritarianism in Latin America.

Based on the above report, the following research problem is proposed for discussion: has the "new" Latin American constitutionalism been able to solve the historical problems related to democracy and authoritarianism in Latin America? From this question, it will be possible to verify whether this epistemology of Constitutional Law has been able to overcome the problems that the region historically faces in relation to democratic consolidation. In fact, Latin America has a history of long periods of dictatorships, false democracies, oligarchic and autocratic governments, interspersed with brief periods of democracy.

The hypothesis of this study is that this new theoretical matrix has not been able to solve the problems of democracy in Latin America. The long history of autocracies reported above transforms the State of "exception" into a true rule, and democratic periods often arise more as a way of maintaining the socio-oligarchic structures already in force than aiming at the common good.

As theoretical references, the works of Roberto Gargarella (*La sala de Máquinas de la Constitución: dos siglos de constitucionalismo em América Latina (1810-2010)*) and Waldo Ansaldi and Verónica Giordano (*América Latina: la construcción del orden*) are adopted.

The article is divided into three parts. Initially, a brief contextualization of the political history of Latin America is presented, highlighting the characteristics that contribute to the problems of democracy and authoritarianism in the region.

The second part discusses Latin American constitutionalism as a response to the challenge of consolidating democracy in the region. The foundations of Latin American constitutionalism,

its characteristics and how it would seek to break with traditional constitutionalism are addressed. The main advantages that this epistemological current would have, according to some of its defenders, are also presented.

Finally, some conclusions will be presented about the relationship between Latin American constitutionalism, especially in its two major milestones (Constitutions of Bolivia and Ecuador), and the problems of democracy and authoritarianism in Latin America. It will be assessed whether this "new" Latin American constitutionalism has been able to overcome the historical problems that the region faces in relation to the consolidation of democracy.

METODOLOGY

As a method of approach, the methodology of historical sociology is used, which acquires relevance for thinking about the processes of Latin American democracy and authoritarianism in a long-term logic, capable of demonstrating whether or not the region's political problems constitute, or not, a historical regularity. This conception makes it possible to approach events from a macro-historical perspective, avoiding the typical "past/present" bipartition, which does not always demonstrate how these two moments can be interconnected, forming part of the same process, which, despite the occurrence of ruptures, also reveals continuities and persistence. As a procedural method, bibliographical, exploratory and documentary research (doctrinal works, articles and legislation) is adopted.

2. INACCESSIBLE DEMOCRACY: A HISTORICAL REGULARITY

Authoritarian political regimes are possibly as old as the social form of human coexistence. It is a fact that democracy, although theorized since ancient times, became a reality in a considerable part of the world only after the twentieth century. For Giuseppe Tosi, despite the nomenclatures, it is the democratic rule of law that would configure, in human history, a state of exception, as it is "a rare and fragile exception in the long history of humanity dominated by authoritarian and totalitarian regimes" (Tosi, 2017, p. 26).¹

1. Free translation. In the original: "uma exceção rara e frágil na longa história da humanidade dominada por regimes

This reality seems even more evident in Latin American societies, in which these authoritarian regimes have the support of various institutions, part of the population and the Church.²

In fact, Latin America is a region with a complex political history and marked by periods of instability, authoritarianism and struggles for democracy (Ansaldi; Giordano, 2012). From the conquest by the Spanish and Portuguese to the present, the region has undergone several political, social and economic transformations that have influenced its trajectory. In the developed social superstructure, there was a bureaucratic, chivalric, idle and formalistic society, which monopolized the prerogatives of political, ecclesiastical and military power in the name of the Crown (Ramos, 2011).

Throughout the nineteenth century, most Latin American countries gained independence from Spain and Portugal, but the process of building democratic institutions proved difficult, often interrupted by military coups and authoritarian regimes. For Roberta Baggio and Paulo Berni, the founding processes in the region played a different role to the European and American bourgeois revolutions. Instead of contributing to the establishment of a new order, they did so precisely in order to prevent such ruptures, so that the oligarchic structures in place were maintained (Baggio; Berni, 2020).

According to Roberto Gargarella, Latin America's founding moment saw a clash between three political and legal groups with significant differences between them: the conservatives, the liberals and the republicans (also called radicals). The former aimed to organize the system around a particular conception of constitution (usually related to the Catholic religion), while assuming a more restrictive and elitist posture regarding the role that should correspond to the will of the majority in controlling the political life of the community.

autoritários e totalitários”.

2. According to Álvarez-Uría, Christianity and, more specifically, Catholicism, for centuries served, and still serves, as a support for hierarchical social structures based on power relations (Fernando Álvarez-Uría, *El reconocimiento de la humanidad: España, Portugal y América Latina en la génesis de la modernidad*, Madrid, Ediciones Morata, 2015).

The second group saw the constitution as a way of setting limits on governments and ensuring that their privileged social and economic positions were maintained. This was reflected in an emphasis on protecting private property and advocating for less state intervention in economic aspects. The third group adopted a Republican position, based on their commitment fundamental with the Rousseauian matrix of self-government, which tended to consider individual autonomy as an ideal that could be mitigated in the name of the “general will” and social well-being (Gargarella, 2014).

In the end, the constituent processes in Latin America, throughout the nineteenth century, started from agreements made between liberals and conservatives, which, despite strong disagreements, had one point in common: the need to leave the people out of fundamental political decisions. Thus, this agreement, taken at the time the main constitutions of the region were approved, consisted of a political bargain that can be summarized in the formula “limited political rights – broad rights”, or, otherwise, “broad political rights – limited property rights” (Gargarella, 2014).

The constitutions created by liberals and conservatives appeared as imperfect syntheses of the legal aspirations of both groups (Gargarella; Pádua; Guedes, 2016), but, despite this, they consolidated an alliance that showed a high degree of stability. At the same time, it illustrated a strong elitism of power, ensuring the blocking of popular participation in politics and, consequently, the fullness of the democratic system.

In this regard, for Latin American states, the first decades of the twentieth century were not much better. If, on the one hand, the independence processes allowed countries to go their own way, on the other hand, what was seen was a seizure of power by minority groups, without effective political participation by the general population (Ansaldi; Giordano, 2012). The Brazilian case is an excellent illustration: unlike the other countries in the region, it maintained the Monarchy even after the independence processes, which was only overcome by a coup d'état. This, however, did not guarantee the rise of democracy, as power was seized by oligarchies. The Oligarchic Republic emerged, which in turn was only overthrown thanks to the Getulio coup in 1930.

In the second half of the twentieth century, several countries in Latin America, under the aegis of military governments, were victims of new coups d'état and began to live under the government of military dictatorships, which led them to experiences of constitutional and democratic blockades (Baggio, 2014). It is known that, to ensure the control and maintenance of political power, military dictatorships used authoritarian tactics, such as the suspension of civil rights and censorship of the press. Military tribunals for the trial of civilians were also established, and any form of political dissent was suppressed.

Military regimes in Latin America have left a legacy of human rights violations and destruction of democratic institutions. To this, we add the tensions throughout the period, as a result of the social and economic inequalities that persist in the region. In fact, the twentieth century was marked by a process of industrialization that, although it generated some degree of development in the region, also ensuring the creation of a middle class, was not accompanied by policies of social inclusion and income redistribution, maintaining the great socioeconomic contrast and marginalization, which end up negatively influencing the quality of democracy (Lüchmann, 2007).

Since the 1980s, many countries in the region have initiated transitions to democracy, influenced by a number of factors, including internal and external pressures, such as the economic crisis of the 1980s, the fall of the Berlin Wall and the spread of democratic ideas on the international stage. In several countries in the region, such as Brazil, Argentina, Chile, Uruguay, Peru and Bolivia, elections were held and measures were taken to consolidate democracy. This included the drafting of new constitutions, the adoption of measures for the protection of human rights, and the decentralization of political power.

However, this process of consolidation of the democratic regime has been slow and often frustrated by economic crises, violence, political polarization and relativization of the – already fragile – political system of popular participation. The concentration of power in the hands of political and economic elites, often associated with foreign interests, is a problem that persists and makes it difficult to solidify popular sovereignty.

Again, the Brazilian example is illustrative. For Adriano Pilatti, although the 1988 Constitution is considered the most advanced in national history, it should still be marked more by its conservative aspects than by the progressives, having been a combination of different factors that produced, for defenders and critics, the opposite idea (Pilatti, 2020).

In part, this would be explained by the victories achieved by the progressive bloc on social and rights issues, which would tend to be remembered more than the great conservative victories in the rest of the constituent process. The conservative interpretation of the result would be predictable, since any innovation or transformation that did not serve the interests of the elites would be considered "aberrant". However, even less privileged groups would not have been able to see the blocks to their interests, overemphasizing social achievements to the detriment of a large system of continuities approved by the National Constituent Assembly (Pilatti, 2020). Once again, as a historical regularity, the constituent process would have occurred based on the conciliation between the holders of power, in a transition from above and without popular participation (Comparato, 2017).

The current Latin American constitutions, even though they are considered more advanced in terms of formal granting of rights, have little changed the state structure, kept open and accessible only to the same elites. For Gargarella (2014), the "engine room" of the Constitution, as historically occurs in Latin America, would have remained unscathed, due to the interest of the liberal-conservative union that has dominated the region for more than two centuries.

For the author, still, the formal recognition of rights would never have been a problem for the constitutionalism built here. If the structures under the control of the same groups were maintained, they could control the (non-) effectiveness of the advances made on the positive plane. Therefore, the very realization of the new rights would end up compromised by the perpetuity of the old structures, which would overturn the achievements reached after the processes of redemocratization (Gargarella, 2014).

A good synthesis of this process of authoritarianism and dictatorships is presented by Ansaldi and Giordano, for whom Latin American societies

were built, throughout colonial domination (particularly since the reign of Philip II), as an organic, hierarchically structured, intolerant, authoritarian order to the point of despotism. This matrix generated authoritarianism and dictatorships of different kinds that in the nineteenth and twentieth centuries defined most of the political regimes in the region (Ansaldi; Giordano, 2012).³

Certain it is that authoritarianism – and, consequently, the lack of consolidation of democracy – appears as a historical regularity in Latin America. On the other hand, it is also clear that, currently, the democratic yearning is constantly growing. Thus, we want to believe that autocratic regimes will become an exception. It is in this context that Latin American constitutionalism acquires relevance.

3. A DRIFTING BOAT? CONSTITUTIONALISM IN LATIN AMERICA AND CHALLENGES TO DEMOCRATIC CONSOLIDATION

3.1. The Ship of Democracy in Latin America: Between Drifts and Threats

In the work “La democracia en América Latina, un barco a la deriva, toccado en la línea de flotación y con piratas a estribor. Una explicación de larga duración”, the historical sociologist Waldo Ansaldi addresses the issue of the “viability of democracy in Latin America”. Analyzing the difficulties faced by Latin American societies in defining democratic political regimes, the author discusses the roots of the instability characteristic of political regimes in the region, questioning why the ruling classes that elevate liberal democracy as a principle of legitimacy end up generating

undemocratic, if not downright dictatorial, regimes (Ansaldi, 2007).

For the author, social inequality, the fragility of civil society, clientelist and corporate practices, structural corruption, among other factors, would contribute to the difficulty of establishing and consolidating democracy in Latin America. Social inequality, for example, would generate divisions and tensions in society, undermining the social cohesion necessary for the effective functioning of a participatory regime. Economic disparity could lead to internal conflicts, making equal representation of interests difficult. The prevailing conception of democracy in twentieth-century Latin America, the social-democratic one, would have been systematically “demolished” by neoliberal policies, shifting the axis of social justice to the idea of “freedom”, understood here as non-state intervention (Ansaldi, 2007, p. 83-84).

A fragile civil society, in turn, could imply limited citizen participation in democratic processes, which would weaken the capacity for oversight and civic engagement. The “bourgeois horror” of the mobilization of the subaltern classes and their eventual excess and lack of control, in addition to the structural fragility of the classes involved in the conflict, would favor solutions of conservative modernization or passive revolution, generating transformist policies aimed at “decapitating” the subordinate classes in situations where they could generate proposals considered potentially dangerous (Ansaldi, 2007, p. 76).

Moreover, clientelism and corporatism would have the potential to distort the democratic process, favoring particular interests to the detriment of the common good. The former would reinforce certain bonds of solidarity between the leader and the grassroots, but also the subordination of the latter to the former. Corporatism would be oriented in the same direction, with the addendum of reducing the weight of party-political mediation in the relations between civil society and the State (Ansaldi, 2007, p. 85-87). All of this could lead to distorted political representation and the perpetuation of the same historically verifiable inequalities in Latin America.

3. Free translation. In the original: “Las sociedades latinoamericanas se construyeron, a lo largo de la dominación colonial (en particular desde el rei de Felipe II), como un orden orgánico, jerárquicamente estructurado, intolerante, autoritario hasta el despotismo. Esa matriz generó autoritarismos y dictaduras de distinto tenor que em los siglos XIX y XX definieron buena parte de los regimenes políticas de la región”.

Finally, structural corruption would undermine trust in democratic institutions, weaken the rule of law itself, and distort the allocation of resources, undermining the effectiveness and legitimacy of the democratic system as a whole. The author also suggests, in line with what has been seen in some paragraphs, that the search for power and the maintenance of privileges can lead the ruling classes to adopt practices that undermine democracy, such as the imposition of neoconservative structural adjustment policies. These practices would aim at preserving their interests and power, often to the detriment of consolidating a truly democratic regime (Ansaldi, 2007, p. 104-106).

When combined, these factors would create significant obstacles to the establishment and consolidation of a genuine and effective democracy in the region, negatively impacting representation, civic participation, and the ability of the democratic system to meet the needs and demands of society.

Thus, in the long-lasting structural historical context, the author argues that it is clear that political democracy – even in its currently dominant, liberal representative form – is far from being consolidated in Latin America. In addition, even in countries that can, in fact, be considered democratic, these regimes would have a maximum relative stability: they would not be consolidated or irreversible. They would be closer to precariousness than to strength: they would be “like a ship that cannot find its way, drifting along the water line and threatened to starboard (right) by pirates who only think of looting” (Ansaldi, 2007, p. 115).⁴

This may explain the quote from Alberto Hirschman, brought up by Ansaldi in the epigraph of his text: “Pessimism has to be at the beginning of any serious reflection on the probability of democracy strengthening in Latin America. The main reason is simple: the historical experience is very unsoothing” (Ansaldi, 2007, p. 53).⁵

4. Free translation. In the original: “Es como un barco que no fim de encontrar el rumbo, Navega a la deriva touchado en la línea de flotación y amenazado a estribor (derecha) por piratas que sólo piensan en el botín”.

5. Free translation. In the original: “El pesimismo tiene que estar en el inicio de cualquier reflexión seria sobre la probabilidad de que la democracia se fortalezca en América Latina. La razón principal es sencilla: la experiencia histórica es muy poco

3.2. Difficulties of democratic consolidation and the possible exit from Latin American constitutionalism

If the consolidation of democracy proves difficult in Latin America, Latin American constitutionalism would emerge as a response to this challenge, seeking to build a more inclusive and participatory model that recognizes the rights of indigenous peoples, minorities and Afro-descendant communities. It would differ from traditional constitutionalism, with a Eurocentric basis (Wolkmer, 2010), in its commitment to social justice and equality, its emphasis on popular participation and the protection of minorities.

At least at the formal level, among the characteristics of Latin American constitutionalism are the adoption of mechanisms of popular participation, such as plebiscites, referendums and popular legislative initiative and revocation of mandate (Barbosa; Teixeira, 2017); the inclusion of social and economic rights, such as the right to health, education and housing; and the recognition of the rights of indigenous and Afro-descendant communities, such as territorial and cultural autonomy.

Thus, Latin American constitutionalism would represent an attempt to overcome the historical problems related to democracy and authoritarianism in the region. Seeking to build a more inclusive, participatory model committed to social justice and equality, this new epistemology intends, from the decolonial framework, to break with the orthodox and Eurocentric view of constitutionalism, which pays excessive attention to individual rights, to the detriment of guaranteeing minimum social rights.

For Idón Moisés Chivi Vargas, traditional constitutionalism could be considered a “mask of colonialism”. It would be historically insufficient to explain colonized societies, not having sufficient lucidity to explain the rupture with European metropolises and the continuity of typically colonial relations, even after the independence processes, throughout the nineteenth to twenty-first centuries (Vargas, 2016).

Against the orthodox way of thinking about constitutions, the new Latin American

tranquilizadora”.

constitutionalism would present new possibilities for thinking about the organization of the State, defining new potentialities for law. For the defenders of this current of thought, the elaboration of new constitutional texts, based on supposedly broad popular participation, inclusive with regard to the recognition of fundamental rights of the various peoples that make up these societies, would reveal the contribution of this phenomenon to the democratic debate today. Its constituent processes would have occurred from the popular political empowerment and the dispute for the recognition of rights and identities (Barbosa; Teixeira, 2017).

Still, this new constitutional epistemology would have demonstrated an effort to enable democracy “from the empowerment of part of the historically marginalized population, such as indigenous, women, peasants, blacks, in countries with an exclusionary constitutionalism and a history of coups d’état”. Finally, it would have concentrated efforts on replacing the neocolonial oligarchic state with the sovereign and democratic national state (Barbosa; Teixeira, 2017, p. 1.136).

This theory would also represent an epistemic and political break with the neoconstitutional hegemonic model. It would be the realization of the need to build, in emergencies, strategies to discuss current tensions, with the inclusion and recognition of new paradigms typical of the Latin American community (Cubides-Cárdenas; Navas-Camargo; Montes, 2021). The examples always cited are the Constitutions of Ecuador and Bolivia, considered two of the great “pillars” of this theoretical basis.

The first would be considered innovative for providing, among other provisions, the inclusion of “Pacha Mama”⁶ as a subject of law in its art. 71, and not only as an object of protection (Ecuador, 2008).⁷ The second, by establishing

6. *The term is an indigenous expression translated as hand “Mother Earth”, meaning the totality of life on earth, from minerals and plants to animals and humans. Its inclusion as a subject of law in the Constitution of Bolivia would be an example of how indigenous culture and philosophy were incorporated into the constitutional text (Tolentino; Oliveira, 2015).*

7. *This certainly does not exclude the emphasis given by the constitutional text to the need for environmental protection. On the contrary, there would be a search for the protection of nature in an integral way, it is not enough that one part of nature is respected, but others are not – the concept of nature that the Constitution of Ecuador addresses would be systemic (Sierra; León, 2016).*

the Plurinational Court and indigenous peasant jurisdiction, would be an example of recognition of diversity and social inclusion in state decision-making (Bolivia, 2009). According to Pastor and Dalmau (2010), the new constitutions would have as a common denominator the need to legitimize the social will through an integral democratic constituent process.

However, after approximately 15 years of the promulgation of both constitutions, and after analyzing the strong democratic crises that both countries are going through, one must question whether, in fact, this so-called “new” constitutionalism can, in fact, be considered as a watershed in the democratic stability of the region, as some authors defend. This is what is intended to be answered in the next topic.

4. LIMITS OF LATIN AMERICAN CONSTITUTIONALISM: DEMOCRATIC CRISES AND AUTHORITARIAN ELEMENTS

The Bolivian and Ecuadorian constitutional texts represented an important paradigm shift in constitutionalism. They establish great popular participation in politics, enunciate nature as a subject of law, and no longer a mere object of protection, recognize the importance of minority groups as never before.

No wonder, therefore, there is a great load of optimism in the writings on the subject (Barbosa; Teixeira, 2017; Tolentino; Oliveira, 2015). It would be, more than a limiting theory of the powers of the State, a social movement capable of promoting greater inclusion – both social and in the participation of decisions about the direction of the State. It would outline a multifaceted, politically interactive democracy, with full freedom, based on republican values and erected in the Constitution as civic support for the project of what a society should be (Armengol, 2010).

However, a closer analysis of the politics of these countries makes it clear that they have not moved so far away from the authoritarian conservatism that historically permeates the region. Gargarella (2015) had already expressed distrust of the supposedly “new” constitutionalism a few years ago and, in fact, in both cases, it can be concluded that this distrust is justifiable.

In Bolivia, even after the Constituent Assembly approved the text of the Constitution in its entirety, a revision body was created that modified 144 articles of the originally approved text. These modifications were all conservative in nature and mainly harmed popular, indigenous, native and peasant movements (Gargarella, 2014).

In Ecuador, the constitutional provision of the rights of nature would not carry the same epistemological meaning as human rights or animal rights. In addition, the inclusion of these new rights would not have been the result of a change in the philosophy of the dominant forces, but rather of a complex political game, which brought together supporters who did not share a vision of rupture with anthropocentrism (Lourenço, 2014).

As if this were not enough, it has been seen that the heads of state of these countries, although democratically elected, paradoxically show a disregard for democracy. Never in the speech, of course. Dictators and dictatorships make a point of adopting a rhetoric of respect for the Constitution and the democratic regime.

Using the rhetoric you want, you can see that Bolivia and Ecuador substantially violate individual rights. And, among them, several strictly linked to the notion of quality of democracy. Ecuador, for example, would stand out for its disrespect for freedom of expression and communication, "translated into constant persecution of the media against the regime" (Barros; Neto, 2015). Bolivia was even reported to the Inter-American Court of Human Rights for violations of the democratic clause, by guaranteeing indefinite reelection to Evo Morales, as if it were a "human right".

The then president, intending to remain in power, promoted a referendum for the people to decide on the possibility of a new re-election. However, the vote was unfavorable, and he sought protection in the Judiciary. The Plurinational Constitutional Court, disregarding the popular decision, admitted a new re-election, on the grounds that restricting the right to participate in elections would "violate a human right". Elected, he was subsequently overthrown by a coup d'état (Baggio; Berni, 2020).

Both countries are going through serious democratic crises. However, unlike the military coups that took place in the twentieth century, they do not imply abrupt ruptures with democracy, which sometimes make them difficult to perceive. What is seen is not the abrupt collapse of democracy, but authoritarian elements that are gradually establishing themselves in a system that would be a "hybrid" between democracy and dictatorship (Barros; Neto, 2015). This is what some jurists and political scientists (Ginsburg and Huq, 2018; Levitsky and Ziblatt, 2018) have called "democratic erosion": processes in which there is a gradual deterioration of the foundations of democracy – truly competitive elections, liberal rights of expression and association, and the Rule of Law, that is, the submission of the State to legal rules – resulting in a regime whose categorization as authoritarian gives rise to discussions. As the process is gradual, changes occur slowly. However, when it is observed as a whole, the weakening of democracy becomes clear.

Furthermore, more than a supposed attachment to authoritarian preferences, the democratic crises in these countries can perhaps be explained by the centralist characteristics of their new constitutions, which inherently carry the risk of emptying the participatory and rights-based approach (Schilling-Vacaflor, 2016). This prediction of concentration of powers in the President's hands would not be new in the constitutional legal systems of these countries; on the contrary, it would merely be the continuity of a historical centralist tendency, with the "new" constitutionalism not being capable of substantially altering the organic element of the different constitutions in the region (Cobos, 2018).

For Uprimny (2011), the problems of constitutionalism in Latin America could also be explained because, despite the presence of notable intellectuals in some constituent processes, such as Álvaro García Linera in Bolivia, the truth is that there was a great disconnect between the development of thought progressive constitution in the region and constituent debates. No theory accompanies the efforts for constitutional reform and implementation of the promises contained in the texts.

Ansaldi and Giordano point out that, more than 30 years after the redemocratization of Latin American countries, the existence of several crises of government did not interrupt the validity of the democratic regime (Ansaldi; Giordano, 2012). However, the crises that have occurred over the last 10 years were not analyzed, among which, in addition to including Ecuadorian and Bolivian political tensions, the Brazilian one can be included, which culminated in the impeachment of Dilma Rousseff, in 2016, in the serious regression of social rights since then and, finally, in the real threat to democratic institutions from 2019.

In practice, the original motives of Latin American constitutionalism synthesize political proclamations that, however, offer more than they actually grant. The model has contradictions and establishes a complicated relationship between the catalog of rights and the constitutional organization of power, together with the strengthening of presidential and centralist perspectives (Gatti, 2019).

It is a varied and complex model. At the same time that the constitutions that represent it are based on premises in the legitimacy of popular constituent processes and contain norms expressly intended to promote the inclusion of vulnerable social groups, the excessive presence of open clauses and principles (sometimes contradictory) can generate weaknesses in terms of legal security, increasing the margin of discretion of its interpreters and applicators (Ugarte, 2013). And, with such decision-making room, guarantee the maintenance of a centralizing, authoritarian and elitist power.

The strong propensity to the elitization of political power and authoritarianism, moreover, is not a recent phenomenon. Instead, it was part of its formation process in Latin America. Perhaps this explains the authoritarian culture of the region and the difficulty in overcoming it. The fact is that, today, the constitutionalism theorized to solve authentic Latin American problems from the Latin American reality has not been successful. Likewise, analyzing the long-term problem, it can be seen that the lack of democratic consolidation seems to have constituted much more a simple continuity of a whole system of domination, existing in the region since its birth, than a phenomenon verifiable in recent times.

From all of the above, it can be concluded that, although Latin American constitutionalism has, in fact, several instruments capable of assisting in the consolidation of democracy, it has not been able to do so. His proposal to break with colonial constitutionalism in order to “build a state that recognizes that Latin American society is not homogeneous, but plural, giving voice to groups previously excluded from the political process, such as indigenous peoples”, is laudable. However, without a state that protects individual rights – even the bourgeois liberal traditions, which are even positively guaranteed even by these new constitutions (Barros; Neto, 2015), it is not possible to guarantee a real democracy.

CONCLUSION

The wave of redemocratizations that Latin American countries went through brought the hope that, finally, respect for institutions and popular participation in politics would constitute paradigms that could be complied with. It was from this premise that the new constitutions of the region were finally promulgated, which, in terms of formal granting of rights, can be considered the most guaranteeist in the history of their countries.

Following this enthusiasm of overcoming the past, new epistemologies, from the decolonial framework, culminated in the creation of what is now called “new” Latin American constitutionalism. This theory relegates Eurocentrism historically used in the study of the matter, seeking, from the reality of Latin America, to solve authentic problems in the region, such as democratic fragility and authoritarianism. In this perspective, the Constitutions of Ecuador and Bolivia are considered a milestone in this new theoretical matrix.

However, despite the advances made in recent years, Latin American constitutionalism still faces significant challenges in its effective implementation and in consolidating democracy in the region. Both countries suffer from serious political crises, and their new constitutional texts, received with such expectation, have not been able to solve them.

In fact, although the region's constitutions are, in fact, the most guaranteed in history in terms

of rights, in their organic part they remained strongly conservative. Unable to join your "engine room". Thus, the very implementation of formally positive rights is compromised. The same, it turns out, happens with the consolidation of democracy.

Thus, resuming the research problem ("has the 'new' Latin American constitutionalism been able to solve the historical problems related to democracy and authoritarianism in Latin America?"), one can answer in the negative: the "new" Latin American constitutionalism, by itself, has not been able to overcome the historical culture of authoritarianism in the region. The absence of deeper ruptures with established power structures and the lack of real democratization of political and social processes have resulted in a fragile democracy that is subject to constant crises.

Although Latin American constitutionalism has, in fact, ways of contributing to the resolution of these adversities that insist on remaining in the politics of the region, it has not been successful when critically examined. In practice, it faces significant challenges in terms of effective popular participation, which goes beyond the mere formal text of fundamental laws.

Likewise, problems such as lack of access to information, social and economic inequality, institutional fragility and populism end up negatively affecting political stability and the consolidation of democracy. It would be essential for Latin American constitutionalism to be able to deal with these issues, ensuring social inclusion, economic justice and the protection of social and economic rights – which has not been observed in practice.

REFERENCES

- Álvarez-Uría, F. (2014). *El reconocimiento de la humanidad*. España, Portugal y América Latina en la génesis de la modernidad. Ediciones Morata.
- Ansaldi, W. (2007). *La democracia en América Latina, un barco a la deriva*. Fondo de Cultura Económica.
- Ansaldi, W., & Giordano, V. (2012). *América Latina: la construcción del orden* (Vol. 1-2). Ariel Argentina.
- Armengol, C. M. V. (2010). Constitución y democracia en el nuevo constitucionalismo latinoamericano. *Revista IUS*, 4 (25), 49-76.
- Baggio, R. C. (2014). Tensionamentos sociais e justiça de transição: contribuições ao constitucionalismo latino-americano. *Novos Estudos Jurídicos*, 19 (2), 627-661.
- Baggio, R. C., & Berni, P. E. Contribuições da Sociologia Histórica ao Constitucionalismo Latino-Americano. *Teorias Críticas e Crítica do Direito*, 2, 189-227.
- Barbosa, M. L., & Teixeira, J. P. A. (2017). Neoconstitucionalismo e Novo Constitucionalismo Latino-Americano: dois olhares sobre igualdade, diferença e participação. *Revista Direito e Práxis*, 8 (2), 1.113-1.142.
- Bolivia. Constitución. (2009). *Constitución Política del Estado Plurinacional de Bolivia*.
- Comparato, F. K. (2017). *A oligarquia brasileira: visão histórica*. Editora Contracorrente.
- Cubides-Cárdenas, J., Navas-Camargo, F., & Montes, L. M. G. (2021). El Nuevo Constitucionalismo Latinoamericano (NCL). *Direitos Democráticos & Estado Moderno*, (2), 03-14.
- Cobos, F. C. (2018). The new Latin American constitutionalism: a critical review in the context of neo-constitutionalism. *Canadian Journal of Latin American and Caribbean Studies/Revue canadienne des études latino-américaines et caraïbes*, 43(2), 212-230.

- Ecuador. (2008). *Constitución de la República del Ecuador*.
- Gargarella, R. (2015). *La sala de máquinas de la Constitución: dos siglos de constitucionalismo en América Latina (1810-2010)*. Katz Editores.
- Gargarella, R. (2015) Lo “viejo” del “nuevo” constitucionalismo latinoamericano. *The Seminar in Latin America on Constitutional and Political Theory*. Yale Law School.
- Gargarella, R., Pádua, T., & Guedes, J. (2016). Constitucionalismo Latino-Americano: Direitos Sociais e a “Sala de Máquinas” da Constituição. *Universitas JUS*, 27 (2), 33-41.
- Gatti, F. (2019). El derecho político frente al «nuevo constitucionalismo latinoamericano». Análisis comparativo con el modelo de democracia constitucional. *Cuaderno Jurídico y Político*, 5(14), 33-40.
- Ginsburg, T., & Huq, A. Z. (2020). *How to save a constitutional democracy*. University of Chicago Press.
- Levitsky, S., & Ziblatt, D. (2019). *How democracies die*. Crown.
- Braga, D. L. (2014). Organicismo, Sustentabilidade e os “Direitos da Natureza”. *Revista Brasileira de Direito Animal*, 9 (17), 87-117.
- Lüchmann, Lígia Helena Hahn. (2007). Democracia deliberativa, pobreza e participação política. *Política & Sociedade*, 6 (11), 183-198.
- Pilatti, Adriano. (2020). *A Constituinte de 1987-1988: progressistas, conservadores, ordem econômica e regras do jogo*. Rio de Janeiro: Lumen Juris.
- Pastor, R. V., & Dalmau, R. M. (2010). *¿Se puede hablar de un nuevo constitucionalismo latinoamericano como corriente doctrinal sistematizada?* Universidad de Valencia.
- Ramos, Jorge Abelardo. (2011) *Historia de la Nación Latinoamericana*. Continente.
- Schilling-Vacaflor, A. (2016). *New Constitutionalism in Latin America: promises and practices*. Routledge.
- Sierra, L. D. C. G., & León, M. Á. (2016). De los derechos ambientales a los derechos de la naturaleza: racionalidades emancipadoras del derecho ambiental y nuevas narrativas constitucionales en Colombia, Ecuador y Bolivia. *Misión Jurídica*, 9 (10), 233-260.
- Tolentino, Z. T., & Oliveira, L. P. S. (2015). Pachamama e o Direito à vida: uma reflexão na perspectiva do novo constitucionalismo latino-americano. *Veredas do Direito – Direito Ambiental e Desenvolvimento Sustentável*, 12 (23), 23-23.
- Tosi, G. (2017) O que resta da ditadura? Estado democrático de direito e exceção no Brasil. *Cadernos IHU ideias*, 15 (267), 03-31.
- Ugarte, P. S. (2013). El nuevo constitucionalismo latinoamericano (una perspectiva crítica). In González Perez, L. R. & Valadés, D. *El constitucionalismo contemporáneo*. Homenaje a Jorge Carpizo, 345-387. México: Universidad Nacional Autónoma de México.
- Uprimny, R. (2011). The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges. *Texas Law Review*, 89, 1.587-1.609.
- Vargas, Idón Moisés Chivi. (2016). Constitucionalismo emancipatório. In Sidekum, A., Wolkmer, A. C., & Radaelli, S. M. (Eds.). *Enciclopédia latino-americana dos direitos humanos* (110-120). Edifurb.
- Wolkmer, A. C. (2010). *Pluralismo e crítica do constitucionalismo na América Latina*. IX Simpósio Nacional de Direito Constitucional, ABDConst., Curitiba, Paraná, p. 143-155.