



LATIN AMERICAN CONSTITUTIONALISM: COMPARATIVE LAW STUDY ON POPULAR PARTICIPATION FOR URBAN LAND PLANNING

Constitucionalismo latino-americano: estudo de direito comparado sobre a participação popular na ordenação territorial

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ABSTRACT

The article studies Constitutional Law, wielding the comparative law analysis of some of the current Latin American Constitutions, concerning the verification of normative forecast of popular participation as an instrument of democratic management in urban land planning. Based on the Latin American Constitutionalism situation as an evolutionary constitutional movement resulted from the *neoconstitutionalism*, it is defined that the existence of *plurinationalism* elements and multiculturalism provides its own constitutional models, in recognized distance from the classic constitutionalism. Due to its intrinsic peculiarities, the formatting of Latin American pluralist democratic dynamics introduces a new paradigm for the democratic management, especially in the planning for urban land planning public policies, forming a recurrent instrument is in many constitutional texts, as analyzed. The study uses the analytical method, based on bibliographic references on the subject. Finally, the resignification of social action is valued, conforming the guarantee of a better democratic participation and plural identity for social and urban development.

Keywords: Latin American Constitutionalism; Comparative law; Popular participation; urban land planning.

RESUMO

O presente artigo estuda o Direito Constitucional, objetivando a análise em direito comparado de algumas das constituições latino-americanas vigentes, para constatação da previsão normativa de participação popular como instrumento de gestão democrática em ordenação territorial. A partir da situação do Constitucionalismo Latino-Americano como movimento constitucional evolutivo decorrente do neoconstitucionalismo, define-se que a existência dos elementos de plurinacionalismo e respeito ao multiculturalismo propiciaram modelos constitucionais próprios, em reconhecido distanciamento do constitucionalismo clássico. Por suas peculiaridades intrínsecas, tem-se que a formatação da dinâmica democrática pluralista latino-americana introduz novo paradigma de gestão democrática, mormente no planejamento de políticas públicas para ordenação territorial, ferramenta recorrente nos diferentes textos constitucionais analisados. O método utilizado é o analítico tendo como base estudo de referências bibliográficas sobre o tema. Por fim, valoriza-se a ressignificação da atuação social, como garantia de maior participação democrática e identidade plural para o desenvolvimento social e urbano.

Palavras-chave: Constitucionalismo Latino-Americano; Direito comparado; Participação popular; ordenação territorial.



1 INTRODUCTION

The Latin American Constitutionalism has stood in interesting perspective for the comparative studies, due to its peculiarities that distinguish it from other forms and structures of the classic constitutionalism. More than the overcoming from the Eurocentric colonialist-republican influence, the democratic evolutionary process of each country has given rise to unique characteristics, given to the valorization of multicultural aspects and the establishment of constitutional norms based on the *plurinationalism*.

Over the political-social establishment, constitutional conventions have aimed to recognize the model of participatory democracy, without excluding the classic representative model. The new constitutional procedures create mechanisms for the participation of social groups and collectivities that allow joint action on the proposal of public policies.

In a special way, it characterizes the legitimation of social groups and collectivities for the popular participation aimed the urban land planning in Latin American countries. As a present instrument in constitutional texts, the popular participation directly motivates the composition of popular opinion between government, civil citizens and the scientific community, all for the governmental management.

The study seeks to understand the foundations of the Latin American Constitutionalism regarding its aspect of *plurinationalism* and the evolutionary process resulting from the *neoconstitutionalist* movements. Assuming the transformative and multicultural aspect, this article aims the main elements presented in the most of countries constitutions, especially for the normative legitimation of popular participation.

Due to their unique characteristics, the construction of Latin American constitutional texts stands out in the valorization of environment as a protective element - even as a holder of rights - and, especially, on the attribution of competences to different ethnic and cultural groups, that form complementary representative fronts to the democratic establishment of the nation, giving rise to a new direction of participatory management.

The method used for the development of the article was the analytical one, based on the study of doctrine and law constitutions, ordering to verify if the popular participation legitimation should be able to strength the democratic management in urban land planning.



2 LATIN AMERICAN CONSTITUTIONALISM

The study of Latin American Constitutionalism has a multifaceted nature, not only for the plurality of States and their different constitutional formations, but mainly due to the historical-political context that each nation went through until its democratization. Adopting the constitutional texts as study object, the doctrine teaches that it is relevant their analysis and contextualization. Furthermore, their understanding permeates the historical-normative phases in which they were conceived, as well as the characterization of their transforming elements.

It is considered that the Constitution corresponds to the political-social context of its nation, which acts as a filter of all infra-constitutional legal system, as a function named as "*Legal constitutionalization*", within the *neoconstitutionalist* aspect, as present in the Latin American constitutions. (BARROSO, 2020, p. 98-99).

The theorization of Latin American Constitutionalism is recognized for the establishment of their new and unique models, which are capable of distancing themselves from the Eurocentric influence and colonialist traditionalism that used to define the Latin American political system for many years. Those models advanced the neoconstitutionalist content, reinforced by the pluralist political management, thanks to the historical-evolutionary process that recognizes interculturality and greater participation of the population.

Carvalho (2008, p. 29) asserts that the Latin America History was marked by political practices of centralization and several other factors, such as the aristocratic domain, cultural and social issues, or even political instability and economic problems.

At first, the main influence on the constitutional norms establishment was from the North American constitutional system, used the same federal state model, the presidentialism model for government and the same constitutionality control system (CARVALHO, 2008, p. 29). Similar precepts of traditional Constitutionalism were followed, with constitutions based on liberal politics that prevailed until the 19th century. In the 20th century, social constitutions emerged in the first half of the century, becoming the post-positivist period during the second half of the century. By the end of the 20th century, the constitutional norms prevalence over the legal system made common ground due to the *neoconstitutionalist* phase.

Acosta (2016, p. 152) explains that the path of Latin American Constitutionalism was responsible to the beginning of the "power decolonization", as called by the scholars. With the independence of many Latin America nations, the colonial political-economic dependence was



overcome, but not entirely, as the “culture of colonialism” prevailed, according to Wolkmer (2020, p. 2).

In its political context, the crescent democratic restructuring derived from the republican process in Latin American countries corresponded to three distinct constitutional movements, as enumerated by Gargarella and Courtis (2009, p. 24): the first movement, of a conservative, politically elitist and morally perfectionist nature; the second movement, of a liberal nature, adopting the system of “checks and balances”, moral neutrality and an “anti-statesman” bias; and the third movement, from a radical nature, politically majoritarian, but morally populist. Each movement process resulted in different contexts and constitutional models implemented, leading to various democratic procedures, as experienced by each Latin American nation. The emphasis is given the Eurocentric emancipation, as a result to the social struggle to “proceed without capitalism” (ACOSTA, 2016, p. 152).

In her studies, Yrigoyen Fajardo classifies American Constitutions into three different cycles, adopting as criteria the multiculturalism and pluralism introduction into the constitutional norms. The first cycle, called “*Multicultural Constitutionalism*”, during the period from 1982 to 1988, when the constitutional texts were assembled by the participation of different socioeconomic groups, as happened in the Canada (1982), Guatemala (1985), Nicaragua (1987) and Brazil (1988) constitutions. The second cycle, called “*Pluricultural Constitutionalism*”, during the period from 1989 to 2005, when the participation of communities of native peoples was introduced, as identified in the constitutions of Colombia (1991), Peru (1993), Bolivia (1994), Argentina (1994), and Venezuela (1999). And the third cycle, called “*Plurinational Constitutionalism*”, during the period from 2006 to 2009, when communities and indigenous justice systems were legitimized, as happened to the Ecuador (2008) and Bolivia (2009) Constitutions (YRIGOYEN FAJARDO, 2011, p.141-142).

In Popular Participation empowerment in the Latin American Constitutionalism, Santamaria (2016, p. 27) mentions the importance of the unprecedented social demands, enumerating the *plurinationalism*, the *pachamama* (mother earth)¹, the *sumak kawsay*², the

¹ *Pachamama* is nature itself, which was recognized as a subject of rights by the Constitution of Ecuador (2008). As provided in the constitutional text, nature has the fundamental right of its existence, for maintaining its evolutionary cycles. The right to full reparation is also recognized, in addition to the rights that affect a community or person, when integrated with nature, or even to any restrictions on activities, technologies or policies that threaten the integrity of the ecosystem (art. 71).

² In his book “*Nacional para el Buen Vivir del Ecuador*”, Rene Ramirez means Sumak Kawsay as “a complex, non-linear concept, historically constructed and in constant resignification, which is the aim of satisfying needs, the achievement of a dignified quality of life and death, loving and being loved, the healthy flowering of all, in peace and harmony with nature and the indefinite extension of cultures, [...] the free time for contemplation

community democracy, the indigenous justice systems and the interculturality. Other precepts were also incorporated, according to each culture of the original peoples of each nation, such as the *Sumak Kawsay* (Well-being), already mentioned, the *Suma Qamaña* (Well-living), and the *Ñande Reko* (Armonious Life) (LÉON, 2010, p. 7).

Léon (2010, p. 7) comments the “political spring” that Latin America has experienced corresponded to an unprecedented moment, characterized by the participation and invitation of different indigenous and traditional peoples to think about themselves and shape “a present and future based on new parameters”. For this reason, the emergence and innovation of new concepts aimed at placing diversity as the “main axis of new visions of society” (LÉON, 2010, p. 7).

Undeniably the construction of the Latin American Constitutionalism identity was carried out through the strands of the transformative constitutionalism and the *plurinationalism* models, both idealized from *neoconstitutionalism*.

For Viciano (2010, p. 6), *neoconstitutionalism* and the Latin American Constitutionalism would be complementary theoretical models. Both complement each other by their main postulates and the same rational objective for the Constitutional State. They are equally the result of government experiences in the configuration of its new constitutions.

According to Santamaria (2016, p. 38), the *neoconstitutionalism* is described as a theorization in which fundamental rights are positioned at the center of the Law and the State issues. In this sense, the laws are not built only from legal principles, but also from the popular perspective, consulting the peoples, its communities, and their respective rights (SANTAMARIA, 2016, p. 38).

Barroso (2020, p. 410) also comments on *neoconstitutionalism*, which is characterized by the “re-enthronement of values in legal interpretation”, attributing “normativity to principles”. In his perspective, the neoconstitucionalismo reflects the theory development of fundamental rights built on the dignity of the human person. In addition, it seeks to bring Law and Ethics closer together (BARROSO, 2020, p. 410).

With a suitable definition, Canotilho (2006, p. 329) lists the elements of the *neoconstitutionalism*, in consonance with the normative provision of article 9 of the *Cotonou Convention* for the elaboration of the European Constitution. The scholar characterizes that *neoconstitutionalism* must be guided by the principle of responsible conduct, and covered on the following points: 1. Sharpening of the political, institutional and constitutional contexts through the permanent assessment of the human rights, the democratic principles and the State Rights; 2.

and emancipation, so that freedoms, opportunities, capacities and potentialities are expanded and flourish” (RAMÍREZ *apud* LÉON, 2010, p. 9) (as translated).

centrality of the principles of sustainable and equitable developments, which presupposes a transparent and responsible management of human, natural, economic and financial resources (good governance and compliance); 3. rigorous outline of the procedural and organizational schemes of good governance, exempling: a) clear decision-making processes of public authorities; b) transparent and accountable institutions; c) legal procedures in resource management; d) consoling the capacity to design and implement measures aimed at preventing and avoiding corruption. (CANOTILHO, 2006, p. 329).

In the same sense, Peter Häberle mentions that *neoconstitutionalism* assimilates and recognizes evaluative pluralism, as it frees the capacity of constitutional interpretation among the multiplicity of subjects before the institutional context, in order to reinforce its principles, rights and duties, within the so-called "open society of interpreters of the Constitution" (HÄBERLE, 1997, p. 24).

Following the analysis of the Latin American Constitutional evolution, the social-democratic character motivated the so-called *Transformative Constitutionalism*. Through this theoretical model, Santos (2010, p. 80) identifies the counter-hegemonic bias, given the social motivations that "face hegemonic views and seek to democratically impose counter-hegemonic views, but do not necessarily defend this possibility". It conveys social reactions unified by several groups and classes in constant conflict (SANTOS, 2010, p. 80).

The *Transformative Constitutionalism* aims on the transformation of the system for the population emancipation, who couldn't exercise their rights, or had only limited paternalistic policies and criminal reprimand from the Government (SANTAMARIA, 2016, p. 38-39). As the constitutional context is transformed, so the Government respects the rights of the communities, as occurred in the constitutions of Colombia (1991) and Mexico (1992).

In advance, the pluralism was adopted as theory, introducing the so-called *Plurinational State* in Latin America. According to Santos:

The Plurinational State activates different nations and cultures. Its main idea is that there is not a single concept of Nation, but two different concepts, one of a civic-political nation and another of a ethical-cultural nation, which is plural. The monocultural logic of the Modern State disappears, and the State becomes pluricultural (SANTOS, 2010, p.72).³

Within the Latin American issue, some countries have significantly remodeled its State's organization, due to the recognition of the plurinationality. The Plurinationality distances itself from

³ "Estado Plurinacional que adiciona diferentes naciones y culturas. La idea principal es que no existe un sólo concepto de Nación, sino dos conceptos de Nación, es decir, la Nación cívica-geopolítica y la Nación étnica-cultural, que es plural. La lógica monocultural del Estado moderno desaparece, y el Estado pasa a ser pluricultural" (SANTOS, 2010 p. 72).

the traditional concept of Nation, by considering the nation as synonym of ethnical, cultural or religious relation of people (SANTOS, 2010, p. 81).

Wolkmer recognizes the Pluralist Constitutionalism as a new paradigm of constitutionalism, as linked to the “Andean Constitutionalism, as a transformative, emancipatory or guarded constitutionalism”, as he conceptualizes:

It is possible to affirm that the political changes and the new procedures of social struggle in the Latin American States, particularly in the Andean region, not only generated new constitutions that materialized new social parties, plural realities and challenging practices, but also introduced, in consequence of the minority cultures diversity and the undeniable strength of the native peoples of the Continent, a new paradigm of Constitutionalism, which we call the Pluralist Constitutionalism (which has ensured that publicists of different tendencies proclaim it as Andean Constitutionalism, transformative, emancipatory or guarded constitutionalism) (WOLKMER, 2020), p. 31).

In the sociological matter, Wolkmer (2020, p. 14) explains that there is a traditional position determined by the integration between Legal Sociology, Politics and Anthropology. However, the Latin American constitutions use “legal pluralism” within the context of “community participatory practices”, also understood as practices “from the bottom to up” (*desde abajo*), corresponding to the experiences of informal power, as an insurgent, parallel or alternative management.

As Wolkmer clarifies, “this type of pluralism includes the experiences of regulations that go beyond the Government State, such as the community justice, native court of justice, african-descendant courts of justice at the quilombos, “peasant rounds (*rondas campesinas*)”, itinerant justice, among others” (WOLKMER, 2020, p. 14). It gives the legitimation and empowerment of the collectivities and ethnic-cultural groups, recognizing their democratic participation.⁴

The Venezuelan Constitution (1999) is an example of the *Plurinationality*, for attending the institutionalization of popular demands arising from community democracy, associated to the political pluralism. In the same sense, the Constitutions of Ecuador (2008) and Bolivia (2009) introduced the plurinational matter, as an unprecedented case, recognizing intercultural collectivities – urban, native, peasant or other groups of communities – allowing the practicing of an egalitarian and plural. jurisdiction, as Wolkmer calls it, the “coexistence of different legal instances in egalitarian hierarchy” (WOLKMER, 2020, p. 26).

⁴ According to Wolkmer, few authors assign the new legal pluralism as “community-participatory” (WOLKMER, 2015, p. 19).

Regarding to the legal pluralism, the Andean Constitutions recognize and empower the community groups as authorities – indigenous and peasant peoples – granting jurisdictional functions and the faculty to solve local conflicts according to their own rules and procedures. In other words, their recent constitutions recognize indigenous and peasant collectives (communities/peoples) with the following competencies: a) the possibility of legitimizing their authorities and institutions (traditional and legitimate authorities); b) the legal competence to create its own decrees and procedures, as a customary law; and c) the competence to organize local jurisdiction as alternative conflict resolution and traditional courts, within the jurisdictional function, for specified issues (YRIGOYEN FAJARDO, 2011, p. 146).

Santos (2010, p. 98-99) defines the intercultural democracy in Latin American constitutions by stating five important points. The first, regarding the coexistence of different forms of democratic deliberation, from the individual voting to a consensus, the elections and the mandates rotation, resulting from the struggle to assume them and the obligation-responsibility that result from them. The second point is characterized by the different criteria of democratic representation, using qualitative representation, within the Eurocentric origin, and an “*indocentric*” representation.

For its third point, Santos (2010, p. 98-99) highlights the recognition of the collective rights of peoples as a condition for the effective individual rights fulfillment, recognizing the cultural citizenship as an element of the whole civic citizenship. As the fourth point, there’s the recognition of new fundamental rights, both individual and plural, such as the right to have access to clean water, land, food sovereignty, the maintenance of natural resources, biodiversity, natural forests and traditional knowledge.

For the fifth point, in addition to the rights, Santos highlights the education oriented to attend to cultural reciprocity standards due to the sociability and subjectivity forms of coexistence. According to Santos (2010, p. 99), “a member of a culture alone is willing to recognize the other culture when his own is respected”, a situation that applies to both indigenous and non-indigenous cultures.

The institutionalization of pluralism and multiculturalism in Latin American constitutions is acknowledged as major lessons to be studied by Comparative Law. They establish a new paradigm for the legitimacy of real participatory democracy in consequence of the popular participation established by pluralism and respect for multiculturalism.

Due to the Comparative Law relevance, it is valid to evaluate as studying source for the assistance set of subsidies for the construction the General Constitutional Law theory, as instructed by Bonavides (2019, p. 41). The comparative study of the constitutions will certainly ease a better

understanding of the Latin American Law evolution and its dimensions. It demonstrates enough reason for this study support, which is intended for a brief analysis of Latin American constitutional norms involving the popular participation in territorial planning.

3 COMPARATIVE STUDY ON POPULAR PARTICIPATION FOR TERRITORIAL ORDERING IN THE CONSTITUTIONS

The Popular participation, mainly concerned by multicultural and plurinational actions, has been present in the Latin American Constitutions. Because of the citizens recognition for decisions integration, popular participation became a main instrument to legitimize public policies for the affected population, especially in matters related to urban zoning and planning.

On the matter of population participation in territorial affairs, Santos (2010, p. 93) recalls that it's been linked to the political-administrative factor due to the "decentralization" and "regional justice" phenomenon. In a second aspect, plurinationality was introduced as a political-cultural factor, in awareness of the "historical justice", as they belonged to the population even before the Modern State establishment.

Therefore, urban planning will be attached to the public policy, for the territorial organizations and it's directly linked to the population of each area. Berros (2015, p.4) places the urban planning directly related to the dialogue between different disciplines, given the hybrid character of environmental themes. It states that it is not possible to think about the territory from an "lonely technical perspective", and it should respect the different perspectives of the interaction between scientific analyses: "both factual science, natural science, as the human science, allow the identification and solutions to modern problems" (BERROS, 2015, p. 4).

Thus, there been elected as Comparative Study objects the constitution normative perspective on the environment, specifically regarding to popular participation attribution for the urban and territorial planning and other urban policies legitimation, as it's presented in its chronological order for each country achievement.

1) Mexico

The Constitution of the United States of Mexico is one of the oldest constitutions still active in America, being effective since 1917⁵. The recognition and guarantee of the indigenous peoples and communities rights was introduced by article 2, item A, which also mentions the right to elect representatives in municipalities with indigenous populations, in each “gatherings” (*ajuntamentos*), as well as the participation of communities.

Art. 2º [...]

A. Esta Constitución reconoce y garantiza el derecho de los pueblos y las comunidades

indígenas a la libre determinación y, en consecuencia, a la autonomía para:

VII. Elegir, en los municipios con población indígena, representantes ante los ayuntamientos, observando el principio de paridad de género conforme a las normas aplicables.

Las constituciones y leyes de las entidades federativas reconocerán y regularán estos derechos en los municipios, con el propósito de fortalecer la participación y representación política de conformidad con sus tradiciones y normas internas.

B. Para abatir las carencias y rezagos que afectan a los pueblos y comunidades indígenas, dichas autoridades, tienen la obligación de:

I. Impulsar el desarrollo regional de las zonas indígenas con el propósito de fortalecer las

economías locales y mejorar las condiciones de vida de sus pueblos, mediante acciones

coordinadas entre los tres órdenes de gobierno, con la participación de las comunidades. Las autoridades municipales determinarán equitativamente las asignaciones presupuestales que las comunidades administrarán directamente para fines específicos. (CONSTITUTION OF THE UNITED STATES OF MEXICO, 1917).

On the specific matter of popular participation, in the article 26 it's defined that it will be up to the Executive Administration to establish procedures for popular participation and consultation on democratic planning, as for the formulation, instrumentalization, control and evaluation of urban planning and programs.

In an “sub-constitutional sense”, the law for human settlements, territorial planning and human development, enacted on October 13, 2016⁶, defined in article 19 that the state councils for urban and territorial planning, the metropolitan and conurbation commissions, and the municipal councils for urban development and housing shall form auxiliary branches for citizen participation

⁵ As noted in: The Constitution of the United States of Mexico. Available in: http://www.diputados.gob.mx/LeyesBiblio/pdf_mov/Constitucion_Politica.pdf.

⁶ Ley General de Asentamientos Humanos, Ordenamiento Territorial y Desarrollo Urbano. Disponible em: http://www.dof.gob.mx/avisos/2527/SEDATU_281116/SEDATU_281116.html. Acesso em 23.12.2021.



and plural legitimation. Those councils have participation among the head executive administration in each territory of the country.

Art. 19. Para asegurar la consulta, opinión y deliberación de las políticas de ordenamiento territorial y planeación del Desarrollo Urbano y Desarrollo Metropolitano, conforme al sistema de planeación democrática del desarrollo nacional previsto en el artículo 26 de la Constitución Política de los Estados Unidos Mexicanos, las entidades federativas y los municipios, en el ámbito de sus respectivas competencias, conformarán los siguientes órganos auxiliares de participación ciudadana y conformación plural: I. Los consejos estatales de ordenamiento territorial y Desarrollo Urbano. II. Las comisiones metropolitanas y de conurbaciones. III. Los consejos municipales de Desarrollo Urbano y vivienda de ser necesarios. Corresponderá a los poderes ejecutivos de las entidades federativas, los municipios y las Demarcaciones Territoriales la creación y apoyo en la operación de tales consejos, en sus respectivos ámbitos territoriales. (CONSTITUTION OF THE UNITED STATES OF MEXICO, 1917).

It states that the performance of the councils and commissions shall correspond as local administration as well, involving the direct activity by popular participation in the territorial and urban scope.

2) Chile

The Political Constitution of the Republic of Chile dates from the year 1980⁷, having been the subject of relevant reforms in 1990 and 2005. However, according to the referendum held on October 25, 2020, there was a decision to fully reform the constitutional text, through a constituent convention, which has been working since April 2021⁸.

The Chilean constitutional structure organizes its government administration through the regional councils. As established in article 102, the councils act within the competence of the regional government, respecting the effective regional citizen participation, including the approval of projects within the national development policy, as for the destination of the national development fund for each region.

Artículo 102. El consejo regional será un órgano de carácter normativo, resolutivo y fiscalizador, dentro del ámbito propio de competencia del gobierno regional, encargado de hacer efectiva la participación de la ciudadanía regional y ejercer las atribuciones que la ley orgánica constitucional respectiva le encomiende, la que regulará además su integración y organización.

Corresponderá desde luego al consejo regional aprobar los planes de desarrollo de la región y el proyecto de presupuesto del gobierno regional, ajustados a la política nacional de desarrollo y al presupuesto de la Nación. Asimismo, resolverá la

⁷ Available in: https://www.oas.org/dil/esp/constitucion_chile.pdf.

⁸ Until the conclusion of this article, the Constitution of Chile had not yet been granted, and the Constitution of 1980 was still current.

inversión de los recursos consultados para la región en el fondo nacional de desarrollo regional, sobre la base de la propuesta que formule el intendente. (POLITICAL CONSTITUTION OF THE REPUBLIC OF CHILE, 1980).

According to the Chilean constitutional text, the urban planning will take place through the “communes”, or “communes groups”, organized in each municipality. These communes shall be responsible, according to organic law, for the promotion of adequate citizen participation in the definition of a more balanced city development.

Artículo 107. La administración local de cada comuna o agrupación de comunas que determine la ley reside en una municipalidad, la que estará constituida por el alcalde, que es su máxima autoridad, y por el concejo. La ley orgánica constitucional respectiva establecerá las modalidades y formas que deberá asumir la participación de la comunidad local en las actividades municipales. Las municipalidades podrán establecer en el ámbito de las comunas o agrupación de comunas, de conformidad con la ley orgánica constitucional respectiva, territorios denominados unidades vecinales, con el objeto de propender a un desarrollo equilibrado y a una adecuada canalización de la participación ciudadana. (POLITICAL CONSTITUTION OF THE REPUBLIC OF CHILE, 1980).

From the constitutional convention perspective, it is expected that the plurinationality will be introduced in a multicultural context for the legitimation of the many representations of the Chilean peoples, as the new constitutional text is in development.

3) Brasil

The Brazilian Federal Republic, the Constitution from 1988⁹, provides in article 193 that the popular participation integrates all public planning policies, in its formulation processes, monitoring, controlling and for the policies evaluation.

Art. 193. A ordem social tem como base o primado do trabalho, e como objetivo o bem-estar e a justiça sociais.
Parágrafo único. O Estado exercerá a função de planejamento das políticas sociais, assegurada, na forma da lei, a participação da sociedade nos processos de formulação, de monitoramento, de controle e de avaliação dessas políticas. (CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL, 1988).

In terms of urban planning, the Brazilian law number 10.257/2001 – “City Statute” - provides in its article 2 that urban policies for the development and planning of social functions and urban properties must be evolved by a democratic management, through the participation of the

⁹ Available in: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm.



population or associations representing various segments of the community. These associations shall work not only in the initial formulation, but also in the planning and monitoring of its executions.

The democratic management shall also be represented as citizen participation through collegiate urban policy bodies, holding debates, public hearings and consultations, by conferences and the popular initiative itself for legal drafting, plans, programs and urban development projects (art. 43).

It is relevant that popular participation is a mandatory condition for budget proposals approval on Brazilian city level, as provided in article 44, for the pluriannual plan, the budget guidelines law and annual budget approvals. However, despite being mandatory, popular opinion also does not have a binding effect for the urban planning final projects and plans government decisions.

Notwithstanding the Brazilian constitution provided for local community participation, but it has not been recognized the multicultural competence of indigenous or peasant populations (e.g. riverside population and quilombola), finding itself still absent in the plurinational estimation.

4) Colombia

The Political Constitution of the Republic of Colombia was promulgated in 1991¹⁰. Praised for been the first constitution to acknowledge the plurinational character in recognition of the indigenous peoples, it also recognizes the rights for nature environment in its article 79. It even conjugates every environmental diversity or integrity matter to the prior community participation for the governmental decisions.

Artículo 79. Todas las personas tienen derecho a gozar de un ambiente sano. La ley garantizará la participación de la comunidad en las decisiones que puedan afectarlo. Es deber del Estado proteger la diversidad e integridad del ambiente, conservar las áreas de especial importancia ecológica y fomentar la educación para el logro de estos fines. (POLITICAL CONSTITUTION OF THE REPUBLIC OF COLOMBIA, 1991).

The article 270 of the Colombian constitution text grants to the specific legislation the organizing for citizen participation system on all different government and management levels. Regarding territorial and urban planning, the Organic Law of Territorial Planning (Ley Orgánica de Ordenamiento Territorial - LOOT), law number 1453/2011, establishes the democratic management, with the purpose of promoting the “transfer of competences and decision-making power for central and decentralized bodies”, including the popular participation for the government.

¹⁰ Available in: https://siteal.iiep.unesco.org/sites/default/files/sit_accion_files/siteal_colombia_2000.pdf.

The article 3, item 7, it's been adopted as a principle that the urban planning policy shall provoke the popular participation, for the cooperation on the development formulation so that the citizens can take an active part in the decisions of urban and territorial organization.

7. Participación. La política de ordenamiento territorial promoverá la participación, concertación y cooperación para que los ciudadanos tomen parte activa en las decisiones que inciden en la orientación y organización territorial. (POLITICAL CONSTITUTION OF THE REPUBLIC OF COLOMBIA, 1991).

According to the Colombian law, urban planning shall be developed by “associations of territorial entities”, which, according to article 11, will jointly provide public services, administrative functions for planning affairs, as well as the main territorial and urban planning development. It also states that the coordination for the directive board or council should include the participation of the community or its associations, grating the involvement part for every decision-making of local interests.

5) Argentina

The Constitution of the Argentine Nation dates from 1994¹¹. It states in its article 41 the right for the environment as a principle to all inhabitants, applying to all generations.

Artículo 41. Todos los habitantes gozan del derecho a un ambiente sano, equilibrado, apto para el desarrollo humano y para que las actividades productivas satisfagan las necesidades presentes sin comprometer las de las generaciones futuras; y tienen el deber de preservarlo. El daño ambiental generará prioritariamente la obligación de recomponer, según lo establezca la ley. Las autoridades proveerán a la protección de este derecho, a la utilización racional de los recursos naturales, a la preservación del patrimonio natural y cultural y de la diversidad biológica, y a la información y educación ambientales. (CONSTITUTION OF THE ARGENTINE NATION, 1994).

The establishment of popular participation is presented in article 75, which defines the guidelines for human development, in consonance with principle 10 of the Rio Declaration on Environment and Sustainable Development in 1992, giving the opportunity for participation in all decision-making procedures.

The specifically popular participation for environment matters and urban planning is regulated by the General Law of the Environment (*Ley General del Ambiente*), law number 25.675/2002. It states the citizen participation with a dual aspect as it shall be a right and a procedure phase of all administrative decisions related to the preservation and environment

¹¹ Available in: <https://siteal.iiep.unesco.org/pt/bdnp/897/constitucion-nacion-argentina>.



protection (art. 19). Although, the popular opinion or objection for projects will not be binding for the authorities to approve them, as provided for in article 20 of the same law.

6) Venezuela

The Constitution of the Bolivarian Republic of Venezuela was enacted by the National Constituent Assembly in 1997¹², which in its preamble foresaw the multiethnic and pluricultural nature of the State.

Chapter VIII from the Constitution recognizes the right of indigenous peoples, assuring their political participation with representation in the National Assembly. Chapter IX of the Venezuelan constitutional text states the right for the nature environment, now integrated into the national policy of territorial ordering and urban planning, which also includes citizen participation.

Capítulo IX. Así, el Estado, con el objeto de garantizar un desarrollo ecológico, social y económicamente sustentable, protegerá el ambiente, la diversidad biológica, los recursos genéticos, los procesos ecológicos, los parques nacionales y monumentos naturales y demás áreas de especial importancia ecológica; al tiempo que velará por un medio ambiente libre de contaminación, en donde el aire, el agua, los suelos, las costas, el clima, la capa de ozono, las especies vivas, gocen de especial protección. De igual manera, el Estado desarrollará una política de ordenación del territorio que atienda a las exigencias del desarrollo sustentable, la cual deberá contar con la participación ciudadana. (CONSTITUTION OF THE BOLIVARIAN REPUBLIC OF VENEZUELA, 1999).

In terms of urban planning, the popular participation is presented in article 178, which defines the competence of the City for the territory planning, with the participation of the community, all for the improvement of people's life conditions.

Artículo 178. Son de la competencia del Municipio el gobierno y administración de sus intereses y la gestión de las materias que le asignen esta Constitución y las leyes nacionales, en cuanto concierne a la vida local, en especial la ordenación y promoción del desarrollo económico y social, la dotación y prestación de los servicios públicos domiciliarios, la aplicación de la política referente a la materia inquilinaria con criterios

de equidad, justicia y contenido de interés social, de conformidad con la delegación prevista en la ley que rige la materia, la promoción de la participación, y el mejoramiento, en general, de las condiciones de vida de la comunidad, en las siguientes áreas:

1. Ordenación territorial y urbanística; patrimonio histórico; vivienda de interés social; turismo local; parques y jardines, plazas, balnearios y otros sitios de recreación; arquitectura civil, nomenclatura y ornato público. (CONSTITUTION OF THE BOLIVARIAN REPUBLIC OF VENEZUELA, 1999).

¹² Disponível em: https://www.oas.org/dil/esp/constitucion_venezuela.pdf. Acesso em 15.12.2021.

However, the Government will still be the holder of sovereignty and competence for the final decisions on territorial organization and urban planning. As provided in article 307, the State holds the power to organize the land for agricultural purposes, to ensure its “agri-food potential”.

7) Ecuador

The Constitution of Ecuador from year 2008¹³, became a reference among the Andean constitutions, for its pioneer ecological-environmental recognition as a subject, as it acknowledges the attribution of rights to Nature (*Pachamama*) and sustainable rights for the well-being (*sumak kawsay*). It also confirms the constitutional advance by recognizing the plurinationalism, as it grants special competences for indigenous and peasant justice courts.

In fact, the indigenous multiculturalism of the Ecuadorian nationality recognizes in its article 56 the identity of all afro-ecuadorian communities, the Montubio people¹⁴ and even the “communes”, which form part of the Ecuadorian State. In addition to the recognition as a nation, these groups are respected as institutionalized associations and receives the right guarantee for property over the land traditionally occupied by the community.

It's also noteworthy that the Ecuadorian Constitution grants attribution for democratic management in urban development and territorial planning projects, as given the power to establish, organize and execute programs regarding managing biodiversity, coexistence and social organization in their territories.

Art. 57. Se reconoce y garantizará a las comunas, comunidades, pueblos y nacionalidades indígenas, de conformidad con la Constitución y con los pactos, convenios, declaraciones y demás instrumentos internacionales de derechos humanos, los siguientes derechos colectivos:

1. Mantener, desarrollar y fortalecer libremente su identidad, sentido de pertenencia, tradiciones ancestrales y formas de organización social.
2. No ser objeto de racismo y de ninguna forma de discriminación fundada en su origen, identidad étnica o cultural.
3. El reconocimiento, reparación y resarcimiento a las colectividades afectadas por racismo, xenofobia y otras formas conexas de intolerancia y discriminación.
4. Conservar la propiedad imprescriptible de sus tierras comunitarias, que serán inalienables, inembargables e indivisibles. Estas tierras estarán exentas del pago de tasas e impuestos.
5. Mantener la posesión de las tierras y territorios ancestrales y obtener su adjudicación gratuita.
6. Participar en el uso, usufructo, administración y conservación de los recursos naturales renovables que se hallen en sus tierras.

¹³ Available in: https://siteal.iiep.unesco.org/sites/default/files/sit_accion_files/siteal_ecuador_6002.pdf.

¹⁴ Denominação atribuída ao povo campesino das zonas rurais e das províncias costeiras equatorianas, ora atribuída a denominação por seu costume de montar a cavalos. Fonte: <https://casadelacultura.gob.ec/postnoticias/montubios/>. Acesso em 20.12.2021.

7. La consulta previa, libre e informada, dentro de un plazo razonable, sobre planes y programas de prospección, explotación y comercialización de recursos no renovables que se encuentren en sus tierras y que puedan afectarles ambiental o culturalmente; participar en los beneficios que esos proyectos reporten y recibir indemnizaciones por los perjuicios sociales, culturales y ambientales que les causen. La consulta que deban realizar las autoridades competentes será obligatoria y oportuna. Si no se obtuviese el consentimiento de la comunidad consultada, se procederá conforme a la Constitución y la ley.

8. Conservar y promover sus prácticas de manejo de la biodiversidad y de su entorno natural. El Estado establecerá y ejecutará programas, con la participación de la comunidad, para asegurar la conservación y utilización sustentable de la biodiversidad.

9. Conservar y desarrollar sus propias formas de convivencia y organización social, y de generación y ejercicio de la autoridad, en sus territorios legalmente reconocidos y tierras comunitarias de posesión ancestral. (THE CONSTITUTION OF ECUADOR, 2008).

The Ecuadorian constitutional text also reinforces the right of public participation – for the people, communities and different nationalities - in all phases of formulation, execution, evaluation and control of public policies in general, according to article 85. It also defines in article 95 that the citizen participation in matters of public interest is a legitimate right, to be achieved by the representative democracy, both directly or indirectly, through its communities.

Therefore, in addition to the prediction of popular participation, it's has been stated the right to democratic management, according to article 100 from the Ecuadorian Constitution. The democratic management shall be fulfilled by the integrated actions of elected authorities, representatives from the dependent regime and representatives of society within the territorial scope of each government level.

Art. 100. En todos los niveles de gobierno se conformarán instancias de participación integradas por autoridades electas, representantes del régimen dependiente y representantes de la sociedad del ámbito territorial de cada nivel de gobierno, que funcionarán regidas por principios democráticos. (THE CONSTITUTION OF ECUADOR, 2008).

The Ecuadorian Constitution confirms not only is the plurinational recognition of the different peoples/nations that forms the State of Ecuador as a mosaic, but it establishes the right of their participation in decision-making, particularly in matters of urban planning and public policies development. As already mentioned, the Ecuadorian Constitution has been the most power granting for the communities and population, among those analyzed in the present study.



8) Bolívia

The Political Constitution of the Bolivian State dates from the year 2009¹⁵, and from its beginning principles for the nations and indigenous peoples, its states the popular participation as a right, as followed by the common well-being and the good living (*ben vivir*).

Artículo 8. II. El Estado se sustenta en los valores de unidad, igualdad, inclusión, dignidad, libertad, solidaridad, reciprocidad, respeto, complementariedad, armonía, transparencia, equilibrio, igualdad de oportunidades, equidad social y de género en la participación, bienestar común, responsabilidad, justicia social, distribución y redistribución de los productos y bienes sociales, para vivir bien. (THE CONSTITUTION OF THE BOLIVIAN STATE, 2009)

The article 402 of the constitution states as Government's obligation to promote human development for the territorial and urban planning, in compliance with the conservation of the environment:

Artículo 402. El Estado tiene la obligación de: 1. Fomentar planes de asentamientos humanos para alcanzar una racional distribución demográfica y un mejor aprovechamiento de la tierra y los recursos naturales, otorgando a los nuevos asentados facilidades de acceso a la educación, salud, seguridad alimentaria y producción, en el marco del Ordenamiento Territorial del Estado y la conservación del medio ambiente. (THE CONSTITUTION OF THE BOLIVIAN STATE, 2009).

In terms of popular participation, the article 300, item 5, defines that the elaboration and execution of territorial and urban planning by the autonomous governments must observe the terms of the municipal states as well as the indigenous competence of peasant origins.

In the specific case of Bolivia, the popular participation is directly associated with multicultural representations, which directly take part of the government management in the development of public policies in territorial and urban planning affairs.

From the analysis of the constitutional texts – in which it was verified how the popular participation proceeds - it represents crucial to seek a common vision so that there is a democratic management in the territorial organization. It also allows the construction of a more just, solidary society concerned with the well-being of every citizen by its community representative participation.

¹⁵ Disponível em: https://www.oas.org/dil/esp/constitucion_bolivia.pdf. Acesso em 15.12.2021.

4 FOR A COMMON GROUND FOR THE POPULAR PARTICIPATION IN LATIN AMERICAN CONSTITUTIONALISM

Identified the similarity among the constitutional texts, the popular participation is a recurring instrument for the balance between the democratic management and popular representation. As a result of the *neoconstitutionalist* movement, the emphasis is on hypotheses in which the participation is reinforced with groups associations legitimized players by the *plurinationalism*. It also highlights the respect for the multicultural formation in each country of the Latin America.

In its legal morphology, popular participation has a non-corporate, community-based collective feature (SILVA, 2009, p. 262), formalized as an instrument for planning discussing, as for decision-making and reviewing public policies. The constitutional provision to promote participation through direct instruments also does not question the essence of the representative democracy system, as presented in the constitutions.

Regarding the participatory democracy, Viciano (2010, p. 20) mentions its complementary effect of legitimacy, scolding an “advance aspect of democracy”, as it cannot correspond to a definitive replacement of government representativeness.

Beçak (2014, p. 70) comments that the presence of popular participation on the constitution elapses from the crisis of representation, given the way political institutions were configured and managed. Initially, there would be a greater objective to “discourage the participation of citizens” rather than necessarily promote it. However, given to the democratic representation, the popular participation became relevant in this scenario, for its combination of representative and participatory democracy features (BEÇAK, 2014, p. 79).

Among the various popular participation designs available and established in the different constitutional texts, there is the common factor of serving as a legitimacy mechanism and public power monitoring (VICIANO, 2010, p. 20). The forms of popular participation defined as innovative tools in the new constitutions – as related to urban and territorial planning – characterizes greater democratic perspectives for the government management, in all its different levels (district, city and state levels).

In terms of environmental management, the popular participation using public hearings and decentralized reunions by collegiate councils emerges a positive aspect for its alliance with the civil society and interested groups. Furthermore, in spite of the existing asymmetry between citizens and the “technobureaucratic body” responsible for the urban planning, the solely information access



would be valuable, engaging informative and educational policies to approach and make participation even more efficient (BEÇAK, 2021, p. 573).

However, the popular participation in constitutional text does not necessarily result into an effectively implemented democratic management. On the one hand, there are several positive experiences on democratic management – not necessarily foreseen in the constitutional ground – which guarantee citizen participation in decision-making for different democratic matters¹⁶. In another bias, it is considered that even for those in the constitutional category, some of the participation instruments are not put into practice.

In a comment on plurinational representation, Acosta states that there is still a long way to go:

In Ecuador, little or nothing has been done. It is obvious that the solely constitutional declaration does not guarantee, in practice, the existence or the construction of a plurinational and intercultural State. The circumstance does not change with the Constitution, even for its avant-garde aspect. However, the debate is taking place in these countries and in other regions. In Peru, for example, in a matter of time, it is possible to anticipate that this issue might be addressed seriously, including at the constitutional level (ACOSTA, 2016, p. 145).

The great struggle of constitutionalism continues to be reconciling the popular sovereignty and the fundamental rights with a newer view for a greater democratic arrangement. The so-called “grand constitutional project of the millennium” (BARROSO, 2020, p. 63) is characterized by pursuing the popular participation use for a greater plural and diverse justice instrumentalization.

5. CONCLUSION

The Latin American Constitutionalism has its own position in the constitutional theory, corresponding to a complex object of study for its recognized evaluative characteristics. More than a sociopolitical phenomenon, the development for the constitution in Latin American countries assembled their own elements distinguishing them from other traditional constitutional texts.

¹⁶ Beçak comments on Paul Ginsborg's research of effectively used deliberative democracy experiences, listing them: the Germans *planungs-zelle* (planning cells), American and British juries, electronic town meetings, consensus conferences, US national deliberation day (according to James Fishkin), the Chicago experiments with citizen governance in public policing and education, and *e-thePeople website* or the Danish empowerment of parents in primary schools (GINSBORG *apud* BEÇAK, 2014, p. 79).

The evolutionary constitutional matter involving the multiculturalism appreciation, based on the recognition of the different nations and plural collectivities in each country, allowed the establishment of a new paradigm, intended to a more democratic action for the accepted participation of social groups.

Among several democratic management models, the instrumentalization of the popular participation became decisive in the constitutional texts, even if it's conferred different levels of action and cooperation. Notably, the normative introduction of the popular participation was identified as a mandatory tool for citizen engagement and collective opinion legitimization.

However, although popular participation may be mandatory, the non-binding aspect for the government administration in decision-making remains. That is enough reason to criticize the instrument, for its unpractical sense, as for its questionable effectiveness on the democratic practice of popular participation performance.

Specifically on urban and territorial planning matters, the popular participation became an essential tool for the civil society and interested local groups cooperation for the most important interventions for city development.

By the acknowledgement of the population's right to participate and manifest, in addition to the respect for the plurinational perspectives, the ideal democratic performance might be well assured. The democratic management associated with plural collectivity can make a coherent step towards the new format of social-political direction.

Moreover, it must be allowed for different nations, ethnicities, social groups and affected stakeholders to be heard, as nature itself been included, as a protected environment and subject of rights. The recognition of the environment as the holder of rights, or the awareness of its protection, might render into a very evolutionary path, which defines Latin American Constitutionalism as a standard to be observed by other constitutional movements.

As stated by Latour, democracy goes beyond the boundaries between science and politics, allowing the addition of several “new voices”, including the voice of “non-humans”. The author states that “restricting the discussion to humans, their interests, their subjectivities, their rights, shall seem, in a few years, as strange as having limited, for such a long time, the right to vote to slaves, the poor and women” (LATOURE, 2004, p. 132).

These are new protective parameters for the public management instruments that allow social action to be re-signified. Thus, all peoples can be ideally heard in the democratic direction of each government, guaranteeing active democratic participation and plural identity in the society coexistence.



Therefore, the population shall feel respected when being heard, as recognized that the urban planning could be developed by those to whom the territory belongs, leading to a greater citizen awareness. This attentiveness grants the maturity for social-environmental problems, allowing the effectiveness of a more qualified democracy management.

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